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NO. COA07-246

NORTH CAROLINA COURT OF APPEALS

Filed: 04 December 2007

EINAT METZKOR COTTER

v.

Durham County  
No. 05 CVD 4863

GAD COTTER

Appeal by defendant from judgment entered 20 November 2006 by Judge Craig B. Brown in Durham County District Court. Heard in the Court of Appeals 11 October 2007.

*No brief filed by plaintiff-appellee.*

*The Williams Day Group, PC by T. Miles Williams, for defendant-appellant.*

STEELMAN, Judge.

When the trial court considered defendant's objections to the award of attorney's fees, defendant received adequate opportunity to be heard on the matter, and a formal hearing was not required. It was error for the court to consider an unverified letter in awarding attorney's fees to plaintiff's Israeli counsel. An affidavit is appropriate evidence which may be used by the trial court to establish a reasonable amount of attorney's fees.

#### I. Factual Background

Einat Metzkor Cotter ("plaintiff") and Gad Cotter ("defendant") were married in Israel on 12 June 1997. One child

was born of the marriage on 30 November 1997. Plaintiff and defendant were divorced on 8 April 1999 in the Family Court of Tel Aviv. Plaintiff and defendant entered into an agreement, which was made part of the divorce judgment (the "Israeli order"). The Israeli order provided, *inter alia*, for child support and a division of personal property.

On 23 September 2005, plaintiff filed a complaint in Durham County District Court requesting the court to:

- (1) Register the . . . Israeli order for child support and property/support payments;
- (2) Award the plaintiff reasonable attorney's fees in connection with enforcement of same;
- (3) Order the Defendant to pay all costs, including reasonable attorney's fees, for the prosecution of this action;
- (4) Determine that the Israeli order is entitled to comity and enforce that order, awarding past due child support arrears to the Plaintiff and the sum of \$80,000 to Plaintiff;
- (5) Find the Defendant in willful criminal and/or civil contempt. . . for his failure to . . . pay child support. . .

On 2 December 2005 plaintiff filed a notice of registration of the Israeli order pursuant to Article 18 of Chapter 1C of the North Carolina General Statutes. Plaintiff subsequently filed a motion for summary judgment. After the 22 February 2006 hearing, the Honorable Craig B. Brown granted plaintiff's motion for summary judgment, recognizing the Israeli order and holding that it was enforceable in the courts of North Carolina. The trial court

further ordered that plaintiff have and recover of defendant the sum of \$80,000, and entered judgment in that amount against defendant. On 8 March 2006 plaintiff filed a motion that defendant be held in contempt for failure to make child support payments, and this motion included a request for attorney's fees. The matter was heard on 11 September 2006, and the court found defendant to be in civil contempt. The contempt order entered on 25 September 2006 held that: "Counsel for Plaintiff is awarded reasonable attorney's fees and costs and shall submit an affidavit for same." Plaintiff's attorney submitted an attorney's fees affidavit to Judge Brown on 23 October 2006, a copy of which was sent to defendant's counsel. On 16 November 2006, counsel for defendant sent a letter to Judge Brown stating his objections to the affidavit. An order awarding attorney's fees was entered on 20 November 2006. Defendant appeals.

## II. Notice and Opportunity to be Heard

In his first argument, defendant contends that the trial court erred in ordering the payment of attorney's fees to plaintiff's counsel without giving defendant notice and an opportunity to be heard on the matter. We disagree.

Defendant relies on *Allen v. Allen*, 65 N.C. App. 86, 308 S.E.2d 656 (1983) to support his contention that, in the absence of a formal hearing on the matter, an award of attorney's fees must be vacated. In *Allen*, the trial court entered a custody order awarding custody of the child to defendant. The court order indicated that plaintiff would be responsible for paying

defendant's attorney's fees, but "that. . . the Court will withhold ruling as to the amount of attorney fees at this time and shall rule on the attorney fees at such time as the plaintiff is brought before the Court." Subsequently, the court entered an *ex parte* judgment and directed plaintiff to pay fees and expenses of defendant's counsel, the amount of which was based on an affidavit provided by defendant's counsel. A copy of the affidavit was not furnished to plaintiff's counsel.

On appeal, this Court vacated the judgment of attorney's fees, emphasizing that it was not entered in accord with the provisions of the consent order. Further, we noted that "G.S. 50-13.6, plainly states. . . plaintiff was entitled to have the determination made in the usual way judicial determinations are made -- in court, before both parties, with each having the opportunity to present information and their views with respect to it" and that "\$16,000 is a substantial matter legally to any litigant." Finally, this Court held that, even if the custody order had been binding with respect to attorney's fees, the order only applied to services rendered up to the time the custody order was entered, and did not apply to future services.

The instant case is distinguishable from *Allen*. First, the attorney's fees in this case were awarded pursuant to a contempt hearing, not a child custody hearing. Our jurisprudence expressly provides that the contempt power of the trial court includes the authority to require the payment of reasonable attorney's fees to opposing counsel as a condition to being purged of contempt for

failure to comply with a child support order. *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970). The contempt order entered by the trial court expressly provided that plaintiff was awarded reasonable attorney's fees. We hold that the award of attorney's fees included in the court's contempt order is proper.

Second, in contrast to *Allen*, the court's contempt order made no mention of a future hearing on the matter of attorney's fees, but instead instructed counsel for plaintiff, Nancy Gordon (Gordon), to submit an affidavit for her fees. Gordon submitted a verified affidavit of attorney's fees to the court, including 10.60 hours of Gordon's time at \$250.00 per hour, and 3 hours of Gordon's legal assistant's time at \$75.00 per hour. A copy of the affidavit was faxed to defendant's attorney and receipt of the affidavit was acknowledged by defendant's counsel in his 16 November 2006 letter. All of the work performed by Gordon was prior to the contempt order.

Upon receipt of Gordon's affidavit, defendant's attorney submitted a letter to Judge Brown, objecting to the entry of an award of attorney's fees on the grounds that:

- (1) Ms. Gordon's affidavit includes time by the Plaintiff's Israeli attorney who submitted an unverified letter detailing his fees. . . .
- (2) Ms. Gordon's affidavit includes time for her legal assistant Donna Henry of 3 hours on the day of the hearing that I believe was an unnecessary expense and ask that this fee not be considered. . . .
- (3) I am requesting that any attorney's fees awarded be included in the arrearage

amount and satisfied under the installment payment established in the order.

Counsel for defendant did not explicitly request a hearing, but instead stated he would be "available for a conference or hearing on this matter."

In its order awarding attorney's fees, the court awarded Gordon \$1,900.00, based upon 7.6 hours of her time at \$250.00 per hour. The court awarded Gordon \$37.50 for one half hour of her legal assistant's time. The court awarded \$3,944.00 for plaintiff's Israeli attorney fees and \$547.80 in costs.

We hold that defendant was given an adequate opportunity to be heard and present his views in this matter. The court did not merely award the amount Gordon requested in attorney's fees, but instead reduced the amount she received by nearly thirty percent. Further, the court reduced the amount awarded to Gordon's legal assistant by nearly eighty-five percent. As one of defendant's objections to the award of attorney's fees was that the amount requested for Gordon's legal assistant was unreasonable, the court's drastic reduction in this amount awarded is evidence of the court's consideration of defendant's objection.

We further note that defendant has failed to demonstrate any prejudice he suffered in the absence of a formal hearing, and has made no showing of how his argument at a formal hearing would have differed from the objections contained in his letter to Judge Brown.

This argument is without merit.

III. Letter from Clifford Entes

In his second argument, defendant contends that the trial court erred in awarding plaintiff attorney's fees for the work done by her Israeli attorney, Clifford Entes (Entes). Defendant contends that the court's findings of reasonableness of Entes' fees are not supported by the evidence. We agree.

In the order awarding attorney's fees, the trial court directed that "[c]ounsel for Plaintiff is awarded reasonable attorney's fees and costs and shall submit an affidavit for same." An affidavit is defined as "an oath or affirmation reduced to writing, sworn or affirmed to before some officer who has authority to administer it." *Alford v. McCormac*, 90 N.C. 151, 152, 1884 N.C. LEXIS 183 (1884) (citation omitted).

Gordon submitted an affidavit regarding the services she provided to plaintiff, including her hourly rate, her skill and experience, the reasonableness of her services compared with fees customarily charged in her area for similar services, and the number of hours she spent working on plaintiff's contempt case. Attached to Gordon's affidavit was an exhibit detailing the exact dates, hours, and costs she incurred. Gordon also attached a letter from Entes which detailed the work he did for plaintiff in Israel. Entes' letter was not verified. Thus, it was not an affidavit, which was required by the court's prior order. We hold the court erred in considering Entes' letter and awarding fees based thereon. The portion of the judgment awarding attorney's

fees to Entes is vacated and remanded to the trial court for further proceedings.

IV. Affidavit of Nancy Gordon

In his final argument, defendant contends that the trial court erred in considering Gordon's verified affidavit in making its award of attorney's fees and costs. Defendant contends that such affidavit was not introduced into evidence at a hearing and was not properly before the court. We disagree.

We first note defendant cites no authority for his contention that a court may not consider an affidavit in awarding attorney's fees. For this reason, this assignment of error is deemed abandoned. N.C. R. App. P. 28(b)(5).

Assuming *arguendo* defendant has preserved this argument for review, in the instant case, the trial court's contempt order directed Gordon to submit an affidavit regarding her fees. In awarding attorney's fees, it is proper for the court to consider affidavits to determine the amount of the award. See *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982); *Cox v. Cox*, 133 N.C. App. 221, 234, 515 S.E.2d 61, 70 (1999); *Middleton v. Middleton*, 159 N.C. App. 224, 227, 583 S.E.2d 48, 49 (2003). As discussed above, a formal hearing was not required, and defendant had an adequate opportunity to be heard on the matter. We hold that the court properly considered Gordon's affidavit in awarding attorney's fees to plaintiff. This argument is without merit.



"Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a) (2007). Defendant makes arguments in his brief regarding the court's findings in the order awarding attorney's fees. However, defendant does not assign as error these findings, and they will not be heard on appeal.

AFFIRMED in part, REVERSED and REMANDED in part.

Judges BRYANT and GEER concur.

Report per Rule 30(e).