[Cite as *Katz v. Katz*, 2015-Ohio-3986.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dolly E. Katz,	:	
Plaintiff-Appellee,	:	
		No. 15AP-143
v.	:	(C.P.C. No. 09DR-12-4873)
Larry Katz et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 29, 2015

Briscoe Law Offices Co., L.P.A., and *Colleen H. Briscoe*, for appellee.

Strip, Hoppers, Leithart, McGrath & Terlecky Co., L.P.A., and *Paul W. Leithart, II*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations

SADLER, J.

{¶ 1} Defendant-appellant, Larry Katz, appeals the January 28, 2015 decision and entry of the Franklin County Court of Common Pleas, Division of Domestic Relations, adopting the magistrate's decision to deny appellant's motion to modify the decree of divorce and to grant the motion to dismiss of plaintiff-appellee, Dolly E. Katz. For the following reasons, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The parties were married on December 31, 1986. On December 14, 2009, appellee filed for divorce from appellant. After numerous motions, intermediate judgments, and temporary orders, the matter came to trial over six days in March 2012.

The trial court issued its decision and judgment entry/decree of divorce on April 17, 2013. In the decree of divorce, the trial court awarded appellant the marital residence along with 48 marital rental properties and ordered appellant to pay appellee a cash lump-sum payment of $1,500,694 to equalize the property division.

{¶ 3} For purposes of this property division, the trial court determined the market value of marital real estate based on the auditor's value of the properties because "neither party presented an expert appraisal of any of the properties." (Divorce Decree, 14.) The court further specified that:

> Mr. Katz testified that the gross values listed on Defendant's Exhibit J were based on appraisals dated January 2009, and he further testified that these values reflected his opinion as to the current values. Mr. Katz testified that the values stated for 1234 Norman and 2831 Fareham Court were based upon his own independent analysis, and testified that they should be valued in the amount of $45,000.00, and $67,000.00 respectively. See Defendant's Exhibit J, notation of "per client." He based this opinion on the location and comparison to other property values in the area, as well as his experience with renting real estate. Mrs. Katz presented current Franklin County Auditor's values for the Franklin County properties and Fairfield County auditor value for the Tillman Court property. A summary of auditor's values for the properties are reflected in Plaintiff's Exhibit 1, with the supporting documentation following the summary within the exhibit. The Court also notes that the seven (7) properties titled to "Larry Katz Trustee" were not included in Defendant's Exhibit J. The Court finds that Mr. Katz's testimony as to the issue of valuation of the properties was not credible, as he failed to provide supporting documentation. Therefore, **the Court finds that the Auditor's values were the only credible evidence presented to establish valuation, and so finds the Auditor's values for each of the properties to be the fair market value.**
>
> Additionally, other than the monthly amount of rent for each rental property, no evidence was provided to indicate the value of each of the rental properties as to rental history, payment history of renters, likelihood of continued, on-going rental, or the percentage/allocation of overall expenses to each property. Without necessary additional evidence, this Court cannot make findings beyond the stated auditor's value of the properties.

(Emphasis added.) (Divorce Decree, 14-15.)

{¶ 4} Regarding the property equalization payment, the court acknowledged that "in order to effectuate this equalization provision with the payment of the total sum of $1,500,694.00 by Defendant Husband to Plaintiff Wife, such a provision will necessarily require Mr. Katz to select and liquidate real properties awarded to him." (Divorce Decree, 56.) Therefore, the court ordered that:

> Defendant Husband shall commence forthwith the process of sale of real properties which he shall solely select, and further, he shall show diligent, good faith efforts on a continual and regular basis to cause the sale of the necessary properties.
>
> Upon the sale of any such property, Mr. Katz shall forthwith distribute the net proceeds to Mrs. Katz, less one-half of the usual and customary actual costs of sale, until the total sum of $1,500,694.00 is paid in full. Mr. Katz must provide bonafide closing documents/purchase settlement statements (Form HUD-1) to demonstrate the actual costs of sale. The Court is cognizant that the sale of real properties is influenced by market forces, but that the payment to Mrs. Katz totaling $1,500,694.00 must be completed within a reasonable period of time, not to exceed three years from the effective date of the filing of this Judgment Entry - Decree of Divorce.
>
> The Court specifically retains jurisdiction to enforce the terms of this provision, including, but not limited to, the appointment of a Special Master, and if necessary, to modify the terms of this provision.

(Divorce Decree, 56-57.)

{¶ 5} Following the decree of divorce, on May 1, 2013, appellant filed a motion for new trial, which was promptly denied by the trial court. Appellant then appealed the decree of divorce to this court, assigning for error, among other real estate related items, "1. The Divorce Decree orders Larry to pay Dolly, as property equalization, the fixed amount of $1,500,694 in cash." *Katz v. Katz*, 10th Dist. No. 13AP-409, 2014-Ohio-1255, ¶ 11 ("*Katz I*"). In unanimously overruling this assignment of error, we stated:

> Larry Katz argues this allocation is unfair because it forces him to liquidate some of his properties to pay Dolly Katz, and **forces him to undergo all the costs and risks associated with selling the properties.** We disagree. * * * He has three years to pay the award. Nothing in the

> decree requires him to liquidate property. He can mortgage properties in lieu of selling them, he can pay the award out of other funds that he controls, or he can liquidate some of his properties, but he has complete control over that process. **Any information regarding repairs, costs, tax ramifications, and risks associated with liquidation of these marital assets remained and remains at all times with Larry Katz. However, there was no evidence in the record of what any of those costs or risks might be. Larry Katz may be correct in his presumption that he will undergo certain risks associated with selling properties, but his evasiveness and lack of credible testimony provided no information that the trial court could use in making those evaluations.**
>
> The trial court had another reason for keeping the real properties in Larry Katz's possession. There was evidence in the record that Larry Katz concealed his intentions and attempted to deprive his spouse of her share of certain proceeds. If, as his counsel suggests, the court should have ordered liquidation and division of the cash proceeds, Dolly Katz would be unable to protect her interest in the net proceeds. Larry Katz could claim large expenses, costs of sale, or choose properties that would give him the greater return and cause Dolly Katz to be deprived of her fair share. Further, since Larry Katz is a real estate broker, the costs of sale and process of selling the property could be problematic to ascertain.
>
> Had Larry Katz been more forthcoming in his testimony and **had he produced documentation for some of his claims**, the trial court might have come to a different conclusion for property allocation.

(Emphasis added.) *Katz I* at ¶ 18-20.

{¶ 6} Additionally, we also remanded the case for further proceedings to add a property which both parties agreed should have been classified as marital property.[1] On remand, the trial court again used the auditor's value of the excluded property to establish its market value and, as a result, the property equalization payment owed to appellee increased to $1,523,171.

[1] On May 29, 2014, this court denied appellant's application of reconsideration of our March 27, 2014 decision, in which appellant again took issue with the property equalization payment.

{¶ 7} On April 16, 2014, appellant filed a Civ.R. 60(B) motion for relief from the April 17, 2013 judgment and divorce decree, contending that appellee lied on various items and that the judgment as stated "cannot be done." (Motion for Relief from Judgment, 1.) On May 5, 2014, the trial court denied the motion, finding that appellant had failed to set forth valid grounds to support the request for relief from judgment and had not sufficiently demonstrated a meritorious claim or defense.

{¶ 8} On November 14, 2014, appellant filed with the trial court a motion to modify the property division equalization, asserting that appellant, upon a hearing, will "provide evidence that the properties which constitute the marital real estate have a value far less than $3,001,388" due to the properties' tenancies, need of repairs, and locations in undesirable neighborhoods. (Motion to Modify, 3.) After new market rates are established, appellant proposed that the court order him to pay one-half of the equity over five years or, alternatively, the court order that the parties equally divide the net proceeds after a sale of a property less costs and income taxes associated with the sale. According to appellant, "[t]he trial judge clearly understood that the sale of the real estate for the Auditor values might be problematic and therefore reserved jurisdiction to modify the provisions of section IV(B)." (Motion to Modify, 3.)

{¶ 9} Appellee filed a motion to dismiss appellant's motion to modify, contending that appellant was attempting to re-litigate the property settlement and that, under R.C. 3105.171(I), the trial court did not have continuing jurisdiction to modify the property award but could clarify and enforce the property award. A magistrate agreed, issuing a decision that found, as a matter of law, that the trial court could not retain jurisdiction over the division of property set forth in a divorce decree. The trial court magistrate noted that this court upheld the decree on appeal and that the motion "appears to be yet one more attempt to change the provisions of the Divorce Decree." (Dec. 3, 2014 Magistrate's Decision, 2.)

{¶ 10} Appellant filed timely objections to the magistrate's decision. On January 28, 2015, the trial court adopted the magistrate's decision, thereby overruling appellant's objections. In so ruling, the trial court agreed that it could not retain jurisdiction over the division of property in a divorce decree to make substantive changes to the decree at a future date under R.C. 3105.171(I) or *Cameron v. Cameron*, 10th Dist.

No. 12AP-349, 2012-Ohio-6258, ¶ 10. Further, the trial court found the decree to be unambiguous and determined that the trial court included the reservation of jurisdiction provision to permit enforcement of the property division terms. Finally, the trial court referred to *Katz I* and stated "[appellant] clearly had an opportunity to present what he believed to be an appropriate value, and it is not appropriate to allow him to re-litigate" the issue. (Jan. 28, 2015 Decision and Entry, 5.)

II. ASSIGNMENT OF ERROR

{¶ 11} Appellant assigns one assignment of error for our review:

> The trial court erred when it overruled the Motion of Defendant (Appellant) Larry Katz for Order Modifying Judgment Entry/Decree of Divorce.

III. DISCUSSION

{¶ 12} The assignment of error challenges the trial court's adoption of the magistrate's decision. When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, ¶ 10. *See also Campbell v. Campbell*, 3d Dist. No. 1-04-11, 2004-Ohio-4294, ¶ 6 (reviewing whether the trial court had jurisdiction to reopen the divorce decree on matters of personal property division for an abuse of discretion). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). When applying the abuse of discretion standard, this court may not substitute its judgment for that of the trial court. *Id.*

{¶ 13} On appeal, appellant contends that he possesses and should be permitted to present evidence—tenancies, repairs, undesirable neighborhoods—which proves the real estate actually is worth less than the $3,001,388 total, derived from auditor's values, which the trial court used as market value. Appellant further contends that "[t]he trial judge did not have the benefit of appraisals by certified appraisers" and "[i]n light of the fact that the values of the marital real estate [were] quite speculative, given the nature of

the county appraisal process, the trial judge ordered the sale of the real estate but reserved jurisdiction to revisit the issue if a party so requested." (Appellant's Brief, 6.)

{¶ 14} " 'The modern view of *res judicata* embraces the doctrine of collateral estoppel, which basically states that if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same claim or a different claim.' " (Emphasis sic.) *Culp v. F.I.G. Holding Co.*, 10th Dist. No. 96APE04-415 (Nov. 26, 1996), quoting *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 74 (1977). Further, in the context of the property division in a divorce decree, " '[n]ot only does R.C. 3105.171(I) prohibit a court from modifying a prior property division, but (appellant's) effort to do so is barred by res judicata, i.e. collateral estoppel * * *' ". *Boehnlein-Pratt v. Ventus Corp.*, 5th Dist. No. 15CA002, 2015-Ohio-2794, ¶ 42, quoting *Cornell v. Rudolph*, 3d Dist. No. 1-10-89, 2011-Ohio-4322, ¶ 17. *See also Etienne v. Etienne*, 4th Dist. No. 04CA16, 2005-Ohio-4953, ¶ 17.

{¶ 15} Here, through a motion to modify, appellant is attempting to revive the issue of the valuation of the real estate for purposes of the property division in the divorce degree. However, appellant already had the opportunity to present evidence to the trial court showing that properties at issue were encumbered by tenancies, were in need of repair, or were located in undesirable neighborhoods, but failed to do so. Appellant also already had, in *Katz I*, the opportunity to argue to this court that these risks affected the property equalization payment. In *Katz I*, we were unpersuaded by appellant's argument, and appellant apparently did not appeal our decision. Considering these two prior final judgments, the trial court did not act unreasonably in concluding it was inappropriate to allow appellant to re-litigate this issue now.

{¶ 16} Further, appellant may not re-litigate the real estate values in the divorce decree under the alleged continuing jurisdiction of the court. Such a proposition runs squarely against the legislature's policy preference of finality of property divisions in divorce decrees, as codified in R.C. 3105.171(I). *See* R.C. 3105.171(I) ("[a] division or disbursement of property or a distributive award * * * is not subject to future modification by the court except upon the express written consent or agreement to the modification by both spouses.").

{¶ 17} Appellant offers no authority to show how *Cameron*, which concerned a divorce decree's division of police pension benefits, alters the general rule set by R.C. 3105.171(I) in this case. Retirement and pension benefits are a "unique type of asset," which are not automatically analogous to real estate division or valuations in the divorce asset division context. *Thomas v. Thomas*, 10th Dist. No. 00AP-541 (Apr. 26, 2001). *See also* R.C. 3105.89 and 3105.81 (stating that a trial court's retention of jurisdiction to "modify" an order dividing payments from public retirement programs is permissible to "implement[]," "enforc[e]," or "carry[] into effect" the order under certain circumstances).

{¶ 18} Regardless, the divorce decree unambiguously shows the trial court did not retain jurisdiction to revisit the values of the real estate for purposes of the distributive award but, instead, settled on the best evidence presented of those values and chose to designate a lump-sum amount to protect appellee's share of the marital estate in light of record evidence of appellant's conduct. In fact, this court already determined that the decree of divorce clearly placed the risks associated with the sale of these properties with appellant due to his "evasiveness and lack of credible testimony." *Katz I* at ¶ 18.

{¶ 19} Finally, to the extent that appellant alternatively argues that the parties, by failing to appeal the jurisdiction provision, consented to the court's ability to modify the real estate valuations, this argument is counter to the language of R.C. 3105.171(I), which clearly requires such consent to be not only "express" but also in writing.

{¶ 20} In summary, appellant had a full and fair opportunity to settle all issues pertaining to value of the real estate with appellee during the divorce proceedings and is precluded from re-litigating those matters with her now. Therefore, the trial court's decision to deny appellant another opportunity to present evidence of the value of the real estate was not an abuse of discretion.

{¶ 21} Accordingly, appellant's assignment of error is overruled.

IV. CONCLUSION

{¶ 22} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.
