STATE OF MICHIGAN

COURT OF APPEALS

MICHELE M. MATICS,

Plaintiff-Appellee,

v

THOMAS F. FODOR,

Defendant-Appellant.

UNPUBLISHED
April 2, 1999

Nos. 209671; 210440
Wayne Circuit Court
LC No. 95-564352 DP

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff commenced this paternity action, and defendant acknowledged paternity upon receipt of blood test results. On January 23, 1997, the trial court entered an order submitted by plaintiff, which plaintiff claimed represented a settlement agreement between the parties, awarding sole custody to plaintiff. Defendant moved to modify custody, arguing that it was in the child's best interest to award defendant custody. Plaintiff moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) with respect to defendant's motion to modify, arguing, *inter alia*, that defendant had admitted in the pleadings that he had abandoned the motion to modify. On January 26, 1998, the trial court entered an order granting summary disposition in favor of plaintiff; in docket no. 209671, defendant appeals as of right from that order.

Defendant also moved below for rehearing or reconsideration of the trial court's January 23, 1997, order, and for relief from that order, arguing that plaintiff had engaged in fraud or misrepresentation in submitting the order to the court as a purported settlement agreement of the parties. Defendant also requested an evidentiary hearing on the matter, and moved for the waiver of the attorney/client privilege so that plaintiff's attorneys could be examined regarding the alleged fraud. On February 27, 1998, the trial court entered an order denying these motions; in docket no. 210440, defendant appeals as of right from that order.

The appeals in docket nos. 209671 and 210440 have been consolidated. We affirm both orders.

Docket No. 209671

In docket no. 209671, defendant argues that the trial court erred in granting plaintiff's motion for summary disposition. We disagree. Without specifying the particular subrule of MCR 2.116(C) upon which it was relying, the trial court granted plaintiff's motion for summary disposition on the ground that defendant had abandoned his motion to modify custody. We conclude that summary disposition was granted pursuant to MCR 2.116(C)(7), which permits summary disposition on the basis of a prior "release." We review de novo a trial court's decision to grant summary disposition. *Limbach v Oakland Co Bd of Road Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Summary disposition must be granted if the pleadings show that a party is entitled to judgment as a matter of law, or if the proofs show that there is no genuine issue of material fact. See MCR 2.116(I)(1).

Black's Law Dictionary (6th ed), defines "release" in part as an "[a]bandonment of claim to party against whom it exists, and is a surrender of a cause of action and may be gratuitous or for consideration," citing *Melo v National Fuse & Powder Co*, 267 F Supp 611, 612 (D Colo 1967), and also as the "giving up or abandoning of a claim or right to person against whom claim exists or against whom right is to be exercised," citing *Adder v Holman & Moody, Inc*, 288 NC 484; 219 SE2d 190, 195 (1975); see also *Larkin v Otsego Memorial Hospital Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1994). A release extinguishes a cause of action.[1] *Larkin*, *supra* at 393. In this case, defendant admitted in his answer to plaintiff's motion for attorney fees that he had abandoned his motion to modify custody. Defendant later admitted that he had made this admission in his answer to plaintiff's amended motion for summary disposition.[2] Accordingly, the pleadings show that plaintiff was entitled to judgment as a matter of law by reason of the fact that defendant's claim for modification was barred due to a prior "release." MCR 2.116(C)(7) & (I)(1).

We note that the trial court granted plaintiff's motion for summary disposition "with prejudice." This should not be taken to mean that defendant is forever precluded from seeking to modify the custody arrangement. See MCL 722.27(1)(c); MSA 25.312(7)(1)(c) (providing that a trial court may modify or amend its previous judgments or orders regarding custody for proper cause shown or because of a change of circumstances). The trial court made this point clear when it explained on the record that "custody is always subject to alteration" and that defendant has a right to again make a motion to modify custody.

Docket No. 210440

In docket no. 210440, defendant first argues that the trial court erred in deciding to enter the January 23, 1997, order submitted by plaintiff, and that the court abused its discretion in denying defendant's motion for rehearing or reconsideration of the decision to enter that order. We disagree. The trial court properly entered the order submitted by plaintiff, since it was an agreement in writing and was signed by defendant, the party against whom it was offered. MCR 2.507(H); *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). Defendant contends that the trial court should have held an evidentiary hearing before entering the order to determine whether the order submitted by plaintiff or an alternative order submitted by defendant represented the true

settlement agreement. However, defendant failed to make a timely request for an evidentiary hearing.[3] The trial court thus was not required to conduct such a hearing. See *Mitchell v Mitchell*, 198 Mich App 393, 399; 499 NW2d 386 (1993).

Moreover, there was no material difference between the order submitted by plaintiff and the order submitted by defendant. Defendant's version contained a provision (which was crossed out in plaintiff's version) limiting future discovery and modifications of child support to the parties' incomes as reported on their income tax returns. Such a provision would have been unenforceable since it would have limited the court's ability to modify or amend its previous judgments orders for the best interests of the child. MCL 722.27(1)(c); MSA 25.312(7)(1)(c). Therefore, because there was no material difference between the two orders, any error of the trial court in entering plaintiff's rather than defendant's version of the order was harmless. MCR 2.613(A).

In addition, the trial court did not abuse its discretion in denying defendant's motion for rehearing or reconsideration of the decision to enter the January 23, 1997, order. Defendant has not demonstrated a palpable error by which the court and the parties were misled, nor has defendant shown that a different disposition would result from correction of the alleged error. MCR 2.119(F)(3); *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). The court was apprised of the existence of both orders at the January 23, 1997, hearing, but chose to enter plaintiff's version. Moreover, since there was no material difference between the two orders, a different disposition would not result from correction of the alleged error because entry of the order submitted by defendant would have resulted in an order that was materially indistinguishable from the order that was in fact entered.

Defendant's next argument on appeal is that the trial court abused its discretion in denying defendant's motion for relief from the January 23, 1997, order, and in refusing to hold an in-person evidentiary hearing on defendant's allegation of fraud. We disagree. An in-person evidentiary hearing was not necessary because our review of the record indicates that the trial court resolved the fraud issue, in part, by relying upon deposition testimony submitted by the parties. See *Williams v Williams*, 214 Mich App 391, 394-400; 542 NW2d 892 (1995). Although an in-person hearing is useful when it is necessary to evaluate a witness' demeanor in order to assess credibility, defendant has not argued that it was necessary to consider demeanor in this case. *Id*., p 399 (explaining that demeanor may be one element in assessing credibility, but that it often plays no role; other factors may be more important determinants of credibility). Here, we conclude that the trial court was able to and in fact did resolve defendant's fraud allegation without reference to the demeanor of the witnesses, thus making an in-person evidentiary hearing unnecessary.

Further, the trial court's finding that there was no fraud was not clearly erroneous, MCR 2.613(C), because this finding was supported by the deposition testimony of Joseph Kosmala. Kosmala, an informal mediator, testified that the changes to page three of the order submitted by plaintiff were made and initialed by the parties in Kosmala's presence. This testimony indicated that plaintiff did not alter the order before submitting it to the court, but rather, that both parties agreed to the modification on page three and that no fraud occurred.

Finally, we note that even if an in-person evidentiary hearing had been held and defendant was able to adduce overwhelming evidence to support his allegations concerning the alteration of the provision in question, defendant would still have been unable to establish fraud. As noted, the only additional provision in defendant's version of the order was unenforceable. Hence, any misrepresentation by plaintiff with respect to that provision would not have been material. Defendant would thus have been unable to establish fraud. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). We therefore conclude that the trial court did not abuse its discretion in refusing to hold an in-person evidentiary hearing and in denying defendant's motion for relief.

Defendant's final argument on appeal is that the trial court should have ruled that plaintiff's attorney/client privilege was waived because the crime-fraud exception to that privilege applied. We disagree. Defendant has not shown that plaintiff or his attorneys engaged in a crime or fraud, nor has defendant adduced evidence that plaintiff communicated with his attorneys regarding a crime or fraud that was ongoing or that was to occur in the future. *People v Paasche*, 207 Mich App 698, 705-707; 525 NW2d 914 (1994). Defendant has thus failed to establish that the crime-fraud exception applies.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] Although a motion to modify custody may not be considered a "cause of action" in the strictest sense, it is analogous to a complaint in that it requests the equivalent of a trial to resolve a disputed issue.

[2] Defendant also concedes in his brief on appeal that he admitted in his answer to the attorney fee motion that he was no longer seeking custody.

[3] We do not consider defendant's subsequent request for an evidentiary hearing in connection with his motion for relief from the January 23, 1997, order, to be timely with respect to the issue whether the court erred in entering that order in the first instance.