

[Cite as *Waszak v. Waszak*, 2015-Ohio-2262.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101462

HEATHER M. WASZAK

PLAINTIFF-APPELLANT

vs.

WILLIAM L. WASZAK

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-09-329248

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Plaintiff-appellant, Heather Waszak (“Heather”), appeals from the trial court’s denial of her motion for relief under Civ.R. 60(B). For the reasons set forth below, we affirm.

{¶2} Heather and defendant-appellant, William Waszak (“William”), married in December 1990, and three children were born as issue of their marriage. Heather filed for divorce from William in December 2009. The parties entered into a separation agreement and shared parenting plan, which was incorporated into a divorce decree in January 2010. Their agreement includes a provision that provides for the nondisclosure of personal property. It states:

15. NON-DISCLOSED AND NON-DIVIDED PROPERTY

In the event that it is later ascertained or discovered that either party owned or had an interest in property, of any kind, not disclosed by such party and not divided or allocated herein, whether such non-disclosure was by virtue of purposeful, negligent, or innocent omission, and such property is substantial (defined herein as worth more than \$2,000.00), the other party shall be entitled to one-half of said property, if it is divisible, or one-half of the value of such property, if it is not divisible. The non-owner party shall be entitled to enforce this provision in court if there is not compliance and to recover his attorney fees in obtaining compliance.

{¶3} Since the divorce decree, the parties have engaged in post-decree litigation through which Heather has learned that William had a pension account with Ernst & Young that was not disclosed at the time of their divorce. In May 2013, Heather filed a motion to show cause, alleging that William failed to fully disclose all assets in violation

of paragraph 15 of the separation agreement. This motion is still pending at the trial court.

{¶4} Then in March 2014, Heather filed a motion for relief from judgment under Civ.R. 60(B), requesting an evidentiary hearing and attorney fees. In her motion, Heather argues that she is entitled to an order vacating and granting her relief from the judgment entry of divorce journalized in January 2010 because she learned, subsequent to her divorce, that William failed to disclose his retirement benefits held by Ernst & Young.

She contends that the basis of their separation agreement is altered because “William misrepresented his income at the time of the divorce, is seeking to lower his monthly child support order obligation, and failed to disclose all the marital assets.” William opposed Heather’s motion, noting that Heather, through her attorney, was made aware of the Ernst and Young account in June 2013, but she waited until March 2014 to file her motion.

{¶5} The trial court denied Heather’s motion, finding that it was not made within a reasonable time and Heather failed to demonstrate a meritorious defense or claim to present if relief was granted. The court further found that an evidentiary hearing was not required because the motion did not contain allegations of operative facts that would warrant relief under Civ.R. 60(B).

{¶6} It is from this order that Heather appeals, raising the following two assignments of error for review, which shall be discussed together.

Assignment of Error One

The trial court erred and/or abused its discretion by failing to grant Heather's March 12, 2013 request for full evidentiary hearing on Heather's motion for relief from judgment and motion for attorney fees and litigation costs.

Assignment of Error Two

The trial court erred and/or abused its discretion by failing to grant Heather's motion for relief from judgment without holding a hearing where Heather alleged sufficient operative facts warranting relief under Civ.R. 60(B)(3), (4) and/or (5).

{¶7} Within these assigned errors, Heather argues that the trial court abused its discretion when it failed to conduct an evidentiary hearing before ruling on her motion for relief from judgment because she has alleged meritorious claims upon which relief must be granted.

Standard of Review

{¶8} We review the trial court's ruling on a motion for relief from judgment under Civ.R. 60(B) for an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An abuse of discretion "'implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

Civ.R. 60(B) — Motion for Relief from Judgment

{¶9} Civ.R. 60(B) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party * *
* from a final judgment, order or proceeding for the following reasons: (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 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.

{¶10} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate that:

(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 of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶11} “[I]f the material submitted by the movant does not provide operative facts which demonstrate that relief is warranted, the court may deny the motion without conducting a hearing.” *Thompson v. Dodson-Thompson*, 8th Dist. Cuyahoga No. 90814, 2008-Ohio-4710, ¶ 12, quoting *Black v. Pheils*, 6th Dist. Wood No. WD-03-045, 2004-Ohio-4270, ¶ 68.

{¶12} In the instant case, Heather moved for relief from judgment under Civ.R. 60(B)(3), (4), and (5), alleging that William concealed an Ernst & Young account during their divorce proceedings and that she did not discover the purported concealment until years after the divorce was finalized. Civ.R. 60(B)(3) provides relief from judgment for situations involving fraud. The rule provides, however, that the motion must be filed within a year from judgment. *See* Civ.R. 60(B). Here, the divorce decree was

journalized in January 2010. Heather filed her Civ.R. 60(B) motion in March 2014, which is more than four years and two months after the divorce was finalized. Therefore, her claim under Civ.R. 60(B)(3) is untimely.

{¶13} Heather also seeks relief from judgment under Civ.R.60(B)(4) and (5), which provide that it is no longer equitable that the judgment should have prospective application, and any other reason justifying relief from judgment. We note that while a motion filed under Civ.R. 60(B)(4) or (5) is not subject to the one-year limitation, it still must be filed within a “reasonable time.” *GTE*, 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. The movant has the burden of presenting evidentiary materials demonstrating that the motion was filed within a “reasonable time.” *Simmons v. Simmons*, 8th Dist. Cuyahoga No. 97975, 2012-Ohio-4146, ¶ 8, citing *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 53, 610 N.E.2d 455 (9th Dist.1991). “What constitutes a reasonable time is dependent upon the facts and circumstances of any particular case.” *Id.*, citing *Cautela Bros. Cement Contrs. v. McFadden*, 32 Ohio App.2d 329, 332, 291 N.E.2d 539 (10th Dist.1972). Timeliness is an issue that is left to the discretion of the trial court, with each case decided on its own merits. *Id.*, citing *Second Natl. Bank of Warren v. Courthouse Square Realty, Ltd.*, 11th Dist. Trumbull No. 92-T-4774, 1994 Ohio App. LEXIS 4887 (Oct. 28, 1994).

{¶14} With regard to Civ.R. 60(B)(4), Heather argues that their separation agreement is no longer equitable because William now seeks to reduce his monthly child support obligation. She contends that William’s financial misrepresentations along with

his motion to modify child support alters the basis of their settlement agreement. We note that “relief under Civ.R. 60(B)(4) is only afforded to those individuals who are subjected to circumstances which could not be foreseen or controlled.” *Settonni v. Settonni*, 8th Dist. Cuyahoga No. 97784, 2012-Ohio-3084, ¶ 30, quoting *Yearwood v. Yearwood*, 2d Dist. Montgomery No. 16352, 1997 Ohio App. LEXIS 5965 (Dec. 31, 1997). Here, the change of circumstance is William’s filing of a motion to modify child support. Heather, however, acknowledges that “child support is always subject to further order of the court[.]” Since the modification of child support is foreseeable, Heather cannot now rely upon Civ.R. 60(B)(4) as a basis to vacate her separation agreement.

{¶15} With regard to Civ.R. 60(B)(5), this court has recognized that claims involving either the nondisclosure or false disclosure of income or assets in domestic relations cases may state a claim for relief from judgment under Civ.R. 60(B)(5) in appropriate circumstances. *Simmons* at ¶ 7, citing *Offenberg v. Offenberg*, 8th Dist. Cuyahoga No. 71538, 1998 Ohio App. LEXIS 2342 (May 28, 1998). Here, Heather offers the same argument as above in Civ.R. 60(B)(4), contending that the court abused its discretion when it denied her motion without an evidentiary hearing.

{¶16} When the trial court denied Heather’s motion for relief from judgment, it found that she did not satisfy her burden of demonstrating that the motion was made within a reasonable amount of time and a meritorious defense or claim to present if relief was granted. The court further found that an evidentiary hearing was not required because the motion did not contain allegations of operative facts that would warrant relief

under Civ.R. 60(B). Therefore, we must determine whether the trial court's finding that Heather's motion under Civ.R. 60(B)(5) was not made within a reasonable amount of time constitutes an abuse of discretion. We find that it was not.

{¶17} Heather filed her motion approximately nine months after she discovered William's purported nondisclosure of assets, which was over four years after the final judgment entry of divorce was filed. In her motion, Heather explained that her motion is timely given the totality of circumstances, including, but not limited to, the substantial lengthy discovery period.

{¶18} The record demonstrates that Heather knew of the Ernst & Young account in June 2013, when her attorney received correspondence that William was eligible to participate in an Ernst & Young retirement plan. An additional nine months passed before Heather filed her Civ.R. 60(B) motion for relief from judgment. While discovery may extend the time normally considered reasonable depending upon the circumstances of a particular case, the nine-month delay is unreasonable because Heather already had a show cause motion pending at the trial court for William's purported failure to disclose assets. Under their separation agreement, Heather is entitled to half of the value of the Ernst & Young account. As a result, Heather's remedy lies within the separation agreement and her pending show cause motion.

{¶19} We note that under R.C. 3105.171(E)(5), if a spouse has substantially and willfully failed to disclose marital property, "the court may compensate the offended spouse with a distributive award or with a greater award of marital property not to exceed

three times the value of the marital property * * * that are not disclosed by the other spouse.” Thus, with her show cause motion, Heather may seek up to three times the value of the Ernst & Young account. In light of the fact that Heather’s remedy lies with her show cause motion, her Civ.R. 60(B) motion was untimely, and she did not provide operative facts that demonstrate relief is warranted, we find that the trial court did not abuse its discretion in denying Heather’s Civ.R. 60(B) motion for relief from judgment without first holding a hearing.

{¶20} The first and second assignments of error are overruled.

{¶21} 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 EILEEN KILBANE, JUDGE

LARRY A. JONES, SR. P.J., and
TIM McCORMACK, J., CONCUR

KEYWORDS:

Motion for relief from judgment; untimely; reasonable time; operative facts; motion to show cause; nondisclosed assets; Civ.R.60(B). Denial of motion for relief from judgment affirmed. Plaintiff's remedy for the nondisclosed asset lies with her show cause motion. Her Civ.R. 60(B) motion was untimely and she did not provide operative facts that demonstrate relief is warranted.