[Cite as *In re Dankworth Trust*, 2014-Ohio-5825.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	CASE NO. 14 BE 9
	)	
WILLIAM DANKWORTH TRUST.	)	O P I N I O N
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Probate Division, Case No. 13MI455.

JUDGMENT: Affirmed.

APPEARANCES:

For Appellee: Attorney Erik Schramm
46457 National Road
St. Clairsville, Ohio 43950

For Appellant: Attorney Todd Kildow
Attorney Robert Plumby
61 Fourteenth Street
Wheeling, West Virginia 26003

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 29, 2014

[Cite as *In re Dankworth Trust*, 2014-Ohio-5825.]
VUKOVICH, J.

{¶1} Respondent-appellant WesBanco Bank, Inc., appeals the decision of the Belmont County Probate Court denying its Civ.R. 60(B) motion to vacate the September 19, 2013 judgment entry that approved the appointment of successor trustee Respondent Comerica Bank & Trust, N.A. to the William Dankworth Trust and accepted the resignation of WesBanco as trustee of the same. That judgment entry indicated that WesBanco would not receive termination fees. The motion to vacate sought to have the no termination fee language removed from the judgment.

{¶2} The issue in this appeal is whether the trial court abused its discretion in denying WesBanco's Civ.R. 60(B) motion. For the reasons expressed below, the probate court did not abuse its discretion in denying the motion because it was inappropriately being used as a substitute for appeal and because WesBanco could not satisfy any of the grounds for relief under Civ.R. 60(B). Therefore, the judgment of the trial court is hereby affirmed.

Statement of the Facts and Case

{¶3} The trust for William Dankworth was created on May 20, 2005 and Charles Dankworth, V (Dankworth) and WesBanco were named as co-trustees. Allegedly sometime in early to mid-2013, due to his dissatisfaction with WesBanco, Dankworth notified WesBanco that he wished to remove WesBanco as trustee and have Comerica Bank appointed as the new co-trustee.

{¶4} On September 12, 2013, Attorney John Estadt, counsel for Dankworth, filed an Application for Appointment of Successor Trustee. The application asked the probate court to appoint Comerica Bank as successor trustee and approve the resignation of WesBanco as co-trustee. Dankworth asked for WesBanco to receive "no termination fees or other fees due or payable." Attached to the application are the original trustee agreement and another agreement which is referred to as the "private settlement agreement." This private settlement agreement indicated that Comerica would accept appointment as successor trustee; that WesBanco resign as trustee; and that the qualified beneficiaries were notified. The private settlement

agreement was signed by a representative of Comerica; Cynthia Perring[1], WesBanco Assistant Vice President and Senior Trust Officer; and all qualified beneficiaries or their representatives.

{¶5} Each page of the private settlement is time-stamped. All pages, except for one, are time-stamped September 12, 2013. Perring's signature was required on two of the pages. The first signature was required after a paragraph that stated that WesBanco agrees to resign. This page has a time-stamped date of September 12, 2013. At the end of the document, Perring's signature was also needed. This last signature has a written date next to it of September 16, 2013. The time-stamped date on this document is September 19, 2013.

{¶6} It is noted that despite the fact that the Application for Appointment of Successor Trustee asks for no termination fees for WesBanco, the private settlement agreement does not contain any language indicating that WesBanco will or will not get termination fees. On September 19, 2013, the probate court issued a judgment approving the appointment of the successor trustee, accepting the resignation of WesBanco as trustee, and ordering that WesBanco was to receive "no termination fee or other fees due or payable." 09/19/13 J.E.

{¶7} Attorney Estadt sent WesBanco, specifically Perring, a copy of the application and entry approving appointment of the successor trustee on September 20, 2013. Exhibit E attached to 03/27/14 Appellee's Reply to Appellant's Response in Opposition to Appellee's Motion to Dismiss.

{¶8} WesBanco did not immediately file an appeal from the appointment decision. Instead on December 5, 2013, WesBanco filed a motion for relief from judgment and motion for reconsideration. WesBanco claimed that it did not waive its standard termination fees and the probate court was incorrect in ordering no termination fees. Attached to the motion is an affidavit from Perring stating that she e-mailed Attorney Estadt asking to see the documents, but was told she could not

[1] In the judgment entry the probate court spells her last name as Parring, however, in all other filings and in the transcript it is spelled Perring.

because they were at Judge Costine's office at the Belmont County Probate Court and if she wanted to see them she would have to go there.

{¶9} Dankworth filed a motion in response to the motion for relief from judgment. 12/20/13 Response. WesBanco filed a reply. 12/24/13 Memorandum in Opposition. A hearing on the matter was held on January 10, 2014.

{¶10} Thereafter, the probate court issued an order denying the motion to vacate:

> The Court finds that Wesbanco [sic] through Parring and Attorney Gardill [Attorney for WesBanco] had ample opportunity to view the pleadings filed in this matter and did not do so. The Court understands that the agreement does not contain language prohibiting a termination fee by Wesbanco. However, that language is in the Application filed with the Court as public record on September 12, 2013. The Court Order was not issued until September 19, 2013. The Court finds that this is ample time for Wesbanco to confirm what the Court's Order would be. Neglect by Wesbanco is not grounds for this Court to grant Wesbanco's Rule 60(B) Motion. The Motion for Relief from Judgment, Attorney Fees and Costs is hereby overruled.

01/15/14 J.E.

{¶11} WesBanco filed a notice of appeal on February 13, 2014. Attached to the notice of appeal are the two judgment entries. The first is the September 19, 2013 judgment entry granting the appointment of the successor trustee and indicating that WesBanco would receive no termination fees. The second is the January 15, 2014 denial of the Civ.R. 60(B) motion for relief from judgment.

{¶12} Prior to the record being transmitted, Dankworth filed a motion to dismiss. Dankworth argued that on appeal, we could only review the January 15, 2014 judgment entry. He contended that the September 19, 2013 judgment entry was a final appealable order and that WesBanco had not timely appealed from that decision.

{¶13} After consideration of WesBanco's motion in opposition and Dankworth's reply to that motion, we granted the motion to dismiss and limited the appeal to a review of the January 15, 2014 judgment entry that denied WesBanco's motion for relief from judgment. 05/12/14 J.E.

First Assignment of Error

{¶14} "The Probate Court of Belmont County committed reversible error when it entered the entry approving appointment of successor trustee."

{¶15} This assignment of error addresses the September 19, 2013 judgment entry that accepted WesBanco's resignation and ordered that it would be entitled to no termination fees. This assignment of error is an attempt to have this court revisit our May 12, 2014 judgment that dismissed the untimely appeal of the September 19, 2013 judgment entry.

{¶16} As aforementioned, shortly after the notice of appeal was filed by WesBanco, Dankworth moved to dismiss the appeal of the September 19, 2013 judgment because it was a final order on that date and a notice of appeal was not filed within the 30 day time limit provided for in App.R. 4.

{¶17} WesBanco responded to that motion and argued that the docket did not show that that judgment was ever served on the parties pursuant to Civ.R. 58(B) and App.R. 4(A). Thus, it contended that the timeframe for appealing had not begun to run. 03/19/14 Motion.

{¶18} Dankworth filed a reply arguing that since WesBanco did not make a formal appearance until the Civ.R. 60(B) motion, there was no party for the Belmont County Probate Court Clerk to serve. Also, he argued that WesBanco was served by his counsel the day after the September 19, 2013 judgment was entered. He contended that that action effectuated service for purposes of Civ.R. 58 and App.R. 4 through the use of Civ.R. 5. He cited *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 619 N.E.2d 412 (1993) to support his position.

{¶19} The docket in this case clearly indicates that the Probate Court Clerk did not serve the September 19, 2013 judgment on WesBanco. The judgment entry,

likewise does not have a notation on it that WesBanco was served. In fact, the judgment entry is devoid of any indication that the entry was served on anyone.

{¶20} Civ.R. 58(B) provides:

> Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

Civ.R. 58(B).

{¶21} Thus, the entry of judgment did not comply with Civ.R. 58(B). Furthermore, App.R. 4(A) contains a tolling provision that applies in civil cases when a judgment has not been properly served on a party according to Civ.R. 58(B). *Frazier v. Cincinnati School of Med. Massage*, 1st Dist. No. C-060359, 2007-Ohio-2390, ¶ 17, citing *In re Anderson,* 92 Ohio St.3d 63, 2001-Ohio-131, 748 N.E.2d 67. If the clerk has failed to serve a party with notice, then the 30 days to appeal cannot begin to run. *Frazier* at ¶ 23. *See also Tolliver v. Liberty Mut. Group*, 10th Dist. No. 05AP-753, 2006-Ohio-2443, ¶ 25.

{¶22} Despite those deficiencies, we properly dismissed the appeal of the September 19, 2013 judgment. In *Hughes*, the Ohio Supreme Court stated:

> Civ.R. 58(B) directs the clerk of court to serve the parties with notice of a judgment, within three days of its entry upon the journal, in a manner prescribed by Civ.R. 5(B). The task of service of notice of a judgment thus normally befalls the court clerk. Civ.R. 58(B) further provides, however, that "[t]he failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A)." App.R. 4(A), by its clear language as quoted above, tolls the time period for filing a notice of

> appeal only if service is not made within the three-day period of Civ.R. 58(B).
>
> The record in this case shows that the court's issuance of the peremptory writ of mandamus was journalized on January 10, 1991. The docket lacks an entry indicating that the court clerk served notice on the parties, nor does the record reveal any evidence of service. Such an apparent defect does not toll the running of the time for appeal, however, unless no service is effected within three days. App.R. 4(A); Civ.R. 58(B). This is not the case here. Civ.R. 5(B) provides that service may be made "by delivering a copy to the person to be served * * *." Appellant's attorney served the Governor's attorney, Assistant Attorney General Patrick A. Devine, with a copy of the peremptory writ on the day it was issued. Service was thus perfected in a manner consistent with Civ.R. 5(B).

Hughes, 67 Ohio St.3d at 431.

{¶23} Here, attached to the reply, is a letter from Attorney Estadt to Dankworth dated September 20, 2013 that indicates that the application and entry approving the appointment of successor trustee are enclosed. That letter is carbon copied with copies of the application and judgment to Perring, WesBanco's Senior Trust Officer. Thus, she received service within the three days and WesBanco could have timely appealed that decision. Consequently, pursuant to *Hughes*, the time to appeal was not tolled.

{¶24} Therefore, based on our May 12, 2014 judgment entry, this assignment of error is dismissed. Accordingly, we will not address the correctness of the trial court's September 20, 2013 decision to deny WesBanco its contractual termination fees.

Second Assignment of Error

{¶25} "The denial of Wesbanco's Rule 60(B) motion for relief from judgment was an abuse of discretion and should be reversed by this honorable court."

{¶26} This assignment of error solely addresses the trial court's January 15, 2014 judgment denying WesBanco's motion to vacate the September 19, 2013 judgment entry. This issue is properly before us.

{¶27} A trial court's ruling on a Civ.R. 60(B) motion is reviewed only for abuse of discretion. *Griffey v. Rajan,* 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987); *Pons v. Ohio State Med. Bd.,* 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). Abuse of discretion exists where a ruling is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶28} It is a fundamental proposition of law that "Civ.R. 60(B) may not be used as a substitute for appeal." *Doe v. Trumbull County Children Services Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986). Civ.R. 60(B) involves matters outside the record which justify relief from judgment. *Campbell v. Elsass*, 10th Dist. No. 89AP-761, 1989 WL 129441 (Oct. 31, 1989). These matters cannot be raised in a direct appeal because they are outside the record; "[T]he gist of post-trial relief is to remedy an injustice resulting from a cause that could not reasonably be addressed during the ordinary trial and appellate proceedings." *In re A.K.*, 2d Dist. No. 2011CA4, 2011-Ohio-4536, ¶ 15, quoting *Volodkevich,* 35 Ohio St.3d at 155. As such, issues which could have been or were raised in a direct appeal ordinarily are not proper issues to be raised in a motion for relief from judgment; the proper vehicle for correction of claimed errors that could have been supported by transcripts and evidence in the record is through a direct appeal, not a Civ.R. 60(B) motion. *Perez v. Angell*, 10th Dist. No. 07AP-37, 2007-Ohio-4519, ¶ 9; *In re A.K.; Campbell*.

{¶29} In reviewing the record in this case, it appears to this court that Civ.R. 60(B) was used as a substitute for appeal. The crux of WesBanco's Civ.R. 60(B) motion was that it did not receive notice of the application for appointment of successor trustee which also requested that WesBanco receive no termination fees. This argument relies on information in the record. For instance, there is no certificate of service on the application and there is no indication in the docket that a copy of that application was ever transmitted to WesBanco.

{¶30} On direct appeal, WesBanco could have made the argument that it was entitled to be served a copy of the application and the failure to serve the application and allow to be heard on the issue denied it due process. WesBanco was a co-trusstee at the time of the filing of the application. A trustee has a fiduciary duty to the beneficiaries. *Bank One Trust Co., N.A. v. Scherer*, 10th Dist. No. 11AP-1140, 2012-Ohio-5302, ¶ 30; *Wayne Sav. Community Bank v. Gardner*, 9th Dist. No. 08CA0016, 2008-Ohio-5926, ¶ 14. Thus, it could be concluded that any filing, whether it is an action, application or motion concerning that trust should be served on the trustee(s). This is especially so in this instance in this case. The application, which requested the appointment of a successor trustee specifically sought to have the probate court order WesBanco to receive no termination fees. However, the termination fees were allegedly allowed for in the trust agreement. Therefore WesBanco certainly has an interest in the application, not only because it is resigning as co-trustee, but also because there is a request for it to not receive termination fees, which it arguably could be entitled to (upon approval of the probate court).

{¶31} Civ.R. 5(B)(3) specifically indicates that a certificate of service shall be attached to the served document. The rule further provides that the court shall not consider the document until proof of service is “endorsed thereon or separately filed.” Civ.R. 5.

{¶32} Therefore, there was a valid argument that could have been made that the application should have been served on WesBanco and the probate court should not have considered the application until there was proof of its service.

{¶33} Consequently, the basis for vacating the September 19, 2013 order could have been raised in a timely direct appeal of that order. That appeal would not have required WesBanco to provide any information that is outside the record; the appeal would rely solely on the fact that there is no certificate of service and nothing in the record to show it received notice.

{¶34} Accordingly, since a Civ.R. 60(B) motion cannot be used as a substitute for appeal, the probate court correctly denied the motion to vacate.

{¶35} Assuming arguendo that we are incorrect in our determination that the motion to vacate was being used as a substitute for appeal, for the reasons expressed below, we find no merit with the argument that the trial court abused its discretion in denying the motion to vacate.

{¶36} In order to prevail on a motion for relief from judgment, pursuant to Civ.R. 60(B), the appellant 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 amount of 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 Electric, Inc. v. ARC Industries, Inc.,* 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of the three *GTE* requirements are not met, the motion should be overruled. *Volodkevich v. Volodkevich,* 35 Ohio St.3d 152, 153, 518 N.E.2d 1208 (1988).

{¶37} The factor at issue in this case is the second element, the grounds for relief under Civ.R. 60(B). Those grounds for relief are: “(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.” Civ.R. 60(B). WesBanco’s Civ.R. 60(B) motion was based on grounds three and five.

{¶38} Civ.R. 60(B)(3) involves fraud or misconduct of an adverse party that is involved in obtaining the judgment. *U.S. Bank, N.A. v. Corley,* 6th Dist. No. L–13–1117, 2013–Ohio–4626, ¶ 13; *PNC Bank, Natl. Assn. v. Botts,* 10th Dist. No. 12AP–256, 2012–Ohio–5383, ¶ 15 citing *State Alarm, Inc. v. Riley Indus. Servs.,* 8th Dist. No. 92760, 2010–Ohio–900, ¶ 21; *First Merit Bank, N.A. v. Crouse,* 9th Dist. No. 06CA008946, 2007–Ohio–2440, ¶ 32. Fraud of an adverse party may exist when, for

example, a party presents material false testimony at trial, and the falsity is not discovered until after the trial. *PNC Bank, Natl. Assn.* at ¶ 15 citing *Seibert v. Murphy,* 4th Dist. No. 02CA2825, 2002–Ohio–6454. Civ.R. 60(B)(5) is a catch-all provision and “reflects ‘the inherent power of a court to relieve a person from the unjust operation of a judgment.’” *Maggiore v. Barensfeld,* 5th Dist. No. 11CA00180, 2012–Ohio–2909, ¶ 35. It is reserved for “extraordinary and unusual case[s].” *Myers v. Myers,* 9th Dist. No. 22393, 2005–Ohio–3800, ¶ 14. This catch-all provision has also been used when the fraud alleged is done by an officer of the court; Civ.R. 60(B)(3) only applies to fraud that is committed by an adverse party. *Wilkerson v. Wilkerson*, 12th Dist. No. CA2013-06-089, 2014-Ohio-1322, ¶ 15 citing *Coulson v. Coulson,* 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983).

{¶39} The motion to vacate set forth two arguments as to why the judgment should be vacated. The first was that the application filed by Dankworth (and his counsel) allegedly misrepresented to the probate court that WesBanco was waiving its termination fees.

{¶40} The argument is meritless because it is not supported by any information in the record; nothing in the record suggests that Dankworth or his attorney indicated to the probate court that WesBanco was voluntarily waiving its termination fees. The Application for Appointment of Successor Trustee was filed by Dankworth; the first paragraph of the application clearly indicates it was filed solely by Dankworth. Thus, it was not an application that WesBanco jointly filed with Dankworth. Paragraph 5 of the application indicates that WesBanco has agreed to resign as co-trustee. This line does not indicate in any manner that WesBanco has agreed to waive its termination fees. Paragraph 6 discusses the private settlement agreement that was signed by all parties. No mention was made of the termination fees in that paragraph. Paragraph 7 is the request for action by the court. It states, “Pursuant to ORC § 5807.05, Co-Trustee Charles H. Dankworth V hereby requests the Court to approve the resignation of Wesbanco Trust and Investment Services of Wheeling, West Virginia, as Co-trustee of the Trust and for appointment of Comerica Bank & Trust N.A. as Successor Co-Trustee with no termination fee or other fees due

or payable." This statement does not indicate that WesBanco is agreeing to waive termination fees. Attached to the application are the private settlement agreement and the trust agreement. The private settlement agreement does not mention or discuss termination fees. The trust agreement provides that the "corporate trustee [WesBanco] shall be entitled to receive compensation for its services in accordance with its Standard Schedule of Fees in effect from time to time during the period over which such services are rendered." Trust Agreement IX Compensation. This would arguably include Termination Fees which are on WesBanco's Standard Fee Schedule. Furthermore, the probate court's judgment entry that accepted the resignation of WesBanco and ordered that there were to be no termination fees, does not indicate in any manner that it was of the opinion that WesBanco was waiving its termination fee. There is no other evidence in the record concerning a misrepresentation or fraud on the court. Consequently, there is no evidence in the record that even remotely supports the conclusion that Dankworth or his attorney represented to the probate court that WesBanco was agreeing to waive the termination fees.

{¶41} The second argument was that the judgment ordering no termination fees should be vacated because WesBanco had no knowledge of what was in the application prior to the order being granted.

{¶42} The record indicates that there is no certificate of service attached to the application. Furthermore, there is no indication in the record that WesBanco received the application prior to the probate court ruling on it.

{¶43} At the trial court level, Dankworth argued that WesBanco was not required to be served because, according to him, WesBanco was not a party and was not entitled to service because it never made an appearance until the Civ.R. 60(B) motion.

{¶44} As aforementioned, there was an argument to be made that WesBanco was entitled to be served with the application. Furthermore, the trial court's decision appears to agree that WesBanco was entitled to have notice of the application. However, after hearing testimony from Perring, it determined that Perring and

WesBanco had ample opportunity to discover that Dankworth was asking for WesBanco to receive no termination fees.

{¶45} Perring is the Trust Officer who signed the private settlement agreement for WesBanco. The e-mails and her testimony show that she was aware that the application had been filed. She was told in an e-mail that the private settlement agreement had to be signed before the judge could approve it. In an e-mail she asked to see the "documents that were signed by the other parties involved." 09/16/13 e-mail. She was told by Dankworth's attorney that he could not send those to her because they were in the probate court's office awaiting WesBanco's signed documents, but that she could go there and see them. 09/16/13 e-mail. There is no evidence that she or anyone from WesBanco made an effort to obtain a copy of the pleading. Perring testified that she did not receive the application prior to it being granted.

{¶46} The probate court, however, questioned her credibility. She had to sign the private settlement agreement in two places. The first signature is time-stamped September 12, 2013. The second signature is time-stamped September 19, 2013. However, she testified that she signed the documents and mailed them to Dankworth's counsel on September 16, 2013. The probate court found that "[t]his calls into question what [Perring] knew and when the information was obtained." 01/15/14 J.E. Credibility is within the purview of the trier of fact and will not be questioned by a reviewing court. *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶47} Given our standard of review and that credibility is within the purview of the trier of fact, we cannot find that the trial court abused its discretion in finding that there was no basis in Civ.R. 60(B)(3) or (5) to grant the motion to vacate. Therefore, for all of the above expressed reasons, this assignment of error is deemed meritless.

Conclusion

{¶48} In conclusion, the first assignment of error addressing the propriety of the probate court's September 19, 2013 judgment is dismissed based on our May 12, 2014 judgment that limited this appeal to a review of the January 14, 2014 judgment

that denied the motion to vacate. The second assignment of error is found to be meritless. Civ.R. 60(B) was being used as a substitute for appeal or, in the alternative, neither Civ.R. 60(B)(3) nor (5) provided a basis for vacation of the September 19, 2013 judgment entry. Accordingly, the judgment of the probate court to deny WesBanco's motion to vacate is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, P.J., concurs.