[Cite as *Dragon v. Dragon*, 2010-Ohio-4694.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

HOLLY M. DRAGON,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2009-A-0058 and 2010-A-0005**
PAUL A. DRAGON,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 DR 162.

Judgment: Affirmed.

Robert E. Somogyi, Hans C. Kuenzi Co., L.P.A., Skylight Office Tower, Suite 410, 1660 West Second Street, Cleveland, OH 44113 (For Plaintiff-Appellee).

John W. Bosco, John W. Bosco Co., L.P.A., Paramount Building, 31805 Vine Street, Willowick, OH 44095 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.,

{¶1} Appellant, Paul A. Dragon, appeals the judgment of the Ashtabula County Court of Common Pleas awarding attorney fees in the amount of $3,500 to appellee, Holly M. (Dragon) Moravick, and adopting an "Agreed Judgment Entry" submitted by appellee's attorney. For the reasons stated herein, we affirm the judgment of the trial court.

{¶2} The parties to the instant appeal were married in 2001 and have two minor children. The parties divorced in January of 2009. As part of the final divorce decree,

appellee was awarded both child support and spousal support. Appellant filed a motion to modify child support on March 31, 2009. A hearing on said motion was scheduled for July 2, 2009; however, prior to the commencement of the hearing, the parties purportedly reached a settlement agreement. Appellee's attorney filed an "Agreed Judgment Entry" with the trial court stating that the "parties have resolved their differences by agreement, the terms of which are set forth herein[.]"

{¶3} Neither the parties nor the attorneys signed the entry. Appellant did not file objections to the "Agreed Judgment Entry"; however, on July 30, 2009, appellee's attorney filed a certification with the trial court stating that he had received a telephone call from appellant's attorney indicating that appellant refused to sign the entry. Consequently, the trial court "ordered for [appellant] to appear and show cause why he failed to sign the agreement that was reached." At this hearing, the trial court also addressed appellee's motion for attorney fees filed October 19, 2009.

{¶4} The hearing was held on December 4, 2009, and at the conclusion of the hearing, the trial court signed the "Agreed Judgment Entry" and awarded attorney fees in the amount of $3,500 to appellee.

{¶5} Appellant filed a timely notice of appeal[1] and, as his first assignment of error, states:

{¶6} "The trial court erred when it ruled that the separation agreement was enforceable and signed the Agreed Judgment Entry."

{¶7} Appellant argues that the parties never reached an agreement, as the income figures used for the parties were incorrect. In addition, appellant notes that the

1. In an order dated January 28, 2010, this court, sua sponte, consolidated 11th Dist. Nos. 2009-A-0058 and 2010-A-0005 for purposes of briefing and disposition.

terms of the settlement were not discussed on the record, and further, neither the parties nor the attorneys signed the "Agreed Judgment Entry." He argues that it was error for the trial court to adopt the entry without holding a hearing on the terms of the agreement.

{¶8} "In the absence of allegations of fraud, duress, undue influence, or of any factual dispute concerning the existence of the terms of a settlement agreement, a court is not bound to conduct an evidentiary hearing prior to signing a journal entry reflecting the settlement agreement." *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, syllabus. "Conversely, when there is [a factual] dispute, the trial court must conduct a hearing on the existence and terms of the out-of-court agreement before it can incorporate settlement terms into its order." *Clark v. Clark* (Mar. 5, 1997), 9th Dist. No. 96CA006383, 1997 Ohio App. LEXIS 739, at *5.

{¶9} At the December 4, 2009 hearing, appellee testified that the parties reached an agreement, and while she did not sign the "Agreed Judgment Entry," she had reviewed the proposed entry and agreed to its terms.

{¶10} Appellant contends that it was error for the trial court to adopt the "Agreed Judgment Entry" submitted by appellee's counsel. However, appellant has not demonstrated the existence of a factual dispute. In fact, prior to the hearing, appellant did not present the trial court with any information or proposed journal entry reflecting his understanding of the settlement reached by the parties. The only information before the trial court prior to the hearing was appellee's certification that appellant refused to sign the entry. Further, appellant did not testify at the hearing. Appellant's attorney noted that appellant stated that the incomes of the parties were incorrect; however, he

did not present the court with any additional information or evidence to substantiate his claim. In the absence of demonstrating a factual dispute over the terms of the settlement agreement, the trial court did not err by adopting the proposed judgment entry. Appellant's first assignment of error is not well-taken.

{¶11} Appellant's second assignment of error alleges:

{¶12} "The trial court abused its discretion when it awarded attorney's fees to Holly M. Dragon, Plaintiff-Appellee."

{¶13} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶14} Pursuant to R.C. 3105.73(B), a court may award all or part of reasonable attorney fees in "any post-decree motion or proceeding that arises out of an action for divorce[.]" "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." Id.

{¶15} The record reveals that appellant has been represented by six attorneys in this matter; appellee has been represented by one attorney. Appellee's counsel testified at the hearing that, after the meeting upon which the parties agreed to the terms of child support, appellant failed to execute the "Agreed Judgment Entry." Appellant further issued a number of subpoenas and filed additional motions with the court. Further, appellant also refused to sign the QDRO.

{¶16} In granting attorney fees to appellee, the trial court stated:

{¶17} "The Court finds that the Defendant's post final decree conduct has caused the Plaintiff to have her counsel expend a considerable amount of time in responding to the Defendant's meritless motion, plus his refusal to cooperate in signing the QDRO and an Agreed Judgment Entry at a prior hearing, resulting in unnecessary incurring of attorney's fees by the Plaintiff."

{¶18} Based upon the findings of the trial court and the record before us, this court cannot say that the trial court abused its discretion in finding it appropriate to award appellee attorney fees. Appellant's second assignment of error is without merit.

{¶19} Based on the opinion of this court, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

{¶20} In *Bolen v. Young* (1982), 8 Ohio App.3d 36, 37-38, the Court of Appeals for the Tenth Appellate District summarized the law applicable to settlement agreements as follows:

{¶21} "The general rule is that, where the parties to an action voluntarily enter into a settlement agreement in the presence of the trial court, the agreement is a binding contract and may be enforced. *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36 ***.

{¶22} "Where the settlement agreement is arrived at by the parties in open court and preserved by being read into the record or being reduced to writing and filed, then the trial judge may, *sua sponte*, approve a journal entry which accurately reflects the terms of the agreement, adopting the agreement as his judgment. *Holland v. Holland* (1970), 25 Ohio App.2d 98 ***. Where an agreement is purportedly arrived at in the presence of the trial judge and approved by the parties, but its terms are not memorialized on the record and one of the parties later disputes the terms of the agreement by refusing to approve an entry journalizing the agreement, the trial judge may not adopt the terms of the agreement as he recalls and understands them in the form of a judgment entry. Instead, the party disputing the agreement is entitled to an evidentiary hearing before another judge (see Code of Judicial Conduct, Canon 3 C (1)(b) – in which the trial judge may be called as a witness to testify as to his recollection and understanding of the terms of the agreement – and, if the court concludes that the parties entered into a binding contract, the settlement may be enforced. See *Spercel v. Sterling Industries*, supra. If the settlement agreement is extrajudicial in the sense that the trial judge is advised that the parties have agreed to a settlement, but he is not advised of the terms of the agreement, then the settlement agreement can be enforced only if the parties are found to have entered into a binding contract. Relief may be sought through the filing of an independent action sounding in breach of contract, or it may be sought in the same action through a supplemental pleading filed pursuant to Civ.R. 15(E), setting out the alleged agreement and breach." (Emphasis sic.) (Parallel citations omitted.)

{¶23} The particular settlement agreement involved in this case is of the third type identified by the *Bolen* court: extrajudicial, having been made outside the presence of the trial judge, without, evidently, advising him of the terms. I respectfully submit best practices would be to read such agreements into the record when made. This would prevent the delay and difficulties occurring in this case, in which the issue of whether the agreed judgment entry submitted by appellee's counsel months earlier complied with the terms of the oral settlement had to await the December 4, 2009 contempt hearing, where the trial judge heard testimony and arguments in determining the settlement's validity.

{¶24} I respectfully concur.