STATE OF MICHIGAN

COURT OF APPEALS

TRUDY JO SIMCOX,

Plaintiff-Appellant,

v

BLAIR RICHARD SIMCOX, JR.,

Defendant-Appellee.

UNPUBLISHED
June 23, 2009

No. 284287
Genesee Circuit Court
LC No. 07-277268-DM

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing plaintiff's complaint for divorce because a default divorce decree had already been entered by a Texas court. We reverse and remand for further proceedings.

Plaintiff and defendant were married in Michigan on May 24, 1991. They have one child together, who was born on December 28, 1994. On July 3, 2007, defendant filed a petition for divorce in Texas, alleging that he had been domiciled in Texas and had been a resident of Dallas County for at least six months and 90 days, respectively. He alleged that plaintiff was not a resident of Texas, but that Texas was the "last state in which marital residence between Petitioner and Respondent occurred, and this suit is filed before the second anniversary of the date on which marital residence ended." Plaintiff acknowledges that she was served with a copy of the Texas complaint for divorce on July 30, 2007. She never responded or appeared in the Texas action, and a default judgment of divorce was entered on September 18, 2007.

In the meantime, on August 31, 2007, plaintiff filed a complaint for divorce in Michigan. She alleged that she had been a resident of Michigan and Genesee County for at least 180 days and ten days, respectively, and that defendant resided in Texas. Plaintiff alleged that the parties separated on or about October 23, 2006, and that their child "presently reside[d]" with her in Michigan. She did not reference the Texas action.

The Texas default judgment appointed both parents as "Joint Managing Conservators" of the child. Plaintiff was given the "exclusive right to designate the primary residence of the child without regard to geographic location." Defendant was ordered to pay child support. The decree also ordered the "Sale of Residence" in Michigan, at a mutually agreed price, with the net sales

proceeds to be divided equally. The decree also divided the parties' personal property and retirement accounts.

After defendant was served with the summons and complaint in this action, he moved to dismiss it and subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(6) and (7), arguing that another action had been initiated between the same parties involving the same claims and that plaintiff's action was barred by res judicata. Defendant did not attach any documentary evidence to the summary disposition motion and brief[1] and stayed away from any discussion regarding where plaintiff and the child resided before and at the time of the Texas proceedings. In her response, plaintiff was adamant that neither she nor the child had ever resided in Texas. Plaintiff submitted school records which indicated that the child had been a student in the Goodrich (Michigan) Area School District since Kindergarten 2000 up until the current date of November 13, 2007. We would also note that defendant, at oral argument before this panel, conceded that Michigan, and not Texas, was the "home state" of the child, which terminology we will address below. Plaintiff also submitted a 2006 federal tax return document, executed by both parties on March 6, 2007, which indicated that the parties' home address was in Goodrich, Michigan. As indicated above, the Texas petition for divorce was filed on July 3, 2007, which date was approximately four months after defendant signed the tax document, yet in the Texas petition, defendant alleged that he had "been a domiciliary of Texas for the preceding six-month period[.]" Defendant presented no evidence showing that he was actually domiciled in Texas for the six-month period as claimed; however, in plaintiff's appellate brief, she states that defendant left his employment in Michigan in October 2006 and relocated to Texas in order to take a job in that state. Plaintiff's brief indicates that defendant has remained in Texas ever since October 2006. At the hearing on defendant's motion for summary disposition, the trial court repeatedly questioned plaintiff's counsel about her failure to take any action in the Texas proceedings. The trial court then dismissed plaintiff's action, explaining:

> I read the law. I don't know of anyway [sic] that I can continue to have jurisdiction. . . . And if that court [in Texas] sets aside the judgment down there, I'll be glad to hear it. But I – at this point I have to dismiss it.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

In *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 620-621; 692 NW2d 388 (2004), this Court, reviewing the Uniform Enforcement of Foreign Judgments Act (UEFJA), MCL 691.1171 *et seq*., and the Full Faith and Credit Clause of the United States Constitution, US Const, art IV, § 1, stated:

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[1] Defendant was not required to do so given that the motion was brought under MCR 2.116(C)(6) and (7). MCR 2.116(G).

> A "foreign judgment" is "any judgment . . . of a court of the United States or of any other court that is entitled to full faith and credit in this state." MCL 691.1172. "The Full Faith and Credit Clause requires that a foreign judgment be given the same effect that it has in the state of its rendition." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 406; 509 NW2d 829 (1993). Although the Full Faith and Credit Clause requires recognition of the judgments of sister states, "collateral attack may be made in the courts of this [s]tate by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it." *Delph v Smith*, 354 Mich 12, 16; 91 NW2d 854 (1958), quoting *Johnson v DiGiovanni*, 347 Mich 118, 126; 78 NW2d 560 (1956).
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> "The Due Process Clause of the Fourteenth Amendment limits the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants. *Kulko v California Superior Court*, 436 US 84, 91; 98 S Ct 1690; 56 L Ed 2d 132 (1978). As a result, a valid judgment affecting a nonresident's rights or interests may only be entered by a court having personal jurisdiction over that defendant. *Int'l Shoe Co v Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 2d 95 (1945)." . . .
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> The United States Constitution does not compel Michigan courts to give a foreign judgment full faith and credit when the jurisdiction of the foreign court has been successfully attacked. *California v Max Larsen, Inc*, 31 Mich App 594, 597-598; 187 NW2d 911 (1971). Thus, to be enforceable under the UEFJA, the foreign judgment must have been entered by a court with jurisdiction over the parties and the subject matter. [Alteration in original.]

In *Nash v Salter*, 280 Mich App 104, 119-120; 760 NW2d 612 (2008), this Court echoed the sentiments enunciated in *Blackburne*, stating:

> Although the Full Faith and Credit Clause . . . requires recognition of sister-state judgments, the constitution does not compel Michigan courts to recognize such judgments where the issuing court lacked jurisdiction over the subject matter or the parties. *Blackburne*, *supra* at 620-621; 28 USC 1738A(a) and (c). "[C]ollateral attack may be made in the courts of this state by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it." *Blackburne*, *supra* at 620-621 (quotation marks and citation omitted). Thus, if plaintiffs can demonstrate that the Texas court lacked personal or subject-matter jurisdiction over this matter, its child-custody order is not entitled to full faith and credit by the courts of this state.

Accordingly, the trial court here was not required to abide by the Texas divorce judgment if Texas did not have personal or subject-matter jurisdiction to enter the judgment, and collateral attack of the Texas judgment can be made in this state. Although defendant did not technically seek to enforce the Texas divorce judgment in Michigan and, allegedly, it has not been filed with a Michigan court, defendant sought to use the judgment as the underlying basis for his res judicata argument in favor of summary disposition. In responding to defendant's motion for

summary disposition, plaintiff was effectively collaterally attacking the Texas judgment on the ground that the Texas court lacked jurisdiction. The trial court erred in dismissing the case without any consideration of the Texas court's jurisdictional reach. Moreover, res judicata generally requires, in part, a prior final decision by a court of competent jurisdiction. *Jones v Chambers*, 353 Mich 674, 680; 91 NW2d 889 (1958); *Harvey v Harvey*, 237 Mich App 432, 436-437; 603 NW2d 302 (1999); *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998); *In re Cook Estate*, 155 Mich App 604, 610; 400 NW2d 695 (1986).

Tex Fam Code Ann § 6.301 provides:

> A suit for divorce may not be maintained in [Texas] unless at the time the suit is filed either the petitioner or the respondent has been:
>
> (1) a domiciliary of this state for the preceding six-month period; and
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> (2) a resident of the county in which the suit is filed for the preceding 90-day period.

However, "[t]he provisions of the residency statute are not jurisdictional, but rather provide the necessary qualifications for bringing an action for divorce." *Stallworth v Stallworth*, 201 SW3d 338, 345 (Tex App, 2006). Further, plaintiff apparently concedes that defendant has resided in Texas since October 2006. Tex Fam Code Ann § 6.305 provides:

> (a) If the petitioner in a suit for dissolution of a marriage is a resident or a domiciliary of this state at the time the suit for dissolution is filed, the court may exercise personal jurisdiction over the respondent or over the respondent's personal representative although the respondent is not a resident of this state if:
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> (1) this state is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which marital residence ended; or
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> (2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

While it would appear that there was never a marital residence in Texas and that plaintiff never lived in nor had meaningful personal contacts with the state of Texas, the record is not sufficiently developed to properly determine whether Tex Fam Code Ann § 6.305 was satisfied or unsatisfied. The income tax documents, as well as the Texas divorce documents, do show that there was marital residency in Michigan; however, it is within the realm of possibilities that marital residency was later established in Texas. Although this possibility seems doubtful, considering the record and lack of argument by defendant, there needs to be evidence presented on the issue, if only a simple, uncontroverted affidavit. Furthermore, and aside from the question

of where the last marital residence was established, the Texas statute also requires contemplation of potential jurisdictional reach under constitutional provisions and law, and evidence is again lacking in this regard.[2]

If on remand the trial court determines that the Texas court lacked jurisdiction under Texas and federal constitutional law, plaintiff's Michigan divorce proceedings can continue.[3] But even if the trial court finds that the Texas court had jurisdiction relative to divorce matters in general concerning plaintiff, the trial court shall nonetheless proceed on child custody matters pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* Both Texas and Michigan have adopted the UCCJEA. See *Hart v Kozik*, 242 SW3d 102, 106 (Tex App, 2007).

Under the UCCJEA, unless an emergency situation is involved, a court of a particular state has jurisdiction to make an initial child-custody determination only where, with some qualifications, the state is or was recently the home state of the child, where no other state has jurisdiction, or where another state has but declines jurisdiction. MCL 722.1201(1); Tex Fam Code Ann § 152.201(a). "Home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding." MCL 722.1102(g); Tex Fam Code Ann § 152.102(7). Except in an emergency situation, "a court of this state may not exercise its jurisdiction . . . if, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with [the UCCJEA.]" MCL 722.1206(1); Tex Fam Code Ann § 152.206(a). In a similar vein, MCL 722.1303(1) provides:

> A court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction that was in substantial conformity with this act or the child-custody determination was made under factual circumstances meeting the jurisdictional standards of this act and the child-custody determination has not been modified in accordance with this act. [See also Tex Fam Code Ann § 152.303(a).]

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[2] Plaintiff's contention that res judicata does not apply because a default and not a litigated judgment was entered in Texas lacks merit and finds no support under Texas or Michigan law. *Cadle Co v Bray*, 264 SW3d 205, 214 (Tex App, 2008); *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

[3] On appeal, we agree with plaintiff that MCR 2.116(C)(6) was not applicable because the Texas action was not pending at the time the trial court decided defendant's motion for summary disposition. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

The question thus becomes whether the Texas court exercised jurisdiction that was in substantial conformity with the UCCJEA. The record establishes, without dispute, that Texas was never the "home state" of the child. The record, and lack of argument to the contrary, supports a conclusion that Michigan was and is the "home state" of the child and that a Michigan court has never "declined" jurisdiction. At oral argument, defendant conceded that Michigan, not Texas, was the child's "home state" and that he had no objection to a Michigan court addressing child custody matters. On the basis of the record and given defendant's concessions, we reverse the trial court and hold that child custody matters shall proceed in the Michigan court, just as if the Texas court, which lacked jurisdiction under the UCCJEA, had never ruled on custody.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray