

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

| | | |
|------------------------|---|-----------------------------|
| MADELINE R. HAVERDICK, | : | O P I N I O N |
| Plaintiff-Appellant, | : | |
| - vs - | : | CASE NO. 2012-T-0006 |
| FRANK HAVERDICK, JR., | : | |
| Defendant-Appellee. | : | |

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2004 DR 417.

Judgment: Affirmed.

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44482 (For Plaintiff-Appellant).

Gary R. Rich, 342 Mahoning Avenue, N.W., P.O. Box 4010, Warren, OH 44482-4010 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Madeline R. Haverdick, n.k.a. Madeline R. Prezioso, appeals from the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, denying her motion for contempt. We affirm.

{¶2} In September 2004, appellant filed a complaint for legal separation from appellee, Frank Haverdick. The case was initially settled by way of stipulation; the matter was reopened, however, after the trial court granted a motion for new trial filed

by appellee. The parties eventually agreed that appellee would take possession of the marital residence.¹ The parties additionally agreed on a division of marital property and household items. The final divorce decree was entered on January 21, 2009 and included the following orders:

{¶3} The marital residence * * * is subject to a lien known as William R. Biviano, Biviano Law Firm vs. Madeline Haverdick [and] is to be in the possession of Defendant Frank Haverdick. Defendant, Frank Haverdick shall pay to Plaintiff as and for her share of marital equity the sum of \$60,000.00 payable immediately. Plaintiff, Madeline Haverdick, shall have 30 days from the date of the closing to vacate the premises.² The lien attributable to Attorney Biviano shall be paid for out of Madeline Haverdick's share.

{¶4} Both parties having agreed that the personal property and household goods have already been divided, said division shall become permanent without any further claim of one against the other.

{¶5} Appellee paid appellant the sum of \$60,000 on April 3, 2009. On May 7, 2009, 33 days after tendering payment, appellee changed the locks on the residence, thereby taking possession of the property and any contents remaining in the home.

{¶6} On May 11, 2009, appellant demanded appellee appear before the court and show cause why he should not be held in contempt for failing to comply with the

1 The record reflects that appellant had rented an apartment in January 2009, but remained in the marital home through the beginning of May 2009.

2 The parties stipulated that appellee would obtain a loan to pay appellant the \$60,000. Given this backdrop, the court's statement "from the date of closing" suggests that appellant would have 30 days from the date the loan is obtained and the money tendered to vacate the premises.

final divorce decree. Additional discovery took place after which the matter came on for trial before the magistrate. The magistrate took two days of testimony and, on January 29, 2010, denied appellant's motion for contempt. On February 10, 2010, appellant filed timely objections to the magistrate's decision alleging both factual and legal errors. The objections also included a request for additional time "to transcribe the recorded testimony of the hearing so that she may make additional arguments and objections in the case." Two days later, the trial court overruled appellant's objections and adopted the magistrate's decision in its entirety.

{¶7} Appellant appealed the decision, alleging the trial court erred in refusing to grant her additional time to prepare the transcript. This court agreed and, in *Haverdick v. Haverdick*, 11th Dist. No. 2010-T-0040, 2010-Ohio-6256, the matter was reversed and remanded. On remand, the trial court reviewed the transcript and, in considering appellant's objections, affirmed the magistrate's decision. This appeal follows.

{¶8} Appellant assigns one error for this court's review:

{¶9} "The trial court erred, to the detriment of appellant, by allowing appellee to constructively evict appellant, and allowing appellee to seize her property without sanctions or punishment."

{¶10} Under her sole assignment of error, appellant contends the trial court erred in adopting the magistrate's decision and failing to hold appellee in contempt of the final divorce decree. Appellant first contends appellee's act of changing the locks in the home, in effect, evicting appellant was illegal. In appellant's view, appellee was required to file a forcible entry and detainer action in the county municipal court. We do not agree.

{¶11} Preliminarily, appellant points out that the magistrate's conclusion that appellee constructively evicted her was inaccurate and contrary to law. Appellant, in this respect, is correct. A constructive eviction has been defined as "such a failure or interference on the part of the landlord with the intended enjoyment of the leased premises as to be of a substantial nature and so injurious to the tenant as to deprive him of the beneficial enjoyment of the leased premises." *Nye v. Schuler*, 110 Ohio App. 443 (1959). This definition clearly does not match the circumstances of this case. Most significantly, the parties in this case did not have a landlord-tenant relationship.

{¶12} Regardless, the trial court, in its judgment, did not adopt the magistrate's manner of framing what occurred. Instead, the trial court concluded appellee's action of changing the locks did not operate as an eviction.

{¶13} With respect to the substance of appellant's argument, appellant asserts that, per the parties' stipulations, appellee's counsel stipulated that he would obtain a formal eviction; the stipulations, however, do not specifically imply appellee agreed to this. During a hearing on the stipulations, the following exchange took place:

{¶14} [Appellee's Counsel:] Upon [appellee's payment of \$60,000], the Plaintiff will have thirty days from that date - - and not a day longer - - to vacate the premises. If she doesn't vacate the premises in thirty days, she will forfeit her right to a forcible eviction to obtain her action and authorize us to proceed into Niles Municipal Court to get an immediate restitution to so remove her. * * *.

{¶15} [Appellant's Counsel:] I'm not confessing judgment if that's what you are driving at, Counselor.

{¶16} [Appellee's Counsel:] She would have - - I want to stipulate we would be able to go into Niles Municipal Court to get immediate - -

{¶17} [Appellant's Counsel:] I'm not going to stipulate something that's your legal right. Where are you coming from with this? She's going to be out of there. Just give me the money. She's been waiting for it for five years.

{¶18} From this exchange, appellant's counsel simply refused to stipulate that appellee had the right to formally evict appellant from the dwelling after 30 days. And, this refusal appears to be based upon (1) counsel for appellant's reassurance that appellant would be out of the house at that time and (2) the inherent superfluity of such a stipulation, i.e., if appellee had a cognizable right to possession after 30 days and if appellee is *not* out, he could exercise his statutory right to move for eviction if he chose to pursue this option. We do not, however, read the foregoing exchange to mean appellee's counsel specifically stipulated that appellee was bound to formally evict appellant if she had not vacated the home.

{¶19} Given these points, the trial court's judgment simply states that after appellee pays appellant \$60,000, her share of the marital equity in the home, appellant shall have 30 days to vacate the premises. Appellant does not dispute that appellee had the legal right to possess the premises at the time he changed the locks. Appellant only takes issue with the fact that appellant changed the locks because, in her view, this act constituted an improper and illegal eviction. The accuracy of this contention, however, is immaterial to whether appellee was in contempt of the trial court's decree when he changed the locks. The decree neither states nor implies (via the incorporated

stipulations) that appellee was obligated to file a forcible entry and detainer action if appellant, after 30 days, had not vacated the dwelling. The decree directly states appellant was obligated to leave the home after the 30-day window passed and appellee “is to be in possession” of the residence at that time. The judgment functioned to put each party on notice of their rights and obligations. We therefore conclude that appellee’s action of taking possession of the residence, regardless of his means, did not violate the divorce decree and, as a result, his actions cannot be construed to stand in contempt of the final order.

{¶20} There was a pre-existing court order specifying the parties’ rights and obligations. Appellant was obligated to leave 30 days after payment and appellee was entitled to take possession after the expiration of those 30 days. Neither party disputes appellee’s entitlement to possession of the residence at the time he changed the locks. We therefore hold, contrary to appellee’s argument, that appellee’s actions in taking possession of the home did not violate the divorce decree and thus the trial court properly concluded appellee was not in contempt of that order.³

{¶21} Appellant next argues the trial court erred in concluding she was not entitled to any personal property found in the home except the washer and dryer in the basement. We do not agree.

{¶22} The final divorce decree provided that “[b]oth parties having agreed that the personal property and household goods have already been divided, said division

³ We note that appellee could have filed a motion to show cause against appellant for violating the divorce decree. Given the circumstances of this case, however, we hold appellee was not required to exercise this option. He had title to the property and a pre-existing court order entitling him to possession of the property. Moreover, appellant testified he had enlisted the assistance of the police to compel appellee to leave the residence two days before he changed the locks. According to appellee, appellant nevertheless refused to leave. Even though appellant’s actions were unorthodox, we discern nothing illicit in his “self-help” methodology given the under the facts of this case.

shall become permanent without any further claim of one against the other.” In this case, when appellee took possession of the home, he testified the dwelling was in a state of squalor with garbage, clothing, and other items strewn throughout. The record indicates that he, his sister, and the parties’ daughter cleaned the home and placed appellant’s clothes and other personal effects in bags. Appellant later retrieved the bags. It is undisputed that certain furniture items were also left in the home. Appellant contends the remaining furniture in the home belonged to her and therefore the trial court erred in failing to find appellee in contempt for not returning the items.

{¶23} At the hearing, the testimony indicated that the marital property belonging to both parties was left in the marital home. And, as discussed above, appellant was permitted to remain in the home until appellee paid appellant her equitable share in the residence. Appellee testified he left his personal property and household goods in the home because, after the divorce decree was entered, he intended on buying the home. When appellee finally took possession of the home, however, he discovered his property had vanished. At the hearing, appellee testified: “All my nonmarital, personal assets - - all my own personal marital assets are all gone - - fixtures, lighting fixtures * * *.” He later elaborated: “Dressers, lawn mowers, wheelbarrows, work benches, vices, toolboxes, all my tools, not even a paint brush left.” Appellee also testified he did not return the furniture left in the home because he thought appellant abandoned the items by not removing them before the expiration of the 30-day timeframe set forth in the final judgment of divorce.

{¶24} Appellant testified that she did not intend to abandon the items left in the home and, in fact, claimed she had enlisted movers to retrieve the furniture prior to

appellee taking possession of the home. Appellant asserted the furniture in the home belonged to her and valued the items at approximately \$255,000. Appellant also claimed that she had left \$1,000 cash in a kitchen cabinet which was not returned. She also asserted she left a significant amount of jewelry throughout the house, which she valued at \$84,000, that was not returned. Appellee denied finding any money or jewelry in the home and his testimony was corroborated by the parties' daughter and appellee's sister, both of whom were present on the date appellant took possession of the home. Moreover, and despite appellant's testimony, the record indicates that, in 2005, the contents of the house, including the furniture, were appraised at approximately \$15,000.

{¶25} The final decree simply states that the personal property and household goods were divided and that division became permanent without any further claim by either party on the date of the decree. A plain reading of this provision demonstrates that, even if appellee kept property that belonged to appellant, his decision not to return items in the house at the time he took possession does not, unto itself, violate the decree.

{¶26} Appellant, as the movant, had the obligation to prove appellee was in contempt of the divorce decree by clear and convincing evidence. *Stychno v. Stychno*, 11th Dist. No. 2008-T-0117, 2009-Ohio-6858, ¶26. An appellate court, however, reviews a trial court's adoption of a magistrate's decision for an abuse of discretion. *Fortney v. Willhoite*, 11th Dist. No. 2011-L-120, 2012-Ohio-3024, ¶33. Given the evidence produced in this case, however, we cannot say the magistrate erred in finding appellant failed to establish that appellee, by not returning the items appellant failed to remove within the clear timeframe established by the divorce decree, violated the

court's order. In other words, the magistrate did not clearly lose his way in ruling appellant failed to meet her burden of proof. We therefore hold the trial court did not abuse its discretion in adopting the magistrate's decision.

{¶27} We acknowledge that the testimony and other evidence received at the hearing indicate that neither appellant nor appellee had completely "clean hands" in this case. Appellee testified that, unbeknownst to him, the property to which he was entitled to via the final decree had been removed from the home by the time he took possession of the residence. The evidence also indicates, however, that some of the property left in the home was likely appellant's by operation of the agreed property division incorporated into the final decree. It consequently appears the magistrate's decision was, at least in part, motivated by an attempt to resolve and finalize the underlying case in a fair and equitable manner given the tumultuous nature of the parties' association. In acknowledging these points, however, this court underscores that our disposition is premised upon the absence of evidence that would show appellee clearly and convincingly violated the final decree.

{¶28} Appellant's assignment of error is overruled.

{¶29} For the reasons discussed above, the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.