In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00105-CV

MARION BRECHEISEN, APPELLANT

V.

TESSA DAWN BRECHEISEN, MICHAEL KEITH BRECHEISEN, and RABO AGRIFINANCE, INC., APPELLEES

On Appeal from the 84th District Court
Hansford County, Texas
Trial Court No. CV04979; Honorable William D. Smith, Presiding

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February 22, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Pending before this Court is a dispute regarding the ownership of proceeds formerly in the registry of the court, arising from the sale of a 3,700 acre farm in Hansford County, Texas, hereinafter simply the Hansford County farm, which was sold during the course of the divorce proceeding pending between Michael Brecheisen and Appellee, Tessa Dawn Brecheisen. Appellant and intervenor below, Marion Brecheisen

(Michael's father), contends the trial court erred by awarding the net proceeds from the sale of the Hansford County farm to Tessa and certain creditors of the community estate instead of finding that he was entitled to the proceeds by virtue of his ownership of the property.[1] Tessa contends the trial court did not err because the proceeds were an asset of the community estate derived from the sale of the Hansford County farm pursuant to an "effective execution" of a community property option to purchase that property. In the underlying divorce proceeding, Michael disclaimed any interest in the property and agreed that Marion should receive the proceeds. Michael has not made an appearance in this appeal, nor has he contested any part of the *Final Decree of Divorce*.[2] Appellees and intervenors below, Lemon, Shearer, Phillips & Good, P.C. and Rabo AgroFinance, Inc., contend that they were entitled to a partial distribution of the proceeds in accordance with the trial court's order and that Marion has no claim to those proceeds.

By eleven issues, Marion contends (1) the trial court erred by granting relief to Tessa because she engaged in fraud and illegal conduct, (2) equity prevents the trial court from having authority to grant relief to Tessa because of her "unclean hands," (3) the trial court erred by granting relief to Tessa because she suffered no damages as a result of Marion's conduct, (4) the trial court erred by refusing to reopen the evidence due to Tessa's failure to supplement pretrial discovery, (5) the trial court erred by

[1] Because this appeal involves three individuals with the same last name, for purposes of clarity we shall hereafter refer to each by their given name.

[2] Despite the fact that this dispute originated as a part of the divorce proceeding between Tessa and Michael, neither party seeks to contest the divorce. The dispute involved in this appeal is the dispute between the adverse claimants to the proceeds formerly in the registry of the court. Those provisions of the *Final Decree of Divorce* pertaining to the divorce, custody and support of the children, and the division of the community estate are not implicated.

refusing to allow Marion to amend his pleading, (6 through 9) the trial court erred by entering the post-decree temporary order of April 11, 2014, (10) the trial court erred by failing to sever the family law claims from the claims of the intervenors, and (11) the trial court erred by awarding attorney's fees after entry of the decree of divorce. We overrule issues one through five and ten; we sustain issues six through nine and eleven; we vacate the temporary order of April 11, 2014, and we affirm the decree of divorce dated December 20, 2013.

BACKGROUND

Michael and Tessa were married on October 21, 2000. During their marriage, on June 5, 2003, Marion entered into an agreement with Michael, the *Lease Purchase Agreement,* whereby Marion leased the Hansford County farm to Michael, for a term of six years with an option to purchase. The annual lease payment of $150,000 was due on August 1 of each year. The option to purchase provided that Michael could exercise that option "during the lease, but no later than the termination date of August 1, 2009," for the sum of $1,750,000, with all previously paid principal being applied to the purchase price.

On March 31, 2008, Marion, Michael, and Tessa entered into a written *Listing Agreement* with Clift, Scott & Associates for the sale of the Hansford County farm. The termination date of the *Listing Agreement* was October 4, 2009; however, the agreement specifically provided that it would be automatically extended to cover any contract in effect on the termination date of the listing.

On June 18, 2008, Marion, Michael, and Tessa entered into a written *Side Agreement* that provided that "the closing of a sale covered by the *Listing Agreement* shall be effective as a timely fulfillment of the purchase option provided for in paragraph IX of the *Lease Purchase Agreement*." Less than three months later, on September 5, 2008, Michael and Tessa ceased to live together as husband and wife, and on February 23, 2009, Tessa filed her *Original Petition for Divorce* in the 84th District Court in and for Hansford County. Tessa sought numerous temporary orders and the ultimate dissolution of the marriage.

On February 9, 2009, after Michael and Tessa had separated, but prior to the petition for divorce having been filed, Marion and Michael entered into a written *Termination Agreement* that provided for termination of the original lease agreement (including the option to purchase) in exchange for a mutual release of claims. Although the agreement acknowledged that Michael, as lessee, had attempted to exercise the option to purchase, it also recited that he had failed to make the lease payment due August 1, 2008. Tessa was not a party to the *Termination Agreement*.

On June 15, 2009, Marion executed a *Farm and Ranch Purchase Contract* whereby he agreed to sell the farm to 0408TXUS Ochiltree, LLC, an Indiana Limited Liability Company, for $3,800,000. That contract eventually closed on March 8, 2010. At closing, Marion received the benefit of payments totaling $1,245,685.63.

On August 20, 2009, while the divorce was still pending and before the contract to sell the Hansford County farm was closed, Marion filed a *Petition in Intervention* in the divorce proceeding. The purpose of the intervention was to determine his

contractual rights and remedies with respect to the *Lease Purchase Agreement* and any proceeds from the sale of the Hansford County farm. Marion alleged the agreement had terminated due to one or more breaches by the lessees (Michael and Tessa) and further by the expiration of the agreement according to its own terms. Michael acknowledged the expiration and termination of the agreement; however, Tessa contended the agreement was still valid, that it was a community property asset, and that the benefits arising from that agreement were subject to division as a part of the pending divorce action. In response to Marion's intervention, Tessa accused Marion and Michael of conspiring to defraud her of the community interest in the option to purchase. Before those issues could be tried, the contract to purchase the Hansford County farm was closed and the net proceeds from the sale (approximately $1,855,000) were placed into the registry of the court.

While the divorce was pending, on September 16, 2009, the law firm of Lemon, Shearer, Phillips & Good, P.C. (the "law firm") also intervened in the divorce proceeding for the purpose of interpleading an additional sum of $157,500 held in the law firm's trust account. The interplead sum represented proceeds from the settlement of a lawsuit where the law firm had represented Tessa and Michael. As a part of its interpleader action, the law firm represented that Plains State Bank had previously claimed a security interest in the Hansford County farm, that Robert Smith was owed the sum of $1,350 as a mediation fee, and that the law firm was owed sums for services rendered. Ultimately, the law firm claimed that it was owed the sum of $36,949.86.

On October 14, 2009, again while the divorce proceeding was pending, Ford Motor Credit Company, LLC also filed a *Petition in Intervention* and an *Application for*

Writ of Sequestration in the divorce proceeding. Ford Motor contended that it had a security interest in a 2007 Ford Expedition purchased by Michael and Tessa. Finding there to be a danger the vehicle would be concealed, disposed of, wasted, destroyed, or removed from the jurisdiction of the court, a writ of sequestration was issued on October 16, 2009. On August 3, 2010, the court ordered the District Clerk to pay Ford Motor the sum of $5,873.47 out of sums in the registry of the court, and on March 11, 2011, the court ordered the District Clerk to pay Ford Motor the additional sum of $5,370.57 out of sums in the registry of the court.

On March 22, 2010, still again while the divorce was pending but now after the sale of the Hansford County farm had been closed, Rabo AgriFinance, Inc. filed its *Plea in Intervention* claiming an interest in the proceeds arising from the sale by virtue of an *Agricultural Security Agreement* executed by Tessa and Michael. That agreement secured Rabo in the payment of sums borrowed by Tessa and Michael for their farming operations conducted on the Hansford County farm. Rabo's claims against Tessa and Michael exceeded one million dollars.

From October 31, 2011 through November 3, 2011, evidence was presented to the court. Marion, Michael, and Tessa each appeared in person and by their respective attorneys. The intervenors, Lemon, Shearer, Phillips & Good, P.C. and Rabo AgroFinance, Inc., appeared by their respective attorneys. Twenty-three months later, on September 27, 2013, the trial court issued a preliminary letter ruling, and more than four years after the *Original Petition for Divorce* had been filed and after four interventions, the trial court finally entered a *Final Decree of Divorce* on December 20, 2013. By agreement of the parties, that decree (1) severed the bonds of matrimony, (2)

established Tessa and Michael as joint managing conservators of their two children, (3) established the rights, privileges, and duties of each parent with respect to the children, including provisions pertaining to the custody, support, and well-being of the children, (4) made provisions for the withholding of earnings for the payment of child support, (5) established an obligation to provide medical support for each child, and (6) admonished Tessa and Michael concerning various post-divorce obligations and statutorily required notices. In addition, the decree (7) divided the community estate, (8) confirmed the separate property of Tessa and Michael, (9) established the primary obligation for the payment of debts incurred during marriage, (10) disposed of claims for the payment of attorney's fees arising from the family law aspect of the proceeding, and (11) established responsibility of Tessa and Michael for the payment of federal income taxes. Beginning at page twenty-nine of the decree, the court found (1) the *Lease Purchase Agreement* was a binding agreement between Marion, Michael, and Tessa, (2) the purchase option pertaining to the Hansford County farm had been duly exercised by Tessa and Michael, (3) the farm had been sold and the net proceeds from the sale were in the registry of the court, (4) those sums were an asset of the community estate, subject to the debts of the community and subject to division by the court, (5) Michael had disclaimed any right to the proceeds, (6) Marion had no ownership interest in the proceeds, (7) Michael and Marion had attempted to perpetuate a fraud on Tessa and Rabo AgriFinance, Inc. pertaining to the farm and the proceeds from the sale of that property, (8) Lemon, Shearer, Phillips & Good, P.C. was entitled to recovery from Michael and Tessa the sum of $44,374.83, plus post-judgment interest, (9) Rabo AgriFinance, Inc. was entitled to recovery from Tessa and Michael the sum of

$1,194,417.41, plus interest totaling $422.45 per day from November 13, 2011, until paid, (10) Rabo AgriFinance, Inc. was also entitled to recover from Tessa and Michael, as reasonable and necessary attorney's fees in the sum of $39,054.12, plus post-judgment interest, and (11) Marion was entitled to recover from Tessa and Michael the sum of $21,963, with no mention being made concerning any right to recover post-judgment interest. The court then ordered that the proceeds in the registry of the court be distributed first to the intervenors, Lemon, Shearer, Phillips & Good, P.C., Rabo AgriFinance, Inc., and Marion Brecheisen, with the balance to be awarded to Tessa.[3] On January 21, 2014, Marion filed a motion for new trial, and on February 11, 2014, he filed a motion to modify, correct, or reform the judgment.[4] Both motions were denied, and on March 17, 2014, Marion filed his notice of appeal. Neither Tessa nor Michael sought to perfect an appeal of the divorce proceedings. *See* TEX. R. APP. P. 25.1(c).

On March 27, 2014, after this court acquired jurisdiction, Tessa filed a *Motion for Temporary Orders Pending Appeal,* pursuant to sections 6.709(a) and 109.001 of the Texas Family Code, wherein she sought to have the trial court order Marion to deposit money into the registry of the court to protect her interest while this appeal was pending. In response, on April 4, 2014, Marion filed his *Motion to Sever.* On April 8, 2014, a hearing was conducted. Marion and Tessa appeared in person and by respective attorneys. Rabo AgriFinance, Inc. appeared by attorney. Michael did not appear. On

[3] On March 28, 2014, subsequent to this appeal having been perfected, the trial court ordered the District Clerk to distribute funds in the registry of the court to the parties in accordance with the *Decree of Divorce.* Those funds were disbursed on March 31, 2014.

[4] Both motions sought to alter, modify, or change the trial court's disposition of Marion's tort and contractual claims concerning the *Lease Purchase Agreement* and his derivative claim against the net proceeds from the sale of the Hansford County farm.

April 11, 2014, in a dispute unrelated to the divorce, the trial court ordered Marion to pay into the registry of the court (1) the sum of $35,000 for Tessa's post-decree attorney's fees and (2) the sum of $29,383.62, as damages to compensate Tessa for the harm she allegedly suffered as a result of the delayed payment of the community debt to Rabo AgriFinance, Inc.[5] Marion did not comply with the court's order, and on July 22, 2014, Tessa filed in this court a motion to dismiss Marion's appeal based upon that failure. We denied that motion on August 28, 2014.[6] In addition to contesting the trial court's treatment of the *Lease Purchase Agreement* in his intervention proceeding, Marion also contests the authority of the court to enter the order of April 11, 2014.

ANALYSIS

For purposes of logical sequence, we will first address Marion's issues six through nine and eleven pertaining to the April 11, 2014, *Temporary Orders Pending Appeal.* We will then return to Marion's first five issues pertaining to the trial court's disposition of the net proceeds from the sale of the Hansford County farm. Finally, we will address issue ten, the trial court's failure to sever the family law claims from the claims of the intervenors.

Not later than the thirtieth day after the date an appeal is perfected, on the motion of a party, after notice and hearing, the trial court may render a temporary order necessary for the preservation of property and for the protection of the parties during

[5] Tessa contends the trial court should have distributed the money in the registry of the court on January 20, 2014, according to the terms of the *Decree of Divorce*. Because those funds were not paid until March 31, 2014, the debt to Rabo AgriFinance, Inc. continued to accrue interest at the rate of $422.45 per diem, thereby reducing the ultimate payment to Tessa.

[6] *Brecheisen v. Brecheisen*, No. 07-14-00105-CV, 2014 Tex. App. LEXIS 9764 (Tex. App.—Amarillo Aug. 28, 2014, no pet.) (mem. op.).

the appeal of a suit for dissolution of the marriage under Chapter 6, Subchapter C of the Texas Family Code. *See* TEX. FAMILY CODE ANN. § 6.709 (West 2006). The clear intent of this provision is to extend the power of the trial court, in a suit for dissolution of the marriage, to enter temporary orders after an appeal has been perfected, to preserve the community property and protect the parties when such relief has not been provided for in the original decree of divorce. *See In re Boyd*, 34 S.W.3d 708, 710-11 (Tex. App.—Fort Worth 2000, orig. proceeding). *See also Grossnickle v. Grossnickle,* 935 S.W.2d 830, 848 (Tex. App.—Texarkana 1996, writ denied) (holding spouse was not entitled to temporary spousal support during appeal when the divorce itself was not being appealed and the appeal was pending on other issues).

Here, based on a review of the judgment being appealed, the *Notice of Appeal*, and the clerk's record filed in this case, we find the subject matter of this appeal is limited to Marion's tort and contractual claims concerning the net proceeds from the sale of the Hansford County farm based upon his interpretation of the *Lease Purchase Agreement* and the subsequent dealings of the parties.[7] Because there was no issue pending with regard to the dissolution of the marriage, we find the temporary order of April 11 was beyond the authority of the trial court and is a nullity. *See In re Boyd*, 34 S.W.3d at 711 (holding that a trial court's power to enter a temporary order pursuant to section 6.709 of the Texas Family Code requires perfection of an appeal pertaining to the dissolution of the marriage). As such, issues six through nine and eleven are sustained.

[7] As a correlative to that finding, we find the provisions of the trial court's order pertaining to the divorce, i.e., the termination of the marriage, custody of the children, and division of the community estate have never been at issue and are affirmed.

Through his first five issues, Marion contends the trial court erred by awarding the net proceeds from the sale of the Hansford County farm to Tessa and the intervenors, Rabo AgriFinance, Inc. and Lemon, Shearer, Phillips & Good, P.C., due to (1) Tessa's allegedly fraudulent and illegal conduct, (2) Tessa's "unclean hands," (3) the lack of damages sustained by Tessa, (4) the refusal of the trial court to reopen the evidence, and (5) the refusal of the trial court to allow Marion to amend his pleadings. Before addressing those claims, it is of particular import that Marion does not contest the sufficiency of the evidence to support the trial court's findings that (1) the *Lease Purchase Agreement* was a binding agreement between Marion, Michael, and Tessa and the purchase option contained therein had been duly exercised, (2) the net proceeds from the sale of the Hansford County farm belonged to Michael and Tessa and Marion had no ownership interest in them, and (3) Michael and Marion had attempted to perpetuate a fraud on Rabo AgriFinance, Inc. and Tessa. Accordingly, we will accept the findings of fact implicated by those conclusions as binding.

As to issues one, two, and three, Marion makes allegations of fraud and "unclean hands" by Tessa concerning the enforceability of the *Lease Purchase Agreement* and related agreements, both oral and written, existing between Marion, Michael, and Tessa.[8] We find application of the principles of equity and estoppel to be inapposite in resolving a dispute between Marion and Tessa due to the existence of the inequitable and inappropriate conduct by Marion. The trial court specifically found Michael and Marion had attempted to perpetuate a fraud on Rabo AgriFinance, Inc. and Tessa by

[8] Marion contends Tessa acted fraudulently by failing to report income information correctly in a bankruptcy proceeding and by illegally failing to report certain income in order to perpetuate tax fraud.

trying to circumvent the establishment of the Hansford County farm (and the proceeds from the sale of that farm) as community property.

The doctrine of "unclean hands" bars equitable relief sought by "one whose conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing." *In re Jim Walter Homes, Inc*., 207 S.W.3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (quoting *Thomas v. McNair*, 882 S.W.2d 870, 880-81 (Tex. App.—Corpus Christi 1994, no writ)). Accordingly, resolving any disputed issues between the parties in accordance with the principles of law applicable to the facts of this case, we find the trial court correctly determined that the net proceeds from the sale of the Hansford County farm should be distributed first to the intervenors, Lemon, Shearer, Phillips & Good, P.C., Rabo AgriFinance, Inc., and Marion Brecheisen, in accordance with the sums found by the court, with the balance, if any, to be awarded to Tessa. Issues one, two, and three are overruled.

As to issues four and five, Marion contends the trial court erred by refusing his requests to reopen the evidence and amend his pleadings. We review a trial court's decision to either reopen the evidence or allow the filing of amended pleadings under an abuse of discretion standard. *See Binford v. Snyder*, 144 Tex. 134, 189 S.W.2d 471, 476 (1945) (stating "[t]he right of a party after having rested his case to reopen it and introduce additional evidence is a question addressed to the sound discretion of the trial court"). *See also The State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) (holding that the trial court's decision to allow or deny a trial amendment may be reversed only if it is a clear abuse of discretion). In reviewing the decision of a trial court

for an abuse of discretion, an appellate court should determine whether the trial court acted without reference to any guiding rules and principles or, alternatively, whether the trial court's actions were arbitrary and unreasonable based on the circumstances of the individual case. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985). In addressing that determination, an appellate court may not substitute its judgment for that of the trial court. *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

In this case, evidence was presented to the court from October 31, 2011 through November 3, 2011. All parties appeared and were represented by counsel. Twenty-three months later, on September 27, 2013, the trial court issued a preliminary letter ruling, and on December 20, 2013, it signed the *Final Decree of Divorce.* Thereafter, on January 7, 2014, Marion filed a *Plea to the Jurisdiction*, contending the trial court lacked jurisdiction to enter a judgment because to do so would help facilitate a fraud as to Marion, allegedly committed by Michael and Tessa for the benefit of their creditors and the community estate. Marion also filed his *Motion to Vacate Judgment*, *Motion for New Trial,* and *Request for Leave to Amend and Subject Thereto, Supplemental Answer*, where he raised for the first time allegations that Tessa acted fraudulently by failing to report income information correctly in a bankruptcy proceeding and by illegally failing to report certain income in order to perpetuate tax fraud. On February 13, 2014, the trial court received evidence and arguments in support of Marion's motions, including a reporter's record of the 2011 proceedings. After considering the evidence and arguments of counsel, the trial court denied Marion's post-judgment motions. Where more than two years elapsed between the original presentation of evidence and the

entry of judgment without any request that the case be reopened and where the trial court conducted a hearing in which it considered a full record of the evidence originally presented, additional testimony, and the arguments of counsel, we fail to see how it could be said that the trial court abused its discretion in denying Marion's request to reopen the evidence.

Concerning the amendment of pleadings, a trial court is vested with discretion to allow trial amendments. TEX. R. CIV. P. 63, 66. Trial amendments should be freely granted so long as the objecting party fails to satisfy the court that the allowance of an amendment would prejudice him in maintaining his cause of action or defense upon the merits. TEX. R. CIV. P. 66. Generally speaking, timing is not determinative of whether the trial court abused its discretion by granting or denying a motion for leave to amend; however, after judgment has been rendered, it is too late to amend. *See Boarder to Boarder Trucking, Inc. v. Mondi, Inc.*, 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ). *See also Mitchell v. LaFlamme,* 60 S.W.3d 123, 132 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Accordingly, in the case at hand, not only did the trial court not abuse its discretion in denying Marion's motion for leave to amend, it would have been an abuse of discretion if the trial court had granted the amendment. *Cantu v. Martin*, 934 S.W.2d 859, 860-61 (Tex. App.—Corpus Christi 1996, no writ). As such, issues four and five are overruled.

Finally, as to issue ten, a trial court may sever separate grounds of recovery, on the motion of any party or on its own motion, "at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just." TEX. R. CIV. P. 41. Rule 41 does not, however, "permit a trial court to sever a case

after it has been submitted to the trier of fact." *See Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n*, 798 S.W.2d 560, 564 (Tex. 1990). *See also In re El Paso Cty. Hosp. Dist.*, 979 S.W.2d 10, 12 (Tex. App.—El Paso 1998, orig. proceeding) (holding that a purely legal dispute is "submitted" to the trial court when all factors to be considered are before the decision maker and the parties have requested a ruling). Marion's motion to sever was not filed until more than three months after the *Decree of Divorce* had been entered. Because severance was not permissible at that late date, the trial court did not abuse its discretion when it denied Marion's motion to sever. Issue ten is overruled.

CONCLUSION

Having overruled issues one through five and ten and having sustained issues six through nine and eleven, we vacate the order of April 11, 2014, and we affirm the *Decree of Divorce* entered December 20, 2013.

Per Curiam