STATE OF MICHIGAN

COURT OF APPEALS

MARIJA DIMIC,

Plaintiff-Appellee,

v

VUKASIN DIMIC,

Defendant-Appellant.

UNPUBLISHED
January 12, 2001

No. 215157
Wayne Circuit Court
LC No. 97-713113-DO

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

The parties were married in Yugoslavia in 1962. Defendant came to the United States in 1968; plaintiff and their son joined him in 1970. The parties' main marital asset was a bar and restaurant they bought in Detroit in 1978, which they later expanded to include a banquet hall. In 1996, they sold the business under a land contract, and the parties entered into a property settlement agreement to divide the proceeds from the sale. Defendant filed for divorce in April 1997. After that suit was dismissed, plaintiff commenced this divorce action. In the process of dividing the marital assets for the purpose of entering the judgment of divorce following the trial in this case, the trial court found that the parties' property settlement agreement was unenforceable and thus included the proceeds from the sale of the restaurant/banquet hall in its property distribution determination.

On appeal, defendant first argues that the trial court abused its discretion when it struck all of defendant's witness subpoenas, which plaintiff first learned of on the first day of trial, on the ground that defendant failed to give plaintiff any notice. We review this issue for an abuse of discretion. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 143-144; 486 NW2d 326 (1992). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling. *Auto Club Ins Ass'n v State Farm Ins*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

In cases where discovery orders are present, this Court has recognized the importance of disclosing witnesses during discovery to avoid unfair surprise. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Further, under the court rules, the exchange of witness lists is mandatory where there is a scheduling order. MCR 2.401(I).

Although there was no discovery or scheduling order in this case, the court rules require a party who has filed pleadings to serve "a copy of every paper later filed in the action." MCR 2.107(A)(1). This Court has found that subpoenas are papers and that the parties in a case are entitled to notice of any discovery requests on witnesses so that they may raise objections and prepare for trial. *In re Forfeiture of $1,159,420*, *supra* at 142.

Here, the court found that plaintiff would be prejudiced by defendant's failure to provide notice of the subpoenas because she did not have the opportunity to prepare for the testimony of the subpoenaed witnesses. Further, while defendant contends that he was unfairly precluded from offering testimony that would have shown the plaintiff entered into the settlement agreement voluntarily, he made no offer of proof with regard to the testimony of the excluded witnesses. See MRE 103(a)(2). Thus, any prejudice to defendant in excluding the witnesses is speculative. Accordingly, we find that the trial court did not abuse its discretion in striking defendant's witness subpoenas on the basis of unfair surprise.

Defendant next contends that the court abused its discretion when it excluded his witness, Dragan Stojanov, from testifying, on the basis of the attorney-client privilege. However, Stojanov fell within defendant's group of undisclosed witnesses included in the trial court's earlier ruling. As discussed above, Stojanov's testimony was properly excluded on the basis that defendant failed to provide notice to plaintiff. Thus, we need not address whether his testimony was properly excluded on the basis of attorney-client privilege.

Defendant next argues that the trial court erred when it set aside the parties' property settlement agreement and included the proceeds of the sale of the parties' business in its property distribution determination. A trial court is bound by a property agreement entered into by the consent of the parties in a divorce action absent fraud, duress, mutual mistake, or severe stress preventing a party from understanding the nature and effect of the party's act. *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). We will not reverse the finding of the trial court regarding the validity of the parties' consent to a settlement agreement absent an abuse of discretion. *Id.*

Here, the trial court determined that plaintiff signed the settlement agreement under duress and that she did not have a full understanding of the nature and effect of her act. The court noted that the agreement did not set forth the down payment or sale price of the business. Further, plaintiff and her son both testified that plaintiff's marriage to defendant was marked by defendant's ongoing physical abuse. Plaintiff testified that even though she was no longer living with defendant, she was afraid of him and she signed the document because "it was better off than being dead," and because she believed that, if she did not sign it, she would "get nothing." Although defendant testified that he was not physically abusive and that plaintiff willingly signed the agreement, the court apparently did not accept his testimony. We will not second-guess a trial court's credibility determinations. MCR 2.613(C); *Mahrle v Danke*, 216 Mich App 343, 352; 549 NW2d 56 (1996). On this record, we cannot say that the trial court abused its discretion in setting aside the property agreement.

Defendant's final claim of error on appeal is that the trial court abused its discretion when it awarded plaintiff attorney fees. We will not reverse the trial court's decision to award or deny attorney fees in a divorce action absent an abuse of discretion. *Hawkins v Murphy*, 222 Mich

App 664, 669; 565 NW2d 674 (1997). A court may award legal fees to a party in a divorce when it is necessary to enable the party to carry on or defend the suit. *Id.*; MCL 552.13(1); MSA 25.93(1); MCR 3.206(C)(2). Attorney fees may also be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Hawkins, supra*. There must be sufficient evidence in the record to support the necessity of a fee award. *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446; 484 NW2d 723 (1992).

During trial in this case, the court noted that the length of the proceedings had been extended because defendant did not "acknowledge service and then we had to go through all those gyrations."[1] Thus, at least some of the expense of the proceedings could be attributed to obstructive behavior by defendant. Further, testimony showed that since leaving her husband, plaintiff was working six days a week cleaning houses and making approximately $18,000 a year. At the time of trial, she had received only $6,000 from the land contract sale. Although she would eventually receive more as a result of the court's division of the marital assets, this Court has found that a party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Accordingly, we find that the trial court did not abuse its discretion in awarding attorney fees to plaintiff.

Affirmed.

/s/ Jane E. Markey
/s/ Jeffrey G. Collins

Judge Murphy concur in result only

[1] In arguing this matter to the court, counsel justified her request for fees by pointing out that defendant originally filed two false affidavits claiming he was never served with the summons and complaint. This apparently prompted a hearing where it was determined that defendant was, in fact, served.