[Cite as *Nettle v. Nettle*, 2010-Ohio-4638.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
KIMBERLY NETTLE nka KIMBERLY HARBARGER Appellee v. DAVID NETTLE Appellant	C.A. No. 25001 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2006-11-3665

DECISION AND JOURNAL ENTRY

Dated: September 29, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant David Nettle ("Husband") appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division, denying his motion to vacate a final divorce decree and temporary orders. For the reasons set forth below, we affirm.

I.

{¶2} On November 14, 2006, Plaintiff-Appellee Kimberly Nettle, n.k.a. Harbarger ("Wife"), filed a complaint for divorce. The parties had no children born of their marriage. Service was initially attempted by certified mail and addressed to Husband at an address in South Carolina. A notation in the docket indicated that certified mail service to that address failed. Wife's attorney thereafter moved for, and was granted, a continuance for the temporary orders hearing originally scheduled for December. The hearing was rescheduled for January 8, 2007.

{¶3} On December 11, 2006, Wife requested certified mail service of the summons, complaint, motion for temporary orders hearing, notice of the temporary orders hearing, and

other documents and motions to Husband at two different post office boxes in South Carolina. On December 28, 2006, the trial court issued notice that a hearing for an uncontested divorce would be held February 27, 2007. On January 4, 2007, a letter from Husband was filed with the trial court moving for a continuance of the January 8, 2007 hearing and acknowledging that he had received the summons in the case on December 28, 2006. It is unclear from the record at which post office box address service was perfected. The docket entry contains numerous columns containing headings that give information such as when the summons was issued, a tracking number, the status of the summons (i.e. claimed or unclaimed), whether the party is deemed served, the identity of the party and the corresponding court costs. The docket indicates that service of process was issued on December 13, 2006 and was claimed. Under the column of the docket entitled "Served" the date listed is January 27, 2007. Husband is identified as the party served.

{¶4} On January 16, 2007, the magistrate held a temporary orders hearing. It is unclear why the hearing took place on January 16 given that it had been scheduled for January 8, 2007. The magistrate subsequently issued a temporary order in which it noted that Husband's motion for a continuance was not granted. The magistrate also ordered temporary spousal support of $314.33 per month. Husband did not move to set aside the order.

{¶5} On February 27, 2007, the trial court held a hearing on the uncontested divorce. Husband was not in attendance and had not filed any other documents, besides his motion for a continuance, with the trial court. The trial court granted the divorce and awarded Wife $1500 per month in spousal support for sixty months. Husband did not file a direct appeal. Over two years later, Husband filed a motion to vacate the final divorce decree and the temporary orders pursuant to Civ.R. 60(B) and due to alleged jurisdictional defects that rendered the decree and

temporary orders void. Specifically, Husband contended that the decree and temporary orders were void due the interplay of insufficient service of process and the failure of the trial court to comply with Civ.R. 75(K). The trial court denied Husband's motion.

{¶6} Husband has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN DENYING [HUSBAND'S] MOTION TO VACATE THE TEMPORARY ORDERS AND THE FINAL DIVORCE DECREE AS SUCH ENTRIES WERE MADE IN CONTRAVENTION [OF] PROCEDURAL REQUIREMENTS[.]"

{¶7} Husband first asserts that jurisdictional defects rendered the decree and temporary orders void. Essentially, Husband suggests that there is a jurisdictional aspect to Civ.R. 75(K), and that this, combined with deficiencies in service of process, caused the decree and temporary orders to be void. Husband also implicitly argues that because the trial court granted the divorce less than forty-two days after service of process was *docketed,* the trial court's decree is void. Husband does not point this Court to any law that directly supports this proposition.

{¶8} Civ.R. 75(K) provides that:

> "No action for divorce, annulment, or legal separation may be heard and decided until the expiration of forty-two days after the service of process or twenty-eight days after the last publication of notice of the complaint, and no action for divorce, annulment, or legal separation shall be heard and decided earlier than twenty-eight days after the service of a counterclaim, which under this rule may be designated a cross-complaint, unless the plaintiff files a written waiver of the twenty-eight day period."

Husband argues that the trial court violated Rule 75(K) because it conducted the uncontested divorce hearing before the expiration of forty-two days after service of process. He contends that because service of process was not docketed until January 27, 2007, when the hearing for the uncontested divorce was held on February 27, 2007, forty-two days had not yet passed and thus,

the trial court was without authority to hear the matter. The trial court ruled in its entry denying Husband's motion to vacate that Husband's letter filed on January 4, 2007 constituted a general appearance and thus, over forty-two days had passed between January 4, 2007 and February 27, 2007. We agree with the result reached by the trial court, but do not deem it necessary to decide whether the January 4, 2007 letter constituted a general appearance.

{¶9} The Fifth District Court of Appeals has noted that:

> "The aforementioned forty-two day rule traces its origins to Ohio's earlier statutory cooling-off or waiting period between filing and hearing in divorce cases. As this Court has recognized, the original legislative purpose of this waiting period was to discourage precipitous terminations of the bonds of matrimony and encourage continuation of the family. In 1970, the forty-two day rule was written into Civ.R. 75(K). In 1977, it became part of Civ.R. 75(J), although it has since returned to its earlier designation under Civ.R. 75(K)." (Internal citations and quotations omitted.) *Clark v. Clark*, 5th Dist. No. 06 CA 8, 2006-Ohio-2902, at ¶7.

The Fifth District concluded that "the Ohio Supreme Court, via the Civil Rules, intended to preserve the concept of a waiting period as had been recited in Ohio legislation, and that such waiting period may not be waived." Id. at ¶8.

{¶10} Assuming, without deciding, that the failure to comply with Civ.R. 75(K) is a jurisdictional defect, we conclude that the spirit of the rule, if not the letter, was complied with in this case. Husband acknowledges in his letter requesting a continuance that was filed with the court on January 4, 2007 that he received service of process on December 28, 2006. Husband does not claim that he was not the author of the letter. While Husband never actually avers that he *filed* the January 4, 2007 letter at issue, he has not claimed that someone else was responsible for filing it with the court. The magistrate in its temporary orders journal entry states that Husband sent the letter to the court. Husband does not claim that he did not receive the magistrate's order when it was issued and did not attempt to mount a challenge to any of the

magistrate's findings. Moreover, while the letter is addressed to the attention of Wife's counsel, Husband put a notation at the bottom indicating he also sent it to the trial court judge. In that letter Husband stated that he received the summons in the case at bar on December 28, 2006. Thus, Husband acknowledged that service of process occurred on December 28, 2006. Husband never disavowed this statement. Nor has Husband ever averred that he did not receive any of the trial court's entries. Therefore, at the point the trial court held the uncontested divorce hearing on February 27, 2007, over forty-two days had passed from the date Husband stated he received the summons. Further, on the date that the trial court entered the judgment of divorce, it is uncontested that the court had personal jurisdiction over Husband.

{¶11} In light of the above, we do not find that the trial court erred when it concluded that it did not conduct the uncontested divorce hearing in contravention of Civ.R. 75(K).

{¶12} Additionally, Husband asserts that the trial court erred in failing to vacate the temporary orders as he did not receive notice of the hearing which took place on January 16, 2007.

{¶13} Husband correctly points out there is no evidence in the record evidencing that the court notified the parties that the hearing that was supposed to take place on January 8, 2007 was continued until January 16, 2007. However, Husband does not assert that he did not receive the magistrate's order issued as a result of the January 16, 2007 hearing. Thus, Husband could have filed a motion within the ten days following the filing of the magistrate's order requesting that the order be set aside. See Civ.R. 53(D)(2)(b). Husband did not do so and thereby forfeited this argument. See *Crawford v. Hawes*, 2nd Dist. No. 23209, 2010-Ohio-952, at ¶25. Husband's first assignment of error is overruled.

III.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE DEFAULT FINAL DECREE OF DIVORCE[.]"

{¶14} In his second assignment of error, Husband argues that the trial court erred in failing to grant his motion to vacate pursuant to Civ.R. 60(B). We disagree.

{¶15} We review a trial court's decision to grant or deny a Civ.R. 60(B) motion under an abuse of discretion standard. *Citibank (S. Dakota), N.A. v. Masters*, 9th Dist. No. 07CA0055-M, 2008-Ohio-1001, at ¶14. But, see, *Good Samaritan Health Group, Inc. v. Stanchak*, 9th Dist. No. 09CA009526, 2009-Ohio-4613, at ¶15 (Dickinson, J., concurring) (concluding the appropriate standard of review is de novo). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

> "To prevail on his motion under Civ.R. 60(B), 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 the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151.

"If any of these three requirements is not met, the motion is properly overruled." *Masters* at ¶13, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174.

{¶16} In the instant case, the trial court did not provide any reasoning for denying Husband's motion pursuant to Civ.R. 60(B). Nonetheless, we cannot conclude that the trial court erred in denying Husband's motion because Husband did not file his motion to vacate pursuant to Civ.R. 60(B) "within a reasonable time[.]" Husband filed his motion to vacate on July 28, 2009, more than two years after the final divorce decree was entered on February 27, 2007.

Although Husband was experiencing some challenging personal circumstances, Husband did have knowledge of the proceedings as well as the final judgment and did not suggest that he was incapacitated to such a degree that he was unable to initiate some action in the court. Given Husband's knowledge of the proceedings, we cannot say that the two-year delay was reasonable. Husband's second assignment of error is overruled.

IV.

{¶17} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas, Domestic Relations Division.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶18} Although I concur in the affirmance of the trial court's decision, I would do so on different grounds. Mr. Nettle raises issues that could have been raised in a direct appeal from the 2007 decree. Instead, he filed a motion to vacate over two years later.

{¶19} As this Court stated in *Naples v. Naples*, 9th Dist. No. 08CA009420, 2009-Ohio-1427, at ¶9:

> "Civ.R. 60(B) permits a party to obtain relief from judgment on several bases such as mistake, excusable neglect, newly discovered evidence, fraud, satisfaction of judgment, and other reasons justifying relief. '[T]he availability of Civ.R. 60(B) relief is generally limited to issues that cannot properly be raised on appeal.' *Haas v. Bauer*, 9th Dist. No. 02CA008198, 2004-Ohio-437, at ¶25, citing *Yakubik v. Yakubik* (Mar. 29, 2000), 9th Dist. No. 19587. See, also, *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 602 (holding that appellant could not rely on arguments it could have asserted in a direct appeal because a Civ.R. 60(B) motion is not a substitute for direct appeal). A Civ.R. 60(B) motion is a proper vehicle for relief if the error alleged does not appear in the record. *Harmon v. Harmon* (May 30, 1984), 9th Dist. No. 11575 (holding that appellant's claim had to be raised through Civ.R. 60(B) rather than a direct appeal because the finding that formed the basis of her claim for relief was not a part of the record). Yet, a Civ.R. 60(B) motion does not provide for the reconsideration of a judgment and cannot be employed to challenge the legal correctness of a trial court's decision. *Thomas v. Fick* (June 7, 2000), 9th Dist. No. 19595; *Yakubik*, supra."

{¶20} I would affirm on this basis.

APPEARANCES:

CHRISTOPHER VANDEVERE, Attorney at Law, for Appellant.

MARTHA HOM, Attorney at Law, for Appellee.