

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

Megan L. Newcomer

Court of Appeals No. L-13-1029

Appellee

Trial Court No. DR2007-0929

v.

Michael G. Newcomer, et al.

DECISION AND JUDGMENT

Appellant

Decided: December 20, 2013

* * * * *

Martin J. Holmes, Sr. and Matthew O. Hutchison, for appellee.

Henry B. Herschel and Eric Allen Marks, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which, on remand from this court, found moot the issue upon which he prevailed on appeal. Because we conclude that appellant received the consideration to which he was entitled on remand, we affirm.

{¶ 2} The facts of this matter are more fully explained in this court's prior consideration of this issue, *Newcomer v. Newcomer*, 6th Dist. Lucas Nos. L-10-1299, L-10-1357, 2011-Ohio-6500, and in the companion case to this matter, *Newcomer v. Newcomer*, 6th Dist. Lucas No. L-11-1183, 2013-Ohio- _____. The parties are appellant, Michael G. Newcomer, and his now former wife, appellee, Megan L. Newcomer.

{¶ 3} Appellant and appellee were married in 1992 and had four children. In 2007, appellee sued for divorce. Appellant filed a counterclaim, also seeking divorce. On October 10, 2007, a magistrate entered preliminary orders that, among other things, ordered appellant to pay temporary child and spousal support, as well as certain household obligations during the pendency of the case.

{¶ 4} On May 18, 2008, appellee requested a hearing, asking that appellant show cause why he should not be held in contempt for failing to pay his temporary support obligations. After extended delays, on December 31, 2009, following the show cause hearing, a magistrate found appellant in contempt and set purge conditions. Appellant objected. On August 10, 2010, the trial court overruled appellant's objections and adopted the magistrate's decision. Appellant was sentenced to 30 days in jail unless he paid the arrearages on the temporary support orders.

{¶ 5} On September 14, 2010, appellant moved to vacate the preliminary orders pursuant to Civ.R. 60(B). Appellant supported his motion with the affidavit of Judi Reed, the controller of the business appellant worked for, Velocity, The Greatest Phone Company Ever, Inc. Reed averred that a late discovered accounting error inflated the

figures presented to the magistrate to establish the amount of appellant's temporary spousal and support orders.

{¶ 6} According to Reed, in preparing the company's tax return, she discovered an error in a loan entry used to report the amount upon which the magistrate computed appellant's imputed income. A duplicate entry in appellant's loan account increased his apparent compensation by \$103,018.72, according to Reed. If the magistrate had the recomputed compensation figure, the imputed income upon which the temporary orders were derived would have been substantially less, appellant insisted. Since the income imputed to him because of the erroneous compensation figure was the basis of the contempt finding, appellant asked that the contempt finding be vacated.

{¶ 7} On September 20, 2010, the trial court denied appellant's Civ.R. 60(B) motion. The court also found appellant had failed to comply with the purge conditions and imposed the deferred 30 day sentence. While appellant served the sentence, he also appealed the court's denial of his motion for relief from judgment. Neither party sought a stay of proceedings in the trial court pending appeal. During the pendency of that appeal, the trial court conducted an eleven day trial on the divorce, including testimony from Velocity controller Judi Reed.

{¶ 8} On June 10, 2011, the court issued its final decree of divorce. Among the matters contained in the final judgment entry, the trial court reduced to judgment the arrearages on the temporary spousal and child support awards and the other sums appellant had been ordered to pay.

{¶ 9} On December 16, 2011, this court issued its decision on the appeal from the trial court's denial of appellant's Civ.R. 60(B) motion. In our decision, we concluded that the Reed affidavit provided newly discovered evidence and the trial court erred in denying appellant's motion. *Newcomer*, 6th Dist. Lucas No. L-10-1299, L-10-1357, 2011-Ohio-6500, ¶ 40-41. We reversed the court's judgment and remanded the matter to the trial court for further proceedings. *Id.* at ¶ 69.

{¶ 10} On remand, appellee moved that the remand be declared a moot issue because the matter of appellant's income had been fully adjudicated in the final decree. Further consideration was barred by the doctrine of res judicata, appellee urged.

{¶ 11} The trial court concluded that the final decree, entered six months prior to this court's decision on the Civ.R. 60(B) appeal, had disposed of the issue. The court noted that at trial appellant had introduced all of the evidence he alleged in his Civ.R. 60(B) motion and he asserted no further evidence after the remand. The court declared our remand satisfied, found the income issue moot and further proceedings unnecessary.

{¶ 12} From this judgment, appellant now brings this appeal. Appellant sets forth a single assignment of error:

The trial court erred in refusing to conduct a hearing on the issue of appellant's income following remand from the 6th District.

{¶ 13} Although the doctrine of res judicata has of late become more nuanced, *see Holzemer v. Urbanski*, 86 Ohio St.3d 129, 132-133, 712 N.E.2d 713 (1999), a broad statement of the doctrine is that,

A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them. *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph one of the syllabus.

{¶ 14} As we noted in the companion case, the general rule is that, once an appeal is taken, the trial court is divested of jurisdiction over the matter appealed, except to take action in aid of the appeal, until the case is remanded by the appellate court. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). The trial court, however, retains the authority to act on issues that are not inconsistent with the court of appeal's power to review, affirm or reverse an appealed judgment. *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 570, 722 N.E.2d 73 (2000).

{¶ 15} In this matter, appellant appealed a judgment denying his Civ.R. 60(B) motion for relief from a judgment. The judgment he sought to vacate imputed income to him and established temporary orders for child and spousal support. Appellant claimed as newly discovered evidence an error discovered in an amount attributed to him in imputing income. This was the subject of the appeal. Thus, the amount of the imputed income and the concomitant temporary child and spousal support orders were on appeal.

The trial court lost jurisdiction over the temporary orders except to take action in aid of the appeal or for collateral issues, such as contempt. *See id.*

{¶ 16} Since prior to remand the trial court lacked jurisdiction over the issue of the temporary orders, it lacked authority to enter a final judgment on the arrearages from those orders. Without jurisdiction over the arrearages on the temporary orders, the part of the final order purporting to reduce the arrearages to judgment is not subject to the doctrine of res judicata.

{¶ 17} Having said that, it is not all that clear that res judicata was the basis of the trial court's decision. In its judgment entry, the court explained its ruling:

The thrust of the [appellate decision] is that this court should have reheard the issues concerning [appellant's] income. Apparently unknown to the appellate court at the time of its Decision is the fact that this court had already done so during the eleven-day divorce trial * * *. Said issues and the evidence adduced thereon were taken into consideration in this court's Judgment Entry of Divorce [filed] approximately six months in advance of the appellate court's Decision. [A]t the divorce trial [appellant] fully litigated the issues of his income and had introduced all evidence he alleged in his prior 60(B) Motion. Said [appellant] has not asserted that he has any further evidence. The findings established through the eleven-day divorce trial would not alter the prior judgments in contempt against [appellant.]

{¶ 18} On this, the court concluded that the evidence adduced during the divorce trial rendered further proceedings on appellant’s Civ.R. 60(B) motion “moot” and that the mandate of the remand was satisfied.

{¶ 19} In our decision relating to the motion for relief from judgment, we stated that the judgment denying relief from judgment was reversed and the matter was “remanded for proceedings consistent with this decision.” *Newcomer*, 6th Dist. Nos. L-10-1299, L-10-1357, 2011-Ohio-6500, ¶ 69. Ordinarily, a trial court receiving such a remand would put on an order granting the Civ.R. 60(B) motion and vacating the original judgment that was the topic of the motion. The court would then reopen the matter and conduct a hearing to determine whether the potential defense raised in the motion, in fact, was meritorious.

{¶ 20} Relating this to the facts of this matter, the court would hold a hearing to permit appellant to put on the testimony of Velocity controller Judi Reed and whatever other witnesses and documentary evidence might be relevant to the issue of the money appellant received from Velocity. Appellee would be permitted to rebut. If, following such a hearing, the court found that the evidence warranted modification of the temporary orders, the court could issue a judgment modifying the vacated temporary orders and computing a new arrearage. If the court was not persuaded by appellant’s newly discovered evidence, it could put on an entry stating such a finding and ratifying its prior judgment.

{¶ 21} In this matter, the court, in its judgment entry, states that during the eleven-day trial it heard the testimony of Judi Reed and any other evidence appellant sought to introduce concerning the money he received from Velocity. The court noted that, during the extensive proceedings since the remand, appellant has come forth with no additional evidence on this issue. Appellant does not contest these statements.

{¶ 22} The issue then seems to be more one of sequence than of substance. Our remand, in essence, directed the trial court to consider the evidence appellant asserted would warrant modification of the temporary orders. The trial court states that this evidence was presented during trial prior to remand and found unpersuasive. Appellant was offered an opportunity to present additional evidence after the remand and failed to do so. Accordingly, appellant was afforded the hearing to which he was entitled by force of the remand and his sole assignment of error is not well-taken.

{¶ 23} There remains an issue which appellant did not raise in his assignment of error. That is whether the trial court could have entered judgment on arrearages from the temporary orders while the matter was on appeal. Since the trial court was divested of jurisdiction over that matter during the appeal, it did not have authority to speak to that issue at that time and any attempt to do so is a nullity. *Fifth Third Mtge. Co. v. Orebaugh*, 12th Dist. Butler No. CA2011-03-039, 2011-Ohio-4472, ¶ 13. While it would have been preferable for the trial court, after remand, to reduce to judgment the sums in arrearage on the temporary orders, it is clear from the language of the court's February 5,

2013 judgment that it intended to ratify its prior decision on the issue in its June 11, 2011 final decree.

{¶ 24} After the remand, the court was re-vested with jurisdiction over the issue of the temporary orders. In these special circumstances, the trial court carried out the mandate of the remand in a satisfactory, if novel, manner. The February 5, 2013 judgment served to revive that portion of the June 11, 2011 judgment that was null when entered. While such a procedure is not preferred, in these circumstances it is acceptable, as we perceive that the outcome will not change and note that the divorce itself had been pending since 2007. On consideration, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the court 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, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, 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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