[Cite as *Marvet v. Marvet,* 2003-Ohio-5605.]

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

Denise M. Marvet	Court of Appeals No. L-02-1309
Appellee	Trial Court No. DR 1999-1381
v.	
Nicholas D. Marvet	**DECISION AND JUDGMENT ENTRY**
Appellant	Decided: October 17, 2003

* * * * *

Martin J. Holmes, for appellee.

James S. Adray, for appellant.

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KNEPPER, J.

{¶1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which granted the Civ.R. 60(B) motion filed by appellee, Denise M. Marvet, in relation to the parties' September 27, 2001 final judgment entry of divorce. For the reasons that follow we affirm the decision of the trial court.

{¶2} Appellant, Nicholas D. Marvet, appeals the decision of the trial court and raises the following assignments of error:

Assignment of Error I

{¶3} "The trial court erred in not entering a nunc pro tunc entry to adopt the agreement as stated on the record of this court or to clear any confusion in the record, and further erred by trying to determine what the parties contemplated."

Assignment of Error II

{¶4} "The trial court erred in granting appellee's motion from [sic] relief from judgment pursuant to Rule 60(B)(3) because the motion is insufficient as a matter of law, the court never made a finding of fraud against Mr. Marvet and if a prima facie case had been made the trial court must hold an evidentiary hearing. Failure to find fraud and to hold an evidentiary hearing is plain error."

Assignment of Error III

{¶5} "Appellee offered no evidence to show cause that the settlement was predicated upon defendant's representation the $60,000 existed in the account as of August 21, 2001, that the value was material to the settlement and therefore it was plain error for the court to base its decision upon this finding as the finding itself is conjecture."

Assignment of Error IV

{¶6} "In a divorce settlement many factors are at play and if the court examines one provision to determine that the judgment should be vacated, the entire judgment must be vacated."

Assignment of Error V

{¶7} "By allowing her counsel to sign the entry after the transfer and knowing the full value of the account the appellee is estopped from collaterally attacking the fairness of

the transaction."

{¶8} On August 21, 2001, the parties entered into a settlement agreement on the record. The portion of the settlement pertinent to this appeal concerns appellant's Merrill Lynch account. The following recitation of the agreement and colloquy occurred regarding the account, its value, and how its proceeds were to be distributed:

{¶9} "MR. HOLMES[1]: *** With regard to the remainder of the property division, [appellee] shall receive the Merrill Lynch account in her name free and clear of any claim of [appellant]. She shall receive $50,000 of the account that has, according to [appellant], a $60,000 balance as of today at Merrill Lynch. It's a stocks account that's in the name of [appellant] and [appellant's] mother. The understanding is [appellant's] mother shall receive the first $10,000 from that account and the remainder shall go to [appellee]. ***

{¶10} "MR. ADRAY[2]: *** I don't think that you're correct on the transfer of the Merrill Lynch account. That what we agreed to was [appellant's mother] is to receive $10,000 from that account. The balance of that account up to $50,000 then is the property of [appellee].

{¶11} "MR. HOLMES: That's correct. With the representation being made by [appellant] as of today that account has a balance of $60,000.

{¶12} "[APPELLANT]: So we're saying that's the gospel, right, that it's worth 60 grand today. When I put it on a spreadsheet and put estimated, it's gospel; is that right?

{¶13} "MR. HOLMES: I've been told that's the value and that's what I'm relying

[1]Attorney Martin J. Holmes was appellee's trial counsel.

upon.

{¶14} "[APPELLANT]: Okay. So you won't object to the words "up to". That's fine.

{¶15} "MR. ADRAY: One other thing.

{¶16} "THE COURT: Is that acceptable, on the Merrill Lynch, the first $10,000 to [appellant's] mother, and then the balance up to $50,000 to [appellee]?

{¶17} "MR. HOLMES: Sure. As long as the representation is in there that –

{¶18} "MR. ADRAY: If the market goes crazy today and it's worth $200,000, he gets the benefit.

{¶19} "THE COURT: Right. And am I to understand if the market likewise goes the other direction, [appellant's mother] still gets $10,000 off the top and then the balance will go to [appellee] here?

{¶20} "MR. ADRAY: Correct."

{¶21} The value of the account was not $60,000 on August 21, 2001. Once appellant's mother received her $10,000, and after fees to Merrill Lynch were paid, appellee received $43,824.49 from the account on August 24, 2001. The parties' judgment entry of divorce was journalized on September 27, 2001, was signed by the parties' counsel, and stated in pertinent part:

{¶22} "[B]ased upon the representation of [appellant] to [appellee] that as of August 21, 2001 that the Merrill Lynch Account *** in the name of [appellant] and [appellant's] mother *** has a fair market value of Sixty Thousand Dollars ($60,000.00), [appellee] shall

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[2]Attorney James S. Adray was appellant's trial counsel.

receive the balance of said account after [appellant's] mother receives stocks worth Ten Thousand Dollars ($10,000.00) in said account. [Appellant] shall furnish [appellee] with the monthly statements for said account for the month of August 2001 and shall transfer out of said account the $10,000 worth of stock to [appellant's] mother and shall transfer to [appellee] or at [appellee's] direction to an account of [appellee's] the remaining stocks and assets in said account. It is expected that the fair market value of the balance shall be approximately Fifty Thousand Dollars ($50,000.00), more or less, depending on market fluctuation after August 21, 2001."

{¶23} After appellee's unsuccessful attempts to obtain the $6,146 balance from appellant, appellee filed a Civ.R. 60(B) motion on January 2, 2002. Appellee argued in her motion that she was entitled to relief pursuant to Civ.R. 60(B)(3), which states:

{¶24} "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: *** (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party ***."

{¶25} Appellee argued that she relied on appellant's misrepresentation that the value of the Merrill Lynch account was $60,000 on August 21, 2001. Appellant responded that, as neither party called Merrill Lynch to verify the exact amount on August 21, 2001, the valuation of the account was merely an estimation of its value and that the most current information available was from the July 28, 2001 statement, which indicated the account had a value of $63,464.44. Additionally, appellant sought Civ.R. 60(B) relief, arguing that the

judgment entry of divorce should be corrected pursuant to a nunc pro tunc order so as to properly reflect the agreement of the parties that was read into the record on August 21, 2001.

{¶26} On September 10, 2002, the trial court granted appellee's Civ.R. 60(B) motion, and held:

{¶27} "At the final hearing, [appellant] represented that the subject Merrill Lynch account of the parties held $60,000 as of August 21, 2001. Any fluctuations in the account, contemplated by the parties at the time of the final hearing, were to be those that may have arisen after August 21, 2001. Any such fluctuations were to enure to the benefit of [appellant], as he would receive the increase, but not suffer the losses. It is clear, however, that the settlement of the parties was predicated upon [appellant's] representation that $60,000 existed in that account as of August 21, 2001.

{¶28} "Now, therefore, [appellee's] 60(B) Motion is sustained, and [appellant's] 60(B) Motion is overruled. The ruling is limited, however, only to the aforesaid Merrill Lynch account. The Court orders that to the extent that the account held less than $60,000 therein, as of August 21, 2001, and thereby resulting in [appellee] receiving less than $50,000 therefrom, [appellant] shall remit within thirty days hereof said difference to [appellee]. [Appellant] shall forthwith deliver to [appellee] the Merrill Lynch monthly statements for the months of July, August, and September, 2001."

{¶29} Appellant argues in his first assignment of error that the trial court erred in not entering a nunc pro tunc entry to adopt the agreement as stated on the record on August 21,

2001, or to clear any confusion in the record. Appellant additionally argues that the trial court erred in "trying to determine what the parties contemplated." Appellant asserts that "what is stated in the record detailing the agreement of the parties and what is set forth in the Judgment Entry dated September 26, 2001 are significantly different and that difference is what brings this matter before the court." In particular, appellant argues that "the judgment upon which [appellee] now seeks to rely, is in need of correction to reflect the true intention of the parties, e.g. the record and the Court and should delete the language 'more or less depending on market value fluctuations after August 21, 2001.'" Appellant suggests that the following statements establish that appellant's statement about the value of the Merrill Lynch account was merely an estimate, and that appellee was only to receive an amount *up to* $50,000, not necessarily a full $50,000:

{¶30} "MR. ADRAY: *** I don't think that you're correct on the transfer of the Merrill Lynch account. That what we agreed to was [appellant's mother] is to receive $10,000 from that account. The balance of that account **UP TO** $50,000 then is the property of [appellee]. (Emphasis added.)"

{¶31} "MR. HOLMES: **THAT'S CORRECT**. With the representation being made by [appellant] **AS OF TODAY** that account has a balance of $60,000 ***. (Emphasis added.)"

{¶32} "MR. MARVET: *** When I put it on a spreadsheet and put **ESTIMATED**, it's gospel; is that right? (Emphasis added.)"

{¶33} "The purpose of a nunc pro tunc order is to have the judgment of the court

reflect its true action. The power to enter a judgment nunc pro tunc is restricted to placing upon the record evidence of judicial action which has actually been taken." *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75. "The province of a nunc pro tunc entry is to make the record speak the truth, to prevent the record from showing that to have occurred which did not occur, and to make it show what did occur that does not appear in the record to have occurred." *Reinbolt v. Reinbolt* (1925), 112 Ohio St. 526, 532. "The power of a court of record to enter nunc pro tunc the evidence of judicial action previously taken, should be exercised only upon evidence which shows clearly and convincingly that such former action was in fact taken ***." *Jacks v. Adamson* (1897), 56 Ohio St. 397, syllabus.

{¶34} The judgment entry of divorce states that the agreement of the parties was based upon the representation of appellant to appellee that, as of August 21, 2001, the Merrill Lynch Account had a fair market value of $60,000, and that it was expected that the fair market value of the balance owed to appellee would be approximately $50,000, "more or less, depending on market fluctuation after August 21, 2001."

{¶35} It is quite clear from the record of the August 21, 2001 hearing that appellant had represented to appellee and her counsel that the value of the account on that day was $60,000. Appellant, however, argues that it was "equally as clear that appellee and her counsel understood that appellant's statement about the account was only an estimate," when counsel acknowledged "that appellee was only to receive **UP TO** $50,000.00 from said account," and that he should not be held to his estimate. We disagree.

{¶36} It is evident from a review of the entire colloquy between the parties, court, and

counsel, that appellee and her counsel relied on the $60,000 estimated value of the account provided by appellant as being an accurate estimate. See, e.g., appellee's counsel's statement: "With the representation being made by [appellant] as of today that account has a balance of $60,000." It is also apparent that the "up to $50,000" discussion actually addressed appellant's concern that he be entitled to any surplus in the account over $60,000 total. See, e.g., appellant's counsel's statement: " If the market goes crazy today and it's worth $200,000, he gets the benefit." Moreover, we find that the statement, "It is expected that the fair market value of the balance shall be approximately Fifty Thousand Dollars ($50,000.00), more or less, depending on market fluctuation after August 21, 2001," accurately reflected the parties' discussion on the record that there could be fluctuations in the market, i.e., should "the market goes crazy", after August 21, 2001, before appellee received her money.

{¶37} Accordingly, despite appellant's arguments to the contrary, we find that the language of the judgment entry of divorce accurately stated the agreement of the parties that was entered into the record on August 21, 2001. We therefore find that the trial court did not err in denying appellant's request for a nunc pro tunc judgment entry. Appellant's first assignment of error is found not well-taken.

{¶38} In his second assignment of error, appellant argues that the trial court erred in granting appellee's Civ.R. 60(B)(3) because the motion is insufficient as a matter of law and because the trial court never made a finding of fraud against appellant. Appellant further argues that, even if a prima facie case of fraud had been set forth, the trial court erred in not conducting an evidentiary hearing. We disagree.

{¶39} In order to prevail on a motion brought under Civ.R. 60(B), a movant must demonstrate: (1) the existence of a meritorious claim or defense, (2) entitlement to relief under one of the grounds set forth in the rule, and (3) that the motion is made within a reasonable time. *GTE Automatic Electric v. Arc Indus.* (1976), 47 Ohio St.2d 146, 151. If the moving party fails to meet any of the three prongs, the court should deny the Civ.R. 60(B) motion. Id.

{¶40} A court's decision to grant or deny a Civ.R. 60(B) motion is within its sound discretion and will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. In order to amount to an abuse of discretion, the court's decision must have been unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A party may not use a Civ.R. 60(B) motion as a substitute for appeal. *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128, 129.

{¶41} In an action for fraudulent misrepresentation, the plaintiff must prove, by a preponderance of the evidence, each of the following elements: (a) a representation or, where there is a duty to disclose, concealment of a fact, which (b) is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169.

{¶42} Appellant first argues that he never made a false representation about the value of the Merrill Lynch account. Rather, he only provided a good faith estimate about what he believed to be the value based upon the last statement he had seen, dated July 31, 2001. Appellant also argues that he clearly qualified his statements about value as being a mere estimate. At most, appellant asserts that he made an innocent mistake. We disagree.

{¶43} It is clear from the record that appellant represented the value of the account to appellee and the court as being $60,000 on August 21, 2001. Although appellant claims he provided a mere estimate, it is clear from the record that appellant was told by appellee's counsel that appellee was not treating the valuation as an estimate and was relying on appellant's representation, in entering into the agreement, that there was $60,000 in the account on August 21, 2001. Hence, we find that there was a representation made by appellant that was material to the divorce agreement.

{¶44} Appellant next argues that he did not "knowingly" make a false statement about the value of the account, insofar as he was relying on the most recent written statement sent to him from Merrill Lynch, which was dated July 31, 2001. We again disagree.

{¶45} As appellant repeatedly indicates in his brief, he is well aware that the value of stock can fluctuate greatly from month-to-month. Despite this knowledge, appellant estimated the value of his stock account based upon a statement that was three-weeks-old. We find that his representation concerning the value of the account was made with utter disregard and recklessness as to whether his valuation was true or false. We further find that to the extent the valuation was provided for purposes of settling the parties' divorce, appellant

clearly intended appellee to rely on his misrepresentation.

{¶46} Appellant further argues that appellee was not justified in relying on his representation because he had stated it was only an estimate. According to appellant, he was not a guarantor of the value of the account and, if appellee had wanted an accurate valuation, she could have called Merrill Lynch to obtain one. We find, however, that, insofar as appellant and his mother were the only account holders, it is clear that appellant was the party in a position to verify the account's current balance. As such, we find appellant's argument that appellee should have called Merrill Lynch to verify the amount herself to be unpersuasive.

{¶47} Moreover, as noted above, despite appellant's arguments, appellee's counsel made it abundantly clear that appellee was relying on appellant's valuation of the stock account. If appellant doubted the accuracy of his valuation, he should have attempted to verify the amount or make it clear to appellee and the court that his valuation should not be relied upon in any way. We therefore find that appellee justifiably relied upon appellant's valuation of the stock account to her detriment.

{¶48} Based on the foregoing and the facts in the record, we find that there was ample evidence to support the trial court's decision without a hearing. Accordingly, we find that the trial court did not abuse its discretion in granting appellee's Civ.R. 60(B)(3) motion. Appellant's second assignment of error is therefore found not well-taken.

{¶49} Appellant argues in his third assignment of error that appellee offered no evidence to show that the settlement was predicated upon defendant's representation that

$60,000 existed in the account as of August 21, 2001, and that the value was material to the settlement. We find, however, that in entering the terms of the agreement, Mr. Holmes clearly stated that they were relying on appellant's representation concerning the value of the account. Obviously, appellant's representation concerning the account's value was material to the settlement. Appellant's third assignment of error is therefore found not well-taken.

{¶50} Appellant argues in his fourth assignment of error that "in a divorce settlement many factors are at play and if the court examines one provision to determine that the judgment should be vacated, the entire judgment must be vacated." We find no merit to appellant's argument and, therefore, find his fourth assignment of error not well-taken.

{¶51} Appellant argues in his fifth assignment of error that appellee had knowledge of the actual value in the account before the divorce judgment entry was signed and, therefore, is now estopped from raising any issue concerning the divorce agreement and the value of the account. Contrary to appellant's argument, we find that the dispute did not concern the language in the agreement; rather, it concerned appellee's misrepresentation regarding the amount in the account. As such, we find that the signing of the final judgment entry of divorce, which contains an accurate recitation of the parties' agreement, does not estop appellee from raising a later issue regarding appellant's misrepresentation concerning the value of the account. Appellant's fifth assignment of error is therefore found not well-taken.

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

JUDGMENT AFFIRMED.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE