2016 IL App (1st) 150772-U

SIXTH DIVISION
April 8, 2016

No. 1-15-0772

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of Cook County.
ANITA RIVAL ROSENBERG,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 13 D 7703
and	)	
	)	
JOSHUA T. ROSENBERG,	)	Honorable
	)	Jeanne Cleveland Bernstein,
Respondent-Appellee.	)	Judge Presding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: We held that the documentary evidence presented to the trial court was insufficient for a determination that the date set forth in the parties' marital settlement agreement for the commencement of the petitioner's monthly child support obligation was a scrivener's error. Therefore, we reversed the trial court's order granting the respondent's petition to correct a scrivener's error and remanded the case for the trial court to hear testimony on the issue raised by the petition. We declined to vacate the order granting the respondent's motion to supplement the record on appeal.

¶ 2 The petitioner, Anita Rival Rosenberg (Anita), appeals from a trial court order granting the petition of the respondent, Joshua T. Rosenberg (Joshua), to correct a scrivener's error in the parties' marital settlement agreement (the MSA). On appeal, Anita contends that the trial court erred when it determined that the date set forth in the MSA for the commencement of her child support obligation was a scrivener's error and reformed the MSA in accordance with Joshua's petition.

¶ 3 During the pendency of this appeal, on October 14, 2015, this court granted Joshua's motion to supplement the record on appeal with the transcript of the October 5, 2015, hearing before the trial court. On October 15, 2015, Anita filed objections to Joshua's motion. On October 19, 2015, we entered an order providing that our October 14, 2015, order would remain in effect and that Anita's objections would be considered with the briefs on appeal.

¶ 4 For the reasons set forth below, we decline to vacate our order granting Joshua's motion to supplement the record. We reverse the trial court's order granting Joshua's petition to correct a scrivener's error and remand for further hearing.

¶ 5 Anita and Joshua were married on September 29, 1996. On August 29, 2013, Anita filed a petition for dissolution of marriage. The parties' three children were still minors at the time of the dissolution of marriage proceedings.

¶ 6 On December 10, 2014, the trial court conducted a prove-up of the grounds for dissolution and entered the judgment for dissolution of marriage, incorporating the MSA and the parties' joint parenting agreement. The MSA was dated December 10, 2014, and was signed and each page initialed by both parties. During the hearing, each party was questioned regarding the terms of the MSA. Under questioning by his counsel, Joshua testified that he understood all the terms and conditions contained in the MSA and agreed to be bound by them.

¶ 7 On December 19, 2014, Joshua filed a petition to correct a scrivener's error in the MSA and alleged the following facts. On November 11, 2014, Joshua's attorneys sent Anita's attorneys a draft of the MSA containing the terms agreed to by the parties during a settlement conference with the trial court. Due to a scrivener's error, the November 11, 2014, draft provided that Anita's child support obligation was to commence on December 1, 2015, rather than December 1, 2014, the date to which Joshua maintained the parties agreed. After changes were made, a final draft of the MSA was sent to Anita's attorneys on November 21, 2015. The fact that the MSA set forth December 1, 2015, rather than the December 1, 2014, for the commencement of Anita's child support obligation remained undetected until after the judgment for dissolution of marriage was entered on December 10, 2014. In support of the petition, Joshua attached exhibits containing correspondence referencing the settlement negotiations before and after the judgment was entered.

¶ 8 Anita responded to the petition maintaining that the evidence of the settlement negotiations was inadmissible under Rule 408 of the Illinois Rules of Evidence (eff. Jan. 1, 2011). She argued that the terms of the MSA were unambiguous and that parole evidence was not admissible to interpret the terms. Anita disputed Joshua's claim that the date was incorrect, but in any event, insertion of the December 1, 2015, date could not be deemed a scrivener's error since the date for the commencement of her monthly child support obligation was not manifestly incongruous when considered with the other provisions of the MSA.

¶ 9 On February 25, 2015, the parties appeared before the trial court. No transcript of the proceedings is included in the record on appeal. However, neither party asserts that the trial court heard testimony on that date. The court entered an order providing that it declined to consider or review the exhibits detailing the settlement negotiations and ordered the exhibits stricken. Based on its review of the MSA, the pleadings and the parties' arguments, the court found that the December 1, 2015, date in paragraph 6(A) of the MSA was a scrivener's error and corrected paragraph 6(A) to provide that Anita's child support obligation commenced on December 1, 2014.

¶ 10 Anita filed a timely notice of appeal from the February 25, 2015, order.

¶ 11 ANALYSIS

¶ 12 I. Joshua's Motion to Supplement the Record on Appeal

¶ 13 During the pendency of this appeal, on October 5, 2015, the parties appeared before the circuit court on Joshua's motions for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013) and for prospective attorney fees for defending against Anita's appeal.

¶ 14 As a basis for granting Joshua's petition for fees, the trial court stated:

"I think this [appeal] is frivolous.

* * *

For her to take this appeal, which she may be successful in *** she's going to strip him of the little dab of money that he got compared to what she has; and I don't want to do that. So, I am proceeding cautiously to let him have some money in advance so that he can defend this particular appeal.

And I can guarantee you that I would have never agreed to a Settlement that let her wait a year before she'd pay child support. That's why I found it a scrivener's error because I would have never agreed to it otherwise, unless it was a mistake."

¶ 15 On October 8, 2015, Joshua filed a motion to supplement the record on appeal with the transcript from the October 5, 2015, hearing. See Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). He alleged that the trial court made certain statements concerning the scrivener's error issue and that the court's statements were relevant to the issue on appeal "particularly concerning her personal knowledge of the terms of the parties' settlement." Anita filed objections to Joshua's motion to supplement the record, arguing that Joshua violated Rule 19 of the First District Appellate Rules by not first submitting his motion to the trial court and that the transcript of the October 5, 2015, hearing did not comply with Rule 329.

¶ 16 The trial court retains jurisdiction regarding supplemental record preparation, and a request for leave to file a supplemental record should be filed in the first instance in the trial court. Ill. App. Ct., First Dist. R. 19 (Sept. 1, 2004). Under Rule 19, a motion to supplement the record "may be filed initially in the Appellate Court only if the movant shows that filing a motion in the trial court would not be practical or that the trial court has denied the motion to supplement the record in whole or in part." Ill. App. Ct., First Dist. R. 19 (Sept. 1, 2004).

¶ 17 Joshua filed his motion to supplement the record in this court. He alleged that it would not be practical to file the motion in the trial court since "most of the briefing in this matter has already occurred," and only Anita's reply brief remained to be filed. Joshua did not allege that the trial court denied his motion to supplement the record on appeal, and we fail to see why the near completion of the briefing schedule made it impractical for him to file his motion in the trial court. Rule 19 specifically provides that the trial court retains jurisdiction for just such a purpose.

¶ 18 We do not condone violations of our appellate rules. However, " 'Supreme Court Rule 329 permits the amendment of the record where there are material omissions or inaccuracies or if the record is otherwise insufficient to present fully and fairly the questions involved.' " *Court of Northbrook Condominium Ass'n v. Bhutani*, 2014 IL App (1st) 130417, ¶ 37 (quoting *People v. Miller*, 190 Ill. App. 3d 981, 988 (1989) (citing Ill. S. Ct. R. 329 (eff. July 1, 1982)).

¶ 19 We agree with Joshua that the trial court's comments regarding the scrivener's error in the MSA are material to the determination of the accuracy of the date set forth in the MSA for the commencement of Anita's monthly child support obligation. The parties do not dispute that the trial court participated in settlement discussions with them that led to the drafting of the MSA.

¶ 20 After due consideration of Anita's objections to the motion and despite Joshua's failure to comply with Rule 19, we conclude that supplementing the record on appeal with the October 5, 2015, transcript comports with the purpose of Rule 329. Therefore, we decline to vacate our October 14, 2015, order granting Joshua's motion to supplement the record on appeal.

¶ 21 II. Scrivener's Error

¶ 22 Anita contends that the trial court erred when it ruled that the December 1, 2015, date for the commencement of Anita's child support obligation was a scrivener's error and reformed paragraph 6(A) of the MSA by inserting December 1, 2014, as the date for Anita's child support payments to commence.

¶ 23 A. Standard of Review

¶ 24 Where, as here, the only evidence presented to the trial court was documentary and the court made no credibility determinations, our review is *de novo*. *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 608 (2009).

¶ 25 B. Discussion

¶ 26 Anita argues that the insertion of December 1, 2015, instead of December 1, 2014, was not a scrivener's or clerical error as the trial court found but rather a deliberate decision on the part of Joshua and his attorneys. "[A]n error that is 'decisional or judgmental' instead of 'mechanical or technical' is not a scrivener's error." *Handelsmen v. Handelsmen*, 366 Ill. App. 3d 1122, 1135 (2006) (quoting *Schaffner v. 514 West Grant Place Condominium Ass'n*, 324 Ill. App. 3d 1033, 1040 (2001)). An error resulting from the deliberate or conscious exercise of judicial or professional judgment or a misapprehension of the law or the facts will not qualify as a scrivener's error. *Handelsmen*, 366 Ill. App. 3d at 1135.

¶ 27 Joshua responds that the trial court correctly determined that error in the date for the commencement of Anita's child support obligation was a scrivener's error. He points out that the definition of a scrivener's error includes typing an incorrect number. See Black's Law Dictionary 563 (8th ed. 2004). He maintains that the insertion of December 1, 2015, instead of December 1, 2014, amounted to no more than a typographical error. See *People v. Wyzgowski*, 323 Ill. App. 3d 604 (2001) (a police officer's sworn report listing the date of the

defendant's arrest as July 7, 2000, instead of July 6, 2000, the correct date, was a scrivener's error and did not deprive the defendant of a substantial right). Therefore the trial court acted properly in correcting the date. See *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100, 107 (1994) (citing cases where a scrivener's error led to the reformation of an insurance contract).

¶ 28 The rules governing contract construction also govern the interpretation of a marital settlement agreement. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010). Our primary objective is to give effect to the parties' intent. *Hall*, 404 Ill. App. 3d at 166. Where a provision is "manifestly incongruous" with other provisions in the agreement, it is a scrivener's error, and reformation of the agreement to correct the error is proper. *Estate of Blakely*, 267 Ill. App. 3d at 107. We therefore turn to the provisions of the MSA pertinent to our determination of this issue.

¶ 29 The parties were awarded joint custody of their three minor children. Article 6 of the MSA sets forth Anita's child support obligation as follows:

> "A. Starting on December 1 2015, and continuing each and every month until the emancipation of the parties' youngest child, Anita shall pay Joshua $4,000 per month on the fifteenth day of each month as and for child support for the minor children."

Paragraph 6(B) defines an emancipation event as the youngest child's death, marriage, reaching the age of 18 or graduation from high school, whichever occurs last but in no event past the age of 19, and residence away from the parents' home, including but not limited to, boarding school.

¶ 30 Paragraph 6(C) provides in pertinent part as follows:

> "The parties agree that the child support amount set forth in Paragraph 6(A) above is appropriate given the specific circumstances of their case, the fact that Anita will pay substantial out-of-pocket expenses as described in Paragraphs 6(D), 8(A), and 8(B) of this Agreement,[1] and the assets awarded to Joshua, including the sum of Two Hundred Fifty Thousand Dollars ($250,000), which Joshua requested be paid to him as part of the One Million Seven Hundred Twenty-Five Thousand Dollar ($1,725,000) lump sum property settlement under Article 11(A) of this Agreement as an advance payment of child support over an eight and one-half (8-1/2) year period."

Under paragraph 11(A) the lump-sum payment which included the $250,000 advance child support payment was payable "[u]pon entry of Judgment for Dissolution of Marriage."

¶ 31 Also pertinent are the maintenance provisions in the MSA requiring lump sum payments from Anita to Joshua. Under paragraph 6(A), Anita was required to pay Joshua maintenance in the form of two lump-sum payments of $70,000 each, one on the day the judgment of dissolution was entered and the second on January 10, 2015. Then "starting on December 1, 2015, and continuing for a total of 36 months *** Anita shall pay Joshua $11,667 monthly on the first day of each month as and for maintenance."

¶ 32 The MSA provided that upon entry of the judgment for dissolution, Joshua would receive a lump-sum payment of child support in the amount of $250,000. The $250,000 advance payment was not subject to any of the emancipating events set forth in the MSA. Moreover, the December 1, 2015, date for the commencement of the monthly child support payments is

[1] Under those paragraphs of the parties' MSA, Anita was solely responsible for the payment of the children's private school tuition, fees, and related expenses; she was to maintain medical and hospital insurance for the children; and she was solely responsible for all of the children's ordinary and extraordinary uninsured medical, dental and optical expenses.

similar to the maintenance lump-sum and delayed monthly payments provision in the MSA. Therefore, the December 1, 2015, starting date for Anita's monthly child support obligation was not manifestly incongruous with other provisions of the MSA and supports Anita's argument that December 1, 2015, was the date the parties intended for the commencement of her monthly child support obligation and not an error, let alone a scrivener's error.

¶ 33 The trial court ruled on Joshua's petition to correct a scrivener's error based on the MSA, the pleadings and on the parties' arguments. We too have reviewed the MSA but find nothing in that document that indicates that the December 1, 2015, date was an error. The record now includes the trial court's comment at the October 5, 2015, hearing stating that it would never have approved an agreement which provided for a year's delay in the payment of child support. On the other hand, the fact that the December 1, 2015, date was in all of the drafts of the MSA, including the final MSA signed by the parties, supports Anita's position that the parties intended that her monthly child support obligation was to begin on December 1, 2015 and not on December 1, 2014, as Joshua argued in his petition.

¶ 34 Based on the record in this case, we are not satisfied that the scrivener's error issue presented by Joshua's petition can or should be resolved without testimony by the parties as to their intentions regarding the date of the commencement of Anita's monthly child support obligation. This case must be remanded to the trial court for an evidentiary hearing consisting of testimony as well as documentary evidence pertinent to the scrivener's error issue raised in Joshua's petition. The ruling on Joshua's petition should include the trial court's factual findings and legal conclusions.

¶ 35 In summary, we decline to vacate the October 14, 2015, order granting Joshua's motion to supplement the record on appeal. The trial court's order granting the respondent's petition to

correct a scrivener's error is vacated, and the cause is remanded for an evidentiary hearing on Joshua's petition to correct a scrivener's error, to be conducted in accordance with this court's directions.

¶ 36 Vacated and remanded with directions.