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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-544

Filed: 17 October 2017

Iredell County, No. 13 CVD 1797

KEVIN S. LASECKI, Plaintiff,

v.

STACEY M. LASECKI, Defendant.

Appeal by plaintiff from order entered 13 December 2016 by Judge L. Dale Graham in Iredell County District Court. Heard in the Court of Appeals 20 September 2017.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Christina Clodfelter, for plaintiff-appellant.

No brief for defendant-appellee.

TYSON, Judge.

Kevin S. Lasecki (“Plaintiff”) appeals from the trial court’s order holding him in civil contempt of court. We vacate and remand.

I. Background

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This is Plaintiff's third appeal before this Court in this matter. *See Lasecki v. Lasecki*, __ N.C. App. __, 786 S.E.2d 286 (2016) ("*Lasecki I*"); *Lasecki v. Lasecki*, COA17-79 (heard 15 May 2017) ("*Lasecki II*").

Plaintiff and Stacey M. Lasecki ("Defendant") separated and entered into a separation agreement on 24 August 2012. Plaintiff agreed to pay Defendant \$2,900.00 per month in child support and \$3,600.00 per month in alimony. If either party breached the separation agreement, the parties agreed the breaching party would be liable to pay for the other party's reasonable attorney's fees.

Plaintiff filed a motion on 1 August 2013, and alleged his income had significantly decreased since the execution of the separation agreement. Plaintiff requested the trial court to issue an order setting his child support obligation. By order dated 28 August 2014, the trial court found it was "feasible for Plaintiff to earn \$150,000.00 and with those earnings to support Defendant and their children," and the \$2,900.00 monthly child support obligation set forth in the separation agreement was reasonable. The court reduced Plaintiff's monthly alimony amount to \$1,385.00.

The trial court ordered Plaintiff to pay these monthly amounts, as well as \$9,592.50 for Defendant's attorney's fees. The court also awarded a money judgment of \$54,432.31 for arrearages in child support and alimony due.

By opinion filed 5 April 2016, this Court held the trial court had erroneously based its decision on the amounts of child support and alimony that Plaintiff was

capable of paying on an imputed income of \$150,000.00, when Plaintiff was actually unemployed. This Court held this conclusion as improper, absent a finding that Plaintiff “was deliberately depressing his income” or “indulging in excessive spending in disregard of his marital obligation to support his dependent spouse[.]” *Lasecki I*, __ N.C. App. at __, 786 S.E.2d at 302. This Court affirmed the trial court’s order in part, vacated in part, and remanded “the portions of the order in which the trial court ordered specific performance of \$2,900.00 monthly in child support and \$1,385.00 monthly in alimony.” *Id.* at __, 786 S.E.2d at 304.

The trial court entered an order upon remand on 13 July 2016. Plaintiff appealed from this order, which is currently pending before this Court (*Lasecki II*).

The portions of that order relevant to this appeal at bar are as follows:

2. Beginning 7/1/2016, the Plaintiff shall pay child support to the Defendant in the amount of \$1,688.00 per month. As additional child support Plaintiff shall maintain medical and dental coverage on the minor children and pay 80% of all uninsured medical and dental expenses in excess of \$250.00 per year and other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders)

. . . .

4. . . . The Plaintiff shall pay the Defendant alimony pursuant to the Separation Agreement in the sum of \$2,850.00 per month, beginning May 1, 2016. These payments shall be in addition to child support ordered

above.

At the end of August 2016, the trial court entered an order, which held Plaintiff in contempt and ordered him to pay the sum of \$7,036.22 to purge himself of the contempt, which Plaintiff paid. Plaintiff paid the court-ordered alimony and child support for the month of September 2016. He paid only the child support for the month of October 2016. He paid neither the child support nor the alimony for the month of November 2016.

On 14 September 2016, Defendant filed a motion for contempt, and asserted Plaintiff had failed to pay the court-ordered child support and alimony payments. Defendant also asserted Plaintiff had discontinued health insurance coverage for the minor children. The hearing was held on 7 November 2016. Defendant asserted Plaintiff was in arrears for one month of child support payments and two months of alimony payments.

On 13 December 2016, the trial court entered an order holding Plaintiff in civil contempt of court. The court found “Plaintiff had insurance on the minor children through his current wife and that insurance was terminated by her,” and the children were without health insurance coverage. The court further found “Plaintiff has made some payments but is behind in the amount of \$7,388.00 through the end of November.”

The court issued an order to arrest Plaintiff and set the following conditions

for Plaintiff to purge himself of contempt: (1) pay the sum of \$7,388.00 to be disbursed to Defendant; and (2) obtain health insurance for the minor children by 26 December 2016, and submit proof of coverage to the court. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this court from final order of the district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2015). The trial court's order for the periodic payment of both child support and alimony, which has been appealed to the appellate division, remains and may be enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. *See* N.C. Gen. Stat. § 50-16.7 (j) (2015); N.C. Gen. Stat. § 50-13.4(f)(9) (2015).

III. Civil Contempt

Plaintiff argues the trial court erred by holding him in civil contempt of court. He asserts the evidence presented at the contempt hearing does not support the trial court's findings of fact, and the findings of fact do not support the conclusion that Plaintiff was in contempt of court. We agree.

A. Standard of Review

Review in civil contempt proceedings 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*.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted).

B. Ability to Pay

Plaintiff was ordered to pay \$1,688.00 in child support, \$2,900.00 in alimony, and to maintain health insurance coverage for the minor children. Plaintiff thereafter lost his job, from which he had earned an annual salary of \$135,000.00. He began working as an independent driver for Uber and Lyft transportation services.

No show cause order was issued by the court for Plaintiff upon the filing of Defendant's motion for contempt. "[W]hen an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party . . . because there has not been a judicial finding of probable cause." *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 205 (2012) (citing *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004)); N.C. Gen. Stat. § 5A-23(a1) (2015).

Plaintiff resides in Arizona and was not present for the hearing. Defendant testified at the contempt hearing.

The trial court found:

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3. That the Plaintiff was employed at FLP prior to the last hearing in May/June 2016. That the Plaintiff lost his job after the last hearing. That the Plaintiff is employed at Uber and Lyft.

4. That the Plaintiff had insurance on the minor children through his current wife and that insurance was terminated by her. That the Court finds that there is no insurance on these children.

5. The Plaintiff has made some payments but is behind in the amount of \$7,388.00 through the end of November.

6. The Court finds that the Plaintiff is in willful contempt of the Court's Order in that he has failed to make payments as ordered by the Court. That the Court finds that the Order is valid. That Plaintiff has the ability to pay his child support and alimony. That Plaintiff works for Uber and Lyft.

In *Jones v. Jones*, this Court explained:

For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order.

Jones v. Jones, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983); *see also* N.C. Gen. Stat. § 5A-21(a)(3) (2015).

“[T]ake reasonable measures” to pay an outstanding judgment could include “borrowing the money, selling defendant’s . . . property . . . , or liquidating other assets, in order to pay the arrearage.” *Id.*; *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 787-88 (1980).

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When a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt and the court may commit such defendant to jail for an indefinite term, that is, until he complies with the order. Under such circumstances, however, there must be a specific finding of fact supported by competent evidence to the effect that such defendant possesses the means to comply with the court order. Our Supreme Court has indicated . . . that *the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition—so that there will be convincing evidence that the failure to pay is deliberate and willful.*

Bennett v. Bennett, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974) (citation and internal quotation marks omitted) (emphasis supplied). The trial court failed to do so here and its order must be vacated.

IV. Conclusion

The trial court's finding that Plaintiff has the present "ability to pay" the arrearage pursuant to the order is based upon Plaintiff's employment with Lyft and Uber. No evidence was presented of Plaintiff's actual income, expenses or financial condition. No "convincing evidence" was presented to show that Plaintiff's failure to pay was "deliberate and willful." *Id.* No evidence was presented regarding the cost or availability of medical insurance for the children. There is no basis to determine whether Plaintiff has the present ability to provide the required medical insurance.

This finding alone is insufficient to support the conclusion that Plaintiff had the present ability to pay \$7,388.00 by either making immediate payment or by

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taking “reasonable measures” or that his “failure to pay is deliberate and willful,” or if Plaintiff has the present ability to obtain or pay the ordered medical insurance. *See id.* The order of contempt Plaintiff appealed from is vacated. This case is remanded to the trial court for further proceedings in accordance with this opinion and precedents. *It is so ordered.*

VACATED AND REMANDED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).