[Cite as *Melkerson v. Melkerson*, 2009-Ohio-6381.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

LAURA MELKERSON,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-G-2887**
- vs -	:	
ERIC MELKERSON,	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Domestic Relations Division, Case No. 06 DC 000162.

Judgment: Affirmed

Terri L. Stupica, 6449 Wilson Mills Road, Mayfield Village, OH 44143 (For Plaintiff-Appellee).

Stanley Morganstern and *Kylie L. Grumbine*, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Eric Melkerson, appeals the decision of the Geauga County Court of Common Pleas, Domestic Relations Division, denying his Motion for Relief from Judgment, by adoption of the Magistrate's Decision and the overruling of objections thereto. For the following reasons, we affirm the decision of the court below.

{¶2} Eric and plaintiff-appellee, Laura Melkerson, were married on May 27, 1989, and four children were born as issue of the marriage.

{¶3} On February 15, 2006, Laura filed a Complaint for Divorce in the Geauga County Court of Common Pleas.

{¶4} On September 15, 2006, an uncontested divorce hearing was held before a magistrate of the court. At this hearing, the parties read into the record an agreement "with regard to all aspects of this case." The principle assets of the marital estate were the marital residence and Eric's 401(k) Profit Sharing Plan and Trust, administered through his employer, Panzica Construction Company. With respect to these two assets, the parties reached the following agreement:

{¶5} Laura's Attorney: The wife shall retain the marital residence and shall give husband a $30,000 offset from the Panzica 401(k) as and for his share of the equity in the marital residence provided she is able to refinance to take husband's name off of the mortgage and equity line of credit within 120 days from today's date.

If wife is unable to refinance, husband shall retain the marital residence and shall pay wife the sum of $26,500 as her share of the equity.

{¶6} ***

{¶7} Laura's Attorney: The parties have a Panzica 401(k). The husband shall transfer 50 percent of the loan balance as of -- 50 percent of the Panzica 401(k) balance as of September 15th, 2006 after the thereon is subtracted, subject to the offset as stated above for husband's portion of the equity in the marital residence in the event that wife is able to refinance the house.

{¶8} Magistrate: That's the $30,000?

{¶9} Laura's Attorney: Yes.

{¶10} Eric's Attorney: This would also include the balance, apart from the $30,000 and apart from the loan, would also include all contributions, gains and losses that may not have been contributed to the 401(k) yet to and including today's date, September 15th.

{¶11} ***

{¶12} Magistrate: Have you [Eric] heard the agreement that we have read into the record today?

{¶13} Eric: Yes, I have.

{¶14} Magistrate: Did you enter into that agreement voluntarily?

{¶15} Eric: Yes.

{¶16} Magistrate: Do you believe that the agreement is fair and equitable to you?

{¶17} Eric: Yes.

{¶18} ***

{¶19} Magistrate: You understand that you can't come back and ask the Court to divide your assets or award spousal support in any other way?

{¶20} Eric: I agree.

{¶21} On November 16, 2006, the trial court entered an Agreed Judgment Entry of Divorce. This document memorialized the parties' in-court agreement, in relevant part, as follows:

{¶22} The Court *** finds that the parties have entered into an agreement which is fair, just, and equitable. The Court further finds that in open court *** the parties acknowledged, under oath, that they had voluntarily entered into an agreement; they are satisfied with its terms; ***.

{¶23} ***

{¶24} IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall retain the marital residence, provided that she is able to refinance to remove Defendant's name from the first mortgage and equity line of credit within one hundred and twenty days (120) commencing on September 15, 2006. Defendant shall receive the first Thirty Thousand Dollars ($30,000) from the Panzica 401(k) as and for his share of equity in the marital residence, in the event that Plaintiff is able to refinance the first mortgage and equity line of credit. Defendant shall quitclaim his interest in the marital residence to Plaintiff upon proof that Plaintiff has obtained refinancing pursuant to the terms outline above. *** In the event that Plaintiff is unable to refinance, Defendant shall retain the marital residence and shall pay a sum of Twenty Six Thousand Five Hundred Dollars ($26,500) as her share of equity in the marital residence.

{¶25} ***

{¶26} IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall transfer fifty percent (50%) of the net balance in the Panzica 401(k) as of September 15, 2006, after the loan has been subtracted and Defendant has received the first $30,000 as his portion of the equity in the marital residence (provided that Plaintiff has been able to refinance the marital residence pursuant to the terms outlined above), minus any gains or losses, via a Qualified Domestic Relations Order (QDRO).

{¶27} The parties did not assign a value to the marital residence or the Panzica 401(k) at the September 15, 2006 hearing or in the November 16, 2006 Agreed Judgment Entry.

{¶28} In December 2006, Laura refinanced the mortgage and was able to have Eric's name removed from it and the equity line of credit. Thereupon, Eric quitclaimed his interest in the marital residence to Laura.

{¶29} On April 2, 2007, a Qualified Domestic Relations Order was filed in the trial court, assigning to Laura $75,482.31 of Eric's total account balance under the Plan. On August 23, 2007, an Amended Qualified Domestic Relations Order was filed, making the same assignment of account funds to Laura.

{¶30} On February 14, 2008, Eric filed a Motion for Relief from Judgment Pursuant to Civil Rule 60(A) and/or Civil Rule 60(B). In it, Eric argued the parties erred in their method of crediting him for his share of the equity in the marital residence. Pursuant to the Agreed Judgment Entry, Eric was entitled to receive from Laura $30,000 for his interest in the marital residence. According to the Judgment Entry, this was realized by awarding Eric $30,000 from the Panzica 401(k) before dividing the remainder equally between the parties. "However, the parties failed to consider that Defendant was already entitled to ½ of the $30,000 to be distributed from the 401(k),

therefore the correct figure to equalize the property should have been $45,000 from the 401(k)."

{¶31} Stated otherwise, Eric was already entitled to half, or $15,000, of the $30,000 setoff intended to reimburse him for his interest in the marital residence. By deducting the setoff prior to dividing the balance of the 401(k), Eric received less that what he was entitled to receive. Subsequent to the filing of the Motion for Relief from Judgment, the parties stipulated that the value of the 401(k), as of September 30, 2006, was $180,964.61. When $30,000 is set off from this amount and the remainder divided, the result is $75,482.31, as reflected in the QDRO filed by the trial court. According to this formula, Eric received $105,482.31 from his 401(k). If the 401(k) had been divided first, and then the $30,000 setoff applied, Eric would have received $120,482.30, a difference of $15,000.

{¶32} On July 30, 2008, a hearing was held on Eric's Motion for Relief from Judgment before a magistrate of the court. Both Eric and Laura testified that it was their intention that the marital estate be divided evenly. Laura testified that she listed the marital residence for sale in January 2007. The residence was sold in August 2007 by "short sale," meaning that the sale price did not cover the amount owed on the mortgage. Cf. *Maguire v. Natl. City Bank*, 2nd Dist. No. 23140, 2009-Ohio-4405, at ¶7. Thus, Laura did not realize any of the equity in the residence awarded her as part of the division of the marital estate. Eric testified that he realized the error in the manner of dividing the Panzica 401(k) in December 2007.

{¶33} On August 6, 2008, the Magistrate's Decision was issued, denying Eric's Motion for Relief from Judgment.

{¶34} On August 19, 2008, after obtaining an extension of time, Eric filed Objections to the Magistrate's Decision Dated August 6, 2008.

{¶35} On February 11, 2009, the trial court entered a Judgment Entry, denying Eric's Motion for Relief from Judgment. A separate Decision approved and adopted the Magistrate's Decision.

{¶36} On March 6, 2009, Eric filed his Notice of Appeal. On appeal, he raises the following assignments of error:

{¶37} "[1.] The trial court erred by failing to correct the mistake made [in] the Divorce Decree, QDRO and Amended QDRO pursuant to Civil Rule 60(A)."

{¶38} "[2.] Whether the mistake made in the offset of 401(k) funds was a clerical and/or mathematical error that can be corrected pursuant to Civil Rule 60(B)(1), (4), and/or (5)."

{¶39} In the first assignment of error, Eric argues the error in realizing the offset of 401(k) funds was a clerical and mathematical error that could have been corrected pursuant to Civ.R. 60(A).

{¶40} "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." Civ.R. 60(A). As construed by the Ohio Supreme Court, "Civ.R. 60(A) permits a trial court, in its discretion, to correct clerical mistakes which are apparent on the record, but does not authorize a trial court to make substantive changes in judgments." *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 100, 1996-Ohio-340, citing *Londrico v. Delores C. Knowlton, Inc.* (1993), 88 Ohio App.3d

282, 285. "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record which does not involve a legal decision or judgment." Id.

{¶41} The purported error in realizing the offset of 401(k) funds to compensate Eric for his equity in the marital residence is not a clerical mistake. Rather, it was a prudential error in effectuating the division of the 401(k). The trial court's Agreed Judgment Entry of Divorce accurately reflects the agreement read into the record by the parties. According to the sworn testimony of that agreement, the Panzica 401(k) was to be divided evenly, "subject to" and "apart from the $30,000" offset for Eric's equity in the marital residence. Consistent with this testimony, the Judgment Entry provided that Eric "shall transfer fifty percent (50%) of the net balance in the Panzica 401(k) ***, after *** [Eric] has received the first $30,000 as his portion of the equity in the marital residence." To alter the manner in which the 401(k) is divided would constitute a substantive change to the court's Judgment. The Rule may not be applied "to change something which was deliberately done." *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118 (citation omitted); cf. *Newton v. Newton*, 2nd Dist. No. 07-CA-018, 2008-Ohio-1757, at ¶5 (trial court could not materially alter the division of the parties' retirement accounts through Civ.R. 60(A), although the judgment did not reflect the parties' intentions); *Chrisman v. Chrisman*, 12th Dist. No. CA97-10-109, 1999 Ohio App. LEXIS 459, at *12 (purported error as to "how to accomplish an equalization" of marital assets was not a clerical error subject to correction by Civ.R. 60(A)).

{¶42} Eric relies upon the case of *Shaver v. Shaver*, 4th Dist. No. 05CA5, 2005-Ohio-6642, to support his position. In *Shaver*, the court of appeals affirmed the decision

of the trial court to correct an error in the division of property through Civ.R. 60(A). The trial court's original judgment ordered the appellee to pay the appellant "a cash settlement of $11,000.00 representing [her] equity and/or share of [the appellee's] retirement/pension plans" and "also *** a cash settlement of $53,504.79 representing [her] equity and/or share of the marital residence." Id. at ¶4. From a review of the record, the court of appeals concluded that "the trial court made an inadvertent mathematical error in the divorce decree when it calculated the cash settlement that [appellee] was to pay [appellant]." Id. at ¶14.

{¶43} Specifically, the trial court failed to realize that the sum of $53,504.79 represented the "total balance" that appellee was to pay the appellant. Id. at ¶19. "Instead of stating the cash settlement as one lump sum, the trial court broke the cash settlement down into two parts, distinguishing the $11,000.00 cash for the pension from [appellant's] portion of the equity in the marital residence." Id. at ¶21.

{¶44} *Shaver* is distinguishable from the present case. In that case, the trial court misinterpreted the agreement reached by the parties in rendering its judgment. In the present case, the judgment correctly reflects the agreement as represented by the parties. That agreement may not have reflected the parties' actual intentions. Such an error, however, does not constitute the sort of clerical or mechanical error subject to correction by Civ.R. 60(A).

{¶45} The first assignment of error is without merit.

{¶46} In the second assignment of error, Eric asserts, in the alternative, that he was entitled to relief from judgment under the provisions of Civ.R. 60(B).

{¶47} The Ohio Supreme Court set forth the standard for granting a Civ.R. 60(B) motion as follows: "To prevail on a motion brought under Civ.R. 60(B), the movant 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 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 Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The Supreme Court has made clear that the movant must meet all three criteria to be entitled to relief. An untimely motion may not be granted solely because the movant has a meritorious defense. "[T]he movant must demonstrate that he is entitled to relief under one of the grounds stated in Civ.[R.] 60(B)(1) through (5)." Id. at 151. While Civ.R. 60(B) is a remedial rule and, therefore, to be construed liberally, the trial court must bear in mind that the rule attempts to "strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done." *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248, citing 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851, quoted in *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12.

{¶48} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242, 1998-Ohio-466, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

{¶49} Eric cites three grounds under Civ.R. 60(B) entitling him to relief: (1) "mistake, inadvertence, surprise or excusable neglect," (4) "it is no longer equitable that

the judgment should have prospective application," and (5) "any other reason justifying relief from the judgment."

{¶50} Initially, subsections (4) and (5) are not appropriate grounds for relief in the present circumstances. With respect to the claim that prospective application is no longer equitable, the Ohio Supreme Court has held that "Civ. R. 60(B)(4) should be construed to provide relief from a judgment which has clearly become inequitable due to subsequent events." *Wurzelbacher v. Kroeger* (1974), 40 Ohio St.2d 90, 92. Eric does not claim that anything has happened since the November 16, 2006 Agreed Judgment Entry of Divorce to render that Judgment inequitable. Rather, Eric claims the Judgment itself is inequitable.

{¶51} "The Ohio Supreme Court has described Civ.R. 60(B)(5) 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. The "catch-all" provision "is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." Id. Thus, when another one of the grounds specified in Civ.R. 60(B) is appropriate, a court may not grant relief under subsection (5). Id. at paragraph three of the syllabus. As explained below, subsection (1), covering mistake, provides the appropriate context for considering the merits of Eric's Motion. Consideration of the "catch-all" provision, therefore, is not warranted.

{¶52} The basis of Eric's argument is that the parties intended an equal division of the marital assets, but that their agreement did not divide the assets equally because of the manner in which the Panzica 401(k) was divided. This is the type of "mutual

mistake shared by both parties as to a material fact of the case" for which courts typically grant relief under subsection (1). *Breckenridge v. Breckenridge*, 11th Dist. No. 2003-G-2533, 2004-Ohio-1845, at ¶11. See, e.g. *Bodnar v. Bodnar*, 5th Dist. No. 05CA77, 2006-Ohio-3300, at ¶27 (relief granted where the judgment entry failed to include adjustments to the amount of support arrearage as intended by the parties); *Nardecchia v. Nardecchia*, 155 Ohio App.3d 40, 2003-Ohio-5410, at ¶10 and ¶17 (relief granted where the parties undervalued their retirement accounts); *Krysa v. Sieber* (1996), 113 Ohio App.3d 572, 578 (relief granted where "the parties are seeking an equal division of marital assets and a mathematical error interferes with that goal").

{¶53} Although Eric has presented a potentially meritorious defense under Civ.R. 60(B)(1), he is not entitled to relief since, as recognized in the Magistrate's Decision, his motion was not timely filed.

{¶54} According to the Rule, "[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). "[A] trial court does not abuse its discretion by overruling a motion as untimely even though an appellant has demonstrated a ground for relief under Civ.R. 60(B) and a potentially meritorious defense." *Joy v. Joy*, 11th Dist. No. 96-T-5404, 1996 Ohio App. LEXIS 3559, at *13 (citation omitted); *Williams v. Williams*, 5th Dist. No. 05 CAF 05 026, 2006-Ohio-2566, at ¶19.

{¶55} In the present case, Eric filed his Motion for Relief from Judgment on February 14, 2008, fifteen months after the November 16, 2006 Judgment Entry of Divorce. Eric argues that he did not realize the mistake until December 2007, and that

the Motion for Relief was filed within a reasonable time of this realization. The Rule, however, clearly states that the Motion must be filed "not more than one year after the judgment, order or proceeding was entered or taken." Cf. *Strack v. Pelton*, 70 Ohio St.3d 172, 175, 1994-Ohio-107 ("[t]he time limits of Civ.R. 60(B) refer to the judgment from which relief is sought, and not to the time of discovery of the new evidence"). Moreover, Eric offers no explanation why it took thirteen months to realize the error in the division of the Panzica 401(k).

{¶56} Thus, based solely on the issue of timeliness, there was no abuse of discretion in the trial court's decision to deny Eric's Motion for Relief from Judgment. *Rose Chevrolet Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20 ("[i]f any of these three [*GTE Automatic*] requirements is not met, the motion should be overruled").

{¶57} Even had Eric's Motion been timely filed, the trial court would still have been within its discretion to deny it. Eric's position is that he only obtained half of the $30,000 of equity in the marital home to which he was entitled. Prior to Eric's filing the Motion for Relief, the home sold for less than the amount of the mortgage, thereby eliminating the value of Laura's home equity. As a practical matter, Eric received more for his equity than did Laura. The Ohio Supreme Court has stated that "a trial court is not required to grant Civ.R. 60(B) relief." *Whitman*, 81 Ohio St.3d 239, 243. In deciding whether to grant relief, a court is entitled to consider the equitable implications of vacating a final judgment on other parties. Cf. id.; *Wurzelbacher*, 40 Ohio St.2d 90, at paragraph one of the syllabus ("a determination of whether further adherence to the judgment would be inequitable also involves the effect of a vacation of the judgment upon other persons and upon the court"). In the present case, the amount of actual

equity in the home when sold was ultimately less than either party anticipated at the time of the Agreed Judgment Entry of Divorce. Stated otherwise, it would not be fair for Laura to have to further compensate Eric for his equity in the marital home where the value of that asset dissipated within months of the Divorce Decree.

{¶58} The second assignment of error is without merit.

{¶59} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas, denying Eric's Motion for Relief from Judgment, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.