

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SARA SMITH,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D03-5448

GREGORY D. SMITH,

Appellee.

Opinion filed February 8, 2005.

An appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

Stephen S. Poché of Stephen S. Poché, P.A., Shalimar, for Appellant.

Michael L. Guttman, Pensacola, for Appellee.

ERVIN, J.

Sara Smith appeals an order striking her motion for attorney's fees incurred in a dissolution of marriage proceeding against appellee, Gregory D. Smith, by reason of appellant's failure to file her motion within 30 days after entry of the final

judgment, as required by Florida Rule of Civil Procedure 1.525. Although the trial court recognized that the instant case was distinguishable from the line of cases holding that a provision in a final judgment reserving jurisdiction to determine entitlement to attorney's fees does not act as an automatic extension of time under Florida Rule of Civil Procedure 1.090(b) to file a motion for fees, it nonetheless granted the motion to strike due to appellant's noncompliance with the 30-day provision in rule 1.525. Because the issue of the wife's entitlement to an attorney's fee had already been decided in the final judgment entered, we vacate the order granting the motion to strike and remand the case for further proceedings.

In appellant's complaint for marital dissolution, filed in 2002, she sought, among other things, an award of attorney's fees. The parties ultimately settled all issues except spousal support and attorney's fees and costs for the benefit of the petitioner/wife. Ten days before the entry of the final judgment, the wife's attorney sent the husband's attorney a letter with a copy of his statement for services performed, and it concluded with the following inquiry: "Please advise if Mr. Smith is willing to pay this amount or if I will have to set a hearing on this issue."

The Final Judgment of Dissolution of Marriage was entered August 29, 2003, in which the decretal portion provided:

9. The petitioner/Wife is entitled to a reasonable

attorney's fee to be paid by the Respondent/Husband. The Court reserves jurisdiction to make a determination as to the amount of this fee in the event that the parties are unable to otherwise agree.

On September 11, 2003, the wife's attorney again wrote to the husband's attorney seeking a response to the wife's request for a stipulation as to the amount of attorney's fees sought by the wife. On September 19, 2003, the husband's attorney replied, offering "the sum of \$6,000.00 in full and complete satisfaction of all amounts due to your firm. This sum would be paid at the rate of \$500.00 per month, until satisfied." Finally, on October 10, 2003, or 42 days after entry of the final judgment, wife's attorney filed a motion for determination of attorney's fees and costs. Thereafter, the husband's attorney moved to strike the wife's motion for fees and costs as untimely.

At the hearing on the motion for determination of the amount of attorney's fees, the husband argued that rule 1.525 requires that a motion for attorney's fees and costs be served no later than 30 days from the filing of the final judgment. The wife's counsel answered, stating that despite his efforts to negotiate the amount of the fee, he had heard nothing from the husband's attorney until September 19, 2003, and that upon receipt of the response, he set a hearing on the motion for attorney's fees. Specifically addressing the husband's motion to strike, counsel for the wife noted that

upon his review of case law addressing rule 1.525, he was of the opinion it did not address the circumstances of a case, such as that at issue, in which the final judgment rendered by the court explicitly stated that wife's attorney was **entitled** to an attorney's fee, and jurisdiction was reserved only for a determination of its amount.

In granting the motion to strike, the trial court recognized that none of the case law which it had reviewed dealt with the issue of entitlement, but it concluded that even though it had decided the question of entitlement, a party seeking fees was still required by the rule to file a motion asking for the amount of the fee within 30 days from the filing of the final judgment. The subsequent written order granting the husband's motion to strike the motion for attorney's fees states in part:

From a review of the record before the Court, the Petitioner/Former Wife's Motion for Determination of Attorney's Fees and Costs was served more than thirty (30) days after the filing of the Final Judgment of Dissolution of Marriage in this matter. Thus, the same is untimely under the plain provisions of Rule 1.525, Florida Rules of Civil Procedure.

.....

... Without a motion for enlargement of time being made, the Court may not and did not reach or consider the issue of excusable neglect further.

The standard of review regarding the trial court's construction of the rules is *de novo*. See State, Dep't of Transp. v. Southtrust Bank, 886 So. 2d 393, 396 (Fla. 1st DCA 2004); Gosselin v. Gosselin, 869 So. 2d 667, 668 (Fla. 4th DCA 2004). See also

Jensen v. Jensen, 824 So. 2d 315, 322 (Fla. 1st DCA 2002), review denied, 842 So. 2d 844 (Fla. 2003). This court’s “standard of review as to the trial court’s finding of excusable neglect is whether an abuse of discretion occurred.” Southtrust, 886 So. 2d at 396.

Rule 1.525, effective January 1, 2001, provides:

Rule 1.525. Motions for Costs and Attorneys’ Fees

Any party seeking a judgment taxing costs, attorneys’ fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Rule 1.525 applies to dissolution of marriage proceedings pursuant to Florida Family Law of Procedure Rule 12.020, “which provides that the rules of civil procedure apply in all family law matters except as otherwise provided in the family law rules or when the family law rules conflict with the rules of civil procedure.” Lyn v. Lyn, 884 So. 2d 181, 183-84 (Fla. 2d DCA 2004). See also Mook v. Mook, 873 So. 2d 363 (Fla. 2d DCA 2004); Gosselin, 869 So. 2d at 668; Wentworth v. Johnson, 845 So. 2d 296, 298 (Fla. 5th DCA 2003). In Wentworth, the court observed that a “request for fees and costs contained within a complaint or answer simply puts one’s adversary on notice that a claim for fees and costs will be sought at the conclusion of the case.” Wentworth, 845 So. 2d at 298-99. The court concluded that in order to comply with rule 1.525, a separate motion must be filed. See id. Accord Diaz v. Bowen, 832 So.

2d 200, 201 (Fla. 2d DCA 2002)(“A request for fees and costs contained within a complaint or answer is not self-effectuating.”).

The Third and Fourth Districts have held that the trial court may extend rule 1.525's time period for filing an attorney's-fee motion if there is a reservation of jurisdiction in the final judgment. See Bray v. Grabowski, 30 Fla. L. Weekly D102 (Fla. 3d DCA Dec. 29, 2004); Fisher v. John Carter & Assocs., Inc., 864 So. 2d 493, 496 (Fla. 4th DCA 2004); Saia Motor Freight Line, Inc. v. Reid, 888 So. 2d 102 (Fla. 3d DCA 2004). However, the Second and Fifth Districts have rejected this position, and have held that a reservation of jurisdiction cannot serve to extend the 30-day period established in rule 1.525. See Mook, 873 So. 2d at 364; Gulf Landings Ass'n, Inc. v. Hershberger, 845 So. 2d 344, 345-46 (Fla. 2d DCA 2003); Wentworth v. Johnson, 845 So. 2d 296, 299 (Fla. 5th DCA 2003). Although this court has agreed with the Second and Fifth Districts in deciding that the requirements of rule 1.525 are mandatory, see Atkins v. Eris, 873 So. 2d 1264, 1266 (Fla. 1st DCA 2004), and Ulico Casualty Co. v. Roger Kennedy Construction, Inc., 821 So. 2d 452, 453 (Fla. 1st DCA 2002), it also holds that rule 1.525 must be considered in conjunction with Florida Rule Civil Procedure 1.090(b), which provides in part:

When an act is required or allowed to be done at or within a specified time . . . by these rules, . . . for cause shown the court at any time in its discretion . . . upon

motion made and notice after the expiration of the specified period, **may permit the act to be done when failure to act was the result of excusable neglect**

(Emphasis added.) See Southtrust Bank, 886 So. 2d at 395. As Southtrust explains:

[R]ule 1.525 requires a motion to tax fees or costs to be served within 30 days after entry of judgment unless, by motion filed pursuant to rule 1.090(b) either before or **after** the 30 days has run, the movant seeks an enlargement of time. If an enlargement of time is requested, the trial court may consider and rule on it according to the requirements of rule 1.090(b).

Id. at 395-96 (emphasis added).

Although cognizant of the distinction between the facts in the case before it and those relied on by the husband's counsel, the trial court nevertheless felt constrained to grant the motion to strike because the wife had neither filed a timely motion for fees nor a rule 1.090(b) motion for enlargement of time. In our judgment, the failure of appellant to file an explicitly designated motion for enlargement of time to seek a reasonable amount of fees did not *per se* bar her right to recover same. If she had filed a motion to extend the time to seek fees after the expiration of 30 days, the court would be required to consider it, subject only to the condition that she demonstrate excusable neglect for not having earlier complied with the 30-day limitation period of rule 1.525. Because the lower court had already decided the wife's entitlement to fees, it should have, in our opinion, treated the wife's untimely motion for

determination of fees and costs as one for enlargement of time, and decided whether the delay in filing same was excusable, an issue not reached by the court.

On remand, the court shall consider the wife's motion as one for an extension of time under rule 1.090(b), and, if it determines the delay should be excused on such basis, it shall thereafter award a reasonable attorney's fee for the benefit of the wife. The order striking fees is VACATED and the case is REMANDED for further proceedings.

BARFIELD and KAHN, JJ., CONCUR.