

IN THE COURT OF APPEALS OF TENNESSEE

FILED
September 28, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY GOSE	:	BLOUNT CIRCUIT
	:	CA No. 03A01-9505-CV-00145
Plaintiff-Appellee	:	
	:	
vs.	:	HON. W. DALE YOUNG
	:	JUDGE
	:	
DELORSE GOSE	:	
	:	
Defendant-Appellee	:	DISMISSED AND REMANDED

CHARLES M. CLIFFORD, OF MARYVILLE, TENNESSEE, FOR APPELLANT
 WILLIAM A. MYNATT, JR., WITH SHEPPEARD & SWANSON, OF
 KNOXVILLE, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sr.J.

The Plaintiff-Appellee, Jimmy Gose, and Defendant-Appellant Delorse Gose were divorced in 1987. They entered into a property settlement agreement which was not reduced to a formal written agreement but was orally stipulated to the court. The stipulation was transcribed by the court reporter

and incorporated in the final decree of the court. As pertinent here, it provides:

"MS. MEARES (Counsel for Wife): Yes. It is further agreed that Mrs. Gose shall be awarded a pro rata amount of Mr. Gose's retirement which is one half of its present value or three hundred and -- We'll supply that figure. It's three hundred and something dollars but it's half of its present value.

"MR. CUNNINGHAM (Counsel for Husband): Half of seventy-seven sixty-six oh nine or whatever.

"MS. MEARES: Yeah, it would be \$383.04."

No Qualified domestic relations order (QDRO) pursuant to 29 USC § 1056 was entered following the entry of the divorce decree.

In July, 1992, Mr. Gose took early retirement and began drawing full retirement without the knowledge of Mrs. Gose and without remitting to her the prorata portion of the retirement benefits to which she was entitled.

In August, 1992, an attorney other than the one who represented Mrs. Gose in the divorce proceeding, filed a motion for a Qualified Domestic Relations Order and such an order was entered in September, 1992. As pertinent, the order provided: "That the Defendant, Delorse E. Gose, is to receive the applicable pension benefit commencing on the Plaintiff's 65th birthday and terminating upon the Plaintiff's death."

In early February, 1994, Mrs. Gose learned Mr. Gose was retired and had been since July, 1992. She immediately

filed a Rule 60.02, TRCP, motion to set aside the Qualified Domestic Relations Order and to award her such other relief as needed to properly give effect to the final divorce decree. She alleged the QDRO, erroneously providing the payments to her would begin on Mr. Gose's 65th birthday, was based on the belief he was still employed and payment of retirement benefits would not be payable until he reached 65 years of age.

The Plaintiff filed a motion to dismiss the Rule 60.02, TRCP, motion based on the one-year limitation of the rule when based on mistake. He also asked for sanctions pursuant to Rule 11, TRCP.

The court sustained the motion to dismiss but denied the request for sanctions.

The Defendant filed a motion to enforce the decree or to alter or amend or set aside the order entered by the court on September 9, 1992, the QDRO, and the order entered July 19, 1994, dismissing its Rule 60.02, TRCP, order.

Plaintiff filed a response in opposition to Defendant's motion and again asked for sanctions pursuant to Rule 11, TRCP, and for attorney's fees and expenses.

The court dismissed Defendant's motion to enforce or to alter or amend the decree.

After Defendant's motion was dismissed, counsel for the Plaintiff asked the court about the sanctions he had

requested, to which the court responded: "It's probably a motion well-taken, but I'm going to reserve ruling on that, Mr. Mynatt, until this matter is finally settled by the court of appeals or the supreme court or whomever."

The judgment dismissing the Defendant's motion and from which this appeal is taken, as pertinent, provides: "The granting of attorney fees and expenses to the plaintiff pursuant to their response is reserved."

The Defendant has appealed, saying the court was in error in denying her relief.

Since this appeal is from an interlocutory decree, it cannot be considered. Rule 3, TRAP, provides: "If multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable...." Rule 54.02, TRCP, states:

When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction any order or other form of decision, however designated, that adjudicates fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

The trial court here did not find there was no just reason for delay and did not expressly direct entry of judgment. In **Fox v. Fox**, 657 S.W.2d 747 (Tenn.1983) the supreme court held:

Rule 54.02 requires as an absolute prerequisite to an appeal the certification by the trial judge, first, that the court has directed the entry of a final judgment as to one or more but fewer than all of the claims, and, second, make an express determination that there is no just reason for delay. Such certification by the trial judge creates a final judgment appealable as of right under Rule 3 T.R.A.P. In the absence of such direction and determination by the trial judge, the order is interlocutory and can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties. **Sidham v. Fickle Heirs**, 643 S.W.2d 324, 325 (Tenn.1982).

657 S.W.2d at 749.

The appeal is dismissed and the case is remanded to the trial court for entry of a judgment forthwith either adjudicating the issue of sanctions or in conformity with Rule 54.02, TRCP. Within our discretion, the cost of this appeal is taxed one-half to the Appellant and one-half to the Appellee.

Clifford E. Sanders, Sr.J.

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.