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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF JUDITH H.)
ANDERSON,)
)
Appellant-Petitioner,)
)
vs.)
)
CHRIS C. ANDERSON,)
)
Appellee-Respondent.)

No. 29A02-0611-CV-979

APPEAL FROM THE HAMILTION SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0411-DR-965

July 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Judith P. Anderson (Wife) challenges the denial of her motion to correct error and thereby, ultimately, the division of property in the decree of dissolution dissolving her marriage with Chris C. Anderson (Husband). The following restated issue is presented: Did the trial court err in denying Wife's motion to correct error?

We affirm.

The facts favorable to the judgment are that on December 28, 2001, Wife filed a petition for dissolution in Hamilton Superior Court. The parties eventually executed a property settlement agreement (the Settlement Agreement) and submitted it for the court's approval. The court approved the Settlement Agreement and incorporated it into a decree of dissolution on September 24, 2002. On October 3, 2002, Husband notified Wife's counsel of an additional asset that was not distributed in the Settlement Agreement. Husband had been involved in Sycon Group, a limited liability corporation that was engaged in the business of real estate. Apparently, shortly before the dissolution, the business was dissolved, as a result of which a note for \$207,020.00 was issued, payable to Husband or Bruce Anderson, who is Husband's brother. Husband had attempted to transfer the note entirely to Bruce, but apparently discovered shortly after the dissolution decree was entered that his attempted transfer was unsuccessful. Thus, he notified Wife's counsel that Wife was entitled to one-half interest in Husband's share of the note. On February 11, 2003, Wife filed a verified petition to modify the Settlement Agreement. After negotiations, on May 23, 2003, the parties filed an Agreed Entry

calling for, among other things, Husband to pay \$100,000 to Wife. The Agreed Entry also contained the following provisions:

17. Chris shall state under oath that he now, and as of the date of filing and date of decree, has had no ownership on [sic] other legal or equitable financial interest in Vintage Properties, Sycon Associates, Sycon Group, LLC of Hokanson OTHER than the promissory notes that were paid in full in November, 2002, and no other assets of the date of filing not disclosed in the settlement agreement, except assets such as clothing and personal property and assets of nominal value.

18. Mel Richards [Wife's counsel] to have until July 1, 2003 (so long as deposing witnesses cooperate in setting dates) in which to take the depositions of Jeff Kimmerling and Pete Isenberg and to complete subpoenas per attached list to:

- a. confirm accuracy of #17 above; and
- b. confirm that the total amount due and payable on the Sycon Group promissory note was \$83,386.44 each to Chris and Bruce Anderson.

Appellant's Appendix at 43. The Agreed Entry further provided it was void if other assets were discovered after talking with Kimmerling and Isenberg. In the ensuing months, Wife received three continuances, extending the deadline for conducting the depositions of Kimmerling and Isenberg until January 1, 2004.

On February 20, 2004, Wife filed a motion to modify the Agreed Entry. In it, Wife noted that since the date of the Agreed Entry, original counsel for both Wife and Husband had passed away, and that on January 26, 2004, Kimmerling and Isenberg's counsel, Sean Clapp, notified Wife that they had requested for a protective order and would no longer agree to a deposition. Clapp's letter stated, in relevant part:

My clients are not willing to sit for depositions. The time that the litigants and the court agreed that Judy Anderson had within which to depose them has expired. My clients tried numerous times and made themselves available on at least two occasions for their depositions, but each time Ms. Anderson or her counsel canceled the depositions.

Moreover, as you might know, Mr. Kimmerling is a CPA, and now is his tax season. He will not be in any position to take time out for his deposition in the near future.

If, however, you and your client would be willing to accept an affidavit as outlined in my Motion for Protective Order,^[1] my clients would be willing to sign such an affidavit. If that is unacceptable, then my clients have instructed me to renew their Motion for Protective Order, including the request to be reimbursed for their attorneys' fees.

Id. at 51 (footnote supplied). In her motion to modify the Agreed Entry, Wife sought to “proceed with all discovery as permitted in accordance with Ind. Code 31-15-7-9.1.”² *Id.* at 50.

In response, on March 3, 2004, Husband filed Respondent's Motion to Dismiss and Response to Petitioner's Motion to Modify Agreed Entry. In it, Husband argued, “Wife now attempts to start the entire process over again by filing yet another Motion to Modify the original Property Settlement Agreement and Decree of Dissolution of

¹ At a hearing on Husband's subsequent motion to dismiss, counsel described the contents of this affidavit as follows: “We offered to provide affidavits from the people to be deposed saying, swearing under oath that Mr. Anderson had no interest in the entities that they were seeking information about as of the time of the dissolution.” *Appellee's Appendix* at 16.

² Ind. Code Ann. § 31-15-7-9.1 (West, PREMISE through 2006 Second Regular Session) states, in relevant part, “(a) The orders concerning property disposition entered under this chapter ... may not be revoked or modified, except in case of fraud. b) If fraud is alleged, the fraud must be asserted not later than six (6) years after the order is entered.”

Marriage.” *Appellee’s Appendix* at 6. Husband also claimed Wife’s motion was based upon the same allegation of fraud that formed the basis of the Agreed Entry and that the time allotted for discovery on those matters had expired. He claimed that Wife’s motion did not comply with Trial Rule 9(B)’s requirement that when a party asserts fraud or mistake, “the circumstances constituting fraud or mistake shall be specifically averred.” Husband further claimed that, having failed to state sufficiently the time, place, and substance of the allegedly false representation, Wife’s motion failed to state a claim upon which relief could be granted. On March 19, 2004, the trial court granted Husband’s March 3 motion and dismissed Wife’s motion to modify the Agreed Entry (the March 19 Order). The concluding paragraph of that order states:

The Court having reviewed the Motion to Modify Agreed Entry filed by Wife finds that even if all allegations contained therein were proven to this Court, the same would not merit modification of the Agreed Order as approved by this Court on May 23, 2003. The Court will therefore grant Husband’s Motion to Dismiss the Motion to Modify and same is DISMISSED at this time. The Court having reviewed the second Motion for Protective Order filed by Mr. Clapp on behalf of Isenberg and Kimmerling, will now grant the same. If Wife has additional grounds to set aside or modify the previously approved Agreed Entry or sufficient grounds to request additional relief from the same, or grounds to set aside this Court’s order granting the Motion for Protective Order, then she may bring the same before this Court and the Court will set the matter for hearing. At that hearing, the Court will determine all matters properly before the Court and raised in any pleading subsequent to this Order and also make appropriate attorney fee awards, if necessary.

Appellant’s Appendix at 55.³

³ We note for future reference that the trial court did not mention T.R. 9 in this order.

On June 10, 2004, Wife's attorney sent a letter to Husband alleging multiple instances in which he had concealed funds, and upon that basis unilaterally declared the Agreed Entry void. Husband's attorney responded with a letter containing a point-by-point rebuttal of Wife's assertions of fraud. On August 26, 2004, Wife filed yet another Petition to Modify Decree of Dissolution based upon general allegations of fraud on Husband's part. On September 1, 2004, Husband filed a motion to dismiss Wife's August 26, 2004 petition to modify. On February 21, 2006, the court conducted a hearing on Husband's motion to dismiss, and granted Husband's motion on June 7, 2006. On July 5, 2006, Wife filed a motion to correct error, which the trial court denied after a hearing.

We review a trial's court ruling on a motion to correct error employing an abuse of discretion standard. *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048 (Ind. 2003). An abuse of discretion occurs where the trial court's decision was against the logic and effect of the facts and circumstances before the court, or if the court misapplied the law. *Walker v. Kelley*, 819 N.E.2d 832 (Ind. Ct. App. 2004).

To determine the validity of the ruling on the motion to correct error, we must peel back several layers of this litigation to arrive at the meaning and import of that ruling. To summarize, the ruling on the motion to correct error denied Wife's request to reverse the trial court's June 7, 2006 order, which (1) granted Husband's September 1, 2004 motion to dismiss Wife's August 26, 2004 motion to modify the decree of dissolution, and (2) granted Husband's January 7, 2005 protective order and granted Isenberg and

Kimmerling's February 27, 2004 motion for protective order. We note that the trial court's March 19 Order remains unchallenged.

We begin with the granting of the protective orders in favor of Kimmerling and Isenberg. According to T.R. 26(C), “[u]pon motion ... by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” Among the permissible actions under this rule, a court may order “that the discovery may be had only on specified terms and conditions, including a designation of the time or place,” T.R. 26(C)(2), and “that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.” T.R. 26(C)(4). The March 19 Order provided that Wife could petition to set aside the protective order only if it was based upon “additional grounds” or “sufficient grounds to request additional relief from the same[.]” *Appellant's Appendix* at 55. “Additional grounds” in this context clearly referred to the dismissed February 20, 2004 motion to modify the Agreed Entry, as well as the Agreed Entry itself. That is, Wife could petition for relief from the protective order if she presented grounds *other than* those that were resolved against Wife in the March 19 Order.

As set out previously, the court determined in its March 19 Order that the allegations of fraud asserted by Wife against Husband up to that point in time no longer served as a potential basis for modification of the Settlement Agreement. To that end, the trial court granted protective orders preventing Wife from deposing Kimmerling and

Isenberg on those matters. It is against that backdrop that the October 4, 2006 order is to be understood. In her August 26, 2004 Verified Petition to Modify Decree of Dissolution and her motion to correct error, Wife alleged that the Settlement Agreement should be set aside because of Husband's fraud, including general allegations that Husband diverted funds into an unspecified bank account and diverted and failed to account for rental payments. Apparently, those allegations were not sufficient to convince the trial court that Wife's August 26 motion to modify was based upon "additional grounds" as required by the March 19 Order.

Even assuming for the sake of argument that Wife is correct in arguing that Trial Rule 9(B) does not apply here, the trial court's ruling represents an exercise of the discretion granted by T.R. 26(C) in enforcing its unchallenged March 19 Order. In the motion to correct error, Wife did not offer more specific information to support her allegations of fraud, but instead presented alternative arguments to the effect that (1) specificity is not required under T.R. 9(B) for a motion to modify and (2) the court erred in ruling that she failed to complete discovery by the deadline. Those allegations do not meet the requirements established by the March 19 Order because they asserted no "additional" grounds. It therefore appears that, to the extent the August 26, 2004 motion to modify and the motion to correct error sought to set aside the March 19 protective orders (and thus, presumably, pursue discovery), it was upon grounds not demonstrably different from those asserted in the Agreed Entry and later reiterated in Wife's February

20, 2004 Motion to Modify Agreed Entry. Attempts to modify based upon those grounds was expressly prohibited by the March 19 Order.

We note here Wife's argument that she was not permitted the full period of time allotted in the Agreed Entry to depose Kimmerling and Isenberg, as they filed a motion for protective order approximately one month before the expiration of the extended term specified by the trial court. She notes in this regard that the hearing on the first motion for protective order was set for several days after the deadline for discovery, i.e., January 1, 2004, the implication being that she was not actually able to pursue discovery for the last month of the modified, allotted time period.

We find nothing in the appellate materials that would have prevented Wife from scheduling a deposition in December 2003, notwithstanding that a motion for protective order was pending and a hearing on that motion had been scheduled. Moreover, it appears that Wife's counsel had been less than diligent in pursuing depositions before the first protective order was filed, as explained by Kimmerling and Isenberg's counsel at the hearing on Husband's motion to dismiss:

Just merely from a discovery perspective we attempted time after time to cooperate with Mr. Richards [i.e., Wife's counsel] to set the deposition. We offered to provide affidavits from the people to be deposed saying, swearing under oath that Mr. Anderson had no interest in the entities that they were seeking information about as of the time of the dissolution. We had depositions – well, the subpoenas initially were hugely overbroad and sought information way back as early as 1995. We asked Mr. Richards to modify those subpoenas and he refused to do that. We had depositions scheduled. I had communicated to him that we were going to have those depositions at my clients' convenience at my office. The day that we were scheduled to have those depositions Mr. Richards called and canceled. We

tried subsequent times to schedule and we were unsuccessful in reaching an agreement of all things on the location of the depositions. My clients, because they were requesting voluminous documents, wanted to have the depositions at my office where they could have the documents available and not have to carry them around and cart them around and Mr. Richards just was not willing to do that.

Appellee's Appendix at 44-45. The trial court had the authority under T.R. 26(C) to limit discovery as it did. Therefore, this aspect of its October 4, 2006 order affirming the protective order is not erroneous.

We turn now to Wife's contention that the trial court erred in denying that aspect of the motion to correct error that challenged the denial of Wife's August 26, 2004 petition to modify the decree of dissolution. As set out above, the August 26 petition sought modification on nonspecific claims of fraud on Husband's part. As is true with the protective orders discussed above, the August 26 petition did not provide sufficient details to permit the trial court to conclude that the allegations therein were "additional," i.e., different from, those that were resolved against Wife by the trial court's March 19, 2004 order. Accordingly, the trial court did not abuse its discretion in this regard.

In summary, via the Agreed Entry, the trial court permitted Wife a finite period of time to conduct discovery for the purpose of determining whether Husband had defrauded her by hiding marital assets during the pendency of the dissolution case and thereby prevented her from receiving her share of same. Wife bore at least some responsibility for the fact that she did not depose Kimmerling and Isenberg in the allotted time, which prompted them and Husband to seek protective orders that would, in effect,

declare an end to the discovery period relating to those matters. Wife responded with a motion to modify the Agreed Entry by extending the discovery period. In its March 19 order, the trial court granted the protective orders and denied what amounted to Wife's request for an extension of time to conduct discovery for the purpose of exploring possible fraud on Husband's part. Moreover, the trial court set conditions for future attempts by Wife to set aside the dissolution decree, one of which was that any such future petitions must be based upon allegations different from those alluded to in the Agreed Entry. In effect, this represented a finding against Wife as to those allegations.

On August 26, 2004, Wife filed a petition to modify the decree of dissolution, based upon unspecified allegations of fraud. Husband filed a motion to dismiss that petition. On June 7, 2006, the trial court granted Husband's September 1 petition and dismissed Wife's August 26 petition to modify the decree, on the basis that the August 26 petition raised no additional grounds, as required by the unchallenged March 19 Order. Put another way, the trial court's March 19 Order forbade the filing of repetitive motions asserting the same grounds, and the August 26 motion to modify violated that order, or at least did not demonstrably comply with it. The court did not abuse its discretion in dismissing the August 26 motion and denying the challenge to that ruling in the form of the July 5, 2006 motion to correct error.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.