**[Cite as *Lisboa v. Lisboa*, 2009-Ohio-5565.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 92636**

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**JOSE C. LISBOA, JR.**

PLAINTIFF-APPELLANT

vs.

**KIMBERLY LISBOA, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**
**AFFIRMED IN PART, REVERSED**
**IN PART, AND REMANDED**

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-295186

**BEFORE:** Rocco, J., Cooney, A.J., and Stewart, J.

**RELEASED:** October 22, 2009

**JOURNALIZED:**

**APPELLANT**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

**{¶ 1}** Plaintiff-appellant, Jose C. Lisboa, Jr., appeals from an order of the domestic relations division of the common pleas court that (1) dismissed, with prejudice, his motion to remove the guardian ad litem ("GAL"), his motion to strike the GAL's testimony, his motion to strike the GAL's report and recommendation, and his motion to strike materials attached to the defendant's motion to show cause, (2) dismissed, for failure to prosecute, his motion to require the defendant to pay taxes on 2005 income, and (3) denied, as moot, the GAL's motion to dismiss appellant's motion to remove her and to strike her report and recommendation. Appellant's sole argument in this appeal is that the trial court failed to provide him with notice of the October 31, 2008 hearing on these motions.

**{¶ 2}** We find that the docket shows that notice of the hearing was sent to appellant on October 1, 2008. This notice informed the appellant that the court would hear the motion to compel appellee to pay taxes on 2005 income. Therefore, we find no error in the court's ruling on this motion. However, the notice did not inform appellant that the court would hear the other motions. Appellant was not given notice of the subject matter of the hearing sufficient to allow him to prepare an argument. Accordingly, we must reverse the rulings on the other motions and remand for further proceedings.

**{¶ 3}** The procedural history of this case is complex, but largely irrelevant to this appeal. The parties were divorced pursuant to a decree entered February 11, 2005. As part of their property settlement, defendant purchased plaintiff's interest in a number of businesses. One of these businesses, Cleveland Granite & Marble/ITX, was involved in a dispute with a contractor regarding ITX's performance under a subcontract. The parties to this case entered into a separate agreement about their financial responsibilities regarding this dispute. After the dispute with the contractor was settled, the parties to this case litigated their respective liability under their own agreement. The resolution of this litigation was the subject of one prior appeal in this case, *Lisboa v. Lisboa*, Cuyahoga App. No. 90105, 2008-Ohio-3129, appeal not allowed, 120 Ohio St.3d 1454, 2008-Ohio-6813.

**{¶ 4}** On October 6, 2008, the domestic relations court issued a judgment entry that terminated appellant's privileges to communicate with the parties' minor child, and found appellant in contempt of court for failing to comply with several judgment entries prohibiting him from harassing appellee. The court further restrained appellant from having contact with appellee's family, friends and employees, and ordered appellant to pay guardian ad litem and attorney's fees. This order was the subject of a separate appeal, *Lisboa v. Lisboa*, Cuyahoga App. No. 92321, 2009-Ohio-5228.

**{¶ 5}** Meanwhile, on September 23, 2008, appellant moved the court to order appellee to pay 2005 income taxes on funds that appellee claimed to have transferred to appellant, but that appellant claimed he never received. On October 1, 2008, the court scheduled this motion for an oral hearing on October 31, 2008 at 9:30 a.m. A motion to compel, a motion to show cause, and a motion for attorney's fees were set for hearing at the same time.

**{¶ 6}** Appellee, her counsel, and the GAL were present at the hearing held on October 31, 2008; appellant was not. Appellee's counsel reported that the motion to compel, motion to show cause and the motion for attorney's fees all related to the contractor dispute that was, at that time, still pending on appeal. Therefore, the court did not address these motions at the hearing. However, the court did proceed to hear appellant's motion to compel appellee to pay 2005 income taxes, as well as several motions that were filed after the notice of the hearing was sent, specifically, appellant's motion to remove the GAL, his motion to strike her testimony, and his motion to strike her report and recommendation; the GAL's motion to dismiss these motions; and appellant's motion to strike exhibits from certain motions filed by the appellee.

**{¶ 7}** The court heard testimony from the GAL, appellee, and appellee's counsel. At the conclusion of the hearing, the court dismissed appellant's motion to compel appellee to pay income taxes and his motions to remove the

GAL, to strike her report, and to strike her testimony. The court also denied appellant's motion to strike exhibits. A judgment entry memorializing these rulings was entered December 4, 2008. This appeal followed.[1]

**{¶ 8}** Appellant's sole assignment of error states:

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROPERLY PROVIDE NOTICE TO MR. LISBOA OF THE OCTOBER 31, 2008 HEARING ON THE VARIOUS MOTIONS FILED, AFTER MR. LISBOA MADE SEVERAL REQUEST [SIC] TO BE PRESENT IN THE COURT VIA INTERNET, AND VIOLATED MR. LISBOA'S RIGHTS TO DUE PROCESS."

**{¶ 9}** The appearance docket reflects that notice of the October 31, 2008 hearing was sent, but appellant complains that it does not indicate that the notice was sent to his address in Brazil or that he received the notice.[2] The docket need not be as specific as appellant would like it to be. We construe the docket's statement that notice was sent as a confirmation that notice was mailed to all parties or their counsel at the most recent address reflected on the docket, unless there is evidence that something else actually occurred. The appearance docket here reflects that appellant was representing himself, and lists his address in Sao Paolo, Brazil. Having no evidence to the

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[1]We assume, without deciding, that this order was final and appealable. But see *Davis v. Lewis* (Dec. 12, 2000), Franklin App. No. 99AP-814 (order denying motion to remove guardian ad litem was not final and appealable).

[2]Notably, appellant does not assert that he did not *receive* notice, although this assertion may be implicit in his argument that the docket does not *show* that he received it.

contrary, we assume that the notice was mailed to him there. "Service by mail is complete upon mailing." Civ.R. 5(B). There is no evidence appellant did not receive the notice. Therefore, we must reject appellant's argument.

**{¶ 10}** Nonetheless, we find a fundamental flaw in the notice that was provided to appellant. The appearance docket listed the specific motions that would be heard at the hearing set for October 31, 2008. The notice that was mailed presumably also listed these motions, but even if it did not, the docket still put appellant on notice that specific motions would be heard. Appellant was *not* advised that the court would hear the motion to remove the GAL, the motion to strike the GAL's testimony, the motion to strike the GAL's report, the GAL's motion to dismiss these motions, or the appellant's motion to strike exhibits. These motions had not even been filed at the time the notice was mailed. No subsequent docket notation or notice added these motions to the list of matters to be heard on October 31, 2008.

**{¶ 11}** Without notice that these motions would be considered at the hearing, appellant was denied the opportunity to be heard on these matters. *Miller v. Miller*, Stark App. No. 2001CA00189, 2002-Ohio-362. Even though he failed to appear at the hearing, we cannot say that he would not have appeared if he had had notice of the matters the court intended to consider. Therefore, we reverse the court's ruling with respect to the motion to remove the GAL, the motion to strike the GAL's testimony, the motion to strike the

GAL's report, the GAL's motion to dismiss these motions, and the appellant's motion to strike exhibits and remand for further proceedings. Appellant did have notice that the court would hear the motion regarding tax liability. Appellant has failed to demonstrate any error in this decision, so we affirm the ruling on that motion.

Affirmed in part, reversed in part, and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MELODY J. STEWART, J., CONCURS
COLLEEN CONWAY COONEY, A.J.,
CONCURS IN PART AND DISSENTS IN PART
(SEE ATTACHED OPINION)

COLLEEN CONWAY COONEY, A.J., CONCURRING IN PART, DISSENTING IN PART:

**{¶ 12}** I concur with the majority's partially affirming the judgment of the domestic relations court. I would, however, affirm in toto. Therefore, I respectfully dissent.

**{¶ 13}** Although I completely agree that courts should ordinarily provide notice of the specific motions to be considered at each hearing, the instant case presents a rare circumstance in which the motions not mentioned in the court's notice were appellant's own post-decree motions, challenging the GAL and her prior testimony and her report and recommendation, as well as seeking to strike exhibits. Because appellant filed these motions, he had the opportunity to be heard, albeit on paper. He also had the opportunity to object to proceeding on his motions if he had appeared at the scheduled hearing. Neither he nor his counsel attended that hearing nor did he "appear" at the oral argument held in this court.

**{¶ 14}** I disagree with the majority's conclusion that "we cannot say that he would not have appeared if he had had notice of the matters the court intended to consider." It would appear that appellant has the financial ability to retain counsel to represent him. Therefore, I would find harmless error and affirm the judgment.