

[Cite as *Olson v. Olson*, 2015-Ohio-5550.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOHN A. OLSON,

)

CASE NO. 15 CO 2

)

PLAINTIFF-APPELLEE,

)

)

VS.

)

OPINION

)

WENDY OLSON,

)

)

DEFENDANT-APPELLANT.

)

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Columbiana County, Ohio
Case No. 13DR90

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Shirley J. Smith
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Poland, Ohio 44514

Atty. Tracey A. Laslo
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For Defendant-Appellant:

Atty. David L. Engler
Engler and Associates, LLC
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 23, 2015

ROBB, J.

{¶1} Defendant-Appellant Wendy Olson appeals the decision of Columbiana County Common Pleas Court denying her Civ.R. 60(B) motion to vacate the decree of dissolution between herself and Plaintiff-Appellee John S. Olson. Appellant raises multiple arguments in this appeal, however, only two are dispositive. They are: 1) whether the trial court lacked jurisdiction over the dissolution because relief from the automatic bankruptcy stay was not acquired, and 2) whether the trial court correctly determined that the objections to the magistrate's decision were untimely.

{¶2} For the reasons expressed below, the trial court's decision to deny the Civ.R. 60(B) motion is hereby affirmed. Relief from the automatic bankruptcy stay was not required, and the trial correctly determined the objections to the magistrate's decision were untimely. Those determinations render the remainder of Appellant's arguments moot.

Statement of the Case

{¶3} Appellant and Appellee were married in October 1984. They filed a petition for dissolution in February 2013 in Columbiana County Common Pleas Court. Although Appellant and Appellee met with an attorney jointly, they agreed that said attorney would only represent Appellee. As such, Appellant appeared pro se for the dissolution proceedings. Finding the separation agreement was fair, just, and reasonable, the trial court granted a decree of dissolution. 4/24/13 Decree.

{¶4} Nine months later, Appellant filed a Civ.R. 60(B)(3) motion to vacate the decree of dissolution claiming attorney misconduct. 2/24/14 Motion. Seven months after that motion, Appellant filed another Civ.R. 60(B) motion. 7/9/14 Motion. She re-asserted Civ.R. 60(B)(3), and argued that the decree of dissolution was void ab initio because the parties had not obtained relief from a bankruptcy stay prior to the decree being issued. 7/9/14 Motion. In addition to arguing Civ.R. 60(B)(3) as a basis for vacating the dissolution, she also asserted Civ.R. 60(B)(4), which states the judgment is no longer equitable. 7/9/14 Motion. Ten days later Appellant filed

another Civ.R. 60(B) motion this time asserting Civ.R. 60(B)(5), any other reason justifying relief. Appellee filed responses to these motions.

{¶15} On August 21, 2014, the magistrate issued its decision overruling the Civ.R. 60(B) motions. That same day the trial court adopted the magistrate's decision. The magistrate and the court ordered the clerk to serve the parties with the decisions. The docket shows the orders were sent on August 25, 2014.

{¶16} Appellant filed objections to the magistrate's decision on September 8, 2014. Appellee timely responded to the objections asserting they should be deemed void based on their untimeliness. 9/12/14 Response.

{¶17} On January 5, 2015, the trial court found that the objections were untimely, and granted Appellee's request to void the objections. Although the trial court voided the objections, it stated it would consider the merits "in the event of further appellate review." It then determined there was no basis to vacate the decree of dissolution. 1/5/15 J.E.

{¶18} Appellant filed an appeal from the January 5, 2015 judgment on February 4, 2015.

{¶19} In April 2015, Appellee filed a motion to dismiss the appeal as untimely. It asserted the appeal was filed on the thirty-first day and as such was untimely. It further argued that even if the appeal was filed on the thirtieth day, it was still untimely because the objections were untimely. According to Appellee, untimely objections do not stay the time for filing an appeal under Civ.R. 53.

{¶110} We partially ruled on the motion to dismiss. We stated that the February 4, 2015 notice of appeal was filed on the thirtieth day because the date of the judgment entry is not counted in computing time. 5/11/15 J.E. As to the party's second argument, we did not issue a ruling. Instead, we stated, "Regarding Appellee's additional arguments on the timeliness of objections to the magistrate's decision, or failure to timely appeal an earlier judgment, such may be raised in Appellee's answer brief, prior to addressing the merits." 5/11/15 J.E.

{¶111} Appellee re-raised these arguments in its appellate brief by reference. The arguments will be addressed in conjunction with the second assignment of error.

First Assignment of Error

“The trial court lacked subject matter jurisdiction.”

{¶12} While the parties were still married, they filed Chapter 13 bankruptcy proceedings. The bankruptcy plan was confirmed in November 2011. The petition for dissolution was filed in February 2013. It is alleged that the repayment period on the bankruptcy plan was 5 years. It is undisputed that during the dissolution proceedings, the trial court was aware of the bankruptcy plan and that no request for relief from the automatic bankruptcy stay was requested or obtained.

{¶13} Appellant asserts the trial court lacked jurisdiction to grant the dissolution because no request for relief from the automatic bankruptcy stay was requested or obtained. She claims that while the trial court could have granted the dissolution and determined custody of the minor child, it could not divide property. She cites 11 U.S.C. 362(b)(2)(A)(iv) to support her position.

Section 362 is the general bankruptcy statute on automatic stays. It provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay-

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

* * *

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate.

11 U.S.C. 362.

{¶14} Appellee counters asserting there was no violation of the automatic stay because the plan was confirmed and, therefore, there was no requirement to request relief from the stay. The parties were not seeking to divide property of the bankruptcy estate. He cites 11 U.S.C. 1327(b) to support his position.

{¶15} That statute pertains to Chapter 13 bankruptcy and indicates the effect of confirmation of the plan:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S.C. 1327.

{¶16} Considering the parties' arguments, our analysis begins with determining what effect 11 U.S.C. 1327(b) has on 11 U.S.C. 362(b)(2)(A)(iv) and vice versa.

{¶17} Case law on this issue is sparse to nonexistent. There is no case in Ohio that cites to both of these provisions and there is no case in Ohio that cites to 11 U.S.C. 1327(b). There are, however, two cases in Ohio that cite to 11 U.S.C. 362(b)(2)(A)(iv): *Greenwood v. Greenwood*, 2013-Ohio-5339, 2 N.E.3d 1002 (6th Dist.); and *May v. May*, 2012-Ohio-2348 (4th Dist).

{¶18} Neither *Greenwood* nor *May* are factually similar to the matter at hand, and do not help determine the interplay between 11 U.S.C. 1327(b) and 11 U.S.C. 362 (b)(2)(A)(iv). In *Greenwood*, Wife filed for divorce and three days before the trial date, Husband filed Chapter 13 bankruptcy proceedings. *Greenwood* at ¶ 3. Since there was no confirmation of the bankruptcy plan, there was no claim that the stay was released and the trial court had jurisdiction to divide the non-bankruptcy estate property. Likewise, *May* dealt with a Chapter 7 bankruptcy that was not yet discharged. *May*.

{¶19} Although Ohio case law may not indicate the resolution of this issue, the language of the two statutes taken in conjunction with each other indicate the trial court was correct that an automatic stay was not violated after confirmation of the plan.

{¶20} It is an elementary rule of statutory construction that a specific statute controls over a general provision. *Quality Ready Mix, Inc. v. Mamone*, 35 Ohio St.3d 224, 226-27, 520 N.E.2d 193 (1988). Here, the automatic stay statute in 11 U.S.C. 362 is the general provision. That statute operates to stay proceedings seeking to determine a division of property that is the property of the bankruptcy estate. The specific provision is 11 U.S.C. 1327. That statute provides that the property listed in the plan vests in the debtor upon confirmation of the Chapter 13 bankruptcy plan.

{¶21} As stated above, 11 U.S.C. 1327(b), which pertains specifically to Chapter 13 bankruptcy, states that unless stated in the plan or order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor.

Thus, that property does not remain under the control of the Bankruptcy Court. The debtor can dispose of that property without approval of the Court.

{¶22} Here, the plan was confirmed. There is no indication the plan or confirmation order did not vest all the property to Appellant and Appellee. Accordingly, the dissolution did not involve bankruptcy property. As a result, there was no requirement to obtain relief from the stay and there was no violation of the automatic stay.

{¶23} This conclusion is supported by an appellate court case from Michigan. *In re Estate of Hornak*, Mich.App. No. 301912, 2012 WL 2617582 (July 5, 2012). In that case, the Michigan Court of Appeals stated:

However, appellant's property was no longer included in the bankruptcy estate as of December 2007. Although estate property does not generally revert back to the debtor, "the confirmation of a [Chapter 13 Plan] vests all of the property of the estate in the debtor." 11 USC 1327(b). In appellant's unsuccessful attempt to modify his Chapter 13 Plan, the bankruptcy court noted that appellant's plan was confirmed on December 21, 2007, and held that pursuant to 11 USC 1327(b) all the property of the bankruptcy estate vested with appellant at that time; so, the property was no longer subject to the automatic stay. *In re Kenneth J Hornak and Judy L Hornak*, unpublished opinion of the U.S. Bankruptcy Court (ED Mich, Docket No. 07-22881-DOB, issued September 27, 2011), at pp 1-2, pp 10-12. As appellant's interest in the decedent's property was no longer contained in the bankruptcy estate as of December 21, 2007, the probate court's order did not violate the automatic stay.

Id.

{¶24} Consequently, we agree with the trial court that the automatic stay provision of 11 U.S.C.362 was only applicable to property within the bankruptcy estate. There was no evidence that the property divided in the dissolution was property of the bankruptcy estate. The property divided in the dissolution was

already vested to Appellant and Appellee upon confirmation of the Chapter 13 Bankruptcy Plan. Thus, there was no violation of the automatic bankruptcy stay. Appellant's assertion that the trial court lacked subject matter jurisdiction to grant the decree of dissolution fails.¹

{¶25} The first assignment of error is meritless.

Second Assignment of Error

"The trial court erred in its initial decision to deny the objections for being untimely."

{¶26} Appellant argues the trial court erred in denying the objections to the magistrate's decision based on its conclusion that the objections were untimely. Appellee counters asserting the objections were untimely and the trial court was correct in holding as such.

{¶27} In addressing these arguments, we will also address Appellee's motion to dismiss the appeal. Appellee's argument that the notice of appeal was not timely filed is based on the position that the objections were untimely. According to him, if the objections are untimely, the automatic stay provision of Civ.R. 53(D)(4)(e)(i) is not invoked. Appellee asserts in order to timely appeal the denial of the motion to vacate, Appellant had to file the notice of appeal within 30 days of the August 21, 2014 judgment entry adopting the magistrate's decision overruling the Civ.R. 60(B) motions.

{¶28} Our analysis begins with the timeliness of the objections. Civ.R. 53(D)(3)(b)(i) states objections are to be filed "within fourteen days of the filing" of the magistrate's decision. The magistrate's decision was filed on August 21, 2014. The objections were filed on September 8, 2014, the eighteenth day after the filing of the decision. Thus, they were filed beyond the 14 day time limit.

¹Appellant's subject matter jurisdiction argument raises a question as to what effect a violation of the stay has on the trial court's decision – does it render it void or voidable? However, we do not need to reach that issue because there was no violation of the stay.

{¶29} Civ.R. 53(D)(5) does allow for an extension of time for “good cause shown.” Good cause includes “a failure by the clerk to timely serve the party seeking the extension with the magistrate’s order or decision.”

{¶30} In an attempt to show good cause and render her objections timely, Appellant argues the trial court considered her objections and thereby indicated there was good cause shown. She also asserts she was not served with the magistrate’s decision until October 7, 2014. This appears to be an insinuation that there is good cause for the untimely filing of objections because the clerk failed to timely serve her. Both of these arguments fail.

{¶31} Although the trial court did consider the merits of the objections after ruling the objections were untimely, the merit decision constituted dicta and did not amount to a finding of good cause. In ruling on the merits, the trial court stated, “Even though untimely, this Court will go on to consider the merits of the Objections and other Motions in the event of further appellate review.” 1/5/15 J.E. The language used by the trial court is different from using “in the interest of justice” language. “In the interest of justice” phrase is an indication that a court will overlook procedural errors and get to the merits of the argument. “In the event of further appellate review” language is an equivalent to “even if I am incorrect, the claims still fail on the merits because.”

{¶32} Moreover, the record does not indicate good cause exists to allow an extension of time. Appellant did not move for an extension of time to file objections. The rule specifically allows for the filing of an extension for good cause shown. However, good cause cannot be shown without the request. See *Blevins v. Blevins*, 10th Dist. No. 14AP-175, 2014-Ohio-3933, ¶ 18 (Appellant was not denied opportunity to object because she should have filed objections or moved the trial court for an extension of time to do so, pursuant to Civ.R. 53(D)(5), after receiving the magistrate’s decision and the judgment entry adopting the decision). Furthermore, the record does not support the insinuation that the clerk failed to timely serve her. The docket shows the clerk sent the magistrate’s August 21, 2014 decision and the trial court’s August 21, 2014 judgment entry on August 25, 2014. August 21, 2014

was a Thursday. August 25, 2014 was a Monday. Therefore, the order was sent within two business days of the decision; the clerk timely served the decision and order. *Niki D'Atri Ents. v. Hines*, 7th Dist. No. 13 MA 57, 2014-Ohio-283, ¶ 6 (three day period to serve does not include weekends and the first day of the act is not counted).

{¶33} For those reasons, we must conclude the trial court correctly determined the objections were untimely.

{¶34} That determination raises the issue of what is the effect of untimely objections. Appellee asserts untimely objections do not invoke the automatic stay provision of Civ.R. 53(D)(4)(e)(i). Therefore, he argues Appellant's February 4, 2015 appeal of the August 21, 2014 judgment entry is untimely and the entire appeal should be dismissed.

{¶35} As provided in Civ.R. 53(D)(4)(e)(i), a trial court is permitted to adopt a magistrate's decision and enter judgment either before or after the 14-day period for filing objections expires. If the court adopts the decision before the period expires, the parties still have the right to file objections. "If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies or adheres to the judgment previously entered." Civ.R. 53(D)(4)(e)(i). The effect of timely objections is clear; they stay the execution of the trial court's judgment until the objections are ruled on. Civ.R. 53(D) does not explicitly speak to what is the effect of untimely objections.

{¶36} Appellate courts have held that a trial court has discretion to consider untimely objections. *Ramsey v. Ramsey*, 10th Dist. No. 13AP-840, 2014-Ohio-1921, ¶ 20. Recent appellate court decisions have indicated this discretion is permitted when the trial court has not already ruled on the magistrate's decision. *Id*; *Patrick v. Ressler*, 10th Dist. No. 04AP-149, 2005-Ohio-4971, ¶ 22. If the trial court considers the untimely objections prior to adopting, reversing or modifying the magistrate's decision, it is deemed an implicit finding that an extension for good cause is found

and the trial court acts within its discretion to consider the untimely objections. *Ramsey* (interest of justice language used to consider the objections).

{¶37} However, those cases do not address the situation before us where the trial court has adopted the magistrate's decision and objections are later filed that are untimely. The Twelfth Appellate District has concluded that the trial court has no discretion to consider the untimely objections in that scenario. *Losekamp v. Losekamp*, 12th Dist. No. CA2013-11-213, 2014-Ohio-4422, ¶ 25; *Learning Tree Academy, Ltd. v. Holeyfield*, 12th Dist. No. CA2013-10-194, 2014-Ohio-2006, ¶ 16-17. It explained there is no automatic stay of the trial court's decision when objections are not timely filed, and the trial court adopts the magistrate's decision during the 14-day objection period. *Losekamp*. Or in other words, a judgment that is entered by a trial court during the 14-day objection period is final if neither party files timely objections to the magistrate's decision. *Id.* If a trial court rules on those untimely objections, under that scenario, the ruling is void because the trial court's jurisdiction terminated when it entered its initial judgment adopting the magistrate's decision. *Id.* (Trial court's decision to consider untimely objections and reverse magistrate's decision was void because the trial court lacked jurisdiction); *Learning Tree* (court does not have "jurisdiction to permit objections to the magistrate's decision when the magistrate's decision was adopted and already made a final judgment by the trial court"). See also *Yazdani-Isfahani v. Yazdani-Isfahani*, 170 Ohio App.3d 1, 10, 2006-Ohio-7105, 865 N.E.2d 924, fn. 2 (4th Dist.) ("The trial court, having not yet adopted the magistrate's decision, exercised its discretion to consider the father's untimely objections sua sponte."); *In re Malone*, 10th Dist. No. 03AP-489, 2003-Ohio-7156, ¶ 32.

{¶38} We agree with the Twelfth Appellate District's reasoning because it gives finality to the trial court's rulings regarding the magistrate's decisions. If objections are permitted to be filed at any time and the trial court is given vast discretion to consider those objections, finality is taken away from the trial court's initial ruling on a magistrate's decision. For instance, a trial court would be

authorized to consider objections that were filed years after the initial order became final.

{¶39} For those reasons, we lack jurisdiction to review the trial court's August 21, 2014 decision denying Appellant's motion to vacate. Jurisdiction in the court of appeals is based upon a timely filing of a notice of appeal. App.R. 4; *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, ¶ 7. A timely notice of appeal was not filed from the August 21, 2014 decision. The portion of this appeal that asks this court to review the August 21, 2014 decision is dismissed.

{¶40} That decision, however, does not mean that the January 5, 2015 order was not an appealable order. The January 5, 2015 trial court order is an appealable order and the February 4, 2015 appeal of that order is timely. Our review of the January 5, 2015 order, however, is limited to whether the trial court's conclusion that the objections were untimely is correct. As explained above, the trial court correctly determined that the objections were not timely.

{¶41} This assignment of error lacks merit.

Third Assignment of Error

"The trial court abused its discretion in endorsing the magistrate's determination to allow the admission of evidence based upon a trial order that was in place before appellant had filed her motion for which she sought to introduce the evidence."

Fourth Assignment of Error

"The trial court abused its discretion in not finding the separation agreement to be so unconscionable as to be enforced."

Fifth Assignment of Error

"The trial court erred in not finding that the separation agreement was a result of fraud, given Appellee's counsel's violation of disciplinary rules regarding conflicts of interest."

Sixth Assignment of Error

“The trial court abused its discretion in not considering the terms of the separation agreement gave it the ability to modify the agreement.”

{¶42} The arguments raised in the third, fourth, fifth and sixth assignments of error are merit arguments. Our resolution of the first two assignments of error, and the arguments raised in the motion to dismiss, moot the merit arguments. Accordingly, they will not be addressed.

Conclusion

{¶43} In conclusion, the trial court's decision is hereby affirmed. Both the first and second assignments of error lack merit. Appellee's motion to dismiss the appeal is granted in part in so far as the appeal asks this court to review the August 21, 2014 judgment entry. However, as to the January 5, 2015 trial court order determining the objections were not timely, the judgment is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.