

[Cite as *Allan v. Allan*, 2015-Ohio-2037.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101700

NEVEAN M. ALLAN

PLAINTIFF-APPELLANT

vs.

NAFIZ ALLAN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-13-345183

BEFORE: McCormack, J., Jones, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: May 28, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Nafiz Allan (“Husband”), appeals the judgment of the Cuyahoga County Common Pleas Court, Domestic Relations Division, finding him in contempt of court for failure to pay temporary spousal support and child support to plaintiff-appellee, Nevean M. Allan (“Wife”). We find no merit to the appeal and affirm.

Procedural History and Substantive Facts

{¶2} Wife filed a complaint for divorce on January 3, 2013, and a motion for temporary support on March 1, 2013. The couple have five minor children. On May 30, 2013, the magistrate granted Wife’s motion, finding that spousal support was appropriate and reasonable. It determined that the combined gross income of both parents is greater than \$150,000, and it ordered Husband to pay \$4,000 per month in spousal support. It also ordered Husband to pay \$2,136.70 per month in child support, when private health insurance is provided, and \$2,024.56 per month in child support and \$366.75 in medical support, when private health insurance is not provided. Finally, the magistrate ordered Husband to pay an additional \$200 per month toward the arrearage. On July 10, 2013, Wife filed a motion to show cause and motion for attorney fees.

{¶3} Husband requested a hearing on the magistrate’s order in accordance with Civ.R. 75(N) and requested modification of the magistrate’s order. The magistrate held a hearing and, on October 18, 2013, issued a modified order of temporary support. The magistrate modified its previous order and ordered Husband to pay as follows: \$2,400

per month in spousal support, effective January 2, 2013; \$860.79 per month in child support, when private health insurance is provided, and \$791.17 per month in child support and \$165.83 in medical support, when private health insurance is not provided; and the mortgage, real estate taxes, and homeowner's insurance at the marital home. Husband filed a motion to set aside the magistrate's order, which was ultimately denied.

{¶4} On November 6, 2013, Wife filed an amended motion to show cause, an amended motion for attorney fees, and a motion for an immediate hearing. Wife's motion for an immediate hearing was granted, and a hearing was held on January 2, 2014.

{¶5} On February 25, 2014, the magistrate issued its decision. Husband filed objections to the magistrate's decision on March 11, 2014, and supplemental objections on May 12, 2014. On June 19, 2014, the trial court issued its order, adopting the decision of the magistrate. The court granted Wife's motion to show cause, finding Husband failed to comply with the court's previous temporary support order of May 30, 2013, and its modified order of October 18, 2013. The court therefore found Husband in civil contempt and sentenced Husband to 30 days in jail or 200 hours of community service, until the contempt is purged. The court stated that the contempt will be purged, provided Husband pays \$3,557, which is equivalent to one month of Husband's total support obligation, within 30 days of the order. The court also ordered Husband to continue to pay spousal and child support as recommended by the magistrate in its modified order of October 18, 2013. Finally, the court granted Wife's motion for attorney fees and ordered Husband to pay \$2,298.50 in attorney fees.

{¶6} Husband appealed the court's order adopting the magistrate's decision, raising three assignments of error for our review:

- I. The trial court erred in finding [Husband] in civil contempt for not complying with a temporary child support and spousal support order which exceeded his gross earned income by 648% where [Husband] showed by a preponderance of the evidence he was not able to pay the support order.
- II. The trial court erred in imposing a purge condition which exceeded [Husband's] gross income by 1,059% of his gross monthly income and where [Husband] showed by a preponderance of the evidence he was not able to pay the purge condition.
- III. The trial court erred by awarding attorney's fees for [Husband's] alleged contempt where no competent credible evidence supporting the fees was adduced.

Standard of Review

{¶7} When ruling upon objections to a magistrate's decision, the trial court is required to make an independent review of the case. Civ.R. 53(D)(4)(d). In doing so, the trial court must decide “whether the [magistrate] has properly determined the factual issues and appropriately applied the law, and where the [magistrate] has failed to do so, the trial court must substitute its judgment for that of the [magistrate].” *Gobel v. Rivers*, 8th Dist. Cuyahoga No. 94148, 2010-Ohio-4493, ¶ 16, quoting *Inman v. Inman*, 101 Ohio App.3d 115, 118, 655 N.E.2d 199 (2d Dist.1995). Thus, the trial court must conduct a de novo review of the case in order to reach its own conclusions. *In re A.S.*, 8th Dist. Cuyahoga No. 101339, 2014-Ohio-4936, ¶ 5.

{¶8} On appeal, our review is more limited. A trial court’s ruling on objections to a magistrate’s decision will not be reversed absent an abuse of discretion. *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 99498 and 100229, 2014-Ohio-1508, ¶ 17. An abuse of discretion implies that the court’s attitude was unreasonable, arbitrary, or unconscionable, not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). An “abuse of discretion” therefore describes a judgment “comporting neither with the record nor reason.” *Hissa* at ¶ 17.

Civil Contempt and Purge Condition

{¶9} In his first assignment of error, Husband contends that the trial court erred in finding him in civil contempt for not complying with the temporary child support and spousal support orders. He specifically argues that the court erred in rejecting his defense of impossibility of performance. According to Husband, he never earned enough money to pay his own mortgage and his father had paid the mortgage for several years prior to the couple’s separation. He also claimed that he was physically unable to work because he suffered from depression. In his second assignment of error, Husband claims that the court’s purge condition was unreasonable in light of his financial circumstances and his inability to work. We address the assignments of error together.

{¶10} We review a finding of contempt for an abuse of discretion. *Kapadia v. Kapadia*, 8th Dist. Cuyahoga No. 96910, 2012-Ohio-808, ¶ 22, citing *In re Contempt of Modic*, 8th Dist. Cuyahoga No. 96598, 2011-Ohio-5396, ¶ 7.

{¶11} Contempt is defined as a disregard of, or disobedience to, an order or command of judicial authority. *Kapadia* at ¶ 26, citing *State v. Flinn*, 7 Ohio App.3d 294, 455 N.E.2d 691 (9th Dist.1982). R.C. 2705.02 provides that disobedience of a lawful order is punishable as contempt. A trial court may therefore employ civil contempt sanctions in order to coerce a party into complying with a court order. *Whitman v. Monastra*, 8th Dist. Cuyahoga No. 76633, 2000 Ohio App. LEXIS 4637, *17 (Oct. 5, 2000).

{¶12} The party initiating the contempt proceedings must demonstrate, by clear and convincing evidence, that the contemnor has failed to pay support. *Pugh v. Pugh*, 15 Ohio St.3d 136, 472 N.E.2d 1085 (1984). The contemnor then bears the burden of proving his inability to pay the court-ordered support. *Id.* at 140. For purposes of contempt, “[a] party must take all reasonable steps within [his or] her power to comply with the court’s order and, when raising the defense of impossibility, must show ‘categorically and in detail’ why [he or] she is unable to comply with the court’s order.” *Briggs v. Moelich*, 8th Dist. Cuyahoga No. 97001, 2012-Ohio-1049, ¶ 15, citing *Lahoud v. Tri-Monex, Inc.*, 8th Dist. Cuyahoga No. 96118, 2011-Ohio-4120, ¶ 54.

{¶13} With any sanction for civil contempt, however, the court must allow the contemnor an opportunity to purge the contempt. *Rose v. Rose*, 8th Dist. Cuyahoga No. 99933, 2013-Ohio-5136, ¶ 7, citing *Carroll v. Detty*, 113 Ohio App.3d 708, 712, 681 N.E.2d 1383 (4th Dist.1996). A trial court abuses its discretion by ordering purge conditions that are unreasonable or where compliance is impossible. *Id.*, citing *Burchett*

v. Miller, 123 Ohio App.3d 550, 552, 704 N.E.2d 636 (6th Dist.1997). A contemnor's unsupported claims of financial difficulty or an inability to pay are insufficient to establish that the trial court's conditions are unreasonable. *Rose* at ¶ 10; *Pettit v. Pettit*, 8th Dist. Cuyahoga No. 64582, 1993 Ohio App. LEXIS 6200, *12 (Dec. 23, 1993).

{¶14} Here, the trial court found Husband in contempt for failing to comply with the temporary support orders of May 30, 2013, and October 18, 2013. It found as follows: no payments were made through Ohio Child Support Payment Central ("OCSPC") as ordered by the court on May 30, 2013; Husband made only one payment directly to Wife in August 2013 for \$1,000; and no subsequent payments were made through OCSPC as ordered in both the original order and the modified order. The court also specifically found that Husband did not comply with its modified order that Husband shall make the mortgage payments on the marital residence. While Husband argued that the bank would not accept payments from him on the mortgage, the court found that Husband provided no testimony or documentary evidence to support his claim.

{¶15} In support of its finding of contempt, the court found that the evidence showed Husband had paid the mortgage, car payments, and payments for the necessities and support of the children, and the mortgage was current for almost seven years, until the couple separated. The court further found that Husband "unilaterally chose not to pay the mortgage or to provide any financial support for his wife and children" after the couple separated in January 2013. The court stated that despite Husband's assertion that his father had made his mortgage payments, utilities, and car payments, Husband failed to

present any evidence in support of his position, and in fact, “the documentary evidence presented by [Wife] in this action in regard to the temporary support orders belies [Husband’s] position.”

{¶16} The court previously determined in its temporary support orders that Husband’s income was \$186,289.01. In support of its finding, the court stated that it relied on Key Bank Business Account Records for Husband’s company produced by Wife. These documents showed Husband’s gross deposits of \$124,874 in 2010, \$150,218.15 in 2011, and \$283,824.14 in 2012. The court averaged the three years of deposits in order to calculate Husband’s income. The court found that Husband’s bank records contradicted his claimed income on 2010 and 2011 income tax returns, which lacked a schedule “C” itemization. The court noted that Husband, when provided an opportunity to supplement his evidence, failed to provide the court with additional documentation to show any claimed ordinary and necessary business expenses or corporate tax returns. The court further noted that the mortgage, taxes, insurance, utilities, and car payments, which were current in December 2012, exceeded Husband’s claimed income of \$20,800 annually. The court therefore found the actual bank records produced by Wife credible and Husband’s position and his tax returns not credible.

{¶17} In its modified support orders, the court found gross receipts (\$166,491, \$171,018, and \$304,624) and claimed losses (\$3,801, \$29,184, and \$42,905) from Husband’s company, Zemtel Corporation, for 2010, 2011, and 2012, respectively. It considered these documents as well as a check register produced by Wife. It noted that

Husband failed to produce supporting financial documentation, company books, and invoices, and it found Husband's tax returns not credible. The court determined that Husband paid \$61,803.29 through the bank for his family's personal expenses, which included the mortgage, utilities, and car payments. Deducting an estimate for food, clothing, and other necessities, the court found that a reasonable income attributed to Husband for 2012 was at least \$70,000.

{¶18} The court concluded that Husband repeatedly failed to present "any and all documentary evidence substantiating his claims," failed to provide a single financial document, and "cavalierly testified that 'My documents are my word.'" The court further found Husband's argument that his father paid for his expenses lacking proof and credibility, especially in light of the fact that Husband did not submit an affidavit from his father, his father is not a signatory on the bank account, and his father is not listed as an owner of Zemtrel Corporation.

{¶19} Finally, the court determined that Husband "has fallen far short of his burden of 'showing categorically and in detail why he is unable to comply.'" The court noted that although Husband claimed he suffers from anxiety, depression, and insomnia, he offered no medical evidence to substantiate his inability to work as a result of such ailments. Further, the court noted that Husband has provided no evidence to support his claim that he earns \$200 per week. Moreover, the court determined that "even though [Husband] concedes he is working, he has not even made any attempts to make minimal payments to support his wife and five children." The court therefore found that

Husband has not taken all reasonable measures within his control to comply with the court's orders and, thus, Husband is in civil contempt for failing to comply with its orders.

{¶20} In its order of June 19, 2014, the trial court adopted the magistrate's decision in its entirety and overruled Husband's objections. The court additionally found as follows: the evidence showed that no payments were made through OCSPC as ordered by the court; Husband failed to show that he took reasonable steps to comply with the court's order and therefore failed to establish a defense of impossibility; Husband made only one payment directly to Wife in the amount of \$1,000; Husband presented no credible evidence that he attempted to make any payments; Husband failed to support his alleged financial condition with documentary evidence; and Husband failed to provide any evidence in support of his alleged medical condition. The court therefore found Husband in contempt.

{¶21} The court also found the purge condition imposed by the magistrate, which equated to one month's total support payment, was reasonable. It further determined that Husband failed to provide any credible evidence that he was unable to meet his support obligation, stating that unsupported claims of financial difficulty or inability to pay are insufficient to establish that a court's purge conditions are unreasonable.

{¶22} In light of the above, we find that the trial court did not abuse its discretion in finding the Husband in contempt for failing to comply with the court's temporary support orders, and its judgment comports with the record. The magistrate provided

detailed findings of fact regarding Husband's contempt, and the trial court adopted the magistrate's decision in its entirety and made additional findings in support of the magistrate's decision. The evidence provided by Wife, including bank account records and gross receipts from Husband's company, demonstrated Husband's ability to pay. Husband's claim regarding his financial position and medical condition lacked evidentiary support and credibility. Finally, Husband failed to demonstrate in sufficient, credible detail his inability to comply with the court's orders.

{¶23} In adopting the magistrate's decision, the court also found the purge condition imposed by the magistrate reasonable and it determined that Husband was unable to provide any credible evidence of his inability to meet his support obligation. Husband's unsupported claim of his inability to pay does not establish that the purge condition is unreasonable.

{¶24} Husband's first and second assignments of error are overruled.

Attorney Fees

{¶25} Husband also claims that the trial court erred by granting Wife's motion for attorney fees and awarding her \$2,298.50 in fees. Husband provides that the award was unreasonable, stating that the attorney fees did not relate to the act of contempt and the evidence supporting the fees was not properly authenticated.

{¶26} Generally, an award of attorney fees lies within the sound discretion of the trial court. *Rand v. Rand*, 18 Ohio St.3d 356, 359, 481 N.E.2d 609 (1985). *Kapadia*, 8th Dist. Cuyahoga No. 101460, 2014-Ohio-5554, at ¶ 4.

{¶27} However, R.C. 3109.05(C) and 3105.18(G) specifically provide that when a party is found in contempt for failure to make support payments as ordered, the court shall require the person to pay any reasonable attorney fees of any adverse party, as determined by the court, that arose in relation to the act of contempt. *Oleksy v. Oleksy*, 8th Dist. Cuyahoga No. 82646, 2003-Ohio-5657, ¶ 42 (child support); *Lemke v. Lemke*, 8th Dist. Cuyahoga No. 96095, 2012-Ohio-257, ¶ 13 (spousal support). Moreover, in contempt actions in domestic relations cases, a trial court may award attorney fees in the absence of supporting evidence when the amount of work and time spent on such a case is apparent. *Fisher v. Fisher*, 8th Dist. Cuyahoga No. 95821, 2011-Ohio-5251, ¶ 29; *see also Shroyer v. Shroyer*, 5th Dist. Coshocton No. 01-CA-011, 2001-Ohio-1901, * 22 (the trial court may use its own knowledge in reviewing the record to determine the reasonableness of attorney fees).

{¶28} Here, the trial court found Husband in contempt for failing to comply with the temporary support orders issued on May 30, 2013, and October 18, 2013. It therefore determined that, in accordance with R.C. 3109.05(C) and 3105.18(G), an award of attorney fees was mandated.

{¶29} The court also found that attorney fees of \$2,298.50 were warranted. It stated that because Husband had not paid anything toward the support order, Wife was compelled to file a motion to show cause and an amended motion to show cause in order to enforce the court's order. It considered the testimony of Wife's attorney, Richard Rabb, and Wife's trial exhibit No. 5, which was an itemization of the work completed by

her counsel, and determined that the fees generated by the attorneys as well as a paralegal were traceable to the work performed on Wife's motions to show cause as well as the motion for an immediate hearing. The court then calculated fees for the attorneys' attendance at the hearing, adding the fees to Wife's original request for attorney fees filed prior to the hearing. It found that the fees were reasonable and directly related to the contempt proceedings.

{¶30} Additionally, the court overruled Husband's objection to Wife's itemized attorney billing statement as unauthenticated. It found that Wife identified and authenticated the billing statement and she testified as to the amount of requested attorney fees and additional fees she will owe for time spent at the hearing. The court further found that Attorney Rabb testified that he supervised the work completed in the case and reviewed the fee bill himself.

{¶31} In light of the above, we find no abuse of discretion in the trial court's award of attorney fees in this case. The court considered the evidence, assessed the reasonableness of the attorney fees, and determined that the fees were associated with Husband's act of contempt. Moreover, the record supports the court's award.

{¶32} Husband's third assignment of error is overruled.

{¶33} 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 domestic relations court 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, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR