[Cite as *In re Miller,* 2009-Ohio-4258.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
DONALD A. MILLER,	:	**CASE NO. 2008-T-0105**
Petitioner-Appellee,	:	
AND	:	
KATHLEEN E. MILLER,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 1994 DS 43.

Judgment: Affirmed.

Edwin Romero and *Joseph R. Young, Jr.,* Manchester, Bennett, Powers & Ullman, Atrium Level Two, The Commerce Building, 201 East Commerce Street, Youngstown, OH 44503 (For Petitioner-Appellee).

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44482 (For Petitioner-Appellant).

DIANE V. GRENDELL, J.

{¶1} Petitioner-appellant, Kathleen E. Miller, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, in which the trial court adopted the magistrate's decision and awarded petitioner-appellee, Donald A. Miller, $100,998.19. For the following reasons, we affirm the decision of the trial court.

{¶2} Kathleen and Donald filed a petition for dissolution of marriage on February 1, 1994. On March 7, 1994, the court entered a decree of dissolution which incorporated a separation agreement made between the parties. In the agreement, the parties stipulated that the fair market value of the marital residence, at the time of dissolution, was $77,000.00. The property was subject to a mortgage of $25,800.00. The parties agreed that, due to a pension offset, Kathleen was entitled to net equity of $29,001.81 and Donald was entitled to net equity of $22,198.19. They further agreed that Kathleen would retain the marital residence and pay the mortgage indebtedness, real estate taxes, and special assessments secured against the marital residence, as well as indemnify Donald and hold him harmless for the mortgage, taxes, and assessments. Kathleen was required to pay Donald his net equity, with interest at two percent, in exchange for a quit-claim deed upon the occurrence of any of the following conditions: "the remarriage of the wife, the death of the wife, should the wife sell said marital residence to a third party, should the marital residence no longer be the principal residence for any of the parties' minor children, should the wife permit a third party not related to her by blood or marriage to reside in said marital residence, or when the younger child of the parties is both eighteen years of age and no longer enrolled in high school on a full-time basis."

{¶3} Kathleen failed to make the mortgage payments and Donald made payments from May 1994 until the mortgage was fully paid on January 2, 2003. His payments totaled $48,796.31. In February 2001, Kathleen and Donald's youngest child turned 18, triggering Kathleen's obligation to pay Donald his net equity in the marital property plus interest, which Kathleen failed to pay.

{¶4} In January 2008, Kathleen filed a Motion to Compel, moving the court to compel Donald to comply with the divorce decree, specifically requesting Donald be ordered to execute a quit-claim deed and surrender ownership of his tools and equipment that had been left in Kathleen's care since the divorce. Donald filed a counter Motion to Compel requesting the court to order Kathleen to repay him all the sums plus statutory interest from the mortgage that he paid on her behalf. He additionally asked that Kathleen be ordered to pay him his equity from the marital residence which was due in 2001.

{¶5} Following an evidentiary hearing, the magistrate issued a decision containing findings of fact and an award in favor of Donald. The magistrate found that the tools and equipment had been used over the years by Donald and had not been abandoned. He ordered Donald to make arrangements with Kathleen to remove all of his tools and equipment. Furthermore, the magistrate found that Kathleen had failed to pay the mortgage or the net equity to Donald as required per the separation agreement. The magistrate also found Donald had made mortgage payments totaling $48,796.31 upon Kathleen's default and demand of the bank. The magistrate awarded Donald $123,491.32, representing his net equity and mortgage payments, plus interest on same, or, in the alternative, fair market value of the marital property minus Kathleen's equity of $29,001.81, whichever was less. The magistrate ordered an appraisal on the marital property be obtained by appraiser John Tricomi.

{¶6} Kathleen filed objections to the magistrate's decision, which the trial court overruled and then adopted the decision of the magistrate.

{¶7} Since, at the time of the judgment entry, the appraisal on the property was not completed nor recorded, this court remanded the instant case back to the trial court

for the purpose of determining the fair market value of the property by the real estate appraiser and issuing a new judgment entry reflecting the same. See *Scott v. Scott*, 11th Dist. No. 2002-T-0185, 2005-Ohio-939 (where a judgment indicates a property appraisal is needed, and the appraisal was not on file at the time judgment was entered, the judgment is not final).

{¶8} On February 6, 2009, the trial court issued a new judgment entry finding the fair market value of the marital residence to be $130,000. Therefore, the court awarded Donald $100,998.19, which equals the market value ($130,000.00) minus Kathleen's pension set-off ($29,001.81), the lesser amount of the previous Judgment Entry's calculations.

{¶9} Kathleen timely appeals[1] and raises the following assignments of error:

{¶10} "[1.] The Trial Court erred to the detriment of Appellant by improperly deferring to an appraiser to determine the ultimate issue.

{¶11} "[2.] The Trial court erred to the detriment of Appellant by improperly calculating the amount owed to Appellee.

{¶12} "[3.] The Trial Court erred to the detriment of Appellant by failing to consider spousal support owed by Appellee to Appellant.

{¶13} "[4.] The Trial Court erred to the detriment of Appellant by failing to consider the defense of laches."

{¶14} Domestic relations courts have great leeway in fashioning equitable property divisions, and a reviewing court cannot disturb such determinations unless, considering the totality of the circumstances, the trial court abused its discretion.

1. Per this court's February 10, 2009 Judgment Entry, Kathleen's notice of appeal, filed October 3, 2008, will be considered a premature appeal, pursuant to App.R. 4(C), as of February 6, 2009, and the case shall proceed according to the Ohio Rules of Appellate Procedure. This court granted the parties leave to file supplemental briefs, if necessary, which neither party filed.

Kunkle v. Kunkle (1990), 51 Ohio St.3d 64, 67. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citations omitted). When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court, but must be guided by a presumption that the findings of the trial court are correct. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶15} In her first assignment of error, Kathleen argues that the court "cannot supplement the record in making its decision by ordering an appraisal to be done after the close of evidence and making that appraisal the ultimate decider of fact."

{¶16} The trial court first found that Donald was entitled to his net equity in the marital residence and mortgage payments plus interest. The court provided an alternative method of calculation, using the fair market value of the marital property minus Kathleen's equity, which was in fact the lesser value. This fair market value ceiling benefited Kathleen; Donald's award was reduced by over $20,000.

{¶17} In *Mochko v. Mochko* (1990), 63 Ohio App.3d 671, the Eighth District Court of Appeals found that the trial court abused its discretion in dividing marital assets without evidence of their value. The court held that where the evidence demonstrates that a marital asset has a significant value, the question of its value "should be submitted for valuation to a knowledgeable person who is a stranger to the proceedings." Id. at 680.

{¶18} Given the great leeway domestic relations courts have in fashioning equitable property divisions, it cannot be said that the trial court abused its discretion in ordering an appraisal to determine the fair market value of the marital property.

{¶19} In her second assignment of error, Kathleen maintains that the trial court impermissibly awarded interest on the mortgage payments made by Donald. She first argues that "there is nothing in the Separation Agreement to indicate that interest would be part of any payback." Donald argues that the agreement did not contemplate Kathleen would breach her contractual duty to pay the mortgage.

{¶20} Specifically, the agreement states that Kathleen "will assume and pay the mortgage indebtedness, real estate taxes, and special assessments secured against said marital residence and she shall save the husband harmless thereon and indemnify the husband thereon." Moreover, Donald asserts that when Kathleen breached the agreement, she became liable to him for the payments, plus interest. Further, Donald asserts "the only way Appellee can be made whole is to award interest for each payment he made. Otherwise, he has not been indemnified or held harmless as required by the separation agreement."

{¶21} Although "[i]t is well-established that whether to award interest on obligations arising out of the division of marital property is within the sound discretion of the trial court." *Mulliken v. Mulliken*, 11th Dist. No. 2007-G-2806, 2008-Ohio-2752, at ¶23 citing *Koegel v. Koegel* (1982), 69 Ohio St.2d 355, at the syllabus, the trial court's Judgment Entry did not specifically include interest on Donald's mortgage payment in the calculation of his award.

{¶22} The February 6, 2009 Judgment Entry awarded Donald $100,998.19, which represented the fair market value of the marital home ($130,000) minus Kathleen's net equity awarded plus the pension set-off ($29.001.81).

{¶23} Donald made the mortgage payments on the marital residence after Kathleen failed to make payments as per the divorce decree. He made payments from

1994 until the mortgage was paid off in 2003, totaling $48,796.31. Additionally, Kathleen owed Donald his net equity in the marital residence, $22,198.19. We cannot say this calculation was unreasonable, arbitrary, or unconscionable.

{¶24} Kathleen further argues that the award was improperly calculated. She claims that the separation agreement ordered her to pay the mortgage on the marital residence, although the second parcel involving adjoining vacant land was not part of the bank mortgage. Donald maintains that "[r]egardless of the property secured, Appellee paid the mortgage and is entitled to be indemnified." Further, he asserts that the "marital property included both the residence and the acreage; this property was retained by [Kathleen], and the net equity of each party was determined with respect to the entire marital property."

{¶25} Kathleen asserts that "it is unclear of what exactly is owed." While this may have been true prior to the remand, it is not true based on the February 6, 2009 Judgment Entry quoted above.

{¶26} For the reasons discussed above, the trial court did not abuse its discretion in fashioning Donald's award.

{¶27} Kathleen's second assignment of error is without merit.

{¶28} In her third assignment of error, Kathleen asserts that the trial court abused its discretion when the court failed to consider the spousal support still owed to her. She asserts that she is entitled to "some reduction for the spousal support, plus statutory interest as was done against [her]." She additionally claims that the failure of Donald to pay his owed spousal support constitutes a breach of the "clean hands" requirement for equity relief.

{¶29} In the magistrate's decision, the magistrate found that "the wife claims that she and husband entered into a verbal agreement in May of 1994 that he would make all of the mortgage payments in return for her waiving seven spousal support payments totaling $2205.00. The husband denies this oral modification which is not credible especially since wife signed a mortgage deed two months later along with a promissory note reiterating her duty to hold harmless, and indemnify husband on said real estate."

{¶30} The magistrate did, in fact, address the spousal support Kathleen argued was still owed to her. He found that the evidence on the issue was not credible and the alleged verbal agreement was contrary to the terms of the mortgage she executed in favor of Donald two months after the alleged agreement was reached.

{¶31} As stated in the trial court's Judgment Entry, "[t]he Court did not have a copy of the transcript of the Magistrate's hearing to review nor did it consider the transcript."

{¶32} Civ.R. 53(D)(3)(b)(iii) provides that any objection to a finding of fact "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." "The duty to provide a transcript or affidavit to the trial court rests with the person objecting to the magistrate's decision." *Calhoun-Brannon v. Brannon*, 11th Dist. No. 2003-T-0019, 2003-Ohio-7216, at ¶9, citing *In re O'Neal*, 11th Dist. No. 99-A-0022, 2000 Ohio App. LEXIS 5460, at *7.

{¶33} "Moreover, if the objecting party fails to provide either of the [foregoing] in support of [its] objections, [the party] "'is precluded from arguing factual determinations on appeal.'"" *Harris v. Transp. Outlet*, 11th Dist. No. 2008-L-188, 2008-Ohio-2917, at ¶35 (citations omitted).

{¶34} Furthermore, "[t]he trial court, or magistrate, is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections in order to assess their credibility and weigh the testimony." *Hvamb v. Mishne*, 11th Dist. No. 2002-G-2418, 2003-Ohio-921, at ¶18, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, we defer to the trier of fact, for matters of witnesses' credibility. Id. (citation omitted). "In the event that the evidence is susceptible to more than one interpretation, a reviewing court must construe it consistently with the trial court's judgment." Id., citing *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 1994-Ohio-432.

{¶35} An appellate court must accept a magistrate's factual findings as true, when no transcript of proceedings before the magistrate is furnished, since, "without a statement of the hearing, [an] appellant cannot demonstrate the error, and thus, [the appellate court] must presume the regularity of the proceedings and that the facts were correctly interpreted." *Harris*, 2008-Ohio-2917, at ¶40 (citations omitted).

{¶36} The magistrate was in the best position to make the credibility determinations, and, since Kathleen failed to supply the trial court with a transcript, we must accept the magistrate's factual findings as true. The magistrate did not abuse his discretion.

{¶37} Kathleen's third assignment of error is without merit.

{¶38} In her final assignment of error, Kathleen maintains that Donald failed to assert his claims promptly and, as a result, his claims for interest on his net equity and for mortgage payments are barred by the doctrine of laches. Kathleen claims that the trial court abused its discretion in allowing this case to proceed when an unreasonable

amount of time occurred before Donald filed his claim and she was prejudiced by this delay.

{¶39} Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 35 (citation omitted). Delay, alone, in asserting a right does not constitute laches. Id. Rather, one must show that he or she has been materially prejudiced by the delay of the person asserting the claim. *Seegert v. Zietlow* (1994), 95 Ohio App.3d 451, 457. Length of time in asserting a claim does not, in itself, satisfy a showing of material prejudice. *Kinney v. Mathias* (1984), 10 Ohio St.3d 72, 75. Material prejudice is shown by proving either (1) a loss of evidence helpful to the defendant's case; or (2) a change in the defendant's position that would not have occurred if the plaintiff did not delay in asserting his or her rights. *State ex rel. Donovan v. Zajac* (1997), 125 Ohio App.3d 245, 250.

{¶40} Kathleen claims she has suffered prejudice by Donald's delay in asserting the breach in the separation agreement. Moreover, she claims that the statutory interest was "piling on *** when the Appellee chose to do nothing." However, the Ohio Supreme Court has held that "the accumulation of interest and the absence of a timely demand for payment [do not] constitute material prejudice." *Thirty-Four Corp. v. Sixty-Seven Corp*. (1984), 15 Ohio St.3d 350, 353.

{¶41} Therefore, Kathleen has failed to demonstrate she has suffered any material prejudice and, therefore, does not meet the requirements of laches.

{¶42} Kathleen's final assignment is without merit.

{¶43} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, awarding Donald $100,998.19, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶44} I concur in part and dissent in part in regard to the assessment of prejudgment interest on the amount owed to appellee arising from appellant's contempt in nonpayment of the mortgage.

{¶45} The assessment of interest from the date of default of each and every payment instead of from the actual determination of the debt prior to the total amount being reduced to judgment is an abuse of discretion and an error of law.

{¶46} A separation agreement incorporated into a divorce decree is a binding contract. *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005-Ohio-6895, at ¶22, citing *In re Coogan* (Dec. 22, 2000), 11th Dist. No. 99-P-0093, 2000 Ohio App. LEXIS 6125.

{¶47} If that contract does not provide for prejudgment interest from the date of default, the court should not impute that amount until the amount is reduced to judgment

by court order. See R.C. 1343.03; *Stoebermann v. Beacon Journal Publishing Co.*, 177 Ohio App.3d 360, 2008-Ohio-3769, at ¶32-33.

{¶48} The case at bar was an action in contempt. There was no request for an action for money judgment nor was there ever a fixed sum determined from the original judgment entry until all of the defenses were asserted, and evidence was introduced as is customary on a motion to show cause in domestic relations proceedings.

{¶49} "While in one sense the money is due when the right of action to recover it accrues, yet it cannot justly be said to be payable until the debtor knows how much is due from him. It is always within the power of a debtor to stop the running of interest by making tender of the amount due, and the law requires great exactness in the amount tendered. If he does not and cannot know the sum in which he is indebted, and yet is required to pay interest from the day the liability is sought to be charged to him, he is deprived of a legal right." *Berger v. Commercial Bank of Cincinnati* (1897), 1897 Ohio Misc. LEXIS 19, at 8-9.

{¶50} The trial court, having continuing jurisdiction, had the authority under its order to modify its former order fixing the amounts owed under the original decree in a lump sum. The question for the trial court was whether the wife was in contempt for non payment of the mortgage, once found, it had jurisdiction to determine a fixed sum due and payable under the divorce decree. It cannot change the terms of that decree if the decree was silent as to the issue of prejudgment interest. It is bound to statutory interest from the date of judgment establishing a fixed sum. In *Meister v. Day* (1925), 20 Ohio App. 224, at paragraphs one through three of the syllabus, the court dealt with a similar situation in regard to alimony. The court held:

{¶51} "An order for alimony, not for a fixed sum, but payable in installments, over which the court expressly or impliedly reserves the right of modification, will not, without modification, support an action for a money judgment.

{¶52} "The remedy is to seek a modification of the order for alimony by reducing it to an order for the payment of a lump sum.

{¶53} "The jurisdiction of the court which entered the order for alimony may be invoked for modification, either by motion filed in the same cause or, in a proper case, by petition for that purpose filed in a separate action in the same court."

{¶54} In *Van Almsick v. Van Almsick* (1941), 69 Ohio App. 425, (Opinion by Judge Hornbeck of the Tenth Appellate District), the court held, at paragraphs one and two of the syllabus:

{¶55} "Where, in an action for divorce, a husband is ordered to pay into court a certain sum per week for the benefit of the wife or minor children, the accounting thus made constitutes *prima facie* evidence of the balance due under the court order.

{¶56} "In such case, it is not error for the court to reduce to judgment the amount of installments in arrearage under such order, upon motion of the wife made in the original divorce action ***." (Emphasis sic.)

{¶57} In that case, the wife did not first seek a modification of the order granting support money by motion filed in the original divorce case she sought to reduce the unpaid installments to a money judgment which procedure was followed in the case at bar. Judge Hornbeck in his opinion discussed at length numerous cases bearing upon this question, one of which is the case of *Meister v. Day*, supra, and it is noted that in that case, although the action for judgment was instituted in the same court, it was

presented by petition in a separate action independent of the divorce case wherein the alimony order was made.

{¶58} Due to the lack of any language in the original entry of divorce and a failure to reduce the matter to judgment and by disregarding the necessity to have the amount reduced to judgment the majority sets a new standard for determining prejudgment interest. By not requiring a judicially determined fixed sum prior to assessing interest, the majority has developed a standard by which all litigants now risk prejudgement interest compounding with the passage of time regardless of one's defenses or lack of evidentiary submissions without a trial. This decision encourages litigants, who have a dispute under their divorce decree to delay filing on motions to determine that arrearage amount knowing that they may be given prejudgment interest, perhaps better than they could have received in the "market."

{¶59} The standard law of contracts in this state holds that prejudgment interest, under R.C. 1343.03, cannot be assumed by a court unless specified in the contract. Therefore, the court in this case exceeded the trial court's authority in rendering prejudgment interest and in entering that interest on an amount that has not been reduced to judgment.

{¶60} For the foregoing reasons, I concur in part and dissent in part.