[Cite as *S.R. v. B.B.*, 2011-Ohio-358.]

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

S.R.

Appellant

v.

B.B.

Appellee

Court of Appeals No. L-09-1293

Trial Court No. 04126286

DECISION AND JUDGMENT

Decided: January 28, 2011

* * * * *

Judith A. Myers, for appellant.

Stewart W. Jones, for appellee.

* * * * *

COSME, J.

{¶ 1} Appellant, S.R., appeals from a judgment issued by the Lucas County Court of Common Pleas, Juvenile Division, denying her Civ.R. 60(B) motion for relief from judgments issued on December 17, 2007, and May 8, 2008. We conclude that the trial court did not abuse its discretion and properly denied the motion.

{¶ 2} Appellant ("mother") and appellee, B.B. ("father") are the unmarried biological parents of C.R., born in December 2002. In February 2006, mother moved for an increase in child support. After father sought visitation with the child in May 2006, the parties entered into a visitation agreement in December 2006.

{¶ 3} On January 30, 2007, father filed a motion to show cause regarding visitation. On February 2, 2007, mother sought to modify the allocation of parental rights. In response, on February 23, 2007, father amended the motion to show cause, requesting: modification of parental rights, the appointment of a guardian ad litem, and that mother submit to a psychological assessment.

{¶ 4} The trial court initially set a motion hearing date of May 16, 2007. Mother's attorney withdrew on that date, and the hearing was rescheduled for July 10, 2007. Meanwhile, mother's second attorney entered an appearance on June 4, 2007, and the hearing was again rescheduled for October. In September, the parties again entered into an interim visitation agreement. Mother, her counsel, and father's attorney appeared at the October 31, 2007 hearing, which was continued to January 23, 2008, because father did not appear.

{¶ 5} On December 3, 2007, mother's second attorney moved to withdraw. On December 10, 2007, father filed a second motion to show cause and for expedited hearing for immediate placement/custody of the child with father. On December 17, 2007, the court granted the motion to withdraw and then conducted a hearing on the motion to show cause. Mother did not appear and the court found her to be in contempt, sentencing

her to ten days in jail which was stayed until January 23, 2008. The court found that service of the notice for the hearing had been perfected on mother. The court then listed purge conditions, and granted father's motion for temporary custody of the minor child, with supervised visits for mother. A hearing to address purge conditions was set for January 23, 2008.

{¶ 6} On December 21, 2007, the summons as to the December 17 contempt hearing was returned, showing that mother had not been personally served and, thus, had not received notice of the hearing. On January 2, 2008, the court appointed Kim Kuhn as guardian ad litem. On January 14, 2008, mother submitted to a mental health assessment at Harbor Behavioral Health.

{¶ 7} On January 23, 2008, mother, pro se, filed objections to the December 17, 2007 orders and mother's new counsel entered an appearance. The court then rescheduled the purge hearing for February 20, 2008, and a final hearing date on the merits of the custody motions was set for March 18, 2008. At the February 20 purge hearing, the court found that mother had been substantially compliant with prior court orders, with the exception of orders pertaining to visitation with father. In addition, the court noted that mother's supervised visitations were also suspended until the date of the March custody hearing, because mother's behavior had caused both CRC the East Toledo Center to refuse to supervise the visits.

{¶ 8} On March 18, 2008, the parties were both present for the scheduled hearing as to the motions for visitation and custody issues before a magistrate. After discussions

between the parties, the magistrate accepted a consent agreement presented by the parties which provided that father would be named legal custodian of the child, mother would engage in therapy to address the visitation issue, mother would have visitation as recommended by that therapist, and all child support orders for either party would be terminated. Both parties were directly addressed by the court. The magistrate specifically asked mother if she understood the agreement that was read into the record and if she wanted "to go ahead today with that as a Court Order." Mother responded "yes" to both questions.

{¶ 9} Mother's attorney then stated that he had discussed "all of the different possible outcomes, all of the different possible considerations, and I'm confident she is making a knowing and intelligent decision in proceeding with this agreement." The guardian ad litem also agreed with the order. The magistrate stated that he would have the agreement prepared as a court order and that all other pending motions were resolved by that order. After the time for objections had run, the court adopted the magistrate's decision and final judgment was entered on May 8, 2008.

{¶ 10} Over the next several months, mother filed several pleadings pro se, including a motion to "retrack" the guardian ad litem. Since the original guardian had already been permitted to withdraw, the court denied mother's motion. On July 22, 2008, mother filed a motion to modify the allocation of parental rights and responsibilities. Because service of notice of the hearing to father was not completed until August 9,

2008, and various continuances were granted, the hearing was eventually scheduled and held on January 28, 2009.

{¶ 11} At that hearing, mother was essentially the only witness heard by the magistrate. The magistrate heard and admitted mother's lengthy narrative testimony, without objection. Mother claimed various issues with the minor child's medical and physical care, including that the child was borderline diabetic, suffered from a wide variety of allergies, had not received appropriate dental treatment and vaccinations, and needed to be tested for leukemia and lymphoma "immediately." Despite her claims, mother provided no medical or other documentation to support her claims. Mother also was unhappy with the former guardian ad litem's services, her own attorney's representations, and complained that she had not had visits with her daughter since father received custody.

{¶ 12} Other than her own testimony, mother presented no witnesses or other evidence as to why she should be designated as the residential parent. Rather, mother requested that she be given custody of the child because she had formerly had custody and had not had visitation over the past months. She also asked that, as a punishment, father not be given any visitation, contact, or information about the child for the next 13 months. She said she would agree to see a therapist as a condition of custody, even though it would be a waste of money.

{¶ 13} The magistrate found that the prior consent judgment entry required mother to engage in counseling and to get a recommendation for visitation, which mother had not

done. Ultimately, the court approved the magistrate's decision and denied mother's motion for change of custody.

{¶ 14} In April 2009, yet another attorney, Judith Myers, entered an appearance on behalf of mother, and filed a motion to commence visitation and companionship with the minor child. On May 7, 2009, mother's counsel filed the Civ.R. 60(B) motion for relief from judgments issued by the court on December 17, 2007, and May 8, 2008, which is the subject of this appeal. As the basis for the motion, mother alleged that she was denied due process as to the December 2007 judgment and that she was mistaken or surprised in her agreement to the May 2008 consent judgment entry. The trial court denied mother's motion and her request for an evidentiary hearing. Mother now appeals from the denial of her Civ.R. 60(B) motion to vacate the judgments issued on December 17, 2007, and May 8, 2008.

I.

{¶ 15} In her first assignment of error, mother argues the following:

{¶ 16} "The trial court abused its discretion when it denied appellant's 60(B) motion because said motion satisfied the three-prong test entitling appellant to relief."

{¶ 17} A successful motion for relief from judgment requires: 1) the existence of a meritorious defense; 2) that the movant is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and 3) that the motion is brought within a reasonable time. *GTE Automatic Elect. v. ARC Indus.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Where the grounds for relief are Civ.R. 60(B)(1), (2) or

(3), the request may not be brought "more than one year after the judgment, order or proceeding was entered or taken." *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, paragraph two of the syllabus; *GTE Automatic Elec., Inc.*, supra.

{¶ 18} The five Civ.R. 60(B) grounds for relief are: "(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." Relief under Civ.R. 60(B) "is improper if any one of the foregoing requirements is not satisfied." *State ex rel. Richard*, supra, at 151. See also *GTE Automatic Elec., Inc.*, supra, at 151 (requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive").

{¶ 19} Several policy questions are to be considered in the application of Civ.R. 60(B). The rule strikes a balance between the need for judgments to be final and the need for courts to vacate their orders to further justice and fairness. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12. Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case. *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶ 33. The

movant bears the burden of submitting factual material which demonstrates the timeliness of the motion. *Rotroff v. Rotroff*, 10th Dist. No. F-06-019, 2007-Ohio-2391, ¶ 13, citing *Youssefi v. Youssefi* (1991), 81 Ohio App.3d 49, 53.

{¶ 20} A motion to vacate a default judgment which was filed nearly seven months after actual notice of the action and more than four months after default judgment was entered, does not, on its face, satisfy the reasonable time requirement. *Mt. Olive Baptist Church v. Pipkins Paints & Home Improvement Ctr., Inc.* (1979), 64 Ohio App.2d 285, 289. In the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion. *Herlihy Moving and Storage, Inc. v. Nickison*, 10th Dist. No. 09AP-831, 2010-Ohio-6525, ¶ 15, citing *Mt. Olive Baptist Church*, supra.

{¶ 21} In other words, an unexplained or unjustified delay in making the motion after discovering a ground for relief may put the motion beyond the pale of a reasonable time. *Herlihy Moving and Storage, Inc.*, supra, ¶ 15, citing *State ex rel. Minnis v. Lewis*, (Dec. 30, 1993), 10th Dist. No. 93AP-812; *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 567; and *Sec. Fed. S. & L. Assn. of Cleveland v. Keyes* (June 29, 1990), 11th Dist. No. 89-G1524 (trial court's granting of a Civ.R. 60(B) motion held to be an abuse of discretion where appellee failed to offer any explanation for an 18-week delay in filing his motion to vacate the default judgment rendered against him).

{¶ 22} With these standards in mind, we will now address whether mother established a meritorious defense to support her motion to vacate and whether the motion was filed within a reasonable time as to either judgment entry.

A. December 17, 2007 Judgment Entry

1. Meritorious Defense: Finding of Contempt

{¶ 23} In the present case, appellant claims that the initial finding of contempt denied her due process. We interpret this to mean that because she was not served notice of the hearing and was found to be in contempt, the court did not have personal jurisdiction and she was denied an opportunity to defend against the show cause motion.

{¶ 24} A court can obtain personal jurisdiction through service of process, a voluntary appearance, or a waiver. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156; *In re Shepard* (March 26, 2001), 4th Dist. No. 00CA12, at fn. 1. Thus, "the chief difference between subject-matter and personal jurisdiction * * * is that the former cannot be waived and may be addressed sua sponte, while the latter may be waived if not objected to upon the party's first appearance in court." *In re Shepard*, supra; see also *Cole v. Smith* (Nov. 24, 1986), 4th Dist. No. 526, (holding that a party may not raise the issue of personal jurisdiction for the first time on appeal). In contempt proceedings, a defendant's compliance with a purge order renders the claim of lack of personal jurisdiction moot. See *Nicholson v. Nicholson* (Sept. 6, 2001), 8th Dist. Nos. 78595, 78756; *Caron v. Manfresca* (Sept. 23, 1999), 10th Dist. No. 98AP-1399.

{¶ 25} In this case, although the court found that mother had been served, the record indicates that personal service was not perfected at the time the court held the contempt hearing. Nevertheless, mother subsequently voluntarily appeared before the court on January 28 and February 20, 2008, regarding the contempt issue. Although she

had filed objections to the December judgment entry, at the February purge hearing, she did not object on the basis of lack of personal service or ask to present evidence in defense of the motion to show cause. As a result, she waived any claim of lack of personal jurisdiction or due process.

{¶ 26} Moreover, although the contempt finding was affirmed, the court did not enforce any penalty or purge conditions, including the original 10 day jail sentence. Consequently, even presuming that mother had not waived her personal jurisdiction, no harm or prejudice resulted from the contempt finding regarding her failure to abide by the court's visitation orders. Therefore, we conclude that mother failed to establish a meritorious defense which would require the court to vacate the contempt finding.

2. Meritorious Defense: Change of Custody

{¶ 27} The hearing held on December 17, 2007, addressed both the show cause motion and father's motion for expedited hearing for immediate placement/custody. Our review of the record indicates that, after hearing testimony presented, it granted *temporary* custody to father until January 20, 2008. The court also ordered visitation for mother, appointed a guardian ad litem, and ordered that mother, father, and child complete psychological evaluations. Therefore, the change of custody was not a final judgment at that point, and the matter was continued, ultimately, until March 2008. We agree that the court erred in the December 17, 2007 judgment entry by designating this change of custody as a "part of the sentence." Nonetheless, since the court could have

also separately awarded the *temporary* change as a result of the motion filed by father, and on the basis of the evidence presented, such error was harmless.

3. Reasonableness of Delay

{¶ 28} We also conclude that the motion to vacate, filed more than 16 months after the December 17, 2007 judgment entry, was not timely. If the basis for relief was considered to be a mistake or surprise under Civ.R. 60(B)(1), it was beyond the one year time limit permitted. If, on the other hand, mother was asserting the basis for relief under Civ.R. 60(B)(5), we note that allowing relief pursuant to Civ.R. 60(B)(5) "has been narrowly defined and should be granted only in extraordinary situations where the interests of justice demand." *In re Marriage of Watson* (1983), 13 Ohio App.3d 344, 346. See, also, *Taylor v. Haven* (1993), 91 Ohio App.3d 846, 849 (grounds for invoking relief pursuant to Civ.R. 60[B][5] must be substantial and may not substitute when conditions under Civ.R. 60[B][1], [2], or [3] apply).

{¶ 29} Although there is no fixed time period within which a motion for relief under Civ.R. 60(B)(5) must be made, it must still be made within a "reasonable time." *Watson*, supra, at 879. The determination of what constitutes a reasonable time is within the sound discretion of the trial court. Id. Even though courts have granted relief from judgment after lengthy delays, it is usually only under unique circumstances. See, e.g., *Taylor*, supra, at 852 (12-year delay may not be unreasonable where appellant ordered to pay support for child that was not his offspring); *Watson*, supra, at 345-347 (four-year delay in requesting relief from a dissolution was not necessarily unreasonable in light of

the best interests of the child and the fact that wife concealed pregnancy of second child during the pendency of the divorce); *Klingman v. Klingman* (Nov. 30, 1984), 6th Dist. No. OT-84-12 (five years was reasonable time where delay was caused by harassment and promises of reconciliation, and where husband's conduct was violent and abusive in forcing wife to agree to the terms of a dissolution).

{¶ 30} In the present case, mother was fully aware of the contempt finding from January 2008 until she filed her motion to vacate. In addition, she was in court multiple times after the December 17, 2007 judgment, and had the opportunity to draw the court's attention to any error that had occurred. Nothing in the record provides sufficient mitigating circumstances to support mother's delay in filing the motion. Therefore, we conclude that mother's motion to vacate the December 17, 2007 judgment entry was not filed within a reasonable time and was not based on any meritorious defense under Civ.R. 60(B)(5).

B. May 8, 2008 Judgment Entry

1. Meritorious Defense: Consent Agreement

{¶ 31} At the March 2008 hearing on the motion for change of custody, mother had the opportunity to present witnesses and evidence, but chose, instead, to enter into a consent agreement with father. That agreement was read into the record. The record indicates that the court directly addressed mother who stated that she both understood and consented to the agreement. Mother's attorney stated that he had discussed the agreement

with her, and mother did not disagree with that statement. Nothing in the agreement provides that mother would instantly be redesignated as the residential parent even if she completed counseling, which she did not. Rather, it clearly indicates that visitation was dependent upon her attendance at counseling and the therapist's recommendation.

{¶ 32} In her motion to vacate, mother stated that she was somehow "surprised" that this agreement was the "final" residential custody determination. We note, that in the allocation of custody rights between two parents, no order is "final." The non-custodial parent continues to have the right to request that such custody allocation be reviewed, based upon changed circumstances. In fact, mother again filed such a motion in July 2008 and a full hearing regarding that motion was held in January 2009. Mother has had several opportunities to argue her position to the trial court regarding custody of R., but has simply not been given the answer she wanted.

{¶ 33} We conclude, therefore, nothing in the record supports mother's claim that she did not understand the nature of the consent judgment entry or that the decision was deemed to be a permanent or "final" order which forecloses mother from seeking custody in the future. Consequently, we conclude that mother did not establish a meritorious defense of mistake or surprise under Civ.R. 60(B)(1).

2. Reasonableness of Delay

{¶ 34} In this case, we initially note that mother briefly argues that, because she was "surprised" or mistaken about the consequences of the consent agreement, the May 8, 2008 judgment should have been vacated. Since the motion was filed on May 7, 2009, it

was filed within the one year outside limitation period of Civ.R.60(B)(1). Just because it was filed within the one year outside time limit, the motion was not necessarily brought within a "reasonable" time. Nonetheless, since we have already determined that mother did not establish the first two criteria in support of her Civ.R. 60(B) motion, we need not further discuss or determine whether the motion as to the May 8, 2008 judgment entry was filed within a reasonable time.

{¶ 35} For the reasons previously discussed, we conclude that mother did not establish meritorious defenses under either Civ.R. 60(B)(1) or (5) for either the December 17, 2007 or the May 8, 2008 judgment entries and the motion was not filed within a reasonable time as to the December 17, 2007 judgment. Therefore, we conclude that the trial court did not abuse its discretion in denying mother's motion for relief from judgment as to those two judgment entries.

{¶ 36} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 37} Mother argues the following in her second assignment of error:

{¶ 38} "The trial court abused its discretion when it failed to hold an evidentiary hearing when appellant's motion contained operative facts which support a meritorious defense and claim."

{¶ 39} Generally a "movant has no automatic right to a hearing on a motion for relief from judgment." *In re Estate of Ramun*, 7th Dist. No. MA 124, 2010-Ohio-6405, ¶ 65, citing *In re Estate of Kirkland*, 2d Dist. No. 2008-CA-57, 2009-Ohio-3765, ¶ 17 and

Hrabak v. Collins (1995), 108 Ohio App.3d 117, 121 (applying Civ.R. 60[B] law to R.C. 2109.35 motion to vacate). "It is an abuse of discretion for a trial court to overrule a Civ.R. 60(B) motion for relief from judgment without first holding an evidentiary hearing only if the motion or supportive affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." (Emphasis omitted.) *Kirkland*, supra, ¶ 17, citing *Boster v. C & M Serv., Inc.* (1994), 93 Ohio App.3d 523, 526.

{¶ 40} In this case, our discussion in mother's first assignment of error is dispositive of this assignment of error. Since mother failed to allege any operative facts or present any argument that would warrant relief under Civ.R. 60(B), no evidentiary hearing was required. Therefore, the trial court did not err in denying mother's motion for such hearing.

{¶ 41} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 42} The judgment of the Lucas County Court of Common Pleas, Juvenile 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE