

STATE OF MICHIGAN  
COURT OF APPEALS

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ERMA L. MULLER,

Plaintiff-Appellee,

v

EDUARD MULLER,

Defendant-Appellant.

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UNPUBLISHED

February 23, 2001

No. 214096

Oakland Circuit Court

LC No. 91-412634-DO

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion to set aside orders amending a judgment of divorce. We vacate the trial court's orders amending the judgment of divorce and remand for further proceedings consistent with this opinion.

Plaintiff filed for divorce from defendant on June 7, 1991. On the same date, a mutual temporary restraining order was entered by the circuit court, enjoining both parties from selling, assigning, concealing, or otherwise disposing of any assets other than for necessary living expenses. Following a bench trial, the trial court entered a judgment of divorce. The parties stipulated to an order staying the proceedings during defendant's appeal to this Court and enjoining defendant from transferring or disposing of any assets identified in the judgment of divorce. This Court affirmed the judgment of divorce in *Muller v Muller*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 1996 (Docket No. 172368). The Supreme Court denied defendant's application for leave to appeal on May 6, 1997. *Muller v Muller*, 454 Mich 906; 564 NW2d 44 (1997).

On June 6, 1997 and June 26, 1997, the trial court entered show cause orders, pursuant to a motion filed by plaintiff, for defendant's failure to comply with the terms of the divorce judgment. At the show cause hearing held on July 16, 1997, plaintiff's counsel asserted that defendant failed to turn over \$200,000 in assets owed to plaintiff under the divorce judgment. Plaintiff requested that the trial court hold defendant in civil contempt and that it appoint a receiver to enforce the judgment. Defendant responded that the accounts did not contain the amounts listed in the divorce judgment and that the total amount remaining in the accounts was approximately \$1,000. The trial court denied plaintiff's motion to hold defendant in contempt, but appointed a receiver to enforce the divorce judgment and ordered defendant not to dispose of

any assets, except those necessary for day-to-day living expenses. On November 19, 1997, the trial court entered an order compelling defendant to appear for a creditor's examination on December 1, 1997, and testify regarding property in his possession and to produce records since June 7, 1991, relating to the assets awarded to each party in the judgment of divorce. Defendant did not appear for the creditor's examination.

On December 30, 1997, plaintiff filed a motion pursuant to MCR 2.612, to amend or to set aside the divorce judgment. Plaintiff brought her motion to amend on the basis of defense counsel's assertion at the show cause hearing on July 16, 1997, that the assets awarded to plaintiff in the divorce judgment had dwindled to a value of approximately \$1,000. Plaintiff asserted that defendant fraudulently dissipated approximately \$200,000 in assets during the divorce proceedings or during the appeals process, in direct violation of the mutual restraining order issued June 7, 1991, and the order staying proceedings and enjoining defendant from dissipating the assets entered on February 10, 1994. Plaintiff requested that the court enter an order amending the judgment of divorce to substitute a like dollar amount from defendant's Civil Service Retirement Benefit pension for the assets allegedly dissipated by defendant. Plaintiff also requested an evidentiary hearing to determine assets in defendant's possession.

On February 4, 1998, plaintiff's attorney argued the motion to amend before the trial court and neither defendant nor his attorney appeared. The trial court granted plaintiff's motion to amend, awarding defendant's Civil Service Retirement Benefit to plaintiff and providing that the divorce judgment may be further amended upon discovery of further assets in defendant's possession. The court made the following findings: that defendant fraudulently violated the order prohibiting the disposal of assets; defendant fraudulently dissipated the assets awarded to plaintiff in the divorce judgment; defendant fraudulently misrepresented to the trial court that the assets existed at the time the judgment of divorce was entered; that defendant fraudulently stipulated to the order prohibiting disposal of the assets during his appeal knowing that the assets had been previously dissipated; and that defendant failed to cooperate in discovery proceedings to determine the existence of assets under his control.

Defendant argues that the trial court erred in granting plaintiff's motion to amend the divorce judgment because the motion was not timely under the court rules. The interpretation and application of court rules presents a question of law that we review de novo. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

Plaintiff filed her motion pursuant to MCR 2.612(C)(1)(c) and (f), which provide:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

\* \* \*

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

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(f) Any other reason justifying relief from the operation of the judgment.

The time limit for filing a motion under MCR 2.612(C)(1) is provided in MCR 2.612(C)(2), which states:

The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken.

The judgment of divorce in this case was entered on December 15, 1993, and plaintiff filed her motion to amend on December 30, 1997, nearly four years after the judgment was entered and approximately seven months after the Supreme Court denied defendant's application for leave to appeal. Plaintiff contends that the statute of limitations was tolled during defendant's appeal. Defendant disagrees and cites *Nederlander v Nederlander*, 205 Mich App 123; 517 NW2d 768 (1994), in support of his argument that because plaintiff brought her motion on the basis of fraud, her motion to amend was untimely under MCR 2.612(C)(2). However, *Nederlander* addressed a situation where a party alleged that the other party made fraudulent misrepresentations *during a divorce proceeding*. *Id.* at 124. This Court strictly enforced the one year period of limitation, stating that "[t]he exercise of due diligence during the course of liberal discovery should expose any intrinsic fraud that may be present in the divorce proceeding." *Id.* at 127. Here, however, plaintiff alleged fraudulent conduct not only during the divorce proceedings, but also alleged that defendant committed fraud after the divorce judgment was entered, and dissipated assets in violation of a court order during the period of a stay when the judgment could not be enforced.

In any event, the trial court did not conduct an evidentiary hearing to determine whether defendant actually dissipated assets awarded to plaintiff in the judgment of divorce and if he did, when he did so. It also is not clear from the record under which subsection of MCR 2.612(1), (c) or (f), the trial court granted plaintiff's motion to amend; thus, it is not clear whether the one year statute of limitations for filing the motion to amend applied or whether plaintiff's motion had to be filed "within a reasonable time." MCR 2.612(C)(2). While the trial court clearly made reference in its order to fraudulent behavior by defendant, the court also found violations of court orders and failure to cooperate with discovery. This Court has stated that in order for relief to be granted under MCR 2.612(C)(1)(f), the reason for setting aside the judgment cannot fall under subsections a through e. *Heugel v Heugel*, 237 Mich App 471, 480; 603 NW2d 121 (1999). However, this Court has also found that a trial court retains some equitable power to modify judgments pursuant to MCR 2.612(C)(1)(f), even if fraud is one factor asserted as a basis for doing so. *Id.* at 480-481.

As discussed below, we are remanding for an evidentiary hearing on the question whether defendant did, in fact, dissipate assets awarded to plaintiff in the judgment of divorce. Once the court determines whether defendant dissipated assets awarded to plaintiff in the judgment of divorce through fraud or other misconduct and *when* any fraud or other misconduct took place, it must determine whether plaintiff's motion for relief was timely under MCR 2.612.

Next, defendant contends that even if plaintiff's motion to amend was timely, the trial court erred in amending the judgment of divorce without holding an evidentiary hearing. This Court will not reverse a trial court's decision on a motion to set aside or amend a prior judgment absent an abuse of discretion. *Heugel, supra* at 478.

Generally, it is an abuse of discretion for a trial court to rule on a motion for fraud, pursuant to MCR 2.612(C)(1)(c), without conducting an evidentiary hearing because the proof

required is “of the highest order.” *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995), quoting *Parlove v Klein*, 37 Mich App 537, 544; 195 NW2d 3 (1972). Further, “where there are conflicting allegations and affidavits with respect to the question whether there has been a fraud perpetrated on the court, the trial court is required to conduct an evidentiary hearing in order to ascertain if the fraud existed.” *Kiefer, supra* at 179.

Plaintiff argues that the trial court was not obligated to hold a separate hearing when defendant failed to oppose the motion. However, even if defendant deliberately failed to respond to the motion, the trial court could not have made “an informed and meaningful determination” of fraud, or the amount of any assets dissipated by defendant, absent an evidentiary hearing or some additional documentary evidence. *Id.* at 180. The record reveals little evidentiary basis for the trial court’s rulings or findings of fact, other than plaintiff’s assertions of wrongdoing. While defense counsel did state, on July 16, 1997, that the balances of the accounts awarded to plaintiff had diminished to approximately \$1,000, defense counsel did not admit that defendant committed fraud or that he transferred any assets in violation of the trial court’s orders. Further, although plaintiff produced at the motion hearing on February 4, 1998, three statements showing balances in two accounts that were awarded to plaintiff in the divorce judgment, plaintiff did not present evidence that the reduced balances were the result of fraud or misconduct by defendant. While the transaction on the Schwab account in February 1994, suggests defendant may have violated the orders staying the transfer of assets, that transaction did not represent all the assets owed to plaintiff. The evidence presented was simply insufficient for the trial court to grant plaintiff’s motion, awarding her one hundred percent of defendant’s pension, valued at \$159,109 in the divorce judgment. Accordingly, we remand for a full evidentiary hearing.<sup>1</sup>

Finally, defendant contends that the trial court erred in denying his motion to set aside as untimely the orders of February 4, 1998. Again, we review this issue de novo. *Grzesick, supra* at 559. A party must bring a motion under MCR 2.612(C)(1)(d) “within a reasonable time.” MCR 2.612(C)(2).

Defendant filed his motion to set aside the orders pursuant to MCR 2.612(C)(1)(d), on May 6, 1998, more than ninety days after the orders were entered, arguing that the trial court’s order was void due to lack of jurisdiction. The trial court found that defendant’s motion was not timely because defendant had actual notice of the motion hearing and simply failed to respond or appear. However, it is not clear from the record whether defendant had actual notice of the motion hearing and the court did not indicate on what basis it found that he did. Further, defendant provided an affidavit stating that he was out of the country for a significant period of time, that he underwent treatment for an illness, and that he was not represented by counsel at the time of the hearing and for several weeks thereafter. Given these circumstances, defendant filed his motion to set aside the amendments within a reasonable time. Accordingly, the trial court should not have denied his motion as untimely.

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<sup>1</sup> Because we are vacating the orders amending the divorce judgment and remanding for an evidentiary hearing, we need not address defendant’s argument that the orders amending the judgment must be set aside because he did not receive proper notice of plaintiff’s motion.

We vacate the trial court's orders amending the divorce judgment and remand for an evidentiary hearing, consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Brian K. Zahra