

IN THE UTAH COURT OF APPEALS

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Rita Messer,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellee,)	
)	Case No. 20090825-CA
v.)	
)	F I L E D
Raymond P. Messer,)	(December 24, 2009)
)	
Respondent and Appellant.)	2009 UT App 396

Eighth District, Vernal Department, 974800046
The Honorable John R. Anderson

Attorneys: Ray Messer, Vernal, Appellant Pro Se
 Melissa A. Patten-Greene, Salt Lake City, for
 Appellee

Before Judges Greenwood, Davis, and Thorne.

PER CURIAM:

This case is before the court on a sua sponte motion for summary affirmance. Appellee Rita Messer (Wife) seeks an award of attorney fees as a sanction under rule 33 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 33.

Wife correctly notes that Appellant Ray Messer (Husband) filed his docketing statement six days late. However, even if we were to dismiss the appeal on this basis, our order would allow ten days in which to file a docketing statement and obtain automatic reinstatement. Thus, we decline to dismiss the appeal for a late docketing statement.

The 1999 divorce decree required the sale of all real property with the exception of a home in which Husband resided. The sales proceeds were to be distributed first to pay marital debts, then to reimburse Wife for \$75,000 of her separate premarital funds that were used to purchase a ranch, after which the balance, if any, was to be divided equally. The sales of the properties proceeded, but the proceeds were exhausted to pay marital debts, up to the time of the sale of a restaurant property in Lapoint, Utah (the Lapoint property). The sales

proceeds of \$46,844.37 were placed in a trust account pending the hearing on distribution.

The divorce decree awarded Wife a judgment of \$10,000, plus interest from the date of the decree, intended to equalize the property distribution. Husband paid only \$4500 on this judgment, but stopped making payments in July 2001 after payments were returned as undeliverable. It is undisputed that Husband owes Wife \$5500 on the judgment. The district court awarded Wife interest at the 1999 statutory rate from the date of the decree for a total of \$4826.29 in interest. This resulted in a total obligation of \$10,326.29. The district court allowed Husband several offsets. First, the district court allowed the entire \$1800 claimed for septic tank repair and the total amount claimed for property taxes of \$2153. The court reduced the amount claimed for ceiling repair by one-half to \$600 and allowed a reduced amount of \$100 claimed for utilities. The court awarded Husband offsets in the amount of \$2250 as one-half of the debt listed in the divorce decree as owed to accountant Aycok and in the amount of \$3000 as one-half of the amount owed to attorney Paulsen. The total amount of offsets was \$9903. Because Husband had retained rents of \$4000 collected for the Lapoint property, this amount was deducted from the offsets, resulting in a total offset of \$5903, and a total remaining obligation of \$4423.29.

Based upon the provisions of the decree awarding Wife \$75,000 from the proceeds of property sales after marital debts were satisfied, the district court awarded Wife the entire amount of \$46,844.37 retained in her counsel's trust account from the Lapoint property sale, with the exception of \$3000, retained pending production of documentary proof of any amounts paid by Wife to attorney Paulsen.

Husband challenges the factual findings of the district court, but he has failed to demonstrate that they are clearly erroneous. Findings of fact entered following a bench trial shall not be set aside unless they are "clearly erroneous." Utah R. Civ. P. 52(a). Findings are "clearly erroneous" only if "they are against the clear weight of evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1023 (Utah Ct. App. 1989).

Husband first claims that he paid \$15,000 in liens on the Lapoint property and should be reimbursed. He believes that he paid a lien of \$9000 to accountant Aycok and \$6000 to attorney Paulsen. The divorce decree liquidated the Aycok debt at \$5500, and Husband received an offset for one-half of that amount. He also received an offset for one-half of the debt to Paulsen. Therefore, Husband received appropriate credits against Wife's

remaining judgment. Husband claims that he should receive \$1600 garnished from a savings account for a judgment obtained against the parties. The district court determined that this was a marital debt paid by marital funds. Husband also claims the district court improperly assessed interest on Wife's judgment by relying upon a letter sent to his attorney containing Wife's forwarding address. The district court did not exclusively rely upon the letter and found that Husband also could have determined Wife's address by contacting her attorney or her relatives in the Vernal area for updated information. The divorce decree specifically awarded interest, and the district court's award was an appropriate interpretation of the decree.

The district court did not err in adjusting the amount claimed for ceiling repair, which was not supported by evidence other than Husband's own estimate. The district court did not err in determining that the barrier installed around the propane tank predated the decree. Husband's claim that he was denied the \$1800 claimed for the septic tank repair is mistaken, because he was allowed that amount as an offset. Finally, Husband claims he was entitled to \$2004 for utilities and ongoing maintenance of the Lapoint property. As with his other claimed offsets, there is no documentary proof and the court did not err in rejecting the claim, with the exception of \$100. Husband failed to demonstrate that the factual findings are clearly erroneous.

Accordingly, we affirm the judgment. We further conclude that the appeal was not frivolous on its face and that Rita has not provided any support for the claim Husband filed the appeal as harassment. Therefore, we deny the request for sanctions under rule 33 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 33.

Pamela T. Greenwood,
Presiding Judge

James Z. Davis, Judge

William A. Thorne Jr., Judge