NO. COA03-762

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

DAVID A. YOUNG,
Plaintiff-Appellant,

v. Moore County
No. 84 CVD 946

MASTROM, INC.,
Defendant-Appellee.

JOHN R. BEITH,
Plaintiff-Appellant,

v. Moore County
No. 85 CVD 006

MASTROM, INC.
Defendant-Appellee.

MASTROM, INC.
Plaintiff-Appellee,

v. Moore County
No. 85 CVD 117

C. DAVID CARPENTER,
Defendant-Appellant.

Appeal by plaintiffs David A. Young and John R. Beith and by defendant C. David Carpenter from order entered 4 April 2003 by Judge William M. Neely in District Court, Moore County. Heard in the Court of Appeals 4 March 2004.

Bruce T. Cunningham, Jr. for appellants.

West & Smith, LLP, by Stanley W. West, for appellee.

McGEE, Judge.

David A. Young (Young), John R. Beith (Beith), and C. David Carpenter (Carpenter) (collectively appellants) filed substantially identical motions on 19 August 1998 and 19 February 1999 requesting an order requiring that G. Monroe Wilson (Wilson), a former director and officer of Mastrom, Inc. (Mastrom), show cause why he should not be held in contempt of court for failure to comply with previous orders of the trial court. The trial court entered an order denying the motions on 12 January 2001. Young, Beith, and Carpenter appealed and our Court reversed and remanded because the "trial court used the incorrect standard in denying Appellants' motion for a show cause order[.]" *Young v. Mastrom, Inc.*, 149 N.C. App. 483, 485, 560 S.E.2d 596, 598 (2002). The trial court reheard the matter on remand and again denied the motions in an order entered 4 April 2003. Young, Beith, and Carpenter appeal this 4 April 2003 order.

Appellants were employees of Mastrom in 1984. Appellants met in late 1984 and discussed establishing a business to compete with Mastrom. Appellants incorporated their new business on 11 December 1984 and informed Mastrom they would be resigning effective 31 January 1985. However, upon learning that Young and Beith were soliciting clients while still employed by Mastrom, Mastrom terminated their employment in December 1984. Carpenter remained employed by Mastrom until 31 January 1985.

Due to termination, neither Young nor Beith received his 1984 year-end contribution to his pension and profit-sharing plans. Similarly, Carpenter's interest in the pension and profit-sharing

plans was forfeited in the spring of 1985 when Mastrom learned that Carpenter had also been soliciting clients while still employed by Mastrom.

In an order filed 5 November 1992, the trial court ordered that Carpenter's interest in the pension and profit-sharing plans be reinstated. Similarly, the trial court ordered that a year-end contribution be made to the pension and profit-sharing plans of Beith and Young. However, the trial court did not determine the amounts to be reinstated and contributed to the accounts. In an order filed 21 September 1994, the trial court found that Wilson was the trustee of each pension and profit-sharing plan of appellants and directed Mastrom and Wilson to transfer specified amounts of money to a designated account for each appellant.

A contempt hearing was held on 5 December 1994. To insure compliance with the 21 September 1994 order, the trial court ordered Mastrom to place sufficient funds with NationsBank for NationsBank to hold as co-trustee with Wilson. Mastrom and Wilson refused to transfer the money. The trial court held a hearing on 2 February 1995 and found as a fact that Wilson testified at that hearing that Mastrom was dissolved in 1986 and that Wilson learned of the dissolution in 1994. Wilson testified that his only connection with the dissolved corporation was his status as a co-trustee of the pension and profit-sharing plans. Therefore, the trial court ordered that Wilson be removed as co-trustee of the pension and profit-sharing plans regarding any accounts held by NationsBank on behalf of appellants.

Appellants again moved for contempt on 15 August 1996 and asked that an order be entered requiring Wilson to appear and show cause why Mastrom had failed to comply with the 21 September 1994 order. Appellants argued that Wilson was still acting as trustee of the pension and profit-sharing plans despite his removal by the trial court. The trial court found Wilson in contempt in an order dated 11 October 1996. After finding insufficient evidence to support a finding that Wilson was in contempt of the 21 September 1994 order, our Court reversed the trial court on 21 April 1998 in an unpublished opinion, *Young v. Mastrom* (COA97-643).

Subsequent to this unpublished opinion, the motions at issue in this case were filed. As explained above, the trial court initially denied these motions in an order entered 12 January 2001. On appeal, our Court reversed this denial because the trial court had utilized the wrong standard. On remand, the motions were reconsidered and were again denied by the trial court in an order entered 4 April 2003. It is the 4 April 2003 order that is at issue in this appeal.

Appellants argue that the trial court erred in denying their motions for order to show cause to hold Wilson in contempt of court on the ground that sufficient evidence was presented to justify the issuance of such order. Appellants assert that the trial court "erred in finding that an insufficient showing had been made to establish probable cause that G. Monroe Wilson had the present capacity to comply with the previous orders of the court." For the reasons stated below, we disagree.

"This Court's review of a trial court's finding of contempt is limited to a consideration of 'whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.'" *General Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 677, 573 S.E.2d 226, 229 (2002) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985)).

According to a prior opinion from our Court concerning these same parties, an "alleged contemnor can only be held in contempt upon a showing, among other things, that he has the present ability to comply with the trial court's order." *Young*, 149 N.C. App. at 485, 560 S.E.2d at 597. In the case before us, the trial court found that appellants "failed to make a showing sufficient to find that probable cause exists to believe that G. Monroe Wilson has the present capacity to comply with the previous orders of the Court in these actions[.]" Consequently, the trial court denied the pending motions of appellants.

The issue for this Court to determine is whether the trial court's finding on Wilson's inability to comply is supported by competent evidence. In arguing that Wilson did possess the ability to comply, appellants first reference a "series of letters written by Monroe Wilson to Young and Beith and their counsel" regarding "such issues as Termination Notice of Profit-Sharing Plan and Denial of Payment Requests."

We do not find appellants' argument persuasive that Wilson's letters to Young and Beith constitute sufficient evidence of

Wilson's ability to comply with the trial court's order. Our Court addressed similar evidence in its prior unpublished opinion on this matter. Our Court examined "periodic statements" that Wilson furnished to Young and Beith and found such "evidence insufficient to support the trial court's finding that Wilson continued to act as a co-trustee." However, appellants point specifically to a 12 December 2002 letter because it was written nine months after our Court's prior published opinion which remanded to the trial court based on the use of an incorrect standard. We note that although more recent letters were presented as evidence to the trial court in this proceeding than in the prior proceedings, this is irrelevant in light of the fact that the letters all essentially conveyed the same information. Thus, as we found in our prior unpublished opinion, these letters are not sufficient to show that Wilson continued to act as co-trustee.

In further support of their argument that there was sufficient evidence of ability to comply, appellants place emphasis on an indemnification agreement whereby MI Professional Management of Southern Pines, Inc. (MI) took over the office formerly operated by Mastrom. Wilson signed this agreement as president of MI, and MI agreed to "assume responsibility for the cost of continuing" litigation between Mastrom and appellants. We note that this indemnification agreement was considered by the trial court the first time it denied appellants' motion. Further, appellants make no argument as to why this agreement shows Wilson had the ability to comply, and we thus find it insufficient as proof of Wilson's

ability to comply with the trial court's order.

The critical fact in this analysis, which appellants fail to address, is that Wilson was removed by the trial court as co-trustee of any of the pension and profit-sharing plans with respect to the accounts of appellants after the 2 February 1995 hearing. As a result, on a previous appeal, our Court concluded that "there is no evidence in the record which shows that Wilson, after being removed as co-trustee, had the authority to direct NationsBank to distribute these funds." Similarly, we conclude that because Wilson had no authority to direct Nationsbank to distribute the funds, Wilson had no ability to comply with the trial court's order. This evidence supports the trial court's finding and this finding supports the trial court's denial of the motion. Accordingly, appellants' argument is without merit.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).