[Cite as *Miller v. Miller*, 2010-Ohio-6521.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Carolyn Miller

Appellant

v.

Terry L. Miller

Appellee

Court of Appeals No. L-10-1097

Trial Court No. DR2004-0209

DECISION AND JUDGMENT

Decided: December 30, 2010

* * * * *

Paul L. Geller, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, appellant, Carolyn J. Miller, asserts the following assignment of error:

{¶ 2} "The trial court erred in not enforcing the terms of the divorce decree which clearly stated that Appellee was to install and not fix furnace."

{¶ 3} Appellee, Terry L. Miller, failed to file a brief on appeal. Therefore, we shall accept appellant's statement of the facts and issues as true and reverse the judgment

of the trial court "if appellant's brief reasonably appears to sustain such an action." App.R. 18(C). See, also, *Anderson v. Ballard*, L-10-1007, 2010-Ohio-3926, ¶ 26.

{¶ 4} It is undisputed that the parties entered into a divorce settlement on August 7, 2007. The settlement was made part of a divorce decree on April 15, 2008. Appellant was awarded the marital residence located on Ventura Street in Toledo, Lucas County, Ohio, and was ordered to commence paying the mortgage on that residence on January 1, 2008. She was also awarded spousal support. With regard to this issue, the decree reads, in material part:

{¶ 5} "Defendant [appellee] shall pay to Plaintiff [appellant] the sum of fifteen hundred dollars ($1500.00) per month, spousal support[,] processing fee at the rate of two (2%) percent per month, for a total monthly payment, including processing fee of fifteen hundred and thirty dollars ($1530.00) for a period of nine years, unless the Plaintiff dies, remarries or cohabitates with another male. If the defendant fails to install a furnace at the Ventura Street address by January 1, 2008 then the spousal support shall be two thousand hundred [sic] dollars ($2000.00) per month, spousal support processing fee at the rate of two (2%) per cent per month, for a total monthly payment including processing fee of two thousand and forty dollars ($2040.00) for a period of nine years unless plaintiff dies, remarries or cohabitates with another male."

{¶ 6} The last paragraph in the decree reads: "**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the parties agree that any changes necessary for the implementation of this agreement be made with only the consent of the lawyers and

consistent with the agreement of the parties." The decree is signed by the domestic relations court judge, appellant, and appellee.

{¶ 7} On August 28, 2008, appellant filed a motion to show cause in which she complained that appellee "failed to pay any spousal support as requited [sic]" by the divorce decree, and did not put a furnace in the house, or pay on the home mortgage as required by the decree. The trial court dismissed this motion on January 16, 2009.

{¶ 8} On May 1, 2009, appellant filed a motion to show cause asserting that appellee was in contempt of court because he failed to install a furnace by January 1, 2008; therefore, the $2,000 per month in spousal support to appellant commenced on that date. Finally, on July 16, 2009, appellant filed a motion to enforce the agreement in which she claimed that appellee failed to install a furnace in the former marital residence on Ventura Avenue by January 1, 2008; therefore, she was entitled to an increase in her spousal support.

{¶ 9} At the hearing before a magistrate on this matter, appellee testified that all the electric furnace needed was a heating element, which he purchased for ten dollars and placed in the furnace before January 1, 2008. To the contrary, the parties' 21-year-old son, Craig L. Miller, averred that he was in the former marital residence after January 1, 2008, and asked his father whether the furnace was "fixed" yet. According to Craig, appellee claimed that he "was waiting for a part from Georgia or something like that." Craig also stated that his father had space heaters in rooms "upstairs" as well as "downstairs" in a room next to the furnace where he was working, and further asserted

that the furnace was not fully functional until February 2009. Appellee, in reply, claimed that electricity is expensive; thus, he did not want to heat the entire house and used space heaters only in the area where he and his son were working. On cross-examination, appellee was asked whether he ever installed a furnace in the house by January 1, 2008. He replied, "The-No, I did not install a furnace."

{¶ 10} On January 8, 2010, the magistrate entered a decision in which he first addressed appellant's motion to show cause and determined that she failed to satisfy the requirements for the grant of such a motion. The magistrate then turned to a discussion of her motion to enforce that clause in the divorce decree which provides for a $500 increase in spousal support if appellant failed to install a furnace in the former marital residence by January 1, 2008. He concluded that appellant "offered no evidence that the furnace was not in compliance with the order by the due date, January 1, 2008." Therefore the magistrate dismissed appellant's motion.

{¶ 11} Appellant filed objections to the magistrate's decision, asserting that "fixing" a furnace is not the same as installing a furnace. It is undisputed that at the time of the hearing on this matter, appellant had not taken possession of the former marital residence and decided that she did not want to live there due to its poor condition. Thus, she argued that there was significant equity in the home as an exchange for increased spousal support. Consequently, appellant claimed that the clause allowing the increase in spousal support for failure to install a furnace was not unconscionable.

{¶ 12} The trial judge overruled appellant's objections finding that, during the hearing before the magistrate both appellant and her attorney used only the terms "repaired" or "fixed" when referring to the furnace. As a result, the court found "that the parties contemplated by their divorce settlement only the repair of the furnace to working order." The court further determined that appellant failed to prove that the furnace was not repaired by January 1, 2008 and, even if it was not repaired until February 2008, appellant suffered no material harm because she did not inquire as to the repair of the furnace until April 2008. Finally, the court observed that at the hearing on this matter, appellant stated that she no longer wanted the house.

{¶ 13} On appeal, appellant points out that a court speaks only through its journal entry. We agree. See *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 439, 2007-Ohio-4555, ¶ 30; *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 611; *San Filipo v. San Filipo* (1991), 81 Ohio App.3d 111, 112. As to spousal support, the term used in the parties' settlement agreement, which was incorporated in the trial court's judgment of divorce, was "install." As observed by Carolyn Miller, there is no reservation of jurisdiction by the trial court to modify the award of spousal support. Thus, the only issue before the lower court, and this court, was and is, the interpretation of the divorce decree as to the meaning of "install a furnace." The fact that appellant's attorney may have used the terms "repair" or "fix" in posing questions has no relevance to that issue. Moreover, appellant was not required to move into the former marital home in order to assert that appellant had not complied with the terms of the divorce decree.

{¶ 14} Generally, absent an abuse of discretion, a trial court's decision to modify or not modify a spousal support award will not be disturbed on appeal. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion is more than an error in judgment; it signifies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} When interpreting a divorce decree that incorporates the parties' separation agreement, the rules of contract interpretation apply to determine the meaning of the terms used. *Yarder v. Scherer*, 6th Dist. No. L-03-1035, 2003-Ohio-6744, ¶ 15. Thus, "a court will give common words appearing in the written instrument their ordinary meaning, unless manifest absurdity results or unless some other meaning is clearly evidenced from the instrument." *Peppas v. Hille*, 6th Dist. No. L-03-1211, 2004-Ohio-2463, ¶ 16. (Citation omitted.) Moreover, a trial court must defer to the express terms of the contract and interpret it according to its plain, ordinary, and common meaning. *Forstner v. Forstner* (1986), 68 Ohio App.3d 367, 372.

{¶ 16} The relevant meaning of "install" is "to set up for use or service." Merriam-Webster Online Dictionary, 2010, http://www.merriam-webster.com (Dec. 14, 2010); Merriam-Webster Dictionary (1996) 606. The examples provided for the word "install" are, e.g., "New locks were installed on all the doors" and "The software installs easily on

your hard drive." Merriam-Webster Online Dictionary, 2010, http://www.merriam-webster.com (Dec. 14, 2010). The pertinent meaning of "fix" is "repair, mend." Id. Likewise, "repair" is relevantly defined as "to restore by replacing a part or putting together what is torn or broken." Id. The example for this term is to "repair a shoe." Id. Clearly, "install" and "fix" or "repair" are not synonymous. Therefore, we find that the trial court abused its discretion in denying appellant's motion to enforce that clause in the separation agreement/divorce decree which required appellee to install a furnace in the former marital residence by January 1, 2008, or appellant's spousal support would increase by $500 per month.

{¶ 17} Appellant's assignment of error is found well-taken. The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is reversed. This cause is remanded to that court solely for the purpose of issuing an order raising appellant's spousal support to $2,000 per month commencing on January 2, 2008 for a period of nine years. Appellee, Terry L. Miller, is ordered to pay the cost of this appeal pursuant to App. 24(A).

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

_____
JUDGE

Mark L. Pietrykowski, J.

_____
JUDGE

Arlene Singer, J.
CONCUR.

_____
JUDGE