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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1411

Filed: 3 July 2018

Moore County, No. 13 CVD 754

ANNA MARIE McNAMARA, Plaintiff,

v.

PATRICK ARTHUR McNAMARA, Defendant.

Appeal by plaintiff from contempt order entered 31 May 2017 by Judge Stephen A. Bibey in Moore County District Court. Heard in the Court of Appeals 2 May 2018.

Wilson, Reives and Silverman, PLLC, by Jonathan Silverman, for plaintiff-appellant.

No brief filed for defendant-appellee.

ZACHARY, Judge.

Plaintiff appeals from a contempt order entered 31 May 2017 in which the trial court found her in civil contempt of a 2 March 2015 Consent Order. On appeal, plaintiff argues that (1) the trial court erred by finding her in contempt because the trial court's finding of fact that plaintiff has had the means and ability to refinance the mortgage was not supported by sufficient evidence, and (2) the trial court's

findings of fact and conclusions of law in the contempt order were insufficient to hold plaintiff in contempt. For the reasons that follow, we reverse and remand the trial court's order.

Background

The parties were married on 19 September 1997 and separated on 1 May 2013. On 28 June 2013, Anna Marie McNamara (plaintiff) filed a complaint against Patrick Arthur McNamara (defendant) seeking child custody, child support, post-separation support, alimony, interim distribution, and equitable distribution. On 5 September 2013, defendant filed an Answer and Counterclaims for child custody, interim distribution, and equitable distribution.

The parties entered into a Consent Order on 2 March 2015, which provided in relevant part as follows:

24. The Plaintiff shall have the former marital home . . . as her sole and separate property on the following conditions:

A. The Plaintiff shall assume the mortgage on the property as her sole and separate responsibility, and shall make timely payment of the same, and shall indemnify the Defendant and hold him harmless for this debt. The Plaintiff shall refinance the mortgage into her name alone within one hundred eighty (180) days of February 2, 2015. When the Plaintiff is ready to refinance the property, the Defendant shall execute a Special Warranty Deed conveying his interest in the property to her.

In accordance with this Order, plaintiff also receives \$4,500.00 per month in alimony,

\$2,400 per month in child support, and an additional \$300 a month from defendant's military retired pay.

On 10 February 2016, defendant filed a Motion for Contempt in which he alleged that plaintiff had failed to comply with the 2 March 2015 Consent Order. Specifically, defendant asserted that plaintiff had willfully failed to make the Mercedes payments in a timely manner, failed to make the mortgage payments in a timely manner, and failed to refinance the thirty year mortgage "into her name alone" despite having the means and ability to do so.

On 17 June 2016, the parties entered into a Memorandum of Judgment/Order in which they agreed, *inter alia*, to continue hearing on defendant's motion for contempt and to take the following actions:

The Plaintiff shall continue to use her best efforts to refinance and/or assume the mortgage on the former marital residence and shall have until November 30, 2016 to accomplish having the Defendant's name removed from the debt. This shall be reviewed at Judge Hill's November status date.

The defendant shall use his best efforts to furnish the 1098 US Bank Interest Statement to the Plaintiff for the 2015 tax year by June 30, 2016.

On 29 March 2017, the trial court conducted a hearing on defendant's Motion for Contempt. At the hearing, defendant presented as evidence (1) plaintiff's online bank statements from 28 August 2015 to 19 January 2016, and (2) the Deed of Trust dated 10 March 2009 with plaintiff and defendant listed as the borrowers. Plaintiff

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presented as evidence (1) a US Bank Mortgage Interest Statement addressed to defendant, and (2) a 27 July 2012 letter from a US Bank Assumption Specialist informing defendant of the procedure to add a name to his account. Plaintiff testified that she attempted to refinance the mortgage on the marital home with Yadkin Bank in the middle of 2015, Mortgage Movement in February 2016, and Loan Depot in November 2016. Her applications were rejected because of her credit history. She also attempted to assume the US Bank loan at some point but her application was rejected either (1) because of her credit history and because her name had been removed from the current mortgage, or (2) because of her credit history and “because the US Bank *account associated with the mortgage* was held in Defendant’s name alone and all correspondence from US Bank was mailed to Defendant’s new rental address . . . and required action on Defendant’s part to allow US Bank to communicate with Plaintiff regarding the financing.” (emphasis added). In order to assume the loan, plaintiff stated that she would have to meet certain conditions:

Credit rating which takes time for a mortgage of that amount and being on a fixed income I have no way to increase the income at the point -- at the present so I -- I really don’t see any way I can refinance the house on my own or purchase the mortgage on my own . . . Or assume the loan.

Additionally, plaintiff was unemployed and had not sought employment beyond applying for her previous job as a flight attendant for Delta Airlines after the parties separated. She was not hired. Plaintiff had made no attempt to sell the house and

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testified that she would not have the ability to purchase a new home if she did sell the house. Further, plaintiff argued that had she known the state of her credit, she would not have consented to the order to have the house refinanced within 180 days.

Following the hearing, the trial court entered an Order of Contempt on 31 May 2017 in which it held plaintiff in civil contempt for her failure to refinance the mortgage in her sole name. The trial court made the following relevant findings of fact:

4. The Plaintiff testified that she understood her responsibility under the Consent Judgment, and that she had not had the mortgage put into her name alone.

5. Since the entry of the March 2, 2015 Order, the Plaintiff has attempted to take out a mortgage in her sole name to pay off the existing mortgage on at least 4 different occasions and has been unsuccessful. The Plaintiff failed to produce verification of her denials from the various lenders.

. . .

9. The Plaintiff still does not receive monthly mortgage statements for the subject mortgage as required by the Court's Order.

. . .

11. The Defendant did not put on evidence regarding the allegations that the Plaintiff had failed to make the Mercedes payments on time, and the Court finds that the Defendant did not prove that the Plaintiff failed to make house payments on time. However, the Defendant did prove that the Plaintiff has failed to refinance the mortgage in her sole name, and that she has had the means and

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ability to comply with the Consent Judgment, and therefore is in civil contempt of Court.

On 29 June 2017, plaintiff filed a Notice of Appeal and Motion to Stay the Order of Contempt. Plaintiff subsequently amended her Motion to Stay on 7 July 2017, and on 11 July 2017, the trial court stayed the Order.

Standard of Review

Our review of “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.” *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). “ ‘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.’ ” *Id.* (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)). “When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper.” *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012) (citing *Bishop v. Bishop*, 90 N.C. App. 499, 506, 369 S.E.2d 106, 110 (1988)).

Discussion

On appeal, plaintiff argues that the trial court’s finding that plaintiff has had the means and ability to refinance the mortgage is not supported by sufficient

evidence and that the trial court's findings of fact and conclusions of law in the contempt order are insufficient to hold plaintiff in contempt.

Our Supreme Court has held that a consent judgment entered by the trial court in a domestic relations action is enforceable by civil contempt. *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 388 (1983). Unlike criminal contempt, the object of civil contempt is to coerce compliance with the order of the court. The elements of civil contempt of court are provided in N.C. Gen. Stat. § 5A-21(a):

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.'

N.C. Gen. Stat. § 5A-21(a) (2017). "This Court has held that 'willfulness' is '(1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so.' " *Moss v. Moss*, 222 N.C. App. 75, 80, 730 S.E.2d 203, 206 (2012) (quoting *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002)). However, "[a] factual finding that the defendant 'has had the ability to pay as ordered' supports

the legal conclusion that violation of the order was willful[.]” *Thompson*, 223 N.C. App. at 519, 735 S.E.2d. at 217 (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985)). Moreover, it is well established, as stated by the Supreme Court, that “the order of the court must be obeyed implicitly, according to its spirit and in good faith. A party must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so.” *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (internal citations, quotation marks, and alterations omitted).

In *Thompson*, this Court reversed the trial court’s order holding the defendant husband in civil contempt for failure to pay postseparation support as ordered. *Thompson*, 223 N.C. App. at 519, 735 S.E.2d at 217. The trial court made the following findings of fact:

1. The Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount.
2. The Defendant has willfully refused to pay the Post Separation Support previously ordered.

Id. at 517, 735 S.E.2d at 216. We held that the trial court had “utterly failed to make findings regarding subsections (1) and (2) of § 5A-21(a),” that is, that the “order remains in force” and “[t]he purpose of the order may still be served by compliance with the order. . . .” *Id.* at 519, 735 S.E.2d at 217. In addition, the trial court’s “‘finding of fact’ that [the] ‘[d]efendant has had the ability and means to pay the Post

Separation Support previously ordered, or at least a substantial portion of that amount’ ” was not sufficient to establish a *present* ability to comply.

Here, as in *Thompson*, the trial court also failed to make the requisite findings for a holding of contempt. The trial court’s finding of fact that plaintiff “has failed to refinance the mortgage in her sole name, and that she has had the means and ability to comply with the consent judgment” is insufficient to find plaintiff in civil contempt. The order failed to address subsections (1) and (2), that the “order remains in force” and “[t]he purpose of the order may still be served by compliance with the order. . . .” In addition, the trial court failed to conclude that plaintiff’s noncompliance with the Consent Order was “willful” as required by subsection (2a) of § 5A-21(a), although the finding that plaintiff has had the ability to comply would support that conclusion. N.C. Gen. Stat. § 5A-21(a). Accordingly, in the present case, the trial court’s findings of fact and conclusions of law are insufficient to hold plaintiff in civil contempt.

Plaintiff further contends that there was insufficient evidence presented that she had the means and ability to comply with the order. On appeal, plaintiff maintains that she is genuinely unable to comply with the Court’s order, and that her inability to comply is not a purposeful attempt to render the order ineffectual, despite her alleged lack of effort to gain employment, to manage her finances in a responsible manner, or to sell the house and satisfy the mortgage. However, because we conclude

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that the trial court failed to make sufficient findings of fact and conclusions of law, we decline to address this argument.

Conclusion

For the reasons stated herein, the trial court's contempt order is reversed. We remand for additional findings, conclusions of law, and analysis consistent with this opinion. In its discretion, the trial court may take additional evidence on these issues.

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).