

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 20-00980

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

HELEN A. MARSHALL, NOW KNOWN AS HELEN BRADLEY,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JERRY MARSHALL, DEFENDANT-RESPONDENT.

ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY
MULDOON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County
(Cynthia Snodgrass, R.), dated January 2, 2020. The order denied the
motion of plaintiff seeking, among other things, to "correct" a
judgment of divorce.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed with costs, defendant is awarded pursuant to 22
NYCRR 130-1.1 costs in the form of reimbursement by Angelo T. Calleri
for actual expenses reasonably incurred and reasonable attorney's fees
and the matter is remitted to Supreme Court, Ontario County, for
further proceedings in accordance with the following memorandum:
Plaintiff appeals from an order that, inter alia, denied her motion
seeking, among other things, to "correct" the parties' judgment of
divorce by increasing the amount of defendant's spousal maintenance
payments and to vacate the judgment pursuant to CPLR 5015 (a) (1)
insofar as the judgment denied her application for attorney's fees.
The judgment was entered January 5, 2018; plaintiff did not appeal
therefrom. Instead, on July 24, 2019, she filed her motion, by
amended order to show cause, described above.

Contrary to plaintiff's contention, Supreme Court properly
refused to "correct" the judgment as to the amount of defendant's
maintenance payments. The relief that plaintiff seeks cannot be
obtained under the sections of the CPLR upon which she relies, i.e.,
CPLR 2001 or 5019 (a). Under CPLR 2001, a court may disregard a
party's error, such as a clerical error, "if a substantial right of a
party is not prejudiced" (*id.*; see *Matter of Tagliaferri v Weiler*, 1
NY3d 605, 606 [2004]). Similarly, the types of mistakes correctable
under CPLR 5019 (a) are "mere ministerial ones, not those involving
new exercises of discretion or a further turn of the fact-finding
wheel" (Siegel & Connors, NY Prac § 420 [6th ed 2018]; see *Meenan v*

Meenan, 103 AD3d 1277, 1278-1279 [4th Dept 2013]).

Contrary to plaintiff's further contention, the court properly denied that part of her motion seeking relief based on excusable default (see CPLR 5015 [a] [1]). CPLR 5015 (a) (1) relief is unavailable where, as here, there was no default. The record establishes that the denial of plaintiff's application for an award of attorney's fees was based not on a default, but on the court's discretionary assessment after a three-day trial that the proof in the trial record did not support such an award. We likewise reject plaintiff's request that we impose sanctions on defendant.

Finally, we consider defendant's request for costs, attorney's fees, and sanctions pursuant to 22 NYCRR 130-1.1. We grant defendant's request in part and award costs in the form of reimbursement by plaintiff's attorney, Angelo T. Calleri, for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct of Calleri in prosecuting this appeal (see 22 NYCRR 130-1.1 [a], [b]; *Sonkin v Sonkin*, 157 AD3d 414, 415 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]), and we remit the matter to Supreme Court to determine such amount (see *Heilbut v Heilbut*, 18 AD3d 1, 9 [1st Dept 2005]). "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). We conclude that Calleri's appellate brief is replete with arguments that qualify as frivolous under the first paragraph of subdivision (c). Indeed, plaintiff's frivolous request that we impose sanctions against defendant by itself qualifies as frivolous conduct (see *id.*).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court