STATE OF MICHIGAN

COURT OF APPEALS

WALTER J. LAWRENCE,

Plaintiff-Appellant,

v

LINDA M. LAWRENCE,

Defendant-Appellee.

UNPUBLISHED
February 25, 2000

No. 210061
Macomb Circuit Court
LC No. 97-005356-DO

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment of divorce entered in this case. We affirm the various show cause and contempt orders the lower court entered against plaintiff; we modify the property settlement provision of the judgment of divorce, and affirm the judgment in all other respects.

I.

Plaintiff first claims that the trial court did not follow the procedural requirements before finding plaintiff in contempt on November 3, 1997 for failing to comply with the court's October 14 order to show cause and the court's October 20 order compelling plaintiff to return defendant's personal property to her.

To the extent that plaintiff raised these issues in his interlocutory appeal with this Court, plaintiff is precluded from again raising these issues before this Court. See *People v Freedland*, 178 Mich App 761, 770; 444 NW2d 250 (1989).

To the extent that plaintiff specifically claims for the first time that the court's November 3 finding of contempt was invalid because plaintiff did not receive personal service of the October orders, plaintiff's claim is without merit. Plaintiff knew of the existence of these orders at least by October 27 because on that date, he filed a motion to set aside the October 20 order for lack of personal service. Thus, before the November 3 hearing at which plaintiff was found in contempt, plaintiff had at least a week's notice of the October 20 order compelling him to return defendant's property. This was a reasonable time to prepare for the November 3 hearing. Plaintiff did not assert he needed additional

time to prepare for the hearing by securing witnesses or presenting evidence to refute defendant's claim that he had wrongfully taken defendant's personal property. Moreover, plaintiff voluntarily appeared at the hearing and had an opportunity to show cause why he not ought to be adjudged in contempt. See *In re Huff*, 352 Mich 402, 413; 91 NW2d 613 (1958). The November 3 order of contempt was not invalid because it did not deprive defendant of procedural due process.

II.

Plaintiff next claims that he was entitled to assert the Fifth Amendment right not to testify against himself at the December 15, 1997 hearing. We disagree.

Contrary to plaintiff's assertions otherwise, the December 15, 1997 proceedings were civil, not criminal, in nature. The constitutional privilege against self-incrimination may be claimed in a civil proceeding if the person claiming the privilege is subject to criminal prosecution and disclosure may incriminate him. *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 726, 734; 344 NW2d 788 (1984). However, plaintiff admitted at the hearing that there were no pending criminal charges, and the court granted plaintiff immunity from criminal prosecution that might be brought against him for taking defendant's personal property. Having been granted such immunity, plaintiff had no reasonable basis on which to refuse to testify. See generally, *In re Colacasides*, 379 Mich 69; 150 NW2d 1 (1967). Plaintiff directly and repeatedly disobeyed the court's order to answer its questions. The court did not abuse its discretion in summarily holding plaintiff in contempt. MCL 600.1701(g); MSA 27A.1707(g), MCL 600.1711; MSA 27A.1711, MCL 600.1725; MSA 27A.1725; *People v Ahumada*, 222 Mich App 612, 617-618; 564 NW2d 188 (1997).

III.

Plaintiff argues that in its show cause order of February 2, 1998, the court attempted to punish plaintiff a second time, in a separate proceeding, for the same offense for which plaintiff was "prosecuted" on November 3, 1997. Plaintiff maintains that this constituted multiple prosecution and punishment for the same offense in violation of the Double Jeopardy Clause. Plaintiff's argument is without merit.

For double jeopardy protections to apply, a person must first be put in jeopardy by a criminal proceeding. *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). This Court has already rejected on the merits plaintiff's interlocutory claim that the November 3 proceeding was a criminal proceeding. Because the November 3, 1997, proceeding was not a criminal proceeding, no jeopardy attached at that proceeding for plaintiff's violation of the October 20 court order.

In addition, the February 2, 1998, order was a preliminary order for plaintiff to show cause—the court did not adjudicate plaintiff in that order as being in contempt. Even assuming that the issue of double jeopardy were applicable, jeopardy in a bench trial attaches at the time the court begins to hear the evidence, which did not occur here until at least February 5. *People v Hicks*, 447 Mich 819, 826-827; 528 NW2d 136 (1994). Because jeopardy did not attach at the time of the February 2 show cause order, which is the specific order plaintiff appeals here, his claim is without merit.

Plaintiff's further claims are without merit that collateral estoppel and res judicata precluded the trial court from relitigating in February 1998 the issue of whether plaintiff violated the October 20, 1997 order. Plaintiff was under a continuing duty to comply with the court's October 20, 1997 order. The trial court was not precluded from finding on February 5, 1998, that plaintiff had still not complied with the previous orders compelling him to return defendant's property and to find plaintiff in contempt of these continuing orders. See *In re Contempt of Dougherty*, 429 Mich 81, 99-100; 413 NW2d 392 (1987). The February proceedings did not relitigate whether plaintiff was in contempt in November for failing to comply with the October 20 order compelling him to return defendant's personal property. The February proceedings determined whether plaintiff was in violation of the October 20, 1997 order as of February 1998.

IV.

Plaintiff's claim that the trial court failed to hold a hearing on plaintiff's objections to the referee's recommended order is without basis in fact. At the hearing held on February 2, 1998, the trial court heard and denied plaintiff's objections to the referee's recommendations and ruled that the issues raised by plaintiff were merged into the trial proceedings which were held on January 22, 1998.

Also without basis in fact is plaintiff's claim that the trial court issued an order on March 3, 1998, imposing $400 in attorney fees against plaintiff. The court did not issue any judgment or order on or around March 3, 1998. The court did not issue any order or judgment imposing $400 in attorney fees, as recommended by the friend of the court, after the judgment of divorce was entered in this case. The trial court did award $5,000 in attorney fees payable from plaintiff to defendant in the judgment of divorce; however, plaintiff does not contest this award.

Plaintiff's claims are without merit.

V.

Next, plaintiff contends that a lien in the amount of $100,000 against his life insurance proceeds as a retiree of General Motors Corporation is invalid because it violates the Employees Retirement Income Security Act [ERISA], 29 USC 1001 et al. However, plaintiff has not established that this life insurance policy is part of a benefit provided under a pension plan and thus protected from alienation or assignment under ERISA. Assuming arguendo that the life insurance policy is part of a benefit provided under a pension plan provided by General Motors, it appears that the proceeds of the life insurance policy are not preempted by ERISA and can be assigned by the judgment of divorce. See *Metropolitan Life Ins v Marsh*, 119 F3d 415 (CA 6, 1997). Plaintiff does not prevail on this claim.

VI.

Finally, plaintiff argues that the trial court erred in the judgment of divorce in ordering in that plaintiff return defendant's personal property to her as well as pay defendant the dollar value of her property, with the award resulting in a "double dip" for defendant. We agree, and defendant has

agreed to stipulate to a redrafting of the judgment of divorce to correct the trial court's ruling regarding the property settlement.

The trial court is to modify the property settlement provisions of the judgment of divorce to state that plaintiff is ordered to return each and every item of defendant's personal property he wrongfully removed from defendant's residence, place of employment or elsewhere. If plaintiff fails to return any of this property to defendant, plaintiff is ordered to immediately pay defendant the dollar value of the property, which has already been established at $102,702.48. This is the combined value of the property for which a value could be ascertained, $27,702.48, and $75,000 for the property plaintiff took for which no value could be determined because of its character and nature.

We remand this case to the trial court for modification of the property settlement provisions of the judgment of divorce as set forth above, and we affirm the judgment of divorce in all other respects. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey