

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000176-MR

CARLEEN BRUNETTI

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 96-CI-000735

DENNIS KEITH SHELBY

APPELLEE

OPINION
AFFIRMING IN PART - REVERSING AND REMANDING IN PART

* * * * *

BEFORE: GUIDUGLI, JOHNSON and KNOPF, Judges.

GUIDUGLI, JUDGE. Carleen Brunetti appeals from a judgment denying her interest and attorney's fees in her action to enforce the terms of a Tennessee divorce decree against her ex-husband, a Kentucky resident. Appellant is entitled to interest under Kentucky statutes granting full faith and credit to out-of-state judgments. We, therefore, reverse the trial court's denial of interest and affirm the denial of attorney's fees.

The fourteen year marriage of Carleen Brunetti [Shelby] (Carleen) and Dennis Keith Shelby (Dennis) was ended by "Final

Decree of Divorce" in Davidson County, Tennessee on September 29, 1988. The divorce decree incorporated by reference a "Marital Dissolution Agreement" negotiated by the parties, which the court affirmatively found to be "equitable." This action concerns paragraph twelve of that agreement, which states:

12. A. Husband shall pay directly to Wife for the support and maintenance of Wife as periodic alimony the sum of \$75.00 per month on or before the first of each succeeding month for a period of 13 months [\$975.00] following the entry of a Final Decree of Divorce or until she remarries, whichever event shall first occur.

B. Husband agrees that he shall reimburse Wife for those funds previously advanced by her in the maintenance of the parties mortgage indebtedness in the amount of \$2,970.00, which shall be paid directly to Wife at the rate of \$165.00 per month commencing on the 15th day of each consecutive month with the first payment to be made within thirty (30) days following the sale of the residential real property referred to in Paragraph No. 1 above, **for all of which let execution issue if necessary.** (Emphasis added).

Paragraph B, above, recites that Carleen had advanced monies which benefited the parties for "the maintenance of the parties mortgage indebtedness in the amount of \$2,970" for some period of the marriage. Dennis cannot dispute that he agreed to pay Carleen \$3,945.00 (\$975.00 + \$2,970), the amounts listed in paragraph 12. Additionally the agreement provided for "execution" if necessary. Dennis never paid anything on either one of these obligations.

On August 5, 1996, Carleen's counsel filed a complaint against Dennis in the McCracken Circuit Court seeking to enforce the Tennessee judgment and for an award of interest and attorney's fees. Dennis filed a pro se answer on August 22, 1996, denying he owed Carleen any money. Carleen's counsel filed a motion for a hearing before Mr. Bill Flynn, the McCracken County Domestic Relations Commissioner (DRC), and a hearing date was set for September 23, 1996. A month later, on the day of the hearing, the DRC recused himself stating that he had known Dennis "for over 30 years and he is a close neighbor." The case was transferred to the circuit court which, on October 8, 1996, scheduled a hearing for November 1, 1996.

Two days before the scheduled hearing, newly retained attorney for appellant made an appearance on behalf of Dennis and requested a continuance. The hearing was reset for November 22, 1996, and subsequently was held on that date. The court heard proof as will be discussed more fully herein, none of which involved a defense for Dennis' failure to pay. After the hearing on December 3, 1996, but before the court could rule, Dennis finally paid Carleen \$3,945 by cashier's check. This was the exact principal amount Carleen had claimed Dennis owed her and which Dennis had denied owing.

By order entered December 20, 1996, the trial court denied Carleen's motion for interest, indicating this result was "in accordance with Courtenay v. Wilhoit, 655 S.W.2d 41 (Ky.App. 1983)." The court also denied Carleen's motion for attorney's

fees because "...this action is not brought under KRS Chapter 403, and there is no legal authority to award attorneys fees." Lastly, the court recited that it was giving "full faith and credit" to the Tennessee decree, but having been informed that the "underlying claim" had been paid, "all other motions would be moot." Carleen filed a notice of appeal on January 17, 1997.

WHETHER CARLEEN WAS ENTITLED TO INTEREST

The issue of interest on a foreign judgment is governed by statute in Kentucky. KRS 360.050 states, "Any indebtedness incurred or judgment rendered out of this state is presumed to bear interest in accordance with the provisions of KRS 360.040." The trial court denied Carleen's motion for interest, citing Courtenay v. Wilhoit, Ky. App., 655 S.W.2d 41 (1983). In Courtenay, supra, the Court stated the issue:

The single issue presented for determination is whether a decree of dissolution of marriage, which incorporates by reference a separation agreement providing for paying of a fixed sum of money in periodic payments, requires interest to be paid on the fixed-sum where the agreement and decree are silent on the issue.

In Courtenay, the trial court had denied the motion for interest because the wife, in a separation agreement, had agreed to receive some of the marital assets to which she was entitled over time, and that the payments would be treated as maintenance. The trial court viewed the motion for interest as one "modifying" the separation agreement and denied the motion. This Court affirmed, holding "Because [Appellee] has kept his payments

current, there is no judgment to which KRS 360.040 can apply.” Id. At 43. Obviously the case at bar is distinguishable on the facts because Dennis never paid any of the periodic fixed payments which he agreed to pay when they were due. Dennis did not pay until Carleen sued him, a hearing was held, and the court was about to rule.

The Court in Courtenay did address the situation presented in this case, stating that when a party missed a payment due under the separation agreement the party due the payment would become a judgment creditor of the party owing the payment. “KRS 360.040 would then become operative and interest would run on the past due payment from its due date until paid.” Id. at 42. As long as there were no factors making an award of interest inequitable, it would be allowed at the statutory rate. Id. The Court pointed out that the purpose of KRS 360.040 is to encourage judgment debtors, like Dennis in this case, “to fulfill the obligations he incurred in the agreement.” Id. at 43. We cannot think of a single reason why an award of interest in this case would be “inequitable.” See also, Hardin v. Hardin, Ky. App., 711 S.W.2d 864, 865 (1986).

There can be no doubt in this case that the Davidson County, Tennessee “Final Decree of Divorce” which incorporated by reference the parties’ “Marital Dissolution Agreement” was a “judgment” to which KRS 360.040 applies. It was the “final order adjudicating all the rights” of the parties. CR 54.01; Petrilli’s Kentucky Family Law, §§ 24.1; 24.23 (1988). The

parties even negotiated that "if necessary", "execution" could issue to collect the \$3,945 specified in paragraph 12.

"Execution" is a legal term of art meaning, "the legal process of enforcing the judgment, ususally by seizing and selling property of the debtor." Black's Law Dictionary p. 568 (6th Ed. 1990).

THE APPLICABLE RATE OF INTEREST

Having determined Carleen is entitled to interest on the judgment, the next issue is the applicable interest rate. Dennis argues that if Carleen is entitled to interest, the Kentucky judgment rate of interest set forth in KRS 360.040 of twelve percent (12%) compounded annually should not apply. Dennis argues instead that the Tennessee judgment rate of ten percent (10%) is all that Carleen should be entitled to. We disagree.

First, Dennis did not submit anything to the trial court regarding the Tennessee judgment rate. The only Tennessee law in the record is contained in Carleen's memorandum to the trial court which cites Tennessee Code Annotated 47-14-121 as providing a 10% judgment rate. Neither party submitted a copy of the statute to the trial court or to this Court. Secondly, Dennis moved to Kentucky and reestablished Kentucky residency after his Tennessee divorce. By this act, Dennis became subject to the laws of this Commonwealth. Carleen was forced to come to Kentucky to execute against Dennis. KRS 360.050 is very clear that foreign judgments, such as the Tennessee judgment at issue, are presumed to bear interest at the Kentucky judgment rate. We

hold Carleen's judgment entitles her to 12% interest compounded annually until the entire balance of principal and interest is paid in full.

ATTORNEY'S FEES

One of the fundamental principles in the American legal system is that parties are responsible for their own attorney's fees. In Louisville Label, Inc. v. Hildesheim, Ky., 843 S.W.2d 321, 326 (1992), our Supreme court pronounced:

Except for fee-shifting statutes which provide that a trial court may assess an attorney's fee for one party against the other, such as provided for in Civil Rights Act litigation by KRS 344.450 and in divorce litigation by KRS 403.220, the obligation to pay one's own attorney falls upon the person employing the attorney rather than upon the opposing litigant.

In this case, Carleen argues that the laws governing Kentucky divorces should apply because the equities cry out that she can only be made whole by recovery of principal, interest and her attorney's fees. As sympathetic as we may be to Carleen's plight, we cannot grant what the law does not allow. We therefore affirm the trial court's denial of Carleen's motion for attorney's fees but reverse the trial court's denial of Carleen's motion for interest and remand with the following directions.

On remand, counsel for the parties shall calculate interest on each of the principal payments called for in paragraph 12 of the marital dissolution agreement, at the rate of 12% per annum, compounded annually, from the date due until the date when Dennis tendered the cashier's check for \$3,945. The

amount paid by Dennis (\$3,945) shall be subtracted from the total due on that date. The remaining balance due on that date shall continue to accrue interest at the rate of 12% per annum, compounded annually, until paid in full.

For the foregoing reasons, we affirm in part and reverse and remand in part the judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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