

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KIMBERLY A. BARTH
(FORMERLY KNOWN AS KIMBERLY A.
ZABOROWSKI)

Appellee

v.

FREDERICK J. ZABOROWSKI

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 972 WDA 2013

Appeal from the Order May 10, 2013
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): Fd 10-006593

BEFORE: PANELLA, J., DONOHUE, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J.

FILED JULY 02, 2014

Appellant, Frederick J. Zaborowski ("Father"), appeals from the order entered on May 10, 2013, by the Honorable Paul E. Cozza, Court of Common Pleas of Allegheny County, which denied his motion for modification of child support. After careful review, we affirm.

Appellee, Kimberly A. Barth ("Mother"), and Father are parents of three children, ages 11, 15, and 18. The couple ended the marriage by divorce and entered into a marriage settlement agreement ("MSA") on September 1, 2010. The MSA stated that Father would pay \$1,900.00 per month in child support to Mother until the youngest child graduated from college in 2024. **See** MSA, 9/1/10, at ¶ 11. Furthermore, the MSA contained

a provision stating, "child support payments shall be subject to modification in the event of a substantial change of circumstances." **Id.**

On May 29, 2012, Mother filed petition to enforce the MSA due to Father's unilateral decision to reduce support payments. **See** Petition to Enforce Marriage Settlement Agreement, 5/29/12. Father paid the full \$1,900.00 per month from July 2011 to November 2011; however, he only paid \$1,500.00 per month from December 2011 to March 2012, and only \$500.00 in April of 2012. **See id.**, at ¶¶ 5-7.

Mother served Father with a request for production of documents in order to obtain proof of income; however, Father served the documents late. Additionally, Father failed to appear for a deposition. Mother then filed a motion for sanctions, which Father did not appear to defend. Upon consideration of Mother's motion for sanctions, the court issued an order dated November 21, 2012. **See** Order, 11/21/12. The order stated that Father's failure to comply with both the request for production of documents and the request to appear for a deposition would preclude him from presenting any evidence at the petition to enforce hearing. **See id.**

The hearing for the petition to enforce was held on December 11, 2012, before a Special Master. **See** N.T., Hearing, 12/11/12, at 2. At the hearing, Father did not enter any evidence of a substantial change in circumstances. **See id.**, at 26-43. Father tried to present a tax return;

however, the Master denied the request as per the November 21 order. **See id.**, at 31-36.

The Master found Father's circumstances to be the same as they were at the creation of the MSA, and concluded Father was bound to that contract. **See id.**, at 38, 41-50. Additionally, the Master ordered Father to pay counsel fees and to make payments of his arrears in the amount of \$200.00 per month until paid off completely. **See id.**, at 49-50. Father then filed exceptions to the Master's report and, on January 10, 2013, a mere 30 days after the hearing, Father filed a motion to modify child support.

The trial court adopted the Master's findings from the December 11, 2012 hearing. **See** Trial Court Opinion, 8/13/13, at 5. Based on the Master's findings that Father demonstrated no substantial change in circumstances, the trial court denied Father's motion to modify support. **See id.** The trial court found no need for an evidentiary hearing on Father's motion to modify his support obligation, reasoning that Father completely failed to enter any evidence of a change in circumstances in the hearing before the Master and that Father has not alleged any change in circumstances since the last hearing. **See id.**

On appeal, Father claims the trial court abused its discretion when it denied his motion for modification of support without an evidentiary hearing. Our standard of review for modification of child support is well settled. An award of support may be modified via petition, at any time, provided the

moving party “demonstrates a material and substantial change in their circumstances warranting a modification.” **Plunkard v. McConnell**, 962 A.2d 1227, 1229 (Pa. Super. 2008); **see also** 23 Pa.C.S.A. § 4352(a). If the trial court “finds that there has been a material and substantial change in circumstances, the order may be increased or decreased depending upon the respective incomes of the parties.” Pa.R.Civ.P. 1910.19(c). The determination of whether such change does indeed exist is within the sole discretion of the trial court. **See Plunkard**, 962 A.2d at 1229. An abuse of discretion occurs where the trial court “overrides or misapplies the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias or ill will.” **Sirio v. Sirio**, 951 A.2d 1188, 1192-93 (Pa. Super. 2008).

Although Father would ordinarily be entitled to an evidentiary hearing so that he may meet his burden of proof, **see Commonwealth ex rel. McClelland v. McClelland**, 450 A.2d 58, 61 (Pa. Super. 1982), his conduct has shown that, under the particular circumstances of this case, the trial court did not abuse its discretion in denying him one.

Father did not enter any evidence of a substantial change in circumstances in the hearing before the Master. The trial court noted that Father’s failure to present evidence was based solely on his utter failure to comply with the court’s discovery deadlines and failure to appear at a deposition. **See** Trial Court Opinion, 8/13/13, at 5. Against this background

of Father's behavior, the trial court reasoned, "[a]nother evidentiary hearing in this matter would be a waste of judicial resources.... Additionally, Father did not allege that there had been any substantial change between the date of the Master's hearing and the presentation of the motion which would warrant additional consideration." *Id.*, at 5-6. We find this explanation eminently reasonable.

Father's filing of a motion to modify support, filed a very short 30 days after the hearing based on Father's unilateral action in reducing support payments, was an obvious attempt to circumvent the effects of his former recalcitrant behavior, which led to the loss of his right to present evidence. The trial court did not abuse its discretion in refusing to reward such conduct by holding an additional evidentiary hearing.¹

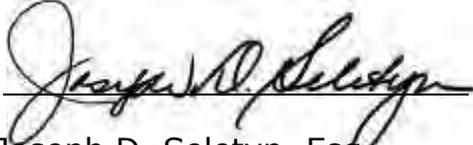
Order affirmed. Jurisdiction relinquished.

Donohue, J., concurs in the result.

¹ Obviously, the trial court cannot foreclose Father in perpetuity from filing a motion to modify his child support obligation based on a change of circumstances. We simply hold that under the facts of this case and under its unique procedural posture, the trial court did not abuse its discretion.

J-S32013-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014