[Cite as *Snellman v. Levine*, 2010-Ohio-5616.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95148

JILL MARIE SNELLMAN

PLAINTIFF-APPELLEE

vs.

GARY JAY LEVINE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-329474

BEFORE: Sweeney, J.,* Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 18, 2010

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JAMES D. SWEENEY, J.:*

{¶ 1} Petitioner Gary Levine appeals from the order of the trial court that determined, within the context of denying his motion for attorney fees, that the terms of his separation agreement unambiguously requires separate bi-yearly payments of $27,000 to Jill Marie Levine n.k.a. Snellman, rather than biannual installments totalling $27,000. For the reasons set forth below, we affirm the trial court's denial of petitioner's request for attorney's fees.

{¶ 2} The parties were granted a dissolution on February 16, 2010. The parties' separation agreement was incorporated into the court's decree and provides, in relevant part, as follows:

{¶ 3} "Husband shall pay to Wife, as and for support, deductible to Husband and taxable to Wife, the sum of $27,000 payable on or before February 28, 2010 and on or before August 28, 2010, and on or before February 28 and on or before August 28, 2010 of each year thereafter for a period of four years (48 months), with the last payment to be made on August 28, 2013."

{¶ 4} On March 9, 2010, Snellman filed a motion to show cause and for attorney's fees, asserting that Levine did not make the February 28, 2010 payment of $27,000. In opposition, Levine moved to dismiss the matter, and moved for attorney's fees. Levine asserted that the separation agreement requires that he pay $27,000 per year, in two increments of $13,500 to be paid in February and August, and that Snellman was seeking, essentially, a modification of the separation agreement.

{¶ 5} The matter came on for hearing before a magistrate on April 23, 2010. At this time, Snellman withdrew her motion to show cause and for attorney fees, but the magistrate noted, "the same arguments are addressed in [Levine's] Motion for Attorney Fees. Therefore the legal arguments must be addressed in order to dispose of that motion."

{¶ 6} The magistrate found as follows:

{¶ 7} "* * * [A]s a matter of law * * * the language of the provision pertaining to spousal support in the Separation Agreement is unambiguous and clear. It provides that Husband shall pay to Wife, the sum of $27,000 payable on or before February 28, 2010 and on or before August 28, 2010. As noted in Webster's Dictionary, the word 'and' means also; as well as; plus. The plain meaning of the sentence means that the Husband shall pay the Wife $27,000 payable on or before February 28, 2010 and on or before August 28, 2010. If they wanted their Agreement to say that he shall pay $13,500 semi-annually in February and August then they could have written it that way. But the way the

provision is written, the plain meaning of the word 'and' means the Husband was obligated to pay the Wife $27,000 in February and in August."

{¶ 8} Levine filed objections to the magistrate's decision, asserting that the magistrate had modified the terms of the parties' separation agreement and that the words of the agreement did not support the magistrate's conclusion. The trial court overruled Levine's objections and adopted the magistrate's decision. Levine now appeals and assigns three related errors for our review.

{¶ 9} For his first assignment of error, Levine asserts that the trial court erroneously altered and modified the terms of the parties' separation agreement by requiring Levine to pay additional spousal support in the amount of $27,000 per year over four years. For his second assignment of error, Levine argues that the trial court erred in determining that, as a matter of law, he is to pay $27,000 on or before February 28, and pay $27,000 on or before August 28, 2010. For his third assignment of error, Levine maintains that the lower court erred in construing and applying the term "and" in determining the spousal support due in this matter.

{¶ 10} We are compelled to emphasize, however, that Snellman withdrew her motion to show cause and for attorney fees in connection with Levine's failure to tender biannual installments totalling $27,000. Although the magistrate noted, "the same arguments are addressed in [Levine's] Motion for Attorney Fees[, t]herefore the legal arguments must be addressed in order to dispose of that motion," the essence of the magistrate's decision, and the trial court's order is that Levine was not entitled to attorney fees. The lower court's additional

language regarding the construction of the separation agreement and the amount of the semi-annual installments was simply dicta and a rationale for the court's decision. That is, where a case is decided on one issue, and dicta pertaining to a separate and distinct issue might be found in the rationale of the case, the court has not decided the matter on the basis of the issue mentioned in dicta. *Westhoven v. Snyder* (1973), 40 Ohio App.2d 91, 318 N.E.2d 167.

{¶ 11} With that said, we therefore reject the contention that the lower court altered and modified the terms of the parties' separation agreement. That is, we are necessarily limited to a determination of whether the trial court abused its discretion in denying Levine's request for attorney's fees, and we will not address the issue, mentioned only in dicta, regarding construction of the parties' separation agreement. On the basis of the record presented, we find no abuse of discretion in connection with the denial of attorney fees.

{¶ 12} The assignments of error are overruled.

Affirmed.

It is ordered that appellee recover from appellant 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.

JAMES D. SWEENEY, JUDGE*

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR.

*(SITTING BY ASSIGNMENT: JUDGE JAMES D. SWEENEY, Retired, of the Eighth District Court of Appeals)