2012 IL App (1st) 110925-U

FIRST DIVISION
June 25, 2012

No. 1-11-0925

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re MARRIAGE OF BRITTON BEREK, Petitioner and WENDY BEREK, Respondent-Appellant, (Michael Minton, Appellee).	) Appeal from the) Circuit Court of) Cook County.)) No. 05 D 009017))) Honorable) Moira Johnson,) Judge Presiding.))))	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ *1* *Held*: Consent judgment for attorney fees was voidable, not void and not subject to collateral attack.

¶ 2 Respondent Wendy Berek[1] appeals from an order of the circuit court granting in part and denying in part her motion to strike a portion of the judgment for dissolution of marriage. On appeal, Ms. Berek contends that: (1) the attorney fee provision contained in the judgment for dissolution of marriage was void because it was a consent judgment for attorney fees in violation of section 508(d) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508(d) (West 2008)) , (2) the denial of her request for the return of the $9,500 she previously paid to her attorney was error, and (3) she is entitled to interest on the $9,500. We do not reach the second or third issues as we determine that the attorney fee provision was not void but voidable and therefore not subject to collateral attack.

¶ 3 BACKGROUND

¶ 4 Attorney Michael Minton represented Ms. Berek in the dissolution of her marriage to Britton Berek.[2] The Bereks entered into a marital settlement agreement, which was supplemented by an addendum. The addendum provided in pertinent part as follows:

"ARTICLE VII

ATTORNEY FEES

7.1 HUSBAND shall pay MICHAEL MINTON the sum of $6,000 from the escrowed funds allocated to him. WIFE shall pay MICHAEL MINTON the sum of $15,000 from

[1]Due to her remarriage, Ms. Berek is also referred to in the record as Ms. Battaglia.

[2]Petitioner Britton Berek is not a party to this appeal.

the escrowed funds allocated to her in addition to the amounts previously paid."

¶ 5 The marital settlement agreement and the addendum were incorporated into the judgment for dissolution of marriage, which was entered by the trial court on December 29, 2006.[3] Thereafter, Ms. Berek paid the sum of $6,000 on April 2, 2007, and the sum of $3,500 on April 10, 2007, to attorney Minton.

¶ 6 On August 25, 2007, Ms. Berek, filed a *pro se* motion pursuant to section 2-1401of the Code of Civil Procedure (735 ILCS 5/1401 (West 2008)) (the Code) and section 508(d) of the Act to strike a portion of the judgment for dissolution of marriage. She maintained that section 7.1 of the addendum constituted a consent judgment prohibited by section 508(d). Pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)), attorney Minton moved to dismiss the motion to strike. On November 24, 2008, an agreed order was entered granting leave to Ms. Berek to withdraw her motion to strike without prejudice.

¶ 7 On November 16, 2010, attorney Minton filed a citation to discover assets against Ms. Berek, seeking to satisfy the judgment for attorney fees entered against her as part of the judgment for dissolution of marriage. Now represented by counsel, Ms. Berek moved for a hearing on her motion to strike. Attorney Minton again moved to dismiss the motion to strike.

¶ 8 On March 25, 2011, the circuit court denied attorney Minton's motion to dismiss and conducted a hearing on the motion to strike. Ms. Berek testified that she first saw the addendum

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[3]The court hearing the dissolution of marriage proceedings will be referred to as the "trial court," and the court hearing the motion to strike proceedings will be referred to as the "circuit court."

to the marital settlement agreement on December 29, 2006. She acknowledged that she initialed each page and signed the last page of the addendum. While acknowledging paying $9,500 to attorney Minton in April 2007, she testified that she made the payments because of the judgment. On cross-examination, Ms. Berek acknowledged that she had reviewed the attorney fees provisions in the addendum. She further acknowledged that on November 10, 2006, she executed an affidavit agreeing to a judgment being entered against her in the amount of $32,862.50 for attorney fees owed to attorney Minton. Ms. Berek further acknowledged that at the prove-up of the dissolution of marriage petition, she testified that the marital settlement agreement and addendum were fair and reasonable and that the attorney fees charged were fair and reasonable.

¶ 9 The circuit court granted the motion to strike in part, ruling that the attorney fee provisions in the addendum was not a consent judgment because no verified petition for the entry of a consent judgment was filed as required by section 508(d). Since the judgment was not enforceable, the court dismissed the citation to discover assets. In ruling on Ms. Berek's request that attorney Minton be ordered to return the $9,500 she paid to him in April 2007, the court stated as follows:

> "Here is my problem. The person paid this money for whatever reason. In the same way that I would not allow this judgment to be used to collect money from her, I think her remedy may be that she needs to sue him for a refund for whatever reason based upon a breach of contract that she may have engaged in in her underlying divorce. But I do not think there should be any enforcement by the post-judgment Court for him trying to

collect additional money from her based on this judgment."

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 Ms. Berek contends that section 7.1 of the addendum constituted a consent judgment for attorney fees and was void because it violated section 508(d) of the Act.

¶ 13 I. Standards of Review

¶ 14 The interpretation of a statute presents a question of law to which we apply the *de novo* standard or review. *People v. Holmes*, 405 Ill. App. 3d 179, 184 (2010). Whether the trial court had jurisdiction to enter the consent judgment for the attorney fees is also a question of law and subject to *de novo* review. See *Director of Insurance v. A&A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 722 (2008).

¶ 15 II. Discussion

¶ 16 Ms. Berek's motion to strike was a collateral attack on the judgment for dissolution of marriage. See *In re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 270 (2003) (a collateral attack on a judgment is an attempt to impeach the judgment in an action other than that in which the judgment was entered). "Under the collateral attack doctrine, a final judgment rendered by a court of competent jurisdiction may only be challenged through direct appeal or procedure allowed by statute and remains binding on the parties until it is reversed through such a proceeding." *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 189 (2010). Ms. Berek did not take a direct appeal from the judgment for dissolution of marriage. While her motion to strike stated that it was brought pursuant to section 2-1401 of the Code, as

well as section 508(d) of the Act, Ms. Berek failed to argue that section 2-1401 applies in this case.

¶ 17 The fact that the motion to strike was a collateral attack on the judgment for dissolution of marriage is significant in this case. " 'Judgments entered in a civil proceeding may be collaterally attacked as void only where there is a total want of jurisdiction in the court which entered the judgment, either as to the subject matter or as to the parties.' " *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998) (quoting *Johnston v. City of Bloomingdale*, 77 Ill. 2d 108, 112 (1979).

¶ 18 A void order or judgment " ' "is one entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved." ' " *In re Marriage of David*, 367 Ill. App. 3d 908, 916 (2006) (quoting *Mitchell*, 181 Ill. 2d at 177, quoting *In re Estate of Steinfeld*, 158 Ill. 2d 1, 12 (1994)). The "inherent power" requirement applies to administrative agencies and courts of limited jurisdiction, not to courts of general jurisdiction, *i.e.*, the circuit courts. *David*, 367 Ill. App. 3d at 917 (citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529-30 (2001).

¶ 19 A voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack. *Mitchell*, 181 Ill. 2d at 174. "Once a court has acquired jurisdiction, an order will not be rendered void merely because of an error or impropriety in the issuing court's determination of the law." *Mitchell*, 181 Ill. 2d at 174; see *People v. Davis*, 156 Ill. 2d 149, 156 (1993) (the power to decide carries with it the power to make the wrong decision as well as the correct decision). The court in a dissolution of marriage proceeding does not exceed its

jurisdiction merely because it overlooks or misapplies the provisions of the Act. *David*, 367 Ill. App. 3d at 916. With these principles in mind, we examine the language of section 508(d).

¶ 20 Section 508(d) of the Act provides in pertinent part as follows:

> "A consent judgment, in favor of a current counsel of record against his or her own client for a specific amount in a marital settlement agreement, dissolution judgment, or any other instrument involving the other litigant, is prohibited. A consent judgment between client and counsel, however, is permissible if it is entered pursuant to a verified petition for entry of consent judgment, supported by an affidavit of the counsel of record that includes the counsel's representation that the client has been provided an itemization of the billing or billings to the client, detailing hourly costs, time spent, and tasks performed, and by an affidavit of the client acknowledging receipt of that documentation, awareness of the right to a hearing, the right to be represented by counsel (other than counsel to whom the consent judgment is in favor) and the right to be present at the time of presentation of the petition, and agreement to the terms of the judgment." 750 ILCS 5/508(d) (West 2010).

¶ 21 There is no dispute that when the trial court entered the judgment for dissolution of marriage, it had jurisdiction over the parties and over the dissolution proceedings in general. Section 508(d) provided the court with the authority to enter a consent judgment for attorney fees in favor of an attorney and against his or her client. Under *Mitchell*, *Davis*, and *David*, the fact that the trial court overlooked the verified petition requirement of section 508(d) did not cause the court to lose jurisdiction. See *Mitchell*, 181 Ill. 2d at 175 (a court may not lose jurisdiction

because it made a mistake in determining the law or the facts or both); *Davis*, 156 Ill. 2d at 156; *David*, 367 Ill. App. 3d at 916.

¶ 22 CONCLUSION

¶ 23 We agree with Ms. Berek that the trial court erred when it entered the consent judgment for attorney fees as part of the judgment for dissolution of marriage. However, the consent judgment is not void because the trial court had jurisdiction of the parties, the subject matter and had the authority to enter a consent judgment for attorney fees. The consent judgment for attorney fees was voidable and was not subject to a collateral attack. Because Ms. Berek's motion to strike was a collateral attack on the consent judgment, the circuit court erred in granting any relief to Ms. Berek. See *Mitchell*, 181 Ill. 2d at 175 (where court reversed the lower court ruling that the original child support order was void finding instead that it was voidable, the original child support order, though erroneous, was ordered reinstated).

¶ 24 Pursuant to our authority under Supreme Court Rule 615 (a) (eff. Feb. 1, 1994), we vacate the March 25, 2011, order and dismiss Ms. Berek's motion to strike with prejudice.

¶ 25 The judgment of the circuit court is vacated, and the motion to strike a portion of the judgment for dissolution of marriage is dismissed with prejudice.

¶ 26 Order vacated; motion to strike dismissed with prejudice.