

STATE OF MICHIGAN
COURT OF APPEALS

RITA KAY FERREIRA,

Plaintiff-Appellant,

v

FABIAN FERREIRA,

Defendant-Appellee.

UNPUBLISHED

January 21, 2014

No. 305640

Wayne Circuit Court

LC No. 09-114426-DO

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order denying plaintiff's post-judgment motion for an award of costs and attorney fees in this divorce action. We reverse and remand for further proceedings.

Plaintiff and defendant were married in June 1995. Plaintiff filed for divorce in October 2009. While the case was pending, the primary sources of contention concerned plaintiff's efforts to obtain records establishing defendant's ownership or control of RDS Tech, Inc., and defendant's failure to pay spousal support. As a result of mediation, the parties reached a settlement and the court entered a consent judgment of divorce on April 1, 2011. The judgment provided that the court would hold an evidentiary hearing on the issue of attorney fees and costs. Before the hearing, plaintiff filed an affidavit with supporting documentation and several depositions that had been taken in anticipation of trial.

At the hearing, over the course of just under two hours, plaintiff and defendant both testified, but the trial court interrupted plaintiff's counsel's cross-examination of defendant and warned of the time. The trial court refused to permit plaintiff's counsel to refute some of defendant's testimony, stating, "Absolutely not. This is your motion on reasonableness and necessity of attorney fees. And it's gone on for hours, needlessly, again." The court initially excused defendant from further testimony before plaintiff's counsel had finished questioning him, but plaintiff's counsel persuaded the court to allow one more question. At 2:13 p.m., the court excused the witness and stated that it was not taking any further witnesses and was "done for the day." The court denied plaintiff's request to call another witness, stating, "We're out of time." The court thereafter denied plaintiff's motion for attorney fees and costs, and subsequently denied plaintiff's motion for reconsideration.

Plaintiff argues that the trial court abused its discretion by refusing to award any attorney fees, despite a disparity in income, a gap in income potential, plaintiff's serious mental and physical health issues, defendant's non-payment of support that necessitated several show cause motions and hearings, and extensive discovery because of questions whether defendant's father was a "straw man" for RDS Tech, Inc.

This Court reviews for an abuse of discretion a trial court's decision whether to grant attorney fees. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). A ruling is not an abuse of discretion when it is within the range of reasonable and principled outcomes. *Id.* at 289. Findings of fact on which the court bases its decision are reviewed for clear error, and questions of law are reviewed de novo. *Id.* at 288.

An award of attorney fees in a divorce action is governed by statute and court rule. MCL 552.13(1) states:

In every action brought, either for a divorce or for a separation, the court may require either party . . . 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.

MCR 3.206(C) states:

(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.

In *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010), this Court summarized the applicable law as follows:

This Court has interpreted this rule to require an award of attorney fees in a divorce action "only as necessary to enable a party to prosecute or defend a suit." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). With respect to a party's ability to prosecute or defend a divorce action, a party "may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Further, a party sufficiently demonstrates an inability to pay

attorney fees when that party's yearly income is less than the amount owed in attorney fees. *Stallworth*, 275 Mich App at 288-289.

The trial court found that plaintiff "is able to bear the necessary and proper costs of this litigation," noting that "she was able to pay already a considerable sum in attorney fees . . . has no inability to work and she will be receiving a monthly income in alimony in addition to the cash settlement." We conclude that the court's analysis is factually and legally flawed.

Plaintiff's testimony at the evidentiary hearing demonstrated, at most, an ability to earn income from waitressing. Plaintiff had an eleventh grade education. She had not worked for RDS Tech, Inc., for many years. In 2010, she worked for six weeks as a waitress. She earned \$2.10 an hour plus tips, but stated that she was "not the best waitress" and sometimes "had to pay them." The job caused plaintiff's back to hurt. Plaintiff's other efforts to find employment were unsuccessful. During the pendency of the divorce case, plaintiff had been in physical therapy for her back and received spinal treatments. Plaintiff also faced mental health issues that impeded her ability to find and maintain employment. In January 2011, she was hospitalized for two weeks following a mental health emergency and then was in "daycare" for the following two weeks. She remained in treatment at the time of the hearing approximately three months later. She was prescribed medication for ADHD, depression, anxiety, and panic attacks. Although defendant testified that he was not aware of any physical or mental ailment that prevented plaintiff from working, he acknowledged her mental health issues and admitted that the last year he knew that plaintiff worked for wages was 2008, when, according to defendant, she worked for the company and earned approximately \$20,000 to \$30,000.¹ The evidence did not provide a basis on which the court could impute income to plaintiff. Cf. *Loutts v Loutts*, 298 Mich App 21, 25, 33; 826 NW2d 152 (2012) (expert witness testified, but his testimony was still inadequate to impute income).

"[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Myland*, 290 Mich App at 702. The evidence showed that plaintiff owed a substantial amount in attorney fees. Plaintiff sufficiently demonstrated her inability to pay attorney fees because any yearly income she could be expected to earn was less than the amount she owed for attorney fees. *Id.*

Defendant acknowledges that this Court has frequently stated that "[a] party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake*, 200 Mich App at 189, citing *Kurz v Kurz*, 178 Mich App 284, 289; 443 NW2d 782 (1989). Nevertheless, defendant contends that plaintiff's spousal support and the \$35,000 that she received in the settlement properly may be considered in determining plaintiff's ability to pay attorney fees. Defendant asserts that because the matter was settled without a trial, there was no showing that plaintiff's standard of living required spousal support in that amount, and accordingly, there is no basis to conclude that she would be relying on those assets for support. We reject defendant's invitation to consider plaintiff's ability to pay attorney fees from

¹ Plaintiff's social security records showed no earnings since 2005, when \$8,000 was reported. The highest earnings that were recorded was \$19,083 in 1990.

her spousal support. Even where the amount of spousal support awarded seems ample, a party is not required to use spousal support to pay attorney fees. Cf. *Olson v Olson*, 256 Mich App 619, 635-636; 671 NW2d 64 (2003) (the plaintiff was awarded \$50,000 a month in spousal support and this Court upheld the trial court's factual finding that the plaintiff was unable to bear the expense of the litigation).

With respect to defendant's ability to pay, defendant testified that he earned approximately \$90,000 a year. However, the reports by the court-appointed expert and plaintiff's expert² showed that defendant routinely used corporate funds for his personal expenses. Defendant gave unsecured promissory notes at zero percent interest for loans that he took from the corporation. Based on the materials supplied, plaintiff's expert provided lower and upper ranges for defendant's compensation for 2008 to 2010. For 2008, the lower end of the range was \$324,564.85 and the upper end was \$572,877.60. For 2009, the lower end of the range was \$356,406.46 and the upper end was \$520,780.21. For 2010, the lower end of the range was \$92,593.28 and the upper end was \$189,173.61. In denying plaintiff's motion for fees and costs, the trial court, perhaps inadvertently, referred to defendant being "employed by the company he owns" The court's appointed expert valued RDS Tech, Inc. at \$360,000. Thus, the evidence showed that defendant is able to contribute to payment of plaintiff's attorney fees and costs.

The trial court also rejected plaintiff's request for attorney fees on the basis that the amounts billed were not reasonable and necessary. "The most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate." *Olson*, 256 Mich App at 636 (citation and quotation marks omitted). The court may consider relevant factors such as "the skill, time, and labor involved, the fee customarily charged in the locality for similar services . . . , the likelihood that plaintiff's counsel's time commitment to this case precluded other employment, the amount in question and the results achieved, the expense incurred, the professional standing and experience of the attorney, and the retainer agreement." *Id.* at 636-637. The trial court referred to the factors set forth in *Bolt v Lansing (On Remand)*, 238 Mich App 37, 60; 604 NW2d 745 (1999), which states:

Factors to be considered when assessing the reasonableness of a requested attorney fee include (1) the skill, time, and labor involved, (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the attorney, (3) the fee customarily charged in that locality for similar services, (4) the amount in question and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the professional

² Defendant asserts that Titus' report cannot be considered because it was not filed by plaintiff until she filed her motion for reconsideration. However, the record discloses that the report was submitted as attachment 29 to plaintiff's financial summary filed on March 30, 2011, and as exhibit 13 to plaintiff's trial brief.

standing and experience of the attorney, and (8) whether the fee is fixed or contingent.

The trial court recognized that plaintiff's counsel was a skilled attorney and it accepted his hourly rate of \$325 as an acceptable hourly rate given his experience. The court noted that there was no evidence that plaintiff's counsel gave up other employment to pursue the case. The court did not find that time limitations were a factor because the trial dates were adjourned, found that the attorney-client relationship was not of any significant length or character, and found that the fee was fixed. With respect to the results obtained, the trial court stated:

Plaintiff asserts that due to Mr. Corriveau's efforts, the final results in the Judgment of Divorce were more advantageous than what had previously been offered, such as the \$3,700/month awarded in spousal support as opposed to the \$1,000/month that had been offered. The Court notes however, that these results were achieved at great cost to the client in excessive billing hours, frequent court appearances, and a 2-day negotiation session in court in lieu of trial.

Thus, the court emphasized that "the time and labor were extensive" but lacked "justification." The court explained that the amounts billed "are not necessary and proper as required by the statute, *supra*, or as enumerated in *Bolt, supra*, because [counsel] needlessly complicated the case."

In reviewing the record, plaintiff's counsel's efforts were primarily directed at forcing defendant to pay spousal support and obtaining discovery concerning RDS Tech, Inc., and its predecessors. Plaintiff diligently pursued discovery from defendant, his father, prior circuit court files, former employees, and banks to acquire documents to support her contention that defendant's father was a "straw man" owner, and that RDS Tech, Inc., was a successor of RDS Technologies, Inc., RDS Technologies, and Keeptrac. The records were filed with plaintiff's trial brief. The fact that the parties ultimately settled and thereby avoided introduction of the evidence at trial does not mean that plaintiff's pursuit of the evidence "needlessly complicated" the case. Rather than examining the motions that plaintiff filed and the rulings that were made, the court imprudently referred to the number of docket entries during the period of plaintiff's counsel's representation.

Moreover, the trial court unduly limited plaintiff's ability to establish her entitlement to the requested attorney fees and costs. In its opinion, the court noted plaintiff's failure to provide evidence showing her inability to work and justification for the hours that plaintiff's counsel billed. However, the trial court hindered plaintiff's presentation of evidence at the hearing by limiting the time and refusing to allow plaintiff to call a witness.

The trial court abused its discretion in its evaluation of the reasonableness and necessity of the hours that plaintiff's counsel billed. Accordingly, we reverse the trial court's order denying plaintiff's request for an award of attorney fees and remand for further proceedings. On remand, plaintiff should be given an opportunity to provide the evidence to meet her burden of proof to establish her entitlement to the award she requested. See *Ewald v Ewald*, 292 Mich App 706, 725-726; 810 NW2d 396 (2011).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly