[Cite as *Lewis v. Lewis*, 2010-Ohio-1072.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gregg R. Lewis,	:	
Petitioner-Appellee,	:	
		No. 09AP-594
v.	:	(C.P.C. No. 06DR-11-4431)
Candice M. Lewis,	:	(REGULAR CALENDAR)
Petitioner-Appellant.	:	

D E C I S I O N

Rendered on March 18, 2010

Craig P. Treneff Law Office, and *Craig P. Treneff*, for appellee.

Wolinetz Law Offices, LLC, Barry H. Wolinetz and *Jennifer L. Prindle*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

McGRATH, J.

{¶1} Defendant-appellant, Candice M. Lewis ("appellant"), appeals from the May 19, 2009 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying her motion for relief from judgment.

{¶2} The parties were married on June 15, 2003, and had no children born as issue of the marriage. Prior to the marriage, the parties entered into a prenuptial agreement for which appellant obtained an attorney to review prior to its execution. In

March 2006, appellant, who was employed as a medical device sales representative for Johnson and Johnson, began an extramarital affair with her client, Dr. R.J. Nowinski, a surgeon from Licking County, Ohio. Appellant separated from her husband, plaintiff-appellee, Gregg R. Lewis ("appellee"), on or about June 15, 2006. Though the parties attended marriage counseling, appellant informed appellee during the month of June 2006 that she wanted to end the marriage.

{¶3} Appellee, an experienced domestic relations attorney in Columbus, Ohio, began preparing drafts of a separation agreement in July 2006. Concerned about a text message, wherein appellant alluded to suicide and referenced purgatory, appellee and his friend, Dr. Marivi Soto, went to appellant's residence. While there, appellee and Dr. Soto removed all the sleeping pills from appellant's residence and urged appellant to see a psychologist, Dr. Charles Gerlach, who the parties had previously seen for marriage counseling. Upon the advice of Dr. Gerlach, appellant checked herself into Riverside Methodist Hospital where she stayed from September 5 to September 7, 2006. As a condition of her release from the hospital, appellant was to enroll in an outpatient treatment program for alcohol at Talbot Hall. Appellant began the outpatient program on September 9, 2006 and completed it on October 26, 2006. During her period of treatment at Talbot Hall, appellant testified she returned to work and was drinking less alcohol. Appellant also testified she had no suicidal ideations after her release from the hospital. Appellant also maintained her relationship with Dr. Nowinski throughout this time period.

{¶4} After preparing at least ten versions of the separation agreement, settlement negotiations finally concluded in October 2006. On October 30, 2006, appellant appeared at appellee's office to execute documents associated with the

dissolution. Because these documents were not accepted by the Licking County Clerk of Courts, appellant appeared at appellee's office to execute a second set of documents on November 2, 2006. According to appellant, she read all the documents prior to signing them. The parties' marriage was terminated pursuant to a decree of dissolution of marriage filed on December 12, 2006. The decree incorporated the separation agreement executed between the parties on November 2, 2006. The separation agreement determined, in addition to other matters, the division of marital property and liabilities. The agreement states that it is based on a full disclosure of all assets and liabilities by each party, that each party declares the terms of the agreement to be fair and equitable, that the property distribution, while not equal, is equitable and in accordance with the parties' agreement, and that each party has signed the agreement as their free and voluntary act. Further, the agreement reflects each party was advised of their right to obtain counsel of their choosing, but that appellee was represented pro se and appellant chose to forgo legal counsel.

{¶5} Approximately a year later, on November 15, 2007, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B), alleging undue influence and that appellee failed to fully disclose assets. Finding appellant had alleged sufficient operative facts which if proven would warrant relief from judgment, the trial court set the matter for a hearing on January 23, 2009. On May 19, 2009, the trial court filed a judgment entry with findings of fact and conclusions of law denying appellant's motion for relief from judgment.

{¶6} This appeal followed, and appellant brings a single assignment of error for our review:

> THE TRIAL COURT ABUSED ITS DISCRETION, AS A MATTER OF LAW, IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60(B) OF THE OHIO RULES OF CIVIL PROCEDURE.

{¶7} Civ.R. 60(B) governs motions for relief from judgment and provides:

> 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; * * * (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 the 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.

{¶8} The Supreme Court of Ohio set forth the requirements for prevailing on a Civ.R. 60(B) motion in *GTE Automatic Elec. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus:

> To prevail on a motion brought 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.

{¶9} The determination of whether to grant a Civ.R. 60(B) motion is within the sound discretion of the trial court, and an appellate court will not reverse that determination absent an abuse of discretion. See *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 66. This court has explained that an abuse of

discretion will not be found where the reviewing court simply could maintain a different opinion were it deciding the issue. *McGee v. C & S Lounge* (1996), 108 Ohio App.3d 656, 660. Rather, an abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Because mutual consent is the cornerstone of dissolution law, "[c]ourts must be wary and ensure that relief under Civ.R. 60(B) is justified, not merely a tool used 'to circumvent the terms of a settlement agreement simply because, with hindsight, [the moving party] has thought better of the agreement which was entered into voluntarily and deliberately.' " *McLoughlin v. McLoughlin*, 10th Dist. No. 05AP-621, 2006-Ohio-1530, ¶24, quoting *Biscardi v. Biscardi* (1999), 133 Ohio App.3d 288, 292.

{¶11} Appellant first argues she is entitled to relief from judgment pursuant to Civ.R. 60(B)(3) because the record contained clear and convincing evidence that appellee exerted undue influence over her during the negotiation of the separation agreement. As stated by this court in *DiPietro v. DiPietro* (1983), 10 Ohio App.3d 44, 46, "[i]n order to prove that he was incompetent to contract at the time he entered into the separation agreement, appellant was required to prove, by clear and convincing evidence, that the separation agreement was executed while appellant was mentally incompetent or under the influence of fraud, undue influence or duress." Id. (internal citation omitted). The elements of undue influence are: (1) a susceptible party, (2) another's opportunity to influence the susceptible party, (3) the actual or attempted imposition of improper influence, and (4) a result showing the effect of the improper influence. Id., citing *West* v. *Henry* (1962), 173 Ohio St. 498, 501.

{¶12} Appellant contends that her alleged weakened mental stability, alcohol dependence, and hospitalization for suicidal ideations caused her to be susceptible to appellee's undue influence. In support, appellant relies on *In re Wood* (June 29, 1999), 10th Dist. No. 98AP-1061, in which this court affirmed the trial court's decision to grant Ms. Wood's motion for relief from judgment and set aside the separation agreement on the basis of undue influence. The underlying facts of that case are as follows. Ms. Wood had completed one year of college, while Mr. Wood obtained both a bachelor's degree and a law degree. At the time of the dissolution, Ms. Wood was earning approximately $23,000 per year as an assistant manager at Ben Franklin Crafts, and Mr. Wood was employed as corporate counsel for Safelite Glass Corporation, earning approximately $95,000 per year. Mr. Wood committed acts of domestic violence, engaged in verbal abuse against Ms. Wood, and had nine extramarital affairs. Ms. Wood expressed her fear of Mr. Wood to several of her friends during the course of the marriage. A year prior to the dissolution, Ms. Wood experienced mental health problems, contemplated suicide, and had mood changes that impacted her work to a degree that termination of employment was discussed. Mr. Wood explained to Ms. Wood that the marital property would be split 80/20 in his favor, and that such division was fair based on the parties' respective marital contributions. Mr. Wood also actively discouraged Ms. Wood from getting her own counsel. Ms. Wood was described at the time of negotiations as "despondent, felt that she had no future, and believed that she was totally responsible for the break up of their marriage." Id.

{¶13} As will be explained, the present matter is in stark contrast to *In re Wood*. Here, appellant graduated in 1998 from The Ohio State University with a Bachelor's of

Science degree in textile chemistry. At the time the marriage ended, appellant was employed by Johnson and Johnson as a surgical device sales representative earning approximately $99,000 per year and was fully supporting herself. Appellee is a domestic relations attorney who has been licensed to practice law since 1989.

{¶14} Less than three years into the marriage, appellant began an extramarital affair with one of her clients, Dr. Nowinski. At the time the relationship began, Dr. Nowinski was also married, had three children, and a pregnant wife. Appellee discovered the relationship when he learned an alleged business trip appellant went on during the weekend of her birthday was actually a non-work related trip with Dr. Nowinski. Though they had attended marriage counseling, appellant left the marital residence in June 2006 and shortly thereafter informed appellee that she wanted to terminate the marriage. Appellee began preparing drafts of the separation agreement and presented appellant with various versions of the same before the parties were able to agree on the final version. Appellant testified she met with an attorney during the summer of 2006, but elected not to hire him.

{¶15} During the time of the negotiations, appellant did testify she was drinking heavily, was depressed, terrified, and felt absolutely powerless against appellee. However, it was appellant who sent appellee a text message referencing purgatory and going to sleep and not awakening, which caused appellee to go to appellant's residence with a physician. After being advised to check herself into the hospital, appellant asked appellee to drive her to the hospital to be admitted, and asked appellee to drive her home from the hospital as well. According to appellant, after she left the hospital from her

three-day stay, she had no suicidal ideations and she was drinking "a lot less" during the time spent in her treatment program.

{¶16} The same week she was released from the hospital, appellant returned to her employment, which included attending surgeries. Appellant also worked on the days she stopped at appellee's office to sign the documents associated with the dissolution and returned to work after she finished signing. Though appellant stated she was terrified and felt powerless against appellee, she also testified she was comfortable stopping at his office and that she felt comfortable enough to stand up to appellee on occasion as she testified at one time she told appellee an early version of the separation agreement was "bullshit." (Tr. 105.) Appellant also testified she read the separation agreement before she signed it. Additionally, appellant's relationship with Dr. Nowinski continued throughout this time and was described by appellant as the happy part of her life.

{¶17} In the judgment entry denying her motion for relief from judgment, the trial court referenced the areas of appellant's testimony which caused the court to question her credibility. The trial court, as fact finder, was entitled to weigh the evidence and determine the credibility of the witnesses. *Young v. Young* (1982), 8 Ohio App.3d 52, 53. Though the trial court found appellant suffered from depression, the trial court aptly noted that depression without more is not a ground for relief under Civ.R. 60(B), as it is not equivalent to mental incompetency. See *DiPietro*, supra. As this court stated in *DiPietro*, "[i]f agreements between husbands and wives could be set aside on the ground that one of the parties was severely depressed when he or she signed the agreement, separation agreements and other agreements executed by persons involved in dissolution or divorce proceedings would tumble like pins on a bowling alley." Id. at 49. Upon review of the

record, we conclude the trial court did not abuse its discretion in finding that appellant failed to meet her burden of establishing undue influence.

{¶18} Appellant also argues under this assigned error that appellee failed to disclose marital assets totaling approximately $425,000, and that there is "ample evidence" in the record establishing the same. Unfortunately, appellant fails to direct this reviewing court to such evidence. Rather, appellant directs us to page five of her motion for relief from judgment which contains a list of items she alleges were undisclosed.

{¶19} As stated in *McLoughlin*, when an asset is completely omitted from the agreement, a party may be entitled to relief from judgment under Loc.R. 17 and Civ.R. 60(B)(5). Id. at ¶30. However, while such an omission may be sufficient grounds for relief under Civ.R. 60(B)(5), "[u]ltimately, whether equity demands that the judgment be set aside remains a question within the court's discretion[.]" Id. at ¶31, citing *In re Murphy* (1983), 10 Ohio App.3d 134, paragraph three of the syllabus.

{¶20} Though appellant stated in her affidavit that appellee failed to disclose $425,000 worth of assets, when asked at the hearing what assets comprised this amount, appellant was unable to offer any testimony on the matter. Additionally, a financial affidavit signed by both parties was filed in accordance with Loc.R. 17 and contains assets appellant alleged in her motion for relief from judgment were not disclosed. Appellee testified that though the financial affidavit did not distinguish between separate and marital property, it did contain "complete disclosure" of the assets at that point in time. Given the record in this case, we are unable to conclude the trial court abused its discretion in denying appellant's motion for relief from judgment pursuant to Civ.R. 60(B)(5).

{¶21} Based on the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and KLATT, J., concur.

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