

[Cite as *Gastineau v. Gastineau*, 2011-Ohio-386.]

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

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PLEZ M. GASTINEAU	:	
Plaintiff-Appellant	:	C.A. CASE NO. 10CA16
vs.	:	T.C. CASE NO. 06-DR-3
	:	(Civil Appeal from
LYNN S. GASTINEAU	:	Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 28th day of January, 2011.

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GRADY, P.J.:

{¶1} This is an appeal from a final order of the court of common pleas sustaining and overruling charges of contempt filed by the parties to a divorce action in post-decree motions.

{¶2} The thirty-nine year marriage of Plez M. Gastineau and Lynn S. Gastineau was terminated by a decree of divorce on March

23, 2006. Plez¹ had worked as a mortgage broker for most of that time. Lynn had been employed as a teacher.

{¶3} The decree of divorce incorporated the terms of the parties' Separation Agreement with respect to their assets and liabilities. Section 2.1 of the Separation Agreement provides:

{¶4} "REAL PROPERTY INTEREST: The parties own real estate located at 9788 Lake Shore Drive in Huntsville, Ohio. Upon the release of the defendant from liability for all joint debts listed below, and the payment to the defendant of \$8,000 Dollars, Wife shall by quit claim deed convey her entire interest in said property to Husband. In consideration of the property division set forth in this agreement, Husband shall assume and pay the following individual and joint debts and agrees to indemnify and hold Wife harmless on said debts; Husband also agrees to pay the eight thousand dollars and settle the joint debts within 45 days after the execution of this agreement."

{¶5} The further provisions of Section 2.1 identify eight specific joint debts Plez agreed to assume and pay. Also identified therein as an obligation Plez agreed to assume and pay is "\$8,000 payable to wife to reimburse her for the original down-payment for the lake-house land," which is the real property

¹ For clarity and convenience, the parties are identified by their first names.

in Huntsville, Ohio to which Section 2.1 refers. The same section concludes with the following further provision:

{¶ 6} "Husband's obligation to pay the above-stated debts shall be considered a domestic support obligation as defined under 11 U.S.C.A. § 523(a)(5). In the event Husband files bankruptcy, the Common Pleas Court of Miami County, Ohio shall retain jurisdiction to order and/or modify spousal support.

{¶ 7} "Husband warrants to Wife that no other joint marital debts exist except the debts listed above.

{¶ 8} "The parties also recognize that Husband is likely to sell his interest to a third party to refinance the above stated debts and will hold an equitable interest in said property thereafter. It is the parties understanding that husband may receive money from the sale of the property by third party when it is resold. The parties agree that Husband shall retain \$8000.00 from the proceeds and any remaining proceeds will be divided equally between Husband and Wife."

{¶ 9} Plez entered into an agreement with a third party, Steve Kappeler, whereby Plez promised to convey the title to the Huntsville property to Kappeler. In return, Kappeler promised to refinance the property, which was subject to a mortgage, for at least \$525,000. The loan proceeds would be applied to pay the mortgage, which was one of the debts identified in Section 2.1

of the Separation Agreement, as well as the other obligations therein that Plez agreed to assume and pay.

{¶ 10} Lynn held the title to the Huntsville property, and she agreed with Kappeler to transfer her title in accordance with the decree. However, Lynn refused to transfer her title to Plez unless and until Plez first paid the \$8,000 he was ordered to pay her.

Plez was unable to do that except from the proceeds of the proposed deal with Kappeler. As a result, the deal collapsed and the parties lost their interest in the Huntsville property in a foreclosure proceeding when Lynn executed a deed in lieu of foreclosure in favor of the mortgage bank.

{¶ 11} Lynn filed two motions for contempt, on July 13 and August 5, 2009. (Dkt. 10, 20). Lynn asked the court to find Plez in contempt for failing to pay the obligations in Section 2.1 of the Separation Agreement and decree he was ordered to assume and pay.

{¶ 12} Plez filed a motion in contempt, on August 13, 2009. (Dkt. 26). Plez asked the court to find Lynn in contempt for failing to transfer her title to the Huntsville property in accordance with Section 2.1 of the Separation Agreement and decree.

Plez filed a second motion, on December 9, 2009, asking the court to vacate the decree pursuant to Civ.R. 60(B). Plez alleged that Lynn had fraudulently concealed assets. (Dkt. 32).

{¶ 13} The various motions were referred to a magistrate, who

filed a written decision on March 18, 2010. (Dkt. 42). The magistrate denied Plez's motion in contempt, finding that Lynn was excused from compliance with the duty to transfer her title to the Huntsville property to Plez imposed by Section 2.1 of the decree because Plez had failed to pay Lynn the \$8,000 Plez was ordered to pay Lynn for reimbursement of her prior down payment on the Huntsville property. The magistrate found Plez in contempt for his failure to pay the \$8,000 as well as joint debts he was ordered to pay. Plez was ordered to make monthly payments of \$500 to Lynn toward those obligations.

{¶ 14} The magistrate filed a second written decision on April 5, 2010 (Dkt. 46), overruling Plez's Civ.R. 60(B) motion to vacate the decree. The magistrate found that the motion lacked merit.

The magistrate also found that the December 9, 2009 motion alleging fraud was untimely under Civ.R. 60(B) because it was not filed within one year after the March 9, 2006 decree the motion sought to vacate.

{¶ 15} Plez filed timely objections to the magistrate's two decisions. The court filed two final orders ruling on those objections on May 20, 2010. One final order overruled Plez's objections to the magistrate's decision denying Plez's motion for Civ.R. 60(B) relief, and adopted the magistrate's decision. (Dkt. 56). The other final order adopted the magistrate's decision

finding Plez in contempt, after modifying his monthly purge obligation to Lynn from \$500 to \$200, because of Plez's poor health and employment prospects. (Dkt. 57).

{¶ 16} Plez filed a notice of appeal from the final order finding him in contempt. (Dkt. 58). Plez did not file a notice of appeal from the final order overruling his motion for Civ.R. 60(B) relief.

FIRST ASSIGNMENT OF ERROR

{¶ 17} "THE TRIAL COURT ERRED BY NOT FINDING THE VALIDITY OF THE BASIC TRANSACTION, INVOLVING A THIRD PARTY, WHICH WOULD HAVE ALLOWED THE APPELLANT TO COMPLY WITH THE TERMS OF THE SEPARATION AGREEMENT AND NOT FINDING THAT APPELLEE, LYNN GASTINEAU, BREACHED THE AGREEMENT BY NOT SIGNING THE UPDATED AGREEMENT AND/OR DEED TO THE LAKE PROPERTY."

SECOND ASSIGNMENT OF ERROR

{¶ 18} "ASSUMING THAT THE COURT FINDS THERE WAS NOT ENOUGH EVIDENCE TO RULE THAT APPELLEE SHOULD HAVE PROVIDED A DEED, THEN THE TRIAL COURT ERRED BY NOT FINDING THAT APPELLEE FORFEITED HER RIGHTS TO THE \$8,000.00 WHEN SHE ALONE MADE THE DECISION TO SIGN THE PROPERTY OVER TO THE BANK THROUGH A DEED IN LIEU."

{¶ 19} For these purposes, contempt consists of "[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer." R.C. 2705.02(A). The decree

of divorce is a judgment of the court.

{¶ 20} The parties' Separation Agreement incorporated into the decree required Lynn to convey her title to the Huntsville property to Plez "[u]pon the release of [Lynn] from liability for all joint debts listed below, and the payment to [Lynn] of \$8000." The \$8,000 payment was separately identified as "reimburse[ment] for her original down-payment on the [Huntsville property]," and an obligation which Plez agreed to pay.

{¶ 21} The trial court found Plez in contempt for failing to pay Lynn the \$8,000 he was ordered to pay her. On that same basis, the court declined to find Lynn in contempt for failing to convey her title to the Huntsville property, reasoning that Plez's prior failure relieved Lynn of that duty.

{¶ 22} Plez argues that the court failed to appreciate the nature of the third-party sale for which the decree provides. Without saying so directly, Plez implies that the court should have understood that the \$8,000 payment to Lynn he was ordered to make would, like the payments for the debts he promised to make to their creditors, necessarily come from monies generated from the refinancing Kappeler promised to undertake after Lynn's title to the property was transferred from Plez to Kappeler. Such third-party sales are common, according to Plez, and to accomplish the sale, "[s]omebody had to be first." (Brief, p. 16.)

{¶ 23} We cannot find that the trial court failed to understand the nature of the transaction. The trial court merely construed the terms of its decree and found that, as between Plez and Lynn, it was Plez who had to be the first to act. The source of the difficulties that occurred following the decree of divorce is instead the trial court's failure to comply with R.C. 3105.171(B).

That section provides that in divorce proceedings "the court shall divide the marital and separate property equitably between the parties." The court failed to do that with respect to the Huntsville property, instead permitting Lynn to retain title to the property, subject to two post-decree contingencies.

{¶ 24} Lynn was required to convey her title "[u]pon the release of [Lynn] from liability for all joint debts listed below, and the payment to [Lynn] of \$8,000." As it is used in Section 2.1, the word "upon" means "on the condition of." Webster's Third New International Dictionary. Plez's payment of \$8,000 to Lynn was a condition precedent to Lynn's duty to convey her interest in the Huntsville property. Plez's failure to make the payment relieved Lynn of her duty and prevented a finding of contempt on her part pursuant to R.C. 2705.02(A). Plez's failure was itself a form of disobedience or resistance to the court's lawful order, from which the court could reasonably find him in contempt. Id.

{¶ 25} With respect to both the joint debts and the \$8,000

payment to Lynn, the trial court reasoned that Plex "assumed the risk to sell the property to fulfill these obligations. The net effect of the language in the agreement was that Pete [sic] would assume the risk [to pay the debts] if the plan failed." (Dkt. 57, p. 5). Plez argues that "[i]t is not equitable that Mr. Gastineau be required to pay anything to Mrs. Gastineau toward the \$8,000 deposit that she put down on the [Huntsville] Real Estate, or toward any of the debts that didn't get satisfied. There has been no evidence that she has had to pay anything on any of the debts. Mrs. Gastineau's only complaint after 5 years is that her credit has been damaged." (Brief, p. 15).

{¶ 26} Lynn offered evidence showing that she has been unable to obtain credit because two of the joint debts remain unpaid. The purge alternative the trial court offered Plez to pay Lynn \$200 per month was for the purpose of permitting Lynn to make payments on those two obligations, relieving her credit problems to that extent. We see no abuse of discretion.

{¶ 27} Neither do we find the relief the court ordered is inequitable. Plez agreed to pay the two debts "[i]n consideration of the property division set forth in this agreement." The Separation Agreement and decree provided for division or distribution of other properties, including motor vehicles, boats, household goods, bank accounts, stocks and bonds, and retirement

accounts. The failure of the provisions concerning sale of the real property does not relieve Plez of the duty he assumed to pay the joint debts. As the trial court found, Plez assumed the risk that the sale might not succeed.

{¶ 28} Regarding the \$8,000 he promised to pay Lynn, Plez argues in his second assignment of error that Lynn forfeited her right to those monies when she executed a deed in lieu of foreclosure in favor of the mortgagor, forfeiting her interest in the Huntsville property, the loss of which the \$8,000 payment was intended to compensate her. Plez contends that he therefore should be relieved of his obligation to pay Lynn the \$8,000, pursuant to Civ.R. 60(B) (4) or (5).

{¶ 29} Lynn had a right to refuse to convey her title, absent the prior \$8,000 payment by Plez, and then to forfeit her title to the property of the mortgagee. However, her conduct in doing so likewise extinguished Lynn's interest in the Huntsville property for which the \$8,000 payment was intended to compensate her. It may be that Civ.R. 60(B) (4) relief could have been available to Plez. However, on this record, that fact does not render the trial court's finding of contempt an abuse of discretion.

{¶ 30} The first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 31} "ONCE THE TRIAL COURT DETERMINED THAT APPELLANT WAS

OBLIGATED ON THE DEBTS OWED TO WIFE, THEY [SIC] FAILED TO UNDERSTAND AND APPRECIATE THE LANGUAGE IN THE SEPARATION AGREEMENT REQUIRING SAID DEBT TO BE TREATED AS A DOMESTIC SUPPORT OBLIGATION AS DEFINED BY 11 U.S.C.A. § 523(a)(5)."

{¶ 32} Section 2.1 of the Separation Agreement that was incorporated into the decree classifies the obligations it imposed on Plez as a "domestic support obligation," and provides: "In the event Husband files bankruptcy, the Common Pleas Court of Miami County, Ohio shall retain jurisdiction to order and/or modify spousal support." Plez argues that "[t]he trial court has erred by rendering judgment against [him] on [Lynn's] motion for contempt when the proper remedy according to the plain language of the Separation Agreement was to come back to court to treat any unpaid debts as a domestic support obligation."

{¶ 33} Plez asserts that he has filed a petition in bankruptcy. However, Section 2.1 does not limit Lynn's remedy in that event to obtaining a "domestic support obligation" order instead of filing charges in contempt. Neither does Plez explain how he was prejudiced because Lynn filed charges in contempt instead of seeking a domestic support obligation order. Indeed, if that alternative would confer a benefit on Plez, it was his duty to seek that relief to obtain the benefit, an alternative which Section 2.1 makes available to both parties.

{¶ 34} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 35} "THE TRIAL COURT FAILED TO APPRECIATE THE IMPOSSIBILITY OF THE ORDERED OBLIGATION DUE TO APPELLANTS CURRENT FINANCIAL SITUATION AND FAILED TO GRANT RELIEF UNDER OHIO CIVIL RULE 60(B) (4), (5)."

{¶ 36} Plez did not file a notice of appeal from the trial court's order denying Plez's motion for Civ.R. 60(B) relief. Therefore, we lack jurisdiction to review the error assigned.

{¶ 37} The fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. concurs.

FROELICH, J. concurs in judgment only.

Copies mailed to:

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Hon. Christopher Gee