

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sandra L. Black,
Appellant-Petitioner,

v.

Robert Black,
Appellee-Respondent,

January 12, 2022

Court of Appeals Case No.
21A-DR-464

Appeal from the Marion Superior
Court

The Honorable Christopher B.
Haile, Magistrate

Trial Court Cause No.
49D06-1501-DR-1435

Robb, Judge.

Case Summary and Issues

- [1] Sandra Black (“Wife”) appeals the trial court’s dismissal of her Verified Petition for Contempt, Attorney Fees and [to] Set Aside Decree of Dissolution Due to Fraud. Wife raises one issue for our review, which we restate as whether the trial court abused its discretion by dismissing Wife’s petition for contempt and Trial Rule 60(B)(3) motion. Robert Black (“Husband”) cross appeals raising one issue, which we restate as whether Husband should be awarded appellate attorneys’ fees. Concluding that the trial court did not abuse its discretion by dismissing Wife’s petition and Husband failed to meet his burden regarding appellate attorneys’ fees, we affirm.

Facts and Procedural History

- [2] On June 3, 2019, the trial court entered a Final Dissolution Order between Wife and Husband. Prior to dissolution, Wife and Husband jointly owned several companies (“Marital Companies”). The Final Dissolution Order awarded the Marital Companies to Wife and provided that she had sixty days to remove all business records of the Marital Companies from the marital residence.¹

¹ The marital businesses include EMR Consulting, Inc., EMR Consulting Group, LLC, and Rocky Edge Enterprises, LLC.

[3] On August 26, 2019, Wife filed a Verified Petition for Contempt and Request for Rule to Show Cause and Restraining Order alleging, in part, that contrary to the Final Dissolution Order, Husband had prevented her from obtaining the Marital Companies' business records and seeking an order restraining him from disposing of those records. On September 24, 2019, Husband filed an Emergency Motion for Hearing Regarding Sale of Real Estate related to efforts to sell the marital residence. The trial court held a hearing on Wife's petition for contempt and Husband's motion on November 1, 2019. At the hearing, both parties introduced evidence regarding Husband's contempt; however, after a recess wherein the trial court requested to see counsel in his office, the hearing was ended and no other evidence was presented, including on Husband's motion. Following the hearing, Husband filed an emergency motion asking the trial court to grant him the authority to execute documents relating to the sale of the marital residence and the trial court issued such an order. The order made no mention of Wife's claim of contempt against Husband² and no separate order addressing Wife's petition was issued.

[4] On December 6, 2019, Wife filed a Verified Petition for Contempt; For Attorney Fees; [and] For Correction of Real Estate Closing Deductions, again alleging, among other things, that Husband had not allowed her access to the

² Instead, the order sets a show cause hearing for March 12, 2020, regarding Wife's alleged refusal to comply with an earlier order requiring her to sign a purchase agreement for the marital estate. *See* Appellant's App., Vol. 2 at 106.

business records of the Marital Companies. The trial court set a hearing for January 31, 2020. This hearing was continued multiple times but never held.

[5] On June 2, 2020, Wife filed her Verified Petition for Contempt, Attorney Fees and [to] Set Aside Decree of Dissolution Due to Fraud. Wife alleged that Husband “has failed to comply with the Orders of the Court, and it is believed [Husband] has taken or kept corporate property from the [Marital Companies], and not disclosed his income from the business of the parties to the Court or to [Wife].” *Id.* at 142. Further, Wife’s petition stated:

The Dissolution Decree herein should be set aside on the basis of fraud, and misrepresentation and on the basis that it is inequitable to [Wife], on false representations of [Husband], such that the Decree should be re-entered requiring [Husband] to pay additional amounts of property division to [Wife].

Id. at 143. Subsequently, the trial court issued an order allowing discovery regarding the issues in Wife’s petition.

[6] On August 17, 2020, the trial court continued a previously scheduled hearing on Wife’s petition for contempt to November 16, 2020, and extended the discovery deadline to October 30, 2020. Wife then filed a motion to extend the discovery deadline further in order to allow for third party discovery. In response, Husband filed a motion asking for a protective order staying all discovery. The trial court then entered a Protective Order Staying All Discovery Pending a Preliminary Show Cause Hearing and scheduled the hearing. On November 6, 2020, the show cause hearing was held wherein Husband argued

that “[e]very single issue that [Wife] has raised in these recent motions were litigated for five years,” and that there is no new evidence from which a Rule 60(B)(3) motion could be based because “[e]very piece of that evidence has been available to them for almost five years.” Transcript of Evidence, Volume 2 at 37-38.

[7] When Wife’s counsel informed the trial court that Wife was available to testify, the trial court stated:

I don’t have time, in fact, we’re running over the one behind this one, so I’m more wanting you to respond to [Husband’s] argument about the situation.

Id. at 44. Wife’s counsel argued that she needed “the income and tax records for [Husband and] we also need to do a third party request for productions [sic] to Sprint Nextel” to prove that payments on contracts from the Marital Companies had been “in some way diverted, and were not received by the company from 2006 to the present[.]” *Id.* at 44-45. Counsel asked the trial court to allow Wife to do additional discovery.

[8] At the end of the hearing, the trial court determined the parties should submit post-hearing briefs and continued the November 16 contempt hearing. In Wife’s post-hearing brief, she contended:

7. Husband testified that he obtained only minimal payment for wrapping up the business, but it appears []Husband changed the addresses of the business and payment locations for pending contracts, so that []Wife did not obtain knowledge of or the actual payment involved. Limited Third party discovery to

Sprint/Nextel is required, to obtain the record of payments on pending contracts for original EMR corporation contracts, and to obtain proper division, along with amended tax filings and all bank accounts of [Husband], business, personal or otherwise.

8. If [Husband] changed the payments and diverted them from [Wife], then [Husband] should have known or knew from available information that the representations of [Husband] and other witnesses for [Husband] were false, and that misrepresentation was made with respect to material facts which would change the Court's judgment. The Court found [Husband] received minimal proceeds from the [Marital Companies], and did not require [Husband] to pay further amounts to [Wife], incorrectly, and but for the misrepresentation of [Husband] and his witnesses, the Court would have divided the proceeds in accord with Indiana law.

Appellant's App., Vol. 2 at 213-14.

[9] On December 28, 2020, the trial court entered an Order of Dismissal which stated:

The Court having reviewed the briefs filed by the parties and the prior orders of the Court including the Decree of Dissolution now finds all pending Motions and Petitions filed [by Wife] including Motion to Correct Error; Motion to Set Aside Decree; Petition for Contempt; Motion for Attorney Fees; and Motion for Additional Discovery should be and hereby are dismissed.

Id. at 236. Wife filed a Motion to Correct Errors which was denied. Wife now appeals the trial court's Order of Dismissal.

Discussion and Decision

I. Relief from Judgment

[10] Wife argues that her Trial Rule 60(B) motion was properly pleaded, and the trial court erred in dismissing it.³ We review the denial of a motion for relief from judgment for an abuse of discretion. *Fitzpatrick v. Kenneth J. Allen & Assoc., P.C.*, 913 N.E.2d 255, 262 (Ind. Ct. App. 2009). An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before the court or reasonable inferences therefrom. *Id.* at 262-63. We may neither reweigh the evidence nor substitute our judgment for that of the trial court. *Centex Home Equity Corp. v. Robinson*, 776 N.E.2d 935, 941-42 (Ind. Ct. App. 2002), *trans. denied*. The burden is on the movant to demonstrate that relief under Indiana Trial Rule 60(B) is both necessary and just. *In re Rueth Dev. Co.*, 976 N.E.2d 42, 51 (Ind. Ct. App. 2012), *trans. denied*. A trial court must balance the alleged injustice suffered by the moving party against the interests of the party who prevailed and society’s interest in the finality of

³ Wife contends that the trial court’s order should be reversed and remanded for “completion of discovery and hearing on all issues.” Brief of Appellant at 14. Trial Rule 60(D) does allow discovery to be conducted in Trial Rule 60(B) proceedings. However, it is well settled that discovery is subject to the trial court’s discretion and allowing discovery is not mandatory in this context. *See Wheatcraft v. Wheatcraft*, 825 N.E.2d 23, 32 (Ind. Ct. App. 2005). We have observed that limitations are necessarily placed upon discovery to prevent it from becoming a tool of oppression and harassment. *Benjamin v. Benjamin*, 798 N.E.2d 881, 890 (Ind. Ct. App. 2003). In a contentious post-dissolution case such as this we cannot say that the trial court abused its discretion in its handling of Wife’s requests for discovery. Further, Wife seems to suggest a hearing should have been held; however, she fails to raise procedural due process as an issue or present a cogent argument that the trial court should have afforded her a hearing on the Trial 60(B)(3) motion. Therefore, we find that she has waived review of this issue. *See Ind. Appellate Rule 46(A)(8)(a)*.

judgment. *Kretschmer v. Bank of Am., N.A.*, 15 N.E.3d 595, 600 (Ind. Ct. App. 2014), *trans. denied*.

[11] In her motion for relief from judgment, Wife alleged:

The Dissolution Decree herein should be set aside on the basis of fraud, and misrepresentation and on the basis that it is inequitable to [Wife], on false representations of [Husband], such that the Decree should be re-entered requiring [Husband] to pay additional amounts of property division to [Wife].

Appellant's App., Vol. 2 at 143.

[12] Under Trial Rule 60(B)(3), a motion based on intrinsic fraud, extrinsic fraud, or fraud on the court may be brought if the fraud was committed by an adverse party and had an adverse effect on the moving party. *Stonger v. Sorrell*, 776 N.E.2d 353, 356 (Ind. 2002). To obtain relief, the movant must show: (1) fraud occurred; (2) such fraud prevented the movant from fully and fairly presenting its case at trial; and (3) the movant has a meritorious claim or defense. *In re Rueth*, 976 N.E.2d at 52. A meritorious defense is one showing that a different result would be reached if the case were tried on the merits. *Nwannunu v. Weichman & Assocs., P.C.*, 770 N.E.2d 871, 879 (Ind. Ct. App. 2002). The movant need not prove the meritorious defense, but only show enough admissible evidence to make a prima facie showing of a meritorious defense indicating to the trial court the judgment would change and the defaulted party would suffer an injustice if the judgment were allowed to stand. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73-74 (Ind. 2006); *see also Cnty.*

Materials Corp. v. Ind. Precast, Inc., 176 N.E.3d 526, 538 (Ind. Ct. App. 2021) (holding that a petitioner failed to establish a meritorious claim when “[n]one of the newly discovered evidence attached to the motion for relief from judgment” demonstrated that the petitioner suffered any damage).

[13] Wife provides no evidence of fraud in her Trial Rule 60(B)(3) motion. In her post-hearing brief, Wife contends that “Husband changed the addresses of the business and payment locations for pending contracts” but at no point has she provided actual evidence to support her claim that Husband diverted business payments.⁴ We conclude that Wife failed to show that fraud occurred and failed to make a prima facie showing of a meritorious defense.

II. Contempt

[14] Whether a party is in contempt is a matter left to the sound discretion of the trial court. *Himes v. Himes*, 57 N.E.3d 820, 829 (Ind. Ct. App. 2016), *trans. denied*. Thus, we review a trial court’s ruling on a petition for contempt for an abuse of discretion and affirm unless, after reviewing the record, we conclude that the decision is against the logic and circumstances before the trial court and have a firm belief that a mistake has been made. *S.W. ex rel. Wesolowski v. Kurtic*, 950 N.E.2d 19, 21 (Ind. Ct. App. 2011). When reviewing a contempt order, we will neither reweigh the evidence nor judge the credibility of

⁴ Wife was awarded the Marital Companies in the Final Dissolution Order and has failed to show that she could not have obtained evidence during the dissolution proceeding.

witnesses. *Himes*, 57 N.E.3d at 829. To hold a party in contempt for a violation of a court order, the trial court must find that the party acted with “willful disobedience.” *Id.* A party may not be held in contempt for failing to comply with an ambiguous or indefinite order. *Rendon v. Rendon*, 692 N.E.2d 889, 896 (Ind. Ct. App. 1998).

[15] Wife contends that Husband “has failed to comply with the Orders of the Court[.]” Appellant’s App., Vol. 2 at 142. However, Wife does not specify which court orders she alleges Husband has failed to comply with. To be punished for contempt of a court’s order, there must be an order commanding the accused to do or refrain from doing something. *Piercey v. Piercey*, 727 N.E.2d 26, 32 (Ind. Ct. App. 2000). Because Wife fails to establish which court order Husband allegedly violated, we conclude the trial court did not abuse its discretion by denying Wife’s petition for contempt.

III. Appellate Attorneys’ Fees

[16] Under Indiana Appellate Rule 66(E), this court “may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.” Our discretion to award attorneys’ fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987). Additionally, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Tioga Pines Living Ctr., Inc. v. Ind. Fam. & Soc.*

Servs. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *trans. denied*. A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. *Manous, LLC v. Manousogianakis*, 824 N.E.2d 756, 767-68 (Ind. Ct. App. 2005).

[17] Indiana appellate courts have categorized claims for appellate attorneys' fees into "procedural" and "substantive" bad faith claims. *Id.* at 768. Husband argues that Wife's appeal constitutes both substantive and procedural bad faith. Substantive bad faith implies conscious wrongdoing due to "dishonest purpose or moral obliquity" whereas procedural bad faith exists when a party "flagrantly disregards the form and content requirements of our rules, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." *Harness v. Schmitt*, 924 N.E.2d 162, 168 (Ind. Ct. App. 2010). Even when an appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found. *Manous, LLC*, 824 N.E.2d at 768.

[18] To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are "utterly devoid of all plausibility." *Id.* Husband argues that Wife's claim is meritless, that she "falsely represented to this Court that she was denied access to business records during the dissolution proceedings," and that Husband has endured nearly a half

decade of litigation “much of which is attributable to the abusive conduct of [Wife].” Amended Brief of Appellee at 28-29.

[19] Here, the trial court ended the November 6 show cause hearing early due to time constraints and denied Wife’s counsel the opportunity to offer exhibits and testimony. Thus, we conclude that Wife’s contention that she was not given an opportunity to be heard is not “utterly devoid of all plausibility.” *Manous, LLC*, 824 N.E.2d at 768. Although Wife is ultimately unsuccessful in this appeal, we cannot say that it was permeated with bad faith or litigated with frivolity or vexatiousness.⁵

[20] To show procedural bad faith Husband argues that Wife “only cited to one rule and three cases in her brief and improperly cites to one of the three cases[;] [she] did not provide a substantive statement of the case[;and she] provided a statement of facts filled with issues that should have been included in the statement of the case.” Br. of Appellee at 29. We do not find that these flaws “flagrantly disregard[ed] the form and content requirements of the rules of appellate procedure,” *Thacker v. Wentzel*, 797 N.E.2d 342, 346-47 (Ind. Ct. App.

⁵ On November 1, 2019, during a hearing on Husband’s alleged contempt and Husband’s Motion for Hearing Regarding the Sale of Real Estate, the trial court only heard evidence of Husband’s contempt, cut the hearing short and issued an order that addressed only Husband’s motion on the sale of real estate. The trial court set hearings for January 31, 2020 and March 12, 2020, that were continued and then never occurred. And most recently, during a show cause hearing on November 6, 2020, the trial court cut the hearing short due to time constraints and only allowed counsel to make arguments but not offer testimony. The trial court’s haphazard administration of this case has clearly exacerbated the contentious litigation between these two parties. However, the Wife failed to raise a procedural due process claim, so accordingly we cannot say that Wife’s contention that she was not given an opportunity to be heard constitutes bad faith.

2003), and we decline to find procedural bad faith that would warrant the imposition of attorneys' fees.

[21] We hold that Husband has not satisfied his burden to demonstrate substantive or procedural bad faith by Wife in pursuing this appeal. We deny Husband's request for appellate attorneys' fees.

Conclusion

[22] We conclude that the trial court did not abuse its discretion by dismissing Wife's petition and Husband failed to meet his burden regarding attorneys' fees. Accordingly, we affirm.

[23] Affirmed.

Bradford, C.J., and Altice, J., concur.