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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001150-MR
AND
NO. 2008-CA-001207-MR

JANET WILSON — APPELLANT/CROSS-APPELLEE

v.

JOHN E. SCHEIBEL — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 97-FC-001407

OPINION
VACATING AND REMANDING ON DIRECT APPEAL, AND
AFFIRMING ON CROSS-APPEAL

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal and cross-appeal from an order entered by the Jefferson Circuit Court, Family Division, regarding the modification of a judgment relating to a maintenance arrearage and interest. For the reasons stated

hereafter, on direct appeal we vacate and remand for further proceedings. We affirm on cross-appeal.

Janet Wilson and John E. Scheibel married in 1968 and separated in 1993, by which time their children were grown. In July 1994, the Warren Circuit Court ordered John to pay temporary maintenance of $6,638.38 per month. In January 1996, the court entered a decree of dissolution awarding Janet permanent maintenance of $1,500 per month, as well as a maintenance arrearage judgment (arrearage judgment) in the amount of $34,058.20 plus 12% annual interest from June 23, 1995, based on John's failure to pay temporary maintenance as directed. The court's decision was affirmed by a panel of this court on appeal.[1]

At some point both parties moved to Jefferson County. In August 1997 the Jefferson Circuit Court, Family Division (the trial court), reduced John's maintenance obligation to $328.03 per month. Although John remained current in satisfying his monthly maintenance obligation, he failed to make payments toward the arrearage judgment.

In October 2007, nearly twelve years after the arrearage judgment was entered, Janet sought enforcement of the judgment and payment of the accumulated arrearage and interest, which had grown to $136,835. John moved to dismiss the motion, asserting that the drastic reductions of his maintenance obligation in 1996 and 1997 demonstrated the excessiveness of the temporary award which created the arrearage. He alleged that Janet had told him he need not

[1] *Scheibel v. Scheibel,* Appeal No. 96-CA-0494-MR, rendered December 19, 1997.

worry about paying the obligation, that he was prejudiced by her silence and delay, and that she was estopped from collecting the judgment so many years after it was entered. John also alleged in a November 2007 deposition that the parties had verbally agreed, ten years earlier, that he would pay $10,000 in full satisfaction of Janet's claims against him. However, Janet denied that any agreement or waiver had occurred in regard to the arrearage, and John admitted he did not pay Janet $10,000.

In January 2008, after a hearing, the trial court awarded Janet a common law judgment for $75,292 representing "the original judgment, plus interest for a period of seven years following the original judgment." The court concluded that it would be unconscionable to require John to pay Janet the requested sum of $136,835, as Janet had not earlier attempted to enforce the judgment and John reasonably could have concluded that she had forgiven the debt. The court also noted that John had satisfied his ongoing maintenance obligations despite his reduced income. This appeal and cross-appeal followed.

Maintenance payments become vested when due, *see Combs v. Combs,* 787 S.W.2d 260, 263 (Ky. 1990), and the trial court clearly had no authority to disturb the accumulated arrearage of $34,058.20. Instead, the issues before us relate solely to the interest which accumulated pursuant to the 1996 arrearage judgment.

We agree with Janet's assertion on direct appeal that the trial court erred by altering the terms of the arrearage judgment and reducing the accumulated

interest due thereon. As noted above, the arrearage judgment, as affirmed on appeal, awarded Janet $34,058.20 "plus interest at the judgment rate of 12% per annum effective June 23, 1995." The interest was awarded pursuant to KRS[2] 360.040, which provides:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

Although John argues otherwise, the statute's use of the term "shall" mandates the imposition of 12% interest on a judgment unless either (1) the judgment is based on a written instrument which provides for a different interest rate, or (2) the court conducts a hearing and sets a lower interest rate when reducing the unliquidated damages claim to a judgment. *See* KRS 446.010(30); *City of Louisville v. State Farm Mut. Auto Ins. Co.,* 194 S.W.3d 304, 307 (Ky. 2006) ("shall" is mandatory under rules of statutory construction).

Pursuant to KRS 360.040, 12% interest was properly attached to the arrearage judgment when it was entered in 1996. *See Combs,* 787 S.W.2d at 263; *Sharp v. Sharp,* 516 S.W.2d 875, 879 (Ky. 1974); *Stephens v. Stephens,* 300 Ky.

[2] Kentucky Revised Statutes.

769, 190 S.W.2d 327, 327 (1945)); *Courtenay v. Wilhoit*, 655 S.W.2d 41, 42 (Ky.App. 1983). In 2008, Janet sought only the enforcement of the earlier judgment. Although John relies on *Hoskins v. Hoskins,* 15 S.W.3d 733 (Ky.App. 2000), as support for his argument that in 2008 the trial court was authorized to address the equity of the 12% interest award, *Hoskins* in fact is not applicable since its "fairness" issue related to the court's reduction of interest when entering an arrearage judgment, rather than to a reduction of interest many years after the arrearage and interest judgment became final.

Here, the 2008 reduction of interest was neither based on a written instrument providing for a different interest rate, nor the result of a hearing reducing an unliquidated damages claim to a judgment. KRS 360.040. Instead, the dispute turns on the issue of the trial court's authority to modify the twelve-year-old arrearage judgment. Certainly, the modification was not authorized pursuant to CR[3] 60.01, which applies only to the correction of clerical mistakes. *See Potter v. Eli Lilly & Co.,* 926 S.W.2d 449, 452 (Ky. 1996), *abrogated on other grounds by Hoskins v. Maricle,* 150 S.W.3d 1 (Ky. 2004). Moreover, the arrearage judgment was not subject to modification pursuant to CR 60.02. That rule "is only available to a party or his legal representative[,]" *Potter, id.* at 452, none of whom filed a motion seeking such relief.

Next, a different result is not compelled by the trial court's finding that it would be unconscionable to compel John to pay 12% interest from the date

[3] Kentucky Rules of Civil Procedure.

of the judgment "since Janet had not attempted earlier to enforce the judgment and John reasonably could have concluded that she had forgiven the debt[,]" and since John had accumulated no additional arrearage despite his reduction in income. The court's conclusion is contrary to the purpose of KRS 360.040, which seeks to place judgments on equal footing with other liquidated demands by ensuring compensation to creditors for the lost use of money, and by encouraging judgment debtors to timely comply with the terms of judgments. *Farmer v. Stubblefield,* 297 Ky. 512, 180 S.W.2d 405, 405 (1944). *See Elk Horn Coal Corp. v. Cheyenne Ress., Inc.,* 163 S.W.3d 408, 422 (Ky. 2005); *Stone v. Kentucky Ins. Guar. Ass'n,* 908 S.W.2d 675, 678 (Ky.App. 1995); *Courtenay,* 655 S.W.2d at 42-43. Neither the trial court's statement that its modification operated as the imposition of 12% interest on the judgment for seven years, nor John's claim that the modification alternatively operated as the imposition of a lower interest rate from the date of judgment forward, changes the fact that the modification of the 1996 arrearage judgment was unauthorized and erroneous.

Janet next argues that the trial court erred by essentially applying the doctrine of laches despite the fact that her 2007 motion to enforce the judgment was filed well within the fifteen-year limitations period for bringing an action to enforce a judgment. *See* KRS 413.090(1). As noted in *Heisley v. Heisley,* 676 S.W.2d 477, 477 (Ky.App. 1984), the equitable defenses of laches or estoppel by acquiescence may not be used to bar the collection of maintenance arrearages within the applicable limitations period. Janet's failure to more quickly seek

enforcement of the January 1996 judgment did not bar her from seeking collection of the maintenance arrearage and interest in 2007.

Finally, we agree with Janet's assertion that the trial court erred by relying on equitable considerations in modifying the duration of the interest due on the arrearage. Although such considerations might have been properly before the court in an action to reduce unliquidated damages to a judgment and to award interest, here the issue before the court was enforcement of a judgment, including interest, which long ago became final. Again, no grounds existed for the court's modification of the previously-awarded interest due on the arrearage judgment.

On cross-appeal John raises the defense of accord and satisfaction, asserting that in 1997 the parties verbally agreed to settle the matter for $10,000. However, his claim is not preserved since he failed to specifically raise it as an affirmative defense to Janet's motion for a common law judgment. CR 8.03. Additionally, Janet denied John's allegation that the parties reached any agreement, and the trial court stated in its January 2008 order that it found no evidence to support John's claim. Having reviewed the record, we cannot say that the trial court's determination was clearly erroneous. CR 52.01. We therefore affirm on cross-appeal.

The order of the Jefferson Circuit Court, Family Division, is vacated and remanded for further proceedings relating to the enforcement of the 1996 judgment imposing 12% interest on the accumulated arrearage.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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