

STATE OF MICHIGAN
COURT OF APPEALS

KIMI LEE VAIL,

Plaintiff-Appellee,

v

JAROLD R. VAIL,

Defendant-Appellant.

UNPUBLISHED

May 6, 2014

No. 313431

Genesee Circuit Court

LC No. 11-301594-DO

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals from a default judgment of divorce entered by the circuit court. We affirm.

The parties were married in 1989 and plaintiff filed for divorce in 2011. Defendant was served on August 15, 2011, and failed to file an answer. According to defendant, he was served while in court on a criminal matter. He turned the documents over to his criminal defense attorney who assured defendant that he “would handle it” but did not. Thereafter, defendant secured new counsel who moved to set aside the default. On May 2, 2012, the trial court issued an order granting the motion to set aside the default, conditioned upon the filing of an answer and the payment of \$700 to plaintiff’s counsel within thirty days. After the deadline passed, defendant had only paid \$200 of that amount and plaintiff’s counsel filed a motion to show cause regarding the non-payment. At the July 9 hearing, the matter was adjourned to July 12, the scheduled trial date. On July 12, defendant still had not paid the remaining balance and the trial court entered a second default. Nevertheless, the trial court permitted defense counsel to argue the merits of the proposed judgment of divorce.

We turn first to the last issue raised by defendant, whether the trial court erred in reinstating the default. The parties agree that we review this issue for an abuse of discretion. See *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). We are not persuaded that the trial court abused its discretion in reinstating the default. First, we note that defendant defaulted not once, but twice in this case. Second, the trial court imposed the \$700 assessment under the provisions of MCR 2.603(D)(4) with the requirement that the amount be paid within 30 days. Nevertheless, more than two months later, only \$200 had been paid.

Nor are we persuaded by defendant’s argument that there had been no mention of the possibility of reinstating the default at either the June 20 settlement conference or the July 9

show cause hearing. Defendant had failed to abide by the conditions imposed to set aside the original default and plaintiff had filed a motion to show cause. Without regard to whether the trial court indicated that it was considering reinstating the default, defendant should have known that that was a very real possibility due to his noncompliance with the May 2 order. We are equally unpersuaded by defendant's argument that the trial court failed to respond to the offer made in the courtroom that defendant's sister was willing to access her line-of-credit to pay the remaining \$500. Defendant had time in advance of the last minute to raise the necessary funds to comply with the trial court's order and failed to do so.

Defendant also argues that the trial court erred in its division of the marital property and in failing to award defendant alimony. We disagree. Even in light of the default, the trial court was obligated to equitably divide the marital property. *Koy v Koy*, 274 Mich App 653, 659-660; 735 NW2d 665 (2007). First, the divorce judgment in this case awarded both parties the personal property then in their possession along with their own bank accounts and debts. While defendant alludes to the fact that he left the marital home with little more than the clothes on his back, he fails to demonstrate that there is any significant difference in value of the personal property awarded to each. Second, the trial court awarded plaintiff both parcels of real estate owned by the parties, as well as the debt on those parcels. The trial court also determined that there was no equity in the property and, indeed, it was possible that there was negative equity. Finally, the trial court awarded each party their interests in the retirement accounts. Defendant had a traditional pension and plaintiff had a defined contribution account. Plaintiff was awarded one-half of the portion of defendant's pension that accrued during the marriage and defendant was awarded one-half of the portion of plaintiff's defined contribution account that accrued during the marriage. This is consistent with the provisions of MCL 552.18 and MCL 552.101(4).

In sum, the trial court equally divided the marital estate. While defendant argues that the trial court "granted the higher income earner (Appellee) the lions [sic] share of [the] marital estate [sic]," in fact his argument essentially becomes a claim that he is entitled to a greater share of the marital estate because plaintiff's income is greater than defendant's. We are not persuaded that this is the case and are satisfied that the trial court equitably divided the marital estate.

Finally, defendant argues that the trial court erred in denying him alimony. We disagree. The trial court, while reserving the question of alimony for the future, denied granting alimony in the divorce judgment. The trial court explained its reasoning as follows:

In my view, considering the length of the marriage and considering the age of the parties, this is not an exercise in equalizing income. I think we have a responsibility to make sure everybody is maintained going forward. But as long as everybody is maintained and can live, I think that that is what's appropriate to consider.

Also, this is not a situation where Mr. Vail needs rehabilitative alimony. It's not as if he spent the entire time raising children as a house husband and spent decades at that and has no skills. He retired in 2008. So, that doesn't present justification for a spousal support award.

Mr. Vail makes \$27,000 a year.^[1] Assuming he doesn't have—or taking off Ms. Vail's pension, that's not a huge income, but that is a more than sufficient income. He has to support himself. He has the normal range of expenses. And \$27,000 is a sufficient amount of income upon which to live.

I'll also note that he is 52 years old. I don't know of anything wrong with his health such that prevents him from working. He's healthy, able bodied. He can work.

This idea that he can't get a job because he's a convicted felon I think is really not well taken. I think there is an element as [plaintiff's counsel] says. It's wrongful conduct to get a felony. Okay. To claim that somehow engaging in wrongful conduct obviates the responsibility of supporting yourself, I just don't think that's a very good argument to make.

I don't know that—I haven't heard either way that he's even tried. I don't know. Maybe he has. I don't know.

But he needs to support himself. If he can't live on \$27,000 a year, then he can go out and get a job. Ms. Vail does it. Ms. Vail works hard.

I don't know what he does all day. He sits around the house or does whatever he wants to do. There's no reason why he can't, in my view, get a job.

So, he's fine. I just don't see any justification whatsoever here, none, for an award of spousal support. I mean the only thing I think I see you saying is that there's a disparity in income. There is a disparity in income. But in this particular case, I don't think that justifies an award of spousal support either.

The awarding of spousal support is within the trial court's discretion. *Koy*, 274 Mich App at 660. We are not persuaded that the trial court erred in denying alimony to defendant.

Affirmed. Plaintiff may tax costs.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher

¹ This figure is the estimate of the amount of defendant's pension that he will receive after the portion awarded to plaintiff in the property division is subtracted.