Circuit Court for Frederick County
Case No.: 10-C-01-000768

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00047

September Term, 2017

WILLIAM BENNISON

v.

DEBBIE BENNISON

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 25, 2018

In 2006, William Bennison, appellant, was ordered by the Circuit Court for Frederick County to pay Debbie Bennison, appellee, indefinite alimony in the amount of $1,200 per month. Appellant stopped making payments in 2015, and filed a Complaint to Terminate/Modify Alimony, alleging he had lost his job. Appellee then filed an Answer and served appellant with Interrogatories and a Request for Production of Documents. Appellant failed to provide complete answers and documents and, in response, appellee filed a Motion to Compel Discovery, which was granted. Appellant did not produce the requested discovery and appellee filed a Motion for Sanctions and a Motion for Contempt. The court granted her Motion for Sanctions, ruled that her Motion for Contempt would be granted by default, and that appellant's Complaint to Terminate/Modify Alimony would be dismissed. At the subsequent contempt hearing, the court ordered appellant to pay an arrearage of $22,892.35. He brought this timely appeal and presents us with the following questions,[1] which we have rephrased and renumbered:

> I. Did the court err in granting appellee's Motion to Compel and Motion for Sanctions?
>
> II. Did the court err in finding appellant in contempt of court for non-payment of alimony and in dismissing his Complaint to Terminate/Modify Alimony?

For reasons to follow, we affirm the judgment of the circuit court.

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[1] Appellant originally presented us with the following questions: 1. Was the Court's finding of contempt by default in error because, inter alia, there was no purge provision, there was no finding of willfulness and Ms. Bennison's proffer of evidence and evidence presented was insufficient to find contempt?; 2. Were the discovery rulings erroneous in that the Motion to Compel did not comport with the Maryland Rules, there was no good faith attempt to resolve the discovery dispute, no notice that the issue would be heard at the Pre-Trial conference, no evidence or review as to whether or not discovery had actually been provided or that the requested discovery was appropriate?; 3. Was the sanction of dismissing the case and precluding evidence contrary to Maryland law?

BACKGROUND

Appellant was ordered by the Circuit Court for Frederick County, on October 4, 2006, to pay appellee $1,200 per month in indefinite alimony. On July 20, 2015, he ceased making payments and filed a Complaint to Terminate/Modify Alimony, claiming he was no longer employed. Appellee filed an Answer and, thereafter, both parties submitted financial statements.[2] She then served appellant with Interrogatories and a Request for Production of Documents on December 10, 2015. A settlement conference was held on February 1, 2016, which appellee was excused from attending.[3] The court ordered both parties to complete written discovery by May 4; update discovery and depositions by August 18; and file a Pre-Trial Statement by August 28. The merits hearing was scheduled for October 6, 2016.

Appellee, on April 25, 2016, filed a Motion to Compel Discovery, alleging that appellant had failed to fully respond to Interrogatories and a Request for Production of Documents[4] and asked for reasonable attorney's fees. In particular, appellee argued the following responses by appellant were deficient:

> **[Interrogatory 1]:** State all addresses where you have resided since October 1, 2006, including temporary addresses, state the beginning and ending dates at each address, and the reasons for leaving. Include in your answer all individuals with whom you resided for each of the periods set for and for

[2] Prior to appellee's filing of a financial statement, appellant brought a Motion to Strike [Appellee's] Answer, alleging she failed to file a financial statement, pursuant to Maryland 9-203. After appellee filed her financial statement, the court denied appellant's Motion to Strike Answer on January 4, 2016, deeming it moot.

[3] Appellee was residing in France at the time.

[4] The documents referred to by appellee included tax returns from 2010 to 2014, the documents used by appellant to calculate assets on his financial statement, and "documents related to depository accounts or investment accounts."

each individual, state that individual's age, relationship to you, and marital status.

[ANSWER]: Since 1 October 2006 I have resided at 1589 S. Dexter Way, Denver CO 80222.

[Interrogatory 14]: If anyone has, since up to the date of your Answers to these Interrogatories, contributed to the payment of your expenses, list the name and address of said person(s), the amount contributed and the dates of the contribution.

[ANSWER]: I am able to survive because I live with my wife.

[Interrogatory 15]: Identify any person(s) who reside with you, and state in detail the monthly expenses of these person(s) which you pay and the contributions, if any, which you receive from such person(s) for any expenses noted in the Financial Statement provided in this matter.

[ANSWER]: I live with my wife. She was not included on financial statement, nor is her income relevant to this matter.

[Interrogatory 23]: List each item of property in which you have any interest. For each item listed, state how it is titled, its value, the amount of any present lien or mortgage on the property, the date of acquisition of the property and identity of any other person with an interest in the property. Such property shall include, but is not limited to, improved or unimproved real property, condominiums, stocks, bonds, debentures, options, and all other securities; bank accounts; including savings accounts, checking accounts, and certificates of deposit; cash; automobiles; art objects; antiques; collections of any type having any value, e.g. stamp, coin, etc.; debts owed to you, whether secured or unsecured; business interests, whether said interest is in a sole proprietorship, partnership, joint venture, or corporation; profit sharing plans; military retirement or disability benefits; pension or retirement rights, whether vested or nonvested or matured or nonmatured; life insurance policies; federal or state disability benefits; annuities; workmen's compensation claims; claims against another arising from contract or tort; etc.

[ANSWER]: Defendant objects to this Interrogatory as being irrelevant. The only property is my home which is mortgaged.

[Interrogatory 24]: List separately each bank account, building and loan account, or other account of money on deposit in which you have [or in the

> last three (3) years, have had] any interest, either alone or together with others, or in another name, giving the type and number of the account, the name and address of the depository and the names and addresses of any other person or persons who have had or now have any interest in the same, specifying the nature and extent of that interest; and state the present balance therein. After each item listed in your Answer, give the date the account was opened, the date closed, if closed, the balance on deposit as of the date of your Answer to these Interrogatories, and the highest and lowest balance in the last three (3) years.
>
> **[ANSWER]:** Defendant objects to this Interrogatory as being irrelevant. Assets were divided pursuant to the divorce decree.

Appellee, further, noted that "the responses remain deficient," despite an attempt by appellant's counsel to clarify them.[5] In his Answer, appellant maintained the Motion to Compel Discovery failed to comply with Maryland Rule 2-303, because "the averments

[5] Appellant's counsel, on April 11, 2016, provided the following responses, which he claims cured the deficiencies:

"1. My client lives with his wife, Laura and has done so for many years.

2. The only person who 'contributes' to his expenses is his wife, and her income is irrelevant for this purpose.

3. I continue to object as to resources -- especially so given that your client did not provide any information in that regard. In any event any savings he had (outside retirement) will be long gone, spent on litigation and living expenses, by the time we litigate this case.

4. The change in circumstances is [appellant's] unemployment. At the time of trial [he] was found to have made $130,000.00. He lost his job and was unemployed (he hopes to be employed soon at a salary far, far below $130,000). What he made prior to the filing of this modification is irrelevant. If [appellant] acquires a new job, we will send you his pay information.

5. The savings listed by [appellant] are largely retirement monies. As you know, [appellee] received her share of the retirement at the time of the divorce. Given that the retirements were equalized they are not a resource for alimony now."

[were] not in numbered paragraphs" and there was "no good faith effort" to respond to his April 11, 2016 letter attempting to supplement discovery.

Appellee filed a Motion for Contempt on August 17, 2016, alleging appellant had failed to pay alimony, since a $553.85 payment was received on July 21, 2015. She claimed a total arrearage of $15,150 was owed. Appellee also filed a Motion for Continuance, on September 1, requesting that the October 2016 trial be postponed. A pre-trial conference was held on September 7, 2016, where counsel for both parties argued their respective positions regarding the Motion to Compel. Thereafter, the court continued the trial date and extended discovery for 60 days. The court, in a written Order entered on September 12, 2016, granted appellee's Motion to Compel Discovery and ordered appellant to fully answer Interrogatories 1, 14, 15, 23, and 24 within thirty days.

In response to the September 12, 2016 Order, appellant filed a Motion to Alter or Amend Order Compelling Discovery, which was denied in a written order dated October 13, 2016. On October 14, 2016, appellee filed a Motion for Sanctions, requesting that the court dismiss appellant's Complaint to Terminate/Modify Alimony, enter an order of default against appellant on her Motion for Contempt, that appellant pay attorney's fees, and "[f]or such other relief as the nature of her cause may require." Appellant filed an Answer and Counter-Motion for Fees for Bad Faith Filing on October 31, 2016, arguing that he was fully compliant in providing the requested discovery and had sufficiently

responded to the alleged deficiencies.[6] He asked the court for a hearing on "discovery issues."

The court, in a written order entered November 18, 2016, ruled upon the Motion for Sanctions:

> ORDERED, that [Appellee's] Motion For Sanctions is hereby GRANTED; and, it is further
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> ORDERED, that [Appellant's] Complaint to Terminate/Modify Alimony filed herein be and is hereby DISMISSED with prejudice; and it is further
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> ORDERED, that [Appellee's] Motion of Contempt is hereby taken in default against [Appellant]. And it is further
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> ORDERED, [Appellant] shall be prohibited from participating in any hearing or trial on the merits for any reason whatsoever including defending against any of the Plaintiff's claims, cross-examining any witnesses, offering any evidence, etc., and it is further
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> ORDERED, that [Appellant] will pay attorney fees to [Appellee] in the amount of $650 which amount is hereby reduced to judgment against [Appellant] and in favor of [Appellee.]

Appellant then filed a Motion for Reconsideration, on November 28, 2016. A hearing was held on February 7, 2017. The court declined to reconsider its November 18, 2016 decision, albeit granting appellant's request to dismiss his Complaint to Terminate/Modify Alimony *without prejudice*. A hearing on the Motion for Contempt was heard on February 15, 2017, wherein the court found appellant in contempt and ordered him to pay an arrearage of $22,892.35. Appellant, thereafter, brought this appeal.

[6] In support of his argument, appellant attached his Interrogatory responses. However, they reflected the same exact answers submitted to appellee prior to the September 12, 2016 Order compelling discovery. Neither did the Answer contain any of the previously requested documents.

ANALYSIS

I. Did the court err in granting appellee's Motion to Compel and Motion for Sanctions?

Appellant maintains that, by granting appellee's Motion for Sanctions and "eliminating [his] ability to defend himself," the court committed an error of law and abused its discretion in entering a default judgment against him as a sanction for discovery violations. He argues "the fact that [he] was not allowed to participate in the hearing should invalidate any finding with regard to arrears or attorney's fees," citing *Greer v. Inman,* 79 Md. App. 350 (1989), for the proposition that "damages must be based on something more than the proffer of the Complainant." According to him, the court did not provide notice that the Motion to Compel would be argued at the September 7, 2016 pre-trial conference. He also takes issue with appellee's initial Motion to Compel, stating it was deficient under Rule 2-303 because it did not contain "paragraphs or averments." Finally, he alleges appellee failed to engage in a good faith effort to resolve a discovery dispute, violating Rule 2-431.

Appellee, conversely, contends the court's action was appropriate, under Maryland Rule 2-433, as a sanction for appellant's failure to comply with the court's September 12, 2016 Order to fully answer Interrogatories. She insists she engaged in good faith discovery and her Motion to Compel was fully in accordance with all applicable Rules.

We agree. Maryland Rule 2-432(b)(1) allows a "discovering party, upon reasonable notice to other parties" to "move for an order compelling discovery if…a party fails to answer an interrogatory[.]" "If a person fails to obey an order compelling discovery, the

court, upon motion of a party…may enter such orders in regard to the failure as are just," including…

> (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;
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> (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or
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> (3) An order…dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party.

Maryland Rule 2-433(a–c).

"[A] trial judge has a large measure of discretion in applying sanctions for failure to adhere to the discovery rules." *Mason v. Wolfing*, 265 Md. 234, 235 (1972). "Even when the ultimate penalty of dismissing the case or entering a default judgment is invoked, it cannot be disturbed on appeal without a clear showing that this discretion was abused." *Id.* (internal citations omitted).

In the present case, appellee initially sent Interrogatories on December 10, 2015, and the answers were returned by appellant incomplete. Appellant claimed he sent "revised" answers in an April 11, 2016 letter, however, a review of the record shows the Interrogatories in question remained unanswered. The court then granted appellee's Motion to Compel Discovery, ordering appellant to fully answer the Interrogatories that had been sent nine months earlier. In his answer, appellant stated he *had* provided sufficient responses in his April 11 letter. However, the April 11 letter, as reproduced in

Footnote 5, did not provide full answers.[7] As a result, the court's decision to order appellant to comply with the discovery requests was not error and fully within its discretion.

Appellant also had sufficient notice that the Motion to Compel would be argued at the pre-trial conference because it was an outstanding motion that had not been ruled upon by the court. Maryland Rule 2-504.2 allows a multitude of issues to be presented at a pre-trial conference, including "[a]ny other matter that the party wishes to raise[.]" Both parties filed "Pre-Trial Statements," prior to the hearing on the Motion to Compel. In his "Pre-Trial Statement," appellant acknowledged that there were discovery disputes and claimed appellee had not provided supplemental discovery. Appellee's "Pre-Trial Statement" stated that "[she] filed a Motion to Compel," that no ruling or order had been received, and that "[d]iscovery [was] incomplete." Appellant also participated fully in the court proceeding, arguing his position, and did not request a delay in responding to appellee's arguments or further indicate to the court that he was not prepared to proceed.

Appellant's argument that appellee's Motion to Compel is deficient under Maryland Rule 2-303 for lacking "paragraphs or averments" is also without merit. Rule 2-303 requires "[a]ll averments of claim or defense [to be made] in numbered paragraphs" and "[e]ach cause of action shall be set forth in a separately numbered count." It further instructs parties that each averment "shall be simple, concise, and direct." The record shows appellee's Motion to Compel listed each averment in *lettered,* instead of *numbered*

[7] At oral argument for the present case, appellant's counsel conceded that she never provided information involving her client's past income and his current wife's income, despite the court order compelling them to do so.

paragraphs. The requests for relief are, however, listed numerically. We do not view appellee's deviation from the rule as dispositive. Especially in light of the Rule's clarification that "[n]o technical forms of pleadings are required," we hold appellee's Motion to Compel was sufficiently pled for purposes of Rule 2-303.

Regarding Rule 2-431, which requires the filing of a certificate "describing the good faith attempts to discuss [discovery disputes] with the opposing attorney," the record shows appellee fully complied with the Rule. Her motion contains a "Certificate of Good Faith" and attached were communications between her attorney and appellant's counsel, which attempted to resolve the dispute. The response from appellant's attorney even contains a statement that, "This serves as a good-faith effort to resolve a discovery dispute."

Moreover, appellant's argument that the discovery violation sanctions were improper because they "eliminated [his] ability to defend himself" is without merit. Rule 2-433(a)(2) authorizes a court to "[refuse] to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence." That is precisely what the court did here. The court ordered, as a sanction for failure to answer Interrogatories, that appellant was "prohibited from participating in any hearing or trial on the merits [of the Motion for Contempt] for any reason whatsoever including defending against any of the Plaintiff's claims, cross-examining any witnesses, offering any evidence, etc."[8]

[8] The record shows that the court did, however, allow appellant's counsel to make objections and present a closing argument.

Appellant's reliance on *Greer v. Inman* is misguided. There, the court entered a default judgment against a defendant in a tort action, but only as to liability, not damages. 79 Md. App. at 352–53. This Court, on appeal, remanded the case, holding the lower court failed to send defendant notice of the default judgment and denied his Motion to Revise without "[articulating] the reasons for its denial." *Id.* at 356. "Although unnecessary to the determination of appellant's motion to revise," the court found that "while the default judgment settled the issue of liability, she should have been permitted to cross examine witnesses and present evidence in mitigation of *damages*." *Id.* (emphasis added). *Greer* reflects a long-standing legal precedent in Maryland that "the entry of a judgment by default in a claim for unliquidated damages merely establishes the non-defaulting party's right to recover." *Id.* (internal citations omitted). Conversely this case does not involve unliquidated damages in a tort action, but rather, the non-payment of court-ordered alimony. Past due alimony is not the same as damages. Moreover, we disagree with appellant's argument that the court, in the case at bar, made a decision based on appellee's proffer alone. As discussed in further detail below, the court's finding of contempt was based not only on appellee's argument and evidence, but on appellant's own stipulation that he owed alimony to appellee. As such, *Greer* is unpersuasive.

Appellant also argues that the Court acted improperly because it failed to hold a hearing on his Answer to Motion for Sanctions and Counter Motion for Fees. Maryland Rule 2-311(f) provides "[a] party desiring a hearing on a motion…shall request the hearing in the motion or response under the heading 'Request for Hearing."' In the present case, appellant's title page stated "ANSWER TO MOTION FOR SANCTIONS AND

COUNTER MOTION FOR FEES FOR BAD FAITH FILING AND REQUEST FOR A HEARING." The body of the motion, however, did not make a request under the heading "Request for Hearing," as required by Rule 2-311(f). Furthermore, in his request for relief, he asked for a hearing on "discovery issues," not on the motion for sanctions or his counter motion. Under these circumstances, it was reasonable for the court to view the request as one regarding general discovery issues.

In sum, the sanctions imposed fully comported with the Maryland Rules and the court did not abuse its discretion.

II. Did the court err in finding appellant in contempt of court for non-payment of alimony and in dismissing his Complaint to Terminate/Modify Alimony?

Appellant avers the court erred in finding him in contempt of court for non-payment of court-ordered alimony. Because the court's order did not contain a purge provision, nor a sanction, appellant contends he is being held in "perpetual contempt – never to be purged, never to be eliminated from his record." He, further, argues the evidence admitted by appellee at the Contempt hearing was inadmissible, lacking foundation and authentication.

Maryland Rule 15-207(e), which governs contempt proceedings for non-payment of court-ordered alimony[9], states, in part:

> (2) *Petitioner's Burden of Proof.* Subject to subsection (3) of this section, the court may make a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing.

[9] The Rule, although not relevant to this case, also applies to non-payment of child support.

> (3) *When a Finding of Contempt May Not Be Made.* The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment, or (B) enforcement by contempt is barred by limitations as to each unpaid spousal or child support payment for which the alleged contemnor does not make the proof set forth in subsection (3)(A) of this section.
>
> (4) *Order.* Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to comply with the direction to make payments.

"If the court finds a contempt, the court must issue a written contempt order that specifies, in clear language, the amount of arrearage due, the sanction for the contempt, and what the contemnor must do to purge him or herself of the contempt." *Jones v. State*, 351 Md. 264, 273 (1998) (*citing* Md. Rule 15-207(e)).

In the case before us, we note, initially, that appellant's counsel made the following statement, on the record, at the start of the hearing on the Motion for Contempt: "We stipulate he didn't pay." In her closing argument, appellant's counsel again specified, "I do not – we acknowledge that the moneys weren't paid." During the course of the hearing, appellee admitted several exhibits, including appellant's 2015 W-2 form, a letter dated March 21, 2016, several of his pay stubs from 2016, and multiple letters offering him employment. The record reveals that, while appellant's counsel did, indeed, object, she

failed to articulate the reasoning behind several of the objections.[10] Moreover, the record shows that appellee testified to her personal knowledge and the authenticity of Exhibits 1 and 2. Several of the other Exhibits were provided by appellant during discovery.

In our view, the court was within its "sound discretion" in admitting this evidence. *See Mines v. State*, 208 Md. App. 280, 291 (2012) ("The admissibility of evidence is left to the sound discretion of the trial court…The decision of whether to allow or preclude the admission of evidence is generally committed to the sound discretion of the trial court.") (internal citations and quotations omitted). In light of appellant's stipulation and the evidence demonstrating his ability to pay, we hold the court did not err in finding, by clear and convincing evidence, that appellant was in contempt of court because he "[had] not paid the amount owed[.]" *See* Maryland Rule 15-207(e)(2).

We further disagree with appellant's argument that he is being held in "perpetual contempt" because the court's order lacked a purge provision. At the conclusion of the hearing, the court ruled:

> I do find the defendant to be in contempt of this Court's order as he had the ability to pay all or at least some portion of the court-ordered alimony since the time of the granting of the order but had failed to do so. I find the arrears to be $22,892.35, and I will grant judgment to the plaintiff against the defendant in that amount. I will also grant an earnings withholding order in

[10] Regarding [Appellee's] Exhibit 1, appellee's bank statement showing the last alimony payment she received, appellant's counsel objected that it "is unnecessary." This is not a proper basis for an objection.

For [Appellee's] Exhibit 2, a document listing the attorney's fees incurred by appellee, appellant's counsel objected, stating, "This, this was filed in mid-August of 2016. These attorney's fees go back to 2015." Similarly, this does not reflect a recognized objection under Maryland law.

> the – for the amount of the $1200 per month, and I will order an additional $300 per month to be paid towards the arrears.

While the court may not have specifically used the term "purge provision," it is clear from the above language that appellant may purge himself of the contempt by paying off the arrearage of $22,892.35. Pursuant to Rule 15-207(e)(4), the court included "directions that [appellant] make specified payments" of $300 a month, in addition to his normal alimony obligation, until the total arrears are paid off. Moreover, the "sanction" imposed was the requirement to pay the arrears. The court, in its discretion, decided not to impose any additional sanctions on appellant, such as incarceration. As such, we hold the court's order was fully in accordance with Maryland Rule 15-207(e).

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