

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Federal National Mortgage Association,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-844
	:	(C.P.C. No. 12CV-14322)
Gina G. Schmidt	:	
[n.k.a. Gina G. Gasbarro] et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
Jack G. Schmidt, Jr.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2015

Onda, LaBuhn, Rankin & Boggs Co., LPA, Timothy S. Rankin, and Derek L. Graham, for Gina G. Schmidt.

The Anelli Law Firm, LLC, and Dianna M. Anelli, for Jack G. Schmidt, Jr.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Jack G. Schmidt, Jr., appeals from a judgment of the Franklin County Court of Common Pleas, General Division, overruling his objections to a magistrate's decision and awarding sanctions in the form of attorney fees payable to appellant's former wife, Gina G. Gasbarro, f.k.a. Gina G. Schmidt. The underlying action began as a foreclosure brought by Federal National Mortgage Association ("FNMA") against the couple's marital residence. FNMA had no role in the sanctions proceeding and has not participated in the present appeal.

I. Facts and Procedural History

{¶ 2} This foreclosure action in the general division of the court of common pleas (hereinafter "general division") proceeded contemporaneously with the parties' divorce case in the Franklin County Court of Common Pleas, Division of Domestic Relations (hereinafter "domestic court"). Because the award of sanctions in this case is based on a finding that Schmidt filed frivolous cross-claims in the foreclosure case by raising matters that were already set for adjudication in the divorce case, we will review the chronological history of both cases in some detail.

{¶ 3} The parties executed a prenuptial agreement and married in 1988. In 2009, both parties executed a mortgage on the marital residence in favor of FNMA's predecessor-in-interest, although only Gasbarro signed the accompanying note. On February 28, 2012, Gasbarro filed her complaint for divorce in the domestic court. On August 3, 2012, the domestic court issued temporary orders providing that Schmidt, who was in possession of the marital residence, would make the required payments on the mortgage loans. On August 30, 2012, Schmidt filed his counterclaim for divorce and asked for enforcement of the parties' prenuptial agreement, including those sections governing ownership of the marital residence.

{¶ 4} The note on the residence remained unpaid, and on November 15, 2012, FNMA began the present case in the general division with a complaint in foreclosure, naming Gasbarro a defendant based on her default on the promissory note. FNMA also named Schmidt as a defendant due to his ownership interest in the property and identified various competing lienholders. On December 18, 2012, Schmidt filed his answer and counterclaim against FNMA in the foreclosure case. This pleading also stated cross-claims against Gasbarro for breach of contract on a third-party beneficiary theory, promissory estoppel, indemnification, declaratory judgment, and an accounting. The cross-claims contained enumerated allegations referencing the pending divorce action in domestic court, seeking enforcement of the couple's prenuptial agreement, and acknowledging that the couple's rights and responsibilities with respect to the marital residence were the subject of the divorce action.

{¶ 5} On January 15, 2013, Gasbarro moved to dismiss Schmidt's cross-claims in the foreclosure action, asserting that the general division lacked subject-matter

jurisdiction because a court of competent jurisdiction, the domestic court, already had the pertinent issues before it.

{¶ 6} While the above motion to dismiss was pending in the general division, the domestic court granted a continuance of trial in the divorce case "based upon the foreclosure action pending * * * which may affect this Court's decision herein." *Schmidt v. Schmidt*, Franklin C.P. No. 12DR-02-0856 (Feb. 4, 2013 agreed entry continuing trial).

{¶ 7} Schmidt opposed the motion to dismiss, filing a lengthy memorandum and asserting that his cross-claims were necessary to determine the value of the marital residence, to ensure that the court would enter judgment "against the appropriate borrower," and to protect himself personally against any possible deficiency judgment growing out of the foreclosure. (R. 61, at 3.) Schmidt also asserted that the parties had "waived their statutory right to have the Domestic Relations Division adjudicate" issues relating to valuation and apportionment of the marital residence. (R. 61, at 5.) He based this last assertion on the trial continuance granted by the domestic court.

{¶ 8} On April 11, 2013, the general division granted Gasbarro's motion to dismiss Schmidt's cross-claims. The court found that "[n]ot only has the Domestic Court already obtained jurisdiction over the parties' rights and obligations regarding the marital residence, it has also issued an order expressly setting forth those obligations." (R. 72, at 3-4.) "[T]he Court notes that the parties' current rights and obligations regarding the marital residence are governed by agreements and orders issued by the Domestic Court. Any disputes arising therefrom must be resolved by the Domestic Court. As such, this Court is without jurisdiction to consider Mr. Schmidt's cross-claim[s]." (R. 72, at 4.) Although Gasbarro's motion to dismiss included a prayer for both costs and fees, the entry of dismissal awards only costs and makes no mention of attorney fees.

{¶ 9} On April 29, 2013, the domestic court entered an agreed judgment entry and decree of divorce reflecting the parties' resolution of their divorce case on the eve of trial. *Schmidt v. Schmidt*, Franklin C.P. No. 12DR-02-0856 (Apr. 29, 2013 final order). The decree addressed all marital property issues including disposition of the marital residence. The decree also provided that each party would be responsible for his or her own attorney fees.

{¶ 10} On September 18, 2013, FNMA dismissed its foreclosure complaint. Tangential references in the record indicate that FNMA took this step after Gasbarro secured financing from her family to cure her default under the FNMA note.

{¶ 11} On September 24, 2013, Gasbarro moved for sanctions in the general division, pursuant to R.C. 2323.51(A)(2)(a)(ii), seeking legal fees and expenses incurred by Gasbarro in defending against Schmidt's cross-claims in the foreclosure case. The court referred the matter to a magistrate for a hearing. After hearing extensive testimony, the magistrate rendered a decision awarding \$22,906.50 in attorney fees to Gasbarro. Schmidt filed objections to the magistrate's decision. The court overruled these, finding that Schmidt's cross-claims were frivolous under R.C. 2323.51(A)(2)(a)(ii) and that Schmidt had not rebutted Gasbarro's testimony at the hearing regarding the amount of fees incurred. The court entered judgment accordingly and this appeal ensued.

II. Assignments of Error

{¶ 12} Schmidt brings the following assignments of error on appeal:

[1.] The trial court erred in concluding that the Domestic Relations Court had full equitable powers and jurisdiction to determine the entirety of the claims between Mr. Schmidt and Ms. Gasbarro, including the evaluation and disposition of the marital residence.

[2.] The trial court erred when it determined that it had concurrent and co-extensive jurisdiction with the Domestic Relations Court, that Ms. Gasbarro first invoked the Jurisdiction of the Domestic Relations Court in Filing the Divorce Action and that the Divorce Court had Exclusive Jurisdiction over the Marital Property to the Exclusion of All Other Courts.

[3.] The trial court erred when it ruled that Mr. Schmidt's cross-claims against Ms. Gasbarro constituted conduct that no reasonable attorney would have brought in light of the existing law.

[4.] The trial court erred in sanctioning Mr. Schmidt by awarding Ms. Gasbarro over \$22,000 in attorney fees.

[5.] Res judicata prevents an attorney's fee award in this case.

III. Standard of Review

{¶ 13} Before considering the individual assignments of error we will review the standard under which the court awarded sanctions in this case. Under R.C. 2323.51(B)(1), a court may award court costs, reasonable attorney fees, and other reasonable expenses to any party in a civil action that is adversely affected by an opponent's frivolous conduct. When considering a motion for such an award, the court must hold a hearing to determine whether the alleged conduct was frivolous, whether any party was adversely affected by it, and the amount of award that will cover the additional costs incurred. *Bennett v. Martin*, 10th Dist. No. 13AP-99, 2013-Ohio-5445, ¶ 17. For purposes of R.C. 2323.51(A)(1)(a), "conduct" includes "the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action * * * or the taking of any other action in connection with a civil action." "Frivolous conduct" is defined as the conduct of a party or the party's attorney that satisfies any of the following:

(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

R.C. 2323.51(A)(2)(a)(i) through (iv); *see also Carasalina, LLC v. Bennett*, 10th Dist. No. 14AP-74, 2014-Ohio-5665, ¶ 30.

{¶ 14} This court has held that conduct is frivolous, pursuant to R.C. 2323.51(A)(2)(a)(ii), when "no reasonable attorney would have brought the action in light of the existing law." *Id.* at ¶ 31, citing *Groves v. Groves*, 10th Dist. No. 09AP-1107, 2010-Ohio-4515, ¶ 17. Whether a reasonable attorney would have brought an action or filed a given pleading is a question of law, which this court reviews de novo. *Id.* In contrast, where a trial court has made a well-founded determination of frivolous conduct, the decision to assess or not assess a penalty for that conduct lies within the sound discretion of the trial court and not will be disturbed on appeal absent an abuse of discretion. *Wiltberger v. Davis*, 110 Ohio App.3d 46, 52 (10th Dist.1996).

IV. First and Second Assignments of Error – Jurisdiction

{¶ 15} Schmidt's first assignment of error asserts that the trial erred when it held that the domestic court had jurisdiction to determine all claims between Schmidt and Gasbarro concerning the valuation and disposition of the marital residence. Schmidt's second assignment of error asserts that the trial court erred when it found that the domestic and general divisions had co-extensive jurisdiction, and that once the domestic court's jurisdiction was invoked with respect to the marital residence, that jurisdiction operated to the exclusion of that of the general division. Because these assignments of error raise closely related issues, we address them together.

{¶ 16} This case is not one in which either court patently lacked subject-matter jurisdiction at the outset. Rather, it is a question of whether it was reasonable for Schmidt and his counsel to assume that the later-invoked court would retain concurrent, and therefore duplicative, jurisdiction over certain issues throughout litigation in both forums.

{¶ 17} The general division indisputably has subject matter jurisdiction in foreclosure cases. *See generally Arlington Bank v. BEE, Inc.*, 10th Dist. No. 10AP-41, 2010-Ohio-6040, ¶ 12. R.C. 3105.011 explicitly confers on the domestic court "full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." This includes the valuation and division of marital property. *Clark v. Clark*, 165 Ohio St. 457 (1956). "It is a fundamental rule that, as between courts of

concurrent and coextensive jurisdiction, the one whose power is first invoked by the institution of proper proceedings * * * acquires the right to adjudicate upon the whole issue and to settle the rights of the parties to the exclusion of all other tribunals. This rule obtains in divorce actions.' " *State ex rel. Miller v. Court of Common Pleas of Lake Cty.*, 151 Ohio St. 397, 400-01 (1949), quoting 14 Ohio Jurisprudence, 410, Section 30.

{¶ 18} The domestic court here gained jurisdiction over the adjudication of the rights and obligations of the parties with respect to the marital residence when Gasbarro commenced the divorce action in February 2012. The domestic court exercised that jurisdiction when it issued temporary orders on August 3, 2012 mandating that Schmidt make payments on the first and second mortgage loans for the marital residence and any other expenses related to the property. Schmidt then filed his answer in the divorce action specifically invoking the existence of a prenuptial agreement governing the ownership of the marital residence. It was not until December 2012, well after all these events had both vested jurisdiction in the domestic court and made clear the parties' recognition of that jurisdiction, that Schmidt attempted to raise multiple identical issues in parallel proceedings in the foreclosure case.

{¶ 19} Schmidt does not dispute the timeline of these events in either case. On appeal, he presents three lines of argument. First, he relies on the proposition that the domestic court relinquished jurisdiction when it adopted an agreed entry that granted a continuance of trial in the divorce case. Second, he asserts that the cross-claims in the foreclosure action are distinct from property issues to be litigated in the divorce. Third, he argues that the doctrine of *lis pendens* operated here to deprive the domestic court of its first-acquired jurisdiction to settle the property issues between the parties.

{¶ 20} We first note that Schmidt mischaracterizes the nature of the domestic court's February 4, 2013 order continuing trial in the divorce case. Schmidt refers to this as an order granting his "Motion * * * to Stay Further Proceedings Pending Resolution of Complaint in Foreclosure." *Schmidt v. Schmidt*, Franklin C.P. No. 12DR-02-0856 (Jan. 14, 2013 motion for stay). He accordingly uses the term "stay" throughout his argument on appeal when referring to this action by the domestic court. (Schmidt's Brief, at 3, 9, 27.) The domestic court granted a specific continuance, rather than a general stay, and this was in response to a joint motion for continuance filed by Schmidt

and Gasbarro a few days after his motion for stay. *Schmidt v. Schmidt*, Franklin C.P. No. 12DR-02-0856 (Jan. 24, 2013 joint motion for continuance.) The domestic court simply acknowledged the parties' concerns that proceedings in the foreclosure case might impact the divorce action and warrant a limited delay for a given event. This does not create a tenable inference that the domestic court intended to relinquish its authority and obligation to adjudicate the property issues arising in the divorce. We conclude that this action by the domestic court is without impact on the jurisdictional issues in this case.

{¶ 21} Schmidt next argues that jurisdictional priority does not apply when the causes of action are not the same. The history of the two cases, however, shows no distinct causes of action. The allegations in Schmidt's cross-claims in the foreclosure and his answer in the divorce case involve identical issues concerning the legal rights and responsibilities of the parties with respect to the division of marital property, including application of the existing prenuptial agreement, which was clearly at issue in the divorce. Schmidt fails to create a distinction between the property issues raised in his cross-claims in the foreclosure action and those issues presented in the divorce case.

{¶ 22} Schmidt finally argues that the doctrine of *lis pendens* deprived the domestic court of jurisdiction. He argues that the marital residence was not specifically identified by address and legal description in any of the divorce pleadings and that, as a result, specific questions concerning the property were still open to resolution in foreclosure action, even where they concerned allocation of the value and ownership of the property as a marital asset. Schmidt asserts that *lis pendens*, codified in Ohio at R.C. 2703.26, requires a sufficiently accurate description of the property to permit reliable identification. As a result, Schmidt asserts the marital residence was not subject to *lis pendens* and, therefore, not "pending" before the domestic court so that that court could have invoked its exclusive jurisdiction over the property.

{¶ 23} The doctrine of *lis pendens* is a notice doctrine, not one governing jurisdiction. It operates to provide constructive notice of a pending lawsuit concerning specifically described property and thereby imputes knowledge of all competing (and possibly superior) claims against the property arising from the suit. *Beneficial Ohio Inc. v. Ellis*, 121 Ohio St.3d 89, 2009-Ohio-311, ¶ 19-20. It is difficult to discern in the present case how the *lis pendens* statute would operate to deprive the domestic court of

its clearly acquired and exercised jurisdiction and vest the later-invoked general division with jurisdiction to determine issues pertaining to the rights of Schmidt and Gasbarro in the marital residence.

{¶ 24} We accordingly find no error in the trial court's determination that the domestic court was vested with full equitable powers and jurisdiction to determine all aspects of the dispute between Schmidt and Gasbarro over ownership of the marital residence and retained that jurisdiction to the exclusion of any jurisdiction in the general division court to determine those issues. Schmidt's first and second assignments of error are overruled.

V. Third Assignment of Error – Frivolous Conduct

{¶ 25} Schmidt's third assignment of error asserts that the trial court erred when it concluded that Schmidt's filing of cross-claims in the foreclosure action constituted conduct that no reasonable attorney would have brought in light of the existing law.

{¶ 26} At the sanctions hearing, Schmidt attempted to show the reasonableness of his filings through the testimony of his former counsel, Brian Laliberte. Attorney Laliberte testified that he filed the cross-claims on Schmidt's behalf in the sincere belief that these were necessary to preserve the contested issues and thus Schmidt's interest in the marital residence. Attorney Laliberte further testified that he filed the relevant pleadings only after consulting with a colleague who specialized in foreclosure defense.

{¶ 27} The court's determination on this question of reasonableness should not be dependent on the subjective belief or opinions of either the sanctioned party or counsel. *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948 (10th Dist.). Our discussion above regarding the relative jurisdiction of the courts largely settles this question because we find that the acquisition of jurisdiction in the domestic court was clear and comprehensive, leaving no room for a reasonable attorney to believe that concurrent jurisdiction remained in the general division. Again, the subjective belief of the party or counsel is not the standard for determination of whether a pleading is warranted under existing law or a good-faith extension of existing law.

{¶ 28} Fundamental notions of fairness and considerations of judicial economy make clear that the law "will not permit a defendant to be harassed by two actions or to be vexed twice for the same cause." *Miller*, 151 Ohio St. at 400. (Internal citation

omitted.) Compounding the problem here, the issues related to jurisdiction were fully laid out in Gasbarro's January 15, 2013 motion to dismiss, yet Schmidt continued to oppose dismissal of these claims until the trial court's entry on April 11, 2013 dismissing the claims. If the lack of jurisdiction was not evident enough on the face of the pleadings at the time Schmidt filed his answer in the foreclosure action, it clearly should have been apparent to a reasonable attorney shortly thereafter. Schmidt's third assignment of error is accordingly overruled.

VI. Fourth Assignment of Error – Attorney Fees Amount

{¶ 29} Schmidt's fourth assignment of error asserts that the trial court's award of \$22,906.50 in legal fees incurred by Gasbarro is excessive. We review the trial court's calculation of the amount of sanctions under a manifest-weight standard, considering the evidence presented before the trial court based on the evidence at the hearing. *Buettner v. Bader*, 6th Dist No. L-97-1106 (Jan. 9, 1998); *Bell v. Nichols*, 10th Dist. No. 10AP-1036, 2013-Ohio-2559, ¶ 63-64. As such, we review the trial court's reward by limiting our review to examine the record to determine if there was competent, credible evidence to support the judgment. *Id.* at ¶ 63.

{¶ 30} As both the magistrate and trial court noted, the evidence before the court regarding fees consisted of billing invoices and summaries provided by Gasbarro and her counsel. Schmidt presented little evidence to develop his theory that the fees were either irrelevant or excessive.

{¶ 31} During testimony provided by Gasbarro's attorney at the fee hearing, counsel for Schmidt did raise the timing of certain items included in the requested fees, since these billed items fell after the court's dismissal of the cross-claims. Counsel for Gasbarro responded that, although the cross-claims were dismissed, residual complications from these cross-claims persisted in both the domestic and foreclosure cases for a time, requiring minor clarifications and alterations in the course of litigation. There was no testimony to rebut this explanation.

{¶ 32} Based on the testimony presented by Gasbarro's counsel, as well as the documentary evidence submitted in support of the award of fees, we find that there was competent, credible evidence in the record to support the trial court's computation of sanctions. Under this standard, we find no error in the magistrate and trial court's

conclusion that the fees were unreasonable and unnecessary in defending the unwarranted cross-claims pursued by Schmidt. Because the award of sanctions was not against the manifest weight of the evidence, Schmidt's fourth assignment of error is overruled.

VII. Fifth Assignment of Error – Res Judicata

{¶ 33} Finally, Schmidt, in his fifth assignment of error, asserts that the trial court could not award sanctions because, by application of the doctrine of res judicata, its prior failure to award fees and costs to Gasbarro, as the prevailing party in the motion to dismiss, concluded this aspect of the action and prevented relitigation of an award of fees. Schmidt also points to the fact that the domestic court had the statutory authority to award fees in the divorce action under R.C. 3105.73(A) and chose not to do so.

{¶ 34} Schmidt presents no pertinent authority to support this reliance on res judicata. To the contrary, nothing prevents a court from awarding fees in subsequent proceedings even without a judgment on the merits. *Gaskill v. Doss*, 5th Dist. No. 00 CA 4 (Dec. 26, 2000) (considering fee provision in Consumer Sales Practices Act). This was the first opportunity offered to the general division to consider an award under R.C. 2323.51. The fact that the domestic court required the parties to pay their own legal fees in the divorce decree relates only to the equities of a fee allocation in divorce proceedings under R.C. 3105.73(A) and had no preclusive effect on a determination of frivolous conduct in the separate proceedings before the general division. Schmidt's fifth assignment of error is overruled.

{¶ 35} The trial court in the present case determined that various aspects of the cross-claims in the foreclosure action were frivolous because no reasonable attorney would have brought the action in the general division foreclosure action when all aspects of those cross-claims were already subject to determination in the divorce action before the domestic court.

VIII. Conclusion

{¶ 36} Having overruled appellant Jack G. Schmidt's five assignments of error, we agree and affirm the judgment of the Franklin County Court of Common Pleas,

General Division awarding sanctions payable to appellee Gina G. Gasbarro pursuant to R.C. 2323.51(A)(2)(a)(ii).

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
