

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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|-------------------|---|--------------------------|
| PIERRE B. EUGENE, | : | IN THE SUPERIOR COURT OF |
| | : | PENNSYLVANIA |
| Appellant, | : | |
| | : | |
| v. | : | |
| | : | |
| HANSI EUGENE, | : | |
| | : | |
| Appellee | : | No. 2254 MDA 2013 |

Appeal from the Order entered November 25, 2013,
Court of Common Pleas, Dauphin County,
Civil Division at No. 2007 CV 9249 DV

BEFORE: DONOHUE, JENKINS and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED JULY 29, 2014

Pierre B. Eugene ("Husband") appeals from the November 25, 2013 order entered by the Dauphin County Court of Common Pleas granting the petition filed by Hansi Eugene ("Wife") to enforce the terms of their marital settlement agreement ("MSA"). Upon review, we affirm in part and reverse in part.

The trial court aptly summarized the factual and procedural histories of this case as follows:

Defendant [H]usband and plaintiff [W]ife were formerly married and divorced by decree entered in April of 2013. As part of the divorce proceedings, the parties entered into a[n] [MSA] [on] February 11, 2012, later incorporated into the decree, under which they agreed that [H]usband would pay [W]ife \$3,404 per month alimony until her 65th birthday in September 2024. Husband also agreed to pay \$1,300 per month towards his spousal support / alimony *pendente lite* arrears which had accrued in

*Retired Senior Judge assigned to the Superior Court.

their support action. Husband was directed under the [MSA] to make these payments bi-monthly (\$2,352) on the 15th and 30th of each month. Provisions addressing the method of payment and [H]usband's failure to make payments were set forth in Paragraph 14B of the [MSA], as follows:

HUSBAND specifically agrees that the semi monthly payments to WIFE shall be paid to WIFE by auto draft from HUSBAND'S Bank Account Number xxxxxxx742 at Key Bank NA, routing number xxxxx077 to PaSCDU^{[FN]1} xxxxx225 and said monies shall continue to be collected by Dauphin County Domestic Relations Office (DRO). Said auto draft shall be executed and effective on or before the date of execution of this Agreement. HUSBAND further specifically agrees that in the event he closes said bank account, he shall and must, prior to closing of the above referenced bank account, establish and authorize an auto draft of the above alimony obligation with an alternate bank account so that no semi[-]monthly alimony payments to WIFE are delayed or not paid.

In the event that HUSBAND ... fails to timely make the semi[-]monthly alimony payments to WIFE, then HUSBAND shall be deemed to be in breach of this Agreement and shall be liable for any and all counsel fees, costs and expenses WIFE incurs as a result of said breach and HUSBAND agrees that the failure to make a timely payment shall provide sufficient grounds for the alimony provision of this Agreement to be referred to the Court of Common Pleas of Dauphin County, Pennsylvania for enforcement pursuant to the DRO office and/or any other relief available under support, alimony or divorce law.

^{[FN]1} The Pennsylvania State Collections and Disbursement Unit (PA SCUDU) is the organizational

unit within the Pennsylvania Department of Public Welfare / Bureau of Child Support Enforcement responsible for collecting and disbursing support. **See**, 23 Pa.C.S.A. § 4302.

On December 10, 2012[,] the parties entered an Addendum to their [MSA] reducing [H]usband's alimony obligation to \$2,500 per month and his arrearage payment to \$1,000 per month. The Addendum did not otherwise change the method of payment[,] which still required [H]usband to make automatic bimonthly payments (of \$1,750) from his bank account to Pa. SCDU.

On October 2, 2013, [W]ife filed a Petition to Enforce the terms of the [MSA] alleging that [H]usband had repeatedly breached Paragraph 14 by failing to make bimonthly alimony and arrearage payments. She claimed he had made virtually no payments since the Agreement had been reached and as a result[,] she has suffered severe economic hardship resulting in numerous eviction actions being filed against her. She sought past due payments and that [H]usband's alimony and arrearage obligations be raised back to their original pre-Addendum amounts.

[H]usband did not answer the petition but later filed a Pretrial Memorandum in which he claimed he set up the auto draft payment as required under the [MSA]; however, he agreed that numerous checks issued by his bank were rejected by Pa. SCDU because his [s]ocial [s]ecurity number was not included on the checks.^{[FN]2} According to [H]usband, it is his bank's policy to not include such sensitive information on its checks due to concerns with identity theft. Husband further asserted that because the terms of [MSA] Paragraph 14 were 'impossible' to perform he should be entirely discharged from paying alimony and arrearages.

^{[FN]2} Husband included in his Pretrial Memorandum copies of eleven such checks, issued between April 12 and September 27, 2013, drafted by his bank

payable to Pa. SCDU in the amount of \$1,750, which were presumably rejected by Pa. SCDU.

[The trial court] held a hearing November 25, 2013, at which a Dauphin County Domestic Relations Section enforcement officer verified that Pa. SCDU will not accept payments without the payor's [s]ocial [s]ecurity number included on the check. He indicated, however, that the Dauphin County Domestic Relations Section had received three payments (checks) of \$1,750 from [H]usband which [H]usband had sent directly to them. He testified that the three payments were submitted by [H]usband only after enforcement proceedings had been initiated against him and were paid to purge his contempts. The Domestic Relations Section was then able to forward each of those three payments to Pa. SCDU for eventual disbursement to [W]ife.

The enforcement officer additionally testified that Husband's total arrears as of the hearing were \$58,194, almost all of which were 'bad arrears,' i.e. arrears that accumulated due to [H]usband's nonpayment ('overdue support') as opposed to arrears that accumulated due to retroactivity of a support order ('past due support'). **See** Pa.R.C.P. 1910.1. He also testified that in addition to sending checks directly to the Domestic Relations Section to send to Pa. SCDU, that another method to effectuate payment was for [H]usband to directly send his payments to Pa. SCDU. At the conclusion of the hearing, [the trial court] indicated that the payment issue could be easily solved by directing [H]usband make his payments directly to Pa. SCDU by personal check, an arrangement to which his attorney agreed.

Trial Court Opinion, 3/20/14, at 1-4 (record citations omitted; footnotes in the original).

Husband filed a timely notice of appeal. He raises four issues for our review:

1. Whether [Husband] was not given the opportunity to present an argument before the court or allowed to present any evidence on his behalf during the hearing held before the order being appealed was entered[?]
2. Whether the [t]rial court erred in treating this as a domestic relations matter and not as a contract matter as the law requires[?]
3. Whether the [t]rial court erred by stating and then acting that it could reform an impossible contract, as [Wife] claimed in her filing in this matter, instead of removing the provision of the contract that was impossible to perform[?]
4. Whether the trial court erred in its determination of both alimony and arrearages, in disregard of the contract that had been entered into by both parties[?]

Husband's Brief at 3-4.

Beginning with Husband's first issue, he claims that he was not permitted to present evidence, question the testifying witness, or make legal argument in support of his position at the hearing on Wife's petition to enforce the MSA. ***Id.*** at 13-18.¹ Husband states that the manner in which the trial court conducted the hearing, *i.e.*, calling and questioning a witness, was in violation of the Rules of Civil Procedure. ***Id.*** at 13-14 (citing

¹ We note with disapproval that in violation of Rule of Appellate Procedure 2119(a), Husband's argument is not "divided into as many parts as there are questions to be argued" and does not "have at the head of each part – in distinctive type or in type distinctively displayed – the particular point treated therein[.]" Pa.R.A.P. 2119(a). As our review of the case is not materially hampered, we decline to suppress the brief or quash the appeal. ***See*** Pa.R.A.P. 2101.

Pa.R.C.P. 223, 1038). The trial court denies that it prohibited Husband from putting on his case, stating that Husband did not offer any witnesses to testify or indicate in any respect what evidence or witness(es) he wished to present. Trial Court Opinion, 3/20/14, at 8.

Our review of the record comports with the trial court's recitation. Husband was not present at the hearing, only his attorney was there on his behalf. N.T., 11/25/13, at 5. At the inception of the hearing, the trial court stated its understanding of the issue before it and requested to hear from the representative from the Dauphin County Domestic Relations Section about "what can or cannot be done in this case." *Id.* at 2. Husband never requested to question the witness, nor did the court ever indicate that he was not permitted to. The record further reflects that the trial court engaged both parties' attorneys in a back-and-forth discussion regarding a solution to the auto draft problem. *Id.* at 4-6. Although Father made no legal argument at that time, there is no support for a finding that the trial court prohibited him from doing so.

We also do not find the manner in which the trial court conducted the hearing to be improper. Contrary to Husband's argument that the trial court is not permitted to call or question a witness, Pennsylvania Rule of Evidence 614 states that the trial court is entitled to do just that. *See* Pa.R.E. 614(a), (b). Moreover, Husband did not object to the trial court calling a witness to

testify or to the questions it posed to the witness.² **See** Pa.R.E. 614(c) (stating that a party may object to the court calling or questioning a witness during the court's examination of the witness). Therefore, in addition to being meritless, the issue is also waived. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In his next two issues raised on appeal, Husband assails the trial court's treatment of the case as a domestic relations matter as opposed to a breach of contract action and its modification of the MSA. Husband's Brief at 18-32. The record reflects that in his pretrial memorandum, Husband cited to contract law regarding impossibility of performance and asserted that the MSA should be discharged because "the requirement that [Husband] set up an auto draft with PA SCDU for the alimony payments to [Wife] is impossible." [Husband's] Pre-Trial [*sic*] Memorandum, 11/8/13, at 2. At trial, however, Husband agreed with the trial court's determination as to how to "solve the problem":

[COUNSEL FOR HUSBAND]: [It]'s our position that we would offer to modify this marriage settlement agreement instead of making the requisite withdraw to PA SCDU but to make it to Dauphin County DRO.

THE COURT: Well, no, he can make it directly to SCDU. That saves extra time.

² We find no support in the record for Husband's contention that "the lack of objection in [*sic*] due to the way the trial court conducted this hearing [making] the idea of raising objections moot." Husband's Brief at 17.

[COUNSEL FOR HUSBAND]: The marriage settlement agreement requires that he do an auto draft.

THE COURT: Right. And I can change that by order of court today.

[COUNSEL FOR HUSBAND]: ***Okay. If he does it by hand then that solves the problem.***

THE COURT: Right.

[COUNSEL FOR HUSBAND]: Okay.

N.T., 11/25/13, at 5-6 (emphasis added).

Our Supreme Court has held that agreement to an issue that the party previously objected to is “in legal effect a deliberate withdrawal of his earlier objection,” and cannot subsequently be argued on appeal before this Court. ***Commonwealth v. LaCourt***, 448 Pa. 86, 89-90, 292 A.2d 377, 379 (1972). As stated above, Husband presented no evidence or argument at trial in support of his pre-trial objection to the MSA’s continued validity based upon his theory of impossibility of performance. Rather, Husband agreed that the trial court’s amendment of the MSA to allow Husband to manually write checks to Pa. SCDU “solves the problem.” As such, he is precluded from arguing on appeal that the trial court erred in this manner.

As his final issue on appeal, Husband argues that the trial court erred by requiring him to pay Wife the \$58,194.66 he owed in arrears within 30 days. Husband’s Brief at 32. Husband states that the Addendum itself identified the penalty for breach of the Addendum, requiring that payments

return to \$3,704.00 per month plus \$1,000.00 on arrears, as set forth in the MSA. ***Id.*** at 33. The trial court found that its order for Husband to make a lump-sum payment of his arrearages was permissible under the MSA, as paragraph 14B grants the court the power “to enforce [H]usband’s duty to pay alimony and arrearages under Pennsylvania support, alimony or divorce law.” Trial Court Opinion, 3/20/14, at 8.

We review a question of the interpretation of an MSA for an error of law or abuse of discretion. ***Stammero v. Stammero***, 889 A.2d 1251, 1257 (Pa. Super. 2005). In support of his argument, Husband cites to section 3105(c) of the Divorce Code, which states: “In the absence of a specific provision to the contrary appearing in the agreement, a provision regarding the disposition of existing property rights and interests between the parties, alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court.” 23 Pa.C.S.A. § 3105(c).

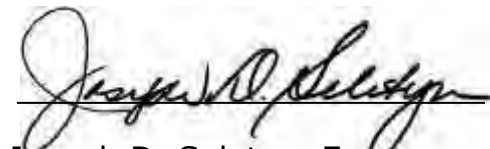
Our review of the MSA and the Addendum reveals that there is no provision permitting the trial court to alter the parties’ agreement regarding the amount of alimony Husband is to pay to Wife. Furthermore, the Addendum states: “Should Husband violate the terms of this Addendum the payments will revert to the amount as set forth in Paragraph 14 [of the MSA] of \$3,704.00 per month plus \$1,000.00 on arrears as set forth in the [MSA][.]” Addendum, dated 12/10/12, at ¶ 5. As the agreement between the parties at issue specifically provides for the amount of alimony and

arrearages that Husband is to pay in the event of a breach of the Addendum, we agree with Husband that the trial court erred by requiring him to make a lump-sum payment on his arrearages.

In summary, we affirm the trial court's order requiring Husband to manually submit alimony payments to Pa. SCDU for Wife. We reverse the trial court's order that Husband make a lump-sum payment of arrearages owed. On remand, the trial court shall enter an order requiring Husband to make payments of \$3,404.00 plus \$1,300.00 in arrears, for total monthly payments of \$4,704.00, to be paid in increments of \$2,352.00 by the 15th and 30th of every month, as required by the MSA. **See** MSA, dated 2/11/12, at ¶ 14B.

Order affirmed in part and reversed in part. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2014