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Appeals Court of Massachusetts.

Katia DE OLIVEIRA
v.
Celso R. MELO.

19-P-203
|
Entered: December 16, 2019.

By the Court (Vuono, Desmond & Ditkoff, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The parties, Katia De Oliveira (mother) and Celso R. Melo (father), are the parents of a son born on August 8, 2008. The mother appeals from an order denying her motion brought under Mass. R. Dom. Rel. P. 60 (b) (4), which sought relief from a modification judgment entered on June 27, 2012 (2012 modification judgment) by a judge of the Probate and Family court transferring sole legal and physical custody of the parties' child from the mother to the father. For the reasons that follow, we agree with the mother that the modification judgment is void. We therefore reverse the order denying the mother's rule 60 (b) (4) motion, and remand the case for further proceedings.

Background. The parties, who were never married to each other, were living in Massachusetts when their child was born. It appears from the record that the parties are Brazilian nationals and that the mother was an undocumented alien at that time.[2] In January 2011, a custody judgment entered (incorporating the parties' stipulation) granting the mother primary physical custody, and requiring her to obtain written permission from the father before traveling outside of the United States with the child. On October 27, 2011, the mother and the child moved to Brazil, allegedly with the father's oral permission.[3] However, on March 5, 2012, the father filed a complaint for modification in the Probate and Family Court seeking sole physical custody on the basis that the mother had removed the child to Brazil without the court's permission.[4]

The father had the complaint served at the mother's former address in Leominster, despite knowing that she had moved to Brazil. The mother never answered the father's complaint. On June 11, 2012, the father and his counsel appeared before a judge of the Probate and Family Court for a pretrial conference on the father's modification complaint. The mother was not present at the pretrial conference, and no attorney appeared on her behalf. In his pretrial memorandum, the father indicated that the mother currently lived in Brazil and her "last known address" was her former Leominster residence. The father alleged that the mother had removed the child from Massachusetts "without notice" to him. The certificate of service accompanying the father's pretrial memorandum indicated that it had been served "upon the attorney of record for each (other) party in hand on June 11, 2012," but no attorney had appeared on the mother's behalf.

***2** As noted, on June 27, 2012, the judge issued the modification judgment transferring sole physical and legal custody of the child to the father. The judge's findings in support of the modification judgment consisted solely of the following: (1) the mother "was properly served at her last known address and has not answered the complaint"; (2) the "[f]ather testified that ... [he] enjoyed a close relationship with the child, and that the child was removed from the country without his permission"; and (3) "the father is a fit parent, ... the child has resided [in Massachusetts] for over six months prior to [the] mother removing him, and that this court has jurisdiction over custody matters [pursuant to] G. L. c. 209B."

The father then initiated proceedings under the Hague Convention in an effort to return the child to the United States. The mother allegedly learned of the 2012 modification judgment when the proceedings commenced in Brazil. The Brazilian Hague Court ultimately declined to order the child's return to the United States, finding that no wrongful removal had occurred as the father had consented to the move. This decision was upheld by a Brazilian appellate court.

On April 7, 2018, the mother returned to the United States with the child, having been granted humanitarian parole while she pursued an asylum claim. Soon after her arrival, she filed a pro se complaint for modification; however, the complaint was never served on the father. On June 4, 2018, the father filed a complaint for modification requesting permission to remove the child to New Hampshire. Pursuant to a temporary order issued on the same day by a different judge, the child began residing primarily with the father in New Hampshire; a further temporary order dated June 27, 2018, permitted parenting time with the mother. On September 24, 2018, the mother filed a motion under Mass. R. Dom. Rel. P. 60 (b) (4) to vacate the 2012 modification judgment, claiming that proper service of the father's complaint was never made and that she did not receive actual notice, and that the judgment was therefore void. The motion was denied. The judge concluded that "the adequacy of service upon [the] [m]other ... was addressed appropriately in the [modification judge's] findings," and the mother's "delay in bringing this motion [was] unreasonable" since she had "constructive notice" of the 2012 modification judgment due to "her participation in the Hague proceedings beginning in May 2012." The present appeal followed.

Discussion. We review the denial of a motion under rule 60 de novo. See Field v. Massachusetts Gen. Hosp., 393 Mass. 117, 118 (1984) (analyzing denial of motion for relief from judgment under identical Mass. R. Civ. P. 60 [b] [4] de novo). We conclude that the 2012 modification judgment is void. Contrary to the judge's conclusion, the service of process did not conform to the requirements of due process of law. See Wang v. Niakaros, 67 Mass. App. Ct. 166, 169-170 (2006). See also Farley v. Sprague, 374 Mass. 419, 422 (1978). As the mother was not properly served and did not receive actual notice of the modification complaint before the judgment, that judgment is void. See Dumas v. Tenacity Constr. Inc., 95 Mass. App. Ct. 111, 114 (2019). See also Fleishman v. Stone, 57 Mass. App. Ct. 916, 916 (2003). Contrast Jones v. Boykan, 79 Mass. App. Ct. 464, 469-471 (2011), rev'd on other grounds, 464 Mass. 285 (2013) (where party had actual notice, judgment not void despite inadequate service). Furthermore, there is no time limit with respect to rule 60 (b) (4) motions based on void judgments.[5] See, e.g., Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 31 (1983) ("Notwithstanding the powerful interest in finality of judgments, a motion for relief from a judgment which was void from its inception lies without limitation of time"). "Because the judgment is void, no action by the defendant in delaying [her] challenge can render it valid." Uzoma v. Okereke, 88 Mass. App. Ct. 330, 331 (2015).

***3** The order denying the motion for relief from the modification judgment is reversed, and the case is remanded for further proceedings.[6]

So ordered.

reversed and remanded

All Citations

Slip Copy, 2019 WL 6835619 (Table)

Footnotes

1 The panelists are listed in order of seniority.

2 Though the father's precise immigration status is not revealed by the record, there is no indication that he was residing in the United States illegally.

3 The mother asserts that the father knew that she had purchased one-way airline tickets and that he accompanied her and the child to the airport. During Hague Convention proceedings in Brazil, the Brazilian court found that the move was prompted by the mother's undocumented status, and that the parties had planned to reunite in Brazil, marry each other, and obtain proper documentation to legally reenter the United States as a family. However, the parties' relationship soured and the plan fell apart.

4 We note that the father did not allege in his complaint that the mother had removed the child without his consent.

5 We reject the father's claim that the substance of the mother's motion actually falls under rule 60 (b) (3) (relief due to fraud or misrepresentation), which has a one year time limit.

6 We note that a trial on father's complaint for modification was scheduled to commence on August 31, 2019. During oral argument, neither party could explain why the trial had been postponed or whether a new trial date had been scheduled. We are confident a new trial date will be scheduled forthwith.

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