

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001140-MR

BUDDY BROCK

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE MARCUS L. VANOVER, JUDGE
ACTION NO. 13-CI-00930

BRIANNA BROCK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CLAYTON AND STUMBO, JUDGES.

COMBS, JUDGE: Appellant, Buddy Brock, appeals from an Order of the Pulaski Circuit Court, Family Division, holding him in contempt for failing to abide by the terms of the parties' Mediation Agreement regarding marital debt. Appellee is Brianna Brock. For the reasons set forth below, we affirm.

We refer to the record as it pertains to the issues before us. Buddy and Brianna were married on April 24, 2009. On August 27, 2013, Buddy filed a verified Petition for Dissolution of Marriage. Thereafter, the parties entered into a Mediation Agreement which provided, in relevant part, that Buddy was responsible for debt on the residence and on a Lowe's credit card:

2. The parties agree that [Buddy] shall be awarded the marital residence, as he owned the home prior to the parties['] marriage. [Buddy] shall also be fully and solely responsible for all debt associated with the residence. [Buddy] intends to refinance the debt thereon and remove [Brianna's] name therefrom within ninety (90) days of the entry of the Decree.

.....

4. The parties have one (1) joint credit card, a Lowe's credit card. The parties agree that [Buddy] shall be solely responsible for that debt.

On April 2, 2014, the trial court entered a Decree of Dissolution of Marriage. In its Findings of Fact and Conclusions of Law, the court incorporated by reference the parties' Mediation Agreement, specifically finding that it was not unconscionable and stating that it was enforceable as part of the Decree.

Paragraph One of the Mediation Agreement provided that Buddy would "terminate his rights to the child born during the time of the marriage." Because Buddy established a relationship with the child, it became unclear as to whether termination was in the child's best interest. Consequently, the court set aside that provision pursuant to KRS¹ 403.180. The court did not

¹ Kentucky Revised Statutes.

make findings related to child support, visitation, or custody in the Decree, anticipating that Buddy would file to terminate his parental rights within ninety days. The court recited, “If however, [Buddy] has not filed a voluntary termination of parental rights within ninety (90) days, those issues may be brought back before the Court upon motion of either party.”

Buddy did not seek to terminate his parental rights within ninety days of the Decree or thereafter. On behalf of Brianna, the Commonwealth of Kentucky (*Commonwealth of Kentucky Ex Rel: Brianna Brock*) subsequently intervened and moved to set child support. Buddy contested the obligation to pay child support on ground that the child, albeit born during the parties’ marriage, had been conceived by artificial insemination. That issue was litigated in a companion case to be heard with this case, and we affirmed by separate opinion the order of the trial court setting child support.²

On September 4, 2014, Brianna filed a Motion to Show Cause why Buddy should not be held in contempt for failure to comply with items two and four of the Mediation Agreement. Brianna contended that Buddy had “not refinanced the credit card debt, the first mortgage, nor the second mortgage and ... has withdrawn additional funds against the second mortgage, thereby increasing the debt, while leaving [Brianna’s] name thereon.” Brianna contended that the

² On March 27, 2015, the trial court entered an Order Establishing Child Support, which we affirmed in *Buddy Brock v. Commonwealth Ex Rel: Brianna Brock*, No. 2015-CA-00624-ME.

outstanding debt and Buddy's late payments precluded her from obtaining credit in her name.

The court heard the Motion on September 12, 2014. Brianna's counsel advised that Buddy had withdrawn an additional \$4,000 against the second mortgage in August 2014, thus increasing the debt. Buddy explained that he used some of the \$4,000 to pay on his Fifth Third Credit card; however, he did not pay the Lowe's card. Buddy also claimed that he could not obtain a loan to refinance the mortgage(s) in accordance with the Mediation Agreement because of the obligation for child support. But at that time, there was no order establishing child support. As noted earlier, the order establishing child support was entered some six months later on March 27, 2015.

On October 1, 2014, the court entered an Order finding Buddy in contempt for failing to comply with the terms of the Decree of Dissolution and for withdrawing additional funds, thus enhancing Brianna's liability. The trial court assessed Buddy "ninety (90) days in jail, to be held in abeyance for thirty (30) days." The court allowed Buddy to purge the contempt by "repaying the sum of \$4,000.00 into the parties' joint second mortgage/equity line of credit within thirty (30) days of September 12, 2014" and by paying Brianna's attorney's fee incurred as an incident to the motion. The trial court took the remainder of the show cause motion under submission to be considered and ruled upon in connection with the pending child support issue.

On January 23, 2015, Brianna filed a Renewed Motion for Contempt, stating that Buddy had not yet refinanced the two debts against the residence and had not removed Brianna's name from the Lowe's credit card. The matter was heard on March 27, 2015. Brianna and Buddy testified -- as did Linda Damron of Stockton Mortgage. Ms. Damron indicated that although Buddy had initiated the refinancing process in June 2014, he had never followed through to complete his the application.

On April 29, 2015, the trial court entered an Order holding Buddy in contempt, but through mistake or inadvertence, neither party received a copy of it. By Order of June 25, 2015, the trial court vacated the April 29, 2015, Order pursuant to CR³ 60.02. On June 25, 2015, the trial court entered Amended Findings of Fact, Conclusions of Law, and Order on Contempt. Concluding that Buddy had not acted in good faith by failing to comply with the terms of the Decree, the trial court granted the motion for contempt in part and denied it in part. It stated as follows:

... [W]hile the Court finds that the parties intended for [Buddy] to be required to refinance the property, the compulsion for him to do so was not explicitly set forth. In the absence of a clear express language to do so, the Court must determine what actions should be accomplished within a reasonable time to fulfill the decree. At this point [Buddy] has not completed any attempt to refinance the property in excess of one (1) year from the entry of the decree. While [Buddy] has not clearly violated a written order, he has not reasonably complied with the intent of the parties by the terms of the agreement or the decree. Therefore, the Court finds that

³ Kentucky Rules of Civil Procedure.

[Buddy] is not in contempt but that he must complete the refinance process within ninety (90) days from the entry of this Order to fulfill the intent of the Decree to remove [Brianna] from liability for the debt on the property.

With respect to the Lowe's credit card, the trial court found:

In the Mediation Agreement and Order ... incorporated into the Divorce Decree, [Buddy] agreed to take responsibility solely for the balance on the Lowe's credit card. At the [January 23, 2015] hearing the Lowe's credit card remained in both of the parties['] names and with an outstanding balance. [Buddy's] testimony was that he did not receive the statements, he did not know how much was due and owing, that Lowe's would not give him information regarding said account. [Buddy] has made some payments, but some of the payments have been late and resulted in finance charges and negative credit history for [Brianna]. The Court finds the Mediation Agreement and Order was clear enough to give [Buddy] reasonable notice of the Order's intent and that [Buddy's] disobedience was willful, in that [Buddy] could have, but refused to comply. All payments have not been made timely resulting in harm to [Brianna] and keeping her responsible for the debt.

The court ordered that Buddy be held in contempt. He was given thirty days in the Pulaski County Detention Center, which he could purge by complying with the terms of the Mediation Agreement and Order. He was directed to remove Brianna's name from the Lowe's credit card within thirty days. As to the mortgage issue, the trial court ordered Buddy to complete the refinancing of the house and to remove Brianna's name from the mortgage within ninety days.

On July 24, 2015, Buddy filed Notice of Appeal from the trial court's June 25, 2015, Amended Findings of Fact, Conclusion of Law, and Order on Contempt. On appeal, Buddy argues: (1) that his actions were not contemptuous;

(2) that the trial court improperly modified the parties' agreement relating to refinancing of the marital residence; (3) that there was no requirement that Buddy make more than one effort to refinance the debt; (4) that Brianna has not demonstrated harm by Billy's inability to refinance the debt or by his late payments; and (5) that the trial court has directed Buddy to perform an impossible task.

The record reveals that Brianna has not filed a brief. CR 76.12(8)(c) provides that:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

The rule is discretionary. We have elected to address the merits.

Buddy argues that his actions were not contemptuous because there was no explicit order directing him to pay the Lowe's credit card in full or to remove Brianna's name from it. He contends that there was no specific language in the Mediation Agreement directing him to do so.

The Decree of Dissolution incorporating the parties' Mediation Agreement was entered on April 2, 2014. At the time of the hearing on Brianna's renewed contempt motion on March 27, 2015 -- nearly a full year later -- the Lowe's card still had an outstanding balance, Brianna was still on the debt, and

Buddy had made some of the payments late. The trial court found that Buddy could have complied but that he refused to do so, exhibiting willful disobedience.

KRS 403.180(5) provides: “Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.” There is an implied covenant of good faith and fair dealing in every contract, “and contracts impose on the parties thereto a duty to do everything necessary to carry them out.” *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005).

When a contract does not fix a time for performance of the contract or of any act or duty of the parties to it, there is no fixed rule to determine what constitutes a reasonable period. Rather, what is a reasonable time is to be determined by the facts and circumstances of each case. Ultimately, a court must make a subjective determination of what constitutes a reasonable period.

Liggett Group, Inc. v. Commonwealth, 232 S.W.3d 559, 563 (Ky. App. 2007)

(citations omitted).

In *Crowder v. Rearden*, 296 S.W.3d 445, 450-51 (Ky. App. 2009),

this Court explained as follows:

A trial court has inherent power to punish individuals for contempt, *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky.App.2001), and nearly unfettered discretion in issuing contempt citations. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky.App.1986). We will reverse a finding of contempt only if the trial court abused its discretion in imposing the sentence.

The court did not deviate from these principles in making a subjective determination as to the reasonableness of Buddy's actions. We conclude that the trial court did not abuse its discretion in holding Buddy in contempt with respect to the Lowe's credit card.

Next, Buddy contends that the trial court improperly modified the parties' Agreement with regard to refinancing the parties' residence, arguing that the court was asking him to perform an impossible task. Buddy claims that he was unable to refinance the mortgage debt due to his potential child support obligation. He also argues that the language in the Agreement was not ambiguous, that the parties were bound by its terms, and that the court was obligated to enforce them. And that is precisely what the trial court did. After finding that Buddy had only commenced but had not *completed* any attempt to refinance the property, the trial court directed him to comply with the Agreement by completing the refinancing process. Whether Buddy will qualify for a loan is unknown until he completes the process as directed by the trial court.

Noting the trial court's disappointment that he only sought refinancing through one institution, Buddy contends that an obligation to seek refinancing at more than one institution cannot be read into the Agreement. We reiterate that the implied covenant of good faith and fair dealing in every contract imposes a duty to do everything necessary to carry it out. *Farmers Bank and Trust*, 171 S.W.3d 4. The trial court did not modify the parties' Agreement; it merely directed Buddy to comply with its terms. We find no error.

Consequently, we affirm the Order of the Pulaski Circuit Court,
Family Division, holding the appellant in contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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