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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1016

Filed: 6 September 2016

Wake County, No. 12 CVD 4605

CHRISTY NEWELL, Plaintiff,

v.

CLYDE S. NEWELL, III, Defendant.

Appeal by defendant from order entered 5 March 2015 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 25 January 2016.

No brief for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

McCULLOUGH, Judge.

Clyde S. Newell III (“defendant”) appeals from order holding him in civil contempt. For the following reasons, we affirm in part and vacate and remand in part for further findings.

I. Background

Christy Newell (“plaintiff”) and defendant married on 31 March 1990, separated on 7 June 2011, and divorced on 12 October 2012. Plaintiff and defendant

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are parents to two children born of their marriage on 11 August 1996 and 16 April 2003.

In connection with their divorce, plaintiff and defendant entered into a consent order on child custody, child support, alimony and attorney's fees (the "custody and support order"), and a consent order and judgment on equitable distribution (the "distribution order"). Both orders were filed 17 September 2012. The custody and support order awarded the parties joint legal and physical custody of the children, set custodial schedules for each child, ordered defendant to pay alimony and child support, and required notice of moves that would require a change in the custodial schedules. The distribution order included provisions directing the division of all marital property, including the sale of the marital residence and a boat.

On 1 August 2014, defendant filed a motion for order to show cause and motion for contempt alleging plaintiff violated portions of the custody and support order by moving the children and interfering with his time with the children as allotted in the custodial schedule. On the same day, plaintiff filed a motion for order to show cause and motion for contempt alleging defendant violated portions of the custody and support order by unilaterally deducting expenses from his monthly support obligation and violated portions of the distribution order by failing to abide by the provisions governing the sale of the marital residence and the boat.

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After the trial court issued orders to appear and show cause to both parties, the matters came on for hearing in Wake County District Court before the Honorable Lori Christian on 13 August 2014.

On 5 March 2015, the trial court filed an order of contempt finding defendant in civil contempt for violations of both orders. Specifically, the trial court found defendant in contempt of the custody and support order for unilaterally deducting money from his monthly support obligation without just cause. The trial court found defendant in contempt of the distribution order for failing to take steps towards selling the marital residence and the boat. As purge conditions, the trial court ordered defendant to place the marital residence and the boat on the market for sale within ten days. The court also ordered defendant to take other steps towards accomplishing the sale of the marital residence and the boat, including requiring a “for sale” sign to be placed in front of the house by 13 September 2014, a date a month after the 13 August 2014 contempt hearing but well before the filing of the order. Concerning plaintiff’s move with the children and the resulting interference with the custodial schedules, the trial court found that plaintiff was not in willful contempt of the custody and support order because her move with the children was required due to financial hardship caused, at least in part, because the marital residence and the boat had not been sold. Defendant filed notice of appeal on 6 April 2015.

II. Discussion

On appeal, defendant argues the trial court erred by not finding plaintiff in civil contempt and by finding him in civil contempt. Defendant further challenges the validity of the purge conditions issued by the trial court. We first address the trial court's order as it relates to defendant being found in contempt. We then address the order as it relates to plaintiff not being found in contempt.

“The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to coerce the defendant to comply with an order of the court.” *Atassi v. Atassi*, 122 N.C. App. 356, 360, 470 S.E.2d 59, 61 (1996) (internal quotation marks and alterations omitted). For that reason,

[f]ailure to comply with an order of a court is a continuing civil contempt [only] as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2015). When an order of civil contempt is challenged on appeal,

[r]eview . . . is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact

made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*.

Gordon v. Gordon, 233 N.C. App. 477, 480, 757 S.E.2d 351, 353 (2014).

1. Defendant's Contempt

We first address defendant's argument that the trial court erred in finding him in civil contempt. Defendant contends he was not in contempt of the distribution order provisions governing the sale of either the marital residence or the boat.

The provisions in the distribution order concerning the sale of the marital residence and the boat provide, in pertinent part, as follows:

1. **Marital Residence.** The parties are the owners as tenants by the entirety of a home located at 3153 Ward Road, Raleigh, NC. Defendant currently resides in the marital residence and shall retain exclusive physical possession until the sale of the home.
2. On or before June 1, 2012, the marital residence shall be placed on the market for sale "as is" with Doug Muhle, of Linda Craft & Team Realtors, at an asking price mutually agreed upon by the parties. In the event the parties do not agree on the listing price, the parties shall defer to the recommendation of the real estate agent to make the decision regarding the listing price with the understanding that both parties intend to sell the house for the best price as possible given the current housing market, in its current condition.

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8. The parties shall discuss and consider all offers for sale. Both parties shall act in good faith in an attempt to sell the home as quickly as possible and to get the best price possible for the home. In the event the parties cannot mutually agree on a purchase price, the parties agree to accept any offer within 95% of the listing price.

....

14. **2000 Stingray Boat.** The parties own a 2000 Stingray Boat which is titled in [p]laintiff's name. The title to this boat is unencumbered. The parties agree to sell the boat. The parties shall cooperate and effectuate all documentation necessary to list the boat on a website to market it sell [sic] and to ensure transfer to a third party upon the sale. The parties shall mutually agree on the purchase price of the boat, however, they warrant that any offer to purchase the boat that is equal to the recommended value per the NADA Guide is a fair price and an offer that they shall accept. The parties shall equally divide all proceeds from the sale of the boat. In the event the purchase is made by way of a check in joint names, the parties shall cooperate and effectuate any documentation necessary to ensure that each party receives his/her share of the proceeds within 72 hours of receiving said payment. Unless otherwise mutually agreed on by the parties or unless necessary to effectuate the purchase of the boat, neither party shall operate the boat until the storage fee has been paid in full and the property taxes and insurance are current.

In holding defendant in contempt of these provisions, the trial court based its determination on the following findings:

11. In the fall of 2012 the Defendant refused to allow the appraiser who was recommended by Doug Muhle, the seller agent, into the home to do a pre-market appraisal or even make an appointment to do so. Since this time the Defendant has not put the house on the market in

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violation of the court order. The Court received several emails into evidence outlining in detail the steps the Plaintiff took to try to get the house and the boat on the market for sale.

12. It was apparent in his testimony to the Court that the Defendant had no intention of putting the house on the market. The Defendant is in contempt.
13. The Defendant has not acted in good faith in the sale of the home to get it sold as soon as possible and to get the best possible price because he has refused to move forward with the sale of the home and another two years have passed[.]
14. Because she has not received these proceeds her financial situation has become dire and she has had to move in with her mother in Greensboro, NC and the minor children have moved with her.
15. The Defendant refuses to sell the boat in violation of the court order. In the spring of 2013 the Plaintiff contacted a boat dealer. The Plaintiff then tried to arrange a second boat dealer to assist in the sale of the boat and the Defendant refused to agree on a price for sale. The Plaintiff has even offered to let him buy her out of the boat but they have been unable to agree on a price.
16. All of the Defendant's actions are in violation of the court order and because of these actions the Plaintiff has not received her half of the proceeds which is causing her a financial hardship.

In his argument on appeal, defendant challenges specific findings and contends the findings do not support the trial court's determination that defendant was in contempt of the provisions governing the sale of the marital residence and the boat.

In regards to the sale of the marital residence, defendant singles out provision number two, above, and asserts that it encompasses “[t]he entirety of the parties’ respective obligations as to selling the former marital residence[.]” Based on provision number two, defendant claims his only obligations were to sign a listing agreement with Doug Muhle by 1 June 2012 and to abide by Muhle’s listing price if the parties cannot agree to a listing price. Defendant asserts there is no evidence that he failed to meet either requirement. In direct response to the trial court’s findings, defendant further asserts there was no requirement that he must allow an appraiser on the property. We are not convinced.

First and foremost, provision number two does not encompass the entirety of the parties’ obligations regarding the sale of the marital residence. Notably, in addition to provisions requiring defendant to maintain the property in good condition, provision number eight requires “[b]oth parties [to] act in good faith in an attempt to sell the home as quickly as possible and to get the best price possible for the home.” As shown above, in this case the trial court found that “[d]efendant had no intention of putting the house on the market[.]” and “[d]efendant has not acted in good faith in the sale of the home[.]” While defendant is correct that there is no provision in the distribution order expressly requiring him to allow an appraiser on the property, if the listing agent recommended an appraiser in order to determine a listing price, it

seems to this Court that allowing the appraiser on the property would fall under defendant's obligation to act in good faith to sell the property.

Although we disagree with defendant's argument, we hold the trial court did not issue sufficient findings of fact to support its finding of contempt. As provided in the distribution order, the listing agent was only to determine the listing price if the parties could not agree to a listing price. Yet, the trial court's contempt order contains no findings as to whether or not the parties ever discussed or failed to agree to a listing price. Additionally, although the trial court's findings that defendant had no intention of selling the marital residence and had not acted in good faith seem to support the finding of contempt, the bases of these findings are not clear without further findings concerning defendant's testimony or defendant's failure to abide by the terms of the disposition order.

In regards to the sale of the boat, defendant acknowledges that the distribution order requires he and plaintiff to mutually agree upon a price for the boat and that no such agreement was ever reached. Defendant, however, contends he alone cannot be faulted for failing to reach an agreement on the purchase price of the boat. Defendant further contends there is no evidence to support the finding that he "refuses to sell the boat" or "refused to agree on a price for sale." Defendant asserts there was a disagreement on the price of the boat, but there was no mechanism under the distribution order to resolve the disagreement.

Upon review of the contempt order, we agree with defendant that the trial court's findings do not support the finding that defendant was in contempt of the provisions governing the sale of the boat. If the evidence supports such a determination, the trial court must issue more specific findings demonstrating how defendant acted unreasonably to discourage the sale of the boat. Such findings may be based on evidence that defendant did not "cooperate and effectuate all documentation necessary" to sell the boat or that defendant refused third-party offers that were equal to the recommended value of the boat per the NADA Guide. The finding that defendant refused to agree to a sale price, however, is not sufficient without findings as to the price suggested by plaintiff and the adequacy of that price.

Because the trial court did not issue sufficient findings to support its determination that defendant was in contempt of the provisions in the distribution order governing the sale of the marital residence and the boat, we vacate those portions of the contempt order and remand for specific findings as to the requirements of the disposition order and defendant's failure to comply with those requirements.

2. Purge Conditions

Defendant also takes issue with the purge conditions set by the trial court. This Court has held that "[an] order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court's conditions under which defendant can purge [himself] of contempt cannot be vague

such that it is impossible for defendant to purge [himself] of contempt” *Watson v. Watson*, 187 N.C. App. 55, 65, 652 S.E.2d 310, 317 (2007) (internal quotation marks and citations omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *see also* N.C. Gen. Stat. §§ 5A-22(a) and -23(e) (2015).

In this case, the trial court issued the following conditions for defendant to purge himself of contempt:

- a. Defendant is ordered to place the house located at 3153 Ward Road, Raleigh, NC on the market for immediate sale. It shall be placed for sale within ten days.
- b. There shall be a “for sale” [sign] in the yard of this home no later than September 13, 2014.
- c. Defendant shall take all steps necessary to get the house into shape for sale including cleaning it up and decluttering it.
- d. Plaintiff shall choose the broker who shall list the property for sale and the Defendant shall fully cooperate with the reasonable requests of the broker regarding the sale of the home including but not limited to: returning phone calls, attending meetings, responding to emails, having the property ready for showings, placing a lockbox on the front door.
- e. The broker shall choose the listing price for the property.
- f. Plaintiff and the Defendant shall determine whether or not any offers for the sale of the property are accepted or not and neither will unreasonably refuse to sell the property. Both parties shall comply with the agent's recommendations, however neither party is obligated to make repairs to the home for its sale.

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- g. The boat shall be placed on the market within the next ten days and shall remain there until sold.
- h. The Plaintiff shall choose the broker for sale of the boat.
- i. The Defendant shall fully cooperate regarding the sale of the boat including having the boat out in the elements if this will get the boat sold.
- j. In the event there is an IRS issue with the sale of the boat and an innocent spouse provision, the Plaintiff shall indemnify the Defendant for any tax liability.

Defendant now argues that even if he was in contempt of the distribution order, the contempt order must be vacated because the purge conditions cannot be complied with because they are contradictory and postdated. Although we have already determined the findings supporting defendant's contempt were inadequate, we briefly address the purge conditions so that the same issues do not arise on remand.

Upon review, we do not find terms of the purge condition "a" to be contradictory, as defendant contends. The ten days specified is clearly the window the court has deemed to constitute placement of the marital residence on the market for immediate sale. This interpretation is bolstered by purge condition "g," which requires the boat to be placed on the market for sale within ten days. We do, however, agree with defendant that purge condition "b" is problematic in that the date specified for a "for sale" sign to be placed in the yard, 13 September 2014, is prior to the entry of the contempt order on 5 March 2015. It is evident from a review of the record that this error is the result of the trial court's delay in entering the contempt order as the

purge conditions were originally announced at the conclusion of the contempt hearing on 13 August 2014. Nevertheless, because the purge condition could not be complied with when the contempt order was entered, we must hold the trial court erred. Upon remand, the trial court may correct this error.

Defendant also points out in a footnote that, like the distribution order, the purge conditions fail to establish how a price for the boat is to be determined if the parties cannot agree to a listing price. Thus, defendant claims the purge conditions are too vague. Again, we agree and direct the trial court to provide further clarification regarding the sale of the boat upon remand.

3. Plaintiff's Contempt

Besides arguing the trial court erred in finding him in contempt of the distribution order, defendant also argues the trial court erred in not finding plaintiff in contempt. Defendant contends plaintiff was in contempt of the custody and support order because she did not comply with the notice and process provision of the order when her relocation impacted the custodial schedules for the children. The relevant portion of the custody and support order provides as follows:

25. The parents will notify each other of any anticipated move that would require a change in the schedule as outlined in [the custody and support order]. They will give a minimum of sixty days[?] notice prior to the move to allow them to make needed changes by mutual agreement, through mediation, or through a court process if unable to resolve the issue at mediation.

In response to defendant's motion to hold plaintiff in contempt, the trial court found in findings fourteen and sixteen, detailed above, that plaintiff was suffering financial hardship because she had not received the proceeds from the sale of the marital residence and the boat. The trial court further found as follows:

19. There is ample evidence that the Plaintiff told the Defendant about her financial situation and the need to move in with her mother.

20. Had the Defendant followed the terms of the Support Order she may not have been in the financial situation she has found herself in. She has downsized her apartment three times. She shared [a] room with her youngest daughter.

....

25. The Plaintiff is not in contempt of court as alleged in the Defendant's motion filed August 1, 2014. She did move, but it was out of financial necessity in part due to the Defendant's actions and not in willful contempt of court.

Upon review, it appears the trial court's findings are supported by the evidence. Notably, an email sent by plaintiff to defendant on 30 July 2014, and entered into the evidence as "Plaintiff's Exhibit #13," indicates that plaintiff notified defendant of her impending move on 24 April 2014, more than sixty days before the move was finalized on 7 July 2014. The email further indicates that plaintiff requested that they return to mediation and defendant refused, stating that plaintiff would have to go to court to change the custody agreement. This evidence supports the trial court's findings and its determination that plaintiff was not in contempt.

Moreover, evidence supports the trial court's findings that plaintiff's relocation with the children was out of financial necessity and, therefore, plaintiff was not in willful contempt of the custody and support order.

Although defendant does not specifically challenge the findings regarding financial necessity, defendant contends financial necessity does not explain plaintiff's failure to follow the notice and process requirements. In addition to provision twenty-five above, defendant specifically cites a provision in the custody and support order that provides that "[i]f the parties are unable to agree on a major decision, they will follow the advice of a qualified professional or will return to mediation in an effort to resolve the issue prior to seeking [c]ourt resolution." Yet, we find defendant's reliance on that provision misplaced. A review of that provision in its entirety, number three in the decretal portion of the custody and support order, reveals that it relates specifically to "all major decisions concerning education and non-emergency medical and dental treatment of [the children]."

Upon review, we hold the trial court's findings related to plaintiff's relocation with the children are supported by the evidence and support the trial court's determination that plaintiff was not in willful contempt of the custody and support order.

III. Conclusion

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Although it appears from the record that defendant has taken steps to frustrate the execution of the disposition order, for the reasons discussed above, we vacate that portion of the contempt order and remand to the trial court for further findings regarding defendant's alleged contempt and for clarification of the purge conditions.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).