Circuit Court for Frederick County
Case No. C-10-FM-19-001826

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1589

September Term, 2021

VALBONA K. DASILVA

v.

TODD J. LOWBER

Reed,
Albright,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 4, 2022

By a judgment of absolute divorce ("JAD"), docketed in the Circuit Court for Frederick County on October 29, 2020, the marriage of Valbona K. DaSilva ("Ms. DaSilva") and Todd J. Lowber ("Mr. Lowber") was dissolved. The JAD granted Ms. DaSilva the right to live in the marital home located at 1802 Weybridge Road, Frederick, MD, for a period of three years, provided that she: 1) be responsible for the payment of a joint tax debt owed to the federal government; and 2) "be responsible for and indemnify" Mr. Lowber for "all expenses associated with the" marital home. The JAD additionally provided:

> In the event the [p]laintiff [Ms. DaSilva] is able to refinance the marital home, and remove [d]efendant from all encumbrance thereto, and extinguish the outstanding federal tax debt with the United States Treasury, [p]laintiff shall then receive the Home free and clear of any claim from [d]efendant. In the event the [p]laintiff fails to timely pay the parties' outstanding joint federal tax debt, the Home shall be listed for sale, and the net proceeds shall first go to paying off the parties' joint federal tax debt (which is approximately $31,000.00). From the remaining proceeds[, p]laintiff shall be reimbursed for all tax payment[s] she personally made from the date of divorce, and then the remaining proceeds shall be split equally between the parties[.] . . .

After the JAD was signed, Ms. DaSilva did not pay any of the expenses associated with the marital home nor did she pay the joint tax debt. Accordingly, on March 23, 2021, Mr. Lowber filed a petition for constructive civil contempt against Ms. DaSilva for failure to meet her obligation as set forth in the JAD. Mr. Lowber, on June 11, 2021, filed a supplement to the petition for contempt. In his supplement, Mr. Lowber alleged, insofar as here relevant, that the holder of the mortgage on the marital home "intend[ed] to repossess" the house because Ms. DaSilva had failed to make any of the required mortgage payments. It was also alleged that Ms. DaSilva had failed to pay all, or any part of, the

joint tax obligation that was mentioned in the JAD. A merits hearing was held on June 22, 2021, in regard to the petition for contempt. After that hearing, the court, on July 22, 2021, docketed an order that read, in material part, as follows:

> ORDERED, that as to Movant's Petition to find Respondent in civil contempt for non-compliance with the requirement of payment of expenses associated with the home as provided on page 2 of the aforesaid Judgment, Movant's Petition is granted, and Respondent[,] Valbona DaSilva[,] is found in contempt of that portion of this [c]ourt's [o]rder; and it is further,
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> ORDERED, that as to Movant's Petition to find Respondent in civil contempt for non-payment of the parties' outstanding tax debt, as referred to on page 3 of the aforesaid Judgment, Movant's Petition is granted and Respondent[,] Valbona DaSilva[,] is found in contempt thereof[;] [a]nd it is further,
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> ORDERED, for purge for said contempt finding for non[-]payment of taxes, as required by the aforesaid Judgment of Absolute Divorce, the former marital home, known as 1802 Weybridge Rd.[,] Frederick[,] M[D.], shall be forthwith sold by a Trustee; and it is further,
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> ORDERED, that Alan Winik, Esq., be and he is hereby appointed Trustee for the purpose of selling the aforesaid former marital home, pursuant to Maryland Rules, and he shall be entitled to such commissions as are customary and traditional or as set by Rule[;] and it is further[,]
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> ORDERED, that as purge for non-payment of the mortgage, that the mortgage shall be paid in full when the marital home is sold.

Ms. DaSilva did not file an appeal from the July 22, 2021 order of contempt. Therefore, the order became final on Monday, August 23, 2021.

Mr. Lowber, on August 24, 2021, filed a "motion regarding proceeds of sale" in which he alleged that, as of August 1, 2021, there was a $51,631.22 delinquency on the mortgage that encumbered the marital home. In his request for relief, Mr. Lowber asked

that Ms. DaSilva be required to show good cause why he was not entitled to an offset from the proceeds from the sale of the marital home in the amount of $51,631.22.

Ms. DaSilva filed a motion to strike Mr. Lowber's motion on the grounds that it was untimely because Mr. Lowber's petition for contempt had not asked for an offset for failure to make the mortgage payments. Mr. Lowber filed an answer in which he asserted that he was not filing a motion to modify the JAD but instead, his motion was to enforce an obligation created by the JAD. The circuit court denied Ms. DaSilva's motion to strike.

A hearing was held on Mr. Lowber's motion for an offset on October 28, 2021. At the outset of the hearing, the judge was advised that the trustee, who was appointed to sell the marital home, had succeeded in doing so. The agreed upon sales price was $550,000.00 and the total loan balance, as of October 31, 2021, was $356,643.59. The total unpaid delinquent portion of the mortgage, which included interest, late fees, principal and taxes, equaled $59,317.80. But, of that delinquent amount, $27,890.67 was the amount delinquent as of the time of the JAD. That meant that if Ms. DaSilva had made all of the mortgage payments required by the JAD, from the time of the divorce until the time of the hearing, she would have paid $31,427.13 ($59,317.80 - $27,890.67) more than she did.

At the hearing, Ms. DaSilva's counsel argued that Mr. Lowber was, in essence, attempting to convince the court that it should grant him money damages due to her contempt. Counsel for Ms. DaSilva pointed out, accurately, that the Court of Appeals, in *Dodson v. Dodson*, 380 Md. 438, 446 (2004), had held that "an award of compensatory damages is ordinarily inconsistent with the nature of a constructive civil contempt action under Maryland law." Mr. Lowber's counsel countered that his client was not seeking

compensatory damages as a result of the court's contempt finding; instead, he was seeking to enforce the promise Ms. DaSilva had made to be responsible for, and to indemnify him for, all expenses connected with the marital home.

Ms. DaSilva's counsel also maintained that Mr. Lowber was not entitled to a setoff for any part of the principal due on the mortgage because payment of principal was not an expense within the meaning of that term as set forth in the JAD. Counsel for Ms. DaSilva, asserted, without citation to any authority, that although "expenses" within the meaning of the JAD did include late charges, interest and taxes, it did not include principal payments.

Counsel for Ms. DaSilva argued, in the alternative, that "if the [c]ourt is inclined to either disagree with me or find some inherent authority to entertain the request for relief," the amount of the setoff should not be based on the full amount of the delinquency ($59,317.80) because under the terms of the JAD, she was not responsible for the $27,890.67 mortgage delinquency that existed on the date of the divorce. According to Ms. DaSilva, the figure that the court should look at, in determining, what, if any, offset Mr. Lowber was entitled to was $31,427.13 ($59,317.80 - $27,890.67). Counsel for Ms. DaSilva pointed out that it would be unfair to give Mr. Lowber a credit for the full amount of the delinquency. According to Ms. DaSilva's counsel, the credit should be 50% of the last mentioned figure because if Ms. DaSilva had made all of the mortgage payments from the date of the JAD to present, all that would mean is that there would be, at the time of settlement, $31,427.13 more in equity than there is presently. If that had happened, the increase in equity would have been split 50-50, which means that Mr. Lowber would be entitled to a credit of 50% of the increase in equity or $15,713.57.

After hearing argument, the trial judge stated that he was not hearing Mr. Lowber's motion for a setoff pursuant to Title 15 of the Maryland Rules of Procedure, which governs contempt actions. Instead, he heard the motion while sitting in equity. The court next said that after carefully reading the language of the JAD, he concluded that the promise to be responsible for "all expenses associated with the" marital home was an "all-encompassing" promise which meant that Ms. DaSilva was responsible for paying principal, interest, late fees, taxes, etc., on the marital home. He further opined that if Ms. DaSilva had paid all of the expenses on the marital home up to November 8, 2021 (the date that the house was to go to settlement), there would be $31,427.13 more in equity to be divided between the parties.

During the hearing, there was a long discussion as to the exact numbers involved. Afterwards, the court concluded as follows:

> My goal here is to place Mr. Lowber in the same position at settlement than he would have been had Ms. DaSilva paid [the mortgage] from the date of judgment through today. I'm fearful that with the documents that I have before me[,] that there may be a windfall to Mr. Lowber and I'm going to keep this record open for counsel to provide further evidence of what would make him whole without a windfall.

The court directed each counsel to submit a memorandum by November 5, 2021, discussing whether Mr. Lowber was entitled to a credit of "$31,284.00 [sic]" or 50% of that figure.

Ms. DaSilva's counsel filed a post-hearing memorandum in which he said that it was anticipated that after paying all of the mortgage payments, interest, late fees and taxes and the $31,000.00 debt owed to the federal government, there would be approximately

$86,000.00 available for distribution. According to counsel's calculation, if Ms. DaSilva had made all mortgage and other payments on the house from the date of the divorce to the date of settlement, the proceeds to be divided would have increased by $31,399.68. Although counsel for Ms. DaSilva reiterated his view that there should be no credit given to Mr. Lowber, counsel maintained that if there were going to be any credit given, it should be 50% of $31,399.68 or $15,699.84.

Counsel for Mr. Lowber filed a memorandum in which he said that the total arrearage was $31,427.20, which was the amount, according to counsel for Mr. Lowber, that his client should receive as a credit.

The court, on November 10, 2021, signed an order that read, in material part, as follows:

> ORDERED, that Movant's Motion be granted in part and denied in part; and it is further
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> ORDERED, that after settlement of their home at 1802 Weybridge Road, Frederick, MD 21702, the sum of $15,781.66 shall be paid to Movant from Respondent DaSilva's one-half (1/2) share of the net proceeds.

Ms. DaSilva filed a timely appeal in which she raises a single issue: "Whether the [c]ircuit [c]ourt erred in awarding the [d]efendant/[a]ppellee a credit from the [p]laintiff's/[a]ppellant's share of the net proceeds from the sale of the marital residence."[1]

[1] In appellant's brief, she raises three subsidiary issues phrased as follows:

(continued . . .)

DISCUSSION

Although the order signed by the circuit court gave Mr. Lowber only 50% (approximately) of what he asked for, he nevertheless asks that we affirm the judgment of the circuit court.

Ms. DaSilva points out that the JAD was silent as to what would happen if she failed to meet her duty to be responsible "for all expenses associated with the" marital home. She argues that because the JAD was silent in this regard "the [c]ourt went outside the four corners of the [JAD], which it cannot do." We reject that argument. Just because the remedy utilized by the circuit court was not specifically mentioned in the JAD, does not mean that the court exceeded its jurisdiction when it signed the order here at issue. Md. Code (2016 Repl. Vol.) Family Law Article ("FL"), § 8-213(a) provides: "Any order,

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(. . . continued)

- Whether the [c]ourt's award of $15,781.66 to the [d]efendant/[a]ppellee from the proceeds of the sale of the marital residence was proper under the terms of the judgment of absolute divorce.

- Whether the [c]ourt's award of $15,781.66 to the [d]efendant/[a]ppellee from the proceeds of the sale of the marital residence was a proper exercise of the [c]ourt's equitable jurisdiction.

- Whether the [c]ircuit [c]ourt correctly determined the amount of the credit from the [p]laintiff/[a]ppellant's share of the net proceeds from the sale of the marital residence.

As can be seen, all three of the subsidiary issues are subsumed into the one issue set forth, *supra*, at page 6.

award or decree entered under this subtitle, may be enforced under the Maryland Rules." The JAD was entered under Subtitle 2 of the Family Law Article Title 8, entitled "Property Disposition in Annulment and Divorce." Under FL § 8-213(a), the trial judge had the right to enforce the provisions of the JAD wherein Ms. DaSilva agreed to be responsible for and indemnify Mr. Lowber for expenses associated with the marital home.

In her brief, Ms. DaSilva acknowledged, at least tacitly, that so long as the relief granted is equitable, the court could grant an offset in the exercise of its equity powers. In this regard, appellant argues:

> When the [c]ourt stated that it was invoking its equity jurisdiction, the Judge expressed a desire to "put Mr. Lowber in a position that he would have been in from [the date of divorce] through November 1, 2021 . . . ." To the extent that the [c]ourt attempted to fashion an equitable remedy, the remedy was not equitable because it gave Mr. Lowber a windfall at Ms. Da[S]ilva's expense. The [c]ourt incorrectly calculated the amount of the credit, and failed to take into account that, equitably, Ms. Da[S]ilva would have been entitled to contribution from Mr. Lowber had she made the mortgage payments.

(Reference to record extract omitted. Emphasis added.)

Appellant's "windfall" argument is expressed in her brief as follows:

> Mr. Lowber lost *nothing* when Ms. Da[S]ilva availed herself of the "Biden forbearance law." The JAD contemplated that Ms. Da[S]ilva would retain the house and pay the tax debt. In exchange, Mr. Lowber would be relieved of the tax debt. If Ms. Da[S]ilva failed to pay the tax debt, the house would be sold, Mr. Lowber would be relieved of the tax debt and would receive a share of equity in the house. Stated differently, what Mr. Lowber stood to gain through the JAD was relief from the tax debt; no more, no less. When the mortgage payments accumulated during the period of forbearance, Mr. Lowber lost nothing because the most he stood to gain, had Ms. Da[S]ilva made the tax payments and paid the mortgage, was to be relieved of the tax debt. As a result of the [c]ourt's contempt order and the order granting the motion regarding sales proceeds, Mr. Lowber obtained a

> windfall – he was relieved of the tax obligation[2] *and* he received half of the net proceeds from the sale of the residence plus the credit awarded by the [c]ourt. This Court should not allow that to happen.

The above argument is flawed because the JAD imposed more obligations on Ms. DaSilva than she acknowledges. It is not true that the JAD simply contemplated that Ms. DaSilva would retain the house and pay the tax debt. Under the JAD, in exchange for her right to retain the house, she agreed to be responsible for (and indemnify Mr. Lowber for) all expenses associated with the marital home. And, she still would have no right to "retain the house after three years" even if she had paid the tax debt and made all mortgage payments on time because, in order to get title to the house and the concomitant right to stay there, she would have had to refinance the house and remove Mr. Lowber's name from all encumbrances connected with the marital home. Put another way, if Ms. DaSilva had paid both the tax debt and made the mortgage payments on time but failed to convince a lender to remove Mr. Lowber's name from the mortgage and any other encumbrance on the marital home, Ms. DaSilva would not have had a right to remain in the house after three years. Under such circumstances, Mr. Lowber, as a tenant in common, would have had the right to have the house sold and in such an event, his equity in the house would have increased by 50% of the mortgage payments Ms. DaSilva had made.

In summary, the JAD provided that in exchange for Ms. DaSilva's agreement to fulfill certain obligations that would otherwise have been joint obligations, she was granted the right to refinance the mortgage indebtedness that encumbered the marital home and,

[2] Ms. DaSilva did not "relieve" Mr. Lowber of his tax obligation inasmuch as he had to pay one-half of it from the proceeds from the sale of the marital home.

provided that she could convince a lender to remove Mr. Lowber's name from "all encumbrances," she would get title to the house free and clear. But, she would not get sole ownership of the house under three scenarios. Scenario one: If she didn't pay off the joint tax obligation; scenario two: If she paid off the tax debt but failed to fulfill her obligations to be responsible for payment of all expenses connected with the marital home or; scenario three: If she paid off the tax debt and made all of the mortgage payments on time, but could not convince a lender to allow her to refinance the mortgage and to release Mr. Lowber from all responsibility under the mortgage. As can be seen, as things developed, Ms. DaSilva got the benefit of being able to reside in the marital home for over one year without fulfilling any of her obligations. Mr. Lowber, under these circumstances, clearly did not receive a windfall, when the court allowed him to enforce his right to receive 50% of the mortgage payments that Ms. DaSilva had agreed to pay but did not.

Ms. DaSilva, in the alternative, argues that the trial judge's award of 50% of the mortgage expenses, aside from being an inequitable windfall, was erroneous for another reason. Her alternative argument is as follows:

> However, in [the] event [that Mr. Lowber was entitled to a 50% credit for the mortgage payments not made], Ms. DaSilva would have a claim for contribution against Mr. Lowber. *Crawford v. Crawford*, 293 Md. 307 (1982); *Manns v. Manns*, 308 Md. 347 (1987). Thus, while Mr. Lowber would have received $15,699.84 more following the sale of the house, Ms. DaSilva would have an equitable claim against him in that same amount as a result of paying the carrying costs.
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> There is nothing equitable in awarding Mr. Lowber more from the sale of the home than he would have received under the JAD provision regarding payment of taxes. And since the JAD is silent as to the remedy for a failure to make the mortgage payments, there is nothing equitable in awarding Mr. Lowber more than he would have received if Ms. DaSilva had carried the

> financial burden of maintaining the jointly held asset. "The general rule is that a co-tenant who pays more than his or her pro-rata share of the carrying charges on jointly held property is entitled to contribution from the other co-tenants." *Manns, supra*, 308 Md. at 3[52-]53 (citing cases).

The "general rule" that Ms. DaSilva cites does not govern when, as here, one co-tenant contractually agrees to make the mortgage payments. The Court of Appeals made this crystalline in *Crawford*, 293 Md. at 315.

Ms. DaSilva next contends that the trial judge erred in construing the JAD to mean that she was required to indemnify Mr. Lowber for the principal due on the mortgage. The contention is expressed as follows:

> Further, at the hearing and in post[-]hearing briefs, Ms. Da[S]ilva argued that the amount of the accrued principal payments should not be included in any calculation of the amount of any credit due to Mr. Lowber. As set forth in the table above, the accrued principal from the date of divorce through the [c]ourt's [o]rder was $8,728.73. The accrued principal should not have been included in the credit calculated by the [c]ourt. The JAD states that Ms. Da[S]ilva would indemnify Mr. Lowber for "all expenses associated with the Home." While interest, taxes and insurance are expenses associated with the home, payments of principal are not. The judgment of absolute divorce could have stated that Ms. Da[S]ilva was obligated to indemnify Mr. Lowber for principal payments. It did not. The judgment of absolute divorce could have required Ms. Da[S]ilva to pay the mortgage. It did not – it only required her to indemnify Mr. Lowber for "expenses associated with the Home."

As mentioned earlier, the JAD obligated Ms. DaSilva to "be responsible for and indemnify"[3] Mr. Lowber for "all expenses associated with the" marital home. Ms.

[3] *Black's Law Dictionary* (7th Ed. (1999) page 773) provides:

> **Indemnify against liability**. A right to indemnity that arises on the

(continued . . .)

DaSilva's argument which cites no authority, is, to say the least, puzzling. It leaves us to guess as to why she contends that the JAD should be interpreted to mean that she was responsible for interest payments on the mortgage debt but not for principal payments on that same debt. We can think of no reason, and appellant suggests none, why the JAD should be interpreted to mean that Ms. DaSilva's agreement to be "responsible for and indemnify [Mr. Lowber] for all expenses associated with the" marital home should be interpreted to mean that Ms. DaSilva had not agreed to indemnify Mr. Lowber for the principal payments that were due every month under the mortgage. "It is well settled that it is not our function to seek out the law in support of a party's appellate contentions." *Benway v. Port Authority*, 191 Md. App. 22, 32 (2010) (quotation marks and citation omitted). Moreover, in *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997) we stated: "[B]ecause appellants, in their brief, cited no authority for their position, their contention was deemed waived" (citing *Oroian v. Allstate Ins. Co.*, 62 Md. App. 654, 658 (1985)). Accordingly, because Ms. DaSilva cites no authority to support her position, her argument

(. . . continued)

> indemnitor's default, regardless of whether the indemnitee has suffered a loss.
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> > *"Indemnity against Liability* – Where the indemnity is against liability, the cause of action is complete and the indemnitee may recover on the contract as soon as his liability has become fixed and established, even though he has sustained no actual loss or damage at the time he seeks to recover. Thus, under such a contract, a cause of action accrues to the indemnitee on the recovery of a judgment against him, and he may recover from the indemnitor without proof of payment of the judgment." 42 C.J.S. *Indemnity* § 22 (1991).

that the trial judge should not have included the principal due on the mortgage when calculating the delinquency, is waived.

CONCLUSION

The circuit court appropriately exercised its equitable powers in this case by enforcing the JAD in such a manner as to put Mr. Lowber in the position he would have been in if Ms. DaSilva had fulfilled her obligations as set forth in the JAD. Accordingly, the judgment entered below shall be affirmed.[4]

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[4] The credit that the circuit court gave to Mr. Lowber was $15,781.66, which is 50% of $31,563.32. In her brief, Ms. DaSilva states that the total delinquency, counting principal, from the date of the JAD to the date of sale of the marital home was $31,399.68; 50% of that figure is $15,699.84, which is about $82.00 less than the number that the court calculated. Nevertheless, counsel for Ms. DaSilva said at oral argument before us, that he did not want us to reverse due to that slight difference.