

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 11, 2014

DANIEL COHEN v. JULIE DIDIER (COHEN)

**Appeal from the Circuit Court for Davidson County
No. 84D1495 Phillip Robinson, Judge**

No. M2013-01370-COA-R3-CV - Filed August 19, 2014

This appeal involves the execution of documents in furtherance of the property division in a divorce decree. The parties were divorced many years ago. To carry out the property division, the final decree of divorce ordered the parties to execute copyright assignments. Twenty-five years later, the ex-husband filed this action to compel the ex-wife to execute the copyright assignments. The ex-wife argued that the action was barred by the ten-year statute of limitations applicable to an action on a judgment. Relying on *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004), the trial court held that execution of the documents was a ministerial act to effectuate the property division in the divorce decree and was not execution on a judgment, so the action was not barred by the statute of limitations. After the ex-wife still failed to execute the copyright assignment documents, the trial court designated the clerk of the court to act for the ex-wife to execute them, pursuant to Tenn. R. Civ. P. 70. The ex-wife appeals. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Jessie Ray Akers, Jr., Mt. Juliet, Tennessee, for Defendant/Appellant Julie Didier (Cohen)

Candi Henry and Donald Capparella, Nashville, Tennessee for Plaintiff/Appellee Daniel Cohen

OPINION

FACTS AND PROCEEDINGS BELOW

Many years ago, Plaintiff/Appellee Daniel Cohen (“Cohen”) and Defendant/Appellant Julie Didier (“Didier”) were married. During the marriage, both were professional song writers.

They jointly owned a music publishing company, Bayou Blanc Music Company (“Bayou Blanc”).¹ Bayou Blanc owned the rights to the songs the parties wrote.

Cohen and Didier divorced in 1985. At the time, they reached an agreement regarding allocation of the right to future royalties to be received by each party as a result of their individual or joint efforts in the writing and publishing of songs. That agreement is reflected in their final divorce decree.² The divorce decree provided that Didier would retain ownership of Bayou Blanc; in turn, Bayou Blanc would “sell, transfer and assign Husband’s pro rata share of copyright ownership in all songs that are owned by Bayou Blanc Music Company to any publishing company designated by the Husband.” To implement this agreement, the decree also provided that the parties would “execute any necessary documents to effectuate the purposes and transactions contained in this Agreement.”

As indicated in the divorce decree, Cohen established a new publishing company, aptly named HimOwnSelf’s Music. The record indicates that he asked Didier to execute a copyright assignment to Cohen of his pro rata share of the copyright interest in songs owned by Bayou Blanc, as per the terms of the divorce decree. Apparently, however, Didier never executed the required copyright assignment documents. The record indicates that, at some point, Didier relocated outside Tennessee. Years passed with no action on execution of the copyright assignment documents.

In July 2010, after the parties had been divorced for over 25 years, Cohen filed a “Petition to Enforce Final Decree or in the Alternative to Modify Final Decree as to Copyright and Royalties” in the Circuit Court for Davidson County.³ In the petition, Cohen asked the trial court to either issue a mandatory injunction requiring Didier to comply with the divorce decree by executing the copyright assignment or, in the alternative, to modify the divorce decree to “remove the requirement of the Wife’s execution of any document and award Husband his pro rata share of the copyrights via a court order that will stand alone in absence of any executed document and can be filed with the appropriate copyright facility.” Cohen also requested an accounting as to royalties Didier had received in the years following the parties’ divorce and asked the trial court to set a show cause hearing on his request for relief.

¹The record does not indicate what type of legal entity Bayou Blanc Music Company is or was at the time the decree of divorce was entered.

²The divorce decree was entered in the “Probate Circuit Court for Davidson County” by Judge James Everett.

³The case was originally assigned to the Honorable Carol Soloman.

In August 2010, Didier filed a “Notice of Objection” and a motion to dismiss Cohen’s petition. The Notice of Objection asserted that a show cause hearing would be inappropriate. The motion to dismiss included a proviso that Didier was entering a special and limited appearance through counsel. Didier alleged in the motion that service of process was improper, and that Cohen’s petition should be dismissed for failure to state a claim and for failure to file within the applicable ten-year statute of limitations, citing Tennessee Code Annotated § 28-3-110(2).⁴

Cohen argued in his reply that his request for relief was not subject to the ten-year statute of limitations. Citing *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004), Cohen contended that the divorce decree in and of itself was insufficient to effectuate the transfer of the royalties, and asserted that Didier’s execution of the copyright assignments was “a mere ministerial task necessary to distribute funds previously allocated,” so it was not subject to the statute of limitations. *Jordan*, 147 S.W.3d at 262. In the alternative, he claimed that Didier was continuing to receive royalty payments that rightfully belonged to him, and that the statute of limitations began to run with respect to each royalty payment when Didier received the payment.⁵

The trial court held a hearing on Didier’s motion to dismiss in January 2011; the record does not contain a transcript or statement of the evidence documenting what occurred at this hearing. Shortly thereafter, the trial court entered a written order summarily denying Didier’s motion to dismiss.⁶

In May 2011, after the trial court’s denial of her motion to dismiss, Didier filed an answer to Cohen’s original petition. The answer asserted several affirmative defenses, including assertions that Cohen’s petition failed to state a claim upon which relief may be granted, and that the action was barred under the statute of limitations.

In June 2011, Cohen filed a motion for partial summary judgment. In the motion, Cohen asked the trial court to adjudicate Didier’s statute of limitations defense and enter an order requiring Wife to execute the copyright assignment. Cohen again cited *Jordan* and argued

⁴The memorandum filed in support of Didier’s motion to dismiss referred to the doctrine of laches and stated, “Laches is reserved for when no statute of limitations applies. . . . [I]n the event this court finds that [the statute of limitations] does not apply, then gross laches certainly would.”

⁵Cohen asserted that the doctrine of laches did not apply because Didier had not shown prejudice resulting from the delay.

⁶A later pleading in the record indicates that Didier sought permission to file an interlocutory appeal of this order, and that this request was denied.

that assignment of the copyrights is a ministerial action and “no statute of limitations applies to actions to compel ministerial actions to effectuate a court order.” Cohen filed a statement of undisputed material facts in support of his motion.

Didier filed a response opposing Cohen’s motion for partial summary judgment. In her response, she distinguished *Jordan* and sought further discovery on her affirmative defenses.

On August 22, 2011, the trial court entered an order granting Cohen’s motion for partial summary judgment.⁷ In the order, the trial court adopted Cohen’s argument: “The execution of the copyright assignment is a ministerial act required to effectuate the court order and is not subject to a statute of limitations defense, per *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 200[4]).” It found that Didier “was required to execute a copyright assignment in order to effectuate property division ordered by the court,” and that she admittedly had not done so. Therefore, the trial court ordered Didier to execute the copyright assignment within 10 days of entry of the order. The order granting the motion for partial summary judgment added that Cohen’s “claims for a money judgment in the amount of the royalties received by [Didier] by virtue of [her] previous failure to execute the assignment are reserved for trial.”⁸

On September 16, 2011, Cohen filed a motion informing the trial court that 10 days had passed since entry of the order requiring Didier to execute the copyright assignment documents and that Didier had refused to comply. Citing Rule 70 of the Tennessee Rules of Civil Procedure, Cohen asked the trial court to “direct the act to be done at the cost of the disobedient party or by some other person appointed by the Court.”⁹ Didier responded by

⁷The trial court apparently held a hearing on the motion on August 12, 2011, but the record does not include a transcript or statement of the evidence detailing what occurred.

⁸Didier claims that, on September 12, 2011, she filed a notice of appeal of the trial court’s order granting partial summary judgment. Didier asserts that her appeal was dismissed because she sought to appeal an order that was not final.

⁹Rule 70 of the Tennessee Rules of Civil Procedure, entitled “ Judgment for Specific Acts; Vesting Title” states:

A decree for specific performance shall, if so ordered by the court, operate as a deed to convey land located in this state, or, in appropriate cases, other property, without any conveyance being executed by the vendor. . . . In all other cases where a judgment or decree directs a party to execute a conveyance of land or other property or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified (or within a reasonable time if no time is specified), the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court,

(continued...)

asking the trial court to deem its grant of partial summary judgment a final order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, to enable her to appeal the order.

In October 2011, the trial court held a hearing on Cohen's motion seeking the appointment of an agent to execute the copyright assignment documents and Didier's motion to have the order granting Cohen's partial summary judgment deemed final under Rule 54.02.¹⁰ On November 7, 2011, the trial court entered an order that adjudicated only Cohen's motion. In that order, the trial court found that Didier had failed and refused to execute the copyright assignment documents in question. Pursuant to Rule 70 of the Tennessee Rules of Civil Procedure, the trial court designated the Davidson County Court Clerk to act for Didier for the purpose of executing the copyright assignment documents. The order expressly reserved Cohen's request for attorney fees. The trial court did not make the order final under Rule 54.02.

Several weeks later, on November 23, 2011, the trial court entered an order directing the Davidson County Court Clerk, previously appointed by the trial court to act for Didier under Tenn. R. Civ. P. 70, to execute the copyright assignment documents at issue on behalf of Didier and Bayou Blanc. The trial court also expressly denied Wife's motion to deem the August 22, 2011 order final pursuant to Tenn. R. Civ. P. 54.02.

After entry of the November 23, 2011 order, many months passed with no activity in the litigation. Finally, in May 2013, the trial court entered an order dismissing the case "for want and lack of prosecution."¹¹ From this order, Didier filed a timely notice of appeal.

⁹(...continued)

and the act when so done has like effect as if done by the party. The court may also in proper cases adjudge the party in contempt. In lieu of directing a conveyance of land or personal property, the court may enter a decree divesting the title of any party and vesting it in others, and such decree has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or possession upon application to the clerk.

Tenn. R. Civ. P. 70.

¹⁰Again, the record does not contain a transcript or statement of the evidence documenting what occurred at this hearing.

¹¹This order was entered by the Honorable Phillip Robinson.

ISSUES PRESENTED AND STANDARD OF REVIEW

On appeal, Didier argues that virtually every order entered by the trial court was erroneous, namely, its denial of her motion to dismiss, its grant of Cohen's motion for partial summary judgment, its appointment of the court clerk to act for her under Rule 70, its denial of her request to designate the appointment order as final under Rule 54.02,¹² its denial of her request to modify, and its order directing the court clerk to execute the copyright assignment documents as her agent.¹³

The gist of Didier's argument on most of these issues, and the question we view as pivotal to the appeal, is whether the ten-year statute of limitations bars Cohen's action in this case. Our analysis of this issue involves the application of the law to undisputed facts, in the denial of Didier's motion to dismiss on the basis of the statute of limitations, and the grant of Cohen's motion for partial summary judgment. For purposes of this appeal, and for our standard of review, we consider both as summary judgment motions. *See* Tenn. R. Civ. P. 12.02 ("If . . . matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56."); *see Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006). The grant or denial of a motion for summary judgment presents a question of law, so our standard of review is *de novo* with no presumption of correctness in the trial court's decision. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011); *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010).

Generally, summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn.

¹²This issue is mooted now that Didier has appealed the trial court rulings she sought to have made final, so we decline to address it on appeal.

¹³In the discussion section of her appellate brief, Didier mentions that the defense of laches was raised in the trial court below and appears to argue it as an alternative if the appellate court determines that the statute of limitations does not apply. This issue was not included in the Statement of the Issues in Didier's appellate brief. An issue not presented in the Statement of Issues in the appellate brief is not properly before the Court of Appeals. Tenn. R. App. P. 27(a)(4); *see Coleman v. Lauderdale County*, No. W2011-00602-COA-R3-CV, 2012 WL 475606, at *3 n.4 (Tenn. Ct. App. Feb. 15, 2012); *Bunch v. Bunch*, 281 S.W.3d 406, 409-10 (Tenn. Ct. App. 2008) (quoting *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001)). An item not specifically listed as an issue presented for review is considered waived, as this Court is under no obligation to search for or derive issues that are not specifically stated in accordance with Rule 27(a)(4). *Coleman*, 2012 WL 475606, at *3 n.4 (citing *Childress v. Union Realty Co.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002)).

2008). To do this, a party moving for summary judgment “may avail itself of one of two avenues: it may negate an essential element of the nonmoving party’s claim, or it may establish an affirmative defense, such as the statute of limitations, that defeats the claim.” *Allied Sound, Inc. v. Neely*, 909 S.W.2d 815, 820 (Tenn. Ct. App. 1995). “A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion.” *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009) (citing *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000))).

ANALYSIS

On appeal, Didier argues that Cohen’s action to compel Didier to execute the copyright assignments on behalf of Bayou Blanc is time-barred under Tennessee Code Annotated § 28-3-110, the ten-year statute of limitations. The statute provides:

The following actions shall be commenced within ten (10) years after the cause of action accrued:

. . .

(2) Actions on judgments and decrees of courts of record of this or any other state or government

Tenn. Code Ann. § 28-3-110(2) (2013). Didier contends that Cohen’s petition is an “[a]ction[] on [a] judgment,” and so is barred under this statute of limitations.

In granting Cohen’s motion for partial summary judgment, the trial court below relied on *Jordan*. Didier argues that *Jordan* is limited to its facts, that is, the analysis relates only to a qualified domestic relations order (“QDRO”) governed by ERISA,¹⁴ Didier insists that application of *Jordan* to the facts in this case is unwarranted.

Jordan, like the instant case, involved a post-divorce action many years after the divorce became final. In *Jordan*, the final decree of divorce, entered in 1991, awarded the wife a percentage of the pension the husband earned with his private employer. In 1992, the year after the divorce became final, the trial court entered a post-judgment order directing “the attorneys for the parties . . . to prepare and present a [QDRO] under the terms and conditions set out in the original decree.” *Id.* at 257.

¹⁴ERISA, the Employee Retirement Security Income Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, is a federal law enacted to regulate private employee benefit plans.

Over ten years later, the wife submitted a proposed QDRO to the trial court for approval. The husband objected, but the trial court was unaware of the husband's objection and entered an order approving the QDRO without considering the husband's objection. *Id.* at 257. The husband then sought relief from the judgment, contending that entry of the proposed QDRO was barred by the ten-year statute of limitations on the enforcement of judgments, set forth in Tennessee Code Annotated § 28-3-110. He argued: "Although ordered to do so, [Wife] failed to act to collect that [1991] monetary judgment from [Husband's] pension and/or retirement plan, until the filing of a 'Proposed' Order in November, 2002. The judgment of the Court in the Final Decree of Divorce as it relates to the monetary amount awarded to [Wife] was never acted upon within ten (10) years of the entry of that judgment contained in the Final Decree of Divorce entered [in] 1991." *Id.* at 258.

The trial court in *Jordan* agreed with the husband. It held:

[Wife] has lost her right to enforce the 1991 Final Decree as it respects the [husband's retirement] Assets. The submission of an Order to carry out the terms of the Decree is similar to a request for an execution or garnishment. If the Decree is not followed, *i.e.*, there is no compliance with its terms, then the order must be enforced by appropriate action. Here there was no Petition for Contempt filed nor any effort to execute upon the judgment for more than ten (10) years after it became final. Likewise, the judgment expired because it was not renewed within ten (10) years.

Id. at 259. Thus, the trial court analogized the wife's act of submitting a QDRO to a request for execution or garnishment on a judgment. Under that reasoning, the trial court set aside its earlier order entering the proposed QDRO. *Id.* at 257-59. The wife appealed.

On appeal in *Jordan*, the appellate court capsulized the pivotal issue: "The core question before us is whether an attempt to secure the approval of and entry of a QDRO is an '[a]ction[] on [a] judgment[]' within the contemplation of Tenn. Code Ann. § 28-3-110." It noted first that, in view of the ERISA statutes, the wife could not simply execute on the judgment in the final decree awarding her a percentage of the husband's benefits:

In the instant case, the judgment of divorce "create[d]" Wife's right to receive benefits under Husband's plan. The proposed QDRO simply "recognizes" that right. However, until the plan administrator approves Wife's proposed QDRO, her right to receive benefits under Husband's plan, even though set forth in a validly-entered judgment of divorce, is not enforceable under ERISA. For example, Wife cannot simply send [the husband's employer] a certified copy of her judgment of divorce and successfully demand payment of 42% of

Husband's benefits. This is because the judgment does not contain the ERISA-mandated information.

Id. at 261 (internal citations omitted). The *Jordan* court noted a New York decision under similar facts in which the court “characterized ‘an action to compel entry of QDRO’ as one ‘to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties’ own binding agreement.’” *Id.* at 262 (quoting *Duhamel v. Duhamel*, 194 Misc.2d 100, 101, 753 N.Y.S.2d 673 (N.Y. Sup. Ct. 2002)).¹⁵ The *Jordan* Court reasoned that the final decree awarding the wife a percentage of the husband’s pension could not be enforced against the “holder of the purse strings,” *i.e.*, the husband’s employer, and “[a]ny attempt to enforce the trial court’s validly-entered division of Husband’s pension plan [against the husband’s employer] would be futile.” *Id.* at 262. It described the approval of the proposed QDRO as “adjunct to the entry of the judgment of divorce and not an attempt to ‘enforce’ the judgment. It is an essential act to bring to fruition the trial court’s decree regarding division [of the marital property].” *Id.* at 262-63. Consequently, the appellate court disagreed with the trial court’s reasoning that the wife’s request for a proposed QDRO was “akin to a request for an execution” on a judgment. *Id.* at 259. It held that the wife’s action seeking approval of the proposed QDRO was “not an action to enforce the divorce judgment, and hence not barred by the ten-year statute of limitations.” *Id.* at 263.

Didier argues that the holding in *Jordan* should be limited to situations involving a QDRO and not extended further:

Under ERISA, a Domestic Relations Order is produced in accordance with state law. The Domestic Relations Order is then sent to the plan administrator, who must ensure that the plan complies with applicable federal law under ERISA and the Tax Code. After the plan administrator approves the Domestic Relations Order, it becomes a Qualified Domestic Relations Order [QDRO]. Under ERISA, there is no statute of limitations for the entry of a QDRO. . . . The “ministerial act” referred to in *Duhamel*, and incorporated by *Jordan*, is an action required by a third party to make a provision of a court order enforceable. [Didier] rejects the notion that *Jordan* applies in this matter, in that the action prayed for is not a mere ministerial act, and the Trial Court’s rulings stepped far beyond the bounds contemplated in *Jordan* and *Duhamel*. Further, this ruling was dispositive of this case

¹⁵The *Jordan* Court cites and discusses both appellate opinions in *Duhamel* but does not expressly adopt the reasoning in either. *Jordan*, 147 S.W.3d at 261-62 (citing *Duhamel v. Duhamel*, 188 Misc.2d 754, 729 N.Y.S.2d 601 (N.Y. Sup. Ct. 2001), and *Duhamel v. Duhamel*, 194 Misc.2d 100, 101, 753 N.Y.S.2d 673 (N.Y. Sup. Ct. 2002)).

We must respectfully disagree with Didier’s argument. The divorce decree in this case provides that “Bayou Blanc Music Company will sell, transfer and assign [Cohen’s] pro rata share of copyright ownership in all songs that are owned by Bayou Blanc Music Company to any publishing company designated by” Cohen and orders the parties to execute “any necessary documents to effectuate . . . [this] transaction.” The act of executing the copyright assignments on behalf of Bayou Blanc, the owner of the rights to the songs, falls squarely in the category of a “mere ministerial task necessary to distribute funds previously allocated” in the divorce decree. *Jordan*, 147 S.W.3d at 262 (quoting *Duhamel*, 194 Misc.2d at 101, 753 N.Y.S.2d at 674).

For example, in *Ryan v. Janovsky*, 999 N.E.2d 895 (Ind. Ct. App. 2013), the ex-wife, twenty years after the parties’ divorce, presented the ex-husband a proposed QDRO for his signature. When he refused to sign, the ex-wife filed a contempt petition arguing that the ex-husband was in contempt of the divorce decree for refusing to sign the proposed QDRO. *Ryan*, 999 N.E.2d at 897. The trial court held that the ex-wife’s action was barred by the statute of limitations. The appellate court in *Ryan* reversed, citing both *Jordan* and *Duhamel*. *Id.* at 900.

More importantly, in the case at bar, as in *Jordan*, while it is up to the trial court to decide how the royalties to the copyrighted songs are “equitably divided in [the parties’] divorce,” until Bayou Blanc executes the copyright assignment documents, “the division decreed by the court *cannot be enforced*. . . .” *Jordan*, 147 S.W.3d at 262 (emphasis in original). As the *Jordan* Court explained, “the trial court’s decree cannot be enforced against the ‘holder of the purse strings.’ Any attempt to ‘enforce’ the trial court’s validly-entered division of [the husband’s retirement benefits] would be futile.” *Id.* In the case at bar, the music publishing company formed by Cohen cannot receive Cohen’s “pro rata share of any publishing royalties to the songs” until the copyright assignments are executed on behalf of Bayou Blanc. Thus, the trial court order designating the court clerk to act for Didier and directing the clerk to sign the copyright assignment documents on behalf of Didier and Bayou Blanc “is adjunct to the entry of the judgment of divorce and not an attempt to ‘enforce’ the judgment. It is an essential act to bring to fruition the trial court’s decree regarding a division” of the parties’ interest in the song royalties. *Id.* at 262-63.

We agree with the trial court that *Jordan* controls under the facts of this case and that Cohen’s action is not barred under the statute of limitations. Therefore, we find no error in the trial court’s denial of Didier’s motion to dismiss or its grant of Cohen’s motion for partial summary judgment. This holding pretermits the other issues raised on appeal.

CONCLUSION

The decision of the trial court is affirmed. Costs on appeal are assessed against Defendant/Appellant Julie Didier (Cohen) and her surety, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE