

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Kathleen Baker

Court of Appeals No. E-09-040

Appellee

Trial Court No. 2007-DR-051

v.

Daniel Baker

DECISION AND JUDGMENT

Appellant

Decided: February 19, 2010

* * * * *

Gowri V. Hampole, for appellee.

Henry W. Kishman, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Daniel P. Baker, appeals a judgment of the Erie County Court of Common Pleas, Domestic Relations Division, granting appellee, Kathleen Baker's, motion to vacate judgment pursuant to Civ.R. 60(B).

{¶ 2} The parties were divorced on February 29, 2008. The divorce decree awarded appellee one-half the value of appellant's Fidelity Preferred Retirement Account. On August 11, 2008, appellee filed a motion to vacate judgment pursuant to Civ.R. 60(B). Appellee alleged that appellant did not disclose all assets that should have been subject to division. Specifically, appellee contended that appellant failed to disclose a portion of the Fidelity Investment Account.

{¶ 3} An evidentiary hearing was held on March 9, 2009. Following the hearing, the magistrate issued a decision finding that appellant had failed to disclose certain assets. Accordingly, the parties' 2009 divorce decree was ordered vacated and supplemented. Appellant filed timely objections to the magistrate's decision. On June 22, 2009, the trial judge adopted the magistrate's decision. Appellant now appeals, setting forth the following assignments of error:

{¶ 4} "I. Appellee's Civil Rule 60(B) motion should have been dismissed since evidence presented by plaintiff-appellee was not 'newly discovered' and was capable of discovery prior to the final hearing in the divorce.

{¶ 5} "II. The court erred in awarding legal expenses to appellee. No probative evidence was introduced indicating that the legal expenses were related to the motion, nor that they were reasonable and necessary.

{¶ 6} "III. The court should have credited appellant with funds used from his retirement account to maintain marital assets."

{¶ 7} In his first assignment of error, appellant contends that appellee did not present the court with newly discovered evidence. Appellant contends that appellee knew that appellant was making withdrawals from the Fidelity account prior to the issuance of their final divorce decree.

{¶ 8} Civ.R. 60(B), in material part, provides:

{¶ 9} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. * * *"

{¶ 10} In order to be granted relief under Civ.R. 60(B)(2), "the moving party must demonstrate that: (1) the evidence was actually 'newly discovered', that is, it must have been discovered subsequent to trial; (2) the movant exercised due diligence; and (3) the evidence is material, not merely impeaching or cumulative, and that a new trial would probably produce a different result." *Cominsky v. Malner*, 11th Dist. No. 2002-L-103,

2004-Ohio-2202, ¶ 20, citing *Holden v. Bureau of Motor Vehicles* (1990), 67 Ohio App.3d 531.

{¶ 11} The question of whether relief should be granted or denied is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion is more than a mistake of law or an error of judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 12} An evidentiary hearing was held on March 9, 2009. Appellee testified that following her divorce, she discovered a document from Fidelity Management Trust Company listing two accounts in appellant's name. She testified that account No. 481-[*****] was disclosed to her during the divorce proceedings but that the second account listed, account No. Z85-[*****], was not disclosed to her during the divorce proceedings. Appellee identified plaintiff's exhibit No. 21 as a mutual restraining order filed on April 2, 2007, which restrained the parties from concealing, selling, transferring, encumbering or otherwise disposing of the their marital assets. Appellee identified plaintiff's exhibit No. 9 which was an IRS form 1099-R indicating that appellant withdrew \$29,011.07 from Fidelity account No. 481-[*****] in 2007. Appellee also identified plaintiff's exhibit No. 10 showing that appellant withdrew \$5,555 from Fidelity account No. 481-[*****] in 2008. Appellee claimed that both withdrawals were in violation of the restraining order.

{¶ 13} Appellant testified that in May 2007, a meeting was held with appellant, his counsel, appellee, and her counsel. Appellant testified that at that meeting, his accounts with Fidelity were discussed. Specifically, appellant informed appellee and her counsel that withdrawals were being made on the accounts to pay the marital bills. According to appellant, the parties agreed that this was how their mutual bills were to be paid despite the restraining order. In July 2007, appellant testified that he attended a pre-trial conference with his counsel, appellee, and appellee's counsel wherein the withdrawals to the Fidelity accounts were again discussed. Appellant also testified that the withdrawals on the accounts were discussed among the parties on the day of their final divorce hearing. Appellant testified that he deposited all of the withdrawals into the parties' joint checking account with appellee's knowledge. Appellant also acknowledged using some of the money he withdrew for a personal trip.

{¶ 14} Following the hearing, the magistrate awarded appellee \$13,018.75 for her share of the 2007 proceeds from the Fidelity account and \$9,576.47 for her share of the proceeds from the 2008 withdrawals.

{¶ 15} A review of the transcript of the proceedings before the magistrate indicates that his decision finding that appellant had failed to disclose certain assets was based on the credibility of the parties. The trial court relied on the magistrate's assessment of the parties' credibility, and we will do the same, as the magistrate was in the best position to make this assessment. *Singh v. Singh*, 12th Dist. No. CA2002-08-080, 2003-Ohio-2372.

{¶ 16} However, this court cannot determine from the record how the magistrate concluded that appellee was entitled to \$13,018.75, or less than half the undisputed amount of the 2007 withdrawals. Moreover, the magistrate's calculation of appellee's share of 2008 withdrawals is clearly in error as the evidence was undisputed that the total withdrawals amounted to \$5,555. Accordingly, appellant's first assignment of error is found not well-taken in part and well-taken in part.

{¶ 17} In his second assignment of error, appellant contends that the court erred in awarding appellee attorney fees in the amount of \$3,715.

{¶ 18} Pursuant to R.C. 3105.73(B), a court may award attorney fees in a post-divorce action, provided that the party requesting such fees establishes financial need and demonstrates that the award is reasonable. *Kitchen v. Kitchen*, 12th Dist. No. CA2006-01-013, 2006-Ohio-6542, ¶ 23, citing *Smith v. Smith*, 12th Dist. No. CA2001-11-259, 2002-Ohio-5449, ¶ 17. The decision of whether or not to award attorney fees in post-divorce proceedings is within the sound discretion of the trial court. *Kitchen*, supra ¶ 24, citing *Carroll v. Carroll*, 5th Dist. No. 05CAF 110079, 2006-Ohio-5531, ¶ 69.

{¶ 19} The record in this case shows that appellee's attorney was retained by appellee from July 2008 through March 2009. Plaintiff's exhibit No. 22, an invoice for services rendered from appellee's counsel to appellee, was admitted into evidence. The invoice showed the following: (1) 20 hours of professional services at a rate of \$175 per hour, (2) \$100 for the cost of the action, (3) \$8 for subpoenas, (4) \$27 for postage, and

(5) \$80 for photocopies. When plaintiff's exhibit No. 22 was introduced into evidence, appellant's counsel commented on the record that: "[t]he document speaks for itself."

{¶ 20} Initially, appellee's counsel miscalculated the above figures reaching an amount of approximately \$6,000. The magistrate, however, correctly calculated the above figures when issuing his decision and reached a fee amount of \$3,715. In awarding the fees, the magistrate noted that it was appellant's responsibility to disclose the money in the Fidelity accounts in the first place.

{¶ 21} This court has reviewed the entire record that was before the trial court and, upon consideration thereof, we find that, as a matter of law, the trial court was authorized to award attorney's fees to appellee pursuant to R.C. 3105.73(B). We find further that, under the circumstances of this case, it was equitable and reasonable for the trial court to calculate the amount of an award of attorney's fees based on the rate of \$175 per hour and the amount of documented work performed by that attorney in this case. Accordingly, the trial court did not abuse its discretion by ordering appellant to pay \$3,715 toward appellee's attorney's fees. Appellant's second assignment of error is found not well-taken.

{¶ 22} In his third assignment of error, appellant contends that because he withdrew money from the Fidelity accounts to pay marital debt, the withdrawals should be considered marital property of which he is entitled to one-half. Having already rejected appellant's claim that the withdrawals were legitimately used for the parties' mutual marital debt, we find appellant's third assignment of error not well-taken.

{¶ 23} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This case is remanded to the trial court for a redetermination of appellee's share of the 2007 and 2008 Fidelity account withdrawals. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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