

NOT DESIGNATED FOR PUBLICATION

No. 109,129

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ESTATE OF M. HENDEL,
Appellant,

v.

MURRAY H. HENDEL,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed March 14, 2014. Reversed and remanded.

Michael Jilka, of Law Office of Michael Jilka, LLC, of Lawrence, for appellant.

J. Eugene Balloun and *Zach Chaffee-McClure*, of Shook, Hardy & Bacon, L.L.P., of Kansas City, Missouri, for appellee.

Before LEBEN, P.J., GREEN and HILL, JJ.

LEBEN, J.: Marjorie and Murray Hendel married in 1955 and divorced in 1974. Their original divorce settlement agreement called for Murray to pay \$650 per month in maintenance until Marjorie died or remarried. After Murray got behind on his payments in 1991, they agreed on a specific sum to be paid on the past-due amounts and a modified maintenance sum going forward of \$500 per month. The district court overseeing their divorce entered an order adopting that amount for future payments in 1991.

In 2004, Marjorie again alleged that Murray was behind on payments, and she initially got a judgment for past-due amounts. But she hadn't given proper notice of her request for judgment to Murray. He got the judgment set aside—and the district court also entered a stay order at Murray's request. The stay order suspended maintenance payments until Marjorie came into court showing that she still met the conditions required to receive payments, *i.e.*, that she was alive and hadn't remarried. Marjorie had at some point moved to India, and Murray had no contact with her. The district court gave Marjorie 60 days to make the required showing.

But she didn't attempt to submit this proof until June 2009. At that time, she filed a claim that the stay order itself was improper, and when that motion was denied, she appealed. Our court ruled that she wasn't entitled to get the stay lifted on the ground that the order had been improper. *In re Marriage of Hendel*, No. 104,518, 2011 WL 4031548, at *4-5 (Kan. App. 2011) (unpublished opinion), *rev. denied* 294 Kan. 943 (2012). But we made no ruling about the underlying question of whether Marjorie was entitled to maintenance as an unmarried, living person—our court ruled that those issues were not properly before us because the district court hadn't made any factual findings about them. 2011 WL 4031548 at *6.

While Marjorie's appeal on the stay order was pending, she filed a separate action against Murray for breach of contract, alleging that his failure to make the maintenance payments violated a contract because he had agreed—as part of a settlement agreement in 1991—to make them.

Murray filed a motion to dismiss the breach-of-contract suit. He claimed that he was excused from performance under the contract because of the stay order. The district court agreed, and it dismissed the suit.

Marjorie died while the breach-of-contract suit was pending, but her estate took over the case. Marjorie's estate has appealed to this court.

At issue is a district court's order dismissing a lawsuit for failure to state a valid claim, and we must review such orders independently, without any required deference to the district court. See *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013). We must accept the facts stated by the plaintiff (here, Marjorie) in the petition as true, along with any reasonable inferences that may be drawn from those facts. We then decide whether those facts and inferences state a potentially valid claim based on legal arguments set out by the plaintiff or on any other possible theory. 296 Kan. at 546.

The district court recognized that a divorce settlement agreement is a contract, and a person may therefore sue to enforce it as a contract, separate and apart from other means normally available to enforce a judgment. See 2 Elrod & Buchele, *Kansas Law and Practice, Kansas Family Law* §11.61 (1999 & 2013-2014 Supp.). But the district court held that Murray "did not actually breach the contract because he was excused from performance" by the stay order. Thus, Marjorie could not sue for breach of contract.

The district court is right with respect to payments that should have been made on or after the date of the stay order. But Marjorie alleged that Murray had failed to make payments before that date—and Murray agreed. In an affidavit Murray filed, he agreed that he had not made three payments: "Since January 1, 2004, I have not made three quarterly payments which total \$4,500. I am prepared to make these payments upon confirmation that [Marjorie] is still alive and unmarried." Murray's attorney said in a court filing that the \$4,500 was due during the time from January 1, 2004, to May 18, 2005. The district court's stay order was entered August 12, 2005.

At this point, we must note one important omission in the record before us: we do not have the stay order. Thus, we can't know its precise terms. It's possible that the order stayed not only future payments but also any obligation to make payment on past-due maintenance obligations. For the purposes of this decision, though, we presume to the contrary for three reasons.

First, under the standard applicable to a motion to dismiss for failure to state a claim, we must make all reasonable inferences in favor of the plaintiff. That's because a court should not dismiss a suit altogether until it is clear that the plaintiff has no claim.

Second, the district court ordinarily would not have had authority to excuse the payment of past-due maintenance. Under Kansas law, when a maintenance payment is due and unpaid, it becomes a final judgment, *see In re Marriage of Evans*, 37 Kan. App. 2d 803, 805, 157 P.3d 666 (2007), and the district court generally does not have jurisdiction to modify maintenance that the parties agreed on unless the agreement provided such authority. See 2 Elrod & Buchele, Kansas Family Law §10.81. Even then, the court's authority would be limited to payments that had not already become due. See 2 Elrod & Buchele, Kansas Family Law §10.82. Our court recognized a limited exception to this rule in our earlier decision in this case, concluding that the district court had the authority to set aside a prior maintenance judgment if the recipient (Marjorie) had remarried or died. *Hendel*, 2011 WL 4031548, at *4. But given the general rule that past-due maintenance becomes a judgment when unpaid, we are unwilling to assume that the stay order in this case actually set aside those judgments since Murray had not provided evidence to the court that Marjorie had either remarried or died.

Third, a stay order ordinarily excuses performance for the time being but does not actually extinguish the underlying obligation. See *Heritage Bank v. Redcom Laboratories, Inc.*, 250 F.3d 319, 328 (5th Cir. 2001).

So we conclude that Marjorie had presented a claim for breach of contract that was sufficient to avoid dismissal for failure to state a claim. The district court's judgment is reversed, and this case is remanded for further proceedings consistent with this opinion.