

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Deborah P. Morley

Court of Appeals No. L-04-1051

Appellee

Trial Court No. DR-02-1071

v.

Clifford F. Morley, Jr.

DECISION AND JUDGMENT ENTRY

Appellant

Decided: September 30, 2004

* * * * *

Stewart W. Jones, for appellee.

Vesper C. Williams II, for appellant.

* * * * *

SINGER, J.

{¶ 1} This accelerated appeal comes to us from a judgment issued by the Lucas County Court of Common Pleas, Domestic Relations Division, denying appellant's Civ.R.60(B) motion for relief from a final judgment of divorce. Because we conclude that the trial court did not abuse its discretion, we affirm.

{¶ 2} Appellant, Clifford F. Morley, Jr., and appellee, Deborah P. Morley, were granted a divorce on October 31, 2002. Appellant never responded to the complaint or appeared to defend the complaint for divorce filed by appellee. On July 14, 2003,

appellee filed a motion to show cause regarding appellant's failure to pay the balance of a credit card and the appellant's alleged incurring of additional debt on another credit card in appellee's name. On October 30, 2003, appellant filed a Civ.R. 60(B)(3) motion to set aside the final divorce decree, alleging fraud in that the entry did not reflect the agreement entered into between the parties. In support of the motion, appellant attached an affidavit which avers that a letter written by his attorney, also attached, represents the true agreement between the parties. The attorney's letter alleged that the decree did not properly reflect the parties' agreement as to spousal support, pension division, bank account division, appellant's income for child support calculations, and contained a conflict in language referencing the parties' mortgage on the marital home.

{¶ 3} On January 26, 2004, the trial court denied appellant's motion, finding that appellant had failed to present a meritorious claim for relief from judgment. The court stated that appellant had not filed a transcript of the final divorce hearing, preventing the review of any agreement terms or statements made at that time. The court also ruled that appellant's affidavit and his attorney's letter, both dated nearly one year after the final judgment entry, offered nothing of evidentiary value in establishing that fraud had occurred. The court noted specifically that appellant's failure to appear at the final hearing constituted a waiver of his right to object to any terms of the final judgment entry.

{¶ 4} Appellant now appeals from that judgment, setting forth the following two assignments of error:

{¶ 5} “*Assignment of Error Number One*: The lower court abused its discretion by denying the Defendant’s 60(B) *Motion To Set Aside The Judgment Entry In Part* when the record reveals uncontroverted evidence of fraud/misrepresentation and substantial material defects as to the income of the parties at the time of judgment and its prospective use and an unequal, unfair division of property without justification that is contrary to Ohio Revised Code 3105.17.1(B), (C) and (F).

{¶ 6} “*Assignment of Error Number Two*: The lower court abused its discretion by denying Defendant’s 60(B) *Motion To Set Aside The Judgment Entry In Part* where the Judgment Entry was entered without first following the mandated determinations required by Ohio Revised Code 3105.18(C)(1) and Civ [sic] Rule 75(F) as to the appropriateness of spousal support, incorporating prior orders and determining issues of property division.”

{¶ 7} We will address appellant’s assignments together. A successful motion for relief from judgment requires 1) the existence of a meritorious defense; 2) that the movant is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and, 3) that the motion is timely brought. *GTE Automatic Elect. v. ARC Indus.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Where a meritorious defense is alleged and the matter timely raised, doubt should be resolved in favor of the motion to set aside the judgment. *Id.* at paragraph three of the syllabus. In these circumstances, failure to grant such a motion constitutes an abuse of discretion. *Id.* at 148. The

movant's burden is to "allege a meritorious defense, not to prevail with the respect to the truth of the meritorious defense." *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, fn. 3.

{¶ 8} If any of the three *GTE* requirements is not met, however, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A party who willfully and deliberately chooses to ignore a complaint and has stated no other reason for failing to appear or answer a complaint has not stated an adequate ground for relief from a default judgment pursuant to Civ. R. 60(B)(5). *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 288. The decision to grant or deny a motion for relief from judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than an error of law or of judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 9} Under *GTE*, appellant must establish that he had a meritorious defense which warrants relief under one of the Civ.R. 60(B) grounds. In this case, during the divorce proceedings, appellant failed to answer the complaint, failed to file any responsive pleadings or schedules, and failed to attend the final hearing. Appellant alleges that he had an agreement which was contrary to what was in the decree, but does not provide any documentation, other than his own statements as to the terms of that agreement. Moreover, he does not say why he waited almost a whole year after the decree was entered to challenge the alleged inaccuracies. While the record does not

reflect any evidence of fraud, it does show that appellant's challenge to the decree occurred only after he was served with the motion to show cause for failing to pay debts according to the final decree.

{¶ 10} Additionally, although appellant's motion was filed based upon Civ. R. 60(B)(3) and Civ.R. 75(F)(1), he is attempting to directly attack the validity of the decree by alleging errors in the trial court's factual findings or legal mistakes in the decree itself. Thus, appellant is really asserting a Civ.R. 60(B)(1) claim. Civ.R. 60(B) is not to be used as a substitute for appeal. *Doe v. Trumbull Cty. Children Serv. Bd.* (1986), 28 Ohio St.3d 128, 131; *Colley v. Bazell*, supra, at 245. A mistake by the trial court in applying the law or finding of fact is not the type of "mistake" contemplated by Civ.R. 60(B)(1) or any other section of Civ.R. 60(B), rather it is the basis for a timely appeal. See, e.g., *Gold Touch, Inc. v. TJS Lab., Inc.* (1998), 130 Ohio App.3d 106, 110-111 (failure to consider an untimely filed brief is not the type of mistake contemplated by 60(B)); *Peltz v. Peltz* (June 27, 1997), 11th Dist. No. 96-G-2026, *May v. Dept. of Hwy. Safety* (June 13, 1995), 10th Dist. No. 94API12-1743, and *Carrabine v. Brown* (Aug. 13, 1993), 11th Dist. No. 92-G-1736 (holding that the mistake or inadvertence referred to in Civ.R. 60(B)(1) is that of a party or his agent, not substantive law mistake by court). Consequently, the factual or legal errors alleged by appellant may not be used to establish a meritorious defense, especially when he failed to appear or contest any of the matters during the divorce proceedings.

{¶ 11} Therefore, we cannot say that the trial court abused its discretion in finding that appellant did not establish a meritorious defense warranting Civ.R. 60(B) relief from the final divorce decree. Accordingly, appellant’s two assignments of error are not well-taken.

{¶ 12} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J.

JUDGE

Judith Ann Lanzinger, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE