

No. 1-12-1671

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF ASTHMA S. AHMED,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
v.)	12 D 2223
)	
SIRAJ K. AHMED,)	Honorable
)	David E. Haracz,
Respondent-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court in Illinois did not abuse its discretion when it denied a motion to stay its proceedings on a divorce petition pending an appeal in Indiana from the dismissal of a petition for a divorce of the same parties.

¶ 2 The parties to this appeal both want a divorce, but they disagree about which state's courts should decide issues concerning the distribution of their assets. Siraj Ahmed filed a petition for a divorce from Asma Ahmed in Indiana. Asma moved to dismiss the petition on grounds of *forum non*

conveniens. When the Indiana trial court granted Asma's motion, she filed a divorce petition in Illinois. Siraj requested a stay of proceedings in Illinois pending the resolution of his appeal in Indiana from the order dismissing his divorce petition. The Illinois trial court denied Siraj's motion for a stay. Siraj appeals. We find that the trial court did not abuse its discretion when it denied Siraj's motion for a stay of the Illinois proceedings on Asma's divorce petition.

¶ 3

BACKGROUND

¶ 4 Asma married Siraj in India in 1983. They had three children, and those children are now adults. In 1993, the family moved to Indiana. They moved to Illinois in 2001 and back to Indiana in 2005. Asma and Siraj separated in 2006, with Asma remaining in Indiana while Siraj moved to Illinois. In 2009, Siraj insisted on relocating Asma to Illinois so that their youngest child could attend an Islamic school. Siraj moved back to Indiana.

¶ 5 On September 20, 2011, Siraj filed a divorce petition in Porter County, Indiana. Ten days later, Asma filed a divorce petition in Cook County, Illinois. The Cook County circuit court dismissed Asma's petition because Siraj filed his petition first. See 735 ILCS 5/2-619(a)(3) (West 2010).

¶ 6 Asma filed a *forum non conveniens* motion in Indiana. The Indiana trial court granted the motion and dismissed Siraj's divorce petition on March 6, 2012. The next day, Asma filed her second divorce petition in Cook County. On March 12, 2012, Asma filed a petition in the Cook County divorce proceeding for an award of interim attorney's fees, and on March 22, 2012, she petitioned for temporary maintenance. In April, she filed a petition for an order enjoining Siraj from transferring or concealing his assets.

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¶ 7 On April 17, 2012, Siraj filed a timely appeal in Indiana from the order dismissing his divorce petition. On April 30, 2012, Siraj filed a motion in Cook County to dismiss Asma's divorce petition or to stay all proceedings on the divorce petition, pending the outcome of his appeal in Indiana. Both parties filed affidavits.

¶ 8 In her affidavit, Asma swore that she never had a paying job, because she served as a homemaker and she raised three children. She took out a home equity loan to meet expenses, but little remained from those funds. She depended entirely upon Siraj for financial support. While the marriage was falling apart, Siraj conveyed title to four pieces of real estate to his brother, without notifying Asma about the transfers. He threatened to dispose of his medical practice and other business ventures if Asma tried to divorce him.

¶ 9 Siraj swore in his affidavit that on May 1, 2012, he started voluntarily paying Asma support of \$500 per week, and he intended to continue doing so. He also paid the mortgage, property taxes, and other taxes for the condominium in Illinois where Asma lived, medical insurance premiums for Asma and all their children, and insurance for Asma's car.

¶ 10 In an order entered May 16, 2012, the trial court denied, without prejudice, Siraj's motion to dismiss Asma's divorce petition, and the court also denied Siraj's motion to stay all proceedings on that petition. On June 6, 2012, the court entered an agreed order directing Siraj to pay Asma \$5000 per month for three months, starting on June 10, 2012. In the order, Siraj agreed to continue paying the mortgage and related costs for Asma's home, plus \$20,000 of Asma's attorney's fees. On June 13, 2012, Siraj filed his notice of interlocutory appeal from the May 16 order denying the motion to stay proceedings on Asma's divorce petition.

¶ 11

ANALYSIS

¶ 12 Supreme Court Rule 307(a)(1) gives this court jurisdiction to consider Siraj's appeal from the denial of his motion to stay proceedings. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010); *Heim v. Herrick*, 344 Ill. App. 3d 810, 812-13 (2003). Section 2-619 of the Code of Civil Procedure allows a court to stay proceedings because of another action pending between the parties for the same cause. 735 ILCS 5/2-619(a)(3) (West 2010). The legislature enacted section 2-619(a)(3) to avoid duplicative litigation. *In re Marriage of Epsteen*, 339 Ill. App. 3d 586, 593 (2003). "However, a trial court is not required to dismiss a proceeding under section 2-619(a)(3) even when the 'same cause' and 'same parties' requirements are met. [Citation.] Rather, the decision to grant or deny the motion is discretionary with the trial court. [Citation.] We review the trial court's decision by applying an abuse of discretion standard." *In re Marriage of Epsteen*, 339 Ill. App. 3d at 593.

¶ 13 Our supreme court, in *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986), held that when a court must decide whether to grant a section 2-619(a)(3) motion to stay proceedings, the court's considerations should include "comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum." *Kellerman*, 112 Ill. 2d at 447-48.

¶ 14 Several Illinois courts have held that the trial court must also weigh "the prejudice that would result to the nonmovant if the motion is granted against the policy of avoiding duplicative litigation." *Doutt v. Ford Motor Co.*, 276 Ill. App. 3d 785, 789 (1995); see *Kapoor v. Fujisawa Pharmaceutical Co.*, 298 Ill. App. 3d 780, 785-86 (1998) ; *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 47 (1990); *Van der Hoening v. Board of Trustees*, 2012 IL APP (1st) 111531, ¶ 25. The court which

decided *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL APP (1st) 110137, disagreed with those cases. The *Performance Network* court said:

"*Kellerman* did not specifically state that 'a court must weigh prejudice to the nonmovant,' as the *Doutt* court stated. Rather, *Kellerman* stated that 'a court should consider' the four factors listed above. See *Kellerman*, 112 Ill.2d at 447-48. It appears *Doutt*, *Arthur Young & Co.*, and *Kapoor* meant that in weighing the prejudice to the nonmovant, a court should consider the four *Kellerman* factors, not that a court should consider prejudice to nonmovant as a separate factor." *Performance Network*, 2012 IL APP (1st) 110137 at ¶ 36.

¶ 15 We disagree with the *dicta* in *Performance Network*. The *Kellerman* court said that the relevant factors "include" the four it listed (see *Kellerman*, 112 Ill. 2d at 447); the *Kellerman* court did not purport to list all relevant considerations for all possible cases. To exercise its discretion equitably, the court should take into account any facts that bear on the fairness of granting or denying the motion for a stay. *Kaden v. Pucinski*, 263 Ill. App. 3d 611, 616-17 (1994). We agree with the statement in *Kaden* that the *Kellerman* "factors are not all inclusive and do not limit a trial court from considering other factors which bear on exercising its discretion." *Kaden*, 263 Ill. App. 3d at 617. The court should consider the prejudicial effect of a stay, and the prejudicial effect of the denial of a stay, when exercising its discretion. *Doutt*, 276 Ill. App. 3d at 789; *Kapoor*, 298 Ill. App. 3d at 785-86; *Arthur Young*, 197 Ill. App. 3d at 47; *Van der Hooning v. Board of Trustees*, 2012 IL APP (1st) 111531, ¶ 25.

¶ 16 Moreover, because this cause arises on an appeal under Rule 307(a)(1), general rules for such appeals apply here. *Heim*, 344 Ill. App. 3d at 812-13. "When a party appeals the trial court's denial of a motion to stay a lawsuit, we will regard the ruling as a denial of a request for a preliminary injunction ***. If granting the stay might harm plaintiffs, [the defendant] had to prove, by clear and convincing evidence, that denying the stay would inflict upon [the defendant] an injustice and hardship greater than any potential harm to plaintiffs." *Heim*, 344 Ill. App. 3d at 812-13. We will consider the balance of the harms as an aspect of our review of the trial court's decision to deny the motion for a stay.

¶ 17 Comity

¶ 18 Our supreme court defined comity as the recognition one jurisdiction allows to the judicial acts of another jurisdiction, having due regard both to interstate duties and convenience and to the rights of its own citizens. *Clubb v. Clubb*, 402 Ill. 390, 399-400 (1949). The last Indiana court to decide any matter related to this case held that Illinois provided a better forum than Indiana for resolution of the divorce proceedings. Thus, comity favors assumption of jurisdiction in Illinois and denial of the motion for a stay.

¶ 19 Siraj argues that comity would require the Illinois court to grant the stay if the Indiana appellate court decides to reverse the trial court's decision. However, he cites no authority for his claim that comity requires deference to a decision a foreign court has not made. See *Hilton v. Guyot*, 159 U.S. 113, 166 (1895). An Indiana court has found that Illinois provides the best forum for this case, and until another Indiana court overturns that holding, comity favors deference to the Indiana trial court's decision. See *Clubb*, 402 Ill. at 399-400; *Hilton*, 159 U.S. at 166.

¶ 20 Multiplicity, Vexatiousness and Harassment

¶ 21 Since the Indiana trial court dismissed Siraj's divorce petition, the parties can proceed with discovery and petitions for interim and final relief only in the Illinois proceeding. Siraj claims that the Illinois litigation causes him vexation because he must pay attorney's fees for motion practice and discovery in Illinois, and if he wins his Indiana appeal, he will need to pay his Indiana attorneys for some duplicative work. Siraj does not suggest how his Indiana discovery would differ from his Illinois discovery, so the Indiana attorneys should benefit from the work of the Illinois attorneys at little added cost. If the Indiana court asserts jurisdiction over the case, the Indiana court will have authority to account for all marital expenses in its distribution of assets. See *In re Marriage of Snemis*, 575 N.E.2d 650, 653 (Ind. Ct. App. 1991). Again, to show multiplicity and vexation, Siraj relies on speculation that the Indiana appellate court might reverse the decision to dismiss his divorce petition under the doctrine of *forum non conveniens*. To avoid multiplicity if the Indiana courts decide to assert jurisdiction over the divorce proceedings, the Illinois court can then reassess the need for the Illinois litigation. Multiplicity, vexation and harassment do not weigh heavily in favor of a stay of the Illinois proceedings.

¶ 22 Complete Relief and *Res Judicata*

¶ 23 Next, we must consider the likelihood that the parties can obtain complete relief in Indiana. If we reverse the trial court's ruling here, and order the trial court to stay all proceedings on Asma's divorce petition pending the resolution of Siraj's appeal in Indiana, Asma will have no order from any court directing Siraj to pay her temporary maintenance. The agreed order for temporary maintenance that the trial court entered in June has already expired. Even if Asma can eventually

obtain equitable distribution of the parties' property in Indiana, she will have no source of income – apart from any amount Siraj might choose to give her – until a court decides to assume jurisdiction over divorce proceedings. The prospect of eventual relief in Indiana cannot fully compensate Asma for the complete lack of any order for maintenance before the Indiana appellate court (and, perhaps, the Indiana Supreme Court) decides whether the trial court should have dismissed Siraj's petition. At this time, Asma cannot obtain the immediate relief she needs in Indiana. Thus, only Illinois courts can grant Asma complete relief.

¶ 24 The Indiana trial court's decision has no *res judicata* effect here, because the court did not address the merits of Siraj's petition. See *Wakehouse v. Goodyear Tire & Rubber Co.*, 353 Ill. App. 3d 346, 351 (2004). The potential *res judicata* effect of an Indiana decision if the Indiana courts decide to assert jurisdiction over the divorce does not make *res judicata* a significant factor favoring a stay.

¶ 25 Balance of the Harms

¶ 26 If the trial court here had entered the stay Siraj sought, Asma would have no order for maintenance until the Indiana appellate court decided whether to reverse the Indiana trial court's decision. Even then, if the appellate court upheld the trial court's decision, Siraj could take a further appeal to the Indiana Supreme Court, leaving Asma's petitions for interim relief without a forum for some further months. Delay in ordering maintenance harms Asma. See *Heim*, 344 Ill. App. 3d at 813. Siraj contends that he will suffer harm beyond payment of maintenance, because he will need to pay Illinois lawyers for work on divorce proceedings in Illinois while paying his Indiana attorneys for working on his appeal. In view of his substantial assets and income, his choice to pursue the

Indiana appeal does not appear to create a substantial hardship.

¶ 27 Siraj cites *Khan v. BDO Seidman, LLP*, 2012 IL APP (4th) 120359, as authority for reversal here. In *Khan*, the plaintiffs sued an investment advisor, an accounting firm, and a bank for mistaken advice about "tax-advantaged investment strategies." *Khan*, 2012 IL APP (4th) 120359, ¶ 1. The trial court dismissed the counts against the accounting firm and the bank based on the statute of limitations. *Khan*, 2012 IL APP (4th) 120359, ¶¶ 24, 31. The appellate court reversed the decision and reinstated the claims against those defendants. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564 (2011). The defendants petitioned for leave to appeal the decision, and the Illinois Supreme Court granted the petition for leave to appeal. *Khan v. BDO Seidman, LLP* (Nos. 112219 & 112221, cons.) (Sept. 28, 2011). The trial court then granted the investment advisor's motion to stay trial court proceedings pending the supreme court's resolution of the appeal concerning the co-defendants. *Khan*, 2012 IL APP (4th) 120359, ¶ 4. The plaintiffs appealed from the order granting the stay. The appellate court held that the trial court did not abuse its discretion when it granted the stay, especially because the supreme court's resolution of the issues concerning the accounting firm's and the bank's appeal could also affect issues in the case against the investment advisor. *Khan*, 2012 IL APP (4th) 120359 at ¶¶ 76-78.

¶ 28 Thus, in *Khan*, the trial court faced closely related claims against several defendants, and the appellate court had found all of the claims viable and in need of resolution. Regardless of the outcome, the supreme court's pending decision will resolve significant issues in the case against the other defendant. Most significantly, nothing in the case indicates that either party would lose the right to needed interim relief if the trial court stayed proceedings pending the supreme court's

decision. The appellate court held that the trial court did not abuse its discretion when it stayed the proceedings.

¶ 29 Here, the Indiana court found that Illinois provided a better forum for resolving Siraj's and Asma's claims against each other. If the Indiana appellate court affirms the trial court's decision, it will not have resolved any issue of significance for the Illinois proceedings. Moreover, Asma persuaded the trial court that she will face significant hardships if no court grants her interim relief pending the Indiana appellate court's decision on the appeal. The appellate court in *Khan* found that the trial court did not abuse its discretion when it granted a motion for a stay; we similarly find that the trial court here did not abuse its discretion when it denied the motion for a stay. *Khan* does not present persuasive grounds for reversal here.

¶ 30 CONCLUSION

¶ 31 Weighing all of the *Kellerman* factors and balancing the hardships, we cannot say that the trial court abused its discretion when it denied Siraj's motion for a stay of Illinois proceedings pending the outcome of Siraj's appeal from the Indiana court's decision to dismiss his petition on grounds of *forum non conveniens*. Accordingly, we affirm the trial court's decision.

¶ 32 Affirmed.