

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

Julie A. Barron (nka Julie A. Glass)

Court of Appeals No. OT-08-055

Appellee

Trial Court No. 04DR216D

v.

Edward Barron

**DECISION AND JUDGMENT**

Appellant

Decided: May 14, 2010

\* \* \* \* \*

John A. Brikmanis, for appellee.

Ron Nisch, for appellant.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} Edward Barron, appellant, appeals an October 29, 2008 judgment of the Ottawa County Court of Common Pleas overruling objections to a magistrate's decision of August 5, 2008, and imposing sanctions on Barron upon failure to purge contempt,<sup>1</sup>

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<sup>1</sup>The trial court imposed a sanction of incarceration for 30 days.

setting new purge conditions,<sup>2</sup> and awarding appellee attorney fees in an amount to be determined. Julie A. Glass, formerly Julie A. Barron, is appellee.

{¶ 2} The parties were married in 1994. This dispute arises out of the dissolution of their marriage in 2004 and failure of Barron to meet obligations under a separation agreement, incorporated into the dissolution decree. Barron asserts two assignments of error on appeal:

{¶ 3} "Appellant's Assignment of Error:

{¶ 4} "I. The trial court erred in adopting the decision of the Magistrate, as the specific orders of the Magistrate were procedurally inappropriate and unlawful. (R.61, 70).

{¶ 5} "II. The Magistrate's Orders in the August 5, 2008 Decision, adopted by the trial court, substantively exceed the contempt powers of the trial court. (R 61, 70)."

{¶ 6} Obligations under the dissolution decree included:

{¶ 7} "Wife shall convey to Husband, by sufficient deed, all her right, title and interest in and to the real estate located at 2708 N. Toussaint S. Road., Oak Harbor, Ohio, and further described in the legal description attached hereto as Exhibit B and incorporated herein by reference.

{¶ 8} "Husband shall be responsible from and after November 1, 2004, and shall hold Wife harmless on any and all liens, mortgages, and encumbrances placed upon the

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<sup>2</sup>The court ordered appellant to pay appellee her equitable interest in certain real property (\$50,000) within 30 days and to hold appellee harmless on existing indebtedness.

aforesaid real estate, in addition to any and all real estate taxes on and after November 1, 2004.

{¶ 9} "Husband shall apply to refinance the existing indebtedness on this real property, solely in Husband's name within 30 days of the date of the final hearing herein and every 90 days thereafter until the refinance is complete. Husband shall complete the refinance within one year of the date of the final hearing herein. At the time the refinance, Husband shall pay to Wife the amount of \$40,000 as and for a partial payment of Wife's equity interest in said property. Husband shall pay an additional \$10,000.00 to Wife representing the balance of Wife's equity interest in said real estate in monthly installments of \$500.00 each, commencing December 1, 2004, and continuing for a period of 20 months until the \$10,000.00 is paid in full."

{¶ 10} On December 27, 2005, Glass filed a pro se motion for the trial court to find Barron in contempt of obligations under the dissolution decree, including failure both to refinance the N. Toussaint S. Road property in his own name and to pay Glass \$40,000 upon refinancing. Unsuccessful court ordered mediation of the dispute followed in March and June 2006.

{¶ 11} The contempt motion proceeded to hearing on November 6, 2006. Appellant did not raise any claim of impossibility of performance in opposition to the motion. In a magistrate's decision of November 30, 2006, the magistrate found Barron in contempt. The finding was based upon admissions at the November 6, 2006 hearing that Barron had failed to refinance the N. Toussaint S. Road property and failed to pay Glass

\$40,000 for her equity interest in the property. Barron did not file objections under Civ.R. 53(D)(3) to the magistrate's finding of contempt.

{¶ 12} The magistrate also set conditions in the November 30, 2006 decision under which Barron could purge himself of contempt. Barron filed Civ.R. 53(D)(3) objections to the magistrate's decision on December 18, 2006.<sup>3</sup> Those objections did not include any objection to the relevant conditions upon which contempt sanctions were ultimately imposed in 2008 – the purge condition that Barron refinance the N. Toussaint S. Road property within 30 days of November 6, 2006 and pay plaintiff \$40,000. Those purge conditions remained in effect from November 30, 2006 forward.

{¶ 13} The November 30, 2006 magistrate's decision also provided that "[t]his matter shall be scheduled for further hearing within sixty (60) days hence for sentencing."

{¶ 14} On January 18, 2008, new counsel appeared on behalf of Glass. He requested the court to schedule a pretrial conference and indicated that the court could proceed further with the contempt motion due to an order recently filed in Barron's bankruptcy case. A new magistrate was assigned to the case and a hearing set for March 28, 2008.

{¶ 15} The record reflects that neither appellant nor his counsel appeared at the pretrial conference scheduled for March 28, 2008. The record also reflects that a copy of

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<sup>3</sup>Barron objected to purge conditions that he could purge contempt "by refinancing or selling," the N. Toussaint S. Road property, asserting that the separation agreement required refinancing alone. (Emphasis added.) He also objected to an order preventing him from selling or encumbering certain other property.

a stipulated judgment entry, stipulated between counsel representing both Barron and Glass in Chapter 7 bankruptcy proceedings brought by Barron, was filed with the trial court on that date. The judgment entry provided that the \$40,000 debt owed by Barron to Glass was non-dischargeable in bankruptcy and that "the Domestic Relations Court of Ottawa County may render other orders and retain jurisdiction to deem the said debt a contingent liability of the debtor Edward Barron."<sup>4</sup>

{¶ 16} A pretrial conference proceeded on May 2, 2008. Both parties and counsel attended. No stenographic or audio record of the proceeding was made. What agreements were reached at the pretrial conference is a matter of dispute in this appeal. Appellant has not filed a record of the proceeding in this court using available procedures under App.R. 9(C) or (D).

{¶ 17} Thereafter the parties submitted briefs to the magistrate. The magistrate issued a decision on August 5, 2008, imposing sanctions on Barron for failure to purge his contempt, setting new purge conditions for contempt, and awarding attorney fees to Glass in an amount to be set. The trial court overruled objections to the magistrate's decision in a judgment of October 29, 2008.

{¶ 18} Under Assignment of Error No. I, Barron claims that the magistrate imposed sanctions for contempt and new purge conditions without a hearing. He claims he was denied an opportunity to present evidence as to impossibility of compliance with

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<sup>4</sup>The order was also subsequently filed with the court as an exhibit to appellee's brief that was filed after the May 2, 2008 pretrial conference.

either the new purge conditions or the purge conditions set under the magistrate's decision of November 30, 2006. He claims that he was denied an opportunity to present evidence that he attempted to refinance the home but was unable to do so.

{¶ 19} In its judgment of October 29, 2008, the trial court stated that at the May 2, 2008 pretrial the parties "agreed to submit briefs to the Court setting forth their respective positions as to whether Defendant could be sentenced on the magistrate's finding of contempt, given that the property had been foreclosed upon and sold." Specifically with regard to compliance with purge conditions, the trial court indicated that "the parties agreed to submit the matter of whether compliance with the purge provisions was an impossibility by briefs."

{¶ 20} Barron asserts that the magistrate asked the parties "to summarize the status of this case and to provide the Magistrate with arguments as to what procedural options the Court had \* \* \*" at the pretrial. Barron denies that he agreed to submit the issue of impossibility by briefs:

{¶ 21} "The appellant did not, and would have not have, waived any opportunity to present evidence as to whether he could comply with the purge conditions. No such opportunity has been provided by the trial court to the appellant, and certainly none was offered at the May 2, 2008 pretrial."

{¶ 22} Glass, in her appellee brief, claims otherwise:

{¶ 23} "Appellant's counsel misrepresents the pre-trial held May 2, 2008 before Magistrate Wood. Magistrate Wood asked of counsel how we wished to proceed,

whether another hearing or brief the issue. I [counsel for Glass] stated that the defendant had already been found in contempt and admittedly had not paid the \$40,000, that there were no real facts in dispute. Ed Barron's counsel \* \* \* concurred and stated briefs would resolve the matter. A briefing schedule was then set and briefs submitted."

{¶ 24} It is the burden of the appellant to provide a transcript or an App.R. 9 substitute for a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199-200. "This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162." *Id.* at 199.

{¶ 25} "App.R. 9(C) permits an appellant to submit a narrative transcript of the proceedings when a verbatim transcript is unavailable, subject to objections from the appellee and approval from the trial court. App.R. 9(D) authorizes parties to submit an agreed statement of the case in lieu of the record." *Id.* at 199-200.

{¶ 26} It is not an appellate court's role under App.R. 9 to resolve disputes about the record on appeal. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 81-82. The Supreme Court of Ohio has recognized that under App.R. 9, such disputes are to be submitted to the trial court for it to resolve in its "sound discretion." *Id.*

{¶ 27} Appellant has not filed a record of the May 2, 2008 pretrial conference using available procedures under App.R. 9(C) or (D). Accordingly, his argument that he did not waive a hearing and agree to submit pending issues in the case to the magistrate on briefs lacks support in the record and is without merit.

{¶ 28} Under Assignment of Error No. I, appellant also argues that evidence was lacking in the record to support the trial court's judgment. We disagree. Appellant had been previously found in contempt and purge conditions set. It was undisputed that appellant had failed to comply with purge conditions to refinance the property and to pay appellee \$40,000.

{¶ 29} Impossibility of compliance, as a defense to sanctions for a failure to purge contempt, is an affirmative defense for which the contemnor has the burden of proof. *In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002, ¶ 36; *McCleese v. Clemmons*, 4th Dist. No. 05CA3016, 2006-Ohio-3011, ¶ 16; *State ex rel. Yosses v. Schachner* (Mar. 17, 2000), 6th Dist. No. L-99-1069.

{¶ 30} In imposing sanctions for failure to purge contempt, the trial court reasoned that the foreclosure action was filed in August 2007 and the N. Toussaint S. Road property was sold under foreclosure in February 2008. The trial court concluded appellant "had nearly three years to comply with the terms of the Separation Agreement and had nearly a year to comply with purge conditions" and failed to do so. The trial court recognized in its judgment that it was appellant's burden, as the party in contempt, to present evidence that purge conditions were unreasonable or impossible to meet. The court found that appellant failed to meet that burden.

{¶ 31} Appellate courts review trial court rulings concerning contempt under an abuse of discretion standard. *Beck v. Beck*, 6th Dist. No. F-07-021, 2008-Ohio-4027, ¶ 19; *Ortmann v. Ortmann* (Mar. 22, 2002), 6th Dist. No. L-01-1045. Abuse of discretion



"connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1984), 5 Ohio St.3d 217, 219.

{¶ 32} In view of appellant's failure to offer evidence in support of any claimed impossibility in performing the purge conditions, we find no abuse of discretion in the trial court's judgment adopting the magistrate's decision to impose sanctions upon plaintiff for failure to purge contempt.

{¶ 33} Appellant's Assignment of Error No. I is not well-taken.

{¶ 34} Under Assignment of Error No. II, Barron claims that the trial court exceeded its contempt powers in the October 29, 2008 judgment. To the extent appellant does not simply reargue issues considered under Assignment of Error No. I under his Assignment of Error No. II, he argues, first, that the trial court's own prior rulings in this case created a "the law of the case" that limited use of the court's contempt powers to coerce refinancing of the N. Toussaint S. Road property alone.

{¶ 35} In response, appellee argues that the doctrine of the law of the case does not apply. We agree. The Ohio Supreme Court has summarized the doctrine in these terms: "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *State ex. rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 47, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, syllabus. (Citations omitted.)

{¶ 36} Appellant's arguments as to law of the case are without merit. The trial court retained its authority to interpret and to enforce the separation agreement's terms providing for division of property. The agreement was incorporated into the dissolution decree and constituted a prior order of the court subject to enforcement by use of contempt powers.

{¶ 37} Appellant next asserts that the trial court exceeded its contempt powers by considering issues "not moved for or presented by the parties." We find this argument is also without merit.

{¶ 38} The May 2, 2008 pretrial was scheduled after a request by counsel for appellee for the trial court to proceed further on the issue of contempt. Appellant had been found in contempt on November 30, 2006. Purge conditions requiring refinancing and payment of \$40,000 to appellee were set on that date as well. It is undisputed, not only had appellant failed to refinance the property and pay appellee \$40,000 prior to the pretrial, but also that ownership rights to the property had been lost due to foreclosure proceedings and foreclosure sale. The question of sanctions for contempt remained to be decided by the court. The magistrate's decision of November 30, 2006, contemplated further proceedings on contempt and provided that "[t]his matter shall be scheduled for further hearing within sixty (60) days hence for sentencing."

{¶ 39} The trial court, in its judgment of October 29, 2008, stated that at the May 2, 2008 pretrial the parties "agreed to submit briefs to the Court setting forth their

respective positions as to whether Defendant could be sentenced on the magistrate's finding of contempt, given that the property had been foreclosed upon and sold."

{¶ 40} The issues addressed by the trial court in its judgment of October 29, 2008, were clearly and directly in issue in this case at the time of the trial court's decision. Appellant's argument that the trial court exceeded its contempt powers by considering issues "not moved for or presented to it by the parties" is without merit.

{¶ 41} To the extent appellant argues that there was no evidentiary basis to impose sanctions for failure to purge contempt, we addressed that issue under Assignment of Error No. I. It was appellant's burden, given his undisputed failure to comply with conditions to purge contempt, to prove the affirmative defense of impossibility of compliance.

{¶ 42} Appellant also argues that the separation agreement, incorporated into the dissolution decree, limited appellant's obligations with respect to the N. Toussaint S. Road property to refinance the property and to pay \$40,000 to appellee upon refinancing. He argues that the obligation to pay \$40,000 was conditioned upon refinancing and that under R.C. 3105.171(I) the division of property under the separation agreement "is not subject to future modification by the court."

{¶ 43} Even under the restrictions of R.C. 3105.171(I), a trial court retains jurisdiction "to clarify and construe its original property division in order to effectuate its judgment." *Strain v. Strain*, 6th Dist. No. L-03-1332, 2004-Ohio-3792, ¶ 13; *Gordon v. Gordon* (2001), 144 Ohio App.3d 21, 24.

{¶ 44} Here the trial court reviewed the terms of the separation agreement and specifically Section 2(a)(iii) of the agreement to give effect to the intent of the parties. In the October 29, 2008 judgment, the court concluded: "It is obvious from this section as well as a reading of the entire Separation Agreement that Defendant was to hold Plaintiff harmless on any existing indebtedness, and pay to Plaintiff her equitable interest in the property." It also concluded that these obligations were not extinguished under the agreement in the event that appellant failed to refinance:

{¶ 45} "The Separation Agreement is not ambiguous simply because the parties failed to make provision for what would occur in the event Defendant could not – or would not – refinance the property. Defendant was given one year to refinance, failure to do so does not absolve him of the intent of the parties that he hold Plaintiff harmless on any existing indebtedness and pay to Plaintiff 'the amount of \$40,000.00 \* \* \*;' and 'an additional \$10,000.00' as her share of the equitable interest in the property."

{¶ 46} We find that the trial court acted to give effect to the intent of the parties as evidenced by the unambiguous terms of the separation agreement in its judgment and did not act to modify the division of property under the separation agreement in violation of R.C. 3105.171(I). Appellant's argument that the trial court lacked jurisdiction under R.C. 3105.171(I) to render its October 29, 2008 judgment is without merit.

{¶ 47} Trial courts hold inherent authority to enforce their orders through contempt proceedings. *Schwarzentraub v. Schwarzentraub*, 6th Dist. No. H-09-012,

2010-Ohio-472, ¶ 10; *Townsend v. Townsend*, 4th Dist. No. 08CA9, 2008-Ohio-6701, ¶ 57-59.

{¶ 48} Appellant's Assignment of Error No. II is not well-taken.

{¶ 49} Upon consideration, we find that substantial justice was done to the party complaining. The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.