STATE OF MICHIGAN

COURT OF APPEALS

KAREN KEREZSI,

Plaintiff-Appellant,

v

JAMES ALAN KEREZSI,

Defendant-Appellee.

UNPUBLISHED
April 27, 1999

No. 202876
Wayne Circuit Court
LC No. 94-405023

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order adopting the mediator's report in this divorce action. We reverse and remand.

Plaintiff filed for divorce in February 1994. In October 1994, the lower court appointed a mediator. The mediator's recommendation was to be binding as to the disposition of the marital property but nonbinding as to child visitation, custody and support. The judgment of divorce was entered in February 1995.

Sometime around November 1996, more than two and one-half years after he was appointed, the mediator submitted his report. Plaintiff filed a motion to set aside the appointment of the mediator and his recommendation, on the grounds that the information relied upon by the mediator was stale and that the mediator overstepped his bounds and advocated on behalf of defendant. As part of her motion, plaintiff made specific requests for relief concerning resolution of the disputed issues. A hearing on plaintiff's motion to set aside the mediator's report and enter specific relief was held in December 1996.[1]

Defendant, who was not represented by counsel, was served with a copy of plaintiff's motion but did not attend the hearing or contact the trial court. The mediator informed the trial court that defendant sought his advice concerning whether or not to attend the motion hearing before making the decision not to attend. The mediator also conveyed to the trial court defendant's desire to accept the mediation report. Plaintiff's counsel informed the trial court that conditions had changed since the

mediator's appointment, that the marital home was foreclosed upon and plaintiff completed bankruptcy proceedings. The trial court granted plaintiff's motion to set aside the mediator's appointment and his findings. The trial court then heard testimony from plaintiff, the only party present, concerning specific challenges to the mediator's report. The trial court resolved all the outstanding issues, and directed plaintiff's counsel to prepare an order.

In February 1997, a hearing[2] was held on plaintiff's motion for entry of the order, before a different judge. Defendant appeared with counsel at this hearing and objected to the substance of the trial court's order. The hearing court denied plaintiff's motion for entry of the order, adopted the mediator's recommendations on all contested issues, and instructed defendant to prepare a new order reinstating the mediator and his report. At the April 1997, hearing on defendant's motion for entry of the order, the hearing court entered its order over plaintiff's objections.

On appeal, plaintiff argues that the hearing court erred in refusing to enter the order prepared by plaintiff in compliance with the trial court's ruling. Plaintiff also argues that the hearing court improperly reinstated the mediator's recommendation because the mediator exceeded his authority. We agree.

A mediation report is properly vacated if the mediator exceeded his powers or where there is "evident partiality…or misconduct prejudicing a party's rights." *Frain v Frain*, 213 Mich App 509, 511; 540 NW2d 741 (1995); MCR 3.602(J)(1)(b),(c). It is misconduct for an arbitrator to engage in ex parte consultation regarding the subject matter of an arbitration award. *Ministrelli Const Co, Inc v Sullivan Bros Excavating, Inc*, 89 Mich App 111; 279 NW2d 593 (1979).

Here it is apparent from the record that the mediator had numerous ex parte contacts with defendant. Plaintiff alleges that those contacts included an hour-long face-to-face conference with defendant regarding the property division and a "prolonged" telephone call concerning defendant's visitation complaints. Plaintiff also alleges that the mediator filed motions on defendant's behalf. Defendant does not dispute these assertions. In addition, it appears from the record that the mediator advocated for defendant at the hearing on plaintiff's motion to set aside, advised defendant that he need not attend the hearing, and had a telephone conversation with defendant concerning whether defendant wanted to accept the mediation report. The trial court, commenting on the mediator's involvement with defendant, said that "this should never have happened."

Even more egregious, the mediator's report reflects a serious intermingling of the areas of "binding" and non-binding mediation. It was within the mediator's scope of authority to determine distribution of the parties' property and debts. It was an abuse of that authority, however, for the mediator to provide a set-off in defendant's favor against the Friend of the Court's recommended child support obligation.

We note that the lower court record in this case is unclear and sometimes incomplete. However, it appears that, by recommendation of the mediator, plaintiff took a "voluntary reduction" in child support, and defendant paid only a fraction of his child support obligation during the two and a half year interim between the divorce judgment and the mediation report.

The mediator was appointed to give a recommendation as to child support within seven days after a January 1995 hearing, but had no authority to determine the amount of defendant's child support obligation or to use it as a balancing tool in making the property division. The mediator clearly exceeded his authority in these matters and his appointment and report were properly set aside by the trial court.

Defendant was on notice from plaintiff's motion that plaintiff was seeking retroactive child support and a different property division that the mediator recommended. Defendant nonetheless chose not to attend the hearing or challenge the trial court's order after it was entered. Instead defendant sought to prevent the entry of the trial court's ruling by improperly challenging the substance, rather than the form, of the proposed order. See MCR 2.602(B); *Saba v Gray*, 111 Mich App 304, 310-311; 314 NW2d 589 (1981). Contrary to defendant's suggestion, defendant could not properly request a rehearing because the order disposing of plaintiff's motion to set aside was never entered and there was no order for the hearing court to reconsider under MCR 2.119(F). While it appears that the mediator and plaintiff's counsel had some in camera discussion with the trial court concerning a 14 day period for defendant to file written objections, there is nothing on the record to suggest that the trial court intended to permit defendant to file objections to the substance of the order.

The hearing court erred in permitting defendant to argue substantive objections to the trial court's order, erred in considering those objections, erred in failing to enter the order comporting with the trial court's ruling, and erred in entering the order prepared by defendant. The hearing court adopted the mediator's report without considering, or even acknowledging, the mediator's intermingling of property and child support issues. The hearing court improperly ordered plaintiff bound to the mediator's recommendation on even non-binding issues without benefit of a trial, even though plaintiff was present at the hearing and objected strenuously.

The hearing court's order is reversed. We remand for further proceedings, with instructions to the lower court to enter an order reflecting the trial court's December 30, 1996, ruling. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] There have been a number of different judges involved during the pendancy of this action. Judge Andrea Ferrara presided at the December 20, 1996, hearing. Discussion of Judge Ferrara's decisions at this hearing will refer to the "trial court".

[2] Judge Dianne Hathaway presided at the February 27, and April 10, 1997, hearings. Discussion of Judge Hataway's decisions will refer to the "hearing court".