

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 242

September Term, 2016

ROBERT I. SACK

v.

MARY ANN M. SACK

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: August 15, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from a dispute involving a marital settlement agreement that gave alimony to appellee for a limited term as incorporated in a judgment of divorce. A provision in the agreement allowed appellant to petition a court for modification if he suffered a 20% or greater reduction in his annual gross income. Five days after being involuntarily terminated from his job, appellant filed such a motion in the Circuit Court for Montgomery County. Appellee answered and concurrently filed a motion for contempt as appellant had failed to pay alimony. Several months later, following a hearing, the court granted appellant's petition for modification, suspended his future alimony obligations, denied his petition for retroactive modification, held him in contempt of court for failing to pay alimony, and awarded appellee \$3,000 in attorney's fees. Appellant brought this timely appeal and presents the following questions for our review¹:

- I. Did the circuit court err in denying appellant retroactive modification of alimony?
- II. Did the circuit court err in finding appellant in contempt of court for failure to pay alimony?
- III. Did the circuit court err in awarding appellee with \$3,000 in attorney's fees?

For the reasons set forth below we shall affirm.

¹ Appellant asked whether the circuit court erred/committed an abuse of discretion in: 1) ordering appellant to pay the full amount of alimony for 2015 when he was unemployed and his income for the year (2015) from severance, cashing in unused vacation time, unemployment, and some part-time consulting work was only slightly higher than appellee's income for the year; 2) ordering appellant to pay the full amount of alimony for January 2016 despite having little or no income, and when appellee's income grossly exceeded appellant's income; 3) denying appellant's request to modify his alimony obligation retroactively to the date he filed his Motion to Modify in January 2015; 4) not suspending appellant's alimony obligation prior to February 1, 2016; 5) holding appellant in contempt for failure to pay alimony when it would not have done so had the trial court retroactively modified appellant's alimony obligation; and 6) awarding appellee the sum of \$3,000.00 in attorney's fees in connection with holding appellant in contempt for failure to pay alimony when it would not have done so had the trial court retroactively modified appellant's alimony obligation?

BACKGROUND

Robert M. Sack (appellant) and Mary Ann Sack (appellee) were married on August 21, 1982, and have three children emancipated by age. Beginning in August of 2009, the parties lived separately and on August 20, 2013, appellee filed for absolute divorce in the Circuit Court for Montgomery County. Thereafter, on April 22, 2014, the parties entered into a Marital Settlement Agreement (the Agreement), resolving all issues related to the division of property and alimony. On May 13, 2014, the parties were granted a judgment of absolute divorce by the circuit court. The Agreement was incorporated, not merged, into the judgment.

The Marital Settlement Agreement contains the following relevant provisions regarding alimony:

11.a. Commencing and accounting on the 1st day of the month following execution of this Agreement and continuing on the 1st day of each month thereafter, [appellant] shall pay, without deduction and without demand, alimony to [appellee] in the amount of \$8,000 per month by direct deposit into an account designated by [appellee] and not through an earnings withholdings order, so long as he does not fall into arrears by thirty (30) days or more. The Parties shall cooperate at the uncontested divorce hearing to obtain a finding that there is no need for an earnings withholding order and to obtain Court approval of payments directly to [appellee].

11.b. Modifiability: Except as expressly otherwise provided in this subparagraph, [appellant's] alimony obligation prior to a Termination Event (as defined below) shall not be subject to modification. If [appellant] has an involuntary reduction in his income that is 20% or greater during the period of time for which he is obligated to pay alimony to [appellee] prior to a Termination Event, [appellant] may seek judicial modification of his alimony obligation set forth in subparagraph 11(a) above. The term "income" as used above means actual gross income from all sources. The Parties agree that the annual base amount of income for Robert shall be \$400,000 to determine

whether [appellant] has suffered a reduction in income meeting the required thresholds.

At the time of the divorce, appellant was employed as the chief medical officer for behavioral health in Magellan Health Service's Complete Care Division. In October 2014, approximately five months later, appellant learned he was going to be involuntarily terminated and that his last day of employment would be December 31, 2014.

On January 5, 2015, after being terminated from his position, appellant filed a motion to modify his alimony obligation in the Circuit Court for Montgomery County, arguing that his loss of employment constituted a reduction in income sufficient to warrant a modification. Appellee filed an answer to his motion on February 23, 2015, and concurrently filed a Motion to Adjudicate Defendant in Contempt of Court and for Violation of a Court Order, or in the alternative to Enforce Agreement, alleging that appellant violated the court order by failing to pay the required monthly alimony payments.

The matters were consolidated and heard by the circuit court on August 25 and 26 of 2015. After consulting with counsel from both parties, the circuit court decided to keep the matter open and scheduled an additional hearing for January 29, 2016. During the course of these three days, both parties testified and presented evidence in support of their respective positions. Appellant testified that since learning he was going to be terminated, he had attempted to secure new employment by updating his resume, reaching out to contacts, signing up for job search websites, applying to positions with several healthcare companies, and hiring a professional job recruiter. On cross examination, appellant was

asked about his spending habits after filing for modification, including the following exchanges:

[Appellee's counsel]: Yet in December of 2014 you took a personal trip to Phoenix, Arizona to play golf, correct?

[Appellant]: Yes.

* * *

[Appellee's counsel]: And at the end of December of 2014 you also took a personal trip to the District of Columbia, correct?

[Appellant]: Yes.

[Appellee's counsel]: And over New Year's you took a personal trip to Charlotte, North Carolina, correct?

[Appellant]: Yes.

* * *

[Appellee's counsel]: Okay, and beginning of January you also took a personal trip to Tampa, Florida correct?

[Appellant]: I visited my girlfriend yes.

[Appellee's counsel]: Okay, and at the end of January of 2015 you took a trip with your girlfriend to Cancun, Mexico, correct?

[Appellant]: That's correct.

[Appellee's counsel]: And you and your girlfriend stayed at the Ritz Carlton there, correct?

[Appellant]: Yes.

* * *

[Appellee's counsel]: So even though you had difficulty with financial planning, you still incurred over \$12,500 on your credit card that month [July 23, 2015 to August 23, 2015]. Correct?

[Appellant]: Could you simplify that question? What is that question? I didn't understand.

[Appellee's counsel]: You incurred \$12,550?

[Appellant]: Yes. I did.

* * *

[Appellee's counsel]: And if you could turn to the next statement which has a payment date of October 20th, 2015, that month you also charged over \$12,000. Correct? On the credit card?

[Appellant]: That's the total.

* * *

[Appellee's counsel]: And if you could turn to the next chronological statement which is at the very top. Payment due date of November 20th, 2015. That month you charged over – it was \$13,900 and change on this credit card. Correct?

[Appellant]: 919. Right.

[Appellee's counsel]: I'm looking at Bates Stamp 120. So September 30th, U-L-E-L-E. That's a restaurant in Tampa. Correct?

[Appellant]: Yeah. It is.

[Appellee's counsel]: And you charged \$709 at a restaurant in Tampa. Correct?

[Appellant]: Yeah. I'm trying to remember what that dinner was. I don't recall. But that is a restaurant in Tampa. Right.

Appellee testified that she began employment with Whole Foods, Inc., in May of 2014. She testified that she suffers from chronic medical problems involving her liver, which has required hospitalization three separate times since beginning her job. Appellee also testified that, prior to signing the Agreement, she frequently discussed her job hunt with appellant. She specifically told him that she “was in the early stages of interviewing for both Whole Foods Market and a job heading development at NIH,” while at Dulles Airport in December of 2013. Appellee stated she “would not have settled for [\$8,000 a month in alimony] had I not been confident that I would get a better job.”

On February 8, 2016, the circuit court issued its ruling. Regarding the motion for contempt of court, the court found “by clear and convincing evidence,” that appellant had not paid his alimony payments and that he had the ability to pay. As a result, the court found that he was in contempt of court. Based on appellant’s unemployment status, the court found that he met the 20% or greater income reduction required by the Agreement to petition for modification. Thus, the court granted appellant’s motion to modify his alimony obligation and suspended his payments beginning March 2016.² The court then scheduled an additional hearing in August of 2016 to revisit the matter, ordering appellant to notify appellee’s counsel if he obtained employment. Appellant’s motion to retroactively modify his alimony obligations was denied. The court, further, ruled that appellant was to pay

² The circuit court initially ruled that the payments would suspend in March 2016, but later corrected itself on the record.

appellee \$3,000 in attorney’s fees. Appellant noted this timely appeal and, thereafter, the circuit court ordered a stay of proceedings pending the outcome of this appeal.

DISCUSSION

Pursuant to Maryland Rule 8-131(c), when an action has been tried without a jury, such as the present case, “the appellate court will review the case on both the law and the evidence [and it] will not set aside the judgment of the trial court on the evidence unless clearly erroneous.” When reviewing a trial court’s award as to alimony, an appellate court will not reverse the judgment unless it concludes that “the trial court abused its discretion or rendered a judgment that was clearly wrong.” *Malin v. Miniberg*, 153 Md. App. 358, 414-15 (2003) (internal citations omitted). Additionally, all evidence contained in an appellate record “must be viewed in the light most favorable to the prevailing party below,” which in this case was the appellee. *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (quoting *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41 (1978)).

I. Did the circuit court err in denying appellant’s petition for retroactive modification of alimony?

Section 8-101 of the Family Law Article, Maryland Code provides “a husband and wife may make a valid and enforceable settlement of alimony, support property rights or personal rights.” Md. Code Fam. Law § 8-101(a). “The court may modify any provision of a deed, agreement, or settlement with respect to alimony or spousal support executed on or after April 13, 1976, regardless of how the provision is stated, unless there is a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.” Md. Code, Fam. Law § 8-103(c). Further, Section

11-101 states that “if a final disposition as to alimony has been made in an agreement between the parties, the court is bound by that agreement.” Md. Code Fam. Law § 11-101(c). However, if there is no provision in the marital settlement agreement barring court modification, “a trial court may modify the amount of alimony awarded as circumstances and justice require.” Md. Code Fam. Law § 11-107(b).

As such, there are two avenues through which a court may grant a petition for modification of alimony where the parties have entered into a marital settlement agreement: 1) the contractual avenue, by following the agreed upon terms in the parties’ modification provision; or 2) the statutory avenue, via sections 8-103 and 11-107(b) of the Family Law Article. In general, “alimony awards may be modified from time to time depending on the needs and financial circumstances of the parties.” *Langston v. Langston*, 366 Md. 490, 509 (2001), *abrogated on other grounds by Bienkowski v. Brooks*, 386 Md. 516, 529 (2005). In considering a petition for modification, a trial court has broad discretion to determine the extent and amount of alimony, *id.* at 504, and must consider specific factors in exercising its discretion. *Baer v. Baer*, 128 Md. App. 469, 484 (1999).

While the General Assembly has never explicitly delineated a provision governing retroactive modification of alimony award, the legislature “repeatedly has vested the courts with broad discretionary power when dealing with alimony[.]” *Langston*, 366 Md. at 504. Courts have interpreted this grant of authority to include awarding retroactive modification back to the date of the initial filing and even further, “as circumstances and justice require” in a particular case. *Id.* at 516.

In *Langston*, the parties entered into a marital settlement agreement, which contained a modification provision that read:

The alimony provisions of this paragraph are subject to the further order of the court and may be modified AS TO AMOUNT ONLY based proportionally on any increase or decrease in the Husbands [sic] gross income using calendar year 1996 as a base year. The alimony provisions with respect to terminating events or date may not be modified by any court of competent jurisdiction.

Id. at 495 (emphasis in original). Within a few weeks of the judgment of absolute divorce, Mr. Langston notified Ms. Langston that he had experienced a substantial decrease in income during 1998. *Id.* at 496. In response, Ms. Langston filed a motion for contempt; a few months later, Mr. Langston filed his petition for modification. *Id.* Following a hearing, the circuit court held that the parties' agreement did not prohibit retroactive modification. *Id.* at 497. An en banc panel disagreed and on review, this court held that a trial court could exercise its discretion and grant retroactive modification. *Id.* at 498.

The Court of Appeals then granted certiorari. In reviewing the separation agreement, the Court applied Maryland's well-established theory of objective contract interpretation, which holds that "a written contract will be considered ambiguous when it is susceptible to more than one interpretation when examined by a reasonably prudent person." *Id.* at 507–08 (internal citations omitted). Because the agreement was silent on the issue of retroactive modification, the Court found Section 11-107(b) dispositive as it permits a trial court, in the exercise of its discretion, to order modification of alimony payments retroactive to a date prior to the formal filing of a request for modification "as circumstances and justice require." *Id.* at 516.

The *Langston* case was then remanded because the trial court had “failed to receive evidence and make findings of fact concerning the relative financial needs and abilities of the parties in reaching its decision.” *Id.* The Court stated, “[t]he trial court must balance the interests and fairness to both the payor and the spouse receiving alimony, in exercising its discretion to modify the alimony award.” *Id.* at 517.

In the present case, the trial court granted appellant’s motion to modify alimony based upon the language of the marital settlement agreement and his unemployment status.

The court noted:

It does not seem disputed that Dr. Sack’s salary from all sources has dropped below the \$320,000.00 for the past year, as we stand here today; thus, a 20 percent reduction pursuant to the settlement agreement that permits a judicial modification in the alimony payments...It would be a challenge, as both parties have said, for the Court to go through the alimony factors as they stand. Moreover, it would just invite another filing if Dr. Sacks does get employment...I’m going to reluctantly agree with defense counsel and suspend payments, effective March of this...year and set this matter back in with the hope, once again that we will be dealing with real numbers from an actual job at that time.

Like the contract in *Langston*, the Agreement here is silent on the issue of retroactive modification. Thus, it was necessary for the circuit court to balance the competing interests to determine if “circumstances and justice” warranted retroactive modification. Appellant asserts that in light of his loss of employment, exhaustion of his severance and unemployment payments, and appellee’s new employment with Whole Foods, “circumstances and justice” required the circuit court to grant his petition for retroactive modification from January 2015 to February 2016. He alleges that appellee misled him during negotiations for the marital settlement agreement by failing to disclose she had

received a job offer from Whole Foods with a \$176,000 salary. Thus, appellant argues that appellee did not have “clean hands” when entering into the Agreement. Finally, appellant states that because his gross income from 2015 was only a “few percentage points” higher than appellee’s gross income, that “there was no legal justification” for the circuit court to deny the modification.

Conversely, appellee argues that the court’s decision not to retroactively modify alimony does not constitute error because appellant had the ability to pay alimony and “didn’t curb his spending in any way” after being terminated. Further, per the terms of the Agreement, her award of “alimony is not-modifiable based on [her] income.” This fact was one of the reasons why the bargain was struck in the first place. Appellee testified that “she would not have settled...had she not been confident that she was very close to receiving an offer for and securing a better paying job.” Finally, she argues that even with her increased income, she does not have sufficient income to cover her monthly expenses, which includes serious, long-term medical costs.

In its ruling, the circuit court clearly evaluated the testimony of the parties and determined that it would not “disavow the agreement that was negotiated after many years of separation. Separation agreements are contracts. The Court cannot and should not terminate contracts when unforeseen factors occur.” The Court then focused on the “relative financial needs and abilities of the parties” in finding that appellant had the ability to pay the monthly alimony after his motion was filed. The Court noted:

Moreover, there were trips to Cancun, and the Britts and Martha’s Vineyard, and other places, along with golf outings. And the most recent, of course,

there were expensive dinners and other non-necessary expenses. The optics are not good for someone attempting to claim that he cannot fill his contractual obligations.

Finally, the circuit court found that appellant had approximately \$1.3 million in assets.

In light of these factual findings, the court’s decision to deny appellant’s motion to retroactively modify alimony was not error. The court clearly balanced the interests and fairness to the parties in deciding not to exercise its discretion and in determining that circumstances and justice did not warrant action.

II. Did the circuit court err in finding appellant in contempt of court for failure to pay alimony?

Appellant argues, because he was unemployed and had significantly reduced income, the circuit court erred in finding him in contempt of court. Appellee disagrees, arguing that “the trial court’s finding of contempt logically flows from its decision not to retroactively modify alimony.”

According to Maryland Rule 15-207(e)(2), a trial court may only make a finding of contempt if “the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed[.]” The contemnor may defend by proving, by a preponderance of the evidence, that the failure to pay was not an act of willful or contumacious non-compliance. *Rawlings v. Rawlings*, 362 Md. 535, 544 (2001) (internal citations omitted).

In the present case, it is undisputed that appellant failed to fulfill his alimony obligation for more than eight months. He further presented no evidence that the failure to

pay alimony was not willful or contumacious. Upon examination by appellee's counsel, the following exchanges occurred:

[Appellee's counsel]: You did not pay any alimony in January of 2015 correct?

[Appellant]: Correct.

[Appellee's counsel]: You intentionally did not pay any alimony in January of 2015 correct?

[Appellant]: I chose not to.

[Appellee's counsel]: That was an intentional choice on your part correct?

[Appellant]: I'm not sure of the difference between an intentional choice and a choice but continue.

[Appellee's counsel]: It was a voluntary choice?

[Appellant]: It was a voluntary choice.

* * *

[Appellee's counsel]: Same for February, March, April, May and June of 2015 you voluntarily chose not to pay spousal support to Ms. Sack?

[Appellant]: Correct.

Later in the cross-examination, appellant admitted that during this period of time he had the ability to pay appellee:

[Appellee's counsel]: And during those months you admit that you had the ability to pay spousal support to Mrs. Sack correct?

[Appellant]: I'm not sure what you mean by the ability.

[Appellee's counsel]: You had the funds from income you were receiving during each of those months to pay the \$8,000 to Mrs. Sack?

[Appellant]: I had savings that I had during that period yes.

[Appellee's counsel]: In the earnings you were receiving from your severance was sufficient for you to not only meet your expenses but to pay Mrs. Sack the \$8,000 per month correct?

[Appellant]: Yes.

In its ruling, the circuit court stated:

I also understand Dr. Sack's desire to not cut into his capital when he is not employed, but I can't, in good conscience, rule that pursuant to Maryland Rule 15-207(e)(3), that he, quote, "Never had the ability to pay more than the amount actually paid."

* * *

And again, I'm not trying to embarrass anyone, but we can't have a double standard in the Court with one standard for working folks who are barely getting by, and another one for folks with pool care, domestic assistance, manicures, and golf green fees, and over \$7,000 in vacation expenses on their financial statements.

* * *

It is undisputed that the, from the testimony, the Court finds, by clear and convincing evidence, that the defendant has not paid \$56,000 in his alimony payments, being eight months from January until August of 2015.

To be sure, the court's finding that appellant was in contempt was fully in accordance with the testimony presented and the requirements under Maryland Rule 15-207. While the court initially held that appellant was in contempt for the seven months of unpaid alimony, the court corrected itself and stated, in the written order dated March 24, 2016, that the contempt amount would include January 2016 as well, making the total

\$64,000. The court then suspended further payment, as of February 1, 2016. We find, therefore, the circuit court’s ruling was not an abuse of discretion.

III. Did the circuit court err in awarding appellee with \$3,000 in attorney’s fees?

Appellant argues “there was no legal basis for an award of [\$3,000 in] attorney’s fees to Appellee in this matter” because the circuit court “expressly found that there was substantial justification” in appellant filing his motion to modify. Furthermore, the court found that regardless of whether appellee filed the motion for contempt, “this matter was going to be litigated one way or the other.” Appellee argues “because of the procedural posture of the case, in order to pursue her Motion for Contempt, Appellee also had to litigate and defend against the Motion to Modify.” Thus, there was “substantial justification” for appellee to “defend against the proceeding given that [appellant] unilaterally decided not to pay any support.” For these reasons, appellee asserts that the award of attorney’s fees was not error nor an abuse of discretion.

The awarding of attorney’s fees in alimony cases is governed by Section 11-110 of the Family Law Article of the Maryland Code. A court “may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.” Md. Code, Fam. Law, § 11-110(b). “Before ordering the payment, the court shall consider: 1) the financial resources and financial needs of both parties; and 2) whether there was substantial justification for prosecuting or defending the proceeding.” Md. Code, Fam. Law, § 11-110(c). In reviewing an award of attorney’s fees,

an appellate court shall reverse the decision upon a finding that there was “error of law or an abuse of discretion.” *Harbom v. Harbom*, 134 Md. App. 430, 464 (2000).

In the present case, the circuit court found:

I have considered the financial needs of both parties and whether there was justification of filing the matter. There was justification of filing the modification. It looks like it was going to be litigated no matter what. The contempt, maybe not so much. The Court having considered all the evidence in the case, the financial situation of both parties, will award \$3,000 in attorney[’s] fees payable to Mr. Feldman in the next 30 days.

Thus, the court ordered:

That [appellant] shall pay [appellee] on or before April 8, 2016, the amount of \$3,000 which represents the reasonable attorney fees [appellee] incurred in bringing the Motion for Contempt.

The court properly considered the financial resources and needs of the parties and found there was an absence of substantial justification for defending the contempt matter.

Thus, we find that the court did not err in awarding appellee \$3,000 in attorney’s fees.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**