[Cite as *Rodgers v. Rodgers*, 2009-Ohio-3059.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91877

MASTER LEE RODGERS

PLAINTIFF-APPELLEE

vs.

HATTIE MAE RODGERS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. DR-113013

BEFORE: Boyle, J., Cooney, A.J., and Celebrezze, J.

RELEASED: June 25, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Hattie Mae Rodgers, appeals from an order of the trial court denying her motion for relief from judgment under Civ.R. 60(B)(5). Finding no merit to the appeal, we affirm.

{¶ 2} The parties were married in September 1958. Appellee filed for divorce in May 1980. They entered into a separation agreement in November 1980, at which time both parties were represented by counsel. The separation agreement was purportedly the entire agreement between the parties. Appellant now claims that appellee was employed by Caterpillar, Inc. for 14 years during the marriage, where he earned a pension that he failed to disclose to the court on his pretrial statement. Appellant moved for a post-decree division of this asset in April 2008, pursuant to Civ.R. 60(B)(5). In her affidavit attached to her motion, appellant averred:

{¶ 3} "Hattie Mae Rodgers, being first duly sworn, deposes and says that she is the Defendant in the within action, and that she was married to Plaintiff Master Lee Rodgers on September 13, 1958 and divorced from him on February 18, 1981.

{¶ 4} "Affiant further states that Plaintiff Master Lee Rodgers was employed by Caterpillar, Inc. from August 1, 1966 to July 31, 1998, and accrued pension benefits from that employment.

{¶ 5} "Affiant further states that a substantial portion of Plaintiff's benefits from Caterpillar, Inc. were accrued during their marriage, and are therefore marital property.

{¶ 6} "Affiant further states that the Judgment Entry for the parties' divorce contains neither a provision for division of the pension benefits nor a waiver of such division; thus, the pension benefits were marital property undisclosed at the time of the divorce, which should therefore be divided at this time.

{¶ 7} "Affiant further states that she needs the income from her 50% of the marital portion of the pension to maintain her household."

{¶ 8} On July 2, 2008, the trial court denied appellant's motion without an evidentiary hearing and without opinion. It is from this judgment that appellant appeals, raising three assignments of error for our review.

{¶ 9} "[1.] The trial court erred in denying the motion to divide a substantial and material asset never revealed to it in the original divorce proceeding.

{¶ 10} "[2.] The trial court erred in denying Appellant's motion for Civil Rule 60(B)(5) relief requesting the trial court to divide the Appellee's pension.

{¶ 11} "[3.] The trial court erred in denying Appellant's motion without first holding an evidentiary hearing."

{¶ 12} Appellant's first two assignments of error address whether the trial court properly denied her Civ.R. 60(B)(5) motion filed 27 years and two months after her divorce from appellee was final. Thus, we will address them together.

{¶ 13} Under Civ.R. 60(B), the court has the authority to vacate a final judgment due to: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time

to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

{¶ 14} To prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order, or proceeding was entered or taken. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus. If a movant fails to satisfy any one of these requirements, the trial court should deny a Civ.R. 60(B) motion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20*; Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351.

{¶ 15} Civ.R. 60(B)(5) is a catchall provision that only applies if none of the more specific grounds apply. *Hamlin v. Hamlin*, 2d Dist. No. 1629, 2004-Ohio-2742.

{¶ 16} The trial court has discretion in deciding a motion for relief from

judgment under Civ.R. 60(B). *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *Laatsch v. Laatsch*, 6th Dist. No. WD-05-101, 2006-Ohio-2923, ¶16. Therefore, we will not disturb a trial court's judgment on appeal absent an abuse of discretion. Id. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} Applying the foregoing standard of review and the required *GTE* test, we cannot say that the trial court abused its discretion in denying appellant's motion for relief from judgment under Civ.R. 60(B)(5).

{¶ 18} This appeal essentially boils down to one question, i.e., whether 27 years can be considered "reasonable time" under the circumstances of this case. We find that it cannot.

{¶ 19} First, appellant does not allege in her affidavit attached to her motion that the reason she waited 27 years was that appellee hid this asset from her or committed fraud in some way. She avers that the pension was "undisclosed at the time of the divorce," but argues that it was "undisclosed" from the court, not her. Further, she does not state that she waited 27 years because she did not know that he had a pension or that she just recently discovered that he had a pension. Nor does she claim that she and appellee inadvertently failed to include the pension in their separation agreement.

{¶ 20} We recognize that appellant may not have alleged these facts, since by

doing so, her claims for relief would have fallen under Civ.R. 60(B)(1), (2), or (3), and under these three subsections, she would have had to file her claim "not more than one year after the judgment." Civ.R. 60(B). "A party may not circumvent the one year limitation by seeking to vacate a judgment under Civ.R. 60(B)(5) when the grounds is duplicative of a ground subject to the time limitation." *Stetler v. Stetler*, 3d Dist. No. 15-05-16, 2006-Ohio-2663 (trial court denied wife's Civ.R. 60(B)(5) motion asking the court to divide her husband's pension 16 years after their divorce was final).

{¶ 21} Indeed, the record reveals no reason why appellant or her counsel could not have discovered the pension at the time of the original proceeding. Nor does appellant state any reason, let alone a valid reason, for the 27-year delay. Accordingly, we cannot find that 27 years is a "reasonable time" under Civ.R. 60(B)(5) under the circumstances.

{¶ 22} Appellant's first two assignments of error are overruled.

{¶ 23} In her third assignment of error, appellant argues that the trial court erred by summarily denying her motion for relief from judgment without holding an evidentiary hearing. We find no error under the facts of this case.

{¶ 24} The Ohio Supreme Court addressed this issue in *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996-Ohio-430. The supreme court explained, "'[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court

should grant a hearing to take evidence and verify these facts before it rules on the motion.'" Id. at 19.

{¶ 25} Here, appellant did not allege operative facts that would entitle her to relief under Civ.R. 60(B)(5) since she did not give a reason in her affidavit for waiting 27 years before requesting the relief. Thus, the trial court was not required to hold an evidentiary hearing to determine that reason.

{¶ 26} Thus, we conclude that the trial court did not abuse its discretion when it summarily denied appellant's motion for relief from judgment without holding an evidentiary hearing.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR