

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RUTH MUSSELMAN, A/K/A RUTH FORD

Appellee

v.

ANDREW FORD

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1434 EDA 2012

Appeal from the Order Entered May 8, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 2000-15947

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.:

Filed: April 5, 2013

Andrew Ford appeals from the order entered on May 8, 2012 in Montgomery County, which granted Ruth Musselman's petition for contempt and directed him to pay \$7,975 as reimbursement of college expenses expended for his two children from 2007 to 2010, and directed him to pay \$2,904.18 in attorney's fees. On appeal, Ford argues the trial court erred: 1) in finding him in contempt when he was willing but unable to comply with the provisions of the October 24, 2000, Property Settlement Agreement ("Agreement"); 2) in directing him to pay Musselman's counsel's fees; and 3) in analyzing the Agreement through strict contract principals rather than as a modification of child support.

* Retired Senior Judge assigned to the Superior Court.

The trial court set forth the facts and procedural history as follows and which we adopt herein:

[Ford], appealed from this Court's Order dated May 8, 2012, which granted [Musselman's] Petition for Contempt filed on March 23, 2011. The parties were married on October 3, 1987 in Telford, Montgomery County, Pennsylvania. The parties had two children of this marriage—Brayden Ford, who was born on July 28, 1989 and Carley Ford, who was born on October 5, 1992. [Musselman] filed a Complaint in Divorce on July 27, 2000. The Divorce Decree dated December 22, 2000 incorporated a property settlement agreement ("the Agreement") executed on October 24, 2000. The Agreement provides in paragraph 12 that [Ford] "will pay 40% of all college costs including tuition, living expenses, books and other costs associated with the children attending college and/or trade school." Paragraph 32 of the Agreement provides that "the breaching party will pay all attorney's fees, court costs and expenses incurred by the other party in enforcing the Agreement." [Musselman] filed a Petition for Contempt on March 23, 2011 claiming Father had breached the Agreement by failing to pay his 40% share (\$10,666) of the children's college expenses from 2007-2010. A trial was conducted on May 8, 2012 and both [Musselman] and [Ford] presented evidence.¹

¹ [Ford] admitted he did not pay for his children's college expenses because he did "not have enough money left over to support my lifestyle." (Andrew Ford, N.T. 120)

The Court entered an Order granting [Musselman's] Petition for Contempt and found [Ford] breached the Agreement. No sanctions were imposed.² The Order directed [Ford] to pay the

² A contempt order is interlocutory and unappealable until sanctions are imposed. *DeMasi v. DeMasi*, 597 A.2d 101 (Pa. Super. 1991); *Genovese v. Genovese*, 550 A.2d 1021 (Pa. Super. 1988)

sum of \$7,975³ as reimbursement of college expenses for the children from 2007-2010 and ordered [Ford] to pay [Musselman's] attorney's fees amounting to \$2,904. [Ford] filed a Notice of Appeal to the Superior Court of Pennsylvania on May 14, 2012...

³ \$10,666 minus a credit of \$2,691 garnished by the Montgomery County Domestic Relations Office.

Trial Court Opinion, 7/13/2012 at 1-2.

Initially we note while the trial court stated it had not imposed sanctions thereby rendering the order interlocutory, an award of counsel fees is sufficient to render an order final. ***See Rhoades v. Pryce***, 874 A.2d 148, 152 (Pa. Super. 2005) (*en banc*)(the imposition of counsel fees can constitute a sanction.) Having established jurisdiction we now may address the issues.

Because it is key to the determination of Ford's other issues, we first address whether the court was correct in using contract law in interpreting the provision in the Agreement regarding payment of college costs. The parties entered into the Agreement on October 24, 2000 which was then incorporated but not merged into the divorce decree of December 22, 2000. "Where . . . a property settlement agreement did not merge into the divorce decree, it stands as a separate contract, is subject to the law governing contracts and is to be reviewed as any other contract." ***Crispo v. Crispo***, 909 A.2d 308, 312-313 (Pa. Super. 2006) (citation omitted). Consequently, when enforcing an agreement, the court must ascertain the intent of the

parties and cannot modify or vary the agreement unless there is “conclusive proof” of fraud, misrepresentation, or duress, or the agreement provides for judicial modification. *Id.* at 313; ***Stamerro v. Stamerro***, 889 A.2d 1251, 1258 (Pa. Super. 2005).

The Agreement states Ford will “pay 40% of all college costs including tuition, living expenses, books and other costs associated with the children attending college and/or other trade school.” Property Settlement Agreement, 10/24/2000 at 7, ¶12. The paragraph does not make the obligation contingent upon Ford’s ability to pay, nor does it provide for modification for any reason. Therefore, in order to find the contract unenforceable Ford must prove fraud, misrepresentation, or duress.

Ford’s argument is that the Agreement was “one sided in [Musselman’s] favor...” He bases this argument on the fact he “was only provided with a payment of \$33,000, representing approximately one-third the equity in the marital home...[;] [Musselman] retained primary physical custody of the minor children...[;] [Musselman] retained the ... three mutual funds held by the parties ...[,] as well as interest in the stocks and bonds[;]” and finally that Ford was “required to pay one-half of [Musselman’s] counsel fees despite not having an attorney himself...” Appellant’s Brief at 12. We agree with the court that:

[Ford] presented no evidence that the property settlement agreement was one-sided. [Ford’s] obligation of 40% of college

expenses is not unreasonable, as it attributes more of the children's college expenses to [Musselman] than [Ford]. [Musselman] testified there were several drafts of the agreement and specific negotiations about the children's college expenses before the agreement was signed. (Ruth Ford [Musselman], N.T. 13-16) The court finds [Musselman's] testimony credible. While it is true [Ford] was unrepresented by counsel throughout the negotiations, he was aware he had a right to hire his own lawyer. (Andrew Ford, N.T. 122-123) [Ford] knew he had the right to seek and receive legal advice from his own counsel and that he could have hired counsel to negotiate the property settlement agreement on his behalf. He knew the attorney who prepared the Agreement represented [Musselman] and not him. (Andrew Ford, N.T. 123) He agreed to be responsible for 40% of college expenses and receive \$33,000 cash because he "just wanted out of the marriage" and a "clean split." (Andrew Ford, N.T. 114, 140) [Ford] knew [Musselman's] lawyer represented solely her interests, as indicated by the advice of counsel provision contained in the agreement itself, which he admitted reading. (Andrew Ford, N.T. 122-123) This provision provides in relevant part:

"Each of the parties hereto acknowledges that they have been advised to seek and receive separate independent legal counsel of their selection and that they are satisfied that they are fully informed and understand the facts as to their legal rights and obligations. Each party acknowledges and accepts that this Agreement is, in the circumstances, fair and equitable and that it is being entered into freely and voluntarily, after Wife has consulted with her attorney, DOREEN L. SMITH, ESQUIRE, and Husband has been advised to seek his own counsel but has elected not to seek the advice of counsel."

[Ford], a college graduate, voluntarily chose to disregard advice to consult an attorney to represent his own interests. He cannot now void an enforceable Agreement based upon his own decision to proceed without counsel.

Trial Court Opinion, 7/13/2012 at 7-8.

We next examine whether the court erred in finding Ford in contempt.

Our standard for reviewing contempt orders is:

Each court is the exclusive judge of contempts against its process. The contempt power is essential to the preservation of the court's authority and prevents the administration of justice from falling into disrepute. When reviewing an appeal from contempt order, the appellate court must place great reliance upon the discretion of the trial judge. On appeal from a court's order holding a party in contempt of court, our scope of review is very narrow. We are limited to determining whether the trial court committed a clear abuse of discretion. ***Garr v. Peters***, 773 A.2d 183, 189 (Pa. Super. 2001) (citations and quotation marks omitted). "An abuse of discretion exists when the trial court has rendered a decision or a judgment which is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will."

Pratt v. St. Christopher's Hosp., 824 A.2d 299, 302 (Pa. Super. 2003), ***affirmed***, 866 A.2d 313 (Pa. 2005) (internal citations and quotations omitted). The trial court found Ford to be in contempt, and directed he pay \$7,975, the outstanding balance of his college expense obligation as well as Musselman's counsel fees.

However, Ford argues because he is willing but unable to pay the obligation he should not have been held in contempt or required to pay counsel fees. Ford cites his decreased income as the primary reason for his inability to pay. The trial court however determined Ford has the ability to pay the obligation in full. We agree.

The testimony showed Ford quit his well-paying job in Pennsylvania just as the parties' son was entering college, moved to Hawaii, and eventually secured a much lower paying job. In 2010, Ford received an inheritance of \$70,000 from his Mother's Estate (\$35,000 cash and a

\$35,000 IRA). Ford testified to using approximately \$19,000 for paying credit card debt. However, there was no testimony as to how the balance of the cash inheritance was spent if at all. Additionally, Ford has the \$35,000 inherited IRA, an IRA he established worth \$19,000, and an investment account containing \$4,000. Ford testified he is unwilling to make withdrawals from these accounts due to the assessment of penalties.

While Ford testified that his unsuccessful March 2012 loan application evidenced his good intentions to meet the obligation, the court correctly noted, “[Ford’s] single attempt at securing a loan far in excess of his obligation of \$7,975 is not sufficient to relieve him of his contractual obligation.” Trial Court Opinion, 7/13/2012 at 5. There was no evidence Ford ever attempted to secure a loan for the lesser amount of \$7,975. We cannot conclude the trial court erred in finding Ford has the ability to pay the outstanding obligation of \$7,975.

Because the record supports the trial court determination that Ford is able but unwilling to pay the obligated amount, the assessment against him for Musselman’s counsel fees pursuant to the Agreement’s paragraph 32 is proper.

Accordingly, we cannot conclude the trial court erred or abused its discretion in determining Ford is in civil contempt of court for refusing to pay his contractual obligation of \$7,975, the outstanding balance for his

children's college costs and expenses and that his failure to do so obligates him to reimburse Musselman's legal costs and expenses incurred in pursuing his breach of the Agreement.

Order affirmed.