

[Cite as *Howard v. Howard*, 2009-Ohio-5399.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

TERRA L. HOWARD	:	
Plaintiff-Appellee	:	C.A. CASE NO. 08CA60
vs.	:	T.C. CASE NO. 07DR220
DAVID E. HOWARD	:	(Civil Appeal from
Defendant-Appellant	:	Common Pleas Court
	:	Domestic Relations Div.)

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O P I N I O N

Rendered on the 9th day of October, 2009.

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GRADY, J.:

{¶ 1} David E. Howard appeals from a final judgment of the domestic relations division of the court of common pleas. Terra L. Howard, the Appellee, did not file a brief.

{¶ 2} David E. Howard and Terra L. Howard were married in

1987. Terra¹ filed a complaint for divorce on July 12, 2007.

On that same date, the court granted Terra's ex parte motion for a restraining order, and it ordered David to not dispose of or impair the parties' equity in any of their assets. (Dkt. 11).

{¶ 3} David filed an answer and counterclaim on July 18, 2007. Subsequently, on David's motion, the court on July 18, 2007 ordered Terra to not transfer or dispose of the interest of either party in any of their properties, real or personal, or any other asset. (Dkt. 19).

{¶ 4} On November 7, 2007, the court journalized amended temporary orders regarding custody and support of the parties' three minor children and Terra's use of the marital residence. The order further states: "All restraining orders previously issued are hereby CONTINUED and extended to both parties." (Dkt. 59).

{¶ 5} The parties appeared at court on February 6, 2008, and through their counsel agreed on the terms of their divorce settlement. David's attorney was directed to prepare an agreed decree of divorce. (Dkt. 72).

{¶ 6} On April 10, 2009, the court journalized a Final

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

Judgment And Decree Of Divorce. (Dkt. 73). The decree was approved by counsel for both parties. The decree indicates that David had seen but not approved the decree, and that Terra had approved its terms by telephone.

{¶ 7} The decree provides that David is awarded the marital residence. In a separate paragraph captioned "Property Settlement," David is ordered to pay Terra \$15,000 for her interest in the marital residence within fifteen days. Failing that, Terra is authorized to list the marital residence for sale and to retain the first \$20,000 of any equity produced by the sale "as a penalty for [David's] not making the property settlement payment" of \$15,000. Another, separate paragraph of the decree states:

{¶ 8} "AUTOMOBILES: Husband shall obtain and retain any and all right, title and interest in the 2006 Nissan Titan pick up truck which wife currently has in her possession, and he shall be responsible for any and all indebtedness thereon, and hold the Wife harmless on said debt, including any past arrearages due on payments for said vehicle. Parties are ordered to cooperate on the transfer of the title of said vehicle. Husband shall also obtain and retain any and all right, title and interest in and to 1990 Chevrolet pick up truck, and he shall be responsible for any and all indebtedness thereon,

and hold the Wife harmless on said debt.”

{¶ 9} On May 30, 2008, David filed an application captioned “Motion For Implementation of Judgment Entry By Alternative Means of Satisfaction.” (Dkt. 86). The motion alleged that Terra had damaged the Nissan Titan pick-up truck while it was in her possession, and that she thereafter turned the truck over to the creditor that financed its purchase. Because he is required to pay the debt on an asset he was awarded but will not receive, David claimed an economic loss, and he asked the court “to compensate him for the value lost to his portion of the property division due to [Terra’s] waste.” David cited and relied on R.C. 3105.171(E)(3), which permits a greater award of marital property to a spouse who is offended by the other spouse’s dissipation or destruction of assets.

{¶ 10} A hearing was held on David’s motion on July 17, 2008. Terra was represented by counsel, but the only evidence presented was David’s testimony. David testified that the Nissan pick-up truck was sold at auction by the creditor for only \$10,000, due to its damaged condition, and that the deficiency balance owed is \$19,610.43. Because he is required by the decree to pay that debt, and will not receive the truck he was awarded, David asked the court to “make an adjustment on the \$15,000 property” settlement obligation the decree

imposed on him to offset his loss. (T. 11).

{¶ 11} David's further testimony demonstrates that Terra had possession of the Nissan pick-up truck since the parties separated in 2007, and that she made the monthly payments for it while the divorce action was pending. David saw the truck when the parties met to negotiate their settlement agreement on February 6, 2008, and he observed that it was undamaged. He later saw it on the street and noticed damage to the truck's back bed.

{¶ 12} David was aware that Terra was late in paying the February 2009 installment, but he subsequently confirmed that she paid it. Thereafter, on March 24, 2009, and without David's knowledge, Terra voluntarily surrendered the truck to Nissan Financing instead of paying the March installment, resulting in its sale at auction for \$10,000.

{¶ 13} The trial court denied the relief David requested on July 18, 2008, in a written decision. (Dkt. 104). The court reasoned:

{¶ 14} "The Defendant moved the Court for an Order making the Plaintiff responsible for the loss of the 2006 Nissan Titan pickup truck which was reposed by the lien holder on or about March 24th, 2008. The Court finds this motion is not well taken and denies the request as the Defendant admitted that he agreed

on February 6, 2008 that he would be responsible for the payments on said vehicle, that he knew the truck payment had been delinquent on at least one previous occasion, and he failed to make the payments for February and March 2008 even though he knew the due date for the payments was the 18th of each month.

The resulting repossession of the vehicle was the Defendant's fault for failing to make the payments as he agreed. The Defendant failed to show that he had requested directly to the Plaintiff or through her attorney that he be given possession of the Nissan truck and instead felt because the decree had not yet been filed that it somehow excused his failure to pay the truck payment he knew needed to be paid. The court does not agree."

{¶ 15} David filed a timely notice of appeal

ASSIGNMENT OF ERROR

{¶ 16} "THE TRIAL COURT ERRED IN NOT CONSIDERING THE LOSS IN VALUE THE APPELLANT SUFFERED IN THE DESTRUCTION OF HIS PROPERTY BY THE APPELLEE."

{¶ 17} At the outset, we note that the domestic relations court could not grant the particular form of relief David's motion requested. When a spouse dissipates or destroys assets, R.C. 3105.171(E)(3) authorizes the domestic relations court to vary from the equal division of marital property required

by R.C. 3105.171(C) (1), when equitably dividing the parties' marital and separate properties in the final judgment and decree of divorce that is mandated by R.C. 3105.171(B), in order to compensate the "offended spouse" with a greater share of marital property. R.C. 3105.171(E) has no application after the decree is final. Furthermore, R.C. 3105.171(E) states: "A division or disbursement of property or a distributive award made under this section is not subject to future modification by the court."

The adjustment of the property division orders in the April 10, 2009 decree that David requested in the motion he filed on May 30, 2008 is expressly prohibited by R.C. 3105.171(I).

{¶ 18} Nevertheless, we believe the trial court abused its discretion in proceeding as it did. It is undisputed that Terra had used the pick-up truck and made the installment payments on it since 2007, and continued to do so while the divorce action was pending, until March of 2008, when she voluntarily turned the vehicle over to the creditor instead of making that month's payment. That was done without David's knowledge. He testified that he would have made the March payment to avoid repossession, but was unaware that it had not been made. (T. 31).

{¶ 19} The trial court's finding that David agreed at the February 6, 2008 settlement conference to pay the installments

due on the truck from that time on due to the fact that he would receive it pursuant to the decree of divorce is not supported by the record. That suggestion was more the product of the court's badgering cross-examination of David than any concession by him, and no other evidence regarding the matter was offered. David's testimony was that he believed Terra would continue to use the truck and make the payments due until the decree was final, when he would get possession of the truck.

That would be consistent with the parties' practice while the divorce action was pending over many months' time. Indeed, Terra continued to use the truck following the February 6, 2008 settlement conference. Exactly when the decree would be final was then unknown. It was reasonable for David to believe that Terra would continue to make the payments due while the truck remained in her possession, until the final decree was filed.

The record does not demonstrate any different understanding on Terra's part.

{¶ 20} Instead of paying the March 2008 installment or telling David it was unpaid, in order to permit him to protect his interest, Terra voluntarily surrendered the truck to the creditor on March 24, 2008. Her conduct was in direct violation of the temporary restraining order of July 18, 2007, which remained in effect and prohibited Terra from transferring or

disposing of the interest of either party in any asset. That is a matter the court wholly overlooked.

{¶ 21} Furthermore, after having disposed of the truck on March 24, 2008, Terra permitted the court to sign and journalize the April 10, 2008 decree awarding the truck to David and ordering him to hold Terra harmless on the balance of the debt owed on it. Terra's conduct could support a claim of fraud upon the court for purposes of Civ.R. 60(B)(3).² Under the tests of *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1971), 47 Ohio St.2d 146, the motion David filed was timely for purposes of Civ.R. 60(B), and the facts adduced at the hearing on his motion could demonstrate a meritorious defense to any claim that David, in equity, should be exclusively burdened with the indebtedness for the truck.

{¶ 22} The trial court abused its discretion when it failed to consider the motion David filed as an application for relief from judgment pursuant to Civ.R. 60(B). The assignment of error is therefore sustained. The judgment denying David's motion from which this appeal was taken will be reversed and vacated, and the matter will be remanded to the domestic relations court to proceed on David's motion of May 30, 2008, as a motion for

²The record does not suggest that Terra's counsel had knowledge of her misconduct.

relief from judgment pursuant to Civ.R. 60(B).

DONOVAN, P.J. And BROGAN, J., concur.

Copies mailed to:

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Hon. Steven L. Hurley