

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-130

NIEN-HSI HSU

vs.

JONG-PING HSU.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Jong-Ping Hsu, appeals from the denial of a motion for relief from a declaratory judgment entered in favor of his brother, the plaintiff, Nien-Hsi Hsu, declaring that the plaintiff is the sole owner of a particular property in Maynard. Discerning no abuse of discretion, we affirm.

1. Standard of review. Much of the defendant's presentation to this court concerns his challenge to the trial judge's decision after trial, specifically the judge's decision to credit the plaintiff's testimony, which unambiguously stated that the funds to purchase the property came from the plaintiff's own savings and a small loan from his mother and that the defendant's name was on the deed only for estate planning purposes. The defendant, however, did not file a notice of appeal of the trial judgment. Accordingly, the

propriety of the trial judgment is not before us. See DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 170 (2018). Furthermore, having not observed the witnesses or their demeanors, "[w]e are in no position to substitute our judgment for that of the judge on credibility questions." Bonina v. Sheppard, 91 Mass. App. Ct. 622, 630 n.10 (2017), quoting Commonwealth v. Werner, 81 Mass. App. Ct. 689, 698 (2012).

The defendant filed a timely notice of appeal of the denial of his motion for relief from judgment, and thus that denial is properly before us. See Fronk v. Fowler, 81 Mass. App. Ct. 326, 333 n.13 (2012). Pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), a party may obtain relief from judgment because of, inter alia, "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Mass R. Civ. P. 59 (b), 365 Mass. 827 (1974)] [or] . . . fraud." We review the denial of such a motion for an abuse of discretion or error of law. See Cahaly v. Benistar Prop. Exch. Trust Co., 451 Mass. 343, 367 n.51 (2008); von Schönau-Riedweg v. Rothschild Bank AG, 95 Mass. App. Ct. 471, 484 (2019).

2. Newly discovered evidence. "A party seeking postjudgment relief on grounds of 'newly discovered evidence' invokes rule 60 (b) (2), and must satisfy four requirements: '(1) the evidence has been discovered since the trial; (2) the

evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted.'" Cahaly, 451 Mass. at 361, quoting United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 52 (1st Cir. 2002). Here, the defendant produced a statistical abstract that reports such statistics as per capita national income for Taiwan, which he claims, without much explanation, demonstrates that the plaintiff's annual income in Taiwan in the 1970s must have been \$22.54 per year. The defendant has never provided a compelling reason why he could not have discovered this government document, published in 2008, prior to trial in 2019. Moreover, the document proves little, because the plaintiff was employed in the United States for over a year prior to the purchase of the property, had previously been employed while a student, and testified that the money he had accumulated in Taiwan was the result of gifts, not income.

The defendant also produced four photographs of various persons standing next to different automobiles. The plaintiff testified at trial to buying a used automobile and then replacing it after it was stolen through insurance proceeds, but he was not asked to describe the automobiles, and thus nothing in the photographs disproves that testimony. Moreover, as the

judge noted, the testimony regarding automobiles had little relevance to the questions before the court, which concerned the source of the money to purchase the property and the intention of the parties regarding its ownership. In any event, "[i]t is settled that 'a new trial will not ordinarily be granted on the ground of newly-discovered evidence which goes only to impeach the credit of a witness at trial.'" Mitchell v. Mitchell, 62 Mass. App. Ct. 769, 776 (2005), quoting DeLuca v. Boston Elevated Ry. Co., 312 Mass. 495, 500 (1942). Accordingly, the judge acted within his discretion in denying relief from judgment based on newly discovered evidence. See Gaw v. Sappett, 62 Mass. App. Ct. 405, 408 (2004).

3. "Particular and demonstrable error." The defendant argues that the motion judge erred because the defendant demonstrated "particular and demonstrable error." That is the standard for reconsideration of a grant of summary judgment, see Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 278 (2020); Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., 82 Mass. App. Ct. 461, 470 (2012), not for relief from judgment. The defendant also argues that there was a fraud on the court, which is a ground for relief from judgment under Mass. R. Civ. P. 60 (b) (3).

"Courts have found fraud upon the court only where there has been the most egregious conduct involving a corruption of

the judicial process itself. Examples are bribery of judges, employment of counsel to 'influence' the court, bribery of the jury, and the involvement of an attorney (an officer of the court) in the perpetration of fraud." Wojcicki v. Caragher, 447 Mass. 200, 210 (2006), quoting MacDonald v. MacDonald, 407 Mass. 196, 202 (1990). The movant must demonstrate fraud by clear and convincing evidence. See Adoption of Yvonne, 99 Mass. App. Ct. 574, 583 n.15 (2021). The motion judge, who was also the trial judge, was entitled to assess the claim of fraud in the light of his "long involvement with this contentious case and his opportunity at trial to assess the credibility of the witnesses." Knott v. Racicot, 442 Mass. 314, 326 (2004).

Here, the defendant's showing falls woefully short of this standard. At most, the defendant argues that the plaintiff's testimony at trial was false. The judge, however, observed the parties' testimony and determined that the plaintiff was credible. We cannot overrule that determination, see Bonina, 91 Mass. App. Ct. at 630 n.10, and the judge acted within his discretion in denying relief from judgment on that basis. See Gaw, 62 Mass. App. Ct. at 408-410.

4. Attorney's fees. The plaintiff requests appellate attorney's fees. The existence of a frivolous appeal permits, but does not require, an award of appellate attorney's fees. See G. L. c. 211A, § 15; Mass. R. A. P. 25, as appearing in 481

Mass. 1654 (2019). Accord Fronk, 456 Mass. at 326-327 ("the Appeals Court has considerable discretion over when to award appellate fees and costs, even if it concludes that the appeal was frivolous"). Although the appeal before us is frivolous, the fact remains that this case exists in this form only because the plaintiff obtained a default judgment in 2006 by making direct misrepresentations to the court about his ability to contact the defendant. Under these circumstances, awarding appellate attorney's fees would be inequitable.

Order denying motion for
relief from judgment
affirmed.

By the Court (Kinder, Sacks &
Ditkoff, JJ.¹),

Clerk

Entered: May 12, 2022.

¹ The panelists are listed in order of seniority.