NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOSEPH HALL,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
LAURIE HALL,	:	
Appellee	:	No. 107 EDA 2013

Appeal from the Order Entered December 4, 2012
In the Court of Common Pleas of Monroe County
Domestic Relations Division No(s).: 945 DR 2010 -8460 Civil 2010

BEFORE: SHOGAN, ALLEN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 17, 2013**

Appellant, Joseph Hall ("Husband"), appeals from the order entered in the Monroe County Court of Common Pleas finding him in contempt of an order which effectuated the parties' marriage settlement agreement.[1] We vacate and remand the portion of the order setting forth the amount of attorney's fees Husband is to pay Wife, and affirm in all other respects.

The parties were married in 1986; the one child born of the marriage

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* Former Justice specially assigned to the Superior Court.

[1] "Generally, an order finding a party in contempt is interlocutory and not appealable unless it imposes sanctions." ***Rhoades v. Pryce***, 874 A.2d 148, 151 (Pa. Super. 2005). The imposition of payment of the opposing party's counsel fees is a sanction, and renders an order immediately appealable. ***Id.*** at 153. As we discuss ***infra***, the court's order directed Husband to pay attorney's fees to Appellee, Laurie Hall ("Wife").

was more than eighteen years old at the time of the divorce filing. On September 7, 2010, Husband filed a complaint in divorce.

October 24, 2011, the parties appeared before the divorce master, indicating they had reached an agreement with respect to economic issues. N.T. 10/24/11, at 2. The parties stated the terms of their agreement orally on the record. In pertinent part, Wife would execute a deed to the marital residence in favor of Husband and relinquish all title and interest, "and the property [would] be the sole exclusive property of [H]usband." ***Id.*** The home was encumbered by a home equity line of credit, and Husband would, "within 90 days of [the date of the master's hearing], remove [W]ife from responsibility from that loan, either by refinancing or mortgage modification or release any way that gets her off of the loan [sic]." ***Id.*** at 2-3. Husband would "continue to make the minimum payments against that loan[,] indemnify [W]ife for the same," and "be responsible for any other carrying charges." ***Id.*** at 3.

The master issued a report on October 31, 2011, stating the parties' economic claims were resolved by stipulation. There is no written, signed settlement agreement between the parties. Instead, the master's report included the transcript from the October 24th hearing, explaining that it encapsulated the parties' agreement.

On November 23, 2011, the court entered a divorce decree which approved the master's report and ordered the parties "to carry out the

terms" of their stipulation and agreement.[2] Decree, 11/23/11.

Approximately three and a half months later, on February 13, 2012, Wife filed a petition for contempt and sanctions, alleging Husband had failed to remove her name from the home equity line of credit, as required by the parties' agreement. The court held a hearing on April 18th. On April 30, 2012, it issued an order finding Husband in contempt, directing him to refinance the loan or remove Wife from responsibility for the home equity line of credit, and directing him to pay Wife $1,000 for attorney's fees. Husband did not appeal from this order.

On August 6, 2012, Wife filed a second petition for contempt and sanctions, averring Husband still had not refinanced the home equity line of credit, obtained a mortgage modification, or taken other steps to remove her from obligation. The court held another hearing, on October 19th, approximately one year after the master's hearing. As of this date, Husband was remarried. N.T., 10/19/12, at 46. Husband conceded that pursuant to the agreement, he was to remove, within ninety days of the master's hearing, Wife from responsibility from the home equity line of credit by refinancing or mortgage modification. ***Id.*** at 23. However, he stated, he was unable to refinance the loan for credit or financial reasons. Husband

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[2] The divorce decree was signed by the Hon. Arthur L. Zulick, while the Hon. Stephen M. Higgins presided over these contempt proceedings and authored the instant trial court opinion.

also called a mortgage broker to testify, who stated that Husband did not qualify for a loan because his debt to income ratio was too high. N.T., 10/19/12, at 7-8. Husband testified that the marital residence was appraised at $180,000, and he currently owed approximately $196,000 on it. ***Id.*** at 26. As of July 1, 2012, Husband leased the house to a renter, for which he received $1,350 per month.[3] ***Id.*** at 29. Husband agreed that during the divorce proceedings, Wife wanted to sell the house, but he did not want to sell it at a loss. ***Id.*** at 30.

On December 4, 2012, the court entered the underlying order finding Husband in contempt of its November 3, 2011 divorce decree and April 30, 2012 contempt order. The court included a purge condition, allowing Husband to list the marital residence for sale within thirty days, at a price of $162,000.[4] Order, 12/4/12, at ¶ 2. The court further ordered Husband to reimburse Wife $2,008.69 for attorney's fees and pay her $500 per month "until such time as [he] has removed [Wife] from her obligation on the home equity loan." ***Id.*** at ¶¶ 4-5.

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[3] The monthly rental rate was $1,500; Husband employed a rental management company, and his net monthly receipt was $1,350. N.T., 10/19/12, at 29-30.

[4] The order further provided that the parties shall discuss all offers on the house with a real estate agent, and that if the parties cannot reach a consensus on an offer, the offer shall be submitted to the court "for review and determination as to whether the offer shall be accepted." Order, 12/4/12, at ¶ 2. Husband was to pay all closing costs, expenses, and other amounts due in connection with a sale. ***Id.***

Husband took this timely appeal and complied with the court's order to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. Husband presents three claims to this Court, that the court erred in: finding him in contempt, imposing counsel fees and a $500 monthly payment to Wife, and issuing a purge condition.

We first note the following relevant authority:

> In proceedings for civil contempt of court, the general rule is that the burden of proof rests with the complaining party to demonstrate that the defendant is in noncompliance with a court order. To sustain a finding of civil contempt, the complainant must prove, by a preponderance of the evidence, that: (1) the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) the act constituting the contemnor's violation was volitional; and (3) the contemnor acted with wrongful intent.

MacDougall v. MacDougall, 49 A.3d 890, 892 (Pa. Super. 2012) (citations omitted).

Husband's first claim is that the court erred in finding him in contempt. In support, he avers the following. First, although he admitted he had not complied with the court's order to fulfill the settlement agreement, "he did not act with wrongful intent." Husband's Brief at 12. Instead, Husband "made multiple attempts to refinance" and submitted ten mortgage applications between May and October of 2012, some with his current wife as a co-borrower, but was unsuccessful. ***Id.*** Second, the court erroneously interpreted the agreement as requiring him to "take '**any other steps**' to ensure [Wife] was relieved from the mortgage," including using his

retirement funds or selling the house. ***Id.*** at 13-14. Instead, the term relied upon by the court, "any way that gets her off the loan," applied simply "to the options of refinance, release, [or] modification." ***Id.*** at 13. Husband adds that although he could have withdrawn $90,000 from his retirement account, the income taxes "would have resulted in a net withdrawal of $55,000," and "[t]his amount would not have guaranteed [his eligibility for] refinancing." ***Id.*** at 14. Finally, the court erred in relying on evidence adduced at the first, April 18, 2012, contempt hearing, as "[t]he record in that [contempt] matter was closed" and thus outside the record for the instant contempt petition. ***Id.*** We find no relief is due.

As stated above, there was no written property settlement agreement. Instead, the parties orally stated the terms of their agreement at the master's hearing. In pertinent part, Husband's counsel stated:

> [T]he parties have agreed to settle their economic issues in this divorce as follows:
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> * * *
>
> As you heard in testimony, the house is encumbered by actually a home equity line of credit . . . . [Husband] will, within 90 days of today's date, remove [W]ife from responsibility from that loan, **either by refinancing or mortgage modification or release any way that gets her off of the loan** [sic].

N.T., 10/24/11, at 2-3 (emphasis added).

At the second contempt hearing, the court noted, "My understanding is that [both parties] were working under the assumption [that the home

equity loan] was going to be refinanced. This is the first time I have heard anybody talk about selling this house." N.T., 10/19/12, at 86. Wife's counsel[5] responded, "[T]he agreement that was reached . . . that the court approved said [Husband] would get [Wife's] name off in any way possible." ***Id.*** Husband's counsel argued, "The agreement says refinance or release, whichever works. . . . It didn't mean everything possible under the sun. It modified the two prior things." ***Id.*** at 87. The court reasoned, "The bottom line here is that they negotiated for [Wife] to have her name off the mortgage [sic]." ***Id.*** at 88.

Furthermore, at the contempt hearing, Husband's counsel conceded the court could order Husband "to list the property to sale at $180,000.00[:]"[6] "It can stay on the market for $180,000.00 for five years or ten years and that would be satisfactory, I suppose, to my client[.]" ***Id.*** at 90. That statement is contrary to the argument he now advances on appeal, that the agreement did not contemplate sale of the house as a

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[5] Our review of counsel's argument, from at least pages 86 through 95 of the October 19, 2012 court hearing transcript, leads us to believe the names of the parties' counsel were reversed. For example, Husband's attorney, Kevin. A. Hardy, Esq., purportedly proposed that the court "[f]orce a sale" and that "**she** should be entitled to **her** attorney's fees." N.T., 10/19/12, at 90 (emphasis added). Immediately thereafter, Wife's attorney, Jeffrey J. Kash, Esq., is attributed with stating, "I suppose Your Honor can order **my client** to list the property to sale at $180,000.00." ***Id.*** at 90 (emphasis added).

[6] ***See*** footnote 5, ***supra***.

means to remove Wife from the home equity obligation. Nevertheless, the court reasoned, "[Wife] has got an expectation that she bargained for that her name would be taken off this mortgage [sic]. That is over a year ago. And it has not happened. And that needs to be accomplished." ***Id.*** at 92.

Finally, Wife's counsel averred that Husband's proposals for alternative compensation[7] were good for him, but "not necessary what is good for her," where Wife could not get a loan or credit card "and is barely getting by." ***Id.*** at 96. Wife's counsel argued, "[Husband] knew going in [t]hat the house was upside down[and] knew what the credit card debt was," and that he had proposed the settlement term with respect to the marital residence. ***Id.*** at 96-97.

In its opinion, the court did consider the evidence cited by Husband in his appellate brief, including the constraints presented by his finances and the market for sale of the house:

> In this instant matter, [Husband] acknowledged that he was aware of the Order and that he agreed to removing [Wife] from the responsibility of a home equity line of credit . . . within ninety (90) days at the Divorce Master's hearing. [Husband] argues, however, that he was unable to remove [Wife's] name from the line of credit despite his best efforts. At the October 19, 2012 hearing [Husband] presented the testimony of Sant Sikan[d], a mortgage broker, who testified that [Husband] is unable to qualify

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[7] Husband suggested he could "forgo the alimony tax deductions," Wife "would pay the taxes like she would have to pay," and he would compensate her $2,000 per year for the taxes, "in exchange for some time to get some of the mortgage [and the parties' son's student loans] paid down." N.T., 10/19/12, at 94.

> for a loan due to his high debt to income ratio. Mr. Sikan[d] stated that the house is "underwater" and [Husband's] alimony payments are too high for him to qualify for a loan.
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> [Husband] also testified at that hearing. He stated that he could remove [Wife's] name from the line of credit through his Charles Schwab Individual Retirement Account (IRA), however, the liquidation of his IRA would result in early withdrawal penalties and negative tax consequences which made it financially undesirable to him. [Husband] also indicated that he never attempted to sell the residence. [Husband] has since remarried and his wife is employed as a physical therapist . . . . [Husband] and his new wife enjoyed a honeymoon on Curacao Island, for which [Husband's] new wife paid for most of the costs. [Husband] is also currently renting the former marital residence for $1,350.00 per month.

Ct. Statement Pursuant to Pa.R.A.P. 1925(a), 2/1/13 ("Trial Ct. Op."), at 4-5 (unpaginated). The court stated its reasoning for finding Husband in contempt:

> Now, fifteen months have elapsed since the settlement and [Wife's] name has not been removed from the . . . line of credit. Although [Husband] claims that he made a good faith attempt to comply with the Court's Orders, we do not agree. [Husband] agreed to take any other steps to ensure that [Wife] was relieved from the responsibility for the home equity line of credit. This includes invading his IRA or listing the former marital residence for sale.
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> The standard to hold one in civil contempt of a Court's Order is that by one's own volition, he/she willfully violated the Court's Order. Although [Husband] may find that his compliance with this Court's Decree/Orders is financially painful, he agreed to these terms in order to resolve the [marital] assets of his previous marriage and obtain a divorce. We believe [Husband] willfully violated this Court's Decree/Order. Specifically, we find that [Husband] was able to remove [Wife] from the responsibility of a home equity line of credit by using his IRA monies or, at a

> minimum, list the former marital residence for sale. In regard to the finding of contempt and award of counsel fees awarded in our April 30, 2012 Order, the record reflects that [Husband] did not ask the Court to reconsider or modify the Order. No appeal was taken from the April 30, 2012 Order. After [Wife] filed another contempt petition we are confident that the finding of contempt, award of counsel fees and imposition of sanctions against [Husband] are warranted and appropriate.

Id. at 6.

Husband wholly ignores the court's reasoning that he voluntarily agreed, after negotiation with Wife, to all the terms of the marriage settlement agreement. He made no claim of fraud or other improper inducement to enter the agreement, and offered no evidence of any intervening change in his financial circumstances or relevant housing market conditions between the October 24, 2011 master's hearing, when the settlement agreement was made, and Wife's August 6, 2012 contempt petition. Indeed, Husband testified that while the house was appraised at $180,000 in August of 2011, approximately $200,000 was owed on it at the time of the divorce proceedings. N.T., 10/19/12, at 25-26. Husband's testimony was relevant only to why the actions he could take to comply were unfavorable to him. We decline to disturb the court's conclusions on the basis that Husband now perceives, after negotiation and agreement to property settlement terms, the disadvantages to him.

We also reject Husband's interpretation, advanced at the contempt hearing and on appeal, that the settlement agreement provided only for

refinance or mortgage modification as a means to remove Wife from her obligations under the home equity line of credit. We reiterate that the statement at the master's hearing was, "[Husband] will, within 90 days of the today's date, remove [W]ife from responsibility from that loan, either by refinancing or mortgage modification or release **any way that gets her off the loan** [sic]." N.T., 10/24/11, at 3 (emphasis added). When read in context, we agree with the court's interpretation that the phrase "any way that gets her off the loan" applies to Husband's refinancing of the loan, making a mortgage modification, or **releasing** Wife from her obligation under the loan. Thus, we do not disturb the court's reasoning that Husband could sell the house as a means of fulfilling the settlement agreement and complying with its order.

We also reject Husband's claim that the court improperly relied on evidence adduced at the April 18, 2012 contempt hearing, which was not of record for the instant contempt petition. He does not identify the evidence the court allegedly improperly considered. ***See*** Husband's Brief at 14-15. Furthermore, a basis for the court's underlying contempt order was the fact that it had previously issued a contempt finding against Husband. In light of the foregoing, we agree with the trial court that Wife proved by a preponderance of the evidence that Husband had notice of the order and that he intentionally did not comply with it. ***See MacDougall***, 49 A.3d at 892. Husband's explanations for why compliance was not financially

favorable to him do not defeat Wife's contempt claim.

Husband's second claim on appeal is that the court erred in imposing attorney's fees and sanctions of $500 per month, which were not intended to compel compliance, but instead were meant to punish him. Husband also avers that Wife "did not testify at the October 2012 hearing" and that "**[i]f** she did present an invoice for counsel fees . . . as the Trial Court indicates in its 1925 statement, she did so outside the record and on an ex parte basis." Husband's Brief at 16 (emphasis added). He disputes the court's reasoning that these sanctions were intended to compensate Wife, and maintains that Wife "presented no direct testimony indicating that she required monetary compensation." ***Id.*** Finally, Husband "point[s] out that Wife did not include her $2,000.00 per month alimony as income in her credit application." ***Id.*** at 16-17. We affirm the awarding of attorney's fees, but remand for the court to determine, with documentation, the proper amount of fees.

This Court has stated:

> Sanctions for civil contempt can be imposed for one or both of two purposes: to compel or coerce obedience to a court order and/or to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance with a court order. Attorneys' fees and other disbursements necessitated by the contemnor's noncompliance may be recovered by the aggrieved party in a civil contempt case. Because an award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent, it is coercive and compensatory, and not punitive. Counsel fees are a proper element of a civil contempt order. In reviewing a grant of attorney[s'] fees, we will not disturb the decision below absent a clear abuse of discretion.

Rhoades, 874 A.2d at 152 (citations omitted).

In its April 30, 2012 order finding Husband in contempt, the court directed Husband to comply with its divorce decree—requiring the parties to effectuate their property settlement agreement—within ninety days, and reimburse Wife $1,000 for attorney's fees within thirty days. Order, 4/30/12, at ¶¶ 1-2. At the time Wife filed her second contempt petition, ninety-eight days later, Husband had not fulfilled either directive. At the second contempt hearing, Wife's counsel requested attorney's fees, arguing "she should not have been put in a position where she has to even file a petition and come here." N.T., 10/19/12, at 96.

We incorporate our above analysis, that the court did not err in finding Husband voluntarily agreed to remove Wife from the home equity obligation, had the means to do so, but chose not to exercise them because of negative consequences to himself. After the court found Husband in contempt once, he still chose preservation of his own financial situation over compliance with the court's order and the parties' agreement. Accordingly, we find no abuse of discretion in the court's decision to award attorney's fees to Wife.

However, we agree with Husband that the record does not include documentation supporting the amount of $2,008.69 of attorney's fees to Wife. Wife did not set forth any monetary amount either in her contempt petition or at the contempt hearing. Accordingly, we remand for the court to determine, within twenty-one days of this memorandum, the proper amount

of attorney's fees. Wife shall submit documentation of her attorney's fees and Husband shall have an opportunity to review it and make any appropriate objections before the court enters an amount.

With respect to the $500 monthly payments to Wife, we disagree with Husband that they were "for an unlimited duration." ***See*** Husband's Brief at 15. Instead, the court's order clearly stated that the payments shall continue "until such time as [Husband] has removed [Wife] from her obligation on the home equity loan"—in other words, until Husband fulfilled compliance with the settlement agreement and court order. ***See*** Order, 12/4/12, at ¶ 5.

At the April 18, 2012 hearing, Wife testified to the following. She earned $21,000 per year as a secretary for the school district. N.T., 4/18/12, at 127. Since the divorce proceedings, she attempted to consolidate her credit card debt to a lower interest rate, but her application was denied because she had "too much money on [her] account [sic]." ***Id.*** at 124-25. Her "credit [was] good," but the home equity debt was $199,000 and she had her own debt of $30,000. ***Id.*** at 125-26. Wife would need to replace her 2004 car in the next year, but she did not have the money to do so. ***Id.*** at 126. Wife did not testify at the October 19th contempt hearing. However, her counsel argued that Wife "has to go down to the [Laundromat] because she cannot afford a washing machine[.]" N.T., 10/19/12, at 94. Counsel stated, "She can't get a credit card. She can't do anything because

what [Husband] said he would do[,] he has not done." ***Id.*** at 96. Counsel reiterated that Wife "is going to need a lot of . . . things[,]" including a new car, but she "is barely getting by." ***Id.*** Counsel argued, "[Wife] wants to be done so she can get a loan on her own and her own credit card and not have her credit affected." ***Id.***

The court awarded the $500 monthly payment to Wife, reasoning:

> The case law is clear that we can compensate a litigant for injuries resulting from [Husband's] [sic] non compliance. [Wife's] credit continues to be negatively impacted by [Husband's] failure [to] fulfill his responsibility under the settlement. Hence, we find that monthly payments are compensatory and appropriate since [Husband] is receiving the benefit of rental payments while [Wife's] credit is continuing to decline.

Trial Ct. Op. at 7. Although the court relied on Wife's testimony from the first contempt hearing, again Husband offers no meritorious argument why the court could not rely on evidence adduced over the course of this matter, where Wife's claims and Husband's reasons for non-compliance have not significantly differed from her first contempt petition to her second. In light of all the foregoing, we hold the court did not err in awarding Wife $500 monthly, until Husband complied with the settlement agreement, as compensation to her for her "injuries resulting from [Husband's] noncompliance with a court order." ***See Rhoades***, 874 A.2d at 152.

Husband's third claim before this Court is that the court erred in issuing a purge condition which required him to sell the marital residence for less than what was owed on the home equity line of credit "and to pay the

shortfall . . . where the evidence demonstrate[d] that [he] did not have the ability to perform." Husband's Brief at 17. Husband maintains "this purge condition is likely to result in a condition that he will be incapable of performing as it will force him to sell the house at a shortfall he cannot cover." ***Id.*** at 18. We find no relief is due.

This Court has stated, "The law in this Commonwealth is . . . that the trial court must set the conditions for a purge in such a way as the contemnor has the **present ability** to comply with the order." ***Hyle v. Hyle***, 868 A.2d 601, 605 (Pa. Super. 2005).

Preliminarily, we note that Husband ignores that the purge condition—sale of the house—is an alternative to the options he has had since the parties' settlement agreement was made, refinancing or modifying the home equity line of credit. Furthermore, for the reasons set forth above, we do not disturb the court's reasoning that sale of the house was not prohibited by the agreement. Finally, we reject Husband's argument that he was unable to or lacked the means to remove Wife from the obligation. Instead, we agree with the trial court that Husband's true claim is that the present means for him to do so are disadvantageous to him. As we concluded above, such consequences do not absolve him of his agreement to the settlement terms and his obligation to comply with the court's orders.

For the foregoing reasons, we vacate the amount of the attorney's fee award and remand for the court to determine, within twenty-one days of this

memorandum, the proper amount of attorney's fees that Husband shall pay to Wife. We affirm the court's order in all other respects.

Order vacated in part and affirmed in part. Case remanded. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 9/17/2013