Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-041

JULY TERM, 2019

Ronald Geraw* v. Pamela Geraw	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 286-5-18 Cndm
		Trial Judge: Nancy J. Waples

In the above-entitled cause, the Clerk will enter:

Husband appeals from the trial court's order in this post-divorce proceeding. We affirm.

The parties divorced in November 2013. Their primary asset was the marital home. "[C]iting the length of [the parties'] marriage, wife's far lower income, and her substantially less promising long-term prospects for generating property and income," the court awarded the home to husband on the condition that he pay wife fifty percent of the home's equity, or $75,275, within nine months if husband could refinance the property. See Geraw v. Geraw, No. 2014-044, 2014 WL 3715005, at *1 (Vt. July 24, 2014) (unpub. mem.), http://www.vermontjudiciary.org/sites/default/files/documents/eo14-044.pdf [https://perma.cc/EXQ3-Y6LU]. Alternatively, if husband was unable to refinance within nine months, after all reasonable efforts, wife could agree to accept a third mortgage on the property, on terms set forth in the court's order. Finally, if neither of the above options proved viable and were accomplished by August 1, 2014, then the court required that the property be listed for sale and the net proceeds after expenses be divided between the parties fifty/fifty. The court's decision was affirmed on appeal. Id.

Wife subsequently moved to enforce the final order. In April 2015, following a hearing at which husband appeared pro se, the court granted wife's request. It found that husband did not pay wife $75,275 within nine months of the final divorce order as ordered and, as of September 2014, he had also stopped paying the mortgage. Husband admitted this at the hearing. He agreed that the house should be transferred to wife and that she could keep any equity that resulted from its sale. Based on these and other findings, the court awarded wife all right, title, and interest in the marital home, free and clear of any right, title, and interest held or claimed by husband. It directed the home to be immediately listed for sale. It held that "[i]f after a bona-fide sale, [wife] has not been made whole on her damages

and on the cash award in lieu of maintenance of $75,275[,] she may pursue enforcement actions."

Several weeks after this decision, husband obtained counsel and moved for reconsideration. He argued that wife was not entitled to $75,275 under the final divorce order, and that he understood his conveyance of title as settling all of wife's outstanding monetary claims against him. Husband asked the court to amend its order to reflect his position. The court denied the motion in June 2015. Husband did not appeal from this decision or the underlying April 2015 order.

In May 2018, wife moved to enforce the April 2015 order, arguing in relevant part that she had netted only $7459.52 from the sale of the marital home and that husband therefore owed her $67,815.48. Husband responded by asking the court to amend the 2015 order pursuant to Vermont Rule of Civil Procedure 60(b)(6). Husband claimed that wife owed him half the proceeds from the sale of the home. He sought an evidentiary hearing on whether he made a good-faith effort to sell the house in October 2014.

The court denied husband's motion, finding an evidentiary hearing unnecessary as husband identified no legal grounds to warrant the relief he requested. The court explained that, to the extent that husband sought relief from the 2015 order, he should have pursued a timely appeal of that order. See Iannarone v. Limoggio, 2011 VT 91, ¶ 14, 190 Vt. 272 ("Courts have long acknowledged that public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." (quotation and alteration omitted)); see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action." (quotation and alteration omitted)). Because husband did not seek direct review of the 2015 order, the court found that he was bound by its terms.

Recognizing that "the doctrine of res judicata is no bar to motions brought pursuant to" Rule 60(b), Cliche v. Cliche, 143 Vt. 301, 306 (1983), the court in its discretion concluded that husband was not entitled to relief under that rule. While husband wanted wife to release him from all claims based on his transfer of title to her, it had been made clear to him both at the 2015 hearing and in the 2015 orders that this was not the case. The court stated that the parties had reached a reasonable agreement in 2015 reflecting the situation as it then existed, and it concluded that the facts did not warrant reopening the judgment. Cf. id. at 307 (upholding Rule 60(b)(6) reopening of final divorce order based on stipulation where trial court found that plaintiff took unconscionable advantage of defendant in execution of final stipulation).

The court was unpersuaded by husband's reference to the fact that he had suffered a traumatic brain injury. It explained that, while husband mentioned this at the 2015 hearing, he did not indicate that he lacked an understanding of the proceedings or that he was incompetent to represent himself. In fact, husband actively participated in the 2015 hearing and neither the parties nor the court had raised any competency questions. Husband's

attorney did not raise this as an issue in his 2015 motion for reconsideration. Finally, the court found that husband's argument concerning his good-faith efforts to sell the property and wife's alleged rejection of the sales similarly did not afford a basis for relief under Rule 60(b). It explained that this evidence could have been presented at the April 2015 hearing and any argument made at that time. As the court observed, it was "not dealing with a litigant who has been denied a first day in court; instead, it is a litigant, who having not prevailed on the first day, wants a second day. The prospect that a new trial judge, in the exercise of discretion, would reach a different result does not justify extraordinary relief." Richwagen v. Richwagen, 153 Vt. 1, 5 (1989). The court acknowledged that husband had been self-represented at the 2015 hearing and thus was entitled to "some leeway from the courts," but he was "still bound by the ordinary rules of civil procedure." Zorn v. Smith, 2011 VT 10, ¶ 22, 189 Vt. 219 (quotation omitted). The court thus denied husband's motion and granted wife's motion to enforce, awarding her a money judgment for the unpaid sum. This appeal followed.

Husband argues that the court should have granted his Rule 60 motion because the April 2015 order significantly modified the final divorce decree. He raises various challenges to the merits of the April 2015 order.

"[A]s we have stated on numerous occasions, a Rule 60(b) motion is addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abused." Riehle v. Tudhope, 171 Vt. 626, 627-28 (2000) (mem.) (citation omitted). There is no legal question presented here, as husband asserts, and our review is not de novo. Cf. Penland v. Warren, 2018 VT 70, ¶ 6 (explaining that question of whether trial court correctly believed that it lacked jurisdiction to exercise its discretion is "a legal issue that we review de novo" (emphasis added)).

We find no abuse of discretion here. As the trial court explained, "Rule 60(b)(6) may not substitute for a timely appeal or provide relief from an ill-advised tactical decision or from some other free, calculated, and deliberate choice of action." Riehle, 171 Vt. at 627. Instead, the rule is "intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time." Id. at 627. This is not one of those cases. Husband could and should have raised his challenges to the merits of the 2015 order through a timely appeal of that order. The 2015 order was not interlocutory, as husband suggests (apparently for the first time on appeal), and the court was not free to amend the order at any time. The 2015 decision was a final appealable order. See, e.g., In re Burlington Bagel Bakery, Inc., 150 Vt. 20, 21 (1988) ("To be final and appealable an order must end litigation on the merits or conclusively determine the rights of the parties, leaving nothing for the court to do but execute the judgment." (quotation omitted). By acknowledging that a future dispute might arise, the court did not suggest that it was issuing an interlocutory order; its decision plainly resolved wife's initial motion to enforce. In any event, as set forth above, the trial court did not conclude that husband's motion was barred by the doctrine of res judicata, as husband appears to assert; it expressly recognized that "the doctrine of res judicata is no bar to motions brought pursuant to" Rule 60(b). Cliche, 143 Vt. at 306. While husband contends that he is entitled to relief because an injustice has been done, the trial court concluded otherwise, and it did not abuse its discretion in doing so. See,

e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which "amount to nothing more than a disagreement with the court's reasoning and conclusion . . . do not make out a case for an abuse of discretion").[1] We find no error in the court's denial of husband's motion or its order granting wife's motion to enforce.[2]

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

[1] For the first time in his reply brief, husband argues that, in considering if the trial court abused its discretion, we should be mindful that he was self-represented at the 2015 hearing and that he had a traumatic brain injury. We do not address these arguments. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 1 n.2, 176 Vt. 356 (stating that Supreme Court "need not consider an argument raised for the first time in a reply brief"). We note that the trial court did consider these arguments in reaching its decision. Even if we were to address them in this appeal, upon this record, we would reach the same conclusion.

[2] Because we conclude that the trial court did not abuse its discretion in declining to vacate the unappealed 2015 decision and denial of reconsideration, we do not address the merits of husband's challenge. That is, we do not consider whether the 2015 decision, on its merits, was a proper exercise of the trial court's authority to enforce the underlying divorce decree.