

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHLEEN K. VON FUMETTI AND
CYRIL W. VON FUMETTI

FILED

AUG 26 1987

CLERK SUPREME COURT

Upon the Petition of
KATHLEEN K. VON FUMETTI

Petitioner-Appellant,

And Concerning
CYRIL W. VON FUMETTI,

Respondent-Appellee.

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Filed August 26, 1987

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Appeal from the Iowa District Court for Dubuque County (No. 3748) -
Thomas H. Nelson, Judge.

Petitioner appeals from summary judgment on her application to modify
the property provisions of her dissolution decree. **AFFIRMED.**

Richard Whitty of O'Connor & Thomas, Dubuque, for petitioner-appellant.

Stephen J. Juergens of Fuerste, Carew, Coyle, Juergens & Sudmeier,
Dubuque, for respondent-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Petitioner Kathleen K. Von Fumetti sought to modify the property division made in her dissolution decree. The trial court entered summary judgment dismissing her claim. Kathleen contends (1) the trial court abused its discretion in not allowing further discovery before ruling on the motion for summary judgment, and (2) the trial court erred in ordering summary judgment. We find no error on these issues. We determine the trial court has no jurisdiction to entertain a petition to modify the property division of a dissolution decree filed nearly five years after the divorce decree was entered.

The parties' marriage was dissolved by judgment and decree of the district court in April, 1981. Though the case was settled by stipulation at the time set for trial, substantial discovery preceded the trial date. In the fall of 1985, Cyril and Kathleen each sought modification of the alimony and child support provision of the decree. They resolved the child support issue by stipulation, but trial was held and a decree entered on the alimony issue.

On April 14, 1986, Kathleen filed an application to modify the property division made in the April 1981 decree dissolving the marriage. She claimed she was entitled to modification because Cyril mistakenly or fraudulently failed to disclose all the property he held when the marriage was dissolved. Cyril answered and denied the claim. Both parties then filed interrogatories prior to the filing on the motion for summary judgment.

On June 16, 1986, Kathleen filed 19 interrogatories with approximately 43 subparts. On July 15, 1986, Cyril objected to Kathleen's interrogatories claiming because of their multiple subparts they constituted more than 30 interrogatories in number. He cited Iowa R. Civ. P. 126 which provides a party shall not serve more than 30 interrogatories on any party except by agreement of

parties or leave of court for good cause. Cyril's objection also set forth the extensive discovery and exchange of information which had transpired through the dissolution and earlier modification matter.

On May 3, 1986, Cyril filed five interrogatories inquiring as to all known facts upon which Kathleen based her claim he mistakenly or fraudulently failed to disclose all property at the time of the dissolution decree. On June 27, 1986, Kathleen answered Cyril's interrogatories and stated her claim was based on at least 200 shares of John Deere stock that were not disclosed. On July 22, 1986, she supplemented her answers adding the claim Cyril reported interest from DuTrac on his tax returns and this was evidence of his failure to accurately disclose his financial condition.

On July 30, 1986, Kathleen filed a motion to compel Cyril to answer interrogatories. On August 28, 1986, the trial court entered the following order:

After reviewing petitioner's supplemental answer to respondent's Interrogatory No. 1, the court finds the same binds petitioner's position with sufficient specificity to make the matters set forth and documents identified the sole evidence of the complaint relied upon.

On September 17, 1986, the trial court determined Kathleen's interrogatories were excessive in number and sustained Cyril's objection. Kathleen sought no further discovery until after Cyril filed his motion for summary judgment.

On November 12, 1986, Cyril filed a motion for summary judgment claiming the John Deere stock and DuTrac Credit Union account were both disclosed at the time of the original decree. On November 25, 1986, Kathleen filed recast interrogatories directed to Cyril. On November 26, 1986, she filed a request for production. On December 1, 1986, Kathleen resisted Cyril's motion for summary judgment. She claimed (a) further discovery was necessary, and (b) there were disputed facts. Kathleen did not deny the John Deere stock and DuTrac account had been disclosed at the time the dissolution was granted.

On December 5, 1986, the trial court found Kathleen was bound by its August 28, 1986, order to her claim of misrepresentation on the John Deere stock and at hearing she admitted the John Deere stock had been disclosed. The trial court sustained Cyril's motion for summary judgment. It is from this order that Kathleen appeals.

I.

We first address Kathleen's claim she was precluded from pursuing necessary discovery prior to the trial court's ruling on the motion for summary judgment. When a party claims he or she has not been given sufficient time to make discovery for purposes of resisting a motion for summary judgment, it is within the discretion of the trial court to determine whether to order a continuance for the purpose of allowing the opposing party to make additional discovery. Miller v. Continental Ins. Co., 392 N.W.2d 500, 503 (Iowa 1986); Moser v. Thorp Sales Corp., 312 N.W.2d 881, 891 (Iowa 1981); Jones v. Swanger, 167 N.W.2d 702, 703 (Iowa 1969). The issue of the trial court allowing additional time to file opposing affidavits is discretionary. Matter of Guardianship and Conservatorship of Cavin, 333 N.W.2d 840, 841 (Iowa 1983). However, the trial court's discovery discretion is partially limited by the supreme court's stated preference for allowing parties against whom a motion for summary judgment is made to complete discovery before summary judgment is entered. Miller, 392 N.W.2d at 503; Moser, 312 N.W.2d at 891; Iowa State Dept. of Health v. Hertko, 282 N.W.2d 744, 755 (Iowa 1979); Carter v. Jernigan, 227 N.W.2d 131, 135 (Iowa 1975).

Summary judgment is not a substitute for trial, but the procedure must not be so summary as to deprive a litigant of a reasonable opportunity to meet the issues presented in the motion for summary judgment. Miller, 392 N.W.2d

at 503. The right to discovery at such juncture is not unlimited and case law talks of opportunity to complete reasonable discovery. Johnson v. RAC Corp., 491 F.2d 510, 514 (4th Cir. 1974); Miller, 392 N.W.2d at 503. Interrogatories should be allowed as are reasonably necessary. Buchholtz v. Swift & Co., 62 F.R.D. 581, 595 (D. Minn. 1973). The party should be given a reasonable opportunity to complete discovery. Penn Galvanizing Co. v. Lukens Steel Co., 59 F.R.D. 74, 80 (E.D. Pa. 1973). There must be a fair opportunity to use the discovery process. Brick v. Wichita, 195 Kan. 206, 211, 403 P.2d 964, 969 (1965). The rules provided for discovery and inspection shall be liberally construed. Iowa R. Civ. P. 121(b). The trial court has wide discretion in ruling upon the discoverable nature of requested information and will not be reversed unless abuse of discretion is found. Farnum v. G.D. Searle Co., 339 N.W.2d 384, 389 (Iowa 1983); Pollock v. Deere and Co., 282 N.W.2d 735, 738 (Iowa 1979). Civil litigants should be allowed to discover information if it appears reasonably calculated to lead to discovery of admissible evidence. State Ex Rel Shanahan v. Iowa District Court, Iowa County, 356 N.W.2d 523, 530 (Iowa 1984). The scope of discovery is generally not limited to evidence admissible at trial. Mason v. Robinson, 340 N.W.2d 236, 239 (Iowa 1983). Discovery rules are to be liberally construed to effectuate disclosure of relevant information to parties. Farnum, 339 N.W.2d at 389. Iowa courts have recognized the important truthseeking process of our judicial system requires that litigants be given wide access to sources of relevant information. Shanahan, 356 N.W.2d at 531.

With these principles before us we review the record. This was the third time the property interests of the parties were before the Iowa courts. Kathleen had the benefit of an extensive exchange of information and discovery in the earlier proceedings. When Cyril sought to identify the nature of Kathleen's

claim she limited it to the John Deere stock and interest from DuTrac. The trial court entered an order restricting her claim to these two issues. There is no showing Kathleen did not have information on these items.

In resisting the motion for summary judgment Kathleen proceeded on a new theory. She did not challenge Cyril's assertion the John Deere and DuTrac items were accounted for in the original action. She made no showing her new theory was based on information not available to her at the time she answered interrogatories. She had not challenged the trial court's order limiting her claim to the John Deere stock. She did not recast her stricken interrogatories until November 25, 1986, nearly two weeks after Cyril's motion for summary judgment was filed and over two months after her interrogatories had been stricken. Kathleen was given a reasonable opportunity to complete discovery prior to the trial court's ruling on Cyril's motion for summary judgment. The trial court did not abuse its discretion.

II.

Kathleen next claims the trial court erred in granting summary judgment. Cyril claimed he reported the John Deere stock and DuTrac. There was no factual issue generated on his failure to report these two items. We find no basis to allow Kathleen to expand her claim beyond those stated in the interrogatories where the record clearly shows the information and facts she now allegedly uses for her expanded claim were available to her and the trial court, in an earlier and unchallenged order, had limited her claim.

Though the issue was not raised by Cyril nor addressed by the trial court, we note the only claim advanced by Kathleen's petition is one for the modification of the property division made in a five-year-old decree. Only those issues pleaded at the time of submission of a motion for summary judgment are issues in the

case. See Federal Land Bank v. Steinlage, No. 86-408, slip op. at 3-5 (Iowa July 22, 1987).

[A] judgment providing for or approving and adopting an adjustment of property rights as between the parties to a divorce proceeding, like any ordinary judgment, cannot be modified or vacated after it has become final, in the absence of fraud, coercion or other grounds on which ordinary judgments may be reviewed, modified, vacated or set aside.

Knipfer v. Knipfer, 259 Iowa 347, 355, 144 N.W.2d 140, 144 (1966). A property division is not subject to modification in the absence of fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case. In re Marriage of Knott, 331 N.W.2d 135, 136 (Iowa 1983); In re Marriage of Johnson, 299 N.W.2d 466, 467-68 (Iowa 1980); Knipfer, 259 Iowa at 356, 144 N.W.2d at 145. Inequitable property division in a dissolution decree should be corrected by an appeal. Thereafter, property rights ought to be accorded some permanency. Knott, 331 N.W.2d at 137. A motion to modify or vacate is not available to supply deficiencies, if any, in the evidence adduced at trial. In re Marriage of Full, 255 N.W.2d 153, 158 (Iowa 1977). See Miller v. Miller, 190 Neb. 816, 817, 212 N.W.2d 646, 647 (1973).

To modify the property division Kathleen must proceed under Iowa R. Civ. P. 252. Iowa R. Civ. P. 253 provides a petition for relief under Iowa R. Civ. P. 252 must be filed within one year after the rendition of the judgment or order involved. The power of the trial court to grant motions for new trial under Rule 252 is based upon and limited by the applicable rules and statutes. If the proceedings were not instituted within the time limited by Rule 253, the court has no jurisdiction to consider the petition. See Kern v. Woodbury County, 234 Iowa 1321, 1324, 14 N.W.2d 687, 688 (1944). See also Gibbons v. Belt, 239 Iowa 961, 33 N.W.2d 374 (1948) (Court exceeded authority in vacating judgment for irregularity where action to vacate not filed within one year pro-

vided by Iowa R. Civ. P. 253); Davis v. Wilson, 239 Iowa 337, 30 N.W.2d 487 (1948) (Proceedings were barred at the time of filing under the provisions of Iowa R. Civ. P. 253); Pedersen v. Pedersen, 235 Iowa 708, 17 N.W.2d 520 (1945) (Court held appellant seeking a new trial on property provision of dissolution decree cannot bring herself under the provisions of Iowa R. Civ. P. 252 because she did not act within the one year time limit provided therein).

The trial court has no jurisdiction to modify the property division made in the 1981 decree because no petition to modify was filed within one year of its rendition. This issue supports the trial court's dismissal of Kathleen's claim. Davis, 239 Iowa at 345, 30 N.W.2d at 491.

We affirm the trial court in sustaining the motion for summary judgment.

III.

Kathleen requests attorney fees on appeal. Her request is denied.

AFFIRMED.