Circuit Court for Howard County
Case No. 13-C-16-107352

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2865

September Term, 2018

JOAN F. BRAULT

v.

CHRISTOPHER A. KOSMOWSKI

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 3, 2020

The Circuit Court for Howard County held appellant Joan F. Brault in contempt because she failed to comply with the terms of a judgment into which her marital property settlement agreement was incorporated, but not merged. She appealed.

Appellant raises two questions, which we have rephrased for clarity:

I. Did the petition for contempt, the show cause order, and the writ of summons seek to have appellant "imprisoned for debt," in violation of Article III, § 38, of the Maryland Constitution?

II. Did the circuit court abuse its discretion in finding an indirect civil contempt?[1]

For the reasons stated herein, we shall affirm the judgment.

FACTS

On March 21, 2017, appellant obtained a judgment of absolute divorce from appellee Christopher A. Kosmowski. A marital property settlement agreement was incorporated, but not merged, into the judgment.

[1] Appellant phrased her questions as follows:

1. Did Plaintiff's petition for contempt, MD R. 9-208(a)(1)(G) order to show cause, and writ of summons seek imprisonment for a debt in violation of the Privileges and Immunities Clause, MD Const., Art. III, § 38, and/or otherwise violate rights of due process and equal access to the courts; U.S. Const., Amend. 14, MD Const., Decl. Rts., Arts. 19 and 24?

2. In failing to independently evaluate all of Defendant's exceptions, did the circuit court fail to exercise discretion and therefore abuse its discretion in finding an indirect civil contempt?

Although appellant's first question refers to a number of state and federal constitutional provisions, the argument in her brief pertains exclusively to Article III, section 38, of the Maryland Constitution. Consequently, we have omitted the other provisions from our formulation of the question presented.

Among other things, the agreement required appellant to refinance the loans that were secured by the marital home or to remove appellee from liability on the loans within 12 months of the date of the divorce. If appellant failed to refinance those loans or to remove appellee from liability on them, the agreement required that the property be listed for sale at a price suggested by a real estate agent.

The agreement also required appellant either to remove appellee from liability on a joint credit card with a specified lender or to pay off the balance due (approximately $25,000) within six months of the date of the divorce. During those six months, the agreement prohibited appellant from incurring additional charges and required her to make at least the minimum payment due.

Finally, the agreement stated that if either party breached the obligations thereunder, the prevailing party should receive the costs and expenses, including attorneys' fees, incurred in prosecuting the breach.

About 16 months after the judgment of divorce was entered, on July 24, 2018, appellee filed a petition for contempt. He alleged that appellant had failed to refinance the loan on the marital home within 12 months of their divorce or to list the property for sale, despite repeated requests for her to do so. He also alleged that in September 2017 appellant had failed to make a $987 payment on the joint credit card and that he had made the payment. By way of relief, he asked the court to: (1) appoint a trustee to list and sell the marital home, (2) order appellant to reimburse him in the amount of $987 for the credit card payment that he had made, and (3) order appellant to pay the attorneys'

fees that he incurred in prosecuting the petition. The petition did not request that appellant be incarcerated to compel her compliance with the court's order.

A magistrate conducted a hearing on the petition on September 27, 2018. Both parties testified. During appellee's testimony, the magistrate received emails dated March 20, April 10, and June 17, 2018, in which he sought appellant's cooperation in listing the house for sale. Appellant testified that she had paid off the $27,562.72 balance on the credit card, but that she had been unable to refinance the marital home within 12 months of their divorce because of false information on her credit report. She did not appear to dispute appellee's contention that he had made one of the credit card payments that she had been required to make. Instead, she asserted that she was unaware of the payment.

After argument, the magistrate recommended: (1) that appellant be held in contempt because of her failure to make one credit card payment and her failure to list the property for sale after she had been unable to refinance the loans; (2) that appellant be permitted to purge her contempt by paying appellee $987 from the proceeds of the sale of the marital home; (3) that appellant be required to pay appellee's attorneys' fees from the proceeds of the sale of the marital home; and (4) that the court appoint a trustee to sell the marital home if it had not been listed for sale on or before October 30, 2018.

Appellant filed exceptions to the magistrate's recommendation. Appellee moved for the appointment of a trustee to sell the marital home.

On March 18, 2019, the court granted appellee's motion to appoint a trustee to sell the marital home, denied appellant's exceptions to the magistrate's recommendations, and adopted all four of the magistrate's recommendations.

In a separate order, the court held appellant in contempt because of her failure to make a credit card payment and her failure to refinance the loans on the marital home or list the home for sale. The court ruled that appellant could purge herself of her contempt by paying $987 to appellee from the proceeds of the sale of the marital home. Finally, the court ordered appellant to pay $2,197.44 in attorneys' fees and expenses.[2]

DISCUSSION

I.

Appellant argues that the contempt proceedings violated Article III, section 38, of the Maryland Constitution. That provision states:

> No person shall be imprisoned for debt, but a valid decree of a court of competent jurisdiction or agreement approved by decree of said court for the support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony (either common law or as defined by statute), shall not constitute a debt within the meaning of this section.

In proceedings related to a divorce, section 38 has a limited scope. Although section 38 does not expressly define "debt," the exclusions in the constitutional provision make it clear that "debt" does not include the obligation to support one's spouse or

[2] The contempt order is rather unusual in that the finding of contempt itself is the only court-imposed sanction that is removed when appellant comes into compliance with the judgment after $987 is subtracted from her share of the proceeds of the sale of the marital home. Because no party has raised this issue, however, we shall not explore it further.

children. *See Middleton v. Middleton*, 329 Md. 627, 638 (1993); *see also* Dan Friedman, *The Maryland State Constitution* 179 (2011). Thus, for example, "since a parent's child support obligation is not a debt within the prohibition of § 38, the obligation of the defaulting parent may be enforced by means of the court's contempt power, including imprisonment, pending the purging of the default." *Middleton v. Middleton*, 329 Md. at 639.

Furthermore, under Md. Code (1984, 2019 Repl. Vol.), § 8-105(a)(2) of the Family Law Article, a court "may enforce by power of contempt . . . the provisions of a deed, agreement, or settlement that contain language that the deed, agreement, or settlement is incorporated but not merged into a divorce decree." Thus, a court may order that a party be incarcerated for contempt if he fails to comply with a provision in a marital settlement agreement that requires him to refinance a loan and remove his wife's name from the obligation, because that requirement is not a "debt" in the sense of an agreement to pay money. *Redmond v. Redmond*, 123 Md. App. 405, 414-15 (1998). Similarly, a court may order that a party be incarcerated for contempt if she fails to comply with a provision in a marital settlement agreement that requires her to transfer title to real property. *Droney v. Droney*, 102 Md. App. 672, 690-91 (1995). On the other hand, a court cannot jail a person for contempt if he or she fails to pay a monetary award. *McAlear v. McAlear*, 298 Md. 320, 351-52 (1984); *see also Haughton v. Haughton*, 319 Md. 460, 464-65 (1990) (holding that husband's agreement to pay joint debts "remained a debt in the classic sense and was not converted into an alimony or support obligation within the exception to § 38's bar against imprisonment for debt").

In the present case, these distinctions are of little moment. Here, the petition for contempt did not request imprisonment, nor did appellee seek imprisonment at any time during the contempt proceedings.

It is true that the show cause order (a preprinted form) states on page 2: "It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order." On page 1, however, the order informs the defendant to "read the Notice on Page 2" "[i]f jail time is requested in the Petition," which it was not.

In these circumstances, appellant never faced the prospect of imprisonment because of her failure to comply with the terms of the agreement. Therefore, even assuming for the sake of argument that any aspect of appellee's contempt petition concerned the failure to pay a debt, the petition did not implicate Article III, section 38, because it did not seek imprisonment for a debt.

II.

Appellant argues that the circuit court abused its discretion in rejecting her exceptions to the magistrate's recommendations and in holding her in contempt. We perceive no abuse of discretion.

A civil contempt must be proved by a preponderance of the evidence. *Droney v. Droney*, 102 Md. App. at 683. "Ordinarily, in a review of contempt proceedings, this Court does not weigh the evidence; rather, we merely assess its sufficiency." *Id.* at 684. We shall reverse a decision to hold a party in contempt only "upon a showing that a

finding of fact . . . was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous." *Id.* at 683-84.

When reviewing the factual findings upon which a contempt order is premised, "[i]t is not our task to re-weigh the credibility of witnesses, resolve conflicts in the evidence, or second-guess reasonable inferences drawn by the court, sitting as fact-finder[;] [r]ather, the evidence and all inferences drawn therefrom must be viewed in the light most favorable to . . . the prevailing party[.]" *Gertz v. Maryland Dep't of Env't*, 199 Md. App. 413, 431 (2011). An abuse of discretion does not occur "simply because the appellate court would not have made the same ruling" as the circuit court; instead, the circuit court's decision must "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *See, e.g.*, *North v. North*, 102 Md. App. 1, 14 (1994).

Appellant sets out five areas of alleged error. We shall address each in turn.

A. Time Was Not of the Essence

Appellant argues that "a contract for the sale of land that stipulates a certain period of time for consummation is treated in equity as formal rather than essential, meaning the period named is relative and not to be interpreted literally." She observes that her agreement with appellee "did not contain any statement to the effect [that] 'time is of the essence.'" She complains that the circuit court implicitly found time to be of the essence.

In pertinent part, the Agreement provided:

> Wife shall refinance or remove Husband's name from any liability on the mortgage and home equity loan within twelve (12) months of the date of the parties' divorce. In the event Wife is more than thirty (30) days late in

> the payment of any mortgage payment . . . or Wife is unable to refinance or remove Husband from liability within twelve (12) months of the date of the parties' divorce, the property will be listed for sale . . . at the price suggested by [a] selected real estate agent[.]

The agreement does not expressly state that time was of the essence. Moreover, because appellee did not file a brief, he has not pointed us to any acts or conduct suggesting that he informed appellant of the crucial importance of refinancing the loan and removing his name from the obligation within 12 months. Accordingly, the parties are presumed to have known that the 12-month period was "'relative'" and was not "'to be interpreted absolutely literally.'" *See String v. Steven Dev. Corp.*, 269 Md. 569, 577 (1973) (quoting *Doering v. Fields*, 187 Md. 484, 490 (1947)).

"'It is,'" however, "'just as true'" that the reference to 12 months "'means something.'" *Id.* (quoting *Doering v. Fields*, 187 Md. at 490). "'It is not to be totally disregarded. It is an approximation of what the parties regard[ed] as a reasonable time under the circumstances . . . .'" *Id.* (quoting *Doering v. Fields*, 187 Md. at 490).

Thus, even when time is not of the essence, this does not mean that "'one party can rely upon that principle to do nothing and embarrass the other.'" *Id.* (quoting *Doering v. Fields*, 187 Md. at 491). "'It means that neither party will be held strictly to the time limited, not that either party will be at liberty to disregard it entirely.'" *Id.* at 577-78 (quoting *Doering v. Fields*, 187 Md. at 491). The parties have a reasonable time, after the period specified in the agreement, to complete their obligations. *See id.* at 578. The question of reasonableness is undoubtedly informed by the length of the period specified in the agreement itself. *See id.* at 577.

In this case, the parties entered into the agreement on February 27, 2017, and the agreement was incorporated, but not merged, into the judgment on March 24, 2017. Although the agreement envisioned that appellant would refinance the loan within 12 months, appellee did not insist on strict compliance with the 12-month term. Instead, he first sent a series of three emails, dated March 20, April 20, and June 17, 2018, urging appellant to list the property for sale. Appellee did not file his petition for contempt until July 24, 2018, 16 months after the agreement was incorporated into the judgment and 17 months after the agreement was signed. The magistrate did not recommend that appellant be held in contempt until September 27, 2018, 18 months after the agreement was incorporated into the judgment and 19 months after the agreement was signed. The court did not formally find appellant in contempt until March 18, 2019, just a few days short of two years after the agreement was incorporated into the judgment and more than two years after the agreement was signed. In these circumstances, we cannot say that the court was clearly erroneous in concluding that appellant failed to comply with her obligations within a reasonable time. *See String v. Steven Dev. Corp.*, 269 Md. at 578.

B. Agreement Did Not State Exact Amount Due on Credit Card

Appellant argues that the circuit court erred in finding her in contempt for failing to make a credit card payment because the agreement did "not specify as a sum certain the balance owed on the joint credit card," but only approximated the amount. She argues that she was denied due process because, she says, she was not able to raise a defense or seek discovery on matters of "contumacious intent, material breach,

impracticality of performance, and an unconstitutional shift in burdens of proof." Her argument is singularly unpersuasive.

The agreement identifies the account as a joint credit card with a specific lender and states that it has "an approximate balance of $25,000.00." The balance probably could not have been stated with any greater degree of precision, because the balance due on a credit card may increase from day to day with the accrual of interest even if no further charges are made. It defies credulity to assert that appellant, a lawyer who was represented by counsel in the drafting of the agreement, could not identify which joint credit card she was required to pay off, when the agreement identified the lender as well as the (unusually large) balance due.

In this regard, we note that, at the hearing before the magistrate, appellant evidenced no confusion or uncertainty about the identity of the account. To the contrary, she began her cross-examination of appellee by asking him about the precise amounts due on the account (down to the penny) at various points and the precise amount of interest charged in 2017 (again, down to the penny). In addition, in her own testimony, appellant told the court that she had paid off the "entire" amount due on that account. "[T]he amount of that credit," she testified, "was zeroed out." In these circumstances, the complaint of a due process violation could not have less merit.

C. Impossibility of Performance

At the hearing before the magistrate, appellant asserted that she had been unable to refinance the loan on the marital home because of false or inaccurate information in her credit report. She also asserted that she had filed an administrative complaint with the

Office of the Attorney General. She now argues that the pending administrative complaint made it "objectively impracticable" for her to refinance the loan within 12 months of the date of the judgment. She complains that the court erred in not concluding that she had a legal excuse from strict performance.

"A breach of contract is generally defined as 'a failure, without legal excuse, to perform any promise that forms the whole or part of a contract.'" *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 51 (2007) (quoting 23 *Williston on Contracts* § 63:1 (4th ed., Supp. 2006)). The agreement required appellant to refinance the loan on the residence or to list the residence for sale if she could not refinance it. She did not (and does not) argue that she was unable to list the house for sale because of the administrative complaint or because of the allegedly false or inaccurate information in the credit report. Therefore, the circuit court did not err in holding her in contempt for failing to list the house for sale.

D. Willful Intent

Appellant argues that the circuit court erred in finding her in contempt because, she says, the evidence did not show that she willfully intended to disobey the terms of the agreement to pay the credit card debt. She points to her testimony that when she closed the joint account, she believed she had made all of the payments that were due. She argues that the evidence suggested only "a strong inference of a negligent failure to comply[.]"

"[O]ne may not be held in contempt of a court order unless the failure to comply with the court order was or is willful." *Dodson v. Dodson*, 380 Md. 438, 452 (2004).

"Willful conduct is action that is '[v]oluntary and intentional, but not necessarily malicious.'" *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 451 (2008) (quoting BLACK'S LAW DICTIONARY 1630 (8th ed. 2004)); *accord Gertz v. Maryland Dep't of Env't*, 199 Md. App. 413, 430 (2011). In determining whether the evidence was sufficient to support the court's finding of willfulness, we consider the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the prevailing party. *Gertz v. Maryland Dep't of Env't*, 199 Md. App. at 430.

Contrary to appellant's claim, there was sufficient evidence to support the trial court's finding of willfulness. In an email dated March 20, 2018, four months before appellee filed the petition for contempt, he informed appellant that he was "still owed reimbursement in the amount of $987.00" for payments that he had made on the credit card in September 2017, when the card was "in default" and the default was "jeopardizing his credit rating." On the basis of that evidence, the court could conclude that, at least as of March 20, 2018, appellant knew of her obligation to reimburse her ex-husband in the amount of that payment, but that she intentionally and voluntarily failed to fulfill that obligation in the months thereafter.

Because appellant indisputably failed to reimburse appellee for several months after he had reminded her of her obligation to do so, the court was not clearly erroneous in finding that appellant had willfully failed to comply with the terms of the judgment.

E. Monetary Damages and Attorneys' Fees

Appellant argues that the circuit court erred in awarding money damages and attorneys' fees because, she says, there was no evidence of "egregious conduct" to justify

a finding of "exceptional circumstances" to order such awards. She cites *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406 (2008), to support her argument.

In *Wang*, 183 Md. App. at 455, we held that, in "appropriate circumstances," a court may impose compensatory fines in civil contempt proceedings, even though Maryland has no statute specifically authorizing such fines. "[U]nder 'exceptional circumstances,'" we held, "a willful violation of a court order, which clearly causes the plaintiff a monetary loss, can form the basis for a monetary award in a civil contempt case." *Id*. at 455 (quoting *Dodson v. Dodson*, 380 Md. at 454).

Here, however, the court did not order appellant to pay damages stemming from her civil contempt. Rather, the court ordered appellant to pay appellee's attorneys' fees pursuant to a fee-shifting provision in the parties' agreement, which had been incorporated into a judgment. *See generally Rauch v. McCall*, 134 Md. App. 624, 637-38 (2000). The agreement specifically provided: "If either party fails in due performance of any of his or her obligation[s] hereunder, the aggrieved party shall have the right to sue for damages for the breach thereof, or to seek other legal remedies as may be available to him." The agreement did not require a finding of "exceptional circumstances" as a precondition to the award of fees. For that reason, we reject appellant's contention that the court erred in ordering her to pay her adversary's attorneys' fees.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.