STATE OF MICHIGAN

COURT OF APPEALS

ALICIA G. BEDSWORTH,

Plaintiff-Cross Appellant,

v

JOHN B. BEDSWORTH,

Defendant-Cross Appellee.

UNPUBLISHED
September 13, 2002

No. 228200
Wayne Circuit Court
LC No. 97-721763-DO

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals the trial court's orders denying her motion for costs and attorney fees incurred in defending defendant's motion to amend a default judgment of divorce.[1] We affirm.

Plaintiff argues that the trial court erred in denying her request for sanctions.[2] We disagree.

A trial court's factual findings with regard to a motion for sanctions will not be disturbed on appeal absent clear error. *State Farm Fire and Casualty Ins v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1990). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). Sanctions are mandatory if a court determines that a claim or defense was frivolous, MCR 2.625, MCL 600.2591, or that a document was signed in violation of MCR 2.114. *Cvengros v Farm Bureau Ins Co*, 216 Mich App 261, 268; 548 NW2d 698 (1996); *In re Forfeiture of Cash and Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993). However, the mere fact that a party does not

[1] In an order dated August 10, 2000, this Court dismissed defendant's original claim of appeal for lack of jurisdiction, but allowed plaintiff to go forward with her cross-appeal pertaining to the denial of attorney fees and costs.

[2] Although the court's statements on the record suggest that it was granting plaintiff's request for attorney fees, the orders that were entered do not reflect such an award. While this discrepancy is unexplained, we deem the orders controlling. See *Riley v Geriatric Center*, 425 Mich 668, 684-685; 391 NW2d 331 (1986); *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

ultimately prevail does not mean that the party's position was frivolous and deserving of sanctions. *Kitchen v Kitchen*, ___ Mich ___; ___ NW2d ___ (Docket No. 116459, decided April 2, 2002), slip op at 10.

Because plaintiff sought sanctions for defendant's allegedly frivolous *motion*, not a frivolous "action or defense," plaintiff's reliance on MCR 2.625 and MCL 600.2591, which govern frivolous claims and defenses, is misplaced. Instead, plaintiff's request for sanctions must be evaluated under MCR 2.114(D).

Under MCR 2.114(D), defense counsel's signature on the motion to amend constituted a certification that the motion was "well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that "the document [wa]s not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Looking to the merits of defendant's motion, MCR 2.601(B) provides that a "[a] judgment by default may not be different in kind from, nor exceed in amount, the relief demanded in the pleading, *unless notice has been given pursuant to MCR 2.603(B)(1)*." Here, while an award of the Neff real estate to plaintiff as her sole and separate property was different from the scope of relief requested in the complaint for divorce, plaintiff provided notice of this requested relief in the proposed default judgment sent to defendant.

As the trial court observed, however, the judgment of separate maintenance was a settlement agreement concerning the division of marital property, duly signed and entered by the court. The default judgment of divorce contained no language explicitly setting aside or modifying the prior judgment. In light of the prior judgment of separate maintenance, we believe defendant had a good faith argument that it could only be set aside or modified as provided by the court rules. See MCR 2.612.

We reach this conclusion even though we acknowledge that this Court has held "that an earlier judgment of separate maintenance in favor of the wife is not a bar to a later absolute divorce." *Engemann v Engemann*, 53 Mich App 588, 592; 219 NW2d 777 (1974). In *Engemann*, this Court relied on New York cases holding that, where a divorce follows a legal separation, the parties are before the court in a "new and different proceeding" where the divorce court is "privileged to consider the question of alimony *de novo*" and, therefore, "the alimony provision in [a] separation decree is not conclusive with respect to the fixation of alimony in the divorce action and does not require plaintiff to bear the burden of showing a change of circumstances." *Engemann*, *supra* at 593, quoting *Kover v Kover*, 29 NY2d 408, 413-414; 278 NE2d 886 (1972). This Court in *Engemann* determined that the New York cases were "sound authority for the proposition that there is no immutability in [a] prior judgment" of separate maintenance. *Engemann*, *supra* at 594. Thus, this Court concluded that the trial court did not err in "modify[ing] the alimony and support provisions made earlier in the judgment of separate maintenance." *Engemann*, *supra* at 594.

This Court's decision in *Engemann* does not explicitly address the division of marital property, only alimony and spousal support. It relies on New York law, and was decided before the adoption of the current court rules. While the rationale of the case is that a party who obtains a judgment of separate maintenance is not precluded from later obtaining a full-fledged judgment

of divorce, it does not address the equitable factors that a trial court is generally required to consider in dividing a couple's marital assets. See *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992).[3] Thus, while *Engemann* may be supportive of plaintiff's position, we are not persuaded that defendant's motion to amend the default judgment was frivolous in the sense that it could not be considered "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." MCR 2.114(D)(2); see also *Taylor v Lenawee Co Brief of Co Rd Comms*, 216 Mich App 435, 445; 549 NW2d 80 (1996) ("careful research did not establish a complete lack of support for plaintiff's position"). Further, there is no indication that defendant's motion to amend was "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3). Therefore, we find no clear error in the trial court's denial of plaintiff's request for sanctions.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage

[3] We acknowledge that the *Sparks* factors are less of a concern where, as here, the property was initially distributed by the consent of the parties and, later, because of defendant's default. See *Applekamp v Applekamp*, 195 Mich App 656, 661-662; 491 NW2d 644 (1992).