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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001115-MR

LEE C. WILBURN — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 08-CI-501099

MARGARET S. WILBURN — APPELLEE

AND NO. 2013-CA-001200-MR

MARGARET S. WILBURN; EUGENE L. MOSLEY; M. THOMAS UNDERWOOD; and MOSLEY, SAUER, TOWNES & WATKINS, PLLC — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DOLLY W. BERRY, JUDGE
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LEE C. WILBURN — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Lee C. Wilburn appeals from two Orders of the Jefferson Circuit Court addressing the modification of maintenance, child support and other issues. He argues that the circuit court erred in failing to make additional findings and by denying his Motion for a New Trial and Judgment Notwithstanding the Verdict. He also contends that his maintenance obligation should be terminated, that the court's Order for him to pay $55,000 in attorney fees is in error, and that the court failed to base its decision on substantial evidence. For the reasons stated below, we AFFIRM the Orders on appeal.

Petitioner/Appellee Margaret S. Wilburn ("Meg") and Respondent/Appellant Lee C. Wilburn were divorced by way of a Decree of Dissolution of Marriage rendered on July 6, 2010. The parties executed a *Settlement Agreement Terms* ("SAT"), which was filed on July 10, 2010, and after being found conscionable was incorporated in the Decree of Dissolution. The SAT provided in relevant part that Lee would pay maintenance to Meg the amount of $7,500 per month for 10 years plus $2,000 for 10 years accrued into SCP LLC. It also addressed numerous other issues, including Lee's obligation to pay 100% of all of the children's living expenses plus tuition, and his agreement to pay all pre-

divorce liabilities and living expenses. As evinced by the SAT, Lee also agreed to pay all legal and other fees related to the divorce. The parties were to split all outstanding credit card debt, which at the time of dissolution was $51,000.

At all relevant times, Lee was a self-employed commercial real estate developer specializing in the construction and management of warehouse distribution centers. At the time of dissolution, he had various properties either managed or under development, which were overseen by Crossdock, Inc. Lee is the owner and President of Crossdock, and his current wife, Julie Tinnell, was formerly the Chief Financial Officer. The sources of gross income for Crossdock and Lee have been construction and property management fees. Before the divorce, Lee and Meg had a marital interest in several business projects, including the income-producing projects Cedar Grove and River Ridge 700, and the non-income producing projects River Ridge 800, River Ridge 900, and 601 East Jefferson.

Lee would later claim that after the dissolution, the commercial real estate market underwent a severe downturn. According to Lee, this downturn resulted in a substantial loss of income such that he "found it impossible to meet those obligations" and he "is underwater with no viable source of income". Lee borrowed money from his mother and brother in an attempt to keep projects afloat.

During this period, from late 2010 through mid 2013, Meg filed numerous contempt motions.

In 2012, Lee moved to modify and/or terminate his maintenance and child support obligation. That Motion and one of Meg's numerous contempt Motions were heard on March 30, 2012, and August 3, 2012. During the pendency of those Motions, the court rendered an Order on April 23, 2012, finding that Lee owed a maintenance arrearage of at least $98,600, and ordered him to pay that amount plus continue making monthly payments of $7,500.

Then on February 4, 2013, the court rendered an Order on Contempt, Modification of Maintenance, Child Support, and Other Issues. At issue was the parties' differing interpretations of the SAT. Specifically, Lee argued that the $9,500 monthly payments to Meg were maintenance, and that this maintenance obligation should be modified because he experienced a substantial change in circumstances after the Decree was rendered. Conversely, Meg argued that the $9,500 monthly payments constituted a portion of the property settlement and were not maintenance subject to modification. In support of her argument, Meg produced a letter from her brother Jim, who is a Florida attorney who produced a draft upon which the SAT was later based. Meg argued that though the $9,500 payments were listed under the heading "Maintenance" in the SAT, the language indicated that the payments were a portion of the property settlement. Upon

considering this issue, the court determined that the SAT language clearly and unambiguously revealed that the $9,500 payments were a maintenance award subject to modification.

The court then addressed whether the SAT had become unconscionable due to Lee's alleged change in financial circumstances and whether he was entitled to modify maintenance. The court noted that this analysis was "complicated by Lee's lack of disclosure regarding all his business dealings", and it found that "[h]e has not been compliant" with the court's July 18, 2011 Order to discuss in advance with Meg the sales of property and the disbursement of funds. The court found that there was no doubt but that Lee's financial status was not good at the present. However, it determined that his financial status was poor *before* executing the SAT. Said the court,

> Lee knew of his financial situation at the time he signed the SAT and when the Decree was entered. Lee not only agreed to the terms of the SAT in 2010, but again in 2011, despite the knowledge of his financial circumstances. Based on the evidence and testimony presented, Lee has not proven that there has been "a change of circumstance so substantial and continuing as to make the terms unconscionable."

The court denied his motion for modification of his maintenance obligation. Thereafter, Lee moved for a new trial and Judgment Notwithstanding the Verdict. That motion was overruled by way of an Order entered on May 30, 2013.

Lee now argues that the Jefferson Circuit Court erred in denying his Motion to Modify Maintenance. The focus of his argument is that his financial circumstances have changed to such a degree that maintenance can no longer be justified. He notes that the commercial real estate market has declined since 2010, that Crossdock had to close its office, and that he and Julie now work from home and do not receive a salary. In his written argument, he details his financial status and claims to have had a cash flow deficit between 2009 and 2011, during which time he had to borrow $956,572. He states that a tenant vacated the River Ridge 700 building in May 2012, which reduced his income to zero. He goes on to claim that none of the properties in which he is involved has any tenants to generate management fees, construction fees or distributions. Additionally, he contends that Meg's financial status is now better than his. Finally, Lee directs our attention to his child support obligation, wherein he agreed to pay 100% of the children's expenses plus education, as well as pre-divorce liabilities, attorney fees and credit card payments. The substance of his argument is that his financial situation has declined to such a degree that the terms of the SAT have become unconscionable, that he was entitled to the reduction or elimination of the financial obligations set forth in the SAT, and that the Jefferson Circuit Court erred in failing to so rule.

As the parties are well aware, KRS 403.250 provides that "the provisions of any decree respecting maintenance may be modified only upon a

showing of changed circumstances so substantial and continuing as to make the terms unconscionable." "To determine whether the circumstances have changed, we compare the parties' current circumstances to those at the time the court's separation decree was entered." *Block v. Block*, 252 S.W.3d 156, 160 (Ky. App. 2007). The trial court's decision to deny modification of maintenance is reviewed for abuse of discretion. *Id.* at 159.

The question for our consideration is whether the Jefferson Circuit Court abused its discretion in concluding that Lee's financial circumstances have not undergone a substantial and continuing change sufficient to render the award of maintenance unconscionable. We conclude that it did not abuse its discretion on this issue. The record reveals a quagmire of business dealings over the course of several years. In attempting to unravel these land ventures, leases, mortgages, management fees, commercial debt, and personal loans from family members, the court was also burdened with what it characterized as Lee's lack of disclosure regarding his business dealings. It ultimately concluded that while Lee's financial status is not good in the present, it had not undergone a substantial change since the SAT was executed. This conclusion is supported by the record.

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004) (citation and footnote omitted).

Abuse of discretion may also be found where a trial court "relies on clearly erroneous findings of fact." *Walters v. Moore,* 121 S.W.3d 210, 215 (Ky. App. 2003). After examining the record, we conclude that the Jefferson Circuit Court's denial of Lee's Motion to Modify Maintenance was not arbitrary, unreasonable, unfair, unsupported by sound legal principals or based on clearly erroneous findings of fact. The court employed the correct standard of law as set out in KRS 403.250. As found by the court, Lee's exhibits demonstrated that his financial problems began in 2009, which was the year before the SAT was executed and the Decree was rendered. At that time he had a cash flow deficit, he was forced to borrow money and his companies showed cumulative losses. Though his financial condition has ebbed and flowed in concert with each successful or failed real estate venture, he has not demonstrated a substantial and ongoing change sufficient to render the SAT unconscionable. The Jefferson Circuit Court properly so found.

As to Lee's child support obligation, he agreed "to pay 100% of all the children's expenses both monthly and incidental plus tuition." When the SAT was executed, one of their children (Francis) was emancipated and attending Tufts University, and the other child (Tyree) was 17 years old and living with Lee. Tyree became emancipated before the Decree was rendered.

In the February 4, 2013 Order from which Lee now appeals, the Jefferson Circuit Court determined that "Lee is 100% responsible for all the

younger child's costs and expenses until such time as he graduated from high school or obtained the age of 18 - whichever last occurred. All the other expenses Lee has paid on behalf of the adult children since June 2011, and any expenses Lee assumes for his adult children in the future are solely voluntary contributions on his part."

It is not clear from Lee's written argument exactly what he seeks from this Court on the issue of child support. The Jefferson Circuit Court ordered in clear and unambiguous terms that "Lee's motion for modification or termination of his child support obligation is GRANTED effective the date the younger child was emancipated." Lee received the very judicial determination that he sought. We find no error.

Lee's written argument also addresses pre-divorce expenses, credit card fees, capital calls on the parties' interest in Cedar Grove and River Ridge 700, the monthly accruals into SCP LLC, and the debt on the Shelby County farm (a.k.a., "STO").[1] For the reasons stated above, we conclude that the Jefferson Circuit Court did not err in finding that the SAT was not unconscionable as it relates to these issues. Additionally, we find no basis for concluding that the court's disposition of these issues was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller*, *supra*. We find no error.

[1] See below for additional discussion of the credit card costs which Meg raises in her cross-appeal.

Lee's next claim of error as it relates to the February 4, 2013 Order is his brief argument that the court erred in awarding $55,000 in attorney fees to Meg.[2] While acknowledging that he agreed via the SAT to pay all attorney fees "related to the divorce", he contends that the court's Order requiring him to pay post-divorce attorney fees - especially in light of his financial situation - was in error. We find no basis for concluding that Meg's post-dissolution contempt motions and other matters are not "related to the divorce" and accordingly find no error on this issue.

Finally, Lee argues that numerous Findings of Fact are in error, that they must be vacated, and that this error demands a new trial or Judgment Notwithstanding the Verdict ("JNOV"). While contending that 15 separate Findings are erroneous, Lee does not reveal why he believes these Findings are in error nor does he otherwise demonstrate why they entitle him to a new trial or JNOV. The denial of a motion for a new trial lies within the sound discretion of the trial court, *Louisville Memorial Gardens, Inc. v. Commonwealth, Dept. of Highways*, 586 S.W.2d 716, 717 (Ky. 1979), and the movant is entitled to a JNOV when there is a lack of evidence to support the verdict. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985). Lee has not demonstrated that the Jefferson

[2] The Order provided that Meg's counsel could move for a Judgment in their name, and they are Cross-Appellants herein.

Circuit Court abused its discretion in denying his motion for a new trial, nor that the evidence does not support the Judgment. We find no error.

In her cross-appeal, Meg first argues that the Jefferson Circuit Court erred in failing to require Lee to reimburse her for one-half of the minimum payments she made on the joint credit card debt from 2010 forward. She notes that the parties were to divide the debt equally and that the trial court properly so found. However, after the divorce, Meg contends that she made the minimum payments on all of the credit card accounts. She maintains that Lee refused to reimburse her for his half of these payments and that the trial court failed to take this into consideration in its February 4, 2013 Order. Meg contends that though the trial court properly ordered Lee to pay half of the remaining debt, it failed to account for the payments that she made immediately after the divorce.

Again, the question for our consideration on this issue is not how we might allocate the credit card debt were we to examine this issue *de novo*, but rather whether the trial court's disposition of the credit card debt was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller*, *supra.* The Jefferson Circuit Court's allocation of debt comports with the SAT and we cannot conclude from the record that the court improperly failed to allocate to Lee one-half of the minimum payments. We find no error.

Meg also contends that the Jefferson Circuit Court erred in failing to impose post-judgment interest on each unpaid maintenance obligation and abused its discretion by failing to require Lee to pay all attorney fees since the date of divorce. KRS 360.040 allows for the accrual of interest on an unpaid judgment. However, "the statute simply requires that a trial court must impose the statutory rate of interest once it determines that interest is appropriate. Nonetheless, the trial court may find that the statutory interest rate is not appropriate given the equities of the particular case and may deny post-judgment interest altogether." *Ensor v. Ensor*, 431 S.W.3d 462, 477 (Ky. App. 2013) (citations omitted).

As to Meg's contention that the trial court erred in its allocation of attorney fees, we also find no error. The Jefferson Circuit Court properly determined that Lee agreed via the SAT to pay "all legal and other fees related to the divorce." It found that "Lee has been minimally compliant from the onset and his failure to cooperate and comply has required that Margaret incur significant attorney's fees and costs. Therefore, as Lee still has the greater financial resources and as he is largely responsible for the bulk of attorney's fees incurred by Margaret, he is responsible for $55,000 toward her attorney's fees." The court found that the costs of her brother's transportation and other fees, such as Meg's fees related to the foreclosure of the Longest house, were outside the scope of "all legal and other

fees related to the divorce". The Jefferson Circuit Court's award of attorney fees comports with the SAT and the record, and we find no error.

For the foregoing reasons, we AFFIRM the February 4, 2013, and May 30, 3013 Orders of the Jefferson Circuit Court.

ALL CONCUR.

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