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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1042

Filed: 5 June 2018

Union County, No. 15 CVD 305

STEPHANIE KAPLAN, Plaintiff,

v.

KEITH J. KAPLAN, Defendant.

Appeal by defendant from order entered 7 March 2017 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 3 May 2018.

Stephanie J. Kaplan, pro se, for plaintiff-appellee.

Leonard G. Kornberg for defendant-appellant.

DAVIS, Judge.

Keith J. Kaplan ("Mr. Kaplan") appeals from the trial court's order finding him in civil contempt based on his failure to comply with prior orders requiring him to pay Stephanie Kaplan ("Ms. Kaplan) a support obligation and attorneys' fees. On appeal, he contends that the trial court erred in holding him in civil contempt because it failed to make sufficient findings that he had the present ability and means to (1) comply with the court's prior orders; and (2) pay the purge amount of $132,420.45 in

connection with the finding of contempt. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

The parties were married on 20 April 1996 and separated on 23 November 2014. One child was born of the marriage. On 5 February 2015, Ms. Kaplan filed a complaint for child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees.

On 12 August 2015, the trial court entered an order for child support (the "Child Support Order"), which required Mr. Kaplan to pay Ms. Kaplan the sum of $4,500 per month as a monthly child support obligation and an additional sum of $18,000 as a retroactive payment of child support. That same day, the court entered a second order (the "Post-Separation Support Order") that required Mr. Kaplan to pay Ms. Kaplan $20,000 monthly for the following thirty six (36) months as post-separation support as well as to make an arrears payment of $40,000.

In both the Child Support Order and the Post-Separation Support Order, the trial court found that Mr. Kaplan had gross monthly earnings of at least $48,779.00 and net monthly earnings of $28,662.56. The court also found that Mr. Kaplan had an additional earning capacity as a result of his consulting work and concluded that he had sufficient income to pay the total support obligation ordered by the court.

By January 2016, Mr. Kaplan had only paid Ms. Kaplan $48,500 of the total $127,500 support obligation he owed her. He had also failed to make any of the required payments in a timely fashion.

Ms. Kaplan filed a motion for contempt and a motion for sanctions based on Mr. Kaplan's noncompliance with the trial court's orders. A hearing was held before the Honorable Hunt Gwyn in Union County District Court at which Ms. Kaplan was represented by Kenneth W. Honeycutt. The court entered an order on 26 January 2016, holding Mr. Kaplan in civil contempt and setting as a purge condition an arrearage payment of $49,000 to Ms. Kaplan. The court also ordered Mr. Kaplan to pay Honeycutt $6,000 in attorneys' fees.

On 28 September 2016, Honeycutt filed a motion for a show cause order, alleging that Mr. Kaplan had failed to pay the $6,000 in attorneys' fees previously ordered for his representation of Ms. Kaplan. The trial court entered a show cause order on 28 September 2016. The order required Mr. Kaplan to appear at a hearing on 30 January 2017.

Ms. Kaplan filed motions for contempt on 7 October 2016 and on 13 January 2017 based on Mr. Kaplan's failure to pay his support obligation. The trial court entered corresponding show cause orders on 14 October 2016 and on 18 January 2017 directing Mr. Kaplan to appear on 30 January 2017 with regard to his failure to comply with the court's Child Custody Order and Post-Separation Support Order.

On 9 January 2017, Ms. Kaplan filed a motion for injunctive relief, requesting that the trial court issue a temporary restraining order and a preliminary injunction against Mr. Kaplan in order to freeze the assets he held in various bank accounts. On 9 January 2017, the trial court issued a temporary restraining order, and on 18 January 2017 the trial court issued a preliminary injunction, restraining Mr. Kaplan from "disposing of, wasting, withdrawing or secreting the funds in all [of his] personal and business accounts . . . except those necessary to pay [Ms. Kaplan] the monthly amounts due pending a hearing on the merits [on her] contempt action."

On 30 January 2017, a hearing was held before Judge Gwyn in Union County District Court. Ms. Kaplan and Honeycutt were present and testified at the hearing. Additionally, Ms. Kaplan presented testimony from Victoria Cole, a forensic accountant. Neither Mr. Kaplan nor his attorney attended the hearing. That same day, the trial court entered an order modifying the 18 January 2017 preliminary injunction.

On 7 March 2017, the trial court entered an order (the "Contempt Order") finding Mr. Kaplan in civil contempt for his failure to pay the support obligation required by the Child Support Order and the Post-Separation Support Order as well as his failure to pay Ms. Kaplan's attorneys' fees. The court found that Mr. Kaplan's noncompliance with its prior orders was "willful, deliberate and without just cause" and that he "has the means and ability to comply with this Court's Orders or is able

to take steps which would enable him to comply with the Court's Orders." The court ordered that Mr. Kaplan "shall be placed in the custody of the Union County Jail until such time as he purges himself of civil contempt by making a payment in the amount of $132,420.45 to be made payable to Stephanie Kaplan." On 13 March 2017, the trial court entered an order for Mr. Kaplan's arrest. Mr. Kaplan filed a timely notice of appeal.

Analysis

On appeal, Mr. Kaplan argues that the trial court erred by (1) holding him in contempt without properly determining that he had the means and ability to comply with the Child Support Order and the Post-Separation Support Order; and (2) concluding that he had the ability to satisfy the purge condition set out in the Contempt Order.

This Court has held that "[t]he standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Lesh v. Lesh*, __ N.C. App. __, __, 809 S.E.2d 890, 900 (2018) (citation omitted). "When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper." *Id.* at __, 809 S.E.2d at 900 (citation omitted). "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) (citation omitted).

In order "[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the present ability test defendant must possess some amount of cash, or asset readily converted to cash." *Tucker v. Tucker*, 197 N.C. App. 592, 595, 679 S.E.2d 141, 143 (2009) (citation omitted).

North Carolina law differentiates between, on the one hand, a contempt proceeding that takes place based simply on the motion of one party to hold the other party in contempt and, on the other hand, a contempt proceeding that occurs following the entry of a judicial order or notice directing a party to appear and show cause why he should not be held in contempt. "A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt." *Gordon*, 233 N.C. App. at 480, 757 S.E.2d at 353 (citation omitted).

In *Tucker*, the trial court issued a show cause order requiring that the defendant appear at the contempt hearing based on his failure to pay alimony. The defendant appeared at the hearing, and the parties stipulated that he was in alimony

arrears in the amount of $42,650. The trial court found him in civil contempt and set his purge payment as $10,000. *Tucker*, 197 N.C. App. at 593, 679 S.E.2d at 142.

On appeal, the defendant argued that there was insufficient evidence to support the trial court's finding that he had the ability to pay the alimony arrearage and, therefore, insufficient evidence to support a finding of civil contempt. We held that based on the show cause order that was entered prior to the contempt hearing, the defendant had the burden of proof to show why he should not be held in contempt. *Id.* at 594, 679 S.E.2d at 143. We further determined that the trial court's findings of fact regarding the defendant's income and assets supported its conclusion that the defendant had the ability to pay the alimony owed. *Id.*

Here, Mr. Kaplan does not dispute that he was in arrears in his support obligation payments to Ms. Kaplan. As in *Tucker*, the trial court entered a show cause order with a judicial finding of probable cause that was based on her verified motion. Thus, at the contempt hearing, the burden was on Mr. Kaplan to demonstrate why he should not be held in civil contempt.

The trial court made the following pertinent findings of fact in the Contempt Order:

> 5. On January 20, 2016, [Mr. Kaplan] was ordered to pay attorney's fees in the amount of six thousand dollars ($6,000.00) to Mr. Honeycutt no later than March 1, 2016. Said amount has not been paid by [Mr. Kaplan].
>
> 6. The purpose of the Order awarding attorney's fees to

Mr. Honeycutt may still be served by [Mr. Kaplan]'s compliance therewith.

7. [Mr. Kaplan] has the means and ability to pay the attorney's fees ordered to be paid to Mr. Honeycutt, but has failed to do so.

8. Since entry of the Order awarding six thousand dollars ($6,000.00) in attorney's fees to Mr. Honeycutt, Mr. Honeycutt has filed contempt motions on February 2, 2016; March 7, 2016; and April 27, 2016, attempting to collect child support and post separation support, pursuant to the orders granting child support and post separation support as set forth below, which motions were also incorporated by reference in [Ms. Kaplan]'s October 7, 2016 contempt motion.

9. From the entry of the January 20, 2016 Order, Mr. Honeycutt accrued additional expenses resulting in [Ms. Kaplan] being indebted to Mr. Honeycutt for attorney's fees in the additional amount of ten thousand five hundred and forty two dollars ($10,542.00) for efforts on behalf of [Ms. Kaplan] and the minor child to recover child support and post separation support and to enforce discovery, all through contempt. Including the six thousand dollars ($6,000.00) previously ordered, [Mr. Kaplan] owes a total of sixteen thousand five hundred and forty two dollars ($16,542.00) in attorney's fees to Mr. Honeycutt.

10. That said services rendered to [Ms. Kaplan] by Mr. Honeycutt are reasonable and necessary considering all of the circumstances.

11. That [Ms. Kaplan] is without sufficient funds to pay for the cost and attorney [sic] fees to prosecute this case.

12. Based on the testimony of Victoria Coble, a forensic accountant, [Mr. Kaplan] earned in 2015 seven hundred thousand dollars ($700,000) per year. He has multiple sources of income and, except as noted below, there is no

evidence that income has changed.

13. [Mr. Kaplan] voluntarily resigned his position at the W.G. (Bill) Hefner Medical Center in Salisbury effective December 31, 2016 to "pursue other interests", where he earned in excess of two hundred and thirty thousand dollars ($230,000) annually, not including any bonuses, etc. That income is imputed to [Mr. Kaplan].

14. The Decretal portion of the Post Separation Support Order provides, in part, as follows:

> "1. [Mr. Kaplan] shall pay post separation support to [Ms. Kaplan] in the amount of $20,000.00 monthly for the next thirty six (36) months, beginning June 1, 2015, and to be paid each month thereafter on the 1st of each month until with [sic] the permanent alimony claim is ruled upon, or there is a contrary decision by the Court. All payments shall be made by direct deposit into an account designated by [Ms. Kaplan]...
>
> 4. [Ms. Kaplan] has withdrawn approximately $40,000.00 of marital funds to provide for her needs and the needs of her son between January 2015 and the date of this hearing, 04/13/15. In consideration of giving the marital estate credit for that $40,000.00, [Mr. Kaplan] has accrued arrears of $40,000.00 himself, making post separation support retroactive to the date the complaint was filed, February 5, 2015. [Mr. Kaplan]'s arrearage of $40,000.00 shall be paid off by [Mr. Kaplan] paying to [Ms. Kaplan] no less than $1,250.00 per month until paid in full, with the first installment to be paid on or before June 1, 2015 and with a like amount thereafter on the first of each month until the said arrearage is paid in full. All payments shall be made by direct deposit into an account designated by [Ms. Kaplan]…

> 6. But for the house, as incident and consequence of this Order, [Mr. Kaplan] is ordered to continue to pay all of those things for which he claims credit in his affidavit, for the benefit of [Ms. Kaplan], including security, Sirius, HVAC, appliance repair, pool maintenance, garbage, post office box, HOA fees and credit card payments...
>
> 9. This Order is enforceable by the contempt powers of this Court."

15. The Decretal portion of the Child Support Order provides, in part, as follows:

> "1. Beginning on June 1, 2015 and the first of each and every month thereafter until Further Order of the court, [Mr. Kaplan] shall pay to [Ms. Kaplan] temporary child support in the amount of $4,500.00 per month. Said payments shall be made by direct deposit to an account designated by [Ms. Kaplan].
>
> 2. [Mr. Kaplan] shall pay to [Ms. Kaplan] retroactive child support for the period from February 1, 2015 through May, 2015 in the amount of $18,000.00 payable over an 18 month period in equal installments of $1,000.00 each with the first installment to be paid on or before June 1, 2015 with a like amount each month thereafter until the said arrearage is paid in full.
>
> 3. [Mr. Kaplan] shall, as additional child support, maintain current medical and dental insurance on behalf of the said minor child and reimburse [Ms. Kaplan] for all uninsured medical and dental expenses, including reasonable and necessary costs related to orthodontic, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders."

16. The Decretal portion of the Order of Contempt and Sanctions, filed herein on January 20, 2016, provided, in part, as follows:

> "1. That [Mr. Kaplan] may purge himself of the civil contempt by complying with the following conditions; all conditions to be met on January 1, 2016, said conditions are as follows:
>
> > ... c. [Mr. Kaplan] is ordered to pay all payments on the first day of each month hereafter for all months forward....
> >
> > f. [Mr. Kaplan] is to pay on the first of every month from here forward and is to do so in the form of a bank draft. It is ordered that it is to be clear whether the draft is for child support, P.S.S., or an arrears payment, or other payments he has been ordered to make."

17. The Decretal portion of the Temporary Restraining Order, filed herein on February 5, 2015, provided, in part, as follows:

> "1. That [Mr. Kaplan] is hereby enjoined and restrained from destroying, selling, gifting, disposing of, wasting, withdrawing, secreting, and/or liquidating any and all business equipment or property, personal and business vehicles, bank accounts, 401(k) accounts, stock plans, profit sharing plans, furnishings, and any and all funds, real estate, personal property, monetary funds owned in the name of either [Ms. Kaplan] or [Mr. Kaplan] or both, including any and all funds held in the name of [Mr. Kaplan]'s Business, TissuePathology, tissuepathology.com, or any form

> thereof, or in the name of Keith J. Kaplan MD, LLC, any funds held in any accounts in the name of [Ms. Kaplan] or [Mr. Kaplan] or both, as set forth in [Ms. Kaplan's] Motion for Injunctive Relief, pending a hearing in this action.
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> 2. That [Mr. Kaplan] is hereby ordered to cooperate fully with the Internal Revenue Service and to pay the parties' taxes so as to prevent any liens from being placed upon the parties' property or accounts, and so as to prevent any damage to [Ms. Kaplan]'s credit that would be associated with [Mr. Kaplan]'s non-payment of said taxes."

18. At the time the Orders were entered, [Mr. Kaplan] had the means and ability to comply with the terms of the Orders, and [Mr. Kaplan] presently has the means and ability to comply with the terms of the Orders.

19. The Orders are still in full force and effect, and the purpose of the Orders may still be served by [Mr. Kaplan]'s compliance therewith.

20. [Mr. Kaplan] has failed to pay the following items:

> a. [Mr. Kaplan] owes a total of seventy four thousand three hundred and thirty nine dollars and seventy one cents ($74,339.71) in post separation support and child support. [Mr. Kaplan] has failed to properly denote all such payments; however, based on the evidence presented the Court determines that of this total amount, [Mr. Kaplan] owes eleven thousand dollars ($11,000.00) in child support and sixty three thousand three hundred and thirty nine dollars and seventy one cents ($63,339.71) in post separation support.
>
> b. [Mr. Kaplan] owes a total of five thousand eight hundred and sixty five dollars and one cent ($5,865.01) for post separation support for January

2017.

c. [Mr. Kaplan] owes six thousand nine hundred and eighty one dollars and seventy four cents ($6,981.74) for the following expenses he was obligated to pay in 2015, but did not pay: three hundred dollars ($300.00) for pool maintenance in the month of June; two hundred and fifty dollars ($250.00) for pool maintenance in the month of July; two hundred dollars ($200.00) for pool maintenance in the month of August; five hundred thirty nine dollars and forty eight cents ($539.48) for security and six hundred and twenty three dollars ($623.00) for pool maintenance in the month of September; forty five dollars and ninety two cents ($45.92) for garbage pick-up, five hundred and twenty two dollars ($522.00) in HVAC expenses, two hundred nineteen dollars and sixty seven cents ($219.67) for Sirius, and six hundred and seventy five dollars ($675.00) for pool maintenance in the month of October; six hundred and fifty five dollars ($655.00) in fireplace/starter expenses, two hundred and seventy dollars ($270.00) in fountain/appliance expenses, and two hundred and nineteen dollars and sixty seven cents ($219.67) for Sirius in the month of November; and two thousand four hundred dollars ($2,400.00) in Homeowners Association Dues and sixty two dollars ($62.00) for garbage pick-up in December.

d. [Mr. Kaplan] owes five thousand three hundred and eighty six dollars and ninety nine cents ($5,386.99) for the following expenses he was obligated to pay through August 2016, but did not pay: one hundred and thirty dollars ($130.00) to maintain a post office box, three hundred dollars ($300.00) for pool maintenance, and one thousand eight hundred and ninety five dollars ($1,895.00) in ejector/appliance expenses in the month of January; three hundred and eighty six dollars and twelve

> cents ($386.12) for Sirius in the month of February; five hundred and forty nine dollars ($549.00) on plumbing appliances and sixty two dollars ($62.00) for garbage pick-up in the month of March; three hundred and ninety one dollars and eighty four cents ($391.84) for security, five hundred dollars ($500.00) for pool maintenance, and one hundred and twenty five dollars ($125.00) for the fountain in the month of April; sixty two dollars ($62.00) for garbage pick-up in the month of June; two hundred forty one dollars and three cents ($241.03) on the washer pump in the month of July; seven hundred and forty five dollars ($745.00) in pool maintenance for the month of August.
>
> e. [Mr. Kaplan] owes thirty nine thousand eight hundred and forty seven dollars ($39,847.00) in credit card debt due to his non-payment of [Ms. Kaplan]'s American Express, USAA, and Citibank credit cards. The failure of [Mr. Kaplan] to pay the American Express account has resulted in [Ms. Kaplan] being sued with a resulting judgment of fifteen thousand four hundred and ninety six dollars and eighty cents ($15,946.80) [sic].

21. [Mr. Kaplan] has failed to provide [Ms. Kaplan] with access to all insurance accounts and passwords to same as previously ordered by the Court.

22. [Mr. Kaplan] has failed to pay the parties' income taxes as previously ordered by the Court.

23. [Ms. Kaplan] has incurred just over fourteen thousand dollars ($14,000.00) in attorney's fees with Penelope L. Hefner.

24. [Ms. Kaplan] has incurred twenty three thousand nine hundred and thirteen dollars and sixty five cents ($23,913.65) in attorney's fees with Richard G. Long.

> 25. [Ms. Kaplan] is an interested party, acting in good faith, who has insufficient means to defray the expenses of this action, including her reasonable attorney's fees. [Mr. Kaplan] should be required to reimburse [Ms. Kaplan]'s costs incurred in bringing this action, including her reasonable attorney's fees, and [Mr. Kaplan] has the means and ability to pay [Ms. Kaplan]'s reasonable attorney's fees.

Based on these findings, the trial court concluded that Mr. Kaplan's failure to comply with the prior orders was "willful, deliberate and without just cause" and that he "has the means and ability to comply . . . or is able to take steps which would enable him to comply with the Court's Orders."

Mr. Kaplan argues that Finding No. 18 was unsupported by competent evidence based on his contention that he does not possess the present ability to pay his support obligation. However, he has failed to challenge any of the other findings upon which Finding No. 18 is based. He does not challenge the trial court's findings regarding his income during the relevant time period. Thus, these unchallenged findings are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

At the 30 January 2017 hearing, Mr. Kaplan had the burden of proving that he lacked the financial resources to comply with the trial court's prior orders and that, therefore, he should not be held in contempt. Nevertheless, he chose not to

appear at the hearing. As such, he cannot now complain about the consequences of his own inaction. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990) (holding that upon court issuing show cause order in civil contempt proceeding "the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril"), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Therefore, Finding No. 18 was supported by competent evidence because the trial court properly relied on the findings from the court's prior orders relating to Mr. Kaplan's income, which demonstrated that he had the means to comply with those orders. In addition, we note that during the hearing Ms. Kaplan testified as to Mr. Kaplan's income in 2015. Mr. Kaplan failed to meet his burden at the hearing of showing that his income had materially changed since those prior orders were entered. Thus, Mr. Kaplan's argument is meritless. *See Reece v. Reece*, 58 N.C. App. 404, 407, 293 S.E.2d 662, 664 (1982) (trial court's decision to hold party in civil contempt based on his present means to comply with court's prior orders was supported by its findings as to his earnings).

Mr. Kaplan also argues that the trial court erred by concluding that he had the present ability to pay the purge condition set out in the Contempt Order, which stated as follows:

> 1. [Mr. Kaplan] is in civil contempt and shall be placed in the custody of the Union County Jail until such time as

> he purges himself of civil contempt by making a payment in the amount of $132,420.45 to be made payable to Stephanie Kaplan.

The trial court's show cause order stated that probable cause existed for Mr. Kaplan to be held in civil contempt based on the verified allegations in Ms. Kaplan's motion. The payment required as the purge condition simply constituted a portion of the amount in which Mr. Kaplan was in arrears on his support obligation. By failing to appear and present evidence at the 30 January 2017 hearing, Mr. Kaplan lost the opportunity to contest the purge condition set by the trial court because the court's prior orders supported its finding that Mr. Kaplan *did* have the ability to pay that amount. Therefore, this argument likewise lacks merit.

Conclusion

For the reasons stated above, we affirm the trial court's 7 March 2017 order.

AFFIRMED.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).