[Cite as *Shumate v. Shumate*, 2010-Ohio-5062.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

LOUISE SHUMATE Appellant v. LEROY SHUMATE Appellee	C. A. No. 09CA009707 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07DR068634

DECISION AND JOURNAL ENTRY

Dated: October 18, 2010

BELFANCE, Judge.

{¶1} Appellant, Leroy Shumate, pro se, appeals from the journal entry of the Lorain County Court of Common Pleas, Domestic Relations Division, granting a motion for relief from judgment filed by appellee, Louise Shumate. This Court affirms.

BACKGROUND

{¶2} On December 12, 2007, Louise Shumate ("Wife") filed a complaint for divorce from Leroy Shumate ("Husband") and the trial court granted the divorce on August 29, 2008. On July 21, 2009, Wife filed a motion for relief from judgment, pursuant to Civ.R. 60(B)(3), asserting that Husband had failed to disclose approximately $15,000 of marital assets that he had placed on deposit with the Clerk of Courts of the Lorain County Court of Common Pleas in Case No. 05CV140860, *Thomas Newell, et al. v. Leroy Shumate*. Husband opposed the motion.

{¶3} Following a two-day hearing, the trial court found that, while married, Husband had deposited $15,000 with the Lorain County Clerk of Courts in connection with a civil action

in which he was a named defendant. Wife was unaware that Husband had deposited this money. The trial court further found that it was "undisputed that Husband was in possession of $15,000 cash" and that he never disclosed the asset to Wife or Wife's counsel during the pendency of the discovery period of the divorce matter. The civil case was closed on November 14, 2006 and Husband did not file a motion to return the deposits until July 10, 2009, almost one year after the journal entry of divorce.

{¶4} The trial court found that Husband's nondisclosure constituted a meritorious claim for Wife in that this undisclosed asset would have affected her share of spousal support and the property division. In light of Husband's misrepresentation, the trial court concluded that Wife was entitled to relief from judgment on the basis of Civ.R. 60(B)(3). It also found that Wife's motion was timely because it was filed within one year of the divorce decree. Husband filed a timely notice of appeal.

ABSENCE OF OFFICIAL TRANSCRIPT

{¶5} The appellate brief filed by Husband raises two primary issues. First, Husband contends that the domestic relations court erred in granting the motion for relief from judgment because the funds he had placed on deposit with the clerk of courts were not marital assets. Second, Husband challenges the trial court's granting of the motion for relief from judgment by disputing the finding of fraud in that he did not know the funds might have been "available" to him until after the divorce was granted and he has, in fact, not received the funds.

{¶6} As indicated above, an oral hearing was had before the trial judge on the motion for relief from judgment. Proper appellate review of Husband's legal arguments would require an evaluation of the evidence presented during the hearing before the trial court. It is an appellant's duty to ensure that the record, or the portion necessary for review on appeal, is filed

with the appellate court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. See, also, App.R. 9(B); App.R. 10(A); Loc.R. 5(A); and Loc.R. 6(A) and (B). "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶7} In this case, the transcript of the motion hearing was not properly made a part of the record before this Court. Although Husband filed a purported transcript of the hearing with this Court, the court reporter failed to file an *original certified* transcript with the trial court. As we have previously stated, this Court "may not properly consider any transcript unless it is certified by an official or properly appointed court reporter." *White v. Yuhas*, 9th Dist. No. 03CA0135-M, 2004-Ohio-5449, at ¶13, citing *Akron v. Giermann*, 9th Dist. No. 20780, 2002-Ohio-2650, at ¶8. App.R. 9(B) contemplates that the official court reporter will prepare an original copy of a verbatim transcript and file it with the trial court. Local Rule 6(C) further provides:

> "(C) Transcript Made Record. No transcript of proceedings shall be considered as a part of the record on appeal unless one of the following applies:
>
> "(1) The official court reporter has certified the transcript as provided in subsection (B) of this rule;
>
> "(2) The record contains an entry of the trial court appointing the court reporter who has certified the transcript;
>
> "(3) The transcript is a part of the original papers and exhibits filed in the trial court;
>
> "(4) The transcript has been incorporated into an App.R. 9(C) statement that has been approved by the trial court; or,
>
> "(5) The court of appeals has granted a motion to supplement the record with a transcript that was filed in a prior appeal."

{¶8} Husband failed to order a transcript from the official court reporter by way of a praecipe and, therefore, the court reporter did not file an original certified transcript with the trial court, as required by App.R. 9(B) and Loc.R. 6. The appellate rules do not permit a party to the action to file a non-original document in the court of appeals with the expectation that it will be considered as a verbatim transcript of the proceedings. Moreover, Husband did not pursue either of the alternative means of providing a record of the hearing through App.R. 9(C) or (D). As a result, the record on appeal contains only the original papers filed in the trial court and a certified copy of the docket and journal entries prepared by the clerk of the trial court.

{¶9} Where the transcript of a hearing is necessary to resolve assignments of error, but such transcript is missing from the record, the reviewing court has "no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp*, 61 Ohio St.2d at 199. In the instant matter, we are unable to resolve Husband's arguments without consideration of the evidence adduced at the hearing and, thus we are unable to determine whether the trial court committed reversible error. Accordingly, in the absence of a complete and adequate record, a reviewing court must presume the validity of the lower court's proceedings and affirm. *Knapp*, 61 Ohio St.2d at 199. See, also, *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7; *State ex rel. Fulton v. Halliday* (1944), 142 Ohio St. 548, 549 (stating that the "proceedings of a trial court are deemed correct unless error affirmatively appears on the face of the record"); *Buckingham, Doolittle & Burroughs v. Brad*y (Feb. 1, 1995), 9th Dist. No. 16835 (in the absence of a transcript from which error can be determined, we presume regularity in the proceedings).

{¶10} For these reasons, Husband's arguments are overruled.

SANCTIONS

{¶11} Wife also asks this Court to impose sanctions against Husband for filing a frivolous appeal, asserting that there is no reasonable question for review. See *Cardservice Internatl., Inc. v. Farmer*, 9th Dist. No. 24642, 2009-Ohio-3692, at ¶11. Although Husband's pro se brief is not skillfully prepared, we decline to find this appeal to be wholly frivolous, because Husband has raised substantive challenges to the propriety of the trial court's journal entry granting Wife Civ.R. 60(B) relief.

CONCLUSION

{¶12} Husband's arguments are overruled. The journal entry of the Lorain County Court of Common Pleas, Domestic Relations Division, is affirmed.

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 Lorain, 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.
DICKINSON, P. J.
CONCUR

APPEARANCES:

LEROY SHUMATE, pro se, Appellant.

GINO PULITO, Attorney at Law, for Appellee.