

[Cite as *Malik v. Malik*, 2018-Ohio-4901.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107183

ROHIT MALIK

PLAINTIFF-APPELLEE

vs.

DIMPLE MALIK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-16-361148

BEFORE: McCormack, P.J., Stewart, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 6, 2018

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TIM McCORMACK, P.J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant Dimple Malik appeals from the decision of the Cuyahoga County Domestic Relations Court granting plaintiff-appellee Rohit Malik's motion to sell the marital residence during the pendency of the divorce proceedings. For the reasons that follow, we affirm the trial court.

{¶2} On March 4, 2016, Rohit filed a complaint for divorce. On September 1, 2016, the magistrate granted Dimple's motion for temporary support. In its order, the magistrate found that Rohit lived in rented quarters, Dimple lived in the marital residence with the couple's two minor children, the monthly mortgage payment was \$610, and the mortgage payment did not include real estate taxes or homeowners' insurance. The magistrate found that Rohit's annual gross income for purposes of temporary support was \$71,089 and Dimple's imputed annual gross income was \$15,600. Effective April 28, 2016, the magistrate ordered Rohit to pay Dimple child support in the amount of \$909.29 per month, which included cash medical support and

payment toward arrearage. The magistrate also ordered Rohit to pay all expenses associated with the marital home, including the mortgage payment, taxes, insurance, and utilities.

{¶3} On September 19, 2016, Rohit filed a motion for a Civ.R. 75(N) hearing, and on June 23, 2017, filed his brief in support, along with supporting financial documentation. Rohit asserted that the magistrate incorrectly determined his salary, and because approximately 70% of his average monthly net income was allocated to Dimple, the support order is unreasonable and does not maintain the status quo of both parties. Rohit asserted that after his financial obligations have been satisfied, excluding credit card bills, child care expenses, and out-of-pocket medical expenses for the couple's minor children, he suffers a monthly income deficit of \$876.38. Rohit further asserted that his current income cannot support two separate households, and he specifically objected to the "purposeful" increase in utility bills for the marital residence.

{¶4} On July 11, 2017, the magistrate issued an amended support order, reducing Rohit's support obligation to \$810 per month and ordering Dimple to pay all utilities for the marital residence. Dimple filed objections to the modified support order, and Rohit filed a brief in opposition to Dimple's objections. Thereafter, Dimple filed a motion for an attorney conference and a motion to continue the trial scheduled for August 23, 2017. The court granted the motion to continue and rescheduled the trial for November 20, 2017.

{¶5} On September 18, 2017, Rohit filed a motion to show cause, asserting that Dimple had failed to pay the utility bills for the marital residence as ordered by the court. Rohit also filed a motion for an order to sell the marital residence. In his motion, Rohit stated that he was unable to maintain two separate households based upon his current income. He also asserted

that Dimple refused to seek employment and/or contribute to the marital expenses. Dimple did not oppose Rohit's motion for sale of the marital residence.

{¶6} The trial commenced on November 20, 2017, and then it was continued to January 18, 2018. Dimple filed another motion to continue the January trial date, stating that counsel was scheduled for trial in another matter on that same day. Rohit opposed the continuance. After considering Rohit's opposition, the court issued a journal entry expressing its frustration with scheduling and it ordered the trial to occur on the previously scheduled date in January, finding that this matter takes precedence over defense counsel's purported conflict. The trial did not proceed in January. At some point, the matter was rescheduled for trial on July 23 and July 24, and according to Rohit, the July trial was continued over his objections.

{¶7} On March 20, 2018, Rohit filed a motion to terminate or modify temporary support, stating that due to Dimple's conduct, there has been a delay in the proceedings and the current temporary support order is no longer reasonable or appropriate. Rohit explained that Dimple has had exclusive use of the marital residence from July 2015, when the couple separated, he was ordered to pay support beginning in August 2016, with a modification made in July 2017, and a substantial change in circumstances warrant termination or modification of the existing support. Rohit also filed a renewed motion for order to sell the marital residence, asserting once again that he is unable to maintain two separate households based upon his current income and Dimple has refused to seek employment or contribute to the marital expenses. Dimple did not oppose Rohit's renewed motion.

{¶8} On April 16, 2018, the trial court granted Rohit's motion for an order to sell the marital residence. The court ordered as follows: (1) the parties shall list the property for sale by a real estate agent mutually agreed upon by the parties, and if the parties cannot agree, Rohit shall

be permitted to select the realtor; (2) Dimple shall cooperate in the listing and the sale of the residence; (3) the parties shall be equally responsible for the cost of any repairs and other preparations necessary or agreed upon to effectively market the real estate as recommended by the real estate agent; and (4) the parties shall cooperate with the real estate agent's recommendations as it pertains to listing price and showings. Finally, the court ordered that the proceeds derived from the sale of the residence shall be held in escrow until the conclusion of the divorce proceedings or an earlier time as agreed between the parties or ordered by the court.

{¶9} On April 20, 2018, Dimple filed a motion to reconsider the court's order to sell the marital residence, arguing that the occupancy and sale of the marital residence is currently at issue in the trial that has commenced but not concluded, and Dimple has expressed a desire to remain in the marital home. In his opposition, Rohit asserted that Dimple had not filed any objections or opposition to either of his motions to sell the marital residence. Additionally, he argued that the sale of the property is in the parties' best interest because Dimple has demonstrated an inability to maintain the home, the expenses related to the marital home for which Rohit has been solely responsible are substantial, and the trial has been repeatedly delayed. Prior to a ruling on the motion for reconsideration, Dimple filed a notice of appeal.

{¶10} On appeal, Dimple contends in one assignment of error that the trial court erred when it ordered the sale of the marital residence after the commencement of trial yet prior to the conclusion of trial. Dimple alleges that the trial court's decision to order the sale of the marital residence was an abuse of discretion because she and her children will be "rendered homeless while the case is pending," if the property sells. In her brief, she appears to focus her argument on the fact that the court's order is final and appealable.

{¶11} To the extent that Dimple argues the order of the sale of the property is a final, appealable order, we agree. This court has jurisdiction over “final orders” of lower courts. Ohio Constitution, Article IV, Section 3(B)(2). An appellate court can only review final, appealable orders. What constitutes a “final, appealable order,” as applicable here, is statutorily defined as “[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment [.]” R.C. 2505.02(B).

{¶12} A “special proceeding” is “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2). Divorce actions are “special proceedings” within the meaning of R.C. 2505.02. *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 6, citing *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379, 632 N.E.2d 889 (1994).

{¶13} A “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). A “substantial right” is essentially a legal right that is enforced and protected by law. *State v. Coffman*, 91 Ohio St.3d 125, 742 N.E.2d 644 (2001).

{¶14} This court has held that a pretrial order of sale in a pending divorce case is a final order under R.C. 2505.02 because the order is issued in a special proceeding and it affects a substantial right, because the appellant would be unable to regain possession of the property if it were sold prior to appellate review. *Alman v. Alman*, 8th Dist. Cuyahoga No. 104951, 2017-Ohio-8659, ¶ 6, citing *Joseph v. Joseph*, 5th Dist. Stark No. CA-7126, 1988 Ohio App. LEXIS 250 (Jan. 25, 1988), and *Oatey v. Oatey*, 83 Ohio App.3d 251, 614 N.E.2d 1054 (8th Dist.1992).

{¶15} Likewise, in this case, if the marital residence is sold prior to our review of the matter, Dimple would be unable to regain possession of the property in the event she prevailed in this appeal. Additionally, as Dimple argues, the sale of the marital residence would have an impact on where she and the children reside. We therefore conclude that the trial court's order of sale of the marital residence is a final, appealable order.

{¶16} A trial court has broad discretion in allocating marital assets. *Neville v. Neville*, 99 Ohio St.3d 275, 791 N.E.2d 434, 2003-Ohio-3624, ¶ 5. Under R.C. 3105.171(J)(2), the trial court may issue any orders that it determines equitable, including “[a]n order requiring the sale or encumbrancing of any real or personal property, with the proceeds from the sale and the funds from any loan secured by the encumbrance to be applied as determined by the court.” We therefore review the court's predecree order of sale for an abuse of discretion. *See Alman, supra*, at ¶ 11 (finding an abuse of discretion where the trial court's predecree order of sale was moot in light of the fact that the husband was current on his support obligation and the sale of \$428,500 in assets to satisfy \$8,000 in sanctions was arbitrary); *Sumser-Armstrong v. Armstrong*, 5th Dist. Stark No. 2005-CA-00245, 2006-Ohio-1924, ¶ 29 (“Pretrial motions are generally addressed to the discretion of the trial court.”). An abuse of discretion is more than a mere error of law or judgment; it implies that a trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} Here, Dimple failed to oppose Rohit's motion to sell the marital residence filed in September 2017 or his renewed motion to sell the marital residence filed in March 2018. Rather, she filed a motion for reconsideration of the court's order of sale, arguing for the first time that the trial court's order was unreasonable, it created a financial burden upon her, and the order could deprive the parties from realizing the fair market value of the property. A motion

for reconsideration filed after a final appealable order has been entered is a nullity. *Warstler v. Hein*, 8th Dist. Cuyahoga No. 74078, 1999 Ohio App. LEXIS 2062, 6 (May 6, 1999), citing *Pitts v. Dept. of Transp.*, 67 Ohio St.2d 378, 379-380, 423 N.E.2d 1105 (1981), fn. 1. Because the trial court's order for sale of the marital residence is a final appealable order, the trial court properly disregarded the motion.¹ The wife's proper recourse was to file this appeal. See *Schaffer v. Schaffer*, 8th Dist. Cuyahoga No. 63944, 1993 Ohio App. LEXIS 5326, 4 (Nov. 10, 1993). However, even if we consider the arguments raised in Dimple's motion for reconsideration, we find the trial court did not abuse its discretion.

{¶18} Dimple alleges on appeal that the court's order to sell the marital residence during the pendency of trial was improper because the sale is unreasonable and it would deprive the parties of the fair market value of their property. In support, she cites to *Oatey*, 83 Ohio App.3d 251, 614 N.E.2d 1054. In *Oatey*, however, this court's discussion regarding the parties' deprivation of fair market value concerned its analysis of whether the trial court's order of the real property was a final appealable order. Finding the court's order to liquidate numerous condominiums within 60 days was indeed a final order, this court stated:

Ordering such an immediate wholesale sacrifice sale of real property accumulated over the course of years is not commercially reasonable and may irrevocably deprive both parties from realizing the fair market value of the assets to their detriment and "so impacts with finality the rights of the respective parties" to constitute an order made in a "special proceeding" warranting an immediate appeal prior to the final disposition of the entire case.

Oatey at 261.

{¶19} In addressing the merits of the parties' argument, this court in *Oatey* found that the trial court's "ordering an immediate wholesale sacrifice sale of real property without regard to

¹ The record demonstrates the trial court did not rule upon Dimple's motion for reconsideration.

market conditions” constituted an abuse of discretion because any loss the parties may have suffered from the liquidation was unnecessary since the proceeds were ordered to be stored in a bank account to hold for possible future attorney fees. *Id.* at 262. Furthermore, we found that the trial court abused its discretion in ordering immediate payment of substantial prospective attorney fees “since the effect is to mandate extending credit to counsel for an opposing party who renders services only at the discretion of the client and who may not continue to provide services until final disposition of the case.” *Id.*

{¶20} Dimple also cites to *Van Fossen v. Van Fossen*, 47 Ohio App.3d 175, 547 N.E.2d 1237 (9th Dist.1988). In *Van Fossen*, the Ninth District Court of Appeals reversed a trial court’s order of a sheriff’s sale of the marital residence “forthwith” as part of a divorce decree. *Id.* at 175. Finding the court abused its discretion, the court of appeals found that the parties were not provided an opportunity to voluntarily sell the property on the open market and the property at issue was the subject of a lawsuit in which a third party had an interest. *Id.* at 176. Importantly, the court noted that sometimes an auction is necessary to finalize a property settlement; however, “an auction should not normally be ordered where there is a reasonable chance of a fair, timely and voluntary sale.” *Id.*

{¶21} Both *Oatey* and *Van Fossen* are clearly distinguishable from this case. Here, the court did not order an immediate liquidation or an auction of the residence. Rather, the court ordered the parties to list the marital residence for sale by a mutually agreed-upon realtor, to share the cost of any repairs or preparations in order to make the property marketable, and to cooperate with the realtor’s recommendations concerning the listing price and showings. Thus, the order purported to provide the parties with a reasonable chance of a fair and timely sale that could yield the best market value. Moreover, the court ordered that the proceeds from the sale

of the residence shall be held in escrow until the court's division of the property. The proceeds were therefore secured for the mutual benefit of the parties and not some third party interest, such as attorney fees.

{¶22} Although Dimple contends that she has no means to support herself and her children and she and her children will be rendered homeless if the marital residence is sold, she has presented no evidence in support of her argument. The record demonstrates that she and the children currently reside in the home and will continue to reside there while the home is listed for sale. During this time, Dimple continues to receive support from Rohit, per the court's order. Further, Dimple would receive a share of the proceeds when the house is sold, which she can use to secure new housing. The record shows that Rohit continues to maintain that he cannot financially support two households, and Dimple asserts that she is unable to financially contribute to the marital household because she is in nursing school and she cares for the couple's two young children. It is entirely reasonable for the trial court to determine that under the totality of the circumstances, neither husband nor wife can support the essentials of the marital residence and therefore a sale of the property is in the best interest of the parties.

{¶23} In light of the above, we do not find the trial court abused its discretion in granting Rohit's motion and ordering the sale of the marital residence. Dimple's sole assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

MELODY J. STEWART, J., and
PATRICIA ANN BLACKMON, J., CONCUR