[Cite as *Tokar v. Tokar*, 2010-Ohio-524.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93506

JANE TOKAR

PLAINTIFF-APPELLEE

vs.

JAY TOKAR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED;
REMANDED FOR CORRECTIONS

Civil Appeal from the
Cuyahoga County Domestic Relations Court
Case No. DR-304298

BEFORE: Blackmon, J., Gallagher A.J., and Boyle, J.

RELEASED: February 18, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

James W. Burke
Burke, Vannucci & Gallagher
22649 Lorain Road
Fairview Park, Ohio 44126

ATTORNEY FOR APPELLEE

Richard A. Rabb
McCarthy, Lebit, Crystal & Liffman
1800 Midland Building
101 West Prospect Avenue
Cleveland, Ohio 44115

PATRICIA ANN BLACKMON, J.:

{¶ 1} In this accelerated appeal, appellant Jay G. Tokar appeals the trial court's denial of his motion for relief from judgment without first conducting a hearing and assigns the following error for our review:

> **"I. The trial court abused its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision, but remand for corrections to the divorce judgment. The apposite facts follow.

Facts

{¶ 3} On March 2, 2007, Jay Tokar filed a motion for relief from judgment pursuant to Civ.R. 60(A) and (B) from the trial court's February 5, 2007 judgment regarding Tokar's divorce from his wife. Prior to the court ruling on the motion, Tokar filed a direct appeal and requested this court remand the matter to the trial court to rule on the motion for relief from judgment. We denied his motion for remand and affirmed the trial court's decision on December 11, 2008.[1]

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[1] *Tokar v. Tokar*, Cuyahoga App. No. 89522, 2008-Ohio-6467.

{¶ 4} On February 20, 2009, Tokar filed a motion for a hearing on his motion for relief from judgment. On May 29, 2009, the trial court denied the motion for relief and motion for a hearing, stating as follows:

> **"Defendant's motion for relief from judgment #239827, filed March 2, 2007 and Motion for Oral Hearing #275940, filed February 20, 2009, are hereby denied. The Court of Appeals issued its ruling affirming the trial court's decision on December 22, 2008. A Motion for Relief may not be used as a substitute for an appeal."**

Motion for Relief from Judgment

{¶ 5} In his sole assigned error, Tokar argues the trial court erred by denying his motion for relief from judgment without first conducting a hearing. We disagree.

{¶ 6} The trial court has discretion whether to hold a hearing before ruling on the motion.[2] Where grounds for relief from judgment do not appear on the face of the record, a court may grant the motion without a hearing.[3] However, where grounds for relief from judgment appear on the face of the record, a court abuses its discretion and may not overrule the motion unless it

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[2]*Gaines & Stern Co., L.P.A. v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1990), 70 Ohio App.3d 643, 646, 591 N.E.2d 866.

[3]*Matson v. Marks* (1972), 32 Ohio App.2d 319, 291 N.E.2d 491, paragraph five of the syllabus; *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 371 N.E.2d

first makes a factual determination of the alleged grounds for relief adverse to the movant.[4] In other words, if the movant's Civ.R. 60(B) motion contains allegations of operative facts warranting relief, the trial court should grant a hearing to take evidence and either discredit or verify these facts before ruling.[5]

{¶ 7} Tokar's Civ.R. 60(B) motion fails to raise allegations of operative facts warranting relief. Tokar raised the same issues in his Civ.R. 60(B) motion that he raised in his first appeal before this court; therefore, res judicata bars the motion. In *Grava v. Parkman Twp.*,[6] the Supreme Court of Ohio explained res judicata as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."

{¶ 8} Tokar argues that res judicata does not apply because he attached evidence to his motion that was not considered by either the trial court or appellate court. The evidence he produced was the affidavit of tax attorney Joseph Corsaro, who testified that the trial court erred in its

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214, syllabus.

[4]*Matson*, 32 Ohio App.2d 319, 291 N.E.2d 491, paragraph six of the syllabus.

[5]*Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 1996-Ohio-430, 665 N.E.2d 1102; *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16, 448 N.E.2d 809; *U.A.P. Columbus JV326132 v. Plum* (1986), 27 Ohio App.3d 293, 500 N.E.2d 924.

[6]73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus.

calculations and that plaintiff's expert witness gave false and misleading testimony.

{¶ 9} A Civ.R. 60(B) motion may not be used to challenge the correctness of a trial court's decision on the merits.[7] Thus, Civ.R. 60(B) may not be used to introduce evidence or arguments that could have been produced at trial.

> "**The gist of post-trial relief is to remedy an injustice resulting from a cause that cannot reasonably be addressed during the ordinary trial and appellate proceedings. *Volodkevich v. Volodkevich*, supra. In other words, Civ.R. 60(B) is not a viable means to attack legal errors made by a trial court; rather, it permits a court to grant relief when the factual circumstances relating to a judgment are shown to be materially different from the circumstances at the time of the judgment."**[8]

{¶ 10} The movant must allege new grounds for Civ.R. 60(B) relief; he may not use the arguments he lost under the judgment to justify relief from the judgment.[9] Thus, a party cannot merely reiterate arguments that concern the merits of the case, like Tokar has done here, because relief under Civ.R. 60(B) is not available as a substitute for appeal.[10] It appears that

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[7]*McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 653, 2006-Ohio-2206, 852 N.E.2d 1235, overruled on other grounds.

[8]*Brackins v. Brackins* (Dec. 16, 1999), Cuyahoga App. No. 75025.

[9]*Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 602, 632 N.E.2d 1376.

[10]*Wozniak v. Tonidandel* (1997), 121 Ohio App.3d 221, 228, 699 N.E.2d 555.

Tokar, disappointed by his trial strategy that relied exclusively upon his own testimony, is attempting to relitigate the same issues with a new witness and testimony. Accordingly, we overrule Tokar's assigned error as to his Civ.R. 60(B) argument.

{¶ 11} Nevertheless, we agree with Tokar's Civ.R. 60(A) motion to correct clerical errors in the divorce judgment entry. The court stated the value of the marital property was $165,568, but then later lists the value as $167,577; the decree states the value of Servisteel is $28,560, but later states it is $28,260; and the court listed the value of Lorain Holdings as $17,000, but later states it is $17,244. We remand the matter for the trial court to make these corrections.

{¶ 12} Tokar's claim that the court committed clerical error by listing TNR, Inc. as his asset, however, is without merit. TNR is depicted on Exhibit HH, which is his personal financial statement. Therefore, we conclude no correction is needed as to the designation of TNR.

{¶ 13} Judgment affirmed and remanded for correction.

It is ordered that appellee recover from appellant her 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.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR