

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-194

No. COA20-161

Filed 4 May 2021

From Guilford County, No. 11 CVD 8181

SANDY MAXWELL, Plaintiff,

v.

MARK D. MAXWELL, Defendant.

Appeal by Defendant from the order entered 9 October 2019 by Judge Brian Tomlin in Guilford County District Court. Heard in the Court of Appeals 9 February 2021.

*Law Firm Carolinas, by T. Keith Black and Jennifer L. Ruby, for Plaintiff-Appellee.*

*Law Office of Lee M. Cecil, by Lee M. Cecil, for Defendant-Appellant.*

GORE, Judge.

¶ 1 Mark D. Maxwell (“Defendant”) appeals the trial court’s order holding him in civil contempt.

I. Background

¶ 2 On 15 June 2010, Sandy Maxwell (“Plaintiff”) and Defendant entered into a separation agreement. The provision of the agreement relevant to this appeal states,

“[Plaintiff] shall remain the recipient of all life insurance policies and Wills and Testaments that [Defendant] and [Plaintiff] currently have in place. Changes will only occur if [Plaintiff] remarries.” At the time of the agreement Defendant had life insurance coverage as a benefit of his military service, known as Service Group Life Insurance (“SGLI”), and was the owner of a term life insurance policy with Lincoln Benefit Life Company (“Lincoln Benefit”). Plaintiff was a named beneficiary of both policies.

¶ 3 On 14 July 2011, Plaintiff sued Defendant for, *inter alia*, specific performance of the separation agreement. In his answer Defendant moved to rescind the separation agreement. On 12 June 2012 Plaintiff amended her complaint to seek absolute divorce from Defendant. The parties were divorced on 11 December 2012.

¶ 4 On 15 July 2013, the trial court heard Defendant’s motion to rescind the separation agreement. At the conclusion of Defendant’s evidence Plaintiff moved to dismiss Defendant’s claim for rescission. The court granted Plaintiff’s motion finding the separation agreement is a valid and enforceable contract between the parties.

¶ 5 The remaining matters in the case were heard on 31 January 2014. The Honorable Judge Jan Samet entered an Order on 27 February 2014, following the hearing which concluded, *inter alia*:

6. Defendant shall provide written copies and proof from his insurance companies that Plaintiff is still named as the beneficiary of the insurance policies and wills and

testaments in effect at the time of the execution of the Agreement and said proof shall be provided to Plaintiff, by and through her counsel, on or before March 31, 2014.

¶ 6

Over the next four years, Plaintiff filed several Motions to Show Cause, which were removed from the court calendar as the parties attempted to resolve the issues out of court. Plaintiff's third Motion to Show Cause was heard on 1 October 2018. The Honorable Judge Shields found Defendant in contempt of the February 2014 Order because, *inter alia*, Defendant "failed to provide appropriate written proof of insurance information. . . ." Judge Shields set conditions through which Defendant could purge himself of contempt, including "providing proof from all insurance companies that had policies then in existence as of the execution of the Parties Separation and Property Settlement Agreement as to the status of the policy, the current named beneficiary of the policy and the amount of the policy. . . ." Judge Shields additionally ordered that Defendant's failure to purge himself of contempt shall result in incarceration for a continuous period of 90 days.

¶ 7

On 4 October 2018, Defendant submitted an affidavit revealing that neither the SGLI nor Lincoln Benefit policies remained in effect. Defendant had declined to renew the Lincoln Benefit term insurance policy when it reached the end of its term, and Defendant became ineligible for SGLI coverage as he was no longer on active military service.

¶ 8

On 20 March 2019 Plaintiff filed her fourth Motion to Show Cause, which is

directly at issue on this appeal. An Order to Show Cause was subsequently entered. A hearing was held before the Honorable Brain K. Tomlin on 26 August 2019. Defendant orally moved to dismiss, arguing the enforcement of the February 2014 Order had previously been heard and adjudicated by Judge Shields and that Defendant had complied with the purge conditions in Judge Shields's order. Defendant's motion to dismiss was denied.

¶ 9

Judge Tomlin found that

5. Judge Samet's order is still in full force and effect and its purpose may still be fulfilled by compliance with said order.

6. The order provided that [] Defendant shall provide written copies and proof from his insurance companies that Plaintiff is still named the beneficiary of the policies and wills and testaments in effect at the time of the execution of the Agreement and said proof shall be provided to Plaintiff, by and through her counsel, on or before March 31, 2014.

7. Defendant had previously been found in contempt [by Judge Shields] for failing to provide proof of Plaintiff remaining the named beneficiary of the insurance policies as ordered by Judge Samet. [Judge Shields's] order provided that Defendant should provide the information on or before October 8, 2018 to Plaintiff's counsel.

...

10. Defendant unilaterally and in direct violation of the Separation Agreement and Judge Samet's order to provide proof of Plaintiff remaining the named beneficiary of the policy allowed the [Lincoln Benefit] policy to lapse.

. . .

14. Defendant is currently employed as a civilian defense contractor and earned gross income per month of between \$5,000.00 and \$6,000.00. Further Defendant has remarried and his wife currently works out of the home.

15. The purpose of Judge Samet’s Order remains in full force and effect.

16. The Court finds Defendant in willful civil contempt without just cause or excuse and shall allow Defendant to purge his contempt as hereinafter set forth.

Judge Tomlin concluded that Defendant could purge contempt by obtaining a life insurance policy through Lincoln Benefit Life Company, or an insurance company of comparable size and rating, and naming Plaintiff as a beneficiary to that policy. Judge Tomlin did not hold Defendant in contempt for failure to maintain the SGLI policy because Defendant was no longer eligible for a SGLI policy following his retirement from the military, and therefore, Defendant could not have willfully violated Judge Samet’s order as to the SGLI policy.

## II. Discussion

¶ 10 “The 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.” *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997) (citations omitted). “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.” *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990).

Civil contempt is designed to coerce compliance with a court order, and a party’s ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant’s assets.

*Watson v. Watson*, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citations and quotation marks omitted), *dis. Review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

¶ 11 Defendant first argues the trial court erred in denying his oral motion to dismiss because the issue had previously been decided before Judge Shields. This argument amounts to the defenses of *res judicata* and collateral estoppel. Both affirmative defenses require a showing of a “final judgment on the merits.” *Beall v. Beall*, 156 N.C. App. 542, 545, 577 S.E.2d 356, 359 (2003). The burden of establishing that a claim is precluded by *res judicata* or collateral estoppel is on the party asserting the defense. *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 679, 657 S.E.2d 55, 61,

62 (2008). Defendant cites no authority supporting his assertion that Plaintiff's claim is barred.

¶ 12 A judgment will be “final” and “on the merits” for the purposes of *res judicata* and collateral estoppel if the judgment resolves the entire case. That clearly was not the instance here. Judge Shields's order required Defendant to provide proof that Plaintiff remained a named beneficiary of the life insurance policies in existence at the time the separation agreement was entered and found Defendant in contempt for failure to provide such proof. Judge Shields made no findings as to whether Defendant was in contempt for failure to maintain the life insurance policies. In contrast, Judge Tomlin's order did find that Defendant was in contempt for failure to maintain the life insurance policy. Therefore, Judge Shields's Order was not a final judgment on the merits.

¶ 13 Next, Defendant argues that Judge Tomlin erred in finding the purpose of Judge Samet's order could still be served. Here, the purpose of Judge Samet's order was to ensure that Plaintiff remained a named beneficiary on Defendant's life insurance policies that existed at the time the separation agreement was entered. Defendant failed to maintain such life insurance policies. Therefore, Judge Tomlin's order requiring Defendant to reinstate the Lincoln Benefit policy can serve the purpose of Judge Samet's order of ensuring Plaintiff is named a beneficiary on Defendant's life insurance policy, as required by the separation agreement. A trial

court's findings of fact are given great deference on appeal. *See Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 573. As a result, Judge Tomlin's finding that the purpose of Judge Samet's 2014 Order could still be served by enforcing compliance was proper.

¶ 14 Finally, we consider Defendant's third and fourth arguments together. Defendant argues that the trial court erred by failing to find that (1) Defendant's conduct was willful or in bad faith and (2) Defendant had the ability to comply with the original order. The willfulness analysis and ability to comply analysis are one in the same. *See Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966) (stating "one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered") (citations omitted). Here, Judge Tomlin found that Defendant had the means to comply with the order when he found that Defendant makes between \$5,000 and \$6,000 per month. Further, even if the willfulness argument is to be considered separately, the record reflects that Defendant was on notice that the Lincoln Benefit insurance policy was expiring, had the opportunity to renew that policy, and chose to let the policy lapse. Considering these facts, Defendant's decision to let the policy lapse was clearly willful. The trial court's findings strongly support a conclusion that, because of his income, Defendant could comply with the order.

### III. Conclusion

¶ 15 For the foregoing reasons, we affirm the trial court's Order holding Defendant



MAXWELL V. MAXWELL

2021-NCCOA-194

*Opinion of the Court*

in civil contempt.

AFFIRMED.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).