

STATE OF MICHIGAN
COURT OF APPEALS

BURGOYNE LEE JONES,

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

DANA MICHELLE JONES,

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellant.

UNPUBLISHED
September 13, 2007

No. 270475
Oakland Circuit Court
LC No. 2005-713663-DO

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Burgoyne Lee Jones appeals as of right and defendant Dana Michelle Jones cross appeals by delayed leave granted from the trial court’s default judgment of divorce. We affirm.

Plaintiff’s sole claim on appeal is that the trial court erred by ordering a default for his failure to comply with the court’s order requiring him to pay temporary support of \$3,200 and attorney fees of \$1,000. Contrary to what plaintiff argues, the record does not indicate that the trial court used the sanction of default as a “hammer” to enforce the temporary support order.¹ Although it is true that the trial court ordered temporary support of \$3,200 and attorney fees of \$500, and added that it would default plaintiff if he failed to timely pay these amounts, plaintiff’s classification of the default as a condition for nonpayment distorts the sequence and nature of the court’s action. The temporary support and fees were actually conditions for adjourning trial after plaintiff failed to appear for trial on February 10, 2006. The trial court’s decision to condition the adjournment on plaintiff’s payment of costs is authorized by MCR 2.503(D)(2). The trial court sanctioned plaintiff an additional \$500 on March 8, 2006, pursuant to MCR 2.114, because it determined that plaintiff’s motion to set aside the temporary support portion of its order was frivolous.² The court entered a default judgment on March 10, 2006, after being advised that

¹ We also find no basis in the record for defendant’s assertion that the trial court imposed a “fine” for plaintiff’s failure to comply with the support order.

² Although the parties’ prenuptial agreement expressly provides that neither party will seek or be
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plaintiff had not made any payment as ordered, and after it rejected plaintiff's claim that he should be excused from making the payments because he had exhausted all his assets.

Because there was no subpoena or order requiring plaintiff's attendance and that counsel appeared on plaintiff's behalf, we might ordinarily find merit in plaintiff's claim that a default was improper. See *Banta v Serban*, 370 Mich 367, 369-370; 121 NW2d 854 (1963); *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517; 449 NW2d 916 (1989). Here, however, plaintiff's counsel sought an adjournment of the scheduled trial and the trial court ultimately decided to grant an adjournment, subject to the conditions imposed. Plaintiff's counsel offered no excuse for plaintiff's absence from the scheduled trial other than plaintiff's need to go to Oregon to negotiate a business contract that was expiring. Plaintiff's counsel did not offer any excuse for her failure to file a pretrial motion for an adjournment other than claiming that she did not know that she could move for an adjournment without defendant's consent. Plaintiff's counsel did not object to the trial court's decision to grant an adjournment, conditioned on plaintiff paying temporary support and attorney fees. Instead, she actually approved the trial court's order as to both form and substance. The trial court correctly treated plaintiff's counsel's approval as an agreement to its order. MCR 2.117(B)(1). Consent orders generally "cannot be attacked or altered absent proof of a mistake, inadvertence, surprise or excusable neglect." *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985). Moreover, "[e]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Having received the full benefit of the adjournment, plaintiff may not now seek to avoid the conditions imposed by the trial court. Under the circumstances, the trial court did not abuse its discretion by proceeding with a default judgment in defendant's favor.

Turning to defendant's claim on cross appeal, we find no support for defendant's claim that the trial court disregarded the terms of the prenuptial agreement. Consistent with MCR 3.210(B)(2), the trial court required that defendant present proofs establishing the amount owed to her under the terms of the prenuptial agreement before entering the default judgment. See *Wyskowski v Wyskowski*, 211 Mich App 699, 702; 536 NW2d 603 (1995). We review a trial court's findings of fact under the clearly erroneous standard, giving deference to its special opportunity to assess the credibility of witnesses who appear before it. MCR 2.613(C); *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

Here, defendant's proofs rested largely on the credibility of her own testimony. In accordance with the prenuptial agreement, the trial court awarded defendant a flat \$200,000 derived from the length of the couple's marriage. The court also sought to restore defendant's pre-marriage net worth as prescribed by the prenuptial agreement. Although defendant testified that \$188,000 was required to restore her net worth to her pre-marriage level, the trial court found that the appropriate amount was \$94,000. To the extent that defendant now claims that she should have been awarded \$345,300 with respect to her net-worth claim, for a total judgment of \$545,300, we find no merit to this claim. Even without considering the parties' agreement

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entitled to spousal support, the temporary support, ordered as a condition of adjournment, should properly be viewed as an interim payment on plaintiff's liability to defendant under the terms of their agreement.

that plaintiff's liability would not exceed 85 percent of his own net worth at the time the divorce action was filed, the parties agreed that plaintiff was only required to pay an amount sufficient to restore defendant to the amount of her net worth as specified in the agreement. To the extent that defendant might be challenging the trial court's factual finding regarding the amount necessary to restore defendant's net worth, defendant has not demonstrated any clear error with the trial court's finding.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald