STATE OF MICHIGAN

COURT OF APPEALS

ELISE ALICE KALAYDJIAN, Plaintiff-Appellant,	UNPUBLISHED September 29, 2011
v	No. 298107 Oakland Circuit Court
SARKIS RICHARD KALAYDJIAN, Defendant-Appellee.	LC No. 2007-733434-DM

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

In this highly contentious divorce action, plaintiff appeals by right the trial court's order denying her motion for attorney fees incurred as a result of defendant's bankruptcy filing. No issues other than that motion for fees are before this Court. We affirm.

The parties were married in 1974 and apparently had a marriage plagued by strife and discord, for which each essentially blames the other while claiming total innocence. The divorce proceedings were largely held before an arbitrator, who declined to make any findings of fault, observing that both parties made serious allegations against the other, but they provided no evidence or corroboration in support of those allegations.[1] In any event, it is undisputed that the marriage had irreparably broken down. During the course of the marriage, defendant was the sole breadwinner, on the basis of his ownership and operation of a business called Precision Autohaus. One of the major relevant disputes between the parties has been defendant's true income: defendant contended that the business—and therefore also his income—has been effectively destroyed by the deteriorating economy, whereas plaintiff contends that "he could not possibly live the lifestyle that the parties have lived while earning the income he has reported on his tax returns." Notably, *both* parties' experts ultimately concluded, after a thorough investigation, that Precision Autohaus was worthless and defendant's tax returns "have no credibility whatsoever."

Due to an apparently incomplete record in this action, and the lack of a record from the collateral action, the exact timing of the relevant proceedings are not known to this Court with

[1] We likewise take no view of the parties' respective fault, if any, for the same reason.

certainty. However, on June 17, 2009, plaintiff filed a motion for, among other things, entry of her proposed judgment of divorce. According to the parties, this judgment was scheduled to be entered on June 30. Plaintiff filed another motion to show cause for defendant's alleged failure to comply with court orders and with the arbitration award,[2] which was scheduled to be heard on July 1. On June 20, 2009, defendant filed for Chapter 13 bankruptcy in United States District Court. The Bankruptcy Court lifted the automatic stay on September 14, 2009, ordering that the instant litigation may continue and that the trial court may apportion and divide the parties' marital estate. The trial court did, after the parties further disputed the appropriate language, enter a judgment of divorce. That judgment is not before this Court.

The relevant matter is that plaintiff moved, pursuant to MCR 3.206(C), for attorney fees for her divorce counsel and for her bankruptcy counsel, incurred as a result of defendant's bankruptcy filing. The parties again made unsupported factual assertions. For example, plaintiff asserted that she was required to obtain specialized bankruptcy counsel and presented certain of the arbitrator's recitations of her complaints about her health as if they were affirmative factual findings. Defendant asserted that plaintiff had already retained her bankruptcy attorney, and that in fact her bankruptcy attorney had himself suggested that defendant would probably need to file for bankruptcy. Plaintiff asserted that defendant is "gainfully employed," and defendant asserted that he had earned a mere $18,000 so far that year. Defendant contended that he had been paying plaintiff considerable amounts of money and genuinely had none left, whereas plaintiff contended that defendant could have chosen to file for bankruptcy after the judgment was entered. The bankruptcy case was eventually dismissed for reasons "stated on the record," but we do not have the record from the Bankruptcy Court available to us.[3]

The trial court denied plaintiff's motion for attorney fees, and plaintiff now appeals. Defendant has initially contended that this Court lacks jurisdiction over this appeal. However, we have jurisdiction over a "final order" as that term is defined in MCR 7.202(6). MCR 7.203(A). A final order includes "a postjudgment order awarding or denying attorney fees and costs." MCR 7.202(6)(a)(iv). There is no requirement that the request be made postjudgment. Consequently, the trial court's denial of plaintiff's motion for attorney fees is a final order appealable by right.

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[2] The question of whether defendant was paying plaintiff's spousal support is yet another issue over which the parties bickered but provided no proofs; even plaintiff's attorney admitted that the show cause assertion was "a he said/she said[,]he says he's paid her; she said she hasn't been paid." Again, we take no position on the issue, and it is not before us, but it is representative of both parties' apparent ongoing eagerness to accuse each other of wrongdoing without providing a scintilla of evidence thereof.

[3] Defendant contends that "[p]laintiff is fully aware that the reason the court dismissed the bankruptcy filing without prejudice was due to the fact that it was not yet known whether [defendant] would have any funds with which to structure a credit or payout due to his pending spousal support issues." We, of course, have no way to verify the accuracy of this allegation.

A trial court's grant of attorney fees is reviewed for an abuse of discretion. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009). The trial court's factual findings underlying the grant are reviewed for clear error, and any underlying questions of law are reviewed de novo. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296-297; 769 NW2d 234 (2009).

Plaintiff first argues that the trial court erroneously concluded that it lacked the authority to award attorney fees on the basis of fees actually incurred in the bankruptcy proceeding itself. Plaintiff argues that under MCR 3.206(C), a party may be awarded fees and expenses incurred *relative to* an action, not merely *in* an action. We agree to some extent that MCR 3.206(C) is not necessarily limited strictly to fees and expenses incurred in an action, but we disagree that it extends to fees and expenses incurred in a separate, collateral action, no matter how closely related that separate action might be.

MCR 3.206(C)(1) states as follows:

> A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses *related to the action* or a specific proceeding, including a post-judgment proceeding. [Emphasis added.]

Plaintiff argues that "*related to the action*" means that the court may order an award of fees incurred in any proceeding that has some logical or causal connection to the instant action. However, plaintiff offers no authority for this other than *Gates v Gates*, 256 Mich App 420; 664 NW2d 231 (2003). But *Gates* held nothing of the sort and did not involve any collateral action. *Gates* only held that on remand, the trial court should award appropriate attorney fees for the appeal as well as the proceedings below. *Gates*, 256 Mich App at 439. But the appeal would be the same action and a post-judgment proceeding, so *Gates* is not in any way instructive.

Defendant, however, offers no instructive authority, either. This Court has merely articulated that "[t]he word 'related' ordinarily means being 'associated' or 'connected.'" *DaimlerChrysler Corp v G Tech Professional Staffing, Inc.*, 260 Mich App 183, 186-187; 678 NW2d 647 (2003), citing *Random House Webster's College Dictionary* (2d ed, 1997). MCR 3.206(C)(1) provides for "fees and expenses related to the action," not fees and expenses related to *a related action*. This is proper, because a participant in another action would be able to request fees *in* that action, and moreover, would do so before a judge in a better position to evaluate their appropriateness. If no fees were available, that would reflect the view of the applicable legislature or highest court that fee awards were inappropriate in that context.

Consequently, the trial court correctly determined that it could not award fees and expenses incurred in a collateral action, in this case, the bankruptcy proceeding.

Plaintiff next argues that she was entitled to attorney fees pursuant to MCR 3.206(C)(2)(a) and (b). Plaintiff correctly argues that MCR 3.206(C)(2) provides two independent possible bases for awarding attorney fees and expenses. The Court Rule is phrased as an inclusive disjunction as follows:

> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that

> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Although the Court Rule provides two possible avenues to an award, each avenue itself requires multiple prerequisites to be satisfied. Plaintiff does not meet all of them for either avenue.

Relevant to MCR 3.206(C)(2)(a), plaintiff points out that she is unemployed and has no assets other than what she is receiving from defendant. However, it does not necessarily follow that she is "unable to bear the expense of the action," nor does it follow that defendant is actually "able to pay." Both parties provide an abundance of invective and claims of persecution, but they provide very little evidence. "It is well settled that a party should not have to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates*, 256 Mich App at 438 (citation omitted). However, there is nothing in the record tending to show how much of plaintiff's support award and property division is necessary for her support, as opposed to necessary for maintaining what was admittedly a fairly lavish lifestyle. More significantly, plaintiff provides *no evidence whatsoever* to rebut defendant's claims that his income has precipitously declined to the point where he really cannot pay. Under the circumstances, because plaintiff has provided no evidence[4] that she is truly "unable to bear" the requested attorney fees or that defendant is truly "able to pay" them, we cannot find clear error in the trial court's findings of fact.

Plaintiff also argues that in the alternative, under MCR 3.206(C)(2)(b), she is entitled to attorney fees because defendant violated a court order. Plaintiff tacitly admits that defendant did not violate a literal order of the circuit court; rather, plaintiff presents a more complex argument. Plaintiff contends that defendant attempted to avoid compliance with the Arbitration Award, which the courts are to enforce as if they were court orders. MRE 3.602(L); MCL 600.5079(1). Defendant argues that although arbitration awards are enforceable as court orders, they are not binding until confirmed by the court.

In an unpublished opinion, this Court has assumed that attorney fees may be awarded pursuant to MCR 3.206(C)(2)(b) for a party's violation of an arbitrator's order. *Desjardins v Desjardins*, unpublished opinion per curiam of the Court of Appeals (Docket No 281480, issued Feb 10, 2009), slip op at 5. However, *Desjardins* relied solely on the appellant's failure to articulate an abuse of discretion by the trial court, not any additional analysis. Furthermore, the attorney fees were awarded pursuant to another order from the arbitrator explicitly providing for, among other things, attorney fees for noncompliance. Even if *Desjardins* was binding authority,

[4] Plaintiff provided an affidavit on appeal that appears not to have been submitted to the trial court and that, in any event, does not shed any additional light on whether defendant "is able to pay."

which it is not, MCR 7.215(C)(1), it would be of minimal instructional value, if any. However, we can find no authority to the contrary.

We conclude, in the absence of instructive authority, that plaintiff's position is rational and correct. Our jurisprudence simply depends on parties complying with orders, even if the party does not like an order, and no matter whether a superior court might ultimately conclude that the order is for some reason flawed. If an arbitrator's award is to be enforced as a court order, it should be treated as one for the purposes of MCR 3.206(C)(2)(b), even if the award has not yet been confirmed by a court. A party who is displeased with the arbitration award should utilize proper procedures for contesting it rather than simply deciding not to comply.

However, MCR 3.206(C)(2)(b) also requires that a party "*refuse*" to comply with an order, not merely fail to comply, and further that the party had the ability to comply.[5] Plaintiff argues that defendant's bankruptcy filing constitutes a refusal to comply with the arbitration award, because defendant's Chapter 13 bankruptcy plan would have eviscerated the provisions of the arbitration award. Presuming that to be true, going through proper legal procedures is not the kind of unilateral refusal to comply with an order contemplated by MCR 3.206(C)(2)(b). By way of analogy, if a party were to file an emergency motion to stay and for expedited review in this Court, or for a writ of mandamus, or any other completely legal mechanism for preventing a court order from going into effect, that party might possibly be subject to sanctions if the party's pleadings were devoid of arguable legal merit. However, whether or not defendant's bankruptcy filing was unethical or motivated by dishonorable desires, it was a completely legal process. Utilization of a proper legal procedure to attempt to avoid the effect of a court order is not a "refusal to comply with a court order." Therefore, under the circumstances, attorney fees were not available to plaintiff under MCR 3.206(C)(2)(b).

Plaintiff finally argues that she is entitled to attorney fees pursuant to MCL 552.13. She argues that this is a broad statute that requires a balancing of the equities whenever justice requires it, and she has no ability to pay her attorney fees and is unemployed. We find no mention of MCL 552.13 in the lower court record.

[5] According to the trial court's opinion, plaintiff had also asked for attorney fees because of defendant's alleged failure to pay spousal support, and the trial court particularly found that plaintiff had "not demonstrated that the attorney fees and expenses were incurred because defendant refused to comply with a previous court order, *despite having the ability to comply*" (emphasis in original). This factual finding is not clearly erroneous, given the contemporaneous finding that defendant's income genuinely appeared to have declined, and the subsequent reduction in his support obligations. The issue of attorney fees for failure to pay support, however, is not before this Court.

But in any event, an award of attorney fees pursuant to MCL 552.13, as with MCR 3.206(C)(2)(a), requires a showing that one party is unable to afford to carry on the action and that the other party can afford to pay. See *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). As discussed, neither fact has been proven here.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh

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JANSEN, J. (*concurring in the result*).

I concur in the result only.

/s/ Kathleen Jansen