[Cite as *Frantz v. Martin*, 2009-Ohio-2378.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92211

THOMAS FRANTZ

PLAINTIFF-APPELLANT

vs.

CHRISTINE S. MARTIN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-314389

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, Thomas Frantz ("Frantz"), appeals the trial court's decision granting the motion for relief from judgment of defendant-appellee, Christine Martin ("Martin"). Finding no merit to the appeal, we affirm.

{¶ 3} On August 2, 2007, the trial court granted Frantz a divorce from Martin. Less than a year later, Martin moved to vacate the divorce judgment entry on the grounds that service was never perfected and that she never received notice of the trial date. The trial court granted Martin's motion, vacated the divorce decree, and reinstated the case. Frantz appeals, raising the following two assignments of error:

{¶ 4} "[I.] The trial court erred in granting the defendant-appellee's motion for relief from judgment without finding that it had satisfied any of the three requirements listed in *GTE Automatic Electric v. ARC Industries* [(1976), 47 Ohio St.2d 146].

{¶ 5} "[II.] The trial court erred in granting the defendant-appellee's motion for relief from judgment against the legal theory of laches thereby rewarding defendant-appellee for waiting 363 days to file her motion after numerous notices of the proceeding and thus punishing plaintiff-appellant who has remarried and has had a baby."

GTE Test

{¶ 6} In his first assignment of error, Frantz argues that Martin failed to satisfy the three elements of the *GTE* test to warrant the trial court's granting of her Civ.R. 60(B) motion for relief from judgment.

{¶ 7} Under Civ.R. 60(B), the court has the authority to vacate a final judgment due to: "(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."

{¶ 8} To prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: (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 for 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* at paragraph two of the syllabus. If a movant fails to satisfy any one of these

requirements, the trial court should deny a Civ.R. 60(B) motion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20*; Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351.

{¶ 9} The trial court has discretion in deciding a motion for relief from judgment under Civ.R. 60(B). *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *Laatsch v. Laatsch*, 6th Dist. No. WD-05-101, 2006-Ohio-2923, ¶16. Therefore, we will not disturb a trial court's judgment on appeal absent an abuse of discretion. Id. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Doe* (1990), 57 Ohio St.3d 135, 137-138, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶ 10} Applying the foregoing standard of review and the required *GTE* test, we cannot say that the trial court abused its discretion in granting Martin's motion for relief from judgment under Civ.R. 60(B).

{¶ 11} Contrary to Frantz's assertion, we find that Martin satisfied all three elements of the *GTE* test.

{¶ 12} First, Martin challenged the division of marital property as being unfair and inequitable. She argued that Frantz owed her money from loans made during the marriage and further asserted in her affidavit that there was an inequitable

distribution of marital property. Although Frantz contends that Martin will not prevail on her claims, this contention is irrelevant for purposes of satisfying the first element of the *GTE* test. See *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, fn. 3 ("movant's burden is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense").

{¶ 13} Next, we find that Martin satisfied the second element of the *GTE* test, demonstrating that she was entitled to relief under Civ.R. 60(B)(5), the catch-all provision. Martin established that she never received notice of the rescheduled trial date. Frantz even concedes that notice was never provided to Martin regarding the rescheduled trial date. Because the trial court failed to provide notice of the trial, which resulted in final judgment being rendered against Martin in her absence, we find that the catch-all provision of Civ.R. 60B(5) was appropriately applied in this case. See *Joe Soler Co. v. 5-Star Brokerage, Inc.* (Oct. 11, 1990), 10th Dist. No. 90AP-505 (failure to provide notice of important stages in judicial proceedings deprived party of due process and warranted relief under Civ.R. 60(B)(5)).

{¶ 14} Finally, Martin moved for relief from judgment less than a year from the trial court's judgment entry granting a divorce. "From a review of case law regarding timeliness of Civ.R. 60(B) motions, it is clear that each case must be decided upon its own facts as a delay of four years has been held to be reasonable, and a delay of four months has been held to be unreasonable." *Kenney v. Derrick* (Dec. 22, 1995), 11th Dist. No. 95-L-068, citing *In re Dissolution of Marriage of Watson* (1983), 13

Ohio App.3d 344; *Mount Olive Baptist Church v. Pipkins Paints and Home Improvement Ctr., Inc.* (1979), 64 Ohio App.2d 285. Given the equitable powers unique to a domestic relations court and the fact that the lower court sits in the best position to determine whether something was filed within a reasonable time, we cannot say that the trial court abused its discretion in finding that Martin satisfied the third element. See R.C. 3105.011 (stating the domestic relations court "has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters"). Indeed, we cannot substitute our judgment for the trial court's merely because we may have reached a different conclusion. Here, the trial court's decision was not unreasonable, arbitrary, or unconscionable.

{¶ 15} Accordingly, the first assignment of error is overruled.

Doctrine of Laches

{¶ 16} In his second assignment of error, Frantz contends that the doctrine of laches precluded the trial court from granting Martin's motion for relief from judgment. He argues that Martin waited too long to file the motion, that he has moved on with his life, including remarrying and having a child, and that he should not be unfairly penalized for her excessive delay. The doctrine of laches, however, is an affirmative defense to a claim. See *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 1995-Ohio-269 (elements for the affirmative defense of laches: "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the

injury or wrong, and (4) prejudice to the other party"). Although the doctrine may be applicable to defeating Martin's claims for spousal support and award of certain marital assets, we find that the reasonableness standard set forth in Civ.R. 60(B) governs. Thus, having already determined that the trial court did not abuse its discretion in finding that the motion was filed within a reasonable amount of time, we overrule the second assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

JAMES J. SWEENEY, J., CONCURS;
MELODY J. STEWART, P.J., DISSENTS WITH SEPARATE OPINION

MELODY J. STEWART, P.J., DISSENTING:

{¶ 17} I respectfully dissent from the majority's decision to affirm the trial court's order granting relief from judgment because appellee failed to satisfy two of

the three mandatory prongs of the *GTE* test: she did not have a proper ground for relief and did not timely file the motion.

{¶ 18} A party's alleged fraud in failing to disclose a marital asset during a divorce action is not a proper ground for relief from a default judgment under Civ.R. 60(B)(3). See *Brackins v. Brackins* (Dec. 16, 1999), Cuyahoga App. No. 75025. Appellee's argument merely challenges the correctness of the court's decision – an incorrect use of Civ.R. 60(B) as a substitute for an appeal that could have been brought from the divorce judgment. Id. at 10. And appellee's attempt to state a ground under the catch-all provision of Civ.R. 60(B)(5) is likewise unavailing because it does not state the ground on which relief should be granted. Relief under Civ.R. 60(B)(5) should be granted only in extraordinary situations where the interest of justice calls for relief. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97. Appellee's failure to give any reason warranting the application of the catch-all provision constitutes a failure to establish one of the prongs of a Civ.R. 60(B) motion for relief from judgment.

{¶ 19} Appellee also failed to establish the "timely filed" prong of a motion for relief from judgment because she waited 363 days from the date of the divorce judgment to file the motion. A Civ.R. 60(B) motion can be untimely, even though filed within a one-year time period allowed by the rule, if it is not filed within a *reasonable* period of time after final judgment. What is reasonable under the circumstances depends on the facts of each case. *Colley v. Bazell* (1980), 64 Ohio

St.2d 243, 249-250. When a movant is aware that there are grounds for relief and delays filing the motion, the courts will require the movant to explain the reasons for the delay. See, e.g., *Kaczur v. Decara*, Cuyahoga App. No. 67546, 1995-Ohio-3038 (Civ.R. 60(B) motion untimely filed when movant offered no reasonable explanation for a nine-month delay in filing the motion); *Drongowski v. Salvatore*, Cuyahoga App. No. 61081, 1992-Ohio-5027 (11-month delay in filing Civ.R. 60(B) motion held untimely because movant failed to provide any explanation). Appellant offered no reasonable explanation for her 363-day delay in filing her motion for relief from judgment, despite admitting that she received notice of the divorce judgment within days of that judgment being issued.

{¶ 20} I would therefore find that appellee failed to meet all of the requirements under *GTE* and that the court erred by granting her relief from judgment.