[Cite as *Hissa v. Hissa*, 2010-Ohio-3087.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93575 and 93606

JOANNE HISSA

PLAINTIFF-APPELLEE

vs.

EDWIN HISSA, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-256928

BEFORE: Gallagher, A.J., Rocco, J., and Blackmon, J.

RELEASED: July 1, 2010

JOURNALIZED:

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SEAN C. GALLAGHER, A.J.:

{¶ 1} This matter comes up on appeal for the fifth time, and represents two consolidated appeals, Cuyahoga App. Nos. 93575 and 93606. Both appellant Edwin Hissa ("Edwin") and cross-appellant Joanne Hissa ("Joanne") have raised issues relating to the trial court's division of marital assets. Furthermore, Joanne appeals the trial court's decision to vacate an order related to motions filed by Edwin, which were dismissed during the pendency of his bankruptcy action. For the reasons herein, we affirm in part and reverse in part.

{¶ 2} A very brief history of the more than ten-year litigation is necessary. Joanne and Edwin were married in 1985 and have two children, now emancipated. In 1997, Joanne filed for divorce; Edwin filed a counterclaim. The parties were divorced in 2001. In the original divorce decree, all of the parties' marital property and marital debt was allocated between them. The trial court affirmed the magistrate's decision to make an equal distribution of property between the parties. As part of that decree, Edwin's medical practice was valued at $553,000 and awarded to him; therefore, Edwin was ordered to pay Joanne $97,000 to equalize the property division. The magistrate also found that the parties had incurred a joint

debt to Joanne's father in the amount of $83,500. The court allocated the debt to Edwin.

{¶ 3} Both parties appealed the original decision, resulting in a decision by this court that the trial court abused its discretion by affirming the magistrate's decision to exclude Edwin's expert's valuation of the practice. *Hissa v. Hissa*, Cuyahoga App. Nos. 79994 and 79996, 2002-Ohio-6313 ("*Hissa I*"). This court held that by sustaining the first assigned error, consideration of the remaining assigned errors relating to the division of marital property was moot, "as any award the [trial] court made would now include a suspect base figure for the value of the practice." Id.

{¶ 4} Three other appeals were brought between 2002 and the present, all of which were either dismissed by one of the parties or dismissed for lack of a final appealable order.[1]

{¶ 5} Between 2001 and 2003, Edwin filed several post-judgment motions to modify visitation, spousal support, and child support. The court set a hearing on those and other outstanding motions for June 1, 2004. On June 1, 2004, Edwin filed for bankruptcy, and he did not appear at the hearing. On June 2, 2004, the docket reflects that the bankruptcy stay was in effect. On June 3, 2004, the docket reflects that the trial court dismissed

[1] See *Hissa II*, Cuyahoga App. No. 82809 (no final appealable order); *Hissa III,* Cuyahoga App. No. 84200 (dismissed by appellant); and *Hissa IV*, Cuyahoga App. No. 90612, 2008-Ohio-4872 (no final appealable order).

all of Edwin's motions for want of prosecution and failure to appear. On December 27, 2005, Edwin filed a motion to vacate the dismissals on the grounds that the stay precluded the trial court from taking any action in the case, and that he was not given notice of the possibility of dismissal. On October 4, 2007, the trial court vacated the dismissals on those same grounds.

{¶ 6} The appeal in *Hissa IV* also concerned another of the issues raised by Joanne's cross-appeal here, i.e., the trial court's October 4, 2007, decision to vacate the dismissal of Edwin's motions for modification of spousal support, child support, and visitation. Also part of the instant appeal are issues related to the trial court's June 25, 2009, decision regarding the valuation of Edwin's medical practice and the debt owed to the estate of Joanne's deceased father.

{¶ 7} For ease of analysis and understanding, we address some of the parties' assigned errors together or in conjunction with assigned errors raised by the other party.

{¶ 8} Edwin raises two assignments of error relating to the valuation of his medical practice.

{¶ 9} "I. The trial court erred and abused its discretion by assigning a value of $553,000 to [Edwin's] medical practice, rather than $321,598."

{¶ 10} "II. The trial court erred and abused its discretion by valuing [Edwin's] medical practice on August 31, 1998 rather than a later date."

{¶ 11} Joanne raises one assignment of error on the same issue.

{¶ 12} "IV. The trial court erred and abused its discretion by valuing [Edwin's] medical practice at $553,000, rather than $650,000; and its decision is against the manifest weight of the evidence."

{¶ 13} On remand from *Hissa I*, the trial court was instructed to consider Edwin's expert report as timely filed when determining the valuation of his medical practice. The parties submitted the issue to the court on briefs rather than at an oral hearing.

{¶ 14} The trial court considered Joanne's expert report, submitted by Robert Greenwald (hereinafter referred to as the "Greenwald report"), as well as Edwin's expert report, submitted by Andrew Finger and Cohen & Company (hereinafter referred to as the "Cohen report"). In its analysis, the court noted that both reports used financial data provided to them by Edwin for his practice through August 31, 1998. The Greenwald report valued Edwin's medical practice at $650,000,[2] and the Cohen report valued his practice at $321,598. Both parties argue their expert report is the one the trial court should have relied on in reaching a determination of valuation of the medical practice.

[2] The Greenwald report did provide alternative analyses based on a comparison between Edwin's practice and the national averages for other similar practices. These figures placed the value of Edwin's practice at figures over $650,000.

{¶ 15} The trial court is vested with broad discretion upon the facts and circumstances of each case to determine the value of marital assets and to fashion an equitable division of property. *James v. James* (1995), 101 Ohio App.3d 668, 681, 656 N.E.2d 399. An abuse of discretion connotes more than an error of law or judgment. It implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 16} Both parties argue the court should have relied solely on his or her expert report. Edwin also argues the court should have determined the value of his practice on a date later than August 31, 1998. Joanne further argues the court should not have considered the Cohen report because it was not authenticated, and therefore constituted hearsay evidence.

{¶ 17} First, we disagree with Edwin that the trial court should have used a date further in the future for valuating his medical practice. Provided a court adequately explains its reasoning for choosing the date it does for valuing property, a reviewing court will give deference to its decision. See *Kramer v. Kramer* (July 29, 1999), Cuyahoga App. No. 74166.

{¶ 18} In this case, the trial court was provided with expert information based on financial figures up through August 31, 1998, despite the fact that the Cohen report was dated April 6, 1999. It is not for the trial court to conduct its own investigation of Edwin's practice after the date for which he

has provided financial data before making its determination. In *Hissa I*, this court affirmed the magistrate's finding that Edwin's tax records for 1999 and his failure to file a Schedule C with the Internal Revenue Service made his assertions about his income and the value of his business after 1998 not credible. Likewise, we find the court did not abuse its discretion in relying on the facts and figures provided by the parties themselves in choosing a date upon which to assess the value of the medical practice.

{¶ 19} With respect to Joanne's argument that the Cohen report constituted hearsay evidence, we are unpersuaded. Generally, an expert's report that is not properly authenticated is inadmissible. *Collins v. Collins* (Feb. 7, 1991), Cuyahoga App. No. 58035. However, "Civ.R. 61 provides that any error or defect in the proceeding which does not affect the substantial rights of the complaining party may be disregarded. Pursuant to this harmless error rule, the existence of error does not require reversal of a judgment unless the error is materially prejudicial to the complaining party." *Fada v. Information Sys. & Networks Corp.* (1994), 98 Ohio App.3d 785, 649 N.E.2d 904.

{¶ 20} We note that along with the Cohen report, Edwin provided an affidavit from Finger, who attested that he was personally responsible for preparing the report, and that he was prepared to testify at a hearing on the matter had the court chosen to hold one. More important, the trial court

found the final valuation figure provided in the Greenwald report more reliable than that provided in the Cohen report. Therefore, Joanne cannot genuinely argue that she was materially prejudiced by consideration of the Cohen report by the court.

{¶ 21} As such, we address whether the trial court abused its discretion in determining the valuation of Edwin's medical practice at $553,000.

{¶ 22} "In valuing a marital asset, a trial court is neither required to use a particular valuation method nor precluded from using any method. * * * A trial court may rely in whole or in part on an expert's opinion when setting a value on marital property * * * There are no rigid rules used by courts to determine value as equity depends on the totality of the circumstances." *Bunjevac v. Bunjevac*, Cuyahoga App. No. 80069, 2002-Ohio-2956, citing *Strong v. Strong* (Nov. 25, 1998), Cuyahoga App. No. 73670. Furthermore, "[a]ny weaknesses in the factual underpinnings of expert testimony goes to the weight and or credibility of the testimony, rather than its admissibility." *Seminatore v. Climaco, Climaco, Lefkowitz & Garofoli Co., L.P.A.* (Dec. 7, 2000), Cuyahoga App. No. 76658.

{¶ 23} The trial court found that both the Greenwald and the Cohen reports used a standard of valuation known as "fair market value." One of the major differences between the two reports was in determining accounts receivables, which both experts agreed were important in determining the

value of the practice. The court found that Edwin was unwilling to provide Greenwald the same information he gave to his own expert; therefore, Greenwald's computation based on accounts receivables was estimated. This factor led the court to find the Cohen report less credible than the Greenwald report, rather than more. The court determined that Edwin's failure to be forthcoming about his business expenses led it to discredit the information he provided his own expert.

{¶ 24} Further, the court found that there was a difference of $186,686 between the IRS Form 1099s issued to Edwin by the insurance companies and his statement of income on his tax return. This was another factor that led the court to find the Cohen report less credible because it appeared Edwin received significant income from sources other than insurance.

{¶ 25} Finally, the trial court found the differences between the information Edwin provided in his bankruptcy petition, the information he provided to the separate experts, and the information he withheld from Greenwald had an impact on his credibility, particularly given his expert's valuation of the medical practice at nearly one-half of what Greenwald determined the value to be.

{¶ 26} We do not find the trial court abused its discretion in relying more heavily on the Greenwald report than on the Cohen report. We do find, however, the trial court properly decreased the overall value of the medical

practice by $97,000, which represented a loan Edwin made to himself from the business. We agree with the trial court's finding that "it would be inequitable to consider a loan to Edwin from the medical practice * * * as both an asset of the practice and income to Edwin."

{¶ 27} Therefore, we find the trial court's determination that Edwin's medical practice should be valued at $553,000, representing its overall value of $650,000 minus the $97,000 loan, is not an abuse of discretion. Furthermore, we do not find that its determination was against the manifest weight of the evidence.

{¶ 28} Edwin's first and second assignments of error are overruled, and Joanne's fourth assignment of error is overruled.

{¶ 29} Next Edwin raises four assigned errors relating to the marital debt to the estate of Joanne's father.

{¶ 30} "III. The trial court erred and abused its discretion by valuing the marital debt owed to the estate of John Kilbane at $120,000, not $83,500 as previously found by the trial court."

{¶ 31} Edwin argues that the trial court erred by increasing the marital debt to the estate of John Kilbane after the matter was remanded in *Hissa I*. We agree.

{¶ 32} The original order of the trial court affirmed the magistrate's finding that, based on the evidence before it, the parties owed Joanne's father

$83,500 for loans Kilbane made to the couple during the course of their marriage. In its June 25, 2009, order, the trial court revisited this determination, stating "this award [the debt] is one of the subjects of the remand as it was included in the division of property order." As such, the trial court found that the debt should be $120,000, not $83,500, as originally determined by the magistrate and affirmed by the trial court in the original divorce decree.

{¶ 33} We read *Hissa I* more narrowly to instruct the trial court to reconsider only the value of the medical practice based on its consideration of Edwin's expert report. We find that by revising the amount of the debt, the trial court exceeded the mandate from this court. See *Haley v. Rural Cellular* (Mar. 13, 1997), Cuyahoga App. No. 70382; *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410.

{¶ 34} This court remanded the case to the trial court to consider Edwin's expert report, which pertained solely to the valuation of his medical practice. The fact that this court stated "any award the [trial] court made would now include a suspect base figure for the value of the practice" did not authorize the trial court to revisit other aspects of the division of property or debt, or other matters related to the divorce settlement. In fact, the trial court acknowledged as much in its June 25 order, where it stated, "the decision and judgment entry is limited by the terms and conditions of the

remand from the Eighth District Court of Appeals. This is not a new trial. Therefore, all other findings and orders contained in the prior judgment entry of divorce * * * remain the final judgment of the court."

{¶ 35} The only figures that could be altered on remand were the valuation of the medical practice and any offset that either party paid the other to make equitable the division of property once the medical practice was re-evaluated.

{¶ 36} Edwin's third assignment of error is sustained, and the debt to the estate of John Kilbane remains at $83,500.

{¶ 37} We address Edwin's final three assignments of error together as they relate to the allocation of marital debt.

{¶ 38} "IV. The trial court erred and abused its discretion by ordering appellant to pay in full the marital debt owed to the Estate of John Kilbane."

{¶ 39} "V. The trial court erred and abused its discretion by failing to include the marital debt owed to the Estate of John Kilbane in the parties' property division to charging the debt against the property before the division."

{¶ 40} "VI. The trial court erred and abused its discretion by issuing an inequitable property division order in violation of R.C. 3105.171."

{¶ 41} Edwin argues here that he should not have been charged with the debt to the estate of Joanne's father without some setoff against the division

of marital property. Whether his argument has merit is not an issue he can raise before this court now.

{¶ 42} In *Nolan,* the case was remanded to the trial court to determine the sole issue of occupancy of the marital home. On remand, the trial court proceeded to rework financial aspects of the property disposition. Id. The supreme court held that this was improper under the "law of the case" doctrine. Id. It held that "the law of the case is applicable to subsequent proceedings in the reviewing court as well as the trial court. Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court." Id.

{¶ 43} Under the "law of the case" doctrine, Edwin is precluded from raising issues related to the allocation of debt in this appeal. Edwin's fourth, fifth, and sixth assignments of error are overruled.

{¶ 44} The remaining three issues Joanne raises in her cross-appeal relate to the motion to vacate granted by the trial court on October 4, 2007. Since they are related, we address them together.

{¶ 45} "I. The trial court erred and abused its discretion by granting the appellant's motion to vacate."

{¶ 46} "II. The trial court erred and abused its discretion by granting the appellant's motion to vacate, where appellant failed to seek a direct appeal of dismissal."

{¶ 47} "III. The trial court erred and abused its discretion by applying the incorrect legal standard in its determination of the appellant's motion to vacate."

{¶ 48} Several of Edwin's motions were pending before the trial court on June 1, 2004, including motion for modified visitation and motion for allocation of sole parental rights and responsibilities and to determine child support and motion to modify child support (all filed August 17, 2001); motion to modify support (filed August 27, 2002); motion to modify spousal support (filed November 12, 2002); and, motion to modify parental rights and responsibilities and child support (filed June 24, 2003). On December 17, 2003, the trial court sent notice to the parties that a hearing date on several motions, including Edwin's outstanding motions, was set for June 1, 2004.

{¶ 49} On June 1, 2004, Edwin filed for bankruptcy, and a mandatory automatic stay was put in effect. On the same date, Edwin failed to appear at the scheduled hearing, and the court dismissed his motions for want of prosecution and failure to appear. The docket reflects that on June 2, 2004, the automatic stay was noted, as was the suggestion of stay; the aforementioned dismissals were journalized on June 3, 2004. It is undisputed that Edwin did not appeal the dismissal of his motions, nor did he file a motion for reconsideration.

{¶ 50} On December 27, 2005, Edwin filed a motion to vacate dismissal of his motions. The trial court granted Edwin's motion to vacate on October 4, 2007. Joanne argues here that the stay did not preclude the trial court from dismissing Edwin's motions for want of prosecution and failure to appear because the motions dealt with custody and support issues, which are not subject to the stay.

{¶ 51} We find that Joanne's first, second, and third assigned errors are moot as they relate to Edwin's motion to vacate; nonetheless, Edwin's post-judgment motions were properly dismissed.

{¶ 52} Generally, under 11 U.S.C. Section 362(a)(1), federal bankruptcy law provides an automatic mandatory stay of judicial proceedings against a debtor upon the filing of a bankruptcy petition. However, 11 U.S.C. Section 362(b) states, in relevant part, as follows: "The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay– * * * (2) under subsection (a)– (A) of the commencement or continuation of a civil action or proceeding– * * * (ii) the establishment or modification of an order for alimony, maintenance, or support; (iii) concerning child custody or visitation; * * * (B) of the collection of alimony, maintenance, or support from property that is not property of the estate * * *."

{¶ 53} In *State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 66, 1996-Ohio-350, 671 N.E.2d 24, the supreme court held that "although the filing of a bankruptcy petition stays the equitable distribution in a divorce case of the debtor's interest in marital assets, certain aspects of the divorce case, such as dissolution of the marriage and child custody issues, are not stayed." See, also, *Sitzman v. Sitzman*, Stark App. No. 2005CA00268, 2006-Ohio-3279 ("automatic stay provision * * * does not automatically stay many of the aspects of a divorce action, such as dissolution of the marriage, child custody issues, spousal support, child support, * * *").

{¶ 54} As such, we find the stay did not operate to preclude ruling on Edwin's motions, the subject of which were modification of parental rights and responsibilities and modification of his child and spousal support obligations. Therefore, the trial court had the authority to dismiss Edwin's motions for want of prosecution.

{¶ 55} Edwin argues that even if the stay did not prevent the court from dismissing his motions, nonetheless, he was not given notice the court intended to dismiss his motions, as required by Civ.R. 41(B).

{¶ 56} Civ.R. 41(B) states the following: "(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." We review the

trial court's dismissal under an abuse of discretion standard. "The decision whether to dismiss for failure to prosecute is within the trial court's sound discretion, and may not be reversed unless the decision was unreasonable, unconscionable, or arbitrary." *Watson v. Trivers*, Cuyahoga App. No. 91606, 2009-Ohio-2256, citing *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 90, 437 N.E.2d 1199.

{¶ 57} We find that Civ.R. 41(B) applies to the dismissal of entire claims for relief, not post-judgment motions like Edwin's. This court has held that the civil rules do not require prior notice by the court before it can dismiss a motion for post-judgment relief for non-prosecution. See *Montano v. Montano* (Dec. 16, 1993), Cuyahoga App. No. 65148.

{¶ 58} Edwin's failure to file a motion for reconsideration of the trial court's dismissal, a direct appeal, or a Civ.R. 60(B) motion for more than 18 months relieves this court from finding error below with respect to the trial court's dismissal of Edwin's post-judgment motions. The trial court's dismissal of Edwin's post-judgment motions was not an abuse of discretion.

{¶ 59} Judgment affirmed in part and reversed in part. This case is remanded to the trial court with instructions to reinstate the debt amount of $83,500 to the estate of John Kilbane.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
PATRICIA A. BLACKMON, J., CONCUR