2011 IL App (2d) 110125-U
No. 2-11-0125
Order filed November 15, 2011



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| In re MARRIAGE OF<br>VIRGINIA E. TURRELL,<br><br>Petitioner-Appellant,<br><br>and<br><br>GRAHAM J. TURRELL,<br><br>Respondent-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court<br>of Du Page County.<br><br><br><br>No. 94-D-1441<br><br>Honorable<br>Linda E. Davenport,<br>Judge, Presiding. |

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

**ORDER**

*Held*: The trial court erred in granting respondent's motion to dismiss petitioner's rule to show cause, which sought an alleged arrearage in maintenance payments. Therefore, we reversed and remanded for additional proceedings.

¶ 1 The marriage of petitioner, Virginia E. Turrell, and respondent, Graham J. Turrell, was dissolved on March 7, 1995. The parties' marital settlement agreement, which was incorporated into the dissolution judgment, provided, as amended, that Graham was to pay Virginia $1,284 per month for five years. The issue of maintenance was reviewable "[a]t the conclusion of five years." On May 11, 2010, Virginia filed a petition for rule to show cause, arguing that Graham had failed to pay

maintenance since June 30, 2003, and was in arrears of over $120,000. Graham filed a motion to strike and dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), arguing that the trial court lacked jurisdiction and, alternatively, that the petition was not called for a hearing within the time allowed by local rules. The trial court granted Graham's motion to strike and dismiss, and it is from this ruling that Virginia appeals. We reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 The maintenance provision in the marital settlement agreement provided:

> "4. The Husband shall pay to Wife as and for maintenance the sum of $1,250.00 per month *for a period of five years* commencing from the entry of the Judgment of Dissolution of Marriage in this cause. *At the conclusion of five years, the issue of maintenance payable by the Husband to the Wife shall be reviewable* by a court of competent jurisdiction. The parties acknowledge that the Wife currently receives, in addition to maintenance, social security disability in the amount of $960.00 per month. The parties further acknowledge that the Wife is afflicted with Lyme's disease, and therefore, dependent upon the Wife's health and employability, *the issue of maintenance shall be reviewable after the period of five years* set forth hereinabove. *The payment of additional maintenance* by the Husband to the Wife shall be dependent upon the Wife's employability, health and needs at that time." (Emphases added.)

An agreed order was contemporaneously filed with the dissolution judgment modifying it in certain respects, including modifying the maintenance provision as follows:

> "That paragraph 4 of the Marital Settlement Agreement is modified so that the sum

of $1,250.00 per month payable as and for maintenance shall be increased to $1,284.00 per month and shall commence as of the month of April 1995. In all other respects paragraph 4 of the Marital Settlement Agreement shall remain the same."

¶ 4 On December 18, 1998, Virginia filed a petition to increase child support and maintenance. On March 2, 2000, Virginia filed a petition to review maintenance, seeking "an order continuing Respondent's obligation to support and maintain Petitioner in the future." The next day, Graham filed a petition seeking to terminate maintenance. In her answer to that petition, Virginia "admit[ted] that five years [had] passed since the entry of the Judgment for Dissolution of Marriage and agree[d] that the issue of maintenance must be reviewed." Following a trial, on May 24, 2001, the trial court found, in relevant part, that there was no credible evidence that Virginia could not work. However, it further found that Virginia should receive some maintenance because she could not be fully employed, as the parties' son was 10 years old and required before and after school care until the age of 12. It ruled: "Petitioner's right to receive and Respondent's obligation to pay maintenance shall be reduced by sixty percent (60%) to the amount of $513.60 per month commencing June 1, 2001, and continuing for a period of two (2) additional years." Virginia appealed the trial court's order, arguing, *inter alia*, that the trial court abused its discretion in its ruling on maintenance.

¶ 5 On appeal, we held that "the trial court abused its discretion when it reduced Graham's maintenance obligation and ordered the termination of maintenance after two years. *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 308 (2002). We stated as follows. In this case, the deciding factor in determining whether to modify or terminate maintenance was Virginia's health. The marital settlement agreement acknowledged that she had Lyme disease and received Social Security disability payments. The agreement stated that the payment of additional maintenance after five years was dependent on Virginia's employability, health, and needs at the time. *Id.* at 309. Virginia

testified that she continued to receive disability and could not work as a nurse due to short-term memory loss and fatigue. A doctor also testified that Virginia could not work because of her symptoms, though the doctor was not her treating physician. Virginia was home-schooling the parties' son, who also had Lyme disease, due to the cognitive and other problems the disease caused him. The trial court found that there was no medical evidence to support Virginia's claim that she was unable to work. However, in doing so, it improperly placed the burden of proof on Virginia, rather than on Graham, who was the party seeking modification. Graham did not meet his burden of showing that there was a substantial change in Virginia's health that would allow her to return to work, and he also did not show that there was a substantial change in his own financial circumstances that would support reducing his maintenance obligation. *Id.* at 309. The reduction in maintenance was therefore an abuse of discretion, and "the two-year limitation on Graham's maintenance obligation [could not] stand" because there was no guarantee that Virginia's medical condition would improve by then. *Id.* at 309-10. We stated, "Certainly a review of the maintenance issue would be appropriate. Upon remand the court may in its discretion determine if and when such a review should take place." *Id.* at 310. We later stated in the order, "We reverse the reduction and limitation of Virginia's maintenance." *Id.* at 312. The appeal as a whole was affirmed in part, vacated in part, and reversed in part, and the cause was remanded. *Id.* The appellate court's mandate was filed with the trial court on May 22, 2003.

¶ 6 On July 3, 2003, Virginia filed a motion to transfer venue to McHenry County. She noted the outcome of this court's decision and stated that an arrearage existed for Graham's non-payment of maintenance and child support. Virginia further stated that she was residing in McHenry County and Graham was living in Cook County.

¶ 7 On July 28, 2003, the trial court issued an order dismissing, on its own motion, pending motions for attorney fees and costs based on local rule 6.04(f), which states that a motion not called for a hearing within 60 days of filing may be stricken upon motion or by the court. 18th Judicial Circuit Ct. R. 6.04(f) (eff. May 10, 1993). The order further stated that, based upon the dismissals, Virginia's motion to transfer venue was moot.

¶ 8 On September 17, 2003, Virginia filed a *pro se* motion to reconsider her attorney fee petition. She noted that this court's mandate was issued in May 2003, and that our decision remanded issues back to the trial court. She stated that "this matter is pending, and not yet fully determined." No ruling on this motion appears in the record. Nothing was filed in the case from 2004 to 2007. In 2008 and 2009, there were petitions and orders relating to child support and college expenses.

¶ 9 On May 11, 2010, Virginia filed a petition for rule to show cause, the subject of the instant appeal. She alleged that Graham had "failed to make any maintenance payments since June 30, 2003 and [was] in arrears in an amount in excess of $120,000." Virginia alleged that the failure to make the maintenance payments was a willful and contumacious violation of the judgment for dissolution of marriage.

¶ 10 On August 26, 2010, Graham filed a motion to strike and dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), arguing that the trial court lacked jurisdiction. Graham argued that the appellate court's order became final on May 22, 2003, when its mandate was filed with the trial court. Graham argued that Virginia then had 30 days to reinstate the case, and having failed to do so, the trial court lost jurisdiction over the issue of maintenance. Graham alternatively argued that the petition was not called for a hearing within the time period allowed by local rule 6.04(f).

¶ 11 The trial court granted Graham's motion to strike and dismiss on October 4, 2010. The trial court orally stated that the maintenance order was reviewable after five years. It stated that it did not think that Virginia could sit on her rights, wait seven years, and let alleged arrearages accumulate. It stated that Virginia had an affirmative obligation to file a petition within a reasonable time, which she failed to do.

¶ 12 Virginia filed a motion to reconsider on November 2, 2010. The trial court denied the motion on January 12, 2011. Virginia timely appealed.

¶ 13 II. ANALYSIS

¶ 14 A section 2-619(a) motion admits the legal sufficiency of a claim but asserts certain external defects or defenses outside that pleading that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). Specifically, section 2-619(a)(1) allows for the involuntary dismissal of an action based on lack of subject matter jurisdiction. 735 ILCS 5/2-619(a)(1) (West 2010). In reviewing the grant of a section 2-619 motion, we must interpret the pleadings and supporting materials in the light most favorable to the plaintiff. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008). A section 2-619 dismissal resembles the grant of a motion for summary judgment; we must determine whether a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). We review *de novo* the grant of a motion to dismiss under section 2-619. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009)

¶ 15 This case additionally involves the interpretation of a marital settlement agreement. A marital settlement is construed in the same manner as a contract. *In re Marriage of Doermer*, 2011 IL App (1st) 101567, ¶27. If the language of the settlement agreement is unambiguous, we must

ascertain the parties' intent solely from the agreement's plain language. *Id.* Language is unambiguous when it is susceptible to only one reasonable interpretation. *Id.* We review *de novo* the interpretation of a marital settlement agreement. *Id.*

¶ 16 We now address Graham's argument that, contrary to Supreme Court Rule 341(h)(6) (Ill. S. Ct. R. 341(h)(6) (eff. Sept. 1, 2006)), Virginia failed to include several relevant facts in her brief. Therefore, according to Graham, her statement of facts is not fair and accurate. Graham states in his conclusion that Virginia's prayer for relief on appeal should be denied due to the alleged factual deficiencies. However, Virginia's brief sets out the basic facts necessary for the appeal, with accurate citations to the record. While the better practice would have been to include some additional relevant facts in her recitation, we find no deficiencies that would warrant chastising Virginia, much less denying her the relief she seeks on appeal solely on this basis.

¶ 17 Turning to the merits, Virginia argues that Graham alleged lack of subject matter jurisdiction because she failed to file a petition for review of the maintenance award within 30 days of the filing of this court's mandate. Virginia argues that there is no legal support for such a proposition, but rather *In re Marriage of Rodriguez*, 359 Ill. App. 3d 307 (2005), and *In re Marriage of Thornton*, 373 Ill. App. 3d 200 (2007), provide for the contrary. In *Rodriguez*, the dissolution judgment provided for maintenance of $320 per week " 'reviewable within four years.' " *Rodriguez*, 359 Ill. App. 3d at 308. After the four-year period expired, the husband sought to terminate maintenance. The trial court ruled in his favor, stating that the wife had not sought review of maintenance within the four-year period, so it no longer had jurisdiction over the issue. *Id.* at 310. The appellate court reversed, reasoning that the dissolution judgment provided for reviewable rehabilitative maintenance, rather than time-limited maintenance with no review provision. The court stated,

> "it is our view that anytime the court provides for maintenance reviewable after a time specified, the court retains jurisdiction to review the maintenance until one or both of the parties petitions for review. Upon review the trial court can consider whether maintenance should continue and, if so, whether the amount should be increased or decreased. Until a party petitions for review, the maintenance award shall continue as ordered." *Id.* at 313.

¶ 18 In *Thornton*, the settlement agreement provided that the husband would pay the wife maintenance " 'for a total of 30 months.' " *Thornton*, 373 Ill. App. 3d at 211. The agreement further provided, " 'The maintenance shall be reviewed at the end of this period, to determine whether it should continue and, if so, to what extent.' " *Id.* The wife did not file a petition to review maintenance until about one year after the 30 months expired. *Id.* at 210. The appellate court held that, as in *Rodriguez*, the trial court retained jurisdiction to review maintenance until the wife filed her petition. However, the court also held that the wife's maintenance award was for a defined period, unlike *Rodriguez*. Thus, the husband's obligation under the dissolution judgment ceased at the end of that period but was reviewable. The court stated that the earliest any additional maintenance installments could accrue was when the wife filed her petition and gave notice. *Id.* at 212.

¶ 19 Virginia argues that under *Rodriguez* and *Thornton*, the trial court properly retained jurisdiction to review maintenance here. Virginia also argues that *Thornton* is distinguishable in that the settlement agreement there provided for maintenance for a finite time period with a definite ending date. Virginia argues that the maintenance provision here is more analogous to *Rodriguez*, in that it did not state that maintenance would terminate at the end of five years, but rather expressly provided for review after five years. Virginia reasons that if the trial court did not lose subject matter jurisdiction to hear a petition to review maintenance, it did not lose jurisdiction to hear a

petition for rule to show cause under the factual circumstances in the case. Virginia also argues that the trial court improperly put the burden on her to seek review, whereas no such burden was upon her under the marital settlement agreement. Virginia argues that both parties had an obligation to seek review if they desired either an increase or termination, for otherwise the maintenance award would continue in the prior amount, as enunciated by *Rodriguez*. See *Rodriguez*, 359 Ill. App. 3d at 313 ("Until a party petitions for review, the maintenance award shall continue as ordered").

¶ 20 Virginia acknowledges that the trial court made a 2001 ruling limiting maintenance and providing a two-year timeframe. However, she argues that when this court reversed that order on appeal, we left the parties as they stood prior to the order. Virginia argues that upon the filing of this court's mandate, maintenance was again set at $1,284 per month, and reviewable. Virginia argues that, moreover, an arrearage accrued between the reduced monthly payment and the reinstated monthly amount. According to Virginia, by dismissing the petition for rule to show cause, the trial court denied her the right to recover her vested property and terminated her maintenance without notice to her. Virginia further argues that the trial court erroneously relied on a *laches* defense that was never pleaded or argued by Graham.

¶ 21 Graham argues that *Rodriguez* has limited, if any, application to this case because the issue there was jurisdiction to modify or review maintenance, while the issue here was Virginia's petition for rule to show cause seeking to enforce a prior order. Graham argues that, in other words, this appeal is based on a petition seeking contempt, not a petition seeking review. Graham further argues that while *Rodriguez* stated that the maintenance award would continue as ordered until a party petitions for review, the statement can be read only in the context of that case, where maintenance was reviewable in four years. Graham argues that here, similar to *Thornton*, he was only required to pay maintenance for a specified time, being five years, and after that, the "issue of maintenance"

was reviewable, meaning maintenance was not guaranteed. Graham also cites the settlement agreement's language that "payment of additional maintenance by [Graham] to [Virginia] shall be dependent on [Virginia's] employability, health and needs at that time." Graham argues that the only interpretation of "additional maintenance" is maintenance in addition to what he was obligated to pay, and that the original maintenance provision is not one that can be enforced beyond the five years mandated. For additional support, Graham cites the record at prove-up, during which the trial court stated that Graham had to pay maintenance for five years and "may have to pay maintenance beyond that, depending on whether" Virginia continued to be in need of maintenance.

¶ 22 Graham argues that another distinction between *Rodriguez* and *Thornton* as compared to this case is that Virginia's petition for review was filed and addressed, meaning that the right to review was exercised and nothing continued. He points out that the trial court reduced maintenance in 2001, and following an appeal, this court reversed that order and remanded in 2002. He argues that, therefore, the original maintenance order remained unaltered with its mandate that the maintenance shall be paid for five years. Graham argues that Virginia acknowledged the remand when she filed her motion to transfer venue, but in July 2003 the trial court struck the motion as moot. Graham maintains this meant that the trial court determined that the issue of maintenance was not before it in July 2003. He argues that Virginia did not challenge the July 2003 order in any legitimate manner, for she did not file a timely motion for reconsideration and did not appeal within 30 days.

¶ 23 Interpreting the language of the marital settlement agreement *de novo*, we agree with Graham that the maintenance clause in the marital settlement agreement is more akin to *Thornton* than *Rodriguez*. The dissolution judgment incorporating the marital settlement agreement was entered on March 7, 1995. The clause here sets maintenance "for a period of five years" and states that "[a]t

the conclusion of five years, the issue of maintenance payable by [Graham] to [Virginia] shall be reviewable." It further states that "dependent upon [Virginia's] health and employability, the issue of maintenance shall be reviewable after the period of five years." Finally, the clause states that the payment of additional maintenance by [Graham] to [Virginia] shall be dependent upon [Virginia's] employability, health and needs at that time." We agree with Graham that by stating that "the *issue* of maintenance *** shall be reviewable" (emphasis added) after five years, depending upon Virginia's health and employability, and that "payment of *additional* maintenance" (emphasis added) will depend on Virginia's "employability, health, and needs at that time," the settlement agreement did not provide for an automatic continuation of maintenance after the five-year period. Rather, whether Virginia would receive any "additional" or further maintenance payments would depend on her situation at that time. Virginia attempts to hang her hat on *Rodriguez*'s statement that "[u]ntil a party petitions for review, the maintenance award shall continue as ordered." *Rodriguez*, 359 Ill. App. 3d at 313. However, the statement, which we note was made without citation to authority, was appropriate under the facts of *Rodriguez*, where the marital settlement agreement was interpreted to provide for ongoing maintenance. In contrast, under the language of the agreement here, as in *Thornton*, Graham's obligation under the marital settlement agreement ended after five years but was reviewable by the court. Correspondingly, the earliest any additional maintenance installment could accrue was when Virginia filed a petition and gave notice. See *Thornton*, 373 Ill. App. 3d at 212.

¶ 24 That being said, consistent with this interpretation, on March 2, 2000, just days before the five-year period ended, Virginia herself filed a petition seeking "an order continuing Graham's obligation to support and maintain Virginia in the future." The trial court ended up reducing and limiting maintenance, and we reversed on appeal. We recognize that, in general, a reversal

abrogates the trial court's judgment and leaves the case as it previously stood, restoring the parties to their original positions. *Garley v. Columbia LaGrange Hospital*, 377 Ill. App. 3d 678, 682 (2007). That is, "[o]nce a judgment is reversed on appeal, it no longer exists." *Wildey v. Paulsen*, 385 Ill. App. 3d 305, 315 (2008). However, here we did not reverse the trial court's entire order granting additional maintenance to Virginia, but rather reversed just its "reduction and limitation of Virginia's maintenance." *Turrell*, 335 Ill. App. 3d 297. It is apparent from our opinion that we ordered that maintenance continue at the previous rate, which would apply retroactively to when the original five-year period ended.

¶ 25 We further agree with Virginia that, contrary to the allegations in Graham's motion to strike, the trial court did not automatically lose jurisdiction over the maintenance issue 30 days after our mandate was filed with the trial court. Graham argues that Virginia had to reinstate the case in order to benefit from our ruling, but we reversed the reduction and limitation on maintenance without a direct remand on the maintenance issue. *Id.* at 312; see *Russell v. Klein*, 46 Ill. App. 3d 660, 664 (1977) (a judgment that is reversed without remand cannot be reinstated in the trial court). We recognize that we stated that a two-year *limit* on the maintenance could not stand, but a future *review* of the maintenance issue would still be appropriate, and upon remand the trial court could determine whether to provide for such a review, and at what future date. See *id.* at 310. That is, we contemplated that the case would have further proceedings on other issues, and we gave the trial court the discretion to decide whether to include a new review period for maintenance as well. *Id.* The trial court automatically reacquires jurisdiction upon the receipt of the appellate court's mandate, even if the prevailing party has not acted, though the losing party must receive notice before new proceedings may start. *People v. Eidel*, 319 Ill. App. 3d 496, 506 (2001). The prevailing party must reinstate the cause "within a reasonable time." *People v. NL Industries, Inc.*,

297 Ill. App. 3d 297, 300 (1998). What constitutes a reasonable time depends on the case's circumstances, including the party's reasons for any undue delay. *Ryan v. Kontrick*, 335 Ill. App. 3d 225, 228-29 (2002). A ruling on a motion for reinstatement is within the trial court's discretion. *Id.* at 229. Thus, even under a reinstatement scenario, a trial court does not automatically lose jurisdiction after 30 days. A party may also reasonably choose to not proceed and incur litigation costs where the prevailing party has apparently abandoned the cause. See *Miller v. Bloomberg*, 126 Ill. App. 3d 332, 338-39 (1984). A party "who does not act [to reinstate a case] is saddled with the result of his inaction" and "risks forgoing whatever benefits it might have gained from pursuing further proceedings on remand." *Eidel*, 319 Ill. App. 3d at 507-08. Here, although Virginia prevailed on her maintenance argument on appeal, Graham had the most to gain from the trial court setting a new review date for maintenance on remand, and he could have sought to reinstate the case for that benefit.

¶ 26 Virginia was not seeking to reinstate the case here. We conclude that she had the right to file a petition for rule to show cause for past-due maintenance, as she was entitled to additional maintenance under the trial court's May 2001 order, as altered by this court's opinion to not include a reduction or limitation on maintenance. We agree with Virginia that the trial court should not have relied on the *laches* doctrine in granting the motion to dismiss, as *laches* in an affirmative defense (*Pielet v. Hiffman*, 407 Ill. App. 3d 788, 798 (2011)) that Graham did not raise at the time of the trial court's ruling. *Cf. Lease Partners Corp. v. R & J Pharmacies Inc.*, 329 Ill. App. 3d 69, 75-76 (2002) (a defendant must raise the affirmative defense of statute of limitations, and a trial court should not decide the issue *sua sponte*). Accordingly, we reverse and remand for further proceedings.

¶ 27 We acknowledge that we review the trial court's judgment rather than its reasoning and therefore may affirm on any basis supported by the record (*Forsberg v. Edward Hospital & Health*

*Services*, 389 Ill. App. 3d 434, 440 (2009)), regardless of whether the trial court based its decision on proper grounds *(Mutual Management Services, Inc. v. Swalve*, 2011 IL App. (2d) 100778, ¶11). In this case, Graham also sought dismissal on the basis that the petition was not called for a hearing within the time period allowed by local rule 6.04(f). However, that rule states that a motion "may" be stricken by the court (18th Judicial Circuit Ct. R. 6.04(f) (eff. May 10, 1993)), thereby making it a discretionary decision rather than a basis for automatic dismissal. We further acknowledge that Virginia waited over seven years to seek to collect the additional maintenance, and enforcement after such a delay could be to Graham's prejudice. Graham filed the motion to dismiss before filing his answer to the petition, so clearly he still has time to assert an affirmative defense, such as *laches*. See 735 ILCS 5/2-613 (West 2010) (affirmative defenses must be set forth in answer or reply); see also *Mondschein v. Power Construction Co.*, 404 Ill. App. 3d 601, 607 (2010), citing 735 ILCS 5/2-616(a) (West 2006) (a party may seek to amend its pleadings to assert an affirmative defense at any time prior to judgment).

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we reverse the judgment of the Du Page County circuit court and remand for further proceedings consistent with this order.

¶ 30 Reversed and remanded.