[Cite as *Gaul v. Gaul*, 2012-Ohio-4005.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

WESLEY J. GAUL, JR.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0065**
- vs -	:	
DIANA J. GAUL,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2006 DR 425.

Judgment: Affirmed.

James R. Skirbunt, and *Sharon A. Skirbunt*, Skirbunt & Skirbunt Co., L.P.A., 3150 One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114 (For Plaintiff-Appellee).

Dennis J. Ibold, Peterson & Ibold, Inc., 401 South Street, Building 1-A, Chardon, OH 44024-1495 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Ashtabula County Court of Common Pleas. Appellant, Diana J. Gaul, challenges the merits of the trial court's decision to overrule her motion for relief from a specific order set forth in underlying divorce decree. Essentially, she contends that the assertions in her motion were sufficient to justify an evidentiary hearing prior to the final disposition of the matter.

{¶2} The parties to this action were married for approximately 30 years and had

three children. In June 2006, appellee, Wesley J. Gaul, Jr., initiated the underlying divorce proceeding. Although the parties were able to stipulate as to the resolution of some of the various issues, it was ultimately necessary for the trial court to hold a five-day bench trial. Due to scheduling conflicts, the trial went forward on various days over a 10-month period.

{¶3} During the evidentiary intake, the trial court heard testimony regarding the parties' potential tax liability for the 2006 tax year if they filed a joint return. Despite the fact that a court order had been issued requiring the parties to file jointly, appellant had failed to comply. As a result, it was necessary for the parties to file an amended return for 2006. The trial testimony on the potential liability was given before the basic process of amending the return could be completed.

{¶4} The final divorce decree was rendered in January 2009. As to appellant's tax liability for 2006, the decree had two provisions, the first of which was stated at page 7:

{¶5} "From [appellant's] one-half (1/2) of the net proceeds from the sale of the marital residence, she shall reimburse [appellee] for one-half (1/2) of the 2006 Federal Tax Liability, $9,688, plus his $9,000 in equity in the Black Sea Road property."

{¶6} The second relevant provision on the 2006 taxes was set forth at page 9 of the divorce decree:

{¶7} "[Appellant] violated this Court's Order that the parties should file a Joint Income Tax return for the tax year of 2006. [Appellee] shall be responsible for the 2006 taxes and [appellant] shall reimburse [appellee] the sum of $9,688, representing one-half (1/2) of the 2006 tax liability when the marital residence is sold."

{¶8} Due to various events, appellee was unable to sell the marital residence as quickly as had been intended. Eventually, the property was subject to a foreclosure proceeding. When appellee was finally able to find a buyer, the parties no longer had any equity in the residence. As a result, appellant's debt for the 2006 taxes remained unpaid.

{¶9} In July 2011, approximately 30 months after the issuance of the divorce decree, appellant moved the trial court for relief from judgment under Civ.R. 60(B). As the basis for the motion, she maintained that when the parties subsequently filed their amended 2006 federal tax return, their total tax liability had only been $12,767. In light of this, appellant asserted that, if she was only liable for one-half of the 2006 tax bill, she should only owe appellee the sum of $6,383.50, not $9,688 as ordered by the trial court in the final decree.

{¶10} In support of her 60(B) motion, appellant submitted a memorandum which delineated her legal argument. However, she did not attach any evidentiary materials to her motion or memorandum.

{¶11} In his response to appellant's motion, appellee raised four arguments for the trial court's consideration. As his primary contention, he stated that appellant was not entitled to relief from the final decree because her motion was not submitted within a reasonable time. As to this point, appellee asserted that he and appellant had actually filed their amended 2006 joint tax return in late 2007. Based upon this, he argued that appellant had been aware of the extent of her actual liability for over three years, and that she technically could have raised the point before the trial court prior to the release of the divorce decree in January 2009. In support of these factual assertions, appellee

attached his own affidavit to his response.

{¶12} Four days after the filing of appellee's response, the trial court rendered a separate judgment overruling appellant's 60(B) motion without a hearing. As the basis for its decision, the trial court merely indicated that it found the arguments in appellee's response to be well taken.

{¶13} On appeal from the foregoing judgment, appellant has raised the following assignment of error for our consideration:

{¶14} "The trial court abused its discretion in denying [appellant's] motion for relief from judgment without a hearing and without providing [appellant] with grounds for dismissal."

{¶15} Since the trial court did not state any exact reason for overruling the Civ.R. 60(B) motion, appellant has presented a counter-argument to each of the contentions asserted in appellee's response at the trial level. In relation to the "timeliness" question, she submits that the trial court abused its discretion in making a final ruling on this point without first conducting an evidentiary hearing. According to appellant, a hearing was needed because there were no materials before the trial court establishing exactly when she first became aware of the existence of the amended tax return.

{¶16} Civ.R. 60(B) enumerates a set of acceptable reasons for granting a party relief from a final judgment in a civil action. The rule states, in pertinent part:

{¶17} "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 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. * * * "

{¶18} In regard to the general purpose of Civ.R. 60(B), this court has indicated that the rule "attempts to strike a balance between protecting the finality of judgments and the unjust operation of a voidable judgment." *Brewster v. Fox*, 11th Dist. No. 2003-L-010, 2004-Ohio-1145, ¶6. Stated differently, the rule provides an equitable remedy under which relief from a judgment should be allowed when so dictated by the interests of justice. *Mortgage Elec. Registration Sys., Inc. v. Kaehne*, 11th Dist. No. 2007-P-0033, 2008-Ohio-4051, ¶13.

{¶19} "In order to prevail on a Civ.R. 60(B) motion, the moving party must demonstrate the following: (1) he has a meritorious defense or claim to present if relief is granted; (2) he is entitled to relief under one of the provisions in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2) or (3), it is not more than one year after the judgment was entered. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, * * *, paragraph two of the syllabus. Civ.R. 60(B) relief is improper if one of the above requirements is not satisfied. *Strack v. Pelton* (1994), 70 Ohio St.3d

172, 174, * * *." *LaRosa v. LaRosa*, 11th Dist. No. 2001-G-2339, 2002 Ohio App. LEXIS 1199, *8-9 (March 15, 2002).

{¶20} In the present matter, appellant never referred to one of the five possible grounds as the basis for her motion. Given that she sought to submit new evidence as to a factual issue which the trial court had decided as part of the final divorce decree, it might appear, at first blush, that she was attempting to proceed under Civ.R. 60(B)(2); i.e., newly discovered evidence. However, in regard to the timing of her awareness of the lower tax liability, appellant only asserted in her motion that the amended 2006 tax returns were filed after the issuance of the final divorce decree. Therefore, pursuant to her factual assertion, the "new" evidence did not come into existence until after the final judgment had been rendered.

{¶21} In reviewing the "new evidence" grounds for relief under Civ.R. 59(A) and 60(B), the Eighth Appellate District has indicated that the rules were only meant to apply to evidence which was already in existence at the time of the trial, but the moving party was excusably unaware of it. *See Schwenk v. Schwenk*, 2 Ohio App.3d 250, 253 (8th Dist., 1982). Although the actual holding in *Schwenk* was limited to a motion for a new trial, the appellate court cited federal case law which concluded that the same logic applies to a motion for relief from judgment under Civ.R. 60(B)(2). *Id.* at 253. Under this logic, documents which were not created until after the trial do not constitute "new evidence" for purposes of seeking relief from a final judgment.

{¶22} Accordingly, if the basis for appellant's 60(B) motion was legally sufficient to state a viable reason for obtaining relief, she could only go forward under 60(B)(4) or 60(B)(5). Unlike the "new evidence" grounds for relief under 60(B)(2), the one-year limit

for bringing a timely 60(B) motion does not apply to 60(B)(4) or 60(B)(5). As a result, in order for appellant to satisfy the "timeliness" prong of the Civ.R. 60(B) standard, it was incumbent upon her to show that her motion had been filed within a reasonable time.

{¶23} In conjunction with her basic argument on the timeliness issue, appellant maintains that, in submitting her Civ. R. 60(B) motion for relief, she was not obligated to attach any evidentiary materials in support. In other words, she contends that she had no duty to produce any evidence until an oral hearing was held on her motion. Upon reviewing the prior precedent in our jurisdiction, this court concludes that appellant's contention on the "evidentiary" requirement is simply incorrect:

{¶24} "With respect to the first prong of the [Civ.R. 60(B)] test, [the rule] does not contain any specific provision requiring a movant to submit evidential material, such as an affidavit to support the motion for relief from judgment. *Thrasher v. Thrasher* (June 15, 2001), 11th Dist. No. 99-P-0103, 2001 Ohio App. LEXIS 2720, at *7. However, the movant must specifically allege operative facts which would support a meritorious claim or defense to the judgment. *Elyria Twp. Bd. Of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 602, * * *. Alternatively, the second and third prongs require the movant to 'submit material of an evidential quality that would indicate the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5) and that the motion is made within a reasonable time.' *Citibank N.A. v. Ohlin* (Mar. 1, 2002), 11th Dist. No. 2000-T-0037, 2002 Ohio 846, citing *Thrasher*, supra, at 5-6." *Brewster*, 2004-Ohio-1145, at ¶9.

{¶25} As was previously noted, a review of the trial record readily indicates that appellant did not attach any materials of evidential quality, such as an affidavit, to either

her Civ.R. 60(B) motion or accompanying memorandum. Thus, pursuant to *Brewster*, the trial court could have found, on this basis alone, that appellant had not made a prima facie showing that her motion was filed in a timely fashion.

{¶26} Alternatively, this court would emphasize that, even if there had been no duty to submit evidentiary materials with the 60(B) motion, our review of the assertions in appellant's motion shows that they were not sufficient to entitle her to an evidentiary hearing on the matter. Regarding issues for which evidentiary materials are not viewed as necessary, this court has still noted that an immediate denial of the motion for relief is appropriate if it only contains bare allegations. *LaRosa*, 2002 Ohio App. LEXIS 1199, at *9. Rather, the motion must allege sufficient operative facts to demonstrate that the moving party will be able to establish the disputed point. *Brewster*, 2004-Ohio-1145, at ¶9.

{¶27} In this case, the trial record shows that the memorandum accompanying appellant's Civ.R. 60(B) motion did not contain any factual assertions pertaining to the issue of how quickly she had brought the motion after learning of the actual tax liability for 2006. Furthermore, as previously discussed, the motion itself only set forth one assertion that was relevant to the "timeliness" issue. That is, the motion only stated that the amended tax return was filed subsequent to the release of the final decree.

{¶28} It is undisputed that appellant filed her Civ.R. 60(B) motion in July 2011, approximately thirty months after the issuance of the divorce decree. Thus, in order for her to demonstrate that she had submitted the motion within a reasonable time, it would have been necessary for her to assert, at the very least, that she did not become aware of the lower tax liability until July 2010, if not later. By only asserting that the amended

tax return was filed at some point after January 2009, appellant did not even provide a general time frame as to when during the 30-month period she signed the amended joint return and, thus, had knowledge of the lower tax liability. To this extent, her motion only contained bare allegations which were not sufficient to establish a possibility that the motion had been submitted within a reasonable time subsequent to the filing of the amended 2006 tax return. As to this point, this court would also indicate that, given that appellant would have had full knowledge of the gist of the situation when she executed the amended joint return, there is no logical reason why she would have been unable to fully explain the facts of the situation in her motion.

{¶29} As part of her argument on the "timeliness" issue, appellant proposes that the determination of whether she filed the motion timely should not be predicated upon when the amended tax return was executed, or when it was filed. According to her, the time for submitting the motion should not have started to run until she became aware that her tax liability could not be offset against her share of the equity in the residence. As to the merits of this proposition, this court would emphasize that, in moving for relief under Civ.R. 60(B), appellant was not asking the trial court to alter the manner in which she would satisfy the tax debt; instead, she sought a new order decreasing the amount of her liability. In light of the fact that, upon signing the amended joint return, appellant would have been able to fully explain to the trial court the reasoning for her request for relief, logic dictates that the time limit for her motion began to run at that time.

{¶30} Finally, it must also be noted that, in responding to the Civ.R.60(B) motion, appellee did not raise any specific facts which would have supported a finding in favor of appellant on the "timeliness" issue. In his attached affidavit, appellee averred that the

2006 amended tax return was filed in late 2007. Given that appellant would have had to sign the joint return before it could be filed, she would have been aware of the lower tax liability at that juncture. Under such circumstances, Civ.R. 60(B) could not have been invoked because, since the trial on the merits of the divorce complaint was still ongoing, appellant could have submitted a copy of the amended joint return as actual evidence.

{¶31} In reviewing the denial of a 60(B) motion on appeal, an appellate court has an obligation to uphold the determination unless the trial court engaged in an abuse of its discretion. *Mortgage Elec. Registration Sys.*, 2008-Ohio-4051, at ¶10. Pursuant to the foregoing analysis, this court concludes that the trial record before us does not show that an abuse of discretion took place. Specifically, the trial court could have justifiably held that appellant's motion did not reference sufficient operative facts to make any type of showing that she had brought the motion within a reasonable time. Hence, because appellant would not be able to satisfy all three prongs of the standard for Civ.R. 60(B) relief, the trial court did not err in overruling her motion without holding an evidentiary hearing.

{¶32} As a separate argument under her sole assignment, appellant argues that the judgment on her 60(B) motion must be reversed because the trial court erred in not expressly stating the underlying reasons for its decision. In addressing this exact point, the Eighth Appellate District has indicated that, while it may be "good practice" for a trial court to provide findings of fact and conclusions of law in its judgment, the Ohio Rules of Civil Procedure do not specifically refer to such a requirement. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 104 (8th Dist.1974). In the instant case, since an evidentiary hearing was never conducted, no findings of fact were necessary. Furthermore, because the

standard for the review of a question of law is de novo, the lack of any reasoning in the trial court's judgment has not altered the nature of our analysis of the trial record. As a result, it cannot be said that appellant's ability to properly argue this appeal has been in any way prejudiced by the procedure followed by the trial court.

{¶33} As appellant has failed to establish any error in the trial court's decision denying her Civ.R. 60(B) motion for relief from the final divorce decree, her assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.