ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL JR, JUDGE

DIVISION II

CA07-465

28 May 2008

FREDA ANN QUARLES OWEN,
APPELLANT

v.

GERALD W. QUARLES,
APPELLEE

AN APPEAL FROM JEFFERSON COUNTY CIRCUIT COURT
[DR-2004-1161-4]

THE HONORABLE LEON N. JAMISON, JUDGE

AFFIRMED IN PART;
REVERSED IN PART
and REMANDED

This divorce case returns to us. In *Owen v. Quarles*, CA06-485, slip op. (Ark. App. 30 May 2007), we affirmed the circuit court's division of the parties' property and debt. During that appeal, however, the parties' disagreements about real and personal property continued and the circuit court conducted further proceedings. Ms. Owen has appealed again. She challenges the parts of a circuit court order that, among other things, required the public sale of the marital home and reduced her share of the sale proceeds by $31,200.00, the cost of repairing post-decree damage to the home. The fighting issue is the adequacy of notice to Ms. Owen about what pending motions would be adjudicated at a hearing—a several-hour hearing, which she failed to attend until the circuit court was ruling from the bench.

Ms. Owen does not assert clear error in the circuit court's factual conclusions that, soon after the parties' divorce became final, she essentially emptied the marital home and vandalized it. The record supports these conclusions, which flow from the intertwined facts about Ms. Owen's post-decree actions. Mr. Quarles was living in the home until it sold. Neighbors saw Ms. Owen's vehicle lead a "caravan" of empty trucks and trailers there. And they saw these vehicles leave several hours later full of stuff. Obscenities and graffiti—"I hate you" and "You will pay"—had been spray painted on the inside walls of the house. Broken glass from light fixtures, mirrors, and furniture had been ground into the home's hardwood floors. An album of wedding photographs was defaced and left in the middle of the floor. In the album, Ms. Owen wrote hateful notes to Mr. Quarles.

Nor does Ms. Owen seek reversal of that part of the circuit court's order that she return Mr. Quarles's personal property. She contends, however, that she had no notice that the hearing from which the order came would also address the cost of repairing the damage to the marital home. She asks us to reverse the repair damages awarded to Mr. Quarles by the circuit court. She also contends that the court erred by ordering a public sale of the home.

I.

We address the sale issue, which is straightforward, first. Ms. Owen's attack on the sale has no merit. The parties' supplemental divorce decree provided that

> the marital real property . . . shall be sold and the net sales proceeds divided equally between the parties. The parties shall have 120 days from the date of the entry of this Supplemental Decree of Divorce to effect the sale by private means. If a qualified and legitimate buyer is not found within the said 120 days then said property upon the request of either party shall be sold at public sale by the Clerk of this Court acting as Commissioner, all as provided by law.

The parties did not sell the home privately; Mr. Quarles requested a sale at the disputed hearing (which we discuss more below); and a commissioner gave notice and conducted a public sale as the court ordered. Ms. Owen had notice of the decree's terms, the passage of time and the judicial steps leading up to the sale, and the sale itself. There was no error in the circuit court enforcing this part of its decree more than one year after entering it.

II.

The tangled issue is whether Ms. Owen had notice that Mr. Quarles's motion for damages for home repairs would be addressed at the disputed hearing. The issue is tangled because the parties filed many papers in the circuit court but have provided us only a partial record. The notice issue raises a mixed question of fact and law under the Due Process Clauses of the State and federal Constitutions. U.S. Const. amend. 14; Ark. Const. art. 2, § 8. We have found no precedent stating the standard of our review, but the cases on point show plenary review by the appellate court without any deference to the circuit court's decision. *E.g.*, *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). We therefore review *de novo*.

Here we must give some procedural background. The post-decree proceedings

began with Mr. Quarles's petition for contempt. Though styled as a petition, the paper was a motion. In that paper, Mr. Quarles sought the return of his personal property, not damages for the cost of repairing the home. At some point, he filed an amended petition for contempt. We do not know what relief Mr. Quarles sought because this amended petition is not in the record presented to us. Someone petitioned to reopen the divorce case, but we do not know who or why because this document is not in the record either. At some point, Ms. Owen must have moved for possession of the marital home. We know that this filing occurred because we have Mr. Quarles's response to that motion—which he combined with his counter-motion seeking damages for the cost of repairing the house.

Several months later, the circuit court scheduled a hearing for February 2007. Mr. Quarles's counsel confirmed the setting in a letter to the court, which stated: "This will confirm the re-setting of this matter for a full day on Tuesday, February 13, 2007, at 9:30 a.m. on Defendant's Contempt Petition and Petition to Re-Open Case." Counsel sent a copy of the letter directly to Ms. Owen. At this point, she had counsel for the then-ongoing first appeal but had not hired new counsel for the circuit court proceedings.

Ms. Owen did not appear at the start of the hearing. Based on the letter we've quoted, the circuit court found that she had notice of the hearing and proceeded. The court spent the morning taking evidence from Mr. Quarles's witnesses about Ms. Owen's removal of the personal property, the damage to the home, the cost of repairs,

and various other matters. After a break, the hearing resumed. Mr. Quarles asked the court to order Ms. Owen to return his personal property and pay for the home repairs, and to order the home sold now. As the court began its ruling from the bench, Ms. Owen entered the courtroom. She asked to be heard at the end of the court's ruling. She first stated that she had no notice of the hearing, but then acknowledged in answering the court's questions that she did.

The circuit court promptly entered an order reflecting its bench ruling: Ms. Owen had to return the personal property within a couple of weeks and show cause why she should not be held in contempt; the home was to be sold at a public sale; and $31,200.00 for home repairs was to be deducted from Ms. Owen's share of the sale proceeds. New counsel then appeared for Ms. Owen. In a motion for reconsideration, counsel argued that Ms. Owen had no notice that the hearing would address the damage to the home and that the order awarding those damages therefore offended due process. Ms. Owen also moved to stay the sale. The circuit court denied both motions.

III.

Ms. Owen makes her no-notice argument as a matter of due process and by relying on our law of contempt. She says that the damages awarded were for criminal contempt without proper notice. Her contempt argument misses the mark for two reasons. First, Mr. Quarles did not seek the home-repair damages as a sanction for her contempt. He could have done so. *E.g.*, *Wakefield v. Wakefield*, 64 Ark. App. 147,

154, 984 S.W.2d 32, 36 (1998); *Walker v. Fuller*, 29 Ark. 448, 469, 1874 WL 1187 (1874). Mr. Quarles's petition for contempt sought only the return of his personal property. Second, as Mr. Quarles points out, the circuit court did not hold Ms. Owen in contempt in the challenged order. The court remarked during its bench ruling that she was disregarding the court's orders—contemptuous behavior certainly—but it specifically ordered Ms. Owen to show cause why it should not hold her in contempt. The circuit court thus reserved a ruling on contempt even as it ordered Ms. Owen to pay damages for home repairs. Out of all this, we conclude that the intricacies of contempt doctrine, *cf. Ward v. Switzer*, 73 Ark. App. 81, 84–85, 40 S.W.3d 325, 327–28 (2001), do not help decide the case. This appeal turns instead on every litigant's due process right, absent exceptional circumstances, to notice of court proceedings.

Ms. Owen is correct in the core of her argument on appeal. She did, as the circuit court concluded, have notice of the February 2007 hearing. But she did not have notice that Mr. Quarles's motion seeking damages for the cost of repairing the home would be adjudicated at the hearing. And before she could be deprived of some of her proceeds from the house sale, the Due Process Clause gives her the right to notice of that prospect. *Arkansas Dep't of Correction v. Bailey*, 368 Ark. 518, 525, ___ S.W.3d ___, ___ (2007). The right to notice applies to proceedings about contempt as well as proceedings about other claims for relief, such as Mr. Quarles's motion for damages. Ark. Code Ann. § 16-10-108(c) (Supp. 2007); *Ivy v. Keith*, 351 Ark. 269,

282, 92 S.W.3d 671, 679 (2002).

At the time of the disputed hearing, several post-decree petitions and motions were pending in this case. Ms. Owen was entitled to know which of these matters would be decided at the hearing so that, if she chose, she could be heard on them. The notice letter to Ms. Owen told her only that the hearing would be about the petition for contempt and the petition to reopen the case. The petition for contempt did not seek money damages for repairs to the marital home. The petition to reopen is not before us. We granted Mr. Quarles's motion to include his motion for damages in the record on appeal. But he did not likewise seek to bring the Petition to Reopen into the record and makes no argument that this Petition sought damages for home repairs. We conclude, therefore, that neither petition put Ms. Owen on notice that the damages issue would be addressed at a hearing on the issues raised in these petitions.

This was not a situation where the parties' motion papers adequately addressed all the disputed issues and the circuit court could grant complete relief to the movant on those papers without a hearing. *Cf.* Ark. R. Civ. P. 78(c). Mr. Quarles's motion for damages was unverified. He filed no affidavits or other evidence in support of the motion. The motion did not seek a specific amount of damages for home repairs. So far as the record presented shows, Ms. Owen never responded to the motion. That omission would support the court granting that motion without any hearing. Ark. R. Civ. P. 7(b)(2). But to award Mr. Quarles damages, the circuit court needed evidence

about the extent of the damage and the costs of repairs. And this evidence was absent from the motion papers.

Mr. Quarles argues that, under Arkansas Rule of Civil Procedure 15(b), Ms. Owen consented to trying the issue of damages by failing to appear until the end of the hearing. We disagree. Rule 15(b) is about conforming pleadings to the evidence when the parties agree expressly or implicitly to litigate an issue not raised in the pleadings. Ark. R. Civ. P. 15(b). Motions are not pleadings. Motions—here labeled "petitions" in the old word of chancery practice—are applications to the court for an order. Ark. R. Civ. P. 7(b). Under our rules, the universe of pleadings contains only these papers: complaints, answers, counterclaims, cross-claims, third-party claims, and replies to these papers. Ark. R. Civ. P. 7(a). Mr. Quarles's motion for damages was not a pleading; neither were the petitions for contempt and to reopen the case. The issue here is not about conforming pleadings to proof, and Rule 15(b) does not apply.

IV.

The issue in this case is notice. Many cases have several motions pending at the same time. A hearing set on one or two such motions is no warrant to decide other pending motions if the defending party fails to appear at the hearing. Ms. Owen had no notice that Mr. Quarles's motion for damages to the home would be adjudicated at the February hearing. We therefore reverse the part of the circuit court's order requiring Ms. Owen to reimburse Mr. Quarles $31,200.00 for damages to the home from her share of the sale proceeds.

We remand for the circuit court to hold another hearing limited to the extent of the damage and the cost of repairs. For three reasons, we hold that whether Ms. Owen is responsible for the damage is not an open question on remand. First, the record does not show that Ms. Owen responded to the motion for damages. Thus she essentially conceded her liability. Second, the facts on this issue are so intertwined with the facts about removing the personal property that the circuit court properly resolved who did the damage at the disputed hearing, which Ms. Owen chose not to attend despite notice. Third, Ms. Owen makes no clear challenge on appeal to her liability for the damages to the home. She concentrates her fire instead on her lack of notice that the amount of those damages would be decided at the disputed hearing.

Affirmed in part; reversed in part and remanded.

PITTMAN, C.J., and ROBBINS, J., agree.