

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001026-MR

THOMAS G. TRI

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 05-CI-00766

REBECCA S. TRI, NOW STEPHENS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

WINE, JUDGE: Thomas Tri appeals from an order of the Oldham Circuit Court entered on May 7, 2009, distributing property under a separation agreement. On appeal, Tri contends: (1) that the trial court erred in distributing property under the agreement by failing to use the valuation date specified in the agreement; (2) that he should receive additional interest from the date of the initial judgment; and (3)

that he is entitled to attorney fees. For the reasons set forth herein, we affirm the Oldham Circuit Court.

History

Thomas and Rebecca Tri had been married for more than fifteen years when they separated in August of 2005. Two minor children were born of the marriage. On October 28, 2005, Thomas filed a petition for dissolution of marriage in the Oldham Circuit Court. Thereafter, Rebecca filed an entry of appearance acknowledging the petition and her support of a separation agreement entered into between the parties. The agreement was filed with the court. The court found that the settlement agreement was not unconscionable and, thus, incorporated it into the decree of dissolution it entered on January 6, 2006.

Thereafter, the parties' marital home was sold and the trial court awarded Rebecca half of the proceeds of the sale in contravention of the settlement agreement between the parties.¹ The Court also distributed the rest of the marital property pursuant to the separation agreement entered into between the parties. On March 22, 2009, this Court reversed on the grounds that the trial court failed to follow the separation agreement when it awarded Rebecca one-half of the proceeds of the sale of the marital home (2008-CA-000043-MR). We remanded with instructions for the trial court to distribute the proceeds from the sale in accordance with the parties' written separation agreement. *Id.*

¹ The separation agreement provided for the marital residence to be split equally between the parties after taking into account Thomas's significant pre-marital interest. The trial court's allocation of half of the proceeds of the sale failed to consider Thomas's pre-marital interest, agreed upon by the parties in the settlement agreement.

On remand, the trial court redistributed the proceeds of the marital home according to the October 28, 2005, separation agreement. The trial court entered an order on May 7, 2009, directing Rebecca to pay Thomas \$64,831.00, representing the difference in the amount previously awarded to her in the distribution and the amount to which Thomas was actually entitled under the agreement when taking his half-million dollar pre-marital interest into account.

Thomas now appeals, contending that the trial court failed to follow the separation agreement by neglecting to use the proper valuation date in its calculation. The valuation date specified in the agreement was November 30, 2005. This valuation date was negotiated in the settlement agreement as the date for valuation of all assets except for the marital home and tractor. A formula for the division of property was attached to the Property Settlement Agreement and entitled "Settlement Summary (2nd Draft – 10/23/05)" (hereinafter referred to as the "original settlement summary"). This attached property settlement agreement laid out a formula by which the marital assets were to be distributed, including all accounts and assets other than the marital home and the tractor. Thomas avers that this settlement summary was only a preliminary statement of how the marital property was to be divided, and that it was anticipated that the amount would change after the proposed valuation date had passed and the parties could finally value each of the assets. Rebecca avers that Thomas is now attempting to use a different calculation than was used in the original settlement summary and that he should be bound by the formula attached to the original agreement.

Standard of Review

In dissolution actions, we review the court's division of marital property for abuse of discretion. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). However, the trial court's enforcement of a settlement agreement distributing marital property involves a question of contract interpretation. Kentucky Revised Statute ("KRS") 403.180(5). As the interpretation of a contract presents a question of law, our review is *de novo*. *Lynch v. Claims Management Corp.*, 306 S.W.3d 93, 96 (Ky. App. 2010); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). On the other hand, we will review the issues of interest and attorney's fees for abuse of discretion.

Analysis

On appeal, Thomas argues (1) that the trial court erred in distributing property by failing to use under the agreement the valuation date specified in the agreement, (2) that he should receive additional interest from the date of the initial judgment, and (3) that he is entitled to attorney's fees. We first address Thomas's argument that the court erred in distributing property under the agreement by failing to use the agreed upon valuation date.

We note at the outset that Thomas failed to raise the issue of the valuation date of the other assets in his first appeal. This Court sees no reason why Thomas could not have raised the issue in the prior appeal, as the trial court had

distributed all of the assets in addition to the marital home according to the exhibits which were present in the record at the time of the hearing. Thomas, however, complained only that Rebecca was improperly awarded proceeds from the sale of the marital home, which failed to account for his significant premarital interest. It is a well-settled and long-standing rule in this Commonwealth that parties may not raise substantive issues in a subsequent appeal which could have been raised in the initial appeal. *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461 (Ky. 1955).

Indeed,

The rule is elementary that, when a matter is in litigation, parties are required to bring forward their whole case; and “the plea of *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Combs v. Prestonsburg Water Co., 260 Ky. 169, 84 S.W.2d 15, 18 (Ky. 1935), quoting *Locke v. Commonwealth*, 113 Ky. 864, 69 S.W. 763, 764 (1902).

Thomas could have raised the valuation of all relevant assets other than the marital home in the first appeal. There is no indication in the record that Thomas raised this in the first appeal.² Instead, this Court was presented with the sole issue of the division of proceeds from the sale of the marital home and this Court remanded to the trial court for the limited purpose of redistributing the

² We note that the briefs from the first appeal are not a part of the record. However, even if Thomas had raised the issue in the briefs for the first appeal, the onus would have been upon him to file a petition for rehearing or modification if this Court failed to address an issue which was raised in the briefs.

proceeds of the marital home. Thomas waived the issue concerning the proper valuation date of the remaining assets by failing to bring it before this Court in the initial appeal.³ See *Hutchings v. Louisville Trust, supra*; *Combs v. Prestonsburg, supra*. “A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. . . It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.” *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999), quoting *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1962).

Next, we consider Thomas’s request for a retroactive award of interest from the date of the initial judgment. We find his argument to be contrary to the established case law of the Commonwealth. Indeed, as the trial court aptly noted, a judgment which has been reversed on appeal is “as though it had never been”, and the final amount awarded shall not bear interest until reduced to a final judgment after return of the case to the circuit court. *Maynard v. Maynard*, 251 S.W.2d 454, 456 (Ky. 1952). Accordingly, the trial court declined to award Thomas interest retroactively from November 2007 to the present because the decision of the trial court was not finally adjudged until it issued its May 7, 2009 order on remand. Therefore, the trial court properly ordered statutory interest from the date of the final judgment. We will not disturb the court’s finding.⁴

³ Moreover, the trial court, in an order dated December 10, 2007, struck all of the exhibits upon which Thomas would now seek to rely in proof of the valuation of the relevant assets as none of the exhibits was introduced at the time of the hearing but were only introduced after the trial court’s initial order resolving the issues presented.

⁴ Regardless, in the interest of equity, the trial court did order that Rebecca pay Thomas one-half of any interest earned during the two-year period that elapsed during which time she held the funds in her possession. However, as no interest accrued to Rebecca during that time because the funds were not held

Finally, we consider Thomas's argument that he is entitled to attorney's fees for the additional litigation he initiated to recoup monies allegedly owed to him. However, in determining whether Thomas is entitled to attorney's fees, we must first look to the separation agreement between the parties as the agreement is not silent on the issue of attorneys fees. Rather, section 31 of the separation agreement states as follows: "The parties shall each be responsible for their own attorneys' fees and the costs of this action already incurred by them."

In evaluating the terms of a contract, the terms shall be accorded their plain meaning. *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657, 659 (Ky. App. 2007). Absent ambiguity in the contract's terms, contract terms are to be strictly enforced. *Id.* Where there is ambiguity, however, such ambiguity will be resolved against the party who drafted the contract. *Warfield Natural Gas Co. v. Clark's Adm'x*, 257 Ky. 724, 79 S.W.2d 21, 26 (Ky. 1934); *Bituminous Cas. Corp. v. Kenway Contracting, Inc*, 240 S.W.3d 633 (Ky. 2008) (insurance contract); *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517 (Ky. App. 1995) (employment contract).

Here, the contract clearly states that each party shall be responsible for his or her own attorney fees. Yet the phrase "each party shall be responsible for their [sic] own attorneys' fees" is followed by the conjunction "and" and the phrase "the costs of this action already incurred by them." We find that this clause may

in an interest bearing account, no interest amounts were distributed to Thomas under the order. We find this to be a most equitable manner in which to divide any interest and note that such an equitable determination was clearly within the court's discretion.

be subject to two interpretations. Either (1) that each party is responsible for the attorneys fees *already* incurred at the time of contract, or (2) that each party is responsible for all attorneys fees previously or subsequently incurred as well as the costs of the action already incurred to them. However, as any ambiguity in a contract is to be resolved against the drafter, we adopt the interpretation most favorable to Rebecca. Accordingly, we find that under the terms of the settlement agreement entered into between the parties, Thomas is precluded from seeking attorney fees from Rebecca.

However, we recognize that courts may exercise their discretion to award attorney fees despite the language in a contract between the parties to a dissolution proceeding. *See, e.g., Ford v. Blue*, 106 S.W.3d 470, 473 (Ky. App. 2003) (involving an antenuptial agreement). Nonetheless, we note that Thomas's argument still fails on appeal as the award of attorney fees is always discretionary with the court and the Oldham Circuit Court found that the award of attorney fees was not warranted in this particular case given the financial resources of the parties. KRS 403.220. *See also, Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001); *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. App. 1982).

Thus, we affirm the judgment and order of the Oldham Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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