[Cite as *Southers v. Southers*, 2011-Ohio-6233.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Terri Southers,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-113 (C.P.C. No. 07DR-08-3213)
Brian Southers,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 6, 2011

Cynthia Roy, for appellee.

Christopher J. Minnillo, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

BROWN, J.

{¶1} Brian Southers, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which the court found him in contempt.

{¶2} On February 19, 2008, Brian and Terri Southers, plaintiff-appellee, were divorced by agreed entry decree of divorce ("decree"), effective December 21, 2007. At the time of the divorce, the parties had three children, all of whom were minors. Terri was represented by counsel at the time of the divorce, while Brian was unrepresented.

Attached to and incorporated into the decree was a "Business Agreement" ("agreement") detailing how the parties would divide their photography business, Emulsion Films, Ltd., that the parties operated during their marriage. In the agreement, which was drafted by Brian, the parties were each to receive 50 percent of the profit sharing. "Profit sharing" was defined as "the profit received after business expenses are paid and operating account is maintained at $10,000." Profit sharing was to commence the first quarter of 2008. The agreement did not define "business expenses" and did not reference Brian's income. In 2008 and 2009, Brian paid no monies to Terri for any business profits pursuant to the agreement. After finding the business too difficult to manage on his own and deciding to become a full-time teacher, Brian sought to sell the photography business. Subsequently, Brian was unable to find a buyer for the business and it closed in 2009.

{¶3} On September 8, 2009, Terri filed a motion for contempt relating to Brian's failure to deliver the business financial records to her and pay her a share of the business profits pursuant to the agreement, as well as Brian's failure to pay the children's school expenses and his wrongful claiming of the children as tax dependents. A hearing was held, at which both parties were represented by counsel. Brian argued that he was not required to pay Terri any monies under the terms of the business agreement because there was no profit after his personal wages were paid as a "business expense," and the business operating account never exceeded $10,000. He also argued he had properly claimed the tax deductions, paid all child related expenses, and provided all pertinent business records to Terri.

{¶4} On January 4, 2011, the trial court issued a decision and entry in which the trial court found Brian in contempt for failure to pay Terri 50 percent of the business profits

pursuant to the agreement and for failure to provide Terri the business records. The court found Terri was entitled to half of the 2008 business profits of $29,688, and half of the 2009 business profits of $5,449. The trial court denied Terri's motion for contempt as it related to Brian's failure to pay the children's school expenses and his claiming of the minor children as dependents on his income tax returns. The court fined Brian $250, sentenced him to one day in jail, and ordered him to pay Terri's attorney fees and costs in the amount of $800. The trial court suspended Brian's fine and jail sentence on condition that he purge his contempt by selling the remaining business property within 60 days of the order and paying one-half of the proceeds to Terri, paying Terri the awarded attorney fees and costs of $800 within 90 days of the order, and paying Terri $17,568 for her share of the 2008 and 2009 net profits. The court also ordered that Brian pay Terri his one-half interest in the proceeds from the sale of the business property, and such be credited against the $17,568 owed by Brian, with the balance owed thereafter to be paid at the rate of $250 per month until paid off.

{¶5} Brian appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING BRIAN SOUTHERS IN CONTEMPT OF COURT FOR NOT SHARING PROFITS IN ACCORDANCE WITH THE PROVISIONS OF THE PARTIES' BUSINESS AGREEMENT THAT WAS INCORPORATED INTO THE DECREE OF DIVORCE.
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> A. THE BUSINESS AGREEMENT MADE A SPECIFIC CONDITION OF THE SHARING OF PROFITS THE MAINTENANCE OF AT LEAST $10,000.00 IN THE BUSINESS BANK ACCOUNT. THE TRIAL COURT FOUND THAT THIS CONDITION HAD NOT BEEN ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

> B. THE TRIAL COURT ERRED IN NOT SUBTRACTING SELF-EMPLOYMENT INCOME FROM THE GROSS RECEIPTS OF EMULSION FILMS, LTD. IN ORDER TO DETERMINE WHETHER THERE WAS A NET PROFIT. IF SELF-EMPLOYMENT INCOME IS DEDUCTED FROM THE GROSS RECEIPTS, THERE IS NO PROFIT TO BE SHARED WITH APPELLEE.

{¶6} Brian argues in his sole assignment of error that the trial court erred when it granted Terri's motion for contempt based upon his non-payment of 50 percent of the profits from the parties' business. When reviewing a finding of contempt, we apply an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479. The prima facie elements of contempt in this context include the existence of a court order and Brian's non-compliance with the terms of that order. See *LeuVoy v. LeuVoy* (May 25, 2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The burden then shifts to Brian to establish any defense he may have for non-payment. See *Morford* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381. Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply or attempted to flout the court order. Id. at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136.

{¶7} Agreements incorporated into divorce decrees are contracts and are subject to the rules of construction governing other contracts. *Pavlich v. Pavlich*, 9th Dist. No. 22357, 2005-Ohio-3305. Typically, we review contractual questions de novo, except where the contract is ambiguous. *Dzina v. Dzina*, 8th Dist. No. 83148, 2004-Ohio-4497. The trial court has broad discretion to clarify ambiguities, but whether a contract is ambiguous is a decision that is made as a matter or law. *Pavlich*. If an ambiguity does not

exist, the trial court "may not construe, clarify or interpret the parties' agreement to mean anything outside of that which it specifically states." Id. Specifically, the trial court must defer to the express terms of the contract and interpret it according to its plain, ordinary, and common meaning. *In re Dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155, 156.

{¶8} In the present case, Brian first argues that the trial court erred when it found him in contempt for failing to share 50 percent of the profits in the business with Terri because the agreement made the profit sharing specifically contingent upon the maintenance of at least $10,000 in the business operating account, and the business operating account never had $10,000 in it. As indicated above, "profit sharing" was defined in the agreement as "the profit received after business expenses are paid and operating account is maintained at $10,000." With regard to this issue, the trial court did not specifically set forth its reasons for finding appellant in contempt, but did make the following finding:

> As indicated above, pursuant to the terms of the "Business Agreement" the company bank account was to be maintained at $10,000 (with possible adjustments). Evidence was not presented as to the balance in the account at the time of divorce or the ongoing annual balances or even if the balance was maintained. In fact, the only testimony presented was by the Defendant who testified that he now maintains the balance at approximately $150.

{¶9} The illogicalness of Brian's interpretation is easily illustrated. The agreement would be meaningless if a condition precedent to his payment of one-half of the profit was simply maintaining a $10,000 balance in the operating account, a somewhat arbitrary figure and a discretionary act on his behalf. Following Brian's argument to its extreme

conclusion, Brian could intentionally maintain an "operating account" of $9,999.99 indefinitely, while earning unlimited revenue that he maintains in other business accounts, thus, avoiding any "profit sharing" under the agreement. This is obviously not what the parties had intended. Rather, the logical reading of the agreement is that the maintenance of $10,000 in the operating account is not a condition precedent but, rather, a minimum balance that must be maintained before determining net profit. In other words, to arrive at the net "profit" that must be equally divided between the parties pursuant to "profit sharing" under the agreement, one must subtract from the business's gross income any business expenses plus as much as is necessary to bring the operating account to a minimum of $10,000. Any amount remaining after this calculation is the profit dividable under the agreement. The rationale behind the provision is clear. It would be imprudent to divide and distribute "profit" without first assuring that there is enough money in the operating account to fund the daily operations of the business. Apparently, Brian believed $10,000 was a reasonable amount he needed to maintain in the operating account, and the trial court presumed he fulfilled the self-imposed duty to do so. For these reasons, we find the maintenance of $10,000 in the operating account was not a condition precedent to payment but was merely a factor in the profit calculation. Therefore, Brian's argument, in this respect, is without merit.

{¶10} Brian next argues under his assignment of error that the trial court erred when it did not subtract his self-employment income from the gross receipts of the business in determining the net profit of the business. Relating to this issue, the trial court found the following:

> The Defendant's argument that the Business Agreement should of or did contemplate that he would have earnings from the business is not well taken as such was not included in the definition of profit in the Business Agreement. This is true, even though the parties agree that Defendant's child support obligation was determined by the income reported on the parties' 2006 income tax returns. The Defendant made his own deal – albeit a bad one and this Court will not substitute its judgment on same.

{¶11} Brian first argues that if he would have hired a photographer to generate the income, such would have constituted a business expense, so the amount he paid himself to do such work should also constitute a "business expense" for purposes of "profit sharing" under the agreement. We disagree. Brian's contention is in conflict with the tax code, as well as his own prior treatment of his self-employment income for tax purposes. If you are a single owner of a limited liability company considered by the Internal Revenue Service ("IRS") as a disregarded entity, as Brian apparently was in this case, a draw from the business is not a deductible business expense; it is merely money taken from profits to pay for personal items and does not affect profit. See, e.g., *Sustainable Forests, LLC v. Alabama Dept. of Revenue* (June 10, 2011), Ala.Civ.App. No. 2091149 (for federal income tax purposes, single-owner limited liability companies are disregarded as entities separate from the owner, and the owner is taxed as a sole proprietor); *Kirsch v. C.I.R.* (Sept. 25, 1995), T.C. Memo. 1995-451 (a draw from a sole proprietorship used for personal living expenses is part of the business profit of the sole proprietorship reported on Schedule C, and is not a deductible expense). However, payment to an employee to perform the same services raises a completely different situation that is handled differently under the tax code. IRS Publication 535 indicates that, if Brian had hired an employee to perform the same services, that employee's salary would be a deductible

business expense. Thus, the tax code treats self-employment income and wages paid to an employee very differently, and Brian's argument drawing an analogy between the two situations is invalid. Furthermore, it is apparent that Brian never before considered his own income as a business expense. On Line 26 of the Schedule C forms attached to his 2007, 2008, and 2009 tax returns, Brian indicated that no "wages" were paid as business expenses; thus, undermining his contention now that his income should be deemed a business expense. For these reasons, we find Brian's argument that his income should have been considered a "business expense" because wages paid to an employee to perform his same services would constitute a "business expense" to be unpersuasive.

{¶12} Although Brian's argument is in direct conflict with how the tax code defines business expenses and treats self-employment income, the parties could have intended "business expenses" to have a different definition for purposes of the business agreement which was incorporated into the decree of divorce. To find such intent, we must look to the agreement. *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 248 (contracts are to be interpreted to carry out the intent of the parties as evidenced by the actual language of the contract). Nowhere in the business agreement does it provide, or even infer, that Brian's income is to be included in the company's "business expenses" for purposes of profit sharing under the agreement. The agreement does not even mention Brian's income. Thus, absent any specific provision defining "business expenses," we must utilize the common and ordinary meaning of the term. As explained above, in the context of a limited liability company, the common meaning of "business expenses" does not include the self-employment income of an owner.

{¶13} Brian contends that we should disregard how the tax code treats his self-employment income and consider what was actually available to pay child support. He points out that his income for purposes of the child support worksheet constituted 100 percent of the business profits, while he had available only 50 percent of the profits to pay child support because he was required to pay 50 percent of the profits to Terri pursuant to the agreement. We disagree with Brian's view. One hundred percent of the business profits were, in fact, available to pay child support, but Brian chose to enter into an agreement in which he voluntarily agreed to pay half of those same profits to Terri. The situation is no different than if Brian had chosen to use 50 percent of the business profits to pay off some other personal debt.

{¶14} As quoted above, the trial court commented that Brian "made his own deal – albeit a bad one and this Court will not substitute its judgment on same." Although Brian argues that it is no more probable that he made a bad deal than Terri made a bad deal, the terms of the parties' contract are not ambiguous, as Brian seems to suggest. Our analysis is based upon a natural reading of the language used, and not used, in the agreement. It is only when Brian seeks to apply his interpretations on the terms of the agreement do they seem to blur into ambiguity. In sum, "profit sharing" was defined in the agreement as "the profit received after business expenses are paid and operating account is maintained at $10,000," and Brian cites no provision in the contract, no common definition, and no legal authority that includes the self-employment income of an owner in a limited liability company as a business expense. Therefore, we find the trial court did not err when it found that Brian's income was not a "business expense" for purposes of the business agreement incorporated into the parties' decree. For all of the

above reasons, the trial court did not abuse its discretion when it found Brian in contempt of court for his failure to share profits in accordance with the business agreement. Brian's assignment of error is overruled.

{¶15} Accordingly, Brian's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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