

[Cite as *Musleve v. Musleve*, 2009-Ohio-5789.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARGARET MUSLEVE	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JEFFREY MUSLEVE	:	Case No. 2009CA00014
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Family Court Division,
Case No. 2006DR00864

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: October 29, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Delaney, J.

{¶1} Plaintiff-Appellant, Margaret Musleve, appeals the December 29, 2008 judgment entry of the Stark County Court of Common Pleas, Family Court Division, to deny her Motion for Relief from Judgment and request for evidentiary hearing. For the reasons that follow, we affirm.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On July 6, 2006, Appellant filed a complaint for divorce against Defendant-Appellee, Jeffrey Musleve. Appellant and Appellee were married on June 4, 1983 and three children were born of the marriage.

{¶3} After three days of testimony, the trial court issued its Final Decree of Divorce on October 4, 2007. Appellant appealed the decision of the trial court in *Musleve v. Musleve*, Stark App. No. 2007CA00314, 2008-Ohio-3961 (“*Musleve I*”). In her appeal, Appellant raised fourteen Assignments of Error and exceeded the maximum page length prescribed by this Court’s Local Rule 10. We addressed only the first thirty pages of Appellant’s brief, exclusive of the assigned errors, issues presented and appendices. *Id.* at ¶20. As such, we reviewed only seven of Appellant’s Assignments of Error.

{¶4} In our decision, we sustained Appellant’s arguments as to her fourth and fifth Assignments of Error. In her fourth Assignment of Error, Appellant argued that the trial court erred by allowing Appellee to keep the Dodge Dakota truck while Appellant continued to pay for the truck. We reviewed the October 4, 2007 judgment entry and found there was a lien indicated on the 1996 Dodge Dakota truck in the amount of \$3,000.00. The trial court awarded Appellee the truck, but did not attribute the lien to

Appellee's column dividing the marital debts and liabilities. We remanded the matter to the trial court for a re-division of the marital liabilities in consideration of the outstanding lien on the Dakota truck. *Id.* at ¶157. In Appellant's fifth Assignment of Error, she argued the trial court erred in not including Appellee's Wellpoint stock as a marital asset. We agreed that the trial court erred in omitting the Wellpoint stock from the division of the marital property and remanded the issue to the trial court for a re-division of the marital property. *Id.* at ¶161.

{¶5} On partial remand, the trial court issued an Amended Final Entry and Decree of Divorce on August 15, 2008. On October 6, 2008, Appellant filed a Motion for Relief from Judgment Pursuant to Civil Rule 60(A) and (B). Appellant argued that she was entitled to relief from judgment from the October 4, 2007 and August 15, 2008 judgment entries. Appellant also requested an evidentiary hearing. Appellee filed a response on December 3, 2008, arguing the issues raised in Appellant's motion for relief from judgment were already presented to this Court in *Musleve I.* On December 29, 2008, the trial court denied Appellant's motion for relief from judgment and request for evidentiary hearing. The trial court found that the issues presented in her motion for relief from judgment were the same issues presented to this Court in *Musleve I.*

{¶6} It is from this judgment Appellant now appeals.

ASSIGNMENT OF ERROR

{¶7} Appellant raises one Assignment of Error:

{¶8} "I. THE TRIAL COURT ERRED BY DENYING THE APPELLANT AN EVIDENTIARY HEARING FOR THE CIVIL RULE 60(A) AND (B) MOTION FOR RELIEF FROM JUDGMENT."

I.

{¶9} Appellant argues the trial court erred in not conducting a hearing and denying her motion for relief from judgment. We disagree.

{¶10} Appellant filed a motion for relief from the trial court's October 4, 2007 and August 15, 2008 judgment entries. She based her motion for relief from judgment on Civ.R. 60(A) and Civ.R. 60(B). Civ.R. 60(A) concerns clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission that may be corrected by the court at any time. She also argued in her motion that she was entitled to relief pursuant to Civ.R. 60(B)(1) (mistake, inadvertence, surprise or excusable neglect); 60(B)(3) (fraud, misrepresentation or misconduct of adverse party); 60(B)(4) (satisfaction of the judgment); and 60(B)(5) (any other reason justifying relief).

{¶11} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} In *GTE Automatic Electric Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶13} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has 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.”

{¶14} The standard for when an evidentiary hearing on a Civ.R. 60(B) motion is necessary is set forth in *Cogswell v. Cardio Clinic of Stark County, Inc.* (October 21, 1991), Stark App. No. CA-8553. In *Cogswell*, this court held under Civ.R. 60(B), a hearing is not required unless there exist issues supported by evidentiary quality affidavits. A trial court must hold an evidentiary hearing when the motion and supporting evidence contain sufficient allegations of operative facts which would support a meritorious defense to the judgment. *Cogswell; BancOhio National Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130.

{¶15} The trial court denied Appellant's motion for relief from judgment and request for hearing because in her motion, she raised the same issues that were presented to this Court in *Musleve I*. Upon our review of Appellant's motion for relief from judgment, the October 4, 2007 and August 15, 2008 judgment entries, and the arguments raised in *Musleve I*, we find that the trial court did not err in not conducting an evidentiary hearing and did not err in denying Appellant's motion for relief from judgment.

{¶16} On partial remand, the trial court's August 15, 2008 judgment entry reconsidered the division of property in accordance with our decision in *Musleve I*. With the exceptions of the consideration of the lien on the 1996 Dodge Dakota truck, the award of the Wellpoint stock to Appellant, and the conclusion that Appellant owes Appellee \$902.50 in order to achieve equity in the division of the property, the August 15, 2008 judgment entry is identical to the October 4, 2007 judgment entry. Appellant

did not raise any of the above-mentioned reconsiderations made by the trial court in her motion for relief from judgment. Her motion for relief from judgment concerns arguments previously raised in her appeal to this Court in *Musleve I*.

{¶17} It is well settled that Civ.R. 60(B) “is not available as a substitute for a timely appeal * * * nor can the rule be used to circumvent or extend the time requirements for an appeal.” *Postel v. Koskal*, Richland App. No. 08-COA-0002, 2009-Ohio-252, ¶25 citing *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 686, 433 N.E.2d 612.

{¶18} Accordingly, we overrule Appellant’s sole Assignment of Error.

{¶19} The judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed.

By: Delaney, J.

Gwin, P. J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

