Circuit Court for Baltimore County
Case Nos. 03-C-06-013007 & 03-C-06-013103

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2560

September Term, 2015

CHRISTINE B. KROPFELDER, ET AL

v.

BERNARD R. KROPFELDER, JR.

Kehoe,
*Krauser,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 20, 2017

* Krauser, J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

In this attorney's fees dispute, one or more of the wheels appear to have fallen off these consolidated cases. For an appellate court to ignore the wreckage before it and plow ahead to decision seems unwise, if not reckless. In our opinion, the facts here cry out for a remand to the Circuit Court for Baltimore County without affirmance or reversal by this Court as provided in Md. Rule 8-604(d)(1).[1] On remand, the circuit court, at the very least, should rule on a motion to intervene, timely filed by appellant's lawyers—a motion whose non-resolution prevents our ability to properly dispose of the appeal before us.

BACKGROUND

This protracted family law litigation began and proceeded in a typical, almost straight-forward fashion.[2] On December 6, 2006, appellant,[3] Christine B. Kropfelder,

[1] Rule 8-604(d)(1) provides:

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

[2] It is not necessary to give more than just the barest outline of the proceedings.

filed a complaint for limited divorce in the Circuit Court for Baltimore County (Civil Case No. 03-C-06-013007).[4] Two days later, appellee filed a complaint for custody of minor children and other relief. This complaint was separately docketed (Civil Case No. 03-C-06-013103) and answered.

Motions to dismiss were filed in both actions. In an order filed June 13, 2007, each motion was denied. In addition, the circuit court *sua sponte* ordered that both actions "are hereby consolidated for all future proceedings." The consolidated cases were tried in 2008 and appellee obtained a judgment of absolute divorce in April 2009. An appeal followed with a remand on a child support issue. *Kropfelder v. Kropfelder*, Nos. 704 & 2767, Sept. Term 2009 (Opinion filed Dec. 17, 2010).

Amid the flurry of post-judgment docket entries was a petition for legal expenses filed by appellant in November of 2010. In a motions ruling entered in both cases on January 24, 2011, the circuit court "held [the motion] for further information."

The next significant event in the litigation was a July 19, 2011 hearing on child support issues and on the remand from this Court. The hearing ended somewhat inconclusively with the circuit court asking for written submissions. The docket entry

(. . . continued)

[3] Although the appellee, Bernard R. Kropfelder, Jr., contends that there is no proper "appellant" before this Court, we will refer to Christine Kropfelder as appellant simply to avoid undue complexity in recounting certain material facts.

[4] Appellee answered and filed a counterclaim for absolute divorce. Appellee later amended his complaint.

stated: "Hearing to then be set for Courts ruling on Mandate and address Attorney Fees and Child Support."

For the most part, docket entries consistently appeared in Civil Case No. 03-C-06-013007.[5] However, Civil Case No. 03-C-06-013103 was left by the side of the road. There were no docket entries from July 19, 2011 to August 14, 2014. Before the Clerk of the Court took notice of this seeming lethargy, the parties took matters into their own hands.

In June of 2015, the Kropfelders entered into a "Settlement Agreement and Mutual General Release of all Claims."[6] This agreement provided in relevant part:

> Each party hereto hereby agrees to terminate, discontinue and/or dismiss the above legal proceeding and to execute appropriate documents to do so. Each party further releases and forever discharges the other party from any and all other claims, actions, causes of action, demands, damages or lawsuits of any kind or nature, whatsoever, arising prior to or on the date of this settlement agreement, including, but not limited to, claims for alimony, spousal support and attorneys' fees and expenses incurred at any time.

On September 11, 2015, the Clerk of the Circuit Court, pursuant to Md. Rule 2-507, issued a Notification of Contemplated Dismissal for Case No. 03-C-06-013103.[7] In

[5] There was a gap in the proceedings from November 21, 2012 to July 23, 2014. This apparent hiatus is not related to this appeal.

[6] Mrs. Kropfelder's attorney was not involved in the preparation of the settlement.

[7] Rule 2-507 provides:

> **(a) Scope.** This Rule applies to all actions except actions involving the military docket and continuing trusts or guardianships.

(Continued . . .)

response, a motion to defer dismissal was filed in appellant's name, arguing that the "vast majority of the post judgment proceedings that remain pending for determination are docketed" in Case No. 03-C-06-013007, that one proceeding remained for determination

(. . . continued)

> **(b) For Lack of Jurisdiction.** An action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction is subject to dismissal as to that defendant at the expiration of 120 days from the issuance of original process directed to that defendant.
>
> **(c) For Lack of Prosecution.** An action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry, other than an entry made under this Rule, Rule 2-131, or Rule 2-132, except that an action for limited divorce or for permanent alimony is subject to dismissal under this section only after two years from the last such docket entry.
>
> **(d) Notification of Contemplated Dismissal.** When an action is subject to dismissal pursuant to this Rule, the clerk, upon written request of a party or upon the clerk's own initiative, shall serve a notice on all parties pursuant to Rule 1-321 that an order of dismissal for lack of jurisdiction or prosecution will be entered after the expiration of 30 days unless a motion is filed under section (e) of this Rule.
>
> **(e) Deferral of Dismissal.** On motion filed at any time before 30 days after service of the notice, the court for good cause shown may defer entry of the order of dismissal for the period and on the terms it deems proper.
>
> **(f) Entry of Dismissal.** If a motion has not been filed under section (e) of this Rule, the clerk shall enter on the docket "Dismissed for lack of jurisdiction or prosecution without prejudice" 30 days after service of the notice. If a motion is filed and denied, the clerk shall make the entry promptly after the denial.

in Case No. 03-06-013103, and that the movant had no objection to dismissal of the latter case, as long as "there is no adverse effect upon the determination of the pending proceedings" in the former case.

Appellee opposed the motion to defer dismissal, emphasizing that there now existed a settlement between the parties, asserting that appellant had advised appellee that she had discharged her attorney, and requesting that both of the consolidated cases be dismissed with prejudice.

Before the circuit court ruled on the motion, appellant's lawyers, on November 3, 2015, moved to intervene in Case No. 03-C-06-013007. The movants noted the prior fee awards and request for legal expenses against appellee, argued that the parties' settlement agreement would, as a practical matter, impair the ability to pursue and recover legal expenses from appellee, and alleged that "it appears that the parties may have collaborated or conspired with each other, as a practical matter, to impair or impede [the attorneys'] ability to pursue and recover legal expenses" from the appellee.

Although this motion was filed on November 3, 2015, it was not docketed until November 9, 2015.[8] However, by the date of this docket entry, the circuit court had ruled on the motion to defer. In an order filed and docketed November 9, 2015 in Case No. 03-

[8] This motion bears two time stamps by the Clerk's Office: one dated October 23, 2015; the other dated November 3rd. The certificate of service also recites October 23rd as the date service was initiated. However, there is no notation in the docket entries of an October 23rd filing and appellant's brief concedes that the motion to intervene was not "formally filed" until November 3, 2015.

C-06-013007 and filed and docketed November 7th in Case No. 03-C-06-013103,[9] the court denied the motion to defer and dismissed both cases with prejudice.

In his November 25, 2015 opposition to the motion to intervene, appellee relied on the circuit court's order to argue that the motion to intervene was now moot and no longer viable. Although the issue was joined, there was never a ruling on the motion to intervene.

Appellant's attorney then filed a motion to alter, amend and/or revise judgment that was deemed filed December 1, 2015 and docketed December 16, 2015.[10] Although the motion reiterated contentions about the alleged erroneous denial of the motion to defer dismissal, it noted that pending in Case No. 03-C-06-013007 was a petition for legal expenses and the motion to intervene. Appellee's opposition noted that the appellant had not authorized the filings of the motion to defer dismissal and the motion to alter or amend, that she instructed her attorney to halt proceedings and that she settled with appellee because her attorney would not abide by her express directions.

[9] The order was signed November 4th.

[10] The movants asserted that an earlier filing within the 10-day period contemplated by Md. Rule 2-534 was thwarted by a misunderstanding over the need for a filing fee. This contention was rejected by this Court in a March 1, 2016 order. That order, although denying a motion to dismiss, noted that because the post-judgment motion was filed more than 10 days after the judgment below, the timeline for a direct appeal of the November 9, 2015 order was not stayed and thus, the appeal of pre-judgment matters was not timely. Rather, the appeal was limited to review of the decision on the post-judgment motion and then, under an abuse of discretion standard.

This motion was denied December 21, 2015 (and filed January 8, 2016). An appeal was noted on January 28, 2016[11] promptly challenged by appellee in a motion to dismiss, for among other reasons, that appellant had not authorized the appeal. As noted earlier, the motion was denied. This Court did not address the authorization issue, but because of timeliness issues, limited the appeal to review of the denial of the motion to alter or amend. Appellee has renewed his motion to dismiss the appeal in his brief.

DISCUSSION

In *Tydings & Rosenberg, LLP v. Zorzit*, 422 Md. 582 (2011), the Court of Appeals held that a law firm has the right to intervene in a domestic relations case to recover counsel fees it has earned while representing the "nonmonied spouse." Intervention was authorized even though the parties, without counsel, had agreed to settle the litigation. *Id.* at 584-85.

As appellee is quick to point out, in *Zorzit*, the law firm's motion to intervene was denied and it was a proper party to appeal that denial. Here, it is asserted that there was no ruling on the motion to intervene and appellant's lawyers are non-parties without standing to challenge the correctness of the dismissal of the consolidated cases. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well settled").[12]

[11] A time-stamp on the notice of appeal gives the filing date as January 27th.

[12] Appellant's lawyers have not asked that they be substituted for appellant as a party pursuant to Md. Rules 8-401(b) and 2-241. Nor is it clear that these rules would apply to the facts here.

In addition, appellee has argued that the motion to intervene was rendered moot by the circuit court's dismissal of the consolidated cases and the settlement reached by the parties.

Because the viability of the motion to intervene affects the jurisdictional issue of the finality of the judgment below, as well as the disposition of a non-party appeal, we will consider that question first. In Maryland, post-judgment intervention is well-recognized. *See Jenkins v. City of Coll. Park*, 379 Md. 142 (2003); and *Coal. For Open Doors v. Annapolis Lodge No. 622, Benevolent & Protective Order of Elks*, 333 Md. 359 (1994). Thus, the entry of judgment does not automatically moot a motion to intervene. In addition, *Zorzit* teaches that a settlement of the parties does not foreclose the kind of motion to intervene at issue here. 422 Md. at 584-85. Finally, the motion in this case was filed *before* dismissal of the consolidated cases, even if by a whisker. The motion was filed on November 3, 2015—six days before the circuit court's ruling rejecting the motion to defer dismissal. However, the date the motion to intervene was docketed, November 9th, coincided with the date of dismissal. More likely than not, the circuit court was not even aware the motion had been filed.[13] In any event, we conclude that a facially plausible motion to intervene was timely filed.

Legal consequences follow from such a finding. One possibility is that the judgment below lacks finality. *See Applebaum v. State Farm Mut. Auto. Ins. Co.*, 109

[13] Given the timeline with respect to the motion to intervene, we are not inclined to view the circuit court's dismissal as an implicit denial of the motion. If the latter were the case, appellee's motion to dismiss the appeal would have to be denied.

F.R.D. 661 (M.D. Pa. 1986) (For purpose of finality, "[w]e certainly consider [ ] the pending motions to intervene as unfinished business"); *In re J.D.*, 304 S.W. 3d 522, 527 (Tex. App. 2009) ("A direct appeal is . . . premature due to the presence of intervention"). The good news for appellee from such a result is that this appeal would be dismissed. The bad news is that the judgment of dismissal below would not be a final judgment until the motion to intervene is disposed of.

Another possibility (and one we adopt here) is the approach taken by the U.S. Court of Appeals for the Second Circuit with regard to non-party appeals and an unresolved motion to intervene. In *Drywall Tapers & Pointers of Greater N.Y., Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs. Inc.*, 488 F.3d 88 (2d Cir. 2007), a union dissatisfied with a settlement between a contractor and a competing union moved to intervene in the U.S. District Court. Without a ruling on the motion to intervene, the union nevertheless appealed from a consent injunction between the named parties. Recognizing that the union was a non-party with no right to appeal, the Second Circuit concluded that the unaddressed motion to intervene warranted a novel approach to an "appellate Catch-22":

> Thus, Local 52's status as a non-party prevents us from adjudicating the merits of its challenge to the Consent Injunction. However, we conclude that its non-party status does not prevent us from acting to cut through this appellate Catch-22. We believe it is appropriate to remand Local 52's purported appeal from the Consent Injunction to the District Court to enable that Court, with its jurisdiction restored, to adjudicate the merits of Local 52's intervention motion.

Id. at 95. *See also Ligon v. City of N.Y.*, 743 F.3d 362, 365 (2d Cir. 2014) ("[T]he proposed intervenors moved to intervene in the District Court. Those motions have not been adjudicated. In the circumstances presented here, we believe it preferable that the motions be addressed there in the first instance . . . .").

For these reasons, we shall remand this case for the circuit court to consider the merits of the motion to intervene filed by appellant's attorneys and any subsequent proceedings. In so doing, we express no opinion on how the court should rule on that motion or on any issues briefed in this case.[14]

We are mindful that a remand prolongs what has already become an interminable action and that it may affect a settlement that in most cases would be an admirable achievement. Nevertheless, we are convinced that "the substantial merits of [the] case

[14] Should the circuit court grant the motion to intervene and reconsider the motion to defer dismissal, it may want to examine the strikingly similar case of *Reed v. Pittman*, 242 So. 2d 554 (La. 1970). There, the Supreme Court of Louisiana reversed a trial court's decision to dismiss one of two consolidated actions as abandoned because of inactivity for more than five years, noting:

> We are here concerned simply with the question of whether, when such separate suits are consolidated for trial, steps in the prosecution or defense of the consolidated proceedings may be regarded as taken not only in the principal suit but also in others consolidated for trial with it. We hold that they may.

Id. at 558. *See also* Annot.: What Constitutes Bringing an Action to Trial or Other Activity in Case Sufficient to Avoid Dismissal Under State Statute or Court Rule Requiring Such Activity within Stated Time, 32 ALR 4th 840 at § 3 9[a], 11[a], 16[b] and 18[a] (1984).

will not be determined by affirming, reversing, or modifying the judgment." Md. Rule 8-604(d)(1).

CASE REMANDED WITHOUT AFFIRMANCE OR REVERSAL FOR FURTHER PROCEEDINGS. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.