**[Cite as *Cox v. Zimmerman*, 2012-Ohio-226.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

| | | |
|---|---|---|
| LIESE E. COX, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-03-022 |
| | : | O P I N I O N |
| - vs - | | 1/23/2012 |
| | : | |
| KENT E. ZIMMERMAN, | : | |
| Defendant-Appellant. | : | |

CIVIL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2010 CVF 0098

Crowe and Welch Attorneys, Robert H. Welch III, 1019 Main Street, Milford, Ohio 45150, for plaintiff-appellee

Kent E. Zimmerman, 889 East Anson Drive, Cincinnati, Ohio 45245, defendant-appellant, pro se

**YOUNG, J.**

**{¶1}** Defendant-appellant, Kent Zimmerman, appeals pro se a decision of the Clermont County Municipal Court denying his Civ.R. 60(B) motion for relief from judgment.

**{¶2}** On March 29, 2008, plaintiff-appellee, Liese Cox, loaned appellant $15,000. In January 2010, Cox filed a complaint in the trial court alleging appellant had stopped reimbursing her and still owed her $9,000. Appellant filed an answer. The matter was heard

before a magistrate on August 17, 2010. Both parties testified at the hearing and were represented by counsel. By decision filed on August 18, 2010, the magistrate entered a $6,449.95 judgment in favor of Cox. Acting pro se, appellant timely filed objections to the magistrate's decision.

**{¶3}** On September 7, 2010, the trial court issued an entry advising appellant (1) he was required under Civ.R. 53 to submit a transcript of the August 17 hearing before the magistrate, (2) he had 30 days to file the transcript, and (3) failure to provide a transcript would result in the adoption of the magistrate's decision "without further consultation." A hearing on appellant's objections was set for October 18, 2010 (the "objections hearing"). The notice of the hearing was filed and docketed into the court's system. Neither appellant nor his counsel attended the hearing. By entry filed on October 18, the trial court overruled appellant's objections and adopted the magistrate's decision granting a $6,449.95 judgment in favor of Cox. The court's entry also noted, "No transcript filed with court."

**{¶4}** On December 1, 2010, appellant, via counsel, filed a motion for reconsideration asking the trial court to reschedule a hearing on his objections to the magistrate's decision. In his motion, appellant asserted that (1) when he filed his pro se objections, the clerk told him the trial court would decide in advance if a transcript was necessary; the clerk later notified him a transcript would not be required; (2) both appellant and his counsel failed to file a notice that appellant was proceeding pro se; (3) apparently, the notice for the objections hearing was sent to counsel only; and (4) appellant never received the notice.

**{¶5}** The record indicates that in August 2010, appellant and his counsel agreed that counsel would no longer represent appellant, effective September 1, 2010. However, counsel's notice of withdrawal was not filed with the trial court until December 1, 2010. On December 23, 2010, the trial court overruled appellant's motion for reconsideration.

**{¶6}** On January 4, 2011, appellant, via counsel, filed a Civ.R. 60(B) motion on the

ground that through mistake and inadvertence, appellant did not receive notice of the objections hearing. Once again, appellant asked the trial court to reschedule a hearing on his objections to the magistrate's decision. Assertions in this motion were identical to the assertions made in the previous motion. A hearing was set for February 16, 2011. By entry filed that day, the trial court summarily overruled appellant's Civ.R. 60(B) motion.

**{¶7}** This appeal follows in which appellant raises the following two assignments of error:

**{¶8}** Assignment of Error No. 1:

**{¶9}** "THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR RECONSIDERATION PURSUANT TO RULE 60(B), THEREBY DENYING APPELLANT'S RIGHT TO DUE PROCESS GRANTED BY THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES." [Sic.]

**{¶10}** Assignment of Error No. 2:

**{¶11}** "THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S RIGHT TO HAVE THE 'OBJECTIONS TO THE MAGISTRATE'S DECISION' APPEALED. THE MAGISTRATE'S DECISION HAD SIGNIFICANT ERRORS."

**{¶12}** At the heart of both assignments of error is appellant's claim that the trial court's denial of his Civ.R. 60(B) motion violated his due process rights because it prevented him from orally arguing his objections to the magistrate's decision in front of the court. Appellant also asserts his Civ.R. 60(B) motion meets the three-prong test under *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146 (1976).

**{¶13}** 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 for

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." *Id.* at paragraph two of the syllabus. A movant is not entitled to relief if any one of the *GTE* factors is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994).

**{¶14}** The decision to grant or deny a motion for relief from judgment pursuant to Civ.R. 60(B) lies in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.*

**{¶15}** For the reasons that follow, we affirm the trial court's denial of appellant's Civ.R. 60(B) motion.

**{¶16}** In his Civ.R. 60(B) motion, appellant alleged he was entitled to relief on the ground he did not receive notice of the objections hearing through mistake and inadvertence, although appellant did not specifically cite to Civ.R. 60(B)(1). However, because notice of the hearing was journalized and docketed into the trial court's system, appellant had reasonable, constructive notice of the hearing date. *Miller v. Miller*, 9th Dist. No. 21770, 2004-Ohio-1989, 2004 WL 840138, ¶ 11; *Didado v. Didado*, 9th Dist. No. 20832, 2002 WL 701945 (Apr. 24, 2002).

**{¶17}** On appeal, appellant argues he is entitled to relief under Civ.R. 60(B)(1), (2), or (5) because the magistrate made several accounting mistakes and failed to put the burden of proof on Cox. However, these issues were not raised in appellant's Civ.R. 60(B) motion. It is well-established that a party cannot raise new issues or legal theories for the first time on appeal. *Hamilton v. Digonno*, 12th Dist. No. CA2005-03-075, 2005-Ohio-6552, 2005 WL 3358984, ¶ 20. Questions not raised in the trial court will not be ruled upon by this court. *Id.*

**{¶18}** Civ.R. 60 imposes an affirmative duty on the moving party to show a meritorious defense or claim should relief be granted. "'Meritorious,' in this context, refers to the substantive merits of the underlying claim." *Meyer v. Geyman*, 6th Dist. No. WD-07-018,

2007-Ohio-5474, 2007 WL 2965626, ¶ 13. Appellant failed to allege in his Civ.R. 60(B) motion any meritorious defense or claim to present if relief were granted. Appellant's motion was therefore deficient on its face. *Servpro of Hancock Cty. v. Gilbert*, 9th Dist. No. 22442, 2005-Ohio-4089, 2005 WL 1875801, ¶ 17.

**{¶19}** Finally, the record indicates that a hearing on appellant's Civ.R. 60(B) motion was set for February 16, 2011. By entry filed that day, the trial court summarily overruled the motion. Assuming a hearing was held on February 16, 2011, there was no transcript of the hearing filed in this case. Nor has appellant filed an App.R. 9(C) or (D) statement from the February 16, 2011 hearing. As a result, we are unable to determine what evidence relating to the *GTE* factors, if any, was presented to the trial court, and subsequently relied upon by the court, when it denied appellant's Civ.R. 60(B) motion. We have no choice but to presume the regularity of the trial court's proceedings. *Geico Indemn. Co. v. Alausud*, 12th Dist. No. CA2010-11-315, 2011-Ohio-2599, 2011 WL 2175775, ¶ 16; *Preferred Capital, Inc. v. Rock N Horse, Inc.*, 9th Dist. No. 21703, 2004-Ohio-2122, 2004 WL 894577, ¶ 12-13; *Euclid Precision Grinding Co. v. Lubealloy, Inc.*, 11th Dist. No. 2002-L-137, 2003-Ohio-6414, 2003 WL 22844287, ¶ 14-17.

**{¶20}** We note that a transcript of the August 17, 2010 hearing before the magistrate (where both parties testified) was finally filed in the trial court on December 22, 2010, thus before appellant's Civ.R. 60(B) motion. However, the record does not indicate whether the transcript was part of the trial court's proceedings when it denied appellant's Civ.R. 60(B) motion. It is well-established that a reviewing court cannot add matters to the record before it which were not a part of the trial court's proceedings. *Trimble Twp. Waste Water Treatment Dist. v. Cominsky*, 4th Dist. No. CA 1535, 1993 WL 112562 (Apr. 12, 1993), fn.1.

**{¶21}** We recognize that appellant was for the most part acting pro se in the proceedings below, and that he is acting pro se on appeal. However, pro se litigants are

bound by the same rules and procedures as members of the bar, regardless of their familiarity with them. *CAT-The Rental Store v. Sparto*, 12th Dist. No. CA2011-08-024, 2002 WL 237359, *2 (Feb. 19, 2002). Pro se litigants are not to be accorded greater rights and must accept the results of their own mistakes and errors, including those related to correct legal procedure. *Id.*

**{¶22}** In light of all of the foregoing, we find that the trial court did not abuse its discretion by denying appellant's Civ.R. 60(B) motion. Appellant's two assignments of error are accordingly overruled.

**{¶23}** Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.