19CA1908 Marriage of Bovino 03-04-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA1908
Pitkin County District Court No. 18DR30027
Honorable Christopher G. Seldin, Judge

In re the Marriage of

David A. Bovino,

Appellant,

and

Claudia Suarez Bovino,

Appellee.

ORDER AFFIRMED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Berger and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 4, 2021

The Locke Law Firm, P.C., Teresa D. Locke, Denver, Colorado, for Appellant

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¶ 1 In this domestic relations case involving David A. Bovino (husband) and Claudia Suarez Bovino (wife), husband appeals the district court's order denying his C.R.C.P. 60(b) motion seeking to set aside wife's attorney's judgment for attorney fees. We affirm but vacate the portion of the order finding husband had perpetrated a fraud on the court. We also remand the case to the district court for the determination of wife's request for appellate attorney fees and costs.

I. Background

¶ 2 In late 2018, husband's attorney, Mr. Lass, filed a petition for legal separation. At that time, husband was a newly-hired attorney in the Aspen office of Kasowitz Benson Torres LLP (KBT). Husband expected to receive compensation in the amount of $1 million for his first year of employment. According to her sworn financial statement, wife was disabled and a stay-at-home parent for the parties' then four-year-old daughter.

¶ 3 On March 28, 2019, Mr. Lass filed a motion to withdraw. In it, he listed KBT's address as husband's last known mailing address. It also alerted husband that if granted, "all pleadings, notices or

other papers may be served on you directly by mail at your last known address."

¶ 4 On April 3, 2019, before the district court ruled on the motion to withdraw, it held a temporary orders hearing. At that time, wife appeared with her attorney, Mr. Littman, and though husband did not appear, he was represented by Mr. Lass. As relevant here, the court entered the following order:

> The [c]ourt finds that [wife's] attorney fees of $45,516.25 incurred to date are reasonable and necessary, both as to rate and hours billed in light of the circumstances. Pursuant to C.R.S. § 14-10-119, [husband] is ordered to pay $35,000 directly to [Mr. Littman] no later than June 30, 2019 for attorney fees incurred as of the date of hearing.

¶ 5 On April 10, 2019, the district court granted Mr. Lass's motion to withdraw.

¶ 6 Mr. Littman then filed a motion to withdraw.

¶ 7 On May 1, 2019, the parties stipulated to dismiss the case without prejudice. While the court had yet to rule on Mr. Littman's motion to withdraw, wife signed the stipulation as "appearing *pro se*."

¶ 8 On May 2, 2019, the district court approved the parties' stipulation to dismiss. Several hours later, Mr. Littman moved for entry of judgment against husband for the $35,000 attorney fee award previously granted in the temporary orders. The certificate of service indicates that he either e-filed or mailed a copy of the motion to husband's last known address.

¶ 9 On May 15, 2019, the district court granted Mr. Littman's motion to withdraw.

¶ 10 On May 31, 2019, the district court, having received no response from husband, granted Mr. Littman's motion for entry of judgment.

¶ 11 About three months later, husband moved to set aside the judgment pursuant to C.R.C.P. 60(b). He advanced two grounds: (1) that the judgment was void for lack of subject matter jurisdiction under C.R.C.P. 60(b)(3) because the district court had already dismissed the case; and (2) that the judgment was voidable under C.R.C.P. 60(b)(1) (mistake) or C.R.C.P. 60(b)(2) (misrepresentation) because Mr. Littman failed to serve him a copy of the motion for entry of judgment.

¶ 12 For his part, Mr. Littman maintained that a copy of the motion was mailed to husband at his last known address as identified in Mr. Lass's motion to withdraw.

¶ 13 On October 2, 2019, the district court denied, without a hearing, husband's C.R.C.P. 60(b) motion. The court explained:

> It is now apparent to the [c]ourt that the stipulated dismissal, coupled with the [C.R.C.P. 60(b)] [m]otion, represents a sneaky effort by [h]usband to defeat the effect of the [c]ourt's [o]rder awarding [Mr. Littman's] attorney fees. The [c]ourt views this as a fraud on the [c]ourt for purposes of Rule 60(b), and therefore sets aside the dismissal previously entered pursuant to that Rule.
>
> Having set aside the dismissal, the [c]ourt reaffirms the [o]rder of attorney fees to [Mr. Littman]. Having now done that, the [c]ourt once again enters the dismissal of the underlying action.
>
> The sort of game playing this [m]otion represents reflects poorly upon an officer of the [c]ourt. The [c]ourt denies all requests for further fees.

The court neither addressed nor made any factual findings with regard to the arguments raised in the motion.

¶ 14 Husband now appeals.

II. Analysis

¶ 15 Husband contends that the district court erred in not setting aside the judgment and in finding that he committed fraud on the court. We disagree with the former contention but agree with the latter one.

A. Setting Aside the Judgment

1. C.R.C.P. 60(b)(3) (Void Judgment)

¶ 16 Husband maintains that the judgment is void under C.R.C.P. 60(b)(3) for lack of subject matter jurisdiction. We disagree.

¶ 17 As an initial matter, we reject wife's assertion that this issue is not preserved. Without subject matter jurisdiction, any judgment the court renders is void, *In re Marriage of Roth*, 2017 COA 45, ¶ 14, and a void judgment may be attacked at any time, *In re Marriage of Anderson*, 252 P.3d 490, 495 (Colo. App. 2010), including for the first time on appeal. *People in Interest of Strodtman*, 293 P.3d 123, 126 (Colo. App. 2011).

¶ 18 We review de novo a court's ruling under C.R.C.P. 60(b)(3). *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 314 (Colo. 2010); *see In re Marriage of Stroud*, 631 P.2d 168, 170 n.5 (Colo. 1981) (When a motion is brought under C.R.C.P. 60(b)(3)

to set aside a judgment because it is allegedly void, the district court has no discretion to determine whether it should grant such relief; the judgment attacked "either is void or it isn't and relief must be afforded accordingly.").

¶ 19 Husband argues that once the district court granted the stipulated dismissal under C.R.C.P. 41(a)(1)(B), the court "was divested of jurisdiction to enter any further orders or to enter a judgment of any kind." We are not persuaded.

¶ 20 A temporary order terminates when the petition for dissolution or legal separation is voluntarily dismissed. § 14-10-108(5)(c), C.R.S. 2020. An action may be voluntarily dismissed "by filing a stipulation of dismissal signed by all parties who have appeared in the action or by their attorneys." C.R.C.P. 41(a)(1)(B).

¶ 21 In certain circumstances, the district court retains limited jurisdiction after a case has been dismissed. *See Town of Monument v. State*, 2018 COA 148, ¶ 8 n.5 (stating that there are exceptions to the general rule that a court loses jurisdiction over the case once it is dismissed with prejudice, including for consideration of a timely motion under C.R.C.P. 60(b)), *aff'd sub nom. Forest View Co. v. Town of Monument*, 2020 CO 52; *see also*

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427-28 (10th Cir. 1990) (the parties were allowed to intervene and modify a protective order three years after the underlying suit was settled).

¶ 22 One instructive example is *Brown v. Silvern*, 141 P.3d 871 (Colo. App. 2005). There, the parties filed a joint motion to dismiss the complaint with prejudice, which the lower court granted. *Id.* at 873. On the following day, the defendant filed a motion seeking sanctions and attorney fees under C.R.C.P. 11 and section 13-17-102, C.R.S. 2005. *Brown*, 141 P.3d at 873. The lower court summarily denied the defendant's request. *Id.* In reversing, the division concluded that the lower court retained jurisdiction even after dismissal of the case to address the pending motions for sanctions and attorney fees. *Id.* at 873-74.

¶ 23 So, contrary to husband's argument, the district court had jurisdiction to rule on Mr. Littman's motion for entry of judgment despite the parties' voluntary dismissal. *See id.*; *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (district court may issue an order dismissing a case with prejudice while retaining jurisdiction over a settlement agreement resolving the underlying dispute); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,

395 (1990) (holding that a voluntary dismissal does not deprive a district court of jurisdiction over a motion seeking sanctions).

¶ 24 And husband's reliance on *Hill v. Dist. Ct.*, 189 Colo. 356, 357, 540 P.2d 1079, 1080 (Colo. 1975) and section 14-10-108(5)(c), does not help him. *Hill* involved a dissolution of marriage case where the lower court, as part of its temporary orders, required the father to pay monthly child support into the court registry. *Id.* at 357, 540 P.2d at 1080. His payments in the registry would then reimburse Adams County Social Services Department (Department) for financial support given to the mother and the parties' child. *Id.* The parties later asked, and the lower court agreed, to dismiss the action. *Id.* Following the dismissal, the Department moved for contempt against the father, alleging his failure to comply with the temporary child support order. *Id.* The lower court ultimately found the father in contempt, imposed a thirty-day jail sentence, and ordered him to pay the arrearages. *Id.* True, the father successfully argued before our supreme court that the lower court had no jurisdiction under section 14-10-108(5)(c) to hold him in contempt after the action had been voluntarily dismissed. *Id.* at 357, 540 P.2d at 1080-81. But the supreme court acknowledged

that the Department could "take appropriate steps to collect the unpaid arrearages from the [father]." *Id.* at 357-58, 540 P.2d at 1081. Here, unlike the father in *Hill*, Mr. Littman did not seek contempt and sanctions against husband. Instead, Mr. Littman sought and obtained a judgment to collect on attorney fees already earned, which was contemplated and effectively permitted under *Hill*. *Id.*

¶ 25 Nor are we persuaded by husband's argument that under section 14-10-108(5)(c) his obligation to pay the temporary attorney fee award immediately "terminated" or expired upon the parties' voluntary dismissal under C.R.C.P. 41(a)(1)(B). In our view, the word "terminate" in section 14-10-108(5)(c) operates prospectively — that is, once the case is dismissed, a temporary order is terminated only as to *future* obligations. Thus, husband's obligation to pay Mr. Littman, as fixed by the temporary order, continued, notwithstanding the parties' dismissal. *See Hill*, 189 Colo. at 357-58, 540 P.2d at 1081 (after dismissal of dissolution case, district court lacked jurisdiction under section 14-10-108(5)(c) to hold the husband in contempt for failing to pay temporary support, but the supreme court noted that he may still be obligated

to pay any unpaid arrearages); *cf. In re Marriage of Price*, 727 P.2d 1073, 1076–77 (Colo. 1986) (where district court determined child support after the entry of dissolution decree, temporary child support order was not terminated on date of dissolution); *In re Marriage of Salby*, 126 P.3d 291, 295 (Colo. App. 2005) ("Temporary orders relating to support payments do not terminate automatically upon the entry of a decree dissolving the marriage."); *In re Marriage of Nussbeck*, 899 P.2d 347, 349 (Colo. App. 1995) (when a district court enters a dissolution decree and does not enter a permanent order concerning maintenance concurrently, temporary maintenance is not terminated on the dissolution date by virtue of section 14–10–108(5)(c)).

¶ 26 Additionally, Mr. Littman was not part of the stipulation for dismissal — in fact, he was still wife's attorney as the district court had yet to rule on his motion to withdraw — and could enforce the attorney fee award in his own right. *See* § 14-10-119, C.R.S. 2020 ("The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.") (emphasis added); *see also* C.R.C.P. 121 § 1–1(2)(b) (an attorney may withdraw from a case only upon approval of the district court).

¶ 27 Given all this, we conclude that the district court had subject matter jurisdiction to enter judgment for attorney fees in favor of Mr. Littman and against husband.

2. C.R.C.P. 60(b)(1) (Mistake) and C.R.C.P. 60(b)(2) (Misrepresentation)

¶ 28 Husband asserts that the district court abused its discretion in denying him relief under C.R.C.P. 60(b)(1) because his failure to respond resulted from Mr. Littman's mistake in not serving him the motion for entry of judgment. In a related assertion, he insists that the court also erred in denying him relief under C.R.C.P. 60(b)(2) because Mr. Littman made a misrepresentation in the certificate of service. We conclude that husband has failed to demonstrate reversible error.

¶ 29 The district court may relieve a party from the effect of a judgment when that party has been a victim of mistake or misrepresentation. C.R.C.P. 60(b)(1), (2); *Goodman Assocs., LLC*, 222 P.3d at 314.

¶ 30 The district court's decision to grant or deny a C.R.C.P. 60(b)(1) or (2) motion lies within its sound discretion, and we will not disturb its ruling absent an abuse of that discretion. *Davidson*

v. McClellan, 16 P.3d 233, 239 (Colo. 2001); *see In re Marriage of Seely*, 689 P.2d 1154, 1160 (Colo. App. 1984). An abuse of discretion exists where the court's decision is manifestly arbitrary, unreasonable, or unfair. *Goodman Assocs., LLC*, 222 P.3d at 314.

¶ 31 "Invocation of the rule demands scrupulous consideration of strong policies favoring finality of judgments." *E.B. Jones Constr. Co. v. City & Cty. of Denver*, 717 P.2d 1009, 1013 (Colo. App. 1986). To that end, a party seeking relief under C.R.C.P. 60(b) has the burden of establishing that such relief is warranted "by clear, strong, and satisfactory proof." *Domenico v. Sw. Props. Venture*, 914 P.2d 390, 392 (Colo. App. 1995).

¶ 32 In his C.R.C.P. 60(b) motion, husband claimed that he never received a copy of Mr. Littman's motion for entry of judgment. According to husband, the certificate of service on the motion for entry of judgment implied that Mr. Littman e-filed him a copy because "US Mail" was not included under his name as it was under wife's, and yet, there were no records indicating electronic service.

¶ 33 In response, Mr. Littman disputed husband's claim. Mr. Littman offered proof of having mailed the motion to husband's last

known address prior to the district court's ruling: (1) a copy of the law firm's cover letter, dated May 2, 2019, which was addressed to husband and referenced an enclosed motion for entry of judgment; and (2) a copy of an envelope from the law firm that was addressed to husband, sent to his last known address, and postmarked on May 3, 2019.

¶ 34 The district court should have made specific findings concerning the above factual dispute because we cannot. *See Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 19 ("appellate tribunals don't (and, indeed, can't) make findings of fact.").

¶ 35 Nevertheless, assuming arguendo that service was not accomplished, husband's specific allegations do not establish any meritorious defenses, nor even offer substantive grounds to deny the motion for entry of judgment — except for the argument that the court lacked subject matter jurisdiction, which we have already rejected. Thus, even if husband correctly asserted that notice of the attorney fee award was insufficient he would not prevail on the merits. Moreover, there is no indication in the record that husband

has ever contested the court's findings regarding the amount or reasonableness of its award.

¶ 36 Thus, even if the judgment were entered prematurely, we conclude that any error was harmless and did not prejudice husband. *See* C.R.C.P. 61 (courts must disregard as harmless any error that does not affect the substantial rights of the parties); *Cissell Mfg. Co. v. Park*, 36 P.3d 85, 91 (Colo. App. 2001) (C.R.C.P. 61 requires a showing of prejudice, harm, or lack of substantial justice).

¶ 37 To the extent husband argues that *his* mistake or excusable neglect caused him to miss the deadline for filing a response to the motion for entry of judgment, we decline to address the argument because he offers no meaningful legal analysis. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010) ("We will not consider a bald legal proposition presented without argument or development."); *see also Westrac, Inc. v. Walker Field*, 812 P.2d 714, 718 (Colo. App. 1991) ("Because defendant has failed to specify why the [district] court erred, we will not review the ruling . . . .").

B. Setting Aside the Finding of Fraud

¶ 38 Last, husband asserts that the record does not support the district court's finding that he committed fraud on the court.

¶ 39 C.R.C.P. 60(b) contains a "savings clause," which, in relevant part, provides a separate ground for relieving a party from judgment. *Carbajal v. Wells Fargo Bank, N.A.*, 2020 COA 49, ¶ 32. A fraud upon the court "interferes with the judicial machinery itself" by depriving "the person against whom the judgment was rendered of an opportunity to defend the action when he has a meritorious defense." *Se. Colo. Water Conservancy Dist. v. Cache Creek Mining Tr.*, 854 P.2d 167, 176 (Colo. 1993) (citation omitted).

¶ 40 The circumstances in this case (*e.g.*, husband being an attorney and the sole source of financial support for the family, the considerable award of attorney fees, and the filing of the joint dismissal when wife was still represented by Mr. Littman) may have raised some suspicion of attempted manipulation on the part of husband. But beyond that, there is no evidence of actual fraud in the record. A finding of fraud is serious (particularly for practicing attorneys), and husband should have been given notice and an opportunity to argue or present evidence to address the issue before

the court ruled. The court therefore erred by sua sponte finding that husband committed fraud on the court. *See Turney v. Civ. Serv. Comm'n*, 222 P.3d 343, 352 (Colo. App. 2009) ("Procedural due process . . . requires fundamental fairness in procedure and is met if the party is provided with notice and an opportunity to be heard."). Accordingly, we vacate this portion of the court's order.

III. Appellate Attorney Fees and Costs

¶ 41 Asserting that the parties' incomes are disparate, wife asks for her appellate attorney fees under section 14-10-119. Because the district court is better equipped to resolve the factual issues regarding their current financial resources, we remand her request to the district court to decide. *See* C.A.R. 39.1; *see also In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

¶ 42 Wife seeks her appellate costs. On remand, the district court should also address this issue. *See* C.A.R. 39(a)(4) ("[I]f a judgment is affirmed in part . . . costs are taxed only as ordered by the [district] court.").

IV. Disposition

¶ 43 The part of the district court's order finding husband acted fraudulently is vacated. Otherwise, the court's order denying

husband's 60(b) motion to set aside or vacate the judgment is affirmed. We remand the case, however, for resolution of wife's request for appellate attorney fees under section 14-10-119, and for calculation of costs under C.A.R. 39(a)(4), respectively.

JUDGE BERGER and JUDGE TOW concur.