

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KEVIN KOLANO

Plaintiff-Appellee

-vs-

ALICIA KOLANO

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Craig R. Baldwin, J.

Case No. 2014AP060026

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County Court
of Common Pleas, Case No. 2011 TM 03
0097

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 2, 2015

APPEARANCES:

For Defendant-Appellant

For Plaintiff-Appellee

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Hoffman, P.J.

{¶1} Defendant-appellant Alicia Kolano appeals the June 13, 2014 Judgment Entry entered by the Tuscarawas County Court of Common Pleas, which overruled her objections to the magistrate's March 3, 2014 decision, and approved and adopted said decision as order of the court. Plaintiff-appellee is Kevin Kolano.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and Appellee were married on July 28, 2007, in Milbourne, Florida. The parties were divorced via judgment entry filed October 1, 2013. In the October 1, 2013 judgment entry, the trial court approved and adopted the magistrate's January 25, 2013 decision relative to the final divorce hearing. Pursuant to the magistrate's recommendation, the trial court ordered Appellant pay Appellee \$7,900.00 as reimbursement for personal property removed from the parties' Florida residence; return certain items of personal property to Appellee; and be responsible for all business and personal tax liability, and to hold Appellee harmless thereon. Appellant did not file an appeal from the final order of divorce. Thereafter, on January 2, 2014, Appellant filed a pro se motion for relief from judgment, which was ultimately denied by the trial court. Appellant did not appeal that decision.

{¶3} On January 10, 2014, Appellee filed a post decree motion for contempt based upon Appellant's failure to abide by the orders set forth in the final divorce decree. The magistrate conducted an oral hearing on the motion on February 24, 2014.

{¶4} Via decision filed March 3, 2014, the magistrate found Appellant in contempt. The magistrate sentenced her to 30 days in jail, but provided her with an opportunity to purge the contempt by placing Appellee's personal property in a storage

rental unit and providing Appellee with the key to the unit; reimbursing Appellee for the payments he made toward the tax obligation; and paying all of the attorney fees Appellee incurred in association with the tax liability as well as the prosecution of the contempt motion.

{¶5} Appellant filed timely objections to the magistrate's decision on March 14, 2014. Via Judgment Entry filed June 13, 2014, the trial court sustained, in part, and overruled, in part, Appellant's objections. The trial court found Appellant in contempt for failing to hold Appellee harmless on the tax liens as ordered and sentenced her to thirty days in the Tuscarawas County Justice Center. The trial court noted the sentence would be suspended upon Appellant's compliance with the purge conditions, to wit: "reimburse [Appellee] for all payments he made towards the tax obligation, specifically the amount of \$2,275.00, plus the expense of his tax attorney in the amount of \$539.59, to hold [Appellee] harmless, as previously ordered." June 13, 2014 Judgment Entry at 4.

{¶6} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶7} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO THE MAGISTRATE'S DECISION IN THAT THE APPELLANT'S DEFENSE OF 'IMPOSSIBILITY TO PAY' ALL FEDERAL AND STATE TAX LIABILITIES AND ALL CORPORATE DEBT WAS NOT SUSTAINED AS THE MANIFEST OF THE EVIDENCED PROVED.

{¶8} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING FUNDS TO APPELLEE FOR HIS TAX PAYMENTS IN THE SUM OF \$2,275.00 AND

FURTHER ORDERING ATTORNEY'S FEES IN THE SUM OF \$539.59 + \$888.75 WHEN THE ADMITTED EVIDENCE SHOWS AN 'INABILITY TO PAY' TAXES AND OTHER DEBTS.

{¶9} "III. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN FAILING TO REVIEW ITS PRIOR ORDERS WHEN IT BECAME AWARE THAT ITS PRIOR DECISIONS LACKED SUBSTANTIAL, IMPORTANT, AND MATERIAL FACTS, THE LACK OF WHICH VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER ART.(1), SEC.16 OF THE CONSTITUTION OF OHIO."

I

{¶10} In her first assignment of error, Appellant contends the trial court abused its discretion in overruling her objection to the magistrate's decision finding her in contempt for failing to hold Appellee harmless on the tax liens as she did not have the means to pay those obligations.

{¶11} In reviewing objections to a magistrate's decision, Civ.R. 53 instructs the trial court to conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Kovacs v. Kovacs*, 6th Dist. Erie No. E-03-051, 2004-Ohio-2777, ¶ 6. Thus, the trial court's standard of review of a magistrate's decision is de novo. *Howard v. Wilson*, 186 Ohio App.3d 521, 2010-Ohio-1125, 928 N.E.2d 1180, ¶ 7. However, "[w]hen a court of appeals reviews the decision of a trial court overruling objections to a magistrate's decision, the standard of review is abuse of discretion." *Palmer v. Abraham*, 6th Dist. Ottawa No. OT-12-029, 2013-Ohio-3062, ¶ 10. An abuse of discretion connotes that the court's attitude was arbitrary,

unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶12} “Civil contempt is defined as that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein.” *Beach v. Beach* (1955), 99 Ohio App. 428, 431, 130 N.E.2d 164, 134 N.E.2d 162. “It is irrelevant that the transgressing party does not intend to violate the court order.” *Pedone v. Pedone* (1983), 11 Ohio App.3d 164, 165. “If the dictates of the judicial decree are not followed, a contempt citation will result.” *Id.*

{¶13} The Ohio Supreme Court has explicitly held a party acting innocently and not in intentional disregard of a court order could not use that innocence as a defense to a charge of civil contempt. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815 [56 O.O.2d 31], paragraph three of the syllabus. “The absence of willfulness does not relieve from civil contempt. * * * An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.” *McComb v. Jacksonville Paper Co.* (1949), 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599.

{¶14} In the instant action, Appellant was ordered to pay all tax liabilities, both individual and corporate, and all corporate debt, and hold Appellee harmless thereon. Appellant acknowledged, since the divorce became final in January, 2014, she had made no attempt to have Appellee’s name removed from the tax liens nor had she taken any action to hold him harmless as to the tax liabilities and corporate debt. This evidence alone was sufficient for the trial court to find Appellant in contempt.

Accordingly, we find the trial court did not abuse its discretion in overruling Appellant's objection to the magistrate's finding on this issue.

{¶15} We note much of Appellant's assignment of error is an attack on the trial court's October 1, 2013 judgment entry. The trial court's October 1, 2013 judgment entry was a final, appealable order. Because Appellant did not appeal from that entry, she has waived any error that could have been raised with respect to that order." *In re Mapley*, 7th Dist. No. 07 MA 36, 2008–Ohio–1180, ¶ 9, citing *In re Nice*, 141 Ohio App.3d 445, 452, 751 N.E.2d 552 (7th Dist.2001).

{¶16} Appellant's first assignment of error is overruled.

II

{¶17} In her second assignment of error, Appellant submits the trial court abused its discretion in ordering her to reimburse \$2,275.00 to Appellee for the payments he made towards the tax obligation, \$539.59 for the expenses of Appellee's tax attorney, and \$888.75, in attorney fees for the prosecution of the contempt motion, as the evidence established her inability to pay.

{¶18} "It has long been held that in a contempt proceeding, inability to pay is a defense and the burden of proving the inability is on the party subject to the contempt order." *Liming v. Damos*, 133 Ohio St.3d 509, 2012–Ohio4783, 514, 979 N.E.2d 297, ¶ 20, citing *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 570, 64 N.E. 567 (1902). "The order of the trial court fixing the amount to be paid and a party's failure to comply with that order serve as prima facie evidence of contempt." *Id.* It is not unreasonable to place the burden of showing the inability to pay on the party charged with contempt because their financial condition and ability to pay are peculiarly within their own knowledge. *Id.*

{¶19} In the instant case, Appellant maintains she does not have the financial means to make payments to Appellee, or to pay the tax liabilities and corporate debt. However, the evidence and the court's findings suggest otherwise. The magistrate specifically found Appellant was voluntarily underemployed. The magistrate also found Appellant reported a number of expenses on her financial affidavit, which she admitted she was not paying, to wit: the \$1,200/month mortgage payment, the \$500/month for attorney fees, and the \$400/month loan installment. In addition, the magistrate determined a number of Appellant's monthly expenses were unreasonable in light of her position she does not have the ability to pay her court ordered payments.

{¶20} Based upon the foregoing, we find the trial court did not abuse its discretion in ordering Appellant to reimburse \$2,275.00 to Appellee for all payments he made towards the tax obligation, \$539.59 for the expenses of Appellee's tax attorney, and \$888.75, in attorney fees for the prosecution of the contempt motion.

{¶21} Appellant's second assignment of error is overruled.

III

{¶22} In her final assignment of error, Appellant argues the trial court abused its discretion in failing to review its prior orders when it became aware the prior decisions lacked substantial, important, and material facts, which resulted in a violation of Appellant's due process rights.

{¶23} It is axiomatic that an alleged contemnor must be afforded due process in a contempt proceeding. *Courtney v. Courtney*, 16 Ohio App.3d 329, 332 (3d Dist.1984), citing *In re Oliver*, 333 U.S. 257, 274–275, 68 S.Ct. 499 (1948). In civil proceedings, due

process requires notice and a meaningful opportunity to be heard. *State v. Hayden*, 96 Ohio St.3d 211, 2002–Ohio–4169, ¶ 6.

{¶24} Herein, Appellant again takes issue with findings made by the trial court in its October 1, 2013 judgment entry. As stated, supra, that judgment entry was a final, appealable order. Appellant did not appeal from that entry; therefore, she has waived any error that could have been raised with respect to that order.” *In re Mapley*, supra. We find Appellant was not denied her right to due process.

{¶25} Appellant's third assignment of error is overruled.

{¶26} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Baldwin, J. concur