**[Cite as *Barnes v. Barnes*, 2012-Ohio-2592.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Vangela Barnes, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-563 (C.P.C. No. 09DR-04-1431) |
| Emanuel Barnes, III, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on June 12, 2012

*Vangela Barnes*, pro se.

*Cynthia M. Roy*, for appellee.

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

CONNOR, J.

**{¶ 1}** Plaintiff-appellant, Vangela Barnes ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas, Division of Domestic Relations, denying her motion for relief from judgment filed pursuant to Civ.R. 60(B). For the reasons that follow, we affirm that judgment.

**{¶ 2}** Appellant and defendant-appellee, Emanuel Barnes, III ("appellee" or "Emanuel"), were married on May 20, 1995. Three children were born as issue of the marriage. On September 15, 2010, an agreed judgment entry decree of divorce was entered.

**{¶ 3}** The decree of divorce addressed, inter alia, the division of the real estate owned by the parties, as well as the division of retirement and pension accounts. With respect to the real estate, the decree stated appellant was awarded the real estate located

at 6780 Lehman Road, Canal Winchester, Ohio, as well as the real estate located at 2890 Falcon Bridge Drive, Columbus, Ohio, free and clear of any interest of Emanuel. The relevant portion of the decree further stated as follows:

> [Appellant] to remove [appellee's] name from all mortgages for both parcels of real estate not later than January 1, 2012 by either refinance, assumption, release from liability or sale. In the event that [appellant] is not able to remove [appellee's] name from the mortgages by either refinance, assumption, release from liability by the time period stated above, then the real estate parcel(s) where the mortgage(s) is/are still in [appellee's] name shall immediately be listed for sale.
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> [Appellee] shall immediately sign mortgage loan modification forms for the real estate located at 6780 Lehman Road. [Appellee] shall also sign quit claim deeds and any other documents that are required for the refinance, assumption, release from liability or sale of either parcel of real estate.

(R. 241-42.)

**{¶ 4}** Regarding the division of assets involving the retirement account and the pensions, the decree stated as follows:

> ***10. Retirements, Pensions and Depository Accounts***: [Appellee] shall be awarded [appellant's] entire JP Morgan Chase & Company retirement, valued at $48,702.97 as of June 30, 2010. * * * [Appellant] shall be awarded 100% of her 401(k) free and clear of any interest of [appellee]. [Appellee] shall be awarded 100% of his 401(k) free and clear of any interest of [appellant].
>
> The parties agree that this division of property is fair and equitable and waive their right to written findings of fact and conclusions of law.

(R. 244.)

**{¶ 5}** Appellant did not appeal the agreed judgment entry decree of divorce. On March 14, 2011, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). Appellant asserted she was entitled to relief because there was evidence demonstrating that, at the time the decree was journalized, appellee had no intention of

fulfilling his obligations of signing the mortgage loan modification forms for the Lehman Road property or of executing the quit claim deed needed to facilitate the loan modification. Appellant contended the division of marital assets, as set forth in the decree, was predicated upon these obligations imposed upon appellee and, in exchange, included the award of appellant's JP Morgan Chase & Company retirement account to appellee in order to allocate and equally divide the parties' assets.

**{¶ 6}** On March 14, 2011, appellant also filed a motion for contempt against appellee, alleging appellee willfully failed to comply with the orders set forth in the decree of divorce. Specifically, appellant argued appellee refused to sign the mortgage loan modification forms for the real estate on Lehman Road and refused to execute a quit claim deed in accordance with the decree of divorce.

**{¶ 7}** A hearing was held on April 19, 2011, regarding both the contempt motion and the Civ.R. 60(B) motion for relief. Although no testimony was taken, the trial court heard arguments from both sides before addressing the issues raised in the motions. First, the trial court ordered the parties to contact a bank representative to confirm that a quit claim deed was required for appellant's loan modification to be approved. Second, the trial court determined the language in the decree discussing the amount of the retirement account to be awarded to appellee was in fact "the entire amount," rather than the $48,702.97 valuation amount listed in the decree. Finally, the trial court orally overruled the Civ.R. 60(B) motion for relief from judgment, finding the parties had bargained as to the terms of the agreement, and because they bargained for it, they should be held to those terms.

**{¶ 8}** A second proceeding was held on May 24, 2011. At that proceeding, appellee executed the quit claim deeds. The original quit claim deeds were retained by appellee's counsel and copies were provided to appellant's counsel. On that same date, the parties filed a stipulation of facts regarding the loan modification. The parties stipulated that if appellant's loan modification application for the Lehman Road property was approved, Emanuel was to immediately convey to the lender the original quit claim deed. A Qualified Domestic Relations Order ("QDRO") was also filed on June 6, 2011, addressing the issue of the JP Morgan Chase & Company retirement account and stating that Emanuel was to be awarded the entire amount of the account. On that same date, an

entry was filed denying appellant's Civ.R. 60(B) motion for relief from judgment. This timely appeal now follows.[1]

**{¶ 9}** Appellant's brief, which was filed pro se, is difficult to decipher and lacks a clear, concise assignment(s) of error. Nevertheless, in attempting to interpret the arguments raised in appellant's appeal, we conclude appellant has raised the following challenges involving the trial court's denial of her Civ.R. 60(B) motion for relief from judgment, claiming the trial court erred by: (1) failing to allow appellant to provide testimony at the hearing; (2) failing to grant relief when there was a mistake or misinterpretation concerning the language used in the decree regarding the retirement account, which resulted in appellee being awarded "the entire amount" of appellant's retirement account, rather than the $48,702.97 amount set forth in the decree or the $42,970.72 amount (calculated as of June 30, 2009) that appellant purportedly believed was going to be used; (3) failing to equalize the assets divided between the two parties, since the current equity in the real estate at issue is not equal to the amount of the retirement account distributed to appellee; (4) determining the liquation date of the retirement account to be as of September 15, 2010, rather than September 30, 2010, because the September 15, 2010 date is not an end-of-the-quarter date, which is required; (5) failing to grant appellant's request for relief and to extend the time to refinance, since appellee's actions caused appellant to lose much of the time allotted to allow her to refinance; and (6) requiring appellant to release the retirement fund, even though appellee has not yet signed over his interest in both properties via quit claim deeds.

**{¶ 10}** Appellant also appears to attempt to raise additional challenges which seem to be unrelated to the Civ.R. 60(B) motion for relief. Appellant claims the trial court erred by: (1) finding appellee in contempt, but failing to impose a penalty for his failure to sign the documents necessary for the loan modification, and (2) failing to grant appellant attorney fees which have been incurred as a result of appellee's refusal to comply with the divorce decree.

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[1] On July 26, 2011, this court granted appellant's motion for a stay of execution in a limited capacity, to wit: as to the JP Morgan Chase & Company retirement account, the amount in the account over and above $48,702.97 shall not be paid to appellee pending resolution of this appeal, conditioned upon the posting of a cash or supersedeas bond in the amount of $2,000.

**{¶ 11}** For ease of discussion, we shall address all of appellant's arguments regarding the denial of her Civ.R. 60(B) motion for relief from judgment together.

**{¶ 12}** Civ.R. 60(B) reads in relevant part, as follows:

> On 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; (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, 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.

**{¶ 13}** " 'In an appeal from a Civ.R. 60(B) determination, a reviewing court must determine whether the trial court abused its discretion.' " *Harris v. Anderson*, 109 Ohio St.3d 101, 102, 2006-Ohio-1934, ¶ 7, quoting *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153 (1997); *see also Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151 (1980).

**{¶ 14}** In order to prevail on a Civ.R. 60(B) motion for relief from judgment, 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.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus; *see also Russo* at 153-54. "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994), citing *GTE Automatic Elec.* at 151.

**{¶ 15}** If the Civ.R. 60(B) motion alleges operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence and verify those facts before ruling on the motion. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996), citing *Coulson v. Coulson*, 5 Ohio St.3d 12, 16 (1983). Conversely, where the motion and any attached evidentiary material fail to allege operative facts which would warrant relief under Civ.R. 60(B), an evidentiary hearing is not required. *Richard* at 151, citing *S. Ohio Coal Co. v. Kidney*, 100 Ohio App.3d 661, 667 (4th Dist.1995).

**{¶ 16}** " 'A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal.' " *State ex rel. Bragg v. Seidner*, 92 Ohio St.3d 87 (2001), quoting *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91 (1998).

**{¶ 17}** "[T]he least that can be required of the movant is to enlighten the court as to why relief should be granted. The burden is upon the movant to demonstrate that the interests of justice demand the setting aside of a judgment normally accorded finality." *Rose Chevrolet, Inc.* at 21.

**{¶ 18}** We begin our analysis by examining Civ.R. 60(B) and noting that appellant has failed to point to any particular subsection of that rule to support her argument that she is entitled to relief. As a result, we do not know definitively which subsection appellant claims entitles her to relief. Nevertheless, in reviewing appellant's claims, we conclude that Civ.R. 60(B)(3), which alleges fraud, misrepresentation or other misconduct of an adverse party, or Civ.R. 60(B)(1), which alleges mistake, inadvertence, surprise or excusable neglect, appear to be the most applicable provisions.[2]

**{¶ 19}** Next, we analyze the three requirements that must be satisfied in order to meet the test to prevail on a motion for relief from judgment. In doing so, we find appellant's motion was timely filed. However, appellant has failed to demonstrate a meritorious defense or claim to be presented if relief was granted, and she has produced no evidence which supports her request for relief from judgment. Additionally, appellant has failed to demonstrate either mistake, inadvertence or excusable neglect, or fraud, misrepresentation or misconduct by appellee.

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[2] Civ.R. 60(B)(5), which provides "any other reason justifying relief from judgment," applies only when a more specific provision is not applicable. *Strack* at 174. *See also Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66 (1983) (Civ.R. 60(B)(5) is intended as a catch-all provision, but the grounds for invoking it should be substantial).

**{¶ 20}** The transcript of the April 19, 2011 hearing reveals that, although no formal sworn testimony was provided at the hearing, appellant's counsel presented several exhibits to the court in conjunction with the arguments made on appellant's behalf. These exhibits included, among others, a copy of the divorce decree, the quit claim deed prepared for Emanuel's signature, and various emails to and from a bank representative regarding the loan modification. Appellant received an adequate hearing at which she had the opportunity to present evidence so that the trial court could assess the allegations set forth in the motion, even though the trial court did not find additional testimony to be necessary under the circumstances. This was not an abuse of discretion.

**{¶ 21}** We also reject appellant's claim that the trial court erred in finding appellee should be awarded the entire amount of the JP Morgan Chase & Company retirement account and in denying appellant's request to set aside this award and substitute a lesser award. Appellant has asserted in her brief that as part of the original negotiations, appellee was to receive the value of her retirement account as of June 30, 2009, which was $42,970.72. The divorce decree, on the other hand, listed the value as of June 30, 2010, as $48,702.97. Appellant claimed she was willing to forego the error, until she reviewed the QDRO and realized it awarded Emanuel the "entire amount" of the retirement account, rather than the specific amount of $48,702.97. However, we do not disagree with the trial court's determination that the language of the decree, specifically section 10, which is titled "Retirements, Pensions and Depository Accounts," supports the conclusion that appellee was to be awarded the entire JP Morgan Chase & Company retirement account, rather than the amount set forth in that paragraph ($48,702.97), which was simply listed for purposes of providing a general valuation for the account. This determination is not an abuse of discretion and appellant has not presented evidence to demonstrate that her claim to the contrary is meritorious.

**{¶ 22}** Next, we consider appellant's claim that the division of assets was not equal. As stated above, a Civ.R. 60(B) motion requesting relief from judgment is not a substitute for a timely appeal. Appellant clearly could have raised this issue on direct appeal, but she chose not to file an appeal. In addition, she cannot demonstrate mistake, inadvertence, surprise or excusable neglect, nor fraud, misrepresentation or other misconduct with respect to this assertion and, thus, she is not entitled to relief on this issue.

**{¶ 23}** As for appellant's claim it is a mistake to use the date of September 15, 2010, as the liquidation date of the retirement account, appellant has not pointed us to any authority to support this assertion. While appellant claims that liquidation needs to be assessed as of an end-of-the-quarter date, such as September 30, 2010, we are unaware of any evidence or testimony which backs up this claim.

**{¶ 24}** Appellant also requests that she be granted additional time to refinance because appellee's actions in refusing to sign the quit claim deed(s) required for completing the modification process in turn delayed her time period for refinancing, which was set to expire January 1, 2012. However, as the trial court noted, the divorce decree requires that the quit claim deeds be signed for purposes of refinancing, not for purposes of modification. Nevertheless, the parties filed a stipulation which stated that, should appellant's loan modification application be approved, appellee would immediately convey to the lender a previously executed quit claim deed. The parties agree that the quit claim deed for the Lehman Road property was executed in accordance with this agreement. Therefore, appellant's arguments with respect to the quit claim deed involving the Lehman Road property are moot, as she cannot demonstrate she is entitled to relief due to fraud. The remainder of appellant's arguments on this issue go to the contempt motion, which we shall address below.

**{¶ 25}** However, the issue of the quit claim deed involving the Falcon Bridge property is still unresolved. With respect to this property, we are aware of no evidence to indicate that appellant has completed a loan modification application for the Falcon Bridge property and/or that said application has been approved and that the execution of the quit claim deed by Emanuel is the only thing holding up the completion of this process. Again, we fail to see how this constitutes mistake, inadvertence, surprise or excusable neglect, or even fraud, misrepresentation or other misconduct on the part of appellee. Furthermore, although appellant may believe it is unfair that she is required to release the JP Morgan Chase & Company retirement account to appellee prior to the final resolution of the issues involving the quit claim deed for the Falcon Bridge property, any purported unfairness does not meet the requirements for relief set forth in Civ.R. 60(B)(1) or (3).

**{¶ 26}** Finally, we address appellant's challenges regarding her contempt motion, as well as her request for attorney fees. Because appellant did not appeal from any contempt motion (and in fact, the record does not demonstrate that the trial court ruled on the contempt motion; rather, it indicates the motion was to be withdrawn, per the trial judge's notes), that issue is not before us, and we shall not consider it. Similarly, appellant's request for attorney fees is also not properly before us, and we shall not consider it either.

**{¶ 27}** In conclusion, we cannot find that the trial court abused its discretion in declining to set aside the September 15, 2010 agreed judgment entry decree of divorce. Accordingly, appellant's assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations is affirmed.

*Judgment affirmed.*

BRYANT and SADLER, JJ., concur.

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