

STATE OF MICHIGAN
COURT OF APPEALS

DOMINIC J. RIGGIO,

Plaintiff-Appellee,

v

SHARON RIGGIO,

Defendant-Appellee,

and

SUE E. RADULOVICH,

Intervening Party-Appellant,

and

SUE E. RADULOVICH, PC,

Intervening Party.

UNPUBLISHED

November 26, 2013

Nos. 308587, 308588 & 310508

Macomb Circuit Court

LC Nos. 2007-005787-DO &

2009-000698-DO

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals,¹ appellant Sue E. Radulovich appeals by right from two trial court orders: in docket numbers 308587 and 308588, she appeals from the December 12, 2011 trial court order that denied her motion to set aside a prior judgment as frivolous and awarded plaintiff's and defendant's counsel attorney fees; in docket number 310508, she appeals from the May 7, 2012 trial court order that found her in contempt for failing to appear before the court and show cause for failing to comply with the December 12, 2011 order to pay attorney fees. Because the trial court did not abuse its discretion by denying Radulovich's motion to set

¹ *Riggio v Riggio*, unpublished consolidation order of the Court of Appeals, entered January 17, 2013 (Docket Nos. 308587, 308588 & 310508).

aside its prior judgment, clearly err by finding that motion frivolous, nor abuse its discretion by holding Radulovich in contempt, we affirm.

I. FACTS

This is the third time these parties have had an appeal before this Court. This case arises out of a divorce action between plaintiff, Dominic Riggio, and defendant, Sharon Riggio, who are both appellees in these instant appeals. On October 3, 2007, plaintiff filed for divorce in Macomb County. *Riggio v Riggio*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 2010 (Docket No. 290221) (hereafter *Riggio I*), p 1. Defendant retained Radulovich as her legal counsel. *Id.* After negotiations, plaintiff and defendant reached a settlement agreement, placed on the record on October 28, 2008. *Id.* at p 2.

In his complaint, plaintiff alleged that he had resided in Michigan for the 180 days immediately preceding the filing, *id.* at p 1, as required by MCL 552.9 for a Michigan court to obtain subject-matter jurisdiction over a divorce case. “According to Radulovich, in the days prior to October 28, 2008, she discovered that plaintiff had signed a declaration of domicile in Florida on April 17, 2007, less than 180 days before plaintiff filed the complaint for divorce.” *Id.* at p 2. Radulovich claimed that she brought the issue to defendant’s attention, but defendant instructed her not to pursue a jurisdictional claim. At the October 28, 2008 hearing, plaintiff responded affirmatively when asked whether he had resided in Michigan for the 180 days preceding the filing of his divorce complaint. *Id.*

As a consequence, “Radulovich questioned the ethical effect of signing a judgment of divorce that, because it included jurisdictional statements, contained a falsehood.” *Id.* Radulovich contacted the State Bar of Michigan for ethics advice. *Id.* After receiving advice, she informed the trial court of the potential jurisdictional issue against defendant’s wishes. *Id.* Radulovich moved the trial court to be allowed to withdraw her representation and requested that the trust funds in her possession be released except for \$150,000 she claimed she was owed in attorney fees. *Id.* She also requested that the divorce case be dismissed and that plaintiff be sanctioned. *Id.*

At a December 22, 2008 hearing addressing Radulovich’s motion, the trial court determined that a jurisdictional evidentiary hearing was required and scheduled the hearing for February 6, 2009. *Id.* “The trial court granted Radulovich’s motion to withdraw, and ordered Radulovich to forward any and all funds she was holding on defendant’s behalf to plaintiff’s counsel within 14 days.” *Id.* Radulovich moved for reconsideration, arguing that the trial court was prohibited from issuing any orders in the case prior to resolving the jurisdictional issue. *Id.* On plaintiff’s motion, the court entered an order requiring Radulovich to appear and show cause as to why she should not be held in contempt for failing to turn over defendant’s funds as ordered by the court. *Id.* The hearing was scheduled for January 20, 2009. *Id.*

After Radulovich failed to appear at the January 20, 2009 hearing, the court adjourned the show cause matter to January 30, 2009 and froze Radulovich’s accounts. *Id.* On January 29, 2009, the court denied Radulovich’s motion for reconsideration. *Id.* “Radulovich again failed to appear at the January 30, 2009 hearing.” *Id.* On that date, the court ordered that all of

defendant's funds held by Radulovich be transferred to plaintiff's counsel's trust account and assessed attorney fees against Radulovich. *Id.* at pp 2-3.

On February 6, 2009, plaintiff indicated that due to the jurisdictional issue he would voluntarily dismiss his divorce complaint. *Id.* at p 3. The court entered a stipulated order dismissing the complaint without prejudice. *Id.* Plaintiff refiled for divorce on the same date.

A. PRIOR APPEALS

In *Riggio I*, Radulovich appealed by leave granted the trial court's December 22, 2008, January 20, 2009, and January 30, 2009 orders. *Id.* Radulovich argued that the court was barred from entering those orders without first determining whether it had subject-matter jurisdiction over the case. *Id.* This Court agreed and remanded the case, ruling:

Without an evidentiary hearing on this [jurisdictional] issue, however, it is unclear whether the trial court lacked jurisdiction. Therefore, we conclude that the only appropriate remedy is to remand to the trial court to reinstate the case and conduct an evidentiary hearing to determine whether the court had subject matter jurisdiction over the action. If the trial court determines that it lacked subject matter jurisdiction, then the court must vacate the December 22, 2008, January 20, 2009, and January 30, 2009 orders. [*Id.* at p 4]

At some point in the interim, the trial court entered an order discharging Radulovich's retaining and discharging liens for legal services provided to defendant. In *Riggio v Riggio*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 291998) (hereafter *Riggio II*), Radulovich appealed by that order by right. *Id.* at p 1. This Court agreed with the *Riggio I* panel that the trial court erred by failing to hold an evidentiary hearing on jurisdiction and noted that, at that point in time, the court had still taken no action pursuant to the remand order in *Riggio I*. *Id.* at p 2. The *Riggio II* panel again remanded for an evidentiary hearing. *Id.* However, the panel also elected to address Radulovich's other arguments and found that the trial court erred by discharging Radulovich's retaining and charging liens. *Id.* at pp 2-3.

B. AFTER REMAND

On June 21, 2011, plaintiff, defendant, and Radulovich entered into a "settlement agreement and mutual release" that provided, among other things:

A. **Subject Matter Jurisdiction.** The parties agree that Judge Switalski shall take proofs to establish the existence or non-existence of subject matter jurisdiction over [the 2007 and 2009 divorce filings].

B. **Dismissal of Lawsuit.** Intervening parties Sue Radulovich and Sue E. Radulovich, P.C. agree that upon the execution of this Agreement they shall dismiss with prejudice The Wayne County Action as to all Defendants. By way of this [provision], intervening parties represent and warrant as a material term of this Agreement that there are no other actions pending, and represent and agree that none will be filed at any point in time after the execution of this Agreement, related in any manner whatsoever to the claims in The Wayne County Action,

with the exception of any action or process of law necessary to accomplish the payment/collection of attorney fees and costs following arbitration.

C. **Orders to be Vacated.** That the orders as to Sue Radulovich and Sue E. Radulovich, P.C., those being December 22, 2008, January 20, 2009, and January 30, 2009, shall be vacated, and that *Sue Radulovich and Sue E. Radulovich, P.C. shall immediately upon execution of this Settlement Agreement withdraw as an intervening party and will have no further involvement in those cases.*

D. **Intention of the Parties.** It is the intention of the parties executing this Agreement [that] the arbitration proceeding before David Elias shall take the place of any and or all other actions by and between the parties in any manner whatsoever and related to any subject matter whatsoever and that upon the completion of the arbitration proceeding all disputes of any nature whatsoever shall be forever barred in their entirety, except to the extent that Sue Radulovich or Sue E. Radulovich, P.C., shall be required to enforce the arbitration award, if any.

E. **Release.** In consideration for all the foregoing, Sue Radulovich and Sue E. Radulovich, P.C. their representatives, agents, heirs and assigns, fully release and discharge [plaintiff, defendant, and their respective counsels] . . . from any and all actions, claims or demands or liabilities of any nature whatsoever, now accrued or which may hereafter accrue, whether known or unknown, arising out of or pertaining to any matters whatsoever which might be claimed at any time by Sue Radulovich or Sue E. Radulovich, P.C., with the exception of their right to pursue legal action or any process necessary to enforce the payment/collection of attorney fees and costs following arbitration.

In consideration of all the foregoing, [plaintiff, defendant, and their respective counsels] . . . fully release SUE RADULOVICH AND SUE E. RADULOVICH, P.C., from any and all actions, claims or demands or liabilities of any nature whatsoever, now accrued or which may hereafter accrue, whether known or unknown, against SUE RADULOVICH OR SUE E. RADULOVICH, P.C.

[Emphasis added.]

Pursuant to the settlement agreement and this Court's remand orders, the trial court held a jurisdictional hearing on August 5, 2011. Plaintiff's counsel indicated that Radulovich and defendant's counsel knew the hearing was occurring and were content to allow the record to be made without their presence. Under oath, plaintiff testified that he had been a Michigan resident for 180 days and a Macomb County resident for 10 days immediately preceding his divorce filings on October 3, 2007 and February 6, 2009. Following the hearing, the trial court issued two jurisdictional orders, one finding that it *had* subject-matter jurisdiction over the 2007 divorce filing, and the other finding that it *has* subject-matter jurisdiction over the 2009 divorce filing.

On December 12, 2011, pursuant to the settlement agreement, the court vacated the orders of December 22, 2008, January 20, 2009, and January 30, 2009.

On September 8, 2011, following arbitration, the parties entered into a consent agreement that awarded Radulovich \$20,000 from plaintiff and \$100,000 from defendant.

On November 28, 2011, Radulovich filed a motion that gave rise to the instant appeals. Radulovich moved the trial court to set aside its August 5, 2011 jurisdictional orders that found that it possessed subject-matter jurisdiction over both the 2007 and 2009 divorce filings. Radulovich alleged that: she had appeared to testify at the August 5, 2011 hearing, but could not because the fee arbitration hearing was scheduled the same day; she had a “personal interest in contesting the jurisdictional issue” because “the court and counsel unethically conspired to commit fraud” that resulted in Radulovich’s disciplinary action before the Attorney Grievance Commission; plaintiff committed perjury that should have been investigated by the court; the court inadequately investigated whether it had jurisdiction and, therefore, did not conduct an adequate evidentiary hearing, and; fraud on the court was committed.

On December 12, 2011, the trial court denied Radulovich’s motion as frivolous and awarded plaintiff’s counsel \$2,400 and defendant’s counsel \$1,475 in attorney fees. Radulovich’s subsequent motion for reconsideration was denied.

On April 2, 2012, defendant moved the court for a show cause order, alleging that Radulovich had failed to pay the attorney fees required by the December 12, 2011 order. On April 3, 2012, the court granted the motion and ordered Radulovich to appear before the court on April 16, 2012 “to show cause, if any she may have, why she should not be held in contempt of court for her refusal and failure to obey the Order of this Court.” The court also provided that the order to show cause be served on Radulovich at least seven days prior to the hearing.

On April 16, 2012, the court heard argument on plaintiff’s and defendant’s motions for a show cause order. Radulovich failed to appear. Plaintiff’s counsel stated that her process server twice attempted to serve Radulovich at her home without success and defendant’s counsel indicated that his process server also attempted to serve Radulovich at her home on three occasions and failed. At plaintiff’s and defendant’s request, the court issued an order directing Radulovich to appear on May 7, 2012 and show cause why she should not be held in contempt for failing to appear. The order provided that service should be accomplished by ordinary mail and by posting at Radulovich’s address.

Radulovich nevertheless failed to appear at the May 7, 2012 hearing. Both plaintiff’s and defendant’s counsel stated that they had both mailed and posted notice in accordance with the court’s April 16, 2012 order. A process server averred that he personally tacked a copy of the order at Radulovich’s address on April 16, 2012. At plaintiff’s and defendant’s request, the trial court issued an order holding Radulovich in contempt for failing to appear and awarding additional attorney fees and costs.

II. MOTION TO SET ASIDE JURISDICTIONAL ORDERS

Radulovich first argues that the trial court abused its discretion by denying her motion to set aside the August 5, 2011 judgments that found that it had subject-matter jurisdiction in the underlying divorce case.² We disagree.

MCR 2.612(C) provides:

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

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

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

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

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

Radulovich appears to argue that the court's jurisdictional orders were based on fraud, MCR 2.612(C)(1)(c), and/or that the orders were void due to the court's failure to conduct an adequate jurisdictional hearing, MCL 2.612(C)(1)(d).³

A. SETTLEMENT AGREEMENT

The trial court properly denied Radulovich's motion to set aside the jurisdictional orders because Radulovich's continued litigation violated the express terms of the settlement agreement.

² "A trial court's decision on a motion to set aside a prior judgment is discretionary and will not be reversed on appeal absent an abuse of discretion." *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW 121 (1999).

³ We note that the issues on appeal in *Riggio I* and *Riggio II* were rendered moot by the terms of the settlement agreement.

“A settlement agreement is binding when it is made in open court.” *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). And, “[c]ourts are bound to enforce settlement agreements absent evidence such as fraud or duress.” *In re Draves Trust*, 298 Mich App 745, 768; 828 NW2d 83 (2012).

The settlement agreement was memorialized before the court and provided that Radulovich would release all her claims, withdraw from the cases an intervening party, and have no further involvement in the divorce matter. Given that there is no evidence that Radulovich was induced to enter into the settlement agreement by fraud or duress, the court was required to enforce the agreement. By filing her motion to set aside the jurisdictional orders, Radulovich violated the provisions of the settlement agreement. Thus, the trial court did not abuse its discretion by denying Radulovich’s motion to set aside its August 5, 2011 jurisdictional orders.

B. SUBJECT-MATTER JURISDICTION

Radulovich’s violation of the settlement agreement provides a sufficient basis in itself to affirm the trial court’s denial of her motion to set aside the jurisdictional orders. However, in the interest of finally bringing this matter to a close, we will address Radulovich’s claim that the trial court erred by ruling that it possessed subject-matter jurisdiction in the underlying divorce case.⁴

At the jurisdictional hearing, plaintiff testified that he had resided in Michigan for 180 days and Macomb County for 10 days immediately preceding both divorce filings, as required by MCL 552.9 for the court to obtain subject-matter jurisdiction over the action. However, in her December 2008 motion to withdraw, Radulovich presented evidence that plaintiff executed a “declaration of domicile” in Florida that contradicted his testimony. Radulovich did not present this evidence to the trial court at the jurisdictional hearing due to her failure to appear. There is no evidence that she did not receive notice of the hearing; in fact, she and her counsel were in the court building at the time.

The evidence supporting the court’s finding of jurisdiction was plaintiff’s testimony, and the only evidence to the contrary was the declaration of domicile. While the court did not discuss the declaration during the hearing, there is no evidence that it was unaware of its existence. Indeed, it was discussed in this Court’s opinion in *Riggio I*. Therefore, the record indicates that the court found plaintiff’s testimony credible even in light of the declaration. We accord great deference to the finder of fact, in this case the trial court, on questions of witness credibility and the weighing of evidence. See *Drew v Cass Co*, 299 Mich App 495, 501-502; 830 NW2d 832 (2013). Moreover, this Court has held that a court’s factual finding on whether a party has met the jurisdictional requirements in a divorce case is “entitled to great weight.” *Leader v Leader*, 73 Mich App 276, 283; 251 NW2d 288 (1977).

We find that the trial court’s factual finding that plaintiff met the residency requirement of MCL 552.9 was not clearly erroneous. We find no legal or factual merit in Radulovich’s

⁴ Whether a circuit court had subject-matter jurisdiction presents a question of law reviewed de novo. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005).

claims that the trial court held an improper ex parte evidentiary hearing, improperly proceeded after issuing its jurisdictional orders, or should have investigated her allegation that plaintiff committed perjury. The trial court did not err by finding that it possessed subject-matter jurisdiction in the underlying divorce case.

III. FRIVOLITY

Radulovich next argues that the trial court erred by finding her motion to set aside the jurisdictional orders frivolous.⁵ We disagree.

MCL 600.2591 provides:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) “Frivolous” means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) “Prevailing party” means a party who wins on the entire record.

The trial court did not specify on what grounds it found Radulovich’s motion frivolous. However, it is clear that Radulovich’s position was “devoid of arguable legal merit” under MCL 600.2591(3)(iii). Radulovich signed the settlement agreement, which provided explicitly that she discharged all of her possible claims against plaintiff and defendant and agreed to completely end her involvement in the underlying divorce case. Thus, by the terms of the settlement

⁵ “A trial court’s findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous.” *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009).

agreement, Radulovich's motion challenging jurisdiction in the divorce matter was frivolous as devoid of arguable legal merit.

Radulovich argues that MRPC 3.3 operates to render her motion not frivolous. MRPC 3.3(a)(1) provides that, "A lawyer shall not knowingly: . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law" Radulovich argues that her awareness of the potential jurisdictional defect protects her motion from being found frivolous because her consent to jurisdiction in the divorce matter would constitute a false statement of material fact or law. However, unlike the original proposed settlement of divorce, the instant settlement agreement contained no acknowledgment of jurisdiction, and, therefore, did not implicate Radulovich's ethical duties under MRPC 3.3.

Accordingly, the trial court did not clearly err by finding Radulovich's motion to set aside the jurisdictional orders frivolous.

IV. CONTEMPT

Radulovich argues that the trial court erred by holding her in contempt.⁶ We disagree.

Radulovich first claims that the court could not issue a show cause order or find her in contempt without first resolving the jurisdictional issue in the underlying divorce case. However, when the court issued the show cause order and found Radulovich in contempt, it had already conducted a jurisdictional hearing and issued resulting orders. Moreover, circuit courts have both an inherent common-law and statutory right to punish contempt of court. *In re Contempt of Steingold*, 244 Mich App 153, 157; 624 NW2d 504 (2000); MCL 600.1701 *et seq.* This Court has held that, although contempt proceedings are quasi-criminal, "even in a criminal case, an illegal arrest or arrest warrant issued on defective procedure will not divest a court of jurisdiction when the court has jurisdiction over the charged offense and the defendant appears before the court." *Porter v Porter*, 285 Mich App 450, 462; 776 NW2d 377 (2009).

In this case, the trial court had jurisdiction over any contemptuous actions that occurred before it, and Radulovich appeared before the court. Further, Radulovich was provided with adequate notice and opportunity to defend against the contempt charge. Both plaintiff's and defendant's counsel stated that process servers repeatedly attempted to serve Radulovich notice of the April 16, 2012 and May 7, 2012 hearings. A process server averred that he posted notice at Radulovich's address in compliance with the court's order. Radulovich has presented no evidence to the contrary. Moreover, Radulovich was aware of her obligation to pay attorney fees under the court's December 12, 2011 order due to her appearance at that hearing. Accordingly, the court had jurisdiction over the contempt proceedings.

⁶ A trial court's issuance of a contempt order is reviewed for an abuse of discretion. *Porter*, 285 Mich App at 454. "Moreover, a trial court's factual findings are reviewed for clear error and questions of law are reviewed de novo." *Id.* at 454-455.

Radulovich next claims that the court erred by finding her in contempt without the benefit of sworn testimony. MCL 600.171(2) provides:

When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.

Radulovich was found in contempt for failing to appear before the court and show cause for failing to pay attorney fees as ordered. This contempt occurred outside the presence of the court. *In re Contempt of McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994) (“It is well settled in this state that an attorney’s failure to appear in court on a hearing date is contempt committed outside the presence of the court”). In *In re Albert*, 383 Mich 722, 723; 179 NW2d 20 (1970), this Court adjudged an attorney guilty of contempt for failure to take timely action when ordered by the Court. Before our Supreme Court, the attorney argued that “contempt procedure must include a show cause order based on an affidavit supporting the charged facts[.]” *Id.* at 724. The Supreme Court rejected the attorney’s arguments, ruling that, “if the [court] order requiring affirmative action by the attorney is a valid order in a particular case, the attorney’s neglect or refusal to obey it is contempt of that court.” *Id.* Further, “[a] court’s judicial notice of its own records is a wholly satisfactory ‘other method’ of establishing the failure” of an attorney to comply with a court order. *Id.*

The trial court issued a valid order requiring Radulovich to appear before the court. Radulovich failed to comply with the order, as evidenced by the court’s own records. Accordingly, the trial court did not abuse its discretion by holding Radulovich in contempt.

V. CONCLUSION

We find that the trial court did not abuse its discretion by denying Radulovich’s motion to set aside its jurisdictional orders, did not clearly err by finding that motion frivolous, nor abuse its discretion by holding Radulovich in contempt.⁷ Accordingly, the December 12, 2011 and May 7, 2012 trial court orders are affirmed.

We also find that the instant appeals were vexatious as “taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal[.]” MCR 7.216(C)(1)(a). The parties spent ample time and resources to come to a global settlement agreement that would finally end this litigation. Yet, appellant has refused to withdraw from the case and cease filing motions in express violation of the settlement agreement. Accordingly, appellant is ordered to pay appellees’ reasonable attorney fees incurred in defending the instant appeals. MCR 7.216(C)(2).

⁷ We decline to address Radulovich’s claim that the trial court impermissibly amended an order on appeal in violation of MCR 7.208(A) because the court never actually amended the order in question.

Additionally, as the prevailing parties, appellees may tax costs under MCR 7.219.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro