

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Cameron M. Sisson

Court of Appeals No. H-17-002

Appellee

Trial Court No. DR 2011 0544

v.

Tonyia M. Sisson

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2017

* * * * *

Nancy L. Jennings, for appellee.

Patricia F. Lowery, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an accelerated case in which appellant, Tonyia Sisson, appeals from a judgment of the Huron County Court of Common Pleas, Domestic Relations Division, where the court assessed costs to appellant and dismissed, without prejudice, her motions to modify visitation, to modify allocation of parental rights and responsibilities, for

temporary orders, and for interim order of family counseling. Finding no error, we affirm the judgment of the trial court.

Assignments of Error

{¶ 2} Appellant sets forth the following assignments of error:

I. The Trial Court abused its discretion accepting a Magistrate's Order as to final disposition of an action.

II. The Trial Court abused its discretion assigning all court costs to Appellant without prior notice, counter to R.C. 3105.73.

Facts

{¶ 3} This accelerated appeal follows a divorce granted to the parties in June 2011. In the divorce decree, the trial court granted custody of the parties' four children to appellee. Appellant was given visitation every other weekend. This court affirmed the judgment. *See Sisson v. Sisson*, 6th Dist. Huron No. H-13-014, 2014-Ohio-2108.

{¶ 4} In October 2014, appellant sought a modification of the divorce decree to allow for a change to her visitation schedule. The matter was assigned to a magistrate. In April 2016, appellant voluntarily dismissed her modification action under Civ.R. 41(A). However, on May 4, 2016, she reinitiated the action in an effort to "modify visitation" and "modify allocation of parental rights and responsibilities."

{¶ 5} From the first modification action that appellant dismissed, the guardian ad litem (GAL) fee balance was carried forward to be charged to the parties. Appellant filed her motion in opposition to the imposition of the fees. The magistrate found the fees

reasonable and denied appellant's motion in opposition. Appellant was ordered to deposit \$500.32, and appellee was ordered to deposit \$228.77, within 30 days from the June 2, 2016 judgment. The different amounts for the parties was stated to be due to appellant dismissing the action and incurring all GAL fees from March 2016 to the date of dismissal.

{¶ 6} On June 15, 2016, appellant objected to the judgment, arguing it was an abuse of discretion to order her "to bear the costs of more than 50% of the fees for any of the outstanding amounts requested by the [GAL]." The objection was eventually overruled, and the court ordered appellant responsible for the stated sum.

{¶ 7} A hearing was held on June 22, 2016, in which the magistrate ordered both parties to deposit \$750 for additional GAL fees. The parties were to submit that amount by the "close of business Monday, July 25th, 2016." The magistrate noted that the issues of modifying visitation and allocating parental rights and responsibilities would depend on the deposit of said amounts.

{¶ 8} On August 29, 2016, the magistrate found the parties paid the initial deposits. He ordered the GAL, who had been appointed throughout the divorce proceedings, to represent the children. Appellant objected to the appointment of the GAL as counsel for the children, arguing that the GAL had a conflict of interest and was going to be a material witness, and therefore, her appointment would run afoul of Sup.R. 48(D). The objection was overruled on September 29, 2016.

{¶ 9} A pretrial hearing to address the visitation and parental rights issues was set for November 8, 2016. At the hearing, the magistrate again ordered the parties to submit an additional deposit of \$750, by December 12, 2016. Appellant's counsel requested an extension of time to make the deposit, stating "I don't think it's possible for my client to come up with \$750 by December 12th, and on top of that, it's Christmas." The magistrate then allowed the parties until the "close of business" on January 9, 2017, to make the deposit.

{¶ 10} Appellant failed to make the deposit by January 9, 2017. On January 18, 2017, the magistrate issued an order addressing the matter, which stated as follows:

It appearing to the Magistrate that, pursuant to a Magistrate's Order filed 17 November 2016, Plaintiff Cameron Sisson and Defendant Tonyia Sisson each have been ordered to deposit the sum of \$750 by the close of business 09 January 2017 with the Huron County Clerk of Courts for the fees of an attorney for Defendants/Children; and, further, that Defendant Tonyia Sisson has failed to make said deposit as ordered,

IT IS HEREBY ORDERED that, unless Defendant Tonyia Sisson complies in full with the orders filed 17 November 2016 in the instant matter by Monday, January 30, 2017 at 4:30 p.m., all pending motions filed by Defendant Tonyia Sisson, including, but not limited to, her Motion to Modify Visitation and Motion to Modify Allocation of Parental Rights and Responsibilities, shall be dismissed without further notice or hearing.

{¶ 11} On January 30, 2017, appellant moved the trial court to set aside the November 17, 2016 and January 18, 2017 orders. In the motion, appellant asserted three propositions as follows.

1) Pursuant to Civ.R. 53(D), the Magistrate is not permitted to issue and [sic] Order, which apparently terminates Defendant-Mother's case sua sponte;

2) None of the Magistrate Orders to date contain a notice of the right to Set Aside the Magistrate's Order within the ten (10) day timeframe and such lack of due process notice is not harmless error[;] and,

3) Mother, Tonyia Sisson, is being denied due process and equal access to justice, because, she cannot pay the funds for both the Guardian Ad Litem appointed by the Court in this case, as well as an additional attorney to represent the children in this case, in order to be heard on her motions, despite Plaintiff-Father's multiple and continuous disregard of the Orders of this Court.

{¶ 12} Also attached to the motion to set aside was a motion for a payment plan in which appellant requested the court permit her to pay \$25 per month, until the full deposit of the ordered \$750 was met. The motion was supported by an affidavit of poverty. Nevertheless, the court denied the motion. The trial court's January 31, 2017 judgment stated as follows:

It appearing to the Court that Defendant Tonyia Sisson has filed on May 4, 2016 a number of motions, including a Motion to Modify Allocation of Parental Rights and Responsibilities; further, that, pursuant to a Magistrate's Order filed November 17, 2016 after hearing held November 8, 2016, Plaintiff Cameron Sisson and Defendant Tonyia Sisson each have been ordered to deposit the sum of \$750.00 by close of business January 9, 2017 with the Huron County Clerk of Courts for the fees of an attorney for Defendants/Children; further, that Defendant Tonyia Sisson has not objected to said order nor did she file any motion to set aside the Magistrate's Order; further, that Defendant Tonyia Sisson has failed to make said deposit as ordered or deposit any amount to the Clerk since November 8, 2016; and, further, Defendant Tonyia Sisson has been provided a notice of intent to dismiss for lack of compliance and has continued to make no effort whatsoever to deposit any amounts toward the fees of an attorney for Defendants/Children, the Court finds that the motions filed by Defendant Tonyia Sisson should be dismissed pursuant to Civ.R. 41(B).

IT IS THEREFORE ORDERED that the all [*sic*] motions filed on or about May 4, 2016, including a Motion to Modify Visitation, Motion to Modify Allocation of Parental Rights and Responsibilities, Motion for Temporary Orders and Motion for Interim Order of Family Counseling, By

Defendant Tonyia Sisson in the above-referenced matter shall be and hereby are dismissed without prejudice; further, that costs are assessed to Defendant Tonyia Sisson.

{¶ 13} Appellant timely appeals from the January 31, 2017 judgment.

Law and Analysis

{¶ 14} In the first assigned error, appellant argues the trial court abused its discretion by dismissing her case “based on a magistrate’s order.” Appellee contends there was no abuse of discretion where the court dismissed the action for appellant’s failure to prosecute the claim.

{¶ 15} Civ.R. 41(B)(1) provides that, “[w]here the plaintiff fails to prosecute, or comply with these rules or *any court order*, the court * * * on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.” (Emphasis added.).

{¶ 16} An appellate court reviews the trial court’s grant of dismissal under Civ.R. 41(B) for an abuse of discretion. *O’Byron v. Poff*, 9th Dist. Wayne No. 02CA0061, 2003-Ohio-3405, ¶ 6. An abuse of discretion means “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} Here, the trial court found that appellant was “provided a notice of intent to dismiss for lack of compliance and has continued to make no effort whatsoever to deposit any amounts toward the fees of an attorney for Defendants/Children[.]” As a result, the court dismissed appellant’s claims pursuant to Civ. 41(B)(1), as stated in its January 31,

2017 judgment. Although appellant now argues the court's January 18, 2017 order needed to be journalized as a "magistrate's decision," and not a "magistrate's order," we are not convinced the distinction relieved appellant of the duty to comply with the demand.

{¶ 18} Consequently, we find no abuse of discretion in disposing the matter without prejudice, and appellant's first assigned error is not well-taken.

{¶ 19} In the second assigned error, appellant asserts the trial court abused its discretion by failing to examine R.C. 3105.73 factors when dismissing her "motion for lack of funds to deposit" and apportioning her all the court costs. Appellee contends the court did not abuse discretion in assessing all costs to appellant because it was the result of her actions.

{¶ 20} R.C. 3105.73(B) states, "[i]n any post-decree motion or proceeding that arises out of an action for divorce, * * * the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable."

{¶ 21} "In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets." *See* R.C. 3105.73(B).

{¶ 22} Review of a trial court's award of litigation costs under R.C. 3105.73(B) is based on an abuse of discretion standard. *Adams v. Adams*, 3d Dist. Union No. 14-13-01, 2013-Ohio-2947, ¶ 23.

{¶ 23} We further note that Civ.R. 41(D) states that, “[i]f a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper[.]”

{¶ 24} Here, the record supports that appellant not only failed to comply with the court’s order in depositing the \$750 for GAL fees, but that she also dismissed the case in April 2016 and refiled it in May 2016. We find that based on her conduct in both failing to comply and in voluntarily dismissing her case, the trial court was well within its discretion to assess the court costs to appellant.

{¶ 25} Accordingly, appellant’s second assignment of error is not well-taken.

Conclusion

{¶ 26} The judgment of the Huron County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

James D. Jensen, P.J.

JUDGE

Christine E. Mayle, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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