[Cite as *Francis v. Francis*, 2010-Ohio-676.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93228

SAIDE FRANCIS

PLAINTIFF-APPELLEE

vs.

FARES FRANCIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-225032

BEFORE: Kilbane, J., Rocco, P.J., and Dyke, J.

RELEASED: February 25, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Fares Francis ("Fares"), appeals the trial court's denial of his motion to vacate a March 21, 2001 nunc pro tunc journal entry. Fares maintains that the trial court erroneously concluded that his motion to vacate was not filed within a reasonable time, and further, that the trial court never had the authority to issue the nunc pro tunc journal entry. After a review of the record and applicable law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} On March 30, 1993, appellee, Saide Francis ("Saide"), filed for divorce from Fares. On May 4, 1993, the trial court issued an order requiring Fares to pay child support and pay the utility bills for Saide's home. On September 7, 1995, the trial court issued a journal entry dissolving the parties' marriage. A hearing was scheduled, and the division of marital assets were held in abeyance pending Fares's bankruptcy filing. Extensive litigation continued on issues unrelated to the instant appeal.

{¶ 4} On August 4, 1998, Saide filed a motion to show cause alleging that Fares violated the trial court's May 4, 1993 order. On August 11, 1998, Fares filed a motion to modify his child support responsibilities. On May 19, 2000, the trial court issued a journal entry that scheduled a hearing on the two pending motions for June 15, 2000.

{¶ 5} On June 13, 2000, Fares's attorney filed a motion to withdraw. On June 15, 2000, the scheduled hearing was held, and Fares failed to appear. On June 16, 2000, the trial court granted the motion by Fares's counsel to withdraw.

{¶ 6} On July 19, 2000, the trial court issued a journal entry finding that Fares consistently violated the trial court's May 4, 1993 order regarding payment of child support and utilities. The trial court concluded that the violations were willful and warranted economic sanctions. Consequently, the trial court awarded Saide all of Fares's interest in their jointly owned property located at 11939 Triskett Avenue, in Cleveland, Ohio. Saide was further awarded all of Fares's interest in property labeled as Unit No. B-703, located at the Dona Maria Playa Project in Lebanon.

{¶ 7} On March 21, 2001, the trial court, sua sponte, issued a nunc pro tunc journal entry adding the additional sanction against Fares that Saide receive one-half of Fares's interest in a deferred compensation plan provided by Fares's employer, Nationwide Insurance. The trial court valued Saide's portion of the deferred compensation plan at $30,655, and concluded that it would be payable on or about May 1, 2018. Neither party appealed the initial July 19, 2000 order, nor did they appeal the March 21, 2001 nunc pro tunc order.

{¶ 8} On January 31, 2008, Fares filed a motion to vacate and modify child support. Fares argued that he relocated to Florida sometime in 1999 and was unaware of Saide's pending motion to show cause and the subsequent hearing and journal entries issued on July 19, 2000 and March 21, 2001.

{¶ 9} On July 16, 2008, Saide filed a brief in opposition to Fares's motion to vacate. Saide argued that Fares had been represented by counsel at the time of the June 15, 2000 hearing, and further, that Fares had filed a motion to modify his child support obligations in response to her motion to show cause.

{¶ 10} On October 20, 2008, a hearing was held before a magistrate on Fares's motion to vacate. On November 6, 2008, the magistrate issued a decision concluding that Fares was represented by counsel at the time of the June 13, 2000 hearing because counsel's motion to withdraw had not yet been granted. Further, Fares's counsel represented to the trial court in his motion to withdraw that he had sent Fares notice of the hearing and called and left messages with another individual at Fares's residence and on the answering machine. The motion to withdraw was mailed directly to Fares's Florida residence. The magistrate also noted that Fares failed to notify the trial court of his new address in 1999, when he moved to Florida.

{¶ 11} Fares filed the instant appeal asserting two assignments of error for our review.

{¶ 12} ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AS A MATTER OF LAW WHEN IT FAILED TO GRANT APPELLANT/DEFENDANT'S MOTION TO VACATE THE NUNC PRO TUNC JUDGMENT ENTRY OF MARCH 21, 2001."

{¶ 13} ASSIGNMENT OF ERROR TWO

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AS A MATTER OF LAW WHEN IT CONCLUDED THAT APPELLANT/DEFENDANT'S MOTION TO VACATE OF JANUARY 31, 2008 WAS NOT FILED WITHIN A REASONABLE TIME."

{¶ 14} We need only address Fares's second assignment of error because it is dispositive.

{¶ 15} In his brief, Fares argues that he learned of the March 21, 2001 nunc pro tunc entry sometime during 2007, therefore, his motion to vacate filed on January 31, 2008, was within a reasonable time. Saide alleges Fares is not entitled to relief because he waited over seven years. After a review of the record, we agree.

Standard of Review

{¶ 16} Motions to vacate are governed by the standards outlined in Civ.R. 60(B). *Gaul v. Abdullah* (Oct. 5, 1995), Cuyahoga App. No. 68839. The trial court is given broad discretion when deciding whether to grant relief

pursuant to Civ.R. 60(B). *Grange Mut. Cas. Co. v. Palladino*, Cuyahoga App. No. 93584, 2009-Ohio-6472, at ¶6, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. A trial court's decision on a motion to grant relief from judgment will not be disturbed by this court absent an abuse of discretion. Id. In order for the trial court to abuse its discretion, "there must be more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 17} Abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." Id. "To prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must submit operative facts which demonstrate that (1) the motion is timely made; (2) the party is entitled to relief under Civ.R. 60(B)(1)-(5); and (3) the party has a meritorious claim or defense." *Lewis v. Brzozowski*, Cuyahoga App. No. 93413, 2009-Ohio-5841, at ¶10, citing *GTE Auto Elec., Inc. v. ARC Indust., Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. The movant is not required to attach evidentiary material to his motion for relief from judgment; however, the movant is required to do more than merely assert that he is entitled to relief. *Palladino* at ¶8, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102.

Analysis

{¶ 18} As an initial matter, we note that the movant bears the burden of establishing that he filed his motion within a reasonable time. *Dillard-Davis v. Dillard* (Nov. 13, 1997), Cuyahoga App. No. 72114, citing *Taylor v. Haven* (1993), 91 Ohio App.3d 846, 633 N.E.2d 1197. Factors to be considered when determining if a party has filed its motion within a reasonable time include the length of time between the judgment and the filing of the Civ.R. 60(B) motion, what caused the delay in filing the motion, whether the delay was reasonable under the circumstances, and the burden on the nonmoving party. *Tabor v. Tabor*, Mahoning App. No. 02-CA-73, 2003-Ohio-1432, citing *Dunkle v. Dunkle* (1999), 135 Ohio App.3d 669, 680-681, 735 N.E.2d 469.

{¶ 19} Fares waited over seven years to seek relief from the March 21, 2001 nunc pro tunc entry. In his brief, Fares argues that he learned of the judgment in 2007, and filed his motion for relief from judgment on January 31, 2008, meaning he waited, at most, 13 months after learning of the judgment entry before he filed his motion for relief. However, the record reveals that at the October 20, 2008 hearing, Fares testified that he may have learned of the judgment entry as early as 2006. During cross-examination, Fares was asked the following:

> **"Q. In June of 2006 you became aware of the fact that there was a judgment from this court?**
>
> **"A. 2006, 2007, around that time, yes." (Tr. 28.)**

{¶ 20} Reviewing the factors to determine timeliness as outlined in *Tabor* the trial court must consider the reason for the delay. In the instant case, Fares argues that his relocation to Florida was responsible for the delay. However, we cannot conclude it was an abuse of discretion for the trial court to find that this contention lacked merit. Fares's counsel admitted sending correspondence to Fares's Florida residence. Further, once counsel's motion to withdraw was granted and Fares was proceeding pro se, he was responsible for informing the trial court of his current address and monitoring the docket. *State ex rel. Halder v. Fuerst*, Cuyahoga App. No. 90442, 2007-Ohio-5938, at ¶6, citing *Nalbach v. Cacioppo*, Trumbull App. No. 2001-T-0062, 2002-Ohio-53.

{¶ 21} We cannot conclude that the trial court abused its discretion in denying a motion for relief from judgment that was filed over seven years after the judgment and almost two years after Fares admits he learned of the judgment.

{¶ 22} In determining that Fares failed to file his motion for relief from judgment within a reasonable time, we need not address the merits of the underlying judgment. A motion for relief from judgment, pursuant to Civ.R. 60(B), cannot be used as a substitute for a direct appeal. *Pursel v. Pursel*, Cuyahoga App. No. 91837, 2009-Ohio-4708, at ¶13, citing *Key v. Mitchell,* 81 Ohio St.3d 89, 90-91, 1998-Ohio-643, 689 N.E.2d 548. Fares did not file a

direct appeal regarding the trial court's March 21, 2001 nunc pro tunc journal entry and cannot attempt to challenge its validity in the instant appeal.

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 issue out of this court directing the common pleas 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 EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR