

STATE OF MICHIGAN
COURT OF APPEALS

HARDIK SHAH,

Plaintiff-Appellee,

v

CATHERINE SHAH,

Defendant,

and

JAMES C. TOTH,

Appellant.

UNPUBLISHED

May 6, 2010

No. 289243

Wayne Circuit Court

Family Division

LC No. 05-519326-DM

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Appellant, James C. Toth, appeals as of right the trial court's order denying his motion for taxation of costs and attorney fees against plaintiff in this divorce action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were married in December 1990. In June 2005, plaintiff filed the instant divorce action. The parties agreed to arbitrate the matter, and Toth, who was defendant's third attorney during the course of this matter, represented defendant for a portion of the arbitration proceedings, before being permitted to withdraw as defendant's counsel, in June 2007. In July 2007, the arbitrator issued his opinion and award. In September 2007, the trial court granted defendant's motion, filed by defendant's new counsel, to vacate the arbitrator's opinion and award, finding that, because no order to arbitrate was ever entered by the trial court, the arbitration proceedings were invalid. The case was reinstated in the trial court and in April 2008, a consent judgment of divorce was entered. That consent judgment provided for the payment by plaintiff of a portion of fees owed by defendant to two attorneys, however, it provided that defendant was solely responsible for the remainder of her attorney fees, including those owed to Toth.

Four months after the consent judgment of divorce was entered, Toth moved the trial court for taxation of costs and attorney fees against plaintiff. Toth alleged that plaintiff was in a better financial position than defendant to pay his fees, and, also, that plaintiff's unreasonable conduct in persisting with the arbitration despite the absence of a court order necessitated the bulk of his fees. The trial court denied Toth's motion, on the basis that the consent judgment explicitly assessed all responsibility for Toth's fees to defendant.

We find no abuse of discretion in the trial court's decision to deny Toth's motion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The trial court correctly concluded that Toth is prevented from recovering his fees from plaintiff by the specific language of the consent judgment of divorce entered into by the parties.

A divorce judgment entered by consent is in the nature of a contract, and it must be construed and applied as such. *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004). Absent fraud, coercion or duress, unambiguous contracts are not open to judicial construction and must be enforced as written. *Lentz v Lentz*, 271 Mich App 465, 471-473; 721 NW2d 861 (2006). As previously noted, the parties' consent judgment of divorce specifically allocates responsibility for paying the attorney fees incurred by defendant. It provides:

Except as otherwise stated in paragraphs 48 H [directing plaintiff to make a payment of \$5,000 to Ann Tobin, one of defendant's former attorneys] and 54 [directing plaintiff to make a payment of \$2,500 to Anita McIntyre, defendant's attorney at the time that the consent judgment of divorce was entered], Defendant shall be solely responsible for the balance of her attorney fees owing, including those to Robert Ihrle, Ann Tobin, Roxanne Cannestrelli, Jim Toth, and Anita McIntyre as well as those she or her attorneys may have hired in these proceedings without any contribution by Plaintiff.

Thus, the consent judgment expressly provides that defendant is entirely responsible for Toth's attorney fees, and plaintiff owes no contribution toward those fees. Defendant was represented by counsel (not Toth) when she signed the consent judgment of divorce. There is nothing in the record to suggest that fraud, coercion or duress played any role in the negotiation or signing of the judgment. Accordingly, the consent judgment's express and unambiguous provision regarding attorney fees must be enforced, and Toth's attempt to secure attorney fees and costs from plaintiff must be denied.

Toth argues that an attorney is permitted to petition the court, on his own behalf, for contribution from the opposing party for the attorney's outstanding fees, even after the domestic relations proceeding has terminated. In support of his position, Toth cites MCL 552.13(1), MCR 3.206(C), *DePew v DePew*, 373 Mich 162; 128 NW2d 533 (1964), and *Stackhouse v Stackhouse*, 193 Mich App 437; 484 NW2d 723 (1992). However, these authorities are inapposite, at least here, in the face of the specific provisions of the parties' consent judgment.

MCL 552.13(1) provides:

In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the

adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, *during its pendency*. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver. (Emphasis added).

By its terms, MCL 552.13 applies during the pendency of the action; Toth's motion was filed four months after the consent judgment of divorce was entered. Additionally, MCR 3.206(C) provides:

(1) 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.

(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. (Emphasis added).

Toth is not a party, and at the time of his motion, he was not defendant's counsel and thus, did not move the court for his fees on her behalf. Further, as the trial court correctly observed, even were Toth moving for his fees on defendant's behalf, the express language of the consent judgment of divorce would bar any request by her for plaintiff to pay those fees. Defendant relinquished any right to seek payment of Toth's fees from plaintiff in the consent judgment. As a result, Toth cannot seek payment of those fees from plaintiff in his own right.

The cases cited by Toth do not compel a different result. In *Stackhouse*, 193 Mich App at 445, this Court determined that "an attorney may bring a motion for fees pursuant to MCL 552.13 . . . in his own name where the client has died and the client would otherwise be entitled to have the attorney fees, or a portion thereof, paid by the other spouse." Without regard to the seemingly dispositive fact that Toth's client did not die, the right of an attorney to move to recover fees on his own behalf, articulated by the Court in *Stackhouse*, is explicitly conditioned on the notion that "the client would otherwise be entitled to have the attorney fees, or a portion thereof, paid by the other spouse." *Id.* at 445. Plainly, that is not the case here, where defendant relinquished any right to seek payment of Toth's fees from plaintiff in the consent judgment. In *DePew*, 373 Mich at 164-165, the Court held that the trial court retained jurisdiction, after the parties reconciled, to determine whether, and in what amount, attorney fees should be paid to the plaintiff-wife's counsel by the defendant-husband. Plainly, in *DePew*, there was no consent judgment assessing responsibility for payment of those fees to the wife, and, in the absence of such, the trial court apparently concluded that the wife was entitled to recover those fees from

the husband. Again, defendant here no longer has any such right to recover Toth's fees from plaintiff, having wholly relinquished that right as part of in the consent judgment.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra

/s/ Stephen L. Borrello

/s/ Douglas B. Shapiro