[Cite as *Incze v Incze*, 2023-Ohio-3249.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

KENDAL C. INCZE, :

Plaintiff-Appellant, :

No. 112208

v. :

NORMAN E. INCZE, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 14, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-12-342827

Appearances:

Sand, Sebolt & Wernow Co., L.P.A., and James F. McCarthy, III, *for appellant*.

Goodwin & Bryan, L.L.P., and Elizabeth A. Goodwin; Kimberly Yoder Co., L.P.A., and Kimberly K. Yoder, *for appellee*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Plaintiff-appellant Kendal C. Timmers, f.k.a. Incze, now known as Kendal Wallace ("Wallace" hereafter), appeals from a decision of the trial court

denying her request to modify a judgment entry regarding a postdecree motion to modify child support filed by her former husband Norman E. Incze ("Incze" hereafter). On appeal, Wallace raises the following two assignments of error for our review:

> I. The trial court erred to the prejudice of plaintiff-appellant in denying the Motion to correct the erroneous judgment that eviscerated a vested property interest set out in the judgment entry of divorce.
>
> II. The trial court denied the plaintiff-appellant due process when the court conducted a hearing without providing for participation when the plaintiff-appellant could not be present in person and proceeded to enter an order exceeding the stated notice for the hearing.

{¶ 2} Having reviewed the record and applicable law, we find Wallace's assignments of error not well taken. Wallace fails to demonstrate her entitlement to relief pursuant to Civ.R. 60(B) as required by *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976). Rather, her motion raises claims that could have been raised on direct appeal, and therefore, Civ.R. 60(B) relief is inappropriate under the doctrine of res judicata.

Factual and Procedural Background

{¶ 3} In 2012, Wallace filed a complaint of divorce against Incze. In January 2014, the trial court entered a divorce decree setting forth the parties' respective parental rights and responsibilities, including child support obligations for the parties' three children. Incze filed a motion to modify child support on August 24, 2021, based on a claim of change of circumstances.

{¶ 4} On November 9, 2021, the trial court set the matter for a hearing on December 6, 2021. On that day, after waiting 20 minutes for Wallace or her counsel to appear, the trial court noted that the matter had been set for an in-person hearing on November 9, 2021, and decided that it would proceed with the hearing despite Wallace's absence. Incze testified at the hearing.

{¶ 5} The next day, on December 7, 2021, the trial court filed a "Judgment Entry Re: Modification of Allocation of Parental Rights and Responsibilities with Support." The court determined that there were two property division payments due from Incze under the divorce decree and, after subtracting Incze's overpayment of child support in the amount of $21,113.17, his remaining obligation to Wallace under the divorce decree is $18,407.75. Wallace did not appeal from the judgment.[1]

{¶ 6} Eleven months later, on November 7, 2022, Wallace, through counsel, filed a "Motion to Correct Judgment Entry Dated December 6, 2021." The motion cited Civ.R. 60, which grants relief from judgment, as authority for the motion but did not identify the specific ground(s) for relief. Rather, Wallace argued that the trial court misconstrued the terms of the divorce decree and reached an erroneous conclusion regarding Incze's remaining property division obligation and, in reducing Wallace's remaining property division obligation by his overpayment of child support, the trial court's decision went beyond the scope of child support and

[1] We note that motions to modify child support are classified as special proceedings and judgments on such motions are final appealable orders. *See, e.g.*, *Weisberg v. Sampson*, 11th Dist. Portage No. 2005-P-0042, 2006-Ohio-3646, ¶ 38.

allocation of parental rights. To explain her absence from the hearing, Wallace attached an affidavit to her motion, alleging that she was unable to attend the hearing because she had tested positive for Covid.[2]

{¶ 7} The trial court denied Wallace's motion, and Wallace now appeals from the court's judgment. We address jointly the two assignments of error raised by Wallace for ease of discussion.

Analysis

{¶ 8} Wallace's "Motion to Correct Judgment Entry Dated December 6, 2021" cites Civ.R. 60 as authority for the motion. As such, we construe it as a motion for relief from judgment pursuant to Civ.R. 60 despite the motion's caption. While the motion cites Civ.R. 60, the motion is devoid of any demonstration required by Civ.R. 60. Civ.R. 60 states the following:

> (A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. * * *
>
> (B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the

[2] Wallace stated in her affidavit that she was unable to retain counsel and had to represent herself because "none of them would take on the case"; that several days before the scheduled hearing, she spoke to the bailiff advising him she was living in Florida and requesting a video hearing, but was told the hearing would be in person; that she booked a flight for December 6, 2021, in order to attend the hearing in person but called the court at 8:58 a.m. that day to inform the court that she tested positive for Covid and was not permitted by TSA to proceed through the security. Wallace also stated she understood the only issue before the court was to be parental rights and responsibilities and child support based on an email she received from Incze's counsel. We note that Wallace did not submit any documentary evidence to support her affidavit.

> court may relieve a party or his legal representative 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 * * *; 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 9} Wallace does not claim there was a mistake of a clerical nature entitling her to relief from judgment pursuant to Civ.R. 60(A). Therefore, we review the motion under Civ.R. 60(B).

{¶ 10} "A motion for relief from judgment under Civ. R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

{¶ 11} In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the moving party 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. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983).

Regarding the second requirement, Civ.R. 60(B) states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect * * *."

{¶ 12} Wallace did not demonstrate or even contend in her "Motion to Correct Judgment Entry Dated December 6, 2021" that her Civ.R. 60 motion, filed 11 months after the court's judgment, was made within a reasonable time.[3]

{¶ 13} Furthermore, Wallace failed to identify the ground(s) (mistake, inadvertence, surprise, or excusable neglect) and failed to set forth appropriate argument in support of the requested relief from judgment. Rather, Wallace merely argued in the motion that the trial court's decision was erroneous.

{¶ 14} It is well established, however, that "'a motion for relief from judgment cannot be predicated upon the argument that the trial court made a mistake in rendering its decision.'" *Pearlman v. Sukenik*, 8th Dist. Cuyahoga No. 87904, 2007-Ohio-542, ¶ 31, quoting *Chester Twp. v. Fraternal Order of Police*, 102 Ohio App.3d 404, 408, 657 N.E.2d 348 (1995). "The type of mistake contemplated by Civ.R. 60(B)(1) is a mistake by a party or his legal representative, not a mistake by the trial court in its legal analysis." *Id.*, citing *Antonopoulos v. Eisner*, 30 Ohio App.2d 187, 284 N.E.2d 194 (8th Dist.1972).

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[3] While Wallace stated in her affidavit that since the hearing she has been "making attempts to find a lawyer to assist me," there is no allegation in the motion that her unsuccessful attempts caused the 11-month delay, or argument that the delay is reasonable under the circumstances.

{¶ 15} We further note that the doctrine of res judicata bars relitigation of a matter that could have been raised on direct appeal. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). "Consequently, if a Civ.R. 60(B) motion raises issues that the movant could have challenged on direct appeal, then the doctrine of res judicata prevents the movant from employing Civ.R. 60(B) as a means to set aside the court's judgment." *Sydnor v. Qualls*, 2016-Ohio-8410, 78 N.E.3d 181, ¶ 29 (4th Dist.), citing *Blasco v. Mislik*, 69 Ohio St.2d 684, 686, 433 N.E.2d 612 (1982) (Civ.R. 60(B) relief inappropriate under doctrine of res judicata when "contentions merely challenge the correctness of the court's decision on the merits and could have been raised on appeal"). All of Wallace's claims — that the trial court's judgment was erroneous and went beyond the scope of the child support matter and that the trial court violated her due process in proceeding with the hearing in her absence — could have been raised on a direct appeal. Wallace's motion is an improper, untimely attempt to seek an appellate review of the trial court's December 7, 2021 judgment, which she failed to appeal. The trial court did not abuse its discretion in denying the motion. The first and second assignments of error are overruled.

{¶ 16} 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.

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MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, A.J., and
EMANUELLA D. GROVES, J., CONCUR