2016 IL App (4th) 150300-U

NO. 4-15-0300

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 30, 2016
Carla Bender
4th District Appellate
Court, IL

JAMES P. PHILLIPS, as Special Representative of LU C. LOGSDON, Deceased, Petitioner-Appellee, v. DAVID A. LOGSDON, Respondent-Appellant.	))))))))	Appeal from Circuit Court of Schuyler County No. 13D26 Honorable Scott J. Butler, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in dismissing respondent's postjudgment petition, which sought to correct several provisions of the final judgment of dissolution of marriage, in order for the judgment to accurately reflect the parties' settlement agreement on those issues.

¶ 2 The issue presented in this appeal is whether the trial court abused its discretion in denying respondent David A. Logsdon's petition for postjudgment relief. Respondent sought to correct several provisions in the final judgment of dissolution of marriage regarding the amounts he was to pay to petitioner, Lu C. Logsdon. He contends the judgment entered did not accurately reflect the parties' agreement as to those amounts. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in August 1995. They separated in June 2013, and petitioner filed dissolution proceedings in September 2013. No children were born or adopted during the marriage.

¶ 5 At a scheduled final hearing on the pending matters of the dissolution on September 2, 2014, the parties advised the trial court they had reached an agreement on the issues pertinent to this appeal. The substance of that agreement was stated for the record. The court asked petitioner's counsel, John R. Alvarez, to prepare the final order and submit the same to respondent's counsel, Luke A. Thomas, for approval. Because the parties could not agree on a proposed order by late October 2014, the court scheduled a case management conference for November 25, 2014. However, at that conference, the trial court entered a written judgment of dissolution of marriage that had been tendered by the parties. Paragraph nine of the judgment indicated "the parties acknowledged in open court that they have reached an agreement as to a portion of the issues between them, which agreement is as follows:" (1) awarding the marital home to respondent, but ordering him to pay $40,000 to petitioner as her share of the equity; (2) ordering respondent to pay $300 per month to petitioner as spousal maintenance, (3) ordering respondent to pay $1,920 to petitioner for the value of certain personal property; and (4) ordering respondent to pay $4,307 for petitioner's medical expenses. We note the judgment repeatedly refers to paragraph I for the allocation of certain amounts. However, no paragraph I appears in this judgment. The signed written judgment was approved as to form by petitioner, petitioner's counsel (Alvarez), and respondent's counsel (Thomas). Approval was "waived" by respondent. It is apparent that Thomas's signature was stamped rather than signed by hand.

¶ 6 In January 2015, attorney Alvarez withdrew from petitioner's representation and attorney Richard D. Frazier was substituted as counsel. The trial court approved the substitution,

and soon thereafter, Frazier filed a petition for indirect civil contempt. Petitioner alleged respondent had failed to make payments and perform other actions as ordered by the final judgment. The petition quoted from various paragraphs of the final judgment.

¶ 7 On March 9, 2015, respondent, by attorney Thomas, filed a response to the petition for indirect civil contempt and included a counterpetition for indirect civil contempt against petitioner. In his response to each numbered paragraph, respondent either admitted the allegation, denied the allegation, or indicated "[n]o response required as the [j]udgment speaks for itself." Respondent alleged petitioner had willfully and contemptuously failed to execute a quitclaim deed, return the endorsed certificates of title to the truck and the boat, and return her keys to the truck. The hearing on the pending contempt motions was scheduled for March 10, 2015.

¶ 8 At the scheduled March 10, 2015, hearing, the parties presented testimony. However, the record before us does not include a transcript of the evidence presented. We have before us only the arguments of counsel and the trial court's ruling. The court found respondent in contempt of court for not paying petitioner her share of the equity in the marital home, her medical expenses, several months of maintenance, and her share of the value of certain personal property. The court sentenced respondent to an immediate indeterminate term in jail on the indirect civil contempt, ordering a purge amount of $8,007.

¶ 9 On March 16, 2015, respondent, by Thomas, filed a motion to vacate the judgment of dissolution of marriage, alleging the amounts owed by respondent stated in the judgment did not accurately reflect the agreement of the parties. Thomas represented he had approved a revised proposed judgment, after contesting the original proposed judgment prepared

by Alvarez. According to Thomas, unbeknownst to him, Alvarez forwarded to the court for signature a judgment different than the one approved.

¶ 10 Petitioner responded with a motion to dismiss respondent's motion to vacate judgment. Petitioner argued respondent's motion to vacate failed regardless of whether he had filed the motion pursuant to section 2-1203 (735 ILCS 5/2-1203 (West 2014)) or section 2-1401 (735 ILCS 5/2-1401 (West 2014)) of the Code of Civil Procedure (Code).

¶ 11 On April 21, 2015, the trial court conducted a hearing on the pending matters, including the parties' respective motions. Thomas clarified he had filed the motion to vacate judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). In response, petitioner's counsel argued Thomas had a duty to review the proposed judgment prior to submission to the court to ensure its accuracy. Beyond that, petitioner argued, Thomas had prepared a response to petitioner's motion for contempt. This response would have required Thomas to refer to and analyze the precise wording of the judgment, since petitioner had quoted the specific provisions of the judgment that counsel was now challenging. Yet, Thomas did not challenge the accuracy of the judgment at that time.

¶ 12 After considering the arguments of counsel, the trial court granted petitioner's motion to dismiss, finding respondent's motion to vacate did not include "adequate allegations regarding the due diligence requirement to reopen a four-month-old judgment that was approved by both lawyers and one of the parties [petitioner], the other party having waived their right to review it and approve it." The court further stated:

> "And for the same reason it's granted, the motion is granted with prejudice because there's no way that the respondent can re-file this. I mean, the facts are what the facts are. From the review

of the pleadings, and the review of the motions, and review of the transcripts, an order was prepared way after the court hearing. That's one of the problems. We have the hearing in September and then we're—we can't remember what happened and these orders get sent back and forth, and then there's a transcript prepared, then people look at the transcripts, and there was an order sent to the court that both lawyers had signed off on. That was back in November, and I—Mr. Thomas admits that he did not review the order that was submitted to him. Then we go for several more months, there is a—and in the intervening time, there's a petition for contempt. I believe Mr. Thomas admits that he did not review that judgment in preparing for that petition for contempt. And in fact, the answer that the respondent had in the judgment speaks for itself. I know I read a response in there that the respondent neither admits or denies the allegations. The judgment speaks for itself, and then we find out later that, by golly, the judgment may not speak for itself.

So whatever the opposite of due diligence is, that's what happened in this case. I did not exercise due diligence when I signed an order that lawyers present to me without thoroughly and meticulously reviewing it. Maybe I should start doing that, but I put some burden on the lawyers to send me what they've agreed to. If they don't agree to it, don't sign it. And then in preparing for a

> subsequent hearing that's based on that very motion to—based on that very order do what I did, look the order over and try to decide whether there's contempt involved or not. That's [*sic*] wasn't done either.
>
> So there's no possible way, in my opinion, that the respondent can allege and show any due diligence based on the record in this case, based on the pleadings and based on the motions that have been filed."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Respondent appeals the trial court's dismissal order, claiming (1) the final judgment the court was given to sign was the incorrect version of the agreed-upon judgment, as it did not accurately reflect the parties' settlement agreement; (2) the court erred in granting petitioner's motion to dismiss respondent's section 2-1401 petition; and (3) the court erred in awarding petitioner her attorney fees associated with her motion to dismiss.

¶ 16 Attached to respondent's motion to vacate the judgment were copies of correspondence between Alvarez and Thomas regarding the preparation and contents of the proposed final judgment of dissolution. Included in this correspondence, was a November 17, 2014, e-mail from Alvarez to Thomas, which indicated, at 2:25 p.m., Alvarez had modified the proposed judgment pursuant to Thomas's review and suggested changes. Alvarez attached what he called the "modified judgment" and asked Thomas if the judgment "covered everything." Later the same day, in an e-mail sent from Thomas to Alvarez at 4:17 p.m., Thomas indicated the proposed judgment was "accurate." Thomas stated: "Thanks for putting this together. I believe

it is accurate. I have no problem (and prefer) if you want to eliminate the signature lines for approval and simply submit the same to the judge for entry. You can represent to him I approve it and I can follow up with an email to him stating my approval."

¶ 17 The judgment entered by the trial court was not the one included in the November 17, 2014, e-mail sent at 2:25 p.m. by Alvarez and approved at 4:17 p.m. by Thomas. The differences relate to the amount respondent was to pay petitioner for unpaid medical bills and the amount respondent was to pay petitioner relating to the division of marital personal property, which included the value of the parties' vehicles. According to Thomas, the difference equates to $10,123.52, to respondent's detriment. The proposed judgment included in the e-mails contained a paragraph I, which was a chart setting forth the "allocation of marital estate and the net sum respondent is to pay the petitioner."

¶ 18 With regard to the unpaid medical bills, according to the parties' agreement, (1) the parties would each pay one-half of the unpaid medical bills totaling $4,307; (2) respondent would reimburse petitioner for one-half of the medical bills she had paid in the amounts of $505.91, $662.52, and $475.53; and (3) respondent would receive a credit for half of the medical bills he paid in the total amount of $812. Thus, respondent would pay $2,569.48 as his share of unpaid medical bills to petitioner. However, in the written judgment, the court ordered respondent to pay petitioner $4,307 in unpaid medical bills.

¶ 19 With regard to the distribution of marital personal property, including the motor vehicles, the parties agreed respondent would be awarded $11,497 worth of marital personal property and petitioner would be awarded $812 worth of marital personal property. In addition, petitioner would receive the 2006 Lincoln, valued at $22,273, while respondent would receive the 1997 Chevrolet truck, valued at $3,222. According to the parties' agreement, the value of the

personal property was equitably divided, meaning they agreed to an offset, crediting respondent in the amount of $8,366. However, the written judgment does not include any offset crediting respondent for receiving less than petitioner. The written judgment has respondent paying approximately $10,000 more to petitioner than the parties had initially agreed.

¶ 20 The scenario presented in this appeal is not an unfamiliar one in Illinois courts. For example, the Third District faced a similar factual situation in *Chastain v. Chastain*, 149 Ill. App. 3d 579 (1986). There, the parties agreed, in open court in December 1984, that the respondent's child support payments in the amount of $230 payable twice each month would not be reduced when the oldest child reached 18 years old. *Chastain*, 149 Ill. App. 3d at 581. However, the drafted judgment, entered in March 1985, stated the respondent would pay $230 per month per child as support until the child reached 18. Thereafter, in July 1985, the respondent reduced his payment in accordance with the written judgment. *Chastain*, 149 Ill. App. 3d at 581.

¶ 21 The petitioner filed a section 2-1401 petition requesting postjudgment relief. *Chastain*, 149 Ill. App. 3d at 581. The respondent filed a motion to dismiss, claiming the petitioner and her counsel had approved the judgment order as written. *Chastain*, 149 Ill. App. 3d at 581. The trial court granted the respondent's motion to dismiss, finding the parties had agreed to the entry of the judgment. *Chastain*, 149 Ill. App. 3d at 581. The petitioner appealed.

¶ 22 The appellate court found the trial court erred in granting the dismissal. *Chastain*, 149 Ill. App. 3d at 582. Because the respondent reduced his child support in accordance with the written judgment, but in contradiction to the settlement agreement, the appellate court found the "situation to be unjust and one appropriate for post-judgment relief." *Chastain*, 149 Ill. App. 3d at 582. It was undisputed the respondent had taken advantage of the ambiguity created by the

written judgment as prepared by his attorney who drafted the order. *Chastain*, 149 Ill. App. 3d at 582.

¶ 23 Further, in *Neumann v. Neumann*, 58 Ill. App. 3d 211 (1978), the Second District addressed a similar case. There, the parties agreed the father would maintain health insurance on the minor children only. The written judgment provided the father would maintain health insurance on the minor children *and* the mother. *Neumann*, 58 Ill. App. 3d at 211. The father cancelled health insurance on the mother and she sought to enforce the written judgment. *Neumann*, 58 Ill. App. 3d at 211. The trial court determined the agreement governed over the written judgment. *Neumann*, 58 Ill. App. 3d at 212. The mother appealed.

¶ 24 The Second District found it obvious from the record that the trial court had not intended to impose "any condition which was at variance with the agreement." *Neumann*, 58 Ill. App. 3d at 213. The mistake of having the written judgment include a provision not previously agreed to by the parties justified the entry of a corrected *nunc pro tunc* order. *Neumann*, 58 Ill. App. 3d at 213-14.

¶ 25 It is interesting to note, in *Neumann*, the mother argued the father was barred from relying on the agreement since he had failed to file a proper motion to vacate the judgment or institute proceedings under what is now section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). *Neumann*, 58 Ill. App. 3d at 214. The appellate court noted, if this was the "usual case" of attacking an erroneous ruling, the mother would be correct. *Neumann*, 58 Ill. App. 3d at 214. However, the court stated as follows:

> "[T]he error in this case was not judicial in character, but rather consisted of the failure of the written decree to properly reflect the trial court's judgment, which was intended to incorporate the terms

> upon which the parties had agreed, and no others. The property settlement agreement is part of the record in this case and constitutes the correct statement of the obligations which the court thought that it was imposing by its decree. Since it appears that [the wife] obtained her own medical insurance after the decree was entered, she cannot claim detrimental reliance upon the decree. Under these circumstances, a *nunc pro tunc* correction of the decree would have been justified [citations], and it was, therefore, not error for the trial court to refuse to grant [the wife] the relief which she prayed for in her petition. However, in order that the record properly reflect the judgment which was entered on February 4, 1972, we are remanding the cause for entry of an order correcting the decree *nunc pro tunc* so that it states the obligations pertaining to medical insurance, as set forth in the property settlement agreement, which the court intended to impose by its decree." *Neumann*, 58 Ill. App. 3d at 214.

¶ 26 In line with our sister courts, we likewise conclude the trial court abused its discretion in denying respondent postjudgment relief under these circumstances. The purpose of an action brought pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)) is "to bring facts not of record to the attention of the trial court which, if known by the trial court at the time judgment was entered, would have prevented its rendition. [Citations.] The petition invokes the equitable powers of the court as justice and fairness require and should be considered in the light of equitable principles." *Manning v. Meier*, 114 Ill. App. 3d 835, 837-38 (1983).

¶ 27 Although relief is generally not available where the moving party or his counsel have been negligent, courts have allowed the judgment to be vacated even though the requirement of due diligence has not been satisfied. *Manning*, 114 Ill. App. 3d at 838. See, *e.g.*, *Lutz v. Lutz*, 55 Ill. App. 3d 967, 970 (1977) ("justice and fairness may require that a judgment be vacated even where there may have been a lack of due diligence in presenting such defense to the trial court"). Such is the case here.

¶ 28 The variance between the parties' settlement agreement (as demonstrated by the stated record during the September 2, 2014, hearing and the correspondence between Alvarez and Thomas) and the final written judgment was the result of a mistake. It is apparent the settlement agreement was reduced to writing in the proposed judgment forwarded to Thomas by Alvarez on November 17, 2014. After Thomas suggested changes, Alvarez complied, changed the document, and resent the proposed judgment to Thomas for approval. Thomas approved the judgment, finding it had incorporated the parties' agreement. Thomas had no reason to believe the judgment signed by the trial court would be different than the one agreed to by both counsel.

¶ 29 Although Thomas arguably should have noticed the error prior to the March 10, 2015, hearing, we do not find his conduct sufficiently negligent to deny respondent postjudgment relief. Respondent's challenge cannot be characterized as one attacking the trial court's erroneous ruling with a lack of due diligence. See *Neumann*, 58 Ill. App. 3d at 214. Instead, respondent sought to have the written judgment reflect the actual agreement of the parties. Because (1) the parties' agreement is part of the record, (2) the agreement provided in the proposed judgment constitutes the intended statement of obligations of the parties, and (3) the court believed it was imposing the agreed upon obligations in its written judgment, a *nunc pro tunc* correction should be entered in this case. The principles of fairness and justice require the

judgment of the trial court be corrected to accurately reflect the parties' agreement as set forth in the November 17, 2014, agreed-upon proposed judgment. We, therefore, reverse the order granting petitioner's motion to dismiss respondent's petition for postjudgment relief and remand with directions to enter a *nunc pro tunc* order conforming the judgment of November 25, 2014, to the agreement of the parties as established in the record.

¶ 30 We note the reversal of the trial court's order entered on April 21, 2015, likewise reverses the award of attorney fees to petitioner ordered therein. Upon remand, petitioner should not be precluded from seeking an award of reasonable attorney fees incurred as a result of the filing of the petition for indirect civil contempt.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the trial court's judgment and remand with directions to enter a *nunc pro tunc* order conforming the judgment of November 25, 2014, to the agreement of the parties as established in the record.

¶ 33 Reversed; cause remanded with directions.