

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MYRNA FLYNN,

Petitioner,

v.

GREGORY T. FLYNN,

Respondent.

No. 2D22-1172

March 10, 2023

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Alissa M. Ellison, Judge.

Mark A. Neumaier, Tampa, for Petitioner.

Scott W. Anderson of Johnson Daboll Anderson, PLLC, Tampa, for Respondent.

SMITH, Judge.

Petitioner, Myrna Flynn (Former Wife), seeks certiorari review of the lower court's order limiting her discovery requests related to Gregory Flynn's (Former Husband) petition for modification of alimony. Because the Former Wife is entitled to discovery related to the Former Husband's assets and liabilities, including those that were awarded to the Former

Husband in the Final Judgment of Dissolution (Final Judgment), we grant the petition and quash the order below.

The Final Judgment, rendered May 13, 2008, ratified the parties' mediated marital settlement agreement and ordered the Former Husband to pay permanent alimony in the amount of \$13,000 per month. The Former Husband is a doctor who owned a medical practice and the building where the practice operated (the Office Building). The Final Judgment provided that as part of the equitable distribution, the Former Husband would receive the real property in the form of the Office Building.

On April 23, 2019, the Former Wife filed a motion for civil contempt and enforcement based on the Former Husband's failure to make the required alimony payment on April 5, 2019. In response, the Former Husband filed his second petition to modify his alimony obligation in May 2019.¹ His petition alleges (1) unforeseen changes in the market within the pain management field of medicine have caused a significant decrease in his income; (2) the Former Wife has no need for alimony because her income has increased; and (3) the Former Husband will soon be sixty-five and "anticipates retiring in the near future."

The Former Wife sought discovery related to the Former Husband's financial situation. The Former Husband did not respond and refused to sit for an examination by a vocational expert. The Former Wife filed multiple motions to compel and then for contempt and sanctions. Meanwhile, on October 11, 2019, the lower court found the Former Husband in willful contempt of court for failing to pay his monthly court-

¹ In November 2012, the Former Husband successfully petitioned for a downward modification of his monthly alimony from \$13,000 to \$9,000.

ordered alimony to the Former Wife. The Former Husband was ordered to pay back alimony to the Former Wife and was specifically ordered to continue paying his monthly alimony obligation. While the discovery disputes continued, the Former Husband filed objections to the Former Wife's discovery requests as they related to the sale of the Office Building.

After a hearing on the Former Husband's objections, the lower court rendered an "Interim Order on Outstanding Discovery," which provided:

By issuing this Order, the Court makes no ultimate determination as to whether Former Wife has waived any interest in the proceeds of the sale [of the office building]. Rather, this Order is rather [sic] to the scope of relevancy for discovery purposes.

It is undisputed that the office building and the associated debt and liens were awarded to the Former Husband in the marital settlement agreement as part of his equitable distribution. A trial court can (and should) consider assets awarded to the former spouse when considering alimony. However, requiring the former spouse to exhaust those assets to make alimony payments would render the alimony obligation inequitable. *Galligar v. Galligar*, 77 So. 3d 808 (Fla. 1st DCA 2011). In turn, a court in its computation of alimony should impute income that could reasonably be projected on a former spouse's liquid assets. *Hodge v. Hodge*, 227 So. 3d 1284 (Fla. 5th DCA 2017).

Taking these propositions together (and without making a threshold determination as to any waiver on the part of the Former Wife), the court finds that discovery related to the sale of the building and any proceeds received by the Former Husband therefrom could be reasonably calculated to lead to the discovery of admissible evidence to the extent imputed income could be projected on these assets. However, the Former Husband's use of those funds after receipt of the same would not be reasonably calculated to lead to the discovery of admissible evidence for discovery purposes.

The Former Wife timely filed the instant petition for writ of certiorari arguing the lower court departed from the essential requirements of the law in limiting the discovery related to the proceeds from the sale of the Office Building. The Former Wife argues that discovery and consideration of all of the Former Husband's assets, from any source whatsoever, is appropriate where the Former Husband is seeking a reduction in his alimony obligation and the Former Wife is seeking to hold him in civil contempt. We agree.

"A petition for certiorari is appropriate to review a discovery order when the 'order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.' " *Inglis v. Casselberry*, 200 So. 3d 206, 209 (Fla. 2d DCA 2016) (quoting *Winderting Invs., LLC v. Furnell*, 144 So. 3d 598, 601–02 (Fla. 2d DCA 2014)). "[W]hen the requested discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim, defense, or counterclaim, relief by writ of certiorari is appropriate." *Giacalone v. Helen Ellis Mem. Hosp. Found., Inc.*, 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009) (footnote omitted).

Similarly here, as in *Giacalone*, the lower court's ruling—that the Former Husband should not have to exhaust the assets he received as equitable distribution in order to satisfy his alimony obligations and, therefore, the discovery of any proceeds he received from the sale of the building would not lead to the discovery of any admissible evidence—eliminated the Former Wife's claims. This was a departure from the essential requirements of the law because the requested discovery of the

Former Husband's assets is relevant or is reasonably calculated to lead to the discovery of admissible evidence.

Moreover, in *Acker v. Acker*, 904 So. 2d 384 (Fla. 2005), the Florida Supreme Court considered whether assets that have been equitably distributed to a party may be considered in determining the proper amount of alimony, specifically in the context of a motion to reduce alimony. The supreme court explained:

Section 61.08(2)(d), Florida Statutes (1997), requires trial courts to consider, when fashioning awards of alimony, "all relevant economic factors, including but not limited to: . . . the financial resources of each party, the non-marital and the marital assets and liabilities distributed to each." Section 61.08(2)(g) requires the court to consider "all sources of income available to either party."

Acker, 904 So. 2d at 389 (emphasis added) (quoting *Lauro v. Lauro*, 757 So. 2d 523, 524–25 (Fla. 4th DCA 2000)). The court in *Acker* held that the trial court properly considered income received from the former husband's pension, which was awarded to the former husband in the final judgment of dissolution, in denying his petition to terminate his alimony payments. *Id.* at 388.

Even *Galligar*, which the lower court relied upon in making its determination in this case, acknowledges that "while the trial court may consider assets awarded to the former husband during distribution for the purposes of determining alimony, . . . requiring him to exhaust those assets to make alimony payments renders the modified alimony obligation inequitable." *Galligar*, 77 So. 3d at 812 (emphasis added). While a party may not be required to deplete or exhaust assets in order to satisfy alimony obligations, here, the Office Building has already been sold, and even if the argument could be made that the Former Husband should not be required to use all of that income to pay his alimony

obligations, the Former Wife is still entitled to inquire as to the proceeds in order to aid and assist the lower court in ultimately determining whether the Former Husband has the ability to pay his previously ordered alimony obligation.

Additionally, the Former Wife has pending a motion for civil contempt based upon the Former Husband's failure to pay his alimony obligation and his further failure to abide by court orders requiring him to participate in discovery, to pay his back alimony from a certain bank account, and to pay any further alimony obligation into the court registry.

[T]he initial order or judgment directing a party to pay . . . alimony is predicated on an affirmative finding that the party has the ability to pay. The initial judicial determination creates, in subsequent proceedings, a presumption that there is an ability to pay. In a civil contempt proceeding for failure to pay . . . alimony, the movant must show that a prior court order directed the party to pay the . . . alimony, and that the party in default has failed to make the ordered payments. The burden of producing evidence then shifts to the defaulting party, who must dispel the presumption of ability to pay by demonstrating that, due to circumstances beyond his control which intervened since the time the order directing him to pay was entered, he no longer has the ability to meet his support obligations. The court must then evaluate the evidence to determine whether it is sufficient to justify a finding that the defaulting party has willfully violated the court order. . . . In determining whether the contemnor possesses the ability to pay the purge amount, the trial court is not limited to the amount of cash immediately available to the contemnor; rather, the court may look to all assets from which the amount might be obtained.

Bowen v. Bowen, 471 So. 2d 1274, 1278–79 (Fla. 1985).

Under *Bowen*, the Former Wife is also entitled to discovery related to the proceeds from the sale of the Office Building in connection with

her motion for contempt, as that discovery is relevant or reasonably calculated to lead to the discovery of admissible evidence unveiling the Former Husband's ability to pay and whether he willfully violated the lower court's October 11, 2019, order.

Accordingly, the proceeds from the sale of the Office Building are assets for proper consideration by the lower court in connection with both the Former Husband's petition to modify alimony and the Former Wife's motion for civil contempt, and thus, the Former Wife is entitled to discovery of all assets related thereto. Therefore, the lower court's "Interim Order on Outstanding Discovery" was a departure from the essential requirements of the law, and the Former Wife is entitled to certiorari relief.

Petition granted; order quashed.

MORRIS, C.J., and NORTHCUTT, J., Concur.

Opinion subject to revision prior to official publication.