[Cite as *Rettig v. Rettig*, 2010-Ohio-2122.]

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

Jeffrey Dean Rettig	Court of Appeals No. WD-09-040
Appellant	Trial Court No. 2006DS0098
v.	
Christine Bodnar Rettig	**DECISION AND JUDGMENT**
Appellee	Decided: May 14, 2010

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John L. Straub and Rebecca E. Dupuis, for appellant.

Frederic E. Matthews, for appellee.

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HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Wood County Court of Common Pleas, Domestic Relations Division, we are asked to consider the following assignments of error:

{¶ 2} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLEE'S MOTION FOR RELIEF FROM JUDGMENT, FILED EXACTLY ONE YEAR FROM THE DATE OF JUDGMENT, WAS TIMELY.

{¶ 3} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLEE WAS ENTITLED TO RELIEF FROM JUDGMENT, PURSUANT TO OHIO CIVIL RULE 60(B)(3), WHEN THE EVIDENCE FAILED TO SUPPORT A CLAIM FOR SUCH RELIEF."

{¶ 4} Appellant, Jeffrey Dean Rettig, and appellee, Christine Bohar Rettig, were married in 1999 and have one minor child, William Perry Rettig. On August 30, 2005, appellee learned that appellant was engaging in extra-marital sex with another male and asked him to leave the marital residence. The parties lived separate and apart from that point forward. On June 12, 2006, appellant and appellee filed a joint petition for the dissolution of their marriage. According to a separation agreement that was also filed by the parties, appellant earned approximately $160,000 per year as the Chief Operating Officer of Greenline Foods, Inc. ("Greenline"), and appellee earned an actual $11,600 per year, plus $50,000 imputed spousal support per year. This separation agreement was subsequently incorporated into the final decree of dissolution filed on July 18, 2006. Pursuant to that judgment, appellant was ordered to pay appellee spousal support in monthly amounts that would decrease each year for the years 2006, 2007, 2008, and part of 2009. Thereafter, appellant was not required to pay appellee any spousal support. Under the terms of the dissolution decree, appellant also paid child support in the amount

of $1,200 per month. If, however, the spousal support was increased during that three year period, the child support would be reduced on a dollar for dollar basis.

{¶ 5} On July 17, 2007, appellee filed a Civ.R. 60(B) motion for relief from judgment premised upon newly discovered evidence, fraud, misrepresentation, "and other misconduct" of appellant. Appellee alleged that it appeared that appellant failed to reveal "material assets" and "income information" during the dissolution process. She therefore asked the domestic relations court to vacate the awards of child and spousal support, as well as the division of marital property. This motion was supported by appellee's affidavit. In that affidavit, appellee averred that based upon recently learned facts, it appeared that at the time of the dissolution appellant held an interest, specifically, stock appreciation rights ("SARS"), in Greenline and an interest in the condominium in which he was residing.

{¶ 6} Appellant filed a memorandum in opposition to appellee's Civ.R. 60(B) motion in which he asserted that her motion was untimely and/or that he had no interest in Greenline at the time of the dissolution. After both parties filed a number of motions, including appellant's request to dismiss appellee's motion for relief from judgment as being untimely and a motion for summary judgment also based upon the alleged untimeliness, the following evidence was offered at a hearing.

{¶ 7} On March 16, 2000, intervenor, Jeffrey Twyman, then the owner of Greenline, offered appellant the position of controller of that company. Included in that offer was the acquisition of 47 SARS, which represented "approximately 5 percent of the

company's value." Appellant accepted the offer and entered into an employment contract with Greenline. A separate document, executed by Twyman and appellant on April 1, 2000, granted Rettig the 47 SARS. Paragraph 21 of this agreement provides, in pertinent part: "The effective date of the Plan shall be June 1, 1999. The Board of Directors may at any time terminate the PLAN."

{¶ 8} Over the next few years, appellant was promoted to the positions of General Manager, Chief Financial Officer, and, finally, Chief Operations Officer. In May 2005, appellant received an additional 47 SARS. A few months later, appellant and appellee separated. Upon learning that appellant was residing in accommodations that he did not consider suitable, Twyman created a limited liability corporation ("LLC") for the sole purpose of purchasing a condominium and leasing it to appellant. Appellant later purchased the condominium from the LLC.

{¶ 9} According to Twyman he terminated the SARS Plan in December 2005 upon the advice of counsel, Victor Ten Brink. While appellant stated that he may have known as early as May 2005 that this plan would be terminated, Ten Brink testified that he first spoke with Twyman in October 2004. Ten Brink asserted that he informed Twyman of the fact that due to newly enacted federal tax laws, several changes would have to be made to Greenline's SARS Plan in order to comply with interim guidelines issued by the Internal Revenue Service. Twyman and Ten Brink then discussed the problem and the development of a new SARS plan over the next several months. In his testimony at trial, Ten Brink stated that appellant's SARS had no value at that point,

therefore, terminating the SARS Plan would have no adverse effect. It is undisputed that Greenline was not performing well financially during this period, and Twyman was seeking a purchaser of the company.

{¶ 10} Richard Ritter, who was hired to head the company in 2000, was the only other executive employee at Greenline. Ritter was also awarded SARS, but had a clause in his separate "Stock Appreciation Rights Grant and Agreement" stating that if the SARS Plan was terminated, that plan would be incorporated into the grant "so as to give effect to the Plan and Grant with respect to Ritter." This document and a second document captioned "Deferred Compensation Agreement" were both generated on March 1, 2000. When Ritter was fired, without cause, by Twyman on March 10, 2006, he was not only granted a promissory note for the amount due from Greenline as deferred compensation, but also provided with a separate "Incentive Fee Agreement." Pursuant to this agreement, Ritter would, *upon the sale of Greenline*, receive a fee in lieu of the value of his SARS. Ritter signed the fee agreement on June 29, 2006.

{¶ 11} At the hearing on appellee's motion for relief from judgment, Ritter testified that he was aware of the fact that Twyman was in negotiations for the sale of Greenline to The Riverside Company ("Riverside") and that a company named Apio also expressed an interest in buying Greenline. After the sale of Greenline to Riverside, Ritter received over two million dollars pursuant to the terms of that agreement. He also became a consultant for Greenline.

{¶ 12} On May 23, 2006, Twyman, along with appellant, met with representatives of Riverside, a private equity buyer, which subsequently sought to purchase 100 percent of Greenline's issued and outstanding stock. A June 14, 2006 "Letter of Interest" sent to Greenline by Riverside, sets forth the "general terms under which we [Riverside] would acquire the Company [Greenline] from you [Twyman] subject to [Riverside's] due diligence."

{¶ 13} On June 16, 2006, David Gesmondi, a Keybank officer who apparently brokered the sale of Greenline, sent an e-mail to Riverside stating: "I spoke to Jeff Twyman and Jeff Rettig this morning, and we have a deal at cash closing * * *. Jeff is viewing this as a partnership * * * and will be prepared to execute this Monday. * * * He views this as a deal that both of us will work hard to close over the next 75 days. * * * As far as the next steps go, if you guys can get us a due diligence list and a proposed timetable, we will begin work on it immediately." On June 20, 2006, Riverside sent Twyman a "Letter of Interest" stating it would be able to issue a "formal" letter of intent and to close the transaction by August 30, 2006.

{¶ 14} On August 1, 2006, 12 days after the parties' dissolution was final, Twyman reinstated the SARS Plan, awarding appellant 109.3 SARS. One of the provisions in the SARS plan provided that the plan was fully vested upon the change in the control of Greenline. Riverside submitted its letter of intent to purchase 100 percent of the issued and capital stock of Greenline on August 14, 2006. According to Twyman, he did not decide to accept Riverside's offer until the Labor Day weekend. The closing on the actual

purchase occurred on September 21, 2006. On that date, appellant received $6,238,582.04 in exchange for his SARS.

{¶ 15} After the hearing, both parties filed proposed findings of fact and conclusions of law. On October 23, 2008, the magistrate issued a 28 page decision in which she determined that Twyman's and appellant's actions constituted fraud and misrepresentation. Thus, she granted appellee's motion for relief from judgment and determined that the $6,238,582.04 was marital property. She therefore ordered appellant to, among other things, transfer $2,349,600 of those funds to appellee as a division of property.

{¶ 16} Appellant filed timely objections to the magistrate's decision. On April 7, 2009, the trial court overruled appellant's objections, and entered a judgment in conformity with the decision of the magistrate. This appeal followed.

{¶ 17} In his first assignment of error, appellant contends that the trial court abused its discretion in finding that appellee's Civ.R. 60(B) motion was timely because the court failed to address the issue of whether that motion was filed within a "reasonable time." To prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate the following: "(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. A failure to satisfy any one of the three prongs of the foregoing standard is fatal to a motion for relief from judgment. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶ 18} In the present case, the basis upon which the trial court granted appellee's motion for relief from judgment was fraud, misconduct, and/or misrepresentation under Civ.R. 60(B)(3). Therefore, appellee was required to, and did, file her motion with one year of the final judgment of dissolution. Appellant claims, however, that the court below failed to address the issue of whether appellee's motion was filed within a reasonable time. Appellant raised this issue both in his response to appellee's motion for relief from judgment and in his motion for summary judgment.

{¶ 19} The party filing a Civ.R. 60(B) motion has the burden to justify any delay in the filing of that motion. *Gron v. Gron*, 7th Dist. No. 07-JE-49, 2008-Ohio-5054, ¶ 32. (Citations omitted.) While the magistrate in this case did not explicitly state that she was addressing the timeliness of appellee's motion for relief from judgment, she noted that appellee finally learned, in 2007, that Greenline was sold. The magistrate further observed that this fact, coupled with the fact that appellant was not forthcoming in providing appellee with information about the sale of Greenline or his part/interest in it, as well as his unusual generosity, made appellee suspicious that he might have received a substantial amount of money. The magistrate found it was only then that appellee hired both a new attorney and a private investigator to look into the matter. We conclude these

findings are sufficient to demonstrate that the magistrate did consider the timeliness of appellee's motion.

{¶ 20} Appellant next relies on *Gron* to argue that appellee set forth no basis showing her motion for relief from judgment was filed within a reasonable time. In *Gron*, the parties entered into an agreement, which was read into the record at the settlement hearing. Id. at ¶ 3. The trial judge inquired of the parties as to whether they wished the court to retain jurisdiction over the issue of spousal support. Id. at ¶ 4. They both replied in the negative. Id. Nonetheless, the court included the following language in the divorce decree: "Spousal support shall terminate if the Wife dies. If the Wife shall remarry or cohabitate with an adult male, the same shall be subject to review by the Court." Id. at ¶ 6. Neither of the parties appealed the trial court's judgment. Id. at ¶ 7.

{¶ 21} Exactly one year after the divorce was final, the wife filed a motion for relief from judgment, asserting the divorce decree did not reflect the agreement of the parties as to the court's post-divorce jurisdiction over spousal support. Id. at ¶ 8. Unlike the case before us, the wife failed to set forth any of the "divisions" in Civ.R. 60(B) as a ground for her motion either in the trial court or on appeal. Id. at ¶ 10 and 20. The *Gron* court also found:

{¶ 22} "Here, the wife presented nothing to the court as to why she waited one year to seek relief. On the contrary, the husband presented evidence that the wife's counsel specifically objected to the matter [reservation of jurisdiction] prior to the entry of the decree, lost this argument to the trial court, continued to sign the entry knowing it

contained this clear language and then failed to appeal such entry on the grounds now raised." Id. at ¶ 33.

{¶ 23} Based upon the foregoing, the Seventh District Court of Appeals concluded that "the failure to demonstrate the reason for the lapse of time here requires denial of the motion for relief from judgment." Unlike *Gron*, Christine Rettig had no knowledge, at the time of the dissolution, that a possible fraud with regard to appellant's SARS existed. By the time that she became suspicious and investigated, it was too late to appeal from the decree of dissolution. Thus, her only recourse was to file a motion for relief from judgment after ascertaining all of the relevant information. We, therefore, conclude appellee's Civ.R. 60(B)(3) motion was filed within a reasonable time, and appellant's first assignment of error is found not well-taken.

{¶ 24} In his second assignment of error, appellant maintains the trial court abused its discretion in granting appellee's Civ.R. 60(B)(3) motion because appellee failed to produce any evidence that he engaged in fraud, misrepresentation, or other misconduct on the question of his alleged SARS during the relevant period, specifically, during the dissolution process. The grant or denial of a motion for relief from judgment is a matter within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Lopshire v. Lopshire*, 11th Dist. No. 2008-P-0034, 2008-Ohio-5946, ¶ 14, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion involves more than an error of law or judgment; it implies that the trial court's attitude in

reaching its decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 25} In determining the existence of fraud of an opposing party for purposes of Civ.R. 60(B)(3), the movant must prove the elements of fraud. *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005-Ohio-6895, ¶ 28. Therefore, appellee was required to "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, that (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." *Marvet v. Marvet*, 6th Dist. No. L-02-1309, 2003-Ohio-5605, ¶ 41, citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169.

{¶ 26} We start with the proposition that marital property consists of all "interest" each spouse has in real or personal property acquired during the marriage. R.C. 3105.171(A)(3)(ii). Stock appreciation rights are a form of deferred compensation. See *Spolum v. Clark Equip. Co.* (N.D.Dist.No.2004), A3-98-95, fn. 2, citing Karns and Hunt (1999), Corporate Executive Deferred Compensation: Should the Exercise of Stock Appreciation Rights (SARs) Trigger Securities Law Liability?, 75 N.D. Law Rev. 535. In general, deferred compensation is considered compensation for past services earned by

an individual and is, therefore, subject to division in a divorce or dissolution. *Greene v. Greene*, 5th Dist. No. 03-CA-85, 2004-Ohio-3529, ¶ 35 (addressing sick leave benefits).

{¶ 27} In the present case, we find that the facts offered at the hearing on this matter gave rise to the inference that during the dissolution proceedings, appellant concealed the fact that he, as the Chief Operating Officer of Greenline, would profit from the sale of that company due to the vesting of his "new" SARS upon the change of control/sale of the company. In particular, appellant, as Chief Operating Officer of Greenline, was aware of the fact that Twyman was actively seeking a purchaser of the company prior to the dissolution proceeding and that he had a buyer during said proceeding. In addition, although Twyman, as the owner of Greenline knew, as early as October 2004, that Greenline's SARS Plan did not comport with the new federal tax laws, he did not terminate that plan until December 2005—after the parties separated and were negotiating a separation agreement. It was only reinstated after the dissolution was finalized, with a clause that would profit appellant upon the change of control of Greenline.

{¶ 28} We also find it is inconceivable that Twyman who, from the evidence offered below, considered appellant not only a colleague but a friend, would insure that Ritter would receive the value of his SARS but that upon the termination of the SARS Plan, appellant would not. Thus, despite the fact that appellant insists that he had no stock appreciation rights at the time of the dissolution or, in the alternative, that said rights had no value, we hold, based upon the facts set forth above, that appellee proved,

by a preponderance of the evidence, that appellant perpetuated a fraud during the course of the parties' dissolution in order to deprive appellee of her share of his SARS. Accordingly, the trial court did not abuse its discretion in granting appellee's Civ.R. 60(B) motion and awarding her a marital share of appellant's SARS. Appellant's second assignment of error is found not well-taken.

{¶ 29} The judgment of the Wood 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

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE