[Cite as *Kaput v. Kaput,* 2011-Ohio-10.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94340

MARY JANE KAPUT

PLAINTIFF-APPELLANT

vs.

JOHN KAPUT

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-302576

BEFORE: Boyle, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 6, 2011

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Mary Jane Kaput ("wife"), appeals from an order modifying her spousal support from defendant-appellee, John Kaput ("husband"). She raises three assignments of error for our review:

{¶ 2} "[1.] The trial court erred and abused its discretion in reducing appellee's spousal support obligation from $5,500 per month to $2,500 per month.

{¶ 3} "[2.] The trial court erred and abused its discretion in failing to find the appellee not in contempt of court for failure to pay the court-ordered spousal support.

{¶ 4} "[3.] The trial court erred and abused its discretion in its award of attorney fees."

{¶ 5} Finding no merit to the appeal, we affirm.

Procedural History and Factual Background

{¶ 6} The parties were married in December 1973 and divorced in May 2006. They were both in their early sixties at the time of the divorce; their three children were emancipated. The parties incorporated a separation agreement, resolving all issues, into their final divorce decree. They divided all property and husband agreed to pay wife $5,500 per month in spousal support until "the earlier to occur of the [wife's] death, remarriage, or cohabitation with an unrelated male, subject to further order of court."

{¶ 7} Husband has twice attempted to reduce or terminate this spousal support order. In February 2008, he moved for a reduction of support. Wife, in turn, moved for an increase in support, to show cause, and for attorney fees. In May 2008, the parties dismissed their respective motions and subsequently entered into an agreed judgment entry whereby it was agreed that husband was in contempt of court for being in arrears, but that he could purge his contempt by paying an agreed amount within 30 days of the entry. The parties further agreed that pursuant to R.C. 3121.441, husband could pay support directly to wife, and need not pass through CSEA by way of a wage withholding order.

But no modification was made to the spousal support amount, either by way of increase or decrease.

{¶ 8} In November 2008, husband again moved to either terminate or modify the spousal support order. This time, the matter was heard by a magistrate. The magistrate found husband to be in contempt of court, and determined that husband owed an arrearage of $18,600. The magistrate recommended that husband pay $400 per month towards the arrearage; that spousal support be reduced to $2,500 per month; and that husband pay $2,000 towards wife's attorney fees. The magistrate further recommended that husband pay support through CSEA. The trial court adopted the magistrate's decision in its entirety and ordered it into the law. It is from the trial court's adoption of this order that wife appeals.

Standard of Review

{¶ 9} This court's standard of review for all three of wife's issues is abuse of discretion. See *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (review of spousal support); *Walton v. Walton*, 6th Dist. No. WD-05-002, 2005-Ohio-5734 (review of contempt finding); *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (review of attorney fees).

{¶ 10} For years, courts have defined abuse of discretion as "more than an error of law or judgment," implying that the court's attitude was "unreasonable, arbitrary or unconscionable." *Steiner v. Custer* (1940), 137

Ohio St. 448, 31 N.E.2d 855, paragraph 2 of the syllabus. But, of course, we do not review errors of law under an abuse of discretion standard. Such errors are simply that, errors of law, and they are reviewed to determine whether they are prejudicial or non-prejudicial. In *City of Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 357, 423 N.E.2d 1095, the Ohio Supreme Court defined arbitrary as "without adequate determining principle, not governed by any fixed rules or standard," and unreasonable as "irrational." Hence, we review

{¶ 11} the court's decision here to determine whether it was issued "ungoverned by any fixed rules or standard" or whether the decision reached was "irrational."

Modification of Spousal Support

{¶ 12} In her first assignment of error, wife argues that the trial court erred in reducing her spousal support because the requisite "change in circumstances" was lacking.

{¶ 13} R.C. 3105.18(E) states that the trial court may modify the amount or terms of a spousal support order upon a determination that "the circumstances of either party have changed." A change of circumstances includes, but is not limited to, "any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." R.C. 3105.18(F).

{¶ 14} Although not set forth in any statute, the Ohio Supreme Court has also held that a court cannot modify an award of spousal support "unless the decree of the court expressly reserved jurisdiction to make the modification and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree." *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, paragraph two of the syllabus.

{¶ 15} Finally, in addition to the required "substantial change," the party seeking modification of spousal support (here, the husband) must not have purposefully brought about the change. See *Marx v. Marx*, 8th Dist. No. 83681, 2004-Ohio-3740.

{¶ 16} Here, there is no dispute that the original separation agreement and divorce decree granted the court jurisdiction to modify the terms of the lifetime spousal support. The issue for wife is whether, pursuant to the above statute, the court abused its discretion in finding that there was an involuntary, substantial change of circumstances justifying the modification.

A. *Res Judicata*

{¶ 17} Wife first argues that the court erred by measuring the change in circumstances from the date of the divorce decree in May 2006, rather than from the date husband dismissed his first request to modify support in May 2008. She maintains that it was res judicata for the court to use the date of the

divorce decree, rather than the agreed judgment entry date. We find that the doctrine of res judicata does not apply.

{¶ 18} Res judicata is a doctrine of judicial preclusion. It states that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, paragraph one of the syllabus. The prior judgment must be an order or decree entered on the merits by a court of competent jurisdiction. *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67.

{¶ 19} Here, in May 2008, the parties voluntarily dismissed their respective motions for modification of spousal support and no modifications were made to the spousal support amount. Thus, there was no decision or order on the merits; the parties simply dismissed their reciprocal requests for modification. Accordingly, the doctrine of res judicata is wholly inapplicable.

B. *Contemplating a Change in Circumstances*

{¶ 20} Wife next argues that the court erred by not adhering to the holding in *Mandelbaum*. Wife first contends that husband *did* contemplate a "downturn" of his income and business at the time of the original decree. She cites to her cross-examination of husband during the hearing on the motion at

issue here. During cross-examination, she states that "husband was reminded that at the time of the divorce, he painted a picture of doom and gloom for the future of his company." Husband agreed and responded, "I turned out to be a prophet, didn't I?"

{¶ 21} While *Mandelbaum* certainly requires that there be a substantial, uncontemplated change in circumstances, the Supreme Court analyzed only the issue of the word "substantial." From *Mandelbaum*, we gain no insight into the issue of what it means to "contemplate" change. Wife asks us to find that since her husband was concerned by the vicissitudes of the business climate for auto parts in 2006, he hence *contemplated* that his income might decrease and he is accordingly barred from seeking relief.

{¶ 22} Wife in her argument would define "*contemplate*" to mean "to think about" or "to reflect upon." She contends that if husband thought that his income might reduce in the future, he contemplated that it would reduce. But we believe that the better meaning of "contemplate" in this context is, "[t]o have as a purpose; intend." Random House Webster's Unabridged Dictionary, 2nd Edition. There is no evidence whatsoever that husband had as a purpose or intended the decline of his business. To hold otherwise would be to say that had wife contemplated (as in "thought about") the success of husband's company at the time of the signing of the separation agreement, she would equally be barred from ever seeking an increase in spousal support. We do

not believe that such an absurd result was contemplated by the Ohio Supreme Court.

C. *Involuntary and Substantial Change in Circumstances*

{¶ 23} Wife next contends that husband's change in income was not "substantial" or "involuntary." She maintains that shareholder loans, which husband took from his companies, should be considered income since he is the only shareholder and he can "take or withhold taking money from each entity as he chooses." She asserts that if those loans are considered income, then there was no decrease in husband's income, let alone a substantial one.

{¶ 24} And as evidence that husband "voluntary" decreased his income, wife points to the fact that husband was current in all of his other debt obligations except for the spousal support obligation, including mortgage payments, boat payments, boat-related expenses (dockominium taxes and yacht club dues), payments on his commercial building, and insurance on his home. Wife asserts that husband was also still able to take care of an adult daughter who does not work (or cannot, according to husband), and her two-year-old daughter, as well as a live-in female friend and her son.

{¶ 25} The magistrate found that husband's income in 2006, at the time of the divorce, was $163,206; after payment of spousal support ($59,250) and self-employment tax, his adjusted gross income was $103,103. The magistrate further found husband's income in 2007 was $158,087; after payment of

spousal support ($66,000) and self-employment tax, his adjusted gross income was $90,732. But in 2008, the magistrate found that husband had a steep decline in income. Specifically, the magistrate found husband's adjusted gross income for 2008, after payment of less than the full amount of spousal support ($49,500) and self-employment tax, was only $22,928.

{¶ 26} The magistrate then considered all of the requisite factors in an exhaustive 20-page report, including all the arguments made by wife. The magistrate concluded:

{¶ 27} "Certain aspects of [husband's] situation are troubling. He has managed to keep his debts other than spousal support current, he has taken on the obligation of the support of others, he controls the accounting of his business without oversight, and he has not shorn himself of expenses, specifically related to the boat, which would provide him some relief.

{¶ 28} "Notwithstanding, the Court finds that a substantial change of circumstance has occurred warranting a review of the spousal support obligation in that [husband's] revenue has declined sharply and his business may shortly, cease to exist due to factors, i.e. the recession, beyond his control that could not have been foreseen in 2006. Economic conditions do change but it is doubtful that [husband], like many people, could have divined the economic forecast and the severity of the impact of his particular business in 2008 and 2009. While some of his choices may be perplexing there is a limit to

the extent that a reasonable person (which [husband] seemed to be) would go to avoid spousal support. The evidence that revenues have waned so radically that [husband] has had to lay off virtually all his employees does not support a conclusion that he purposefully brought about the loss of business and what may be the soon-to-be demise of the company."

{¶ 29} We find no error of law in the magistrate's decision reducing spousal support. We further find that the trial court's conclusions are not arbitrary, or unreasonable.

{¶ 30} As to wife's argument that husband's loans from the company should be considered income, the magistrate analyzed the issue in detail and concluded that the allegation was simply unsupported by the evidence. We agree with the trial court's adoption of the magistrate's conclusion.

{¶ 31} Wife's first assignment of error is overruled.

Contempt of Court

{¶ 32} In wife's second assignment of error, she contends that the trial court erred by not finding husband in contempt of court for failing to pay spousal support.

{¶ 33} A review of the record here shows that the magistrate did find husband to be in contempt of court. Regarding this issue, however, the magistrate stated, "the elimination of the [husband's] employment income made it impossible for him to strictly comply with the Court's support order." The

magistrate did note, "[h]owever, [husband] could have managed to pay something commensurate with this order on a regular basis and did not do so, and is therefore in contempt of Court."

{¶ 34} The trial court adopted the magistrate's decision in its entirety. The trial court ordered husband to pay $400 per month toward the accumulated arrearage. But wife contends that "[husband] should have been found to be in contempt of court for a second time and ordered to pay in full all arrearages within 30 days. If they were not paid, he should have been subject to a jail sentence." We disagree.

{¶ 35} Given the magistrate's findings, the fact that the court did not order a more severe punishment for contempt rather than payment on the arrearage, is neither an error of law, nor an abuse of discretion.

{¶ 36} Wife's second assignment of error is overruled.

Attorney Fees

{¶ 37} In wife's final assignment or error, she asserts that the trial court erred and abused its discretion by not awarding her more attorney fees than it did, i.e., it awarded only $2,000 of a total of $10,000. We disagree.

{¶ 38} R.C. 3105.73 addresses attorney fees and expenses in a post-decree proceeding. In pertinent part, it provides that a trial court *may* award all or part of reasonable attorney fees and expenses to the extent that such an award is equitable. Further, R.C. 3105.18(G) requires a court to

assess all court costs arising out of the contempt proceeding and requires the defaulting party to pay any reasonable attorney fees of the adverse party "as determined by the court that arose in relation to the act of contempt." And Cuyahoga County Domestic Relations Local Rule 21(A)(2) requires that a request for attorney fees necessitated by defending an action "shall be by motion filed at least 14 days prior to the hearing on the motion to be defended."

{¶ 39} In the instant case, two matters were litigated: (1) [husband's] motion to modify spousal support, and (2) wife's motion to show cause for [husband's] failure to pay spousal support. In her affidavit in support of her motion to show cause, wife requested that she be awarded reimbursement of her attorney fees "in the prosecution of this motion." She filed no other request for attorney fees. Accordingly, the magistrate was limited to awarding fees that arose in relation to the act of contempt.

{¶ 40} Wife submitted a request for fees of approximately $10,000. The magistrate had the difficult job of separating the costs of pursuing the show cause motion from the costs of defending against the modification, and found the amount of $2,000 to be appropriate. Appellant has not cited this court to any evidence in the record that this is not the appropriate recompense. Accordingly, we find no error of law or abuse of discretion.

{¶ 41} Wife's third assignment of error is overruled.

Judgment 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR