[Cite as *Osting v. Osting*, 2009-Ohio-2936.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Nancy M. Osting	Court of Appeals No. OT-07-033
Appellee	Trial Court No. 91-DR-213A
v.	
Steven J. Osting	**DECISION AND JUDGMENT**
Appellant	Decided:

* * * * *

Howard C. Whitcomb, III, for appellee.

Keithley B. Sparrow, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This matter is before the court on the April 15, 2009 judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, which denied the Civ.R. 60 motion for relief from judgment filed by appellant, Steven J. Osting. For the reasons that follow, we affirm the decision of the trial court.

{¶ 2} The parties' marriage was dissolved pursuant to a decree dated January 17, 1992. In conjunction with their separation agreement, on December 7, 1991, the parties signed a notarized worksheet computing child support for their minor child. In addition to appellant's $7,817.79 yearly support obligation, the worksheet indicated that appellant was obligated to pay an additional $1,282.21 yearly, for a total of $9,100 per year. The additional $1,282.21 was referenced as "Comments, rebuttal or adjustments to correct inequities or provide for unique circumstances." The trial court, however, did not indicate the nature of the inequities or provide any explanation for the additional child support obligation.

{¶ 3} On November 7, 2006, appellant filed a motion for relief from judgment, pursuant to Civ.R. 60, with respect to the additional $1,282.21 yearly support obligation. Appellant argued that although he signed both the worksheet and the separation agreement, he was not represented and "believes that either because of some mistake or possible inadvertence, possible fraud, his child support was artificially increased." Appellant further argued that "he, at no time, had explained to him by either the Court or his then-wife's counsel that there would be an upward deviation and the reason for same is not included in the Decree of Dissolution and/or the Separation Agreement."

{¶ 4} The magistrate denied appellant's motion on February 26, 2007, and, again, on June 14, 2007, in a nunc pro tunc decision entry. The trial court affirmed the decision of the magistrate on June 29, 2007; however, the trial court's decision was not journalized

until April 15, 2009, upon remand from this court.[1] In denying appellant's motion, the trial court held that appellant was not entitled to relief pursuant to Civ.R. 60(A) because substantive changes in final orders, such as a change in the amount of child support owed, were beyond the scope of "clerical mistake" contemplated by the rule.

{¶ 5} The trial court also held that, although appellant had a meritorious claim to present if relief was granted, due to the trial court's failure to adhere to the statutory guidelines set forth in R.C. 3119 when awarding the additional $1,282.21 in child support, appellant nevertheless failed to establish his entitlement to relief pursuant to Civ.R. 60(B). Specifically, the trial court held that the "mistake" contemplated by Civ.R. 60(B)(1) is a mistake by a party or his legal representative, and does not include a mistake made by the trial court in rendering its decision. With respect to appellant's Civ.R. 60(B)(2) argument, the trial court held that the additional award of child support could not be "newly discovered" evidence because the amount of $1,282.21 was referenced on the worksheet that appellant signed before a notary on December 7, 1991. With respect to appellant's Civ.R. 60(B)(3) argument, the trial court found that appellant failed to establish his right to relief because he offered no operative facts in support of his assertion that the increase in child support payments was the result of "fraud."

[1]The parties were given additional time to amend their original appellate briefs, but no amended brief was filed.

Regardless of the merits of appellant's claims, the trial court held that any ground for relief pursuant to Civ.R. 60(B)(1), (2) or (3) was untimely raised as it was not brought within a year of the trial court's decree of dissolution.

{¶ 6} With respect to appellant's claimed relief pursuant to Civ.R. 60(B)(5), "any other reason justifying relief from judgment," the trial court held that this "catch-all" provision cannot be used as a substitute for any of the other more specific provisions of Civ.R. 60(B), and must be based upon substantial grounds, including court errors and omissions that affect a party's ability to pursue a cause of action. Because appellant was not prevented from raising a cause of action, and because the essence of his claims was based on mistake, inadvertence, newly discovered evidence or "possible fraud," the trial court found that appellant's claim for relief did not fall within Civ.R. 60(B)(5). The trial court additionally noted that appellant cannot use Civ.R. 60(B)(5) to bypass the one-year time limit for relief from judgment pursuant to Civ.R. 60(B)(1), (2) and (3).

{¶ 7} On appeal, appellant raises the following as his sole assignment of error:

{¶ 8} "The Court erred in determining that Appellant was not entitled to relief from judgment pursuant to Civil Rule 60, Ohio Rules of Civil Procedure."

{¶ 9} Appellant argues on appeal that the trial court erred in failing to support its child support deviation with findings and, therefore, must be vacated. Appellant acknowledges that the provisions of Civ.R. 60(B)(1), (2) and (3) do not apply; however,

appellant argues that "the broad brush" of Civ.R. 60(B)(5) does apply and should act to relieve appellant from judgment.[2]

{¶ 10} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party bears the burden to 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 time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. If the moving party fails to meet any of the three prongs, the court should deny the Civ.R. 60(B) motion. Id.

{¶ 11} The decision whether to grant relief from judgment lies within the discretion of the trial court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. Civ.R. 60(B) states that "[o]n 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

[2]Appellant does not allege that Civ.R. 60(A) applies.

from the judgment." Under any provision, "[t]he 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." Civ.R. 60(B).

{¶ 12} Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. "It is generally held that court errors and omissions are reasons justifying relief under the 'other reason' clause." *State ex rel. Gyurcsik v. Angelotta* (1977), 50 Ohio St.2d 345, 347. The grounds for relief pursuant to Civ.R. 60(B)(5), however, should be substantial and, in any event, cannot "be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi*, paragraphs one and two of the syllabus.

{¶ 13} In this case, although the trial court failed to include its rationale for the child support deviation, there is no indication that the deviation was erroneous. Moreover, appellant agreed to the increased award at the time child support was computed. In seeking relief from judgment, appellant argues that the deviation occurred as a result of mistake, inadvertence, or fraud, as he was never told that there would be an upward deviation in his child support obligation. Appellant's grounds for relief, however, fall within the reasons set forth in Civ.R. 60(B)(1), (2) or (3), which are time-barred due to appellant's failure to raise these issues within one year of the parties' judgment entry of dissolution. Appellant cannot use the "catch-all" provision of Civ.R. 60(B)(5) as a substitute for the more specific grounds set forth in Civ.R. 60(B)(1), (2) or (3), to avoid

the one-year filing requirement. Additionally, even if appellant could establish that the "catch-all" provision should be applied in this case, absent any explanation from appellant, we find that the 14 year delay in filing his motion for relief from judgment was unreasonable. Accordingly, we find that appellant's claims for relief from judgment are time-barred and, as such, the trial court did not abuse its discretion in denying appellant's motion. Appellant's sole assignment of error, therefore, is found not well-taken.

{¶ 14} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE