STATE OF MICHIGAN

COURT OF APPEALS

SHEELA MARY RICHER, Plaintiff-Garnishment-plaintiff-Appellee,	UNPUBLISHED October 28, 2014
v	No. 318312 Delta Circuit Court
MATTHEW JON RICHER, Defendant-Garnishment-defendant-Appellant.	LC No. 11-021236-DM

Before: MURPHY, C.J., and SAWYER and M.J. KELLY, JJ.

PER CURIAM.

Defendant Matthew Jon Richer appeals the trial court's order denying his objection to garnishment, originally and on reconsideration. In a judgment of divorce entered by the trial court, defendant was ordered to pay plaintiff Sheela Mary Richer "$20,000.00 as a property settlement transfer." Plaintiff claimed that defendant failed to make the required payment, and she initiated garnishment proceedings against him. Defendant contended that he had already made the $20,000 payment during the divorce litigation by refinancing the marital home, with the resulting promissory note being executed in his name only, and using the proceeds to pay off the $20,581 balance on a loan for which plaintiff was solely liable. Therefore, according to defendant, the judgment of divorce was satisfied relative to his $20,000 payment obligation and plaintiff was not entitled to garnish his wages or bank accounts. The trial court rejected defendant's stance for reasons explained below, continuing the garnishment, and we affirm.

Before plaintiff filed her complaint for divorce, and in contemplation of divorce proceedings, the parties executed an agreement on July 27, 2011, with respect to issues of custody and parenting time relative to their two minor children, child support, health insurance, the division of personal and real property, and other miscellaneous matters. Plaintiff drafted the agreement herself. Relevant here, the agreement contained the following clause:

> [Plaintiff] is agreeing to sign off on the [marital] residence [in] . . . Bark River, Michigan 49807. [Defendant] is agreeing on paying [plaintiff] $20,000 for her portion of the home. Once the divorce is finalized [plaintiff] will be taken off the deed, and will find another place to reside[] with her children. [Defendant] will have to have [plaintiff] paid off by the date that the divorce is finalized, if he

> doesn't comply or is not able to pa[y] [plaintiff] her portion by this date, then [plaintiff] will pursue half of the home[']s value and child support through the State of Michigan's child Support Formula and all the support section in this document will be void.

Under a section of the agreement titled "Accounts/Loans/Savings/Checking/Bills," the parties agreed that "[t]he accounts that have both [plaintiff] and [defendant's] name on them will be signed off by one of the parties, agreed upon when necessary."

On August 3, 2011, plaintiff filed her complaint for divorce. The complaint provided, in part, that there was "property to be divided and debts to be allocated" and that plaintiff desired a fair and equitable division of the marital debts and property.[1] In September 2011, the parties refinanced the marital home through Delta County Credit Union (DCCU) for purposes of debt consolidation.[2] DCCU held the existing note and mortgage on the home. While both parties executed a new mortgage covering the loan, defendant alone signed and was responsible for payment under the promissory note associated with the refinancing. The home was valued at $89,000 and the new loan was for approximately $75,000. From the $75,000, about $37,000 was applied to pay off the existing mortgage and loan balance on the home, about $15,000 was applied to two loans from Great Lakes First Federal Credit Union, and $20,581 was applied to pay off a second loan obtained from DCCU. The $20,581 DCCU loan balance that was paid off through the refinancing originated from a $30,000 loan that had been taken out in 2008 in plaintiff's name alone and that was cosigned by a family friend. The monthly payment on the loan was $625, which was later reduced to $500. Plaintiff testified that defendant was not on the loan because he had bad credit, and she also indicated that the loan was taken out to cover numerous *marital* debts, including a debt on a vehicle driven by defendant. Defendant did not testify to the contrary, although he claimed not to have known about the $30,000 loan until after the divorce proceedings commenced. Plaintiff testified that defendant was fully aware of the loan from the very beginning. Defendant had no answer when plaintiff's counsel asked him whether he did not notice from 2008 forward that payments were no longer being made on his vehicle. Defendant did testify that plaintiff handled all of the family's finances.

With respect to the refinancing, the DCCU loan officer testified about being concerned when plaintiff expressed that "this was in satisfaction of the divorce." Because of the loan officer's concerns, and absent any prompting from the parties, she prepared a document that provided as follows:

---

[1] An amended complaint for divorce filed by plaintiff on December 22, 2011, retained this language.

[2] Our factual discussion is based on documents in the lower court record and testimony taken at hearings on April 4 and August 26, 2013, in relationship to defendant's postjudgment objection to garnishment. Testimony was provided by both parties, plaintiff's original divorce attorney, and a senior mortgage loan officer at DCCU.

September 13, 2011[3]

To Whom it May Concern:

On this date my husband . . . refinanced our marital home located [in] . . . Bark River, MI 49807. We are in the process of filing for a divorce[4]. Part of the proceeds of this refinance were used to pay off a debt I owe to [DCCU] in the amount of $20,581.95.

I had requested the amount of $20,000.00 for the divorce settlement and have agreed that this will satisfy that settlement. [Emphasis added.]

At the end of the document was plaintiff's typed name with a signature line above it. Plaintiff's name was signed on the signature line. Plaintiff could not recall executing the document and would not definitively admit to signing it, although she conceded that the signature on the document looked like her signature. The DCCU loan officer testified that the signature matched plaintiff's signature on the various closing documents. While plaintiff had counsel at the time of the refinancing, counsel did not participate in any of the refinancing meetings and closing, and defendant did not have counsel at the time.

On May 1, 2012, a hearing was conducted to place a divorce settlement agreement on the record. Plaintiff testified, in pertinent part, as follows:

Q. Now, looking at property settlement. First of all, before you actually left the marital residence, you and [defendant] pretty much had worked everything out, is that true?

A. Yes, we did.

Q. You had basically refinanced the marital home in [defendant's] name and – his name solely?

A. Yes.

Q. And paid off some marital debt?

A. Yes.

[3] September 13, 2011, was the date that the parties closed on the refinancing.

[4] We note that plaintiff's divorce complaint had already been filed by September 13, 2011.

Q. And then there was an agreement that he was going to pay you $20,000 for your equitable portion of the house?

A. Yes.

Q. And that agreement was that that would be *after the finalized divorce*?

A. Yes.

Q. And you're to sign off on the deed, and you have no problem doing so, is that correct?

A. No, I don't. [Emphasis added.]

Next, defendant was called to the stand, and he testified, in relevant part, as follows:

Q. You heard the settlement agreement that was given by your wife on the marital property . . ., correct?

A. Yes, that's correct.

Q. Are you in agreement with all the terms of this settlement agreement as stated by your wife?

A. Yes, I am.

. . .

Q. And you're asking the Court to adopt all of the provisions of the agreement in a judgment of divorce?

A. Yes, I am.

Plaintiff subsequently filed and served a proposed judgment of divorce under the seven-day rule, MCR 2.602(B)(3). Defendant filed some objections with respect to child support and parenting time, but nothing was said in regards to the property settlement provision, which is set forth below. Defendant later filed a supplemental objection, raising issues concerning entitlement to dependency exemptions for tax purposes, computation of earnings relative to determining child support, and healthcare coverage, but again stating nothing with respect to the property settlement language. Defendant subsequently filed a second supplemental objection, raising custody issues, and yet again nothing was stated as to the property settlement provision. A judgment of divorce was entered by the trial court on October 3, 2012. The divorce judgment provided that defendant was awarded the marital home and was solely responsible for the mortgage on the home. Most importantly, the divorce judgment provided:

> In consideration of the values of the various assets and debts that have been divided between the parties, and to equalize such values, Defendant shall pay to the Plaintiff $20,000.00 as a property settlement transfer.
>
> Payment of the settlement transfer amount shall be made directly to LaCosse Law by instrument payable to Plaintiff, within sixty (60) days of the date of entry of this Judgment. During such sixty (60) day period, no interest shall accrue on the amounts payable. Thereafter, interest shall accrue on any unpaid balance at the rate of twelve percent (12%) per year, compounded monthly.

This language plainly and unambiguously contemplated a future payment of $20,000, absent any indication whatsoever that defendant's obligation under the divorce judgment to pay plaintiff $20,000 had already been satisfied.

The parties subsequently engaged in several proceedings regarding plaintiff's motion to change custody, in which she sought sole physical custody of the minor children; the divorce judgment had awarded the parties joint legal and physical custody of the children. We note that much of the litigation between the parties pertained to custody and parenting time, and the parties' attention was generally focused on and devoted to custody and parenting-time matters. At the end of February and beginning of March 2013, a writ of garnishment was prepared and served on defendant's credit union and his employer with respect to defendant's apparent ongoing obligation under the divorce judgment to pay plaintiff $20,000, which plaintiff claimed had not been paid. On March 14, 2013, defendant filed an objection to garnishment, asserting that the judgment had been satisfied. It was defendant's position that satisfaction had been accomplished when the $20,581 procured during the refinancing was applied to the DCCU loan that had been solely in plaintiff's name, which amount would eventually have to be paid by defendant in making his monthly mortgage payments on a loan for which he alone was now responsible.

On April 4, 2013, an evidentiary hearing was held on defendant's objection to garnishment, with testimony coming from plaintiff and defendant. Defendant testified that the parties' property division agreement was that he would pay plaintiff $20,000 and do so by obtaining refinancing in his name alone and paying off the $20,581 debt that was solely plaintiff's obligation. Defendant testified that he never agreed to paying off the $20,581 loan balance and then paying plaintiff an additional $20,000; he adamantly claimed that there was no way he could financially muster such an additional payment. Plaintiff was equally adamant that the $20,581 obtained through the refinancing and applied to her loan was simply meant to eliminate *marital* debt for which they had both been responsible and that the agreement was that defendant would additionally pay $20,000 to her, representing her share of the home's equity.[5] The trial court denied defendant's objection, indicating that whatever may have been agreed upon by the parties prior to the divorce settlement hearing and entry of the judgment of divorce, the transcript of the hearing and the divorce judgment itself plainly and unambiguously reflected

[5] We note that on the basis of the testimony by the DCCU loan officer, the actual total equity in the home in September 2011 was approximately $14,000.

contemplation of "a prospective payment, not in recognition of something that had already been received." On April 17, 2013, the trial court formally entered an order denying defendant's objection to garnishment. We note that, at the time, the September 13, 2011 document, ostensibly signed by plaintiff at the closing on the refinancing and suggesting satisfaction of a $20,000 property settlement agreement (hereafter the "DCCU document"), had apparently not been brought to the attention of the attorneys and certainly not the court.

On April 18, 2013, defendant filed a motion for reconsideration, claiming that defense counsel had met with the DCCU loan officer after the objection hearing and that the loan officer, on subsequently reviewing the loan file, discovered the DCCU document, which the court should take into consideration in reexamining the objection to garnishment. A new evidentiary hearing was conducted on August 26, 2013, on the motion for reconsideration, where the parties again testified, along with the DCCU loan officer and plaintiff's first attorney, who had been plaintiff's counsel at the time of the divorce settlement hearing and had prepared the divorce judgment.

Plaintiff's prior counsel testified that shortly before the divorce settlement hearing, there were negotiations between the parties at the office of defendant's counsel, which resulted in the settlement agreement that was later placed on the record at the hearing. According to counsel, at no time during the negotiations did defendant or his attorney express that the $20,000 had already been paid. It was the view of plaintiff's former attorney that the $20,000 was to be paid after the settlement hearing in court. She also testified that there "were two separate amounts," the amount obtained through the refinancing to pay off marital debt, i.e., the $20,581, and the $20,000 to be paid by defendant to plaintiff after the divorce was finalized. Counsel stated, "it wouldn't make any sense to me that [plaintiff] be solely responsible for marital debt from her portion of the equitable home." On cross-examination, plaintiff's former counsel stated that while she did not have a specific recollection of the negotiations, property settlement had obviously been discussed before the settlement hearing, otherwise "we wouldn't have had an agreement." As part of defendant's testimony, he claimed that he understood the settlement agreement that was placed on the record at the divorce settlement hearing, but it was also his understanding that the $20,000 settlement had already been paid or satisfied. Plaintiff continued to maintain her position that she was owed $20,000 under the divorce judgment and that the obligation was not satisfied by the payment of the $20,581 loan balance at the time of the refinancing, considering that the loan was associated with marital debt.

The trial court again denied defendant's objection to garnishment, essentially for the same reasons it had previously denied the objection. The court noted that pursuant to *Buzynski v Buzynski*, 369 Mich 129; 119 NW2d 591 (1963), settlement agreements are binding, particularly when, as here, the parties are represented by counsel, the parties testify to acknowledging and understanding the agreement, and the settlement is plain and unambiguous. The trial court stated that "this is a textbook case why parties should never do their own paperwork on something as important as a divorce." The trial court, as previously determined, found that the settlement agreement placed on the record and the divorce judgment contemplated a prospective or future payment of $20,000. In conclusion, the court ruled:

> I'm satisfied this [DCCU] document does not destroy the later agreement of the parties. Does not fill in or satisfy that later agreement to any other extent because it's the latest agreement where both had lawyered up, both had lawyers,

> both appearing in court, both testifying this is what they were agreeing to, the judgment that subsequently was prepared with that. That reflects that agreement specifically on the property to which there is no objection. And everybody had an opportunity while it was floating out there – the judgment was floating, waiting to be signed, to say, "No, no. This doesn't reflect it. We should get credit for this, or to stop it." It wasn't done. And, therefore, the Court is going to be denying the objection to the garnishment. It will proceed.

On September 5, 2013, the trial court entered an order formally denying defendant's motion for reconsideration of the earlier denial of his objection to garnishment. Defendant appeals as of right.

Initially, plaintiff maintains that this Court lacks jurisdiction to hear defendant's appeal as of right with respect to the garnishment rulings, where defendant could only appeal as of right the divorce judgment, as that judgment constituted the final judgment in this case, i.e., "the first judgment or order that dispose[d] of all the claims and adjudicate[d] the rights and liabilities of all the parties[.]" MCR 7.203(A)(1); MCR 7.202(6)(a)(i). MCR 3.101(P) provides that "[a] judgment or order in a garnishment proceeding may be set aside or appealed in the same manner and with the same effect as judgments or orders in other civil actions."[6] This language indicates that, for purposes of an appeal and appellate jurisdiction, a garnishment proceeding is treated like an independent civil action, thereby suggesting that an appeal would be of right given that the denial of the garnishment objection fully adjudicated the garnishment matter. However, we find it unnecessary to resolve the question. In the interest of judicial economy, and assuming that the filing of an application for leave to appeal was the proper jurisdictional route, we hereby exercise our discretion and treat defendant's claim of appeal as an application for leave, grant leave, and address defendant's appellate arguments. *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

In *Ward v DAIIE*, 115 Mich App 30, 35; 320 NW2d 280 (1982), this Court provided a broad overview of the judgment-collection tool known as garnishment:

> Once a judgment is obtained, garnishment is a legitimate and common procedure to satisfy a claim. The design of a garnishment proceeding is to preserve a principal defendant's assets in the control of the garnishee, *i.e.*, one who has property or money in his possession belonging to the defendant, so that the assets may later be accessible to satisfy a judgment against the principal

[6] MCR 7.203(A)(2) provides that an appeal as of right exists in regards to "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule."

> defendant. Rather than being a new or different action, a garnishment proceeding is ancillary to the original suit. [Citations omitted.]

Garnishment after judgment is governed by MCR 3.101. See also MCL 600.4011. A valid objection to garnishment is that "the judgment has been paid." MCR 3.101(K)(2)(e). Defendant's argument on appeal is just that – "the judgment has been paid." And it was satisfied by defendant's act of paying off the $20,581 balance on plaintiff's loan with proceeds from the refinancing of the marital home. The ultimate question is whether defendant's obligation to pay plaintiff $20,000 under the judgment of divorce was independent of the transaction involving the refinancing of the home and payment of the $20,581 debt.

At the divorce settlement hearing, the agreement placed on the record was that defendant would pay plaintiff $20,000 "*after* the finalized divorce." (Emphasis added.) Defendant acknowledged and accepted that agreement and asked the trial court to adopt it in a judgment of divorce. Defendant did not object to this future payment of $20,000, remaining entirely silent on any claim that the payment had already been made. More enlightening is the judgment of divorce itself, which unequivocally called for a future payment of $20,000, as it was to be made within 60 days and sent directly to plaintiff's then counsel. Payment was also to be made "by instrument payable to [p]laintiff," and the payment of the $20,581 loan balance owed to DCCU was certainly not by instrument payable to plaintiff. The divorce judgment even contemplated the possibility of interest "on any unpaid balance" after 60 days, which language was completely unnecessary and meaningless if the payment obligation had already been satisfied. Nothing in the plain and unambiguous language of the divorce judgment remotely suggested preexisting satisfaction of the $20,000 judgment obligation. In three separate objections to the proposed judgment of divorce, defendant did not once question the language dictating a future payment of $20,000.

Defendant's assertion regarding the nature of the parties' agreement is not consistent with the divorce judgment, and to provide defendant the remedy that he seeks would effectively necessitate the rewriting and modification of the judgment. Given the acknowledgment and acceptance of a future payment of $20,000 at the divorce settlement hearing, the un-objected-to divorce judgment mandating a future $20,000 payment, and the failure to seek relief from the divorce judgment or to appeal the judgment, defendant essentially waived his arguments against garnishment because those arguments necessarily impinged on the proper construction of the divorce judgment. See *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) (acquiescence evidenced an agreement to waive a secured right and a party cannot complain on appeal when its own unequivocal conduct established waiver, which is in keeping with the longstanding rule against harboring error as an appellate parachute). Defendant's challenge of the garnishment proceedings was, in effect, an improper collateral attack on the divorce judgment. In *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999), this Court noted that the defendant's failure to appeal the original divorce judgment precluded a collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions. Here, defendant stipulated to a future payment of $20,000 to be made to plaintiff.

Although not cited by either party, we note the language in MCR 2.507(F), which provides:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Accordingly, an agreement that is made in open court or evidenced by a writing is binding on the parties. Here, the parties agreed in open court at the divorce settlement hearing to a future payment of $20,000, and the provision in the divorce judgment calling for the $20,000 payment was entered by consent. The agreement was binding.

The parties discuss the contract principle of novation, which is unnecessary to reach in light of our discussion above, but which we shall briefly touch on, as it further supports our holding. "A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one." *In the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). Consent to a novation need not be in writing, "but may be implied from the facts and circumstances of the transaction." *Id.* Here, assuming the existence of an earlier agreement or obligation that was valid and enforceable, a new or substituted obligation to prospectively pay plaintiff $20,000 was created through the consent of the parties as evidenced by the settlement agreement placed on the record and the consent divorce judgment. Defendant contends that there was no consideration as needed to effectuate a novation; however, the settlement agreement was reached as a result of negotiations on multiple issues as testified to by plaintiff's prior attorney, so we can safely conclude that some form of consideration, no matter how slight, shaped the end product relative to property settlement that became part of the judgment of divorce. See *Moffit v Sederlund*, 145 Mich App 1, 11; 378 NW2d 491 (1985) ("Courts will not ordinarily inquire into the adequacy of consideration[.]").

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael J. Kelly