

[Cite as *Jenkins v. Jenkins*, 2010-Ohio-1184.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN J. JENKINS

Plaintiff-Appellee

-vs-

KATHRYN J. JENKINS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 0106

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Domestic Relations
Division, Case No. 06DR01422CRB

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

RONALD P. BOECKMAN

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STEPHEN B. WILSON

35 South Park Place, Suite 150

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Hoffman, J.

{¶1} Defendant-appellant Kathryn J. Jenkins appeals the August 14, 2009 Judgment Entry of the Licking County Court of Common Pleas, Domestic Relations Division, denying her motion for relief from judgment. Plaintiff-appellee is John J. Jenkins.

STATEMENT OF THE FACTS AND CASE

{¶2} Via Judgment Entry of August 12, 2008, the Licking County Court of Common Pleas, Domestic Relations Division, entered a decree of divorce dividing the parties' marital assets and liabilities, establishing spousal support in favor of Appellant, and finding Appellant in contempt of court. Appellant then filed an appeal with this Court. Via Judgment Entry of February 27, 2009, this Court affirmed the judgment of the trial court. See, *Jenkins v. Jenkins*, Licking App. No. 2008-CA-0117.

{¶3} Appellant is a 59 year-old, disabled woman. She has never attended school, cannot read or write and is unemployed. She suffers from numerous medical issues and has been diagnosed with attention deficit hyperactivity disorder (ADHD). She has no source of income other than spousal support.

{¶4} During the proceedings before the trial court, Appellant retained the services of Norman Kahn, allegedly believing he was a properly licensed attorney. However, several days before trial, Kahn informed Appellant she would be represented by Attorney Thomas Lloyd at trial. Appellant avers she met with Lloyd on only one occasion prior to trial for a period of fifteen minutes.

{¶5} Attorney Lloyd was admitted to the practice of law in Ohio on March 6, 1947. Norman Kahn had been disbarred by the Ohio Supreme Court on October 16,

1974. Appellant first learned of Kahn's disbarment on August 5, 2009. At trial, Kahn informed the trial court he was a paralegal registered with the Supreme Court of Ohio.

{¶6} Appellant maintains Lloyd was ill prepared and confused during the trial in this matter, relying on Kahn for direction.

{¶7} As noted supra, Appellant filed an appeal from the original divorce decree. Via Judgment Entry of February 27, 2009, this Court affirmed the decision of the trial court.

{¶8} On August 10, 2009, Appellant filed a Civil Rule 60(B) motion for relief from judgment. Via Judgment Entry of August 14, 2009, the trial court denied the motion.

{¶9} Appellant now appeals, assigning as error:

{¶10} "I. THE TRIAL COURT ERRED IN FAILING TO TERMINATE THE PROCEEDINGS AT THE FINAL DIVORCE HEARING AND IN DENYING DEFENDANT-APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIVIL RULE 60(B)."

{¶11} Appellant's assigned error asserts the trial court erred in failing to sua sponte terminate the proceedings at the final divorce hearing due to the incompetent representation by Attorney Lloyd, and in failing to grant Appellant's motion for relief from judgment pursuant to Civil Rule 60(B).

{¶12} As to the first portion of Appellant's argument, as noted in the Statement of the Facts and Case set forth above, Appellant filed a direct appeal from the trial court's August 12, 2008 Judgment Entry. Appellant could have raised this argument on

direct appeal to this Court as it is premised upon the record presented therein; therefore, this argument is barred by res judicata.

{¶13} We next proceed to address Appellant's argument the trial court erred in denying her Civil Rule 60(B) motion for relief from judgment. The rule reads:

{¶14} "(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc

{¶15} "On 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 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶16} "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

{¶17} As more than one year has elapsed from the date of judgment, Appellant must seek relief according to subsection (5), the general catch-all provision. Ohio case

law provides Appellant's remedy for Attorney Lloyd's alleged incompetence is an action for malpractice, and Civil Rule 60(B)(5) is not to be used as a substitute for a malpractice action. *Baysinger v. Home Developers, Inc.* (March 29, 2001), Cuyahoga App. No. 78443, citing *Pool Man Inc. v. Rea* (Oct. 17, 1995), Franklin 1995, and *Argo Plastic v. Cleveland* (1984), 15 Ohio St.3d 389, 474 N.E.2d 328. Accordingly, we do not find the trial court abused its discretion in denying Appellant's motion for relief from judgment.

{¶18} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN J. JENKINS

Plaintiff-Appellee

-vs-

KATHRYN J. JENKINS

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 09 CA 0106

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY