

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93916

DARLENE M. PUMPER

PLAINTIFF-APPELLEE

vs.

STEVEN W. PUMPER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-312366

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Steven Pumper (“Steven”), appeals from an order of the trial court denying his motion for relief from judgment under Civ.R. 60(B)(4). Finding no merit to the appeal, we affirm.

Facts

{¶ 2} In September 2006, plaintiff-appellee, Darlene Pumper (“Darlene”), filed a complaint for divorce, which Steven subsequently answered and asserted a counterclaim. The parties disputed issues relating to property division, child and spousal support, and attorney fees. After extensive settlement negotiations, however, the parties came to a mutual understanding on July 17, 2008 and voluntarily entered into a Judgment Entry of Divorce, which incorporated the parties’ Separation Agreement and Shared Parenting Plan disposing of all matters. The decree was journalized on July 18, 2008.

{¶ 3} Nearly a year later, Steven moved for relief from the judgment, stating that he is “unable to pay the property division payments and also unable to meet his support obligations.” Relying on Civ.R. 60(B)(4), he argued that the economic downturn, coupled with his being named in a Cuyahoga County corruption probe and his forced resignation from D-A-S Construction, entitles him to relief from judgment because the prospective application of the divorce decree is no longer equitable. In his affidavit, he averred that, pursuant to a plea agreement he entered with the government, he faces a potential sentence of somewhere

between six-and-one-half years to ten years in prison. He further argued that, based on these events and the resulting loss in income, it is impossible for him to satisfy his support obligations and property division payments required under the decree.

{¶ 4} In a detailed, well-reasoned opinion, the trial court denied Steven’s motion.

{¶ 5} Steven appeals, raising the following two assignments of error:

{¶ 6} “[I.] The trial court erred and abused its discretion in its denial of appellant’s [Civ.R.] 60(B) motion for relief from judgment without a hearing.

{¶ 7} “[II.] The trial court erred and abused its discretion in its denial of appellant’s [Civ.R.] 60(B) motion for relief from judgment.”

Motion for Relief from Judgment

{¶ 8} To prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must submit operative facts that demonstrate that (1) the motion is timely made; (2) the party is entitled to relief under Civ.R. 60(B)(1)-(5); and (3) the party has a meritorious claim or defense. See *GTE Auto. Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. The trial court has discretion in determining whether the motion will be granted, and in the absence of a clear showing of abuse of discretion, the decision of the trial court will not be reversed. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564, 566.

{¶ 9} The trial court denied Steven’s motion after finding that he failed to allege operative facts satisfying any of the *GTE* requirements, let alone all three. Upon review of Steven’s motion and affidavit, we find that the trial court did not abuse its discretion.

{¶ 10} First, Steven offered no reason to explain his waiting nearly a year to file his motion for relief from judgment. In finding that the circumstances and facts of this case demonstrated that the motion was untimely, the trial court noted the following:

{¶ 11} “Shortly after the journalization of the divorce decree, the stock market plummeted, and on or about July 28, 2008, the FBI confiscated [Steven’s] personal and business records in its ongoing probe into the public corruption in Cuyahoga County. However, in his brief, [Steven] failed to explain what caused the nine-month to nearly one-year delay in filing his motion for relief. The court, therefore, finds that [Steven] did not establish that his motion for relief was filed within a reasonable period of time.”

{¶ 12} This court has repeatedly upheld a trial court’s decision to deny a motion for relief from judgment as untimely when there has been an unjustified delay of more than two months. See *Fed. Natl. Mort. Assoc. v. Goldstein*, 8th Dist. No. 87743, 2006-Ohio-6769, ¶13, citing *Larson v. Umoh* (1986), 33 Ohio App.3d 14, 17, 514 N.E.2d 145; see, also, *Mt. Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 289, 413 N.E.2d 850. Here, it is apparent

from the record that Steven had notice of the events that he alleges entitle him to relief from judgment several months before he filed his motion. Because he failed to provide any explanation for his delay, the trial court properly found his motion to be untimely.

{¶ 13} We likewise agree that Steven has failed to set forth operative facts demonstrating that he is entitled to relief under Civ.R. 60(B)(4), which provides that the trial court may grant relief from judgment when “it is no longer equitable that the judgment should have prospective application.”

{¶ 14} Steven argued that it was no longer equitable for him to be bound by the terms of the judgment entry of divorce because there was no way that he could have foreseen the “global economic downturn that occurred in September of 2008” or “his being named as a target” in the Cuyahoga County corruption probe, which in turn resulted in his forced resignation from D-A-S Construction Company. As a result of the financial impact of both the global market and the publicity surrounding the probe, Steven indicated that “the company, which was the primary asset of the parties, is not worth anywhere close to the numbers being utilized during the negotiations leading up to the judgment.” Based on his alleged diminished assets and inability to earn an income, he argued that Civ.R. 60(B)(4) entitles him to relief from judgment. This argument, however, is unpersuasive.

{¶ 15} Civ.R. 60(B)(4) “was designed to provide relief to those who have been prospectively subjected to circumstances which they had no opportunity to

foresee or control.” *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 146, 493 N.E.2d 1353. But when a party voluntarily enters into a separation agreement, the party is bound by the terms of that agreement, even if the party’s financial circumstances change. *Id.* Indeed, a change in a person’s financial situation is always a possibility; therefore, “it is considered a foreseeable event for purposes of Civ.R. 60(B)(4) even if there was no immediate reason to believe the change was about to occur when the judgment was issued.” *Barnes v. Barnes*, 5th Dist. No. 2003CA00383, 2005-Ohio-544, ¶32.

{¶ 16} In *Barnes*, the movant requested that the court relieve him of his spousal support obligations that he agreed to pay under a settlement agreement because his financial situation had changed; specifically, he lost his job. Relying on Civ.R. 60(B)(4), the movant argued that it was no longer equitable to require him to continue to comply with the support obligation because (1) he was no longer employed, and (2) at the time he agreed to the support provision in the agreement, he could not have foreseen that his position with his employer would have been eliminated. Recognizing that a change in a person’s financial situation is always foreseeable, the court rejected the movant’s argument, stating the following:

{¶ 17} “In turn, since such a change is foreseeable, the party should have considered this point in negotiating the terms of the separation agreement. The fact that the party failed to ensure that the agreement covered this possibility is not

a valid reason for concluding that it would be inequitable to continue to enforce the provisions of the agreement.” Id.

{¶ 18} Applying the reasoning of *Barnes*, the trial court found that Steven, “in negotiating his settlement, should have taken into consideration the financial ramifications his criminal conduct would bring in the imminent future.” The court further recognized that Steven, “as a businessman in the construction business, either had contemplated or should have contemplated the day-to-day volatility in the world financial markets and the possibility that such fluctuations could hinder future business ventures while he was negotiating support and property division.” We agree.

{¶ 19} On appeal, Steven contends that the trial court erred in its reasoning because “even the most sophisticated financial gurus never foresaw the events of September 2008.” But Steven’s argument ignores the fact that his own criminal conduct contributed to his loss of employment and alleged diminished assets. The record further reflects that such conduct, which obviously was in his control and knowledge, occurred prior to his even negotiating the agreement. He therefore cannot rely on the ramifications of such conduct as grounds to vacate the decree under Civ.R. 60(B)(4). See *Youssefi v. Youssefi* (1991), 81 Ohio App.3d 49, 610 N.E.2d 455 (events that occurred prior to judgment cannot be relied upon as grounds to vacate the judgment pursuant to Civ.R. 60(B)(4)).¹

¹We summarily note that Steven’s reliance on *Geiger v. Geiger* (1994), 96 Ohio

{¶ 20} And, as discussed above, a party cannot rely on Civ.R. 60(B)(4) to vacate a settlement agreement due to a change in finances when the party should have considered such a change in negotiating the settlement. As a matter of law, a decline in property value is a foreseeable event. See *Yearwood v. Yearwood* (Dec. 31, 1997), 2d Dist. No. 16352. Notably, Steven voluntarily agreed that the court would not retain jurisdiction over the order; he could have bargained for a reservation of jurisdiction regarding his spousal support obligation but chose not to. Under such circumstances, a trial court does not abuse its discretion in refusing to vacate a decree under Civ.R. 60(B)(4). See *Barnes*, 2005-Ohio-544, ¶31, citing *Sidwell v. Sidwell* (June 4, 1998), 5th Dist. No. CT97-0042.

{¶ 21} Finally, we find that Steven has failed to set forth operative facts that demonstrate that he has a meritorious defense if relief is granted. We agree with the trial court that the defense of “impossibility” is not valid when it arises solely from Steven’s own illegal conduct.

{¶ 22} As for Steven’s claim that the trial court abused its discretion in not holding an evidentiary hearing, one is not required when the motion and attached evidentiary material do not contain allegations of operative facts that would

App.3d 644, is misplaced. He relied on this case in his motion for relief from judgment, arguing that his situation is analogous and warranted relief under Civ.R. 60(B)(4). The trial court easily distinguished the case. Indeed, the relief granted in *Geiger* arose out of unforeseen events, which were totally unrelated to any misconduct of the husband, the moving party, and were actually attributed to the wife.

warrant relief under Civ.R. 60(B). *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151, 666 N.E.2d 1134.

{¶ 23} Accordingly, we find no abuse of discretion and overrule Steven’s two assignments of error.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, 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

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR