[Cite as *Jones v. Jones*, 2015-Ohio-3650.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

DONNA A. JONES,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 14CA33
v.	:	
	:	DECISION AND
	:	JUDGMENT ENTRY
RICHARD E. JONES,	:	
	:	
Defendant-Appellant.	:	Released: 09/01/2015

APPEARANCES:

Richard E. Jones, pro se Appellant.

Donna A. Jones, pro se Appellee.

Hoover, P.J.

{¶ 1} Appellant-defendant Richard E. Jones ("appellant") appeals a judgment from the Athens County Court of Common Pleas denying his motion for post decree relief based upon the discovery of new evidence. In the motion, appellant sought to introduce new evidence regarding the valuation of Texas residential property appellant and Donna A. Jones ("appellee") owned during their marriage and sold in 2009. Soon after the final divorce decree was issued, appellant, on behalf of the parties, purchased the house at a foreclosure sale following the buyers' default on the promissory note. The trial court denied appellant's motion because the foreclosure came after the final hearing; and the new evidence would not require a modification of the court's prior ruling on the issue. For the following reasons, we overrule appellant's four assignments of error and affirm the judgment of the trial court.

I. FACTS

{¶ 2} Appellee filed a complaint for divorce against her husband, appellant, on September 23, 2010. The parties agreed that this filing date was also the date of termination of the marriage.

{¶ 3} This appeal concerns two pieces of real property. The first piece of real property was located at 8306 Depot Street, New Mansfield, Ohio 45766 ("Depot"). Appellee owned this property prior to the marriage. Appellee received the property in a prior divorce proceeding; and it remained titled solely in her name. In the final divorce decree, the trial court addressed the Depot property as follows:

> During the marriage, Defendant [appellant] contributed separate funds of $2,670.00 to repairs on the home. In June of 2009, at the request of the parties, the property was appraised by the county. The revised total value for all three (3) parcels was $27,980.00. This appraisal was done prior to the majority of the parties' repairs being done. Prior to June of 2009, the real estate was valued at $45,260.00. In her 2011 response to discovery, Plaintiff [appellee] indicated the house has a fair market value of $65,000.00. Nether party had the property appraised as part of the divorce proceedings. While defendant wants to calculate the marital equity by using the revised 2009 valuation, the evidence does not support such. The evidence indicates that at the time the parties married, the property was valued at $45,260.00. It depreciated in value during the marriage, some repairs were made, and, as indicated by the Plaintiff [appellee], at the end of the marriage the property has a fair market value of $65,000.00 [sic]. Therefore, there is an appreciation of $19,740.00 that occurred during the marriage.

{¶ 4} The second piece of real property was located at 706 Walk the Plank, LaJoya, Texas 78560 ("Walk the Plank"). The parties purchased the property for $180,000 in 2005. Appellant paid the entire purchase price of the home with his separate funds. The parties sold the home to buyers for a purchase price of $239,000.00. The trial court in its final divorce decree stated the following regarding the Walk the Plank property:

> ***Plaintiff did a lot of physical work. She stripped the wallpaper and painted. She routinely cleaned the carpets to keep them white. She scrubbed grout to keep it clean. She cleaned and stained the deck. She painted the shed to match the house. She removed and pruned shrubs and bushes. She worked on the flower beds and kept them weeded. The parties did hire a contractor to do some work. There is appreciation of $59,000.00 during the marriage.

{¶ 5} It is clear that the trial court used the parties' purchase price of $180,000 in 2005 and subtracted it from the parties' selling price of $239,000 in 2009 to calculate the appreciation. It is noteworthy that in December 2013, appellant filed a motion for the court's permission to foreclose on the Walk the Plank property because the buyers in the 2009 transaction had stopped making payments on the promissory note. The remaining balance of the note was approximately $180,000. The trial court granted appellant's motion and instructed the appellant to:

> ***proceed to a trustee foreclosure sale on the parties' behalf. If a trustee's sale takes place, Attorney Davis is authorized to bid the balance of the note, approximately $180,000.00, and, if that is the highest bid, take the property back in the parties' names. If a higher bid is received, all proceeds shall be deposited in an escrow account for the parties, requiring both signatures to access. If a lower

bid is received, the parties, by agreements, may accept it and let the property go to another buyer.

{¶ 6} The trial court issued a final decree of divorce on June 2, 2014 and awarded the Depot property to appellee, free and clear from any claim of appellant. The trial court awarded the Walk the Plank property to appellant, free and clear from any claim of appellee. In order in effectuate an equitable division of the property, the trial court ordered appellant to pay appellee $14,630. This amount took into account other marital assets not at issue in this appeal.

{¶ 7} On June 16, 2014, appellant filed a "Motion for Post Decree Relief, Newly Discovered Evidence" pursuant to Athens County Court Rule 24.12. In the motion, appellant requested that the court "grant" newly discovered evidence and sought to "change" the court's ruling that there was an appreciation of $59,000 to the Walk The Plank property. Appellant sought to introduce the following evidence as new evidence: (1) a foreclosure sale deed regarding the 2014 sale of the Walk The Plank residence; (2) a summary of legal fees and expenses; (3) a property tax balance sheet for the Walk the Plank residence dated June 13, 2014; and (4) a Hidalgo County property valuation of the Walk the Plank residence for 2010. Lastly, even though the deed of trust conveying the Walk the Plank property to the parties, dated April 13, 2009 had already been introduced during the proceedings, appellant sought to introduce it again as new evidence.

{¶ 8} Appellant argued that the foreclosure sale of the Walk the Plank property, in which appellant regained possession of the home for a purchase price of $40,000, rendered the deed of trust, dated April 13, 2009, null and void. Appellant argued that because the court used the deed to value the property, the court should establish a new value for the Walk the Plank property. Appellant contended that the value of the Walk the Plank property at the time of divorce was

$136,849, as provided by the 2010 Hidalgo County appraisal. Appellant also argued that the property was not marital, but separate. Appellant contended that the court should have used the "county appraisal valuation" for the Walk the Plank property as it did for the Depot property. Finally, appellant suggested in his motion that because appellee claimed an interest in the Walk the Plank property, she should be held responsible for half of the expenses incurred in the June 2014 foreclosure.

{¶ 9} On July 28, 2014, the trial court overruled appellant's motion and declined to revisit the final divorce decree. The trial court interpreted appellant's motion for post decree relief as a Civ.R. 60(B) motion. First, the trial court discussed the issue of the Walk the Plank property as being separate: "The issue of separate property was properly before and considered by the magistrate. Further, the Court previously reviewed this issue as well and set forth its ruling in its Decree concerning the matter. None of the 'new' information provided persuades the court to change or modify its decision concerning this issue." On the issue of valuation of the property, the court ruled that the foreclosure repossession occurred on June 3, 2014, one day after the court issued its final divorce decree. Since the foreclosure took place after the final hearings, the court found that such facts did not warrant admission of any new evidence and that the new evidence would not require a modification of the court's prior ruling. Additionally, the court declined to award appellant the expenses incurred by the foreclosure sale. Finally, on the issue of taxes, the court heard no evidence where taxes were requested to be apportioned or awarded between the parties; thus the request post judgment was untimely and denied.

II. LAW AND ANALYSIS

{¶ 10} Appellant's First Assignment of Error:

THE TRIAL COURT ERRED ON ENTRY (PG. 1. ¶1, FILED JUL 28, 2014) ON INTERPRETATION OF DEFENDANT/APPELLANT, RICHARD JONES'S POST DECREE RELIEF, NEWLY DISCOVERED EVIDENCE, FILED JUNE 16, 2014, INTERPRETING DEFENDANT'S ATHENS COUNTY COURT LOCAL RULE 24.12 AS CIV. R. 60(B) MOTION AS WELL, WHEN CIV. R.59(A)(8) MOTION COULD HAVE BEEN USED AS WELL.

{¶ 11} In his first assignment of error, appellant argues that his post decree motion could have been more appropriately interpreted as a Civ.R. 59(A)(8) motion instead of a Civ.R. 60(B) motion. Appellant contends that if the court interpreted his motion under Civ.R. 59(B)(8), he would have met the time to appeal the decisions made in the divorce decree. Appellant also argues that the trial court never took any action concerning items 7 or 8 in his motion for post decree relief or his request that the court continue judgment.

{¶ 12} In the appellee's brief, appellee wrote a brief statement of the case and then stated: "I concur with the findings of the Athens County Trial Court and find his [appellant's] assertions of error unfounded." She argues that appellant was granted at least four continuances in order for him to prepare for court. Appellee contends that appellant is attempting to manipulate dates and property valuations to suit his own best interests.

{¶ 13} Previously, this Court has noted that " '[c]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.' " *State v. Burkes*, 4th Dist. Scioto No. 13CA3582, 2014-Ohio-3311, ¶11 quoting State *v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. We recognize that this citation is normally used in the criminal context but the same concept applies here because appellant is arguing that the court misinterpreted his motion.

{¶ 14} Appellant's post decree motion was titled "Motion For Post Decree Relief, Newly Discovered Evidence." The motion specifically requested that the trial court "grant newly discovered evidence as set forth in Athens County Court Rule 24.12." The motion proposes new evidence for the court to consider. Appellant does not specifically request a new trial.

{¶ 15} The Rules of the Athens County Court of Common Pleas state:

24.12 POST DECREE RELIEF

(A) Post decree motions shall contain the exact language of the original order sought to be changed, the change requested and a complete and accurate statement of movant's reasons and/or bases for change. Failure to supply this information will result in the motion being dismissed. A copy of the original order may be attached to the motion in lieu of reciting the exact language of the original order sought to be changed.

(B) Motions for modification of parental rights and responsibilities shall contain a professional statement by movant's attorney that he or she believes a bona fide basis for said motion exists.

{¶ 16} Civ.R. 60(B) states:

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. 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. 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.
>
> The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

{¶ 17} Civ.R. 59(A)(8) states:

> (A) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> ***
>
> (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial

{¶ 18} Considering these three rules and appellant's post decree motion, we find that the trial court did not err when it interpreted appellant's motion as a Civ.R. 60(B) motion. Appellant's motion does not request a new trial pursuant to Civ.R. 59(A)(8). Furthermore, earlier in the proceedings appellant filed a pro se "Motion for New Trial" citing Civ.R. 59(A)(1) and a "Motion for New Trial, Newly Discovered Evidence pursuant to Civ.R. 59(A)(8). Appellant's motion for post decree relief more accurately depicts a traditional 60(B) motion for relief. For

those reasons, we find appellant's first assignment of error to be without merit; and therefore, we overrule the first assignment of error.

{¶ 19} Appellant's Second Assignment of Error:

COURT OVERRULES DEFENDANT USE OF NEW EVIDENCE FILED 16 JUN 2014, MOTION FOR POST DECREE RELIEF, NEWLY DISCOVERED EVIDENCE.

{¶ 20} Appellant's Third Assignment of Error:

TRIAL COURT ERRED IN GRANTING SALE PRICE OF $239,000.00 FOR (EOMD) [end of marriage date] VALUATION ON (WTP) [Walk the Plank] PROPERTY. TRIAL COURT ERRED IN ALLOWING APPRECIATION OF 59,000.00 OF (WTP).

{¶ 21} We will address appellant's second and third assignments of error together because they challenge the trial court's decision on appellant's post decree motion. In his second and third assignments of error, appellant argues that the trial court erred when it denied his post decree motion to admit new evidence. Appellant contends that his post decree motion to introduce newly discovered evidence is appropriate because the discovery of the foreclosure evidence was not available until after the final hearing. Appellant argues that the foreclosure sale voids the 2009 sale price of $239,000 as viable in a calculation for the appreciation of the property. Appellant also argues that because the court used a county appraisal for the valuation of the Depot property, the trial court should have used the 2010 Hidalgo County valuation for the Walk the Plank property.

{¶ 22} "In an appeal from a Civ.R. 60(B) determination, a reviewing court must determine whether the trial court abused its discretion." *Elliot v. Smead Mfg. Co.*, 4th Dist. Hocking Nos. 08CA13 & 08AP13, 2009-Ohio-3754, ¶ 7 citing *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 666 N.E.2d 1134 (1996) citing *Rose Chevrolet, Inc. v. Adams*, 36 Ohio

St.3d 17, 20, 520 N.E.2d 564 (1988). The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 23} "To prevail on a Civ. R. 60(B) motion, a movant must demonstrate that: (1) they have a meritorious defense or claim to present if relief is granted; (2) they are 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." *Wells Fargo Bank, N.A., v. Smith, et al.*, 4th Dist. Gallia No. 13CA6, 2014–Ohio–1802, ¶ 8., citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.,* 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 24} Appellant, in his post decree motion, argued the following: (1) the subsequent to the proceedings foreclosure sale rendered the sale price of $239,000, which was used to calculate the appreciation of the Walk the Plank property, null and void; (2) the value of the Walk the Plank property was $136,849; (3) the Walk the Plank property is not marital, but separate because there was no increase in value; and (4) because the trial court accepted the "county appraisal valuation" of $45,260 for the Depot property, it should have accepted the county appraisal for the Walk the Plank property. Appellant proposed the foreclosure sale deed and a 2010 Hidalgo County property valuation for the Walk the Plank property.

{¶ 25} Appellant's arguments regarding the valuation of the Walk the Plank may not be proper in this appeal (see analysis of appellant's fourth assignment of error)[1]. Although appellant

[1] Like appellant's fourth assignment of error, the trial court's ruling regarding the appreciation of the Walk the Plank property could have been raised on direct appeal. Appellant's 60(B) proposed new evidence does not change the trial court's determination that the sale price of the property

introduces a new 2010 property evaluation form Hidalgo County, the issue was argued at length during the entire divorce proceeding as well as the final hearing. Appellant may have benefited procedurally by directly appealing the trial court's ruling on the appreciation of the Walk the Plank property. However, appellant does raise an issue that indeed could not have been brought at the final hearing, as the foreclosure took place subsequent to the final hearing.

{¶ 26} On December 12, 2013, appellant filed a motion for the court's permission to foreclose on the Walk the Plank property. The buyers in the 2009 sale of the property had not been making payments on the promissory note. At the time appellant filed the motion, the balance remaining on the note was about $180,000. The trial court granted appellant's motion, authorizing him to proceed with the foreclosure. Specifically, the trial court instructed that if the bid was lower than $180,000, the parties were to, by agreement, "accept it and let the property go to another buyer."

{¶ 27} "Valuations of the marital property must be determined as to a specific date (*i.e.*, date of permanent separation, *de facto* termination of the marriage or the date of the final divorce hearing.)" *Lones v. Lones*, 4th Dist. Washington No. 96CA34, 1998 WL 12598 (Jan. 16, 1998) citing *Landry v. Landry*, 105 Ohio App.3d 289, 293, 663 N.E.2d 1026 (1995).

{¶ 28} "A trial court has some latitude in the means it uses to determine the value of a marital asset." *Kevdzija v. Kevdzija*, 166 Ohio App.3d 276, 2006 -Ohio- 1723 850 N.E.2d 734, ¶ 23 (8th Dist.). " 'When valuing a marital asset, a trial court is neither required to use a particular valuation method nor precluded from using any method.' " *Id.* quoting *Clymer v. Clymer*, 10th Dist. Franklin No. 99AP–924, 2000 WL 1357911 (Sept. 21, 2000).

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should be the value used in an application calculation. Therefore, to the extent appellant's position is rearguing the issue of valuation, it is not proper here upon an appeal of his post decree motion.

{¶ 29} The Ohio Supreme Court has stated the following concerning the sale price being the best evidence of the value of a piece of property:

> Indeed, as this court has often observed, "[a]ppraisals based upon factors other than sales price are appropriate for use in determining value only when no arm's-length sale has taken place, or where it is shown that the sales price is not reflective of the true value." * * * *Columbus Bd. of Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St.3d [218,] 219, 9 OBR 528, 459 N.E.2d 894. See, also, *N. Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1990), 54 Ohio St.3d 98, 561 N.E.2d 915, in which we held that "[i]n the absence of evidence of a recent arm's-length sale between a willing buyer under no compulsion to buy and a willing seller under no compulsion to sell, the testimony of expert witnesses becomes necessary"; and *Dublin Senior Community Ltd. Partnership v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 459, 687 N.E.2d 426, in which we held that "when an actual sale is not available, 'an appraisal becomes necessary,' " quoting *Park Invest. Co.* [*v. Bd. of Tax Appeals*] 175 Ohio St. [410] 412, 25 O.O.2d 432, 195 N.E.2d 908.

{¶ 30} Since the end of marriage date was September 23, 2010, the trial court needed to calculate the value of the Walk the Plank on or close to that date in time. The actual sale of the property in 2009 was a proper means to calculate the value of the property at the end of the marriage. By using the 2005 purchase and the 2009 sale prices of the property, we do not find the trial court's method to determine the value of the marital property to be unreasonable or improper. The subsequent foreclosure sale does not have any effect on the value of the property as of the end of marriage on September 23, 2010. The foreclosure sale did not void the trial

court's determination of the appreciation of the Walk the Plank property during the marriage. Therefore, we do not find the trial court abused its discretion when it denied appellant's motion for post decree relief. Appellant's second and third assignments of error are not well taken and are overruled.

{¶ 31} Appellant's Fourth Assignment of Error:

TRIAL COURT ERRED IN NOT DEDUCTING 23,000.00 (@ 5% FOR TWO YEARS) PASSIVE INCOME (ORC 3105.171(A)(4)(6)) ON INTEREST, OF THE FIRST TWO YEARS, NOT CHARGED TO BUYER OF (WTP) [Walk The Plank] SALE PRICE.

{¶ 32} In his fourth assignment of error, appellant argues that the magistrate misquoted R.C. 3105.171(A)(6)(a). He contends that because he offered the buyers of the Walk the Plank residence two years free of interest, a savings of $23,000, the magistrate should have deducted the $23,000 from the increased valuation of $59,000. Appellant argues that the $23,000 should have been treated as passive income. Appellant concludes that the total net appreciation for the Walk the Plank residence should be $34,000 if his third assignment of error is not well taken.

{¶ 33} As we mentioned briefly during our analysis of appellant's third assignment of error, the issues raised in appellant's fourth assignment of error are not properly before this court. " '[W]here the remedy of appeal is available to a party, and where the issues raised in a motion for relief from judgment are those which could properly have been raised on appeal, a motion for relief from judgment will be denied.' " *Newell v. White,* 4th Dist. Pickaway No. 05CA27, 2006-Ohio-637, at ¶ 14, quoting *Burroughs Real Estate Co. v. Zennie R. Heath*, 8th Dist. Cuyahoga No. 40476, 1980 WL 354563 (Mar. 20, 1980). "In order to bring [himself] within the limited area of Civ.R. 60(B), [appellant] must establish the existence of extraordinary circumstances which rendered [him] unable to appeal[.] * * * [A] party should not be permitted

to circumvent the appeals process through application of Civ.R. 60(B), *since it is the function of the appellate court to correct legal errors committed by the trial court." Newell* at ¶ 14 quoting *Taylor v. Taylor*, 4th Dist. Lawrence No. 1801, 1987 WL 8854, *4 (Mar. 27, 1987) (emphasis sic).

{¶ 34} Civ.R. 60(B) was intended to provide relief from judgment in specific, enumerated situations and cannot be used as a substitute for a direct, timely appeal. *Elliot* at ¶ 13 citing *Doe v. Trumbull County Children Services Board*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986) paragraph two of the syllabus. "If a party raises the same question in a Civ.R. 60(B) motion as that [sic] he could have raised on a direct appeal, he could get an indirect extension of time for appeal by appealing the denial of the Civ.R. 60(B) motion." *Newell* at ¶ 15, citing *Parke–Chapley Construction Company v. Cherrington*, 865 F.2d 907, 915 (7th Cir.1989) Thus, "[w]hen a Civ.R. 60(B) motion is used as a substitute for a timely appeal, and when the denial of that motion is subsequently appealed, the proper response is the dismissal of the appeal." Garrett v. Gortz, 8th Dist. Cuyahoga No. 90625, 2008-Ohio-4369, at ¶ 14, citing State ex rel. Richard v. Cuyahoga Cty. Commrs., 89 Ohio St.3d 205, 2000-Ohio-135, 729 N.E.2d 755.

{¶ 35} Appellant's argument regarding passive income is an issue not properly before this court. This issue was litigated during the divorce proceedings. The trial court concluded that neither party was able to establish, by a preponderance of the evidence, that the appreciation of the Depot or Walk the Plank properties was due to passive appreciation. Appellant did not even raise this issue in his motion for post decree relief. This argument should have been raised in a direct appeal. Therefore, we dismiss this assignment of error.

III. CONCLUSION

{¶ 36} We do not find that the trial court erred when it interpreted appellant's motion for post decree relief to be a Civ.R. 60(B) motion. The trial court did not abuse its discretion in denying appellant's motion for post decree relief. Finally, appellant's fourth assignment of error is dismissed, as the issue raised is not proper in this appeal. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds that reasonable grounds exist for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County 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.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court

By:_____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.