

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER L. GORDON a/k/a JENNIFER L.
LANXNER,

UNPUBLISHED
January 13, 2011

Plaintiff-Appellant,

v

JASON S. GORDON,

No. 294910
Oakland Circuit Court
LC No. 2007-730585-DM

Defendant-Appellee.

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order requiring her to pay defendant's attorneys fees and costs in connection with her objections to a hearing referee's findings and recommendations. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

This case arose from defendant's motion to modify his child and spousal support obligations in connection with a divorce judgment. That judgment, dating from February 2008, required that defendant pay \$3,000 per month for the support of the parties' three children, along with \$3,500 per month in spousal support for 42 months. At the time the divorce judgment was entered, defendant was earning \$150,000 per year.

Only several months later, however, defendant filed a motion for modification of child support based on a substantial reduction of his income. The matter was referred to the Friend of the Court. After taking evidence, the hearing referee recommended that defendant pay \$841 per month in spousal support and \$1,429 per month in child support. The circuit court entered the proposed orders of the Friend of the Court on an interim basis, pending a judicial hearing pursuant to MCR 3.215(G)(1).

Plaintiff filed objections to the proposed orders, asserting that defendant was falsifying his income and complaining that defendant had produced neither his nor his employer's 2008 tax returns. At the hearing on the objections, the trial court indicated that it would consider only new evidence that would cast the hearing referee's findings concerning defendant's financial

situation into doubt, and cautioned that if plaintiff could not support her objections with such evidence the court would consider defendant's request for attorney fees and costs.

The trial court reviewed the transcripts from the evidentiary hearing before the hearing referee, and noted that although defendant did not submit his 2008 tax return, he did submit his 2008 W-2 statements from his employer, along with multiple earnings statements, checks, a Friend of the Court questionnaire with exhibits, and answers to interrogatories.

Defendant's father testified before the hearing referee that he was the sole owner of defendant's employer, and that recent economic conditions had necessitated major reductions in numbers of employees, along with employees' salaries and benefits. This included reducing defendant's salary by half and eliminating insurance coverage for his children.

After the document setting forth plaintiff's objections was prepared, but before those objections were filed with the trial court, defendant produced for plaintiff his 2008 tax return, which comported with his representations concerning his income that year. This was made known to the trial court at the hearing on plaintiff's objections. At the evidentiary hearing that followed, the parties additionally offered defendant's employer's tax returns for 2005, 2007, and 2008, which supported defendant's father's testimony concerning the fortunes of the company. Plaintiff in fact presented no new evidence to rebut the hearing referee's findings and used the occasion only to reiterate standing arguments.

The trial court concluded as follows:

The documentary evidence provided to [the hearing] Referee . . . , and supplied to this court, as well as the testimony of the parties and Defendant's father contradicts Plaintiff's assertions that Defendant is secreting assets or income. Plaintiff offers no new evidence to support her claims. Further, Plaintiff did not raise a sustainable objection to the fact that the 2008 tax returns had not yet been filed or produced on the record before the Referee. Plaintiff merely raised her concern about not having enough time to look over the 2006 and 2007 tax returns presented at the time of hearing. The court does not find that Defendant's income was misrepresented to the Friend of the Court Referee Defendant's objection to the Friend of the Court recommendation is stricken.

The trial court adopted the recommendation of the Friend of the Court and entered the proposed orders. The court reiterated that it had made known that it was poised to award fees and costs if plaintiff's position were found to be frivolous, then stated its intention to do so. Defendant's attorney presented a detailed accounting of fees and costs. Thereafter the trial court entered an order setting forth the downward adjustments of defendant's support obligations and entered an order requiring plaintiff to pay fees and costs totaling \$7,272 as "reasonable attorney fees and costs actually related to Plaintiff's sanctionable filing."

II. ANALYSIS

This Court reviews an award of costs and fees for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "A trial court's finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly

erroneous.” *State Farm Fire & Cas Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991).

In arguing this issue, plaintiff does not dispute defendant’s attorney’s account of fees and costs, but challenges only the propriety of the award in the first instance.

MCR 3.215(E)(4) states that “[a] party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection . . .,” and adds, “The objection must include a clear and concise statement of the specific findings or application of law to which an objection is made.” MCR 3.215(F)(3) in turn provides, “If the court determines that an objection is frivolous or has been interposed for the purpose of delay, the court may assess reasonable costs and attorney fees.”

A claim is frivolous if “(1) the party’s primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party’s position was devoid of arguable legal merit.” *Cvengros v Farm Bureau Ins Co*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996), citing MCL 600.2591(3)(a).

In this case, the trial court never suggested that plaintiff raised objections for the purpose of delaying the progress of the case or injuring defendant, but made plain that it was concerned about a lack of factual bases for her assertions that defendant was misrepresenting his financial situation to the court. Accordingly, the question is whether the trial court clearly erred in concluding that plaintiff’s position in raising objections was without a reasonable basis in fact or law.

The hearing referee was well satisfied that “the record quite clearly demonstrates that the defendant has sustained a substantial change in circumstance and reduction in income.” Plaintiff filed an objection, “inasmuch as the spousal support and child support were reduced seventy-five percent (75%) without the Defendant ever providing his 2008 tax return for the corporation and his personal return or showing any proof of income.” Plaintiff continued that she “now believes that the Defendant is falsifying his income and that is why he will not provide his tax returns as proof,” and requested judicial review de novo.

But in the proceedings that followed, the only new evidence brought to the trial court’s attention supported defendant’s position. Plaintiff otherwise offered only argument. Plaintiff thus failed to bring any new evidence to challenge the hearing referee’s findings that defendant’s income has indeed been reduced as he said.

On appeal, plaintiff continues to protest that she did not have defendant’s 2008 tax return at the moment she documented her objections. That return obviously was not available during the Friend of the Court hearings, and apparently was not available to plaintiff when her objections were documented. But it was indisputably in plaintiff’s hands before the May 27, 2009, hearing at which plaintiff pressed to proceed with an evidentiary hearing, knowing that the document supported defendant’s position. The earlier unavailability of the 2008 return thus offered no support for the position plaintiff maintained over the course of that and the July 30,

2009, evidentiary hearing that followed. Similarly, the corporate tax returns apparently supported defendant's representations concerning the declining fortunes of defendant's employer, and thus offered no support for plaintiff's suspicions that defendant was falsely asserting that he had suffered a substantial reduction in income owing to the poor economy.

Plaintiff's strongest argument, on its face, for reversing a finding of frivolousness is that, even if she could not present evidence to rebut defendant's testimony and documentation concerning the recent downgrading of his financial situation, she was still entitled to urge the court to invoke its equitable powers to depart upward from the child support formula in recognition of defendant's overall advantages in family connections, assets, and income-generating potential. However, no such argument was presented at the July 30, 2009, evidentiary hearing. Instead, on that occasion plaintiff merely reiterated familiar arguments in connection with evidence long in the record, supplemented with only additional documentation that comported with defendant's position concerning the changing trajectory of his financial position.

Because plaintiff brought no new evidence, or even argument, to the proceedings that took place in response to her filing of objections that supported her position, the trial court did not clearly err in deeming her objections as lacking bases in fact or law. For that reason, the court did not abuse its discretion in awarding defendant his reasonable fees and costs in connection with defending against those objections. *Moore*, 482 Mich at 516.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto