2014 IL App (2d) 131114-U
No. 2-13-1114
Order filed September 17, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KELLY ANN COWEN, n/k/a Kelly Ann Harmon, Petitioner-Appellee, and SCOTT RICHARD COWEN, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 07-DV-374 Honorable James S. Cowlin, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: On petitioner's petition for a rule to show cause for respondent's failure to refinance two properties pursuant to a marital settlement agreement, the trial court lacked jurisdiction to modify the agreement by requiring respondent to sell the properties if he could not refinance.

¶ 2 Respondent, Scott Richard Cowen, appeals from an order of the circuit court of McHenry County requiring him to refinance two residential properties and, in the event he is unable to do so, to sell those properties. Because the trial court lacked jurisdiction to order the sale of the properties, we vacate that part of the order but otherwise affirm.

¶ 3 I. BACKGROUND

¶ 4 The marriage of respondent and petitioner, Kelly Ann Cowen (n/k/a Kelly Ann Harmon), was dissolved on November 14, 2008. The dissolution judgment incorporated a marital settlement agreement (MSA). Pertinent to this appeal, article IX of the MSA disposed of various real and personal property, including a residence at 28685 Harbor Drive, Barrington, and a rental property at 917 Ski Hill Road, Fox River Grove. The MSA provided as to both properties that respondent was to assume responsibility for the respective mortgages and to "hold [petitioner] free, harmless and indemnified thereon." The MSA further provided that within 90 days of its effective date respondent "shall refinance the property removing [petitioner] as a debtor on all mortgages."

¶ 5 On June 27, 2013, petitioner filed a *pro se* petition for a rule to show cause. The petition alleged that respondent had never refinanced either property. The petition requested that respondent be ordered to, within 90 days, either refinance the properties or sell them.

¶ 6 The trial court conducted an evidentiary hearing at which respondent and petitioner proceeded *pro se*. Respondent acknowledged that the MSA required him to refinance the two properties. He was to do so to remove petitioner from any liability on the notes and mortgages.

¶ 7 According to respondent, the lender, Bank of America, would not allow him to refinance the Harbor Drive property. After trying unsuccessfully to obtain refinancing from other lenders, respondent sought refinancing through HAMP.[1] He was approved for a three-month trial

[1] HAMP is an acronym for the Home Affordable Modification Program. It is a program offered through the United States Departments of the Treasury and Housing and Urban Development. Home Affordable Modification Program, http://www.makinghomeaffordable.gov /programs/lower-payments/Pages/hamp.aspx (last visited Sept. 11. 2014).

beginning in August 2013. If he successfully completed the trial, he would be able to refinance and petitioner's name would not be on the new loan and mortgage.

¶ 8 When the trial court asked him why it should not hold him in contempt for failing to refinance within 90 days, respondent answered that "[i]t was impossible." He explained that, because of the sudden drop in real-estate values, he would have needed two to three hundred thousand dollars for a down payment, which he did not have.

¶ 9 According to respondent, as of November 2008, the Harbor Drive home was valued at about $650,000. The most recent appraisal in June 2012 showed a value of $524,000. At the time of the hearing, the mortgage balance was around $800,000, including penalties and interest. Even if respondent were able to obtain refinancing under HAMP, it would apply only to the first mortgage. He would still have to renegotiate the second mortgage of about $100,000.

¶ 10 Respondent's assets consisted of bank accounts, furnishings, fixtures, equipment, and vehicles worth about $80,000. He had a profit-sharing plan worth about $70,000. He was the sole owner of a motorcycle-parts importing business. His 2012 tax return showed income of about $50,000.

¶ 11 Respondent's father created a revocable trust to help respondent obtain the refinancing under HAMP. As beneficiary, respondent received $4,100 per month under the trust. The trust terminated in June 2013.

¶ 12 The Ski Hill property was valued at around $100,000. Respondent hoped that he could sell it for that amount. He owed $100,000 at the time of the hearing. Respondent received $1,300 rent per month from that property.

¶ 13 Respondent planned on refinancing his Harbor Drive residence first to preserve a place for the parties' daughters to stay. After doing so, he would focus on the Ski Hill property.

¶ 14 The trial court ruled that, because respondent had failed to refinance the two properties, he had violated the MSA. However, the court found that he did not willfully fail to comply, because, due in large part to the real-estate crash that occurred around the time of the dissolution, he was financially unable to refinance. Therefore, the court found that he was not in contempt.

¶ 15 Nonetheless, it ordered respondent to continue with the HAMP process. The court ordered him to refinance the Harbor Drive property by January 15, 2014. If he failed to do so, he was required to list the property for sale immediately, even if doing so resulted in a "short sale." The court noted that any sale depended on market conditions and that it could not control how long it would take to sell the property. The court commented that, if respondent could not sell the property after making a good-faith effort to do so, then the property would likely go into foreclosure and that was something the court had no control over.

¶ 16 As for the Ski Hill property, the court ordered respondent to refinance it by March 19, 2014. If he could not do so, then he must sell it.

¶ 17 Respondent filed a motion to reconsider, which the trial court denied. He then filed this timely appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, respondent, who is represented by counsel, contends that the order requiring him to sell the two properties must be vacated for several reasons. First, he argues that the trial court lacked the authority to rewrite the MSA to require him to sell the properties. Second, he maintains that, because the MSA was a contract, petitioner needed to show that she suffered damage from his alleged breach, which she failed to do. Third, he asserts that it is impossible to comply with the order, because any short sale would require the lenders approval and neither he nor the court has control over the lenders. Although petitioner has not filed a response brief,

because the record is simple and the issues can be decided without an appellee's brief, we will decide the merits of the appeal. See *In re Parentage of K.E.B.*, 2014 IL App (2d) 131332, ¶ 28.

¶ 20 Section 510(b) of the Illinois Marriage and Dissolution of Marriage Act prohibits the modification of any provisions in a dissolution judgment related to property disposition, unless the court finds the existence of conditions that justify reopening the judgment under state law. 750 ILCS 5/510(b) (West 2012). A court has jurisdiction to modify such provisions only if circumstances exist to reopen the judgment as in any civil case. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010). Thus, a court may modify a property-settlement provision only in accordance with the parameters of section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). *In re Marriage of Hall*, 404 Ill. App. 3d at 164. The court does not have jurisdiction to engraft new obligations onto a dissolution judgment or otherwise equitably modify it. *In re Marriage of Hubbard*, 215 Ill. App. 3d 113, 117 (1991). On the other hand, a court retains jurisdiction to enforce the dissolution judgment. *In re Marriage of Hall*, 404 Ill. App. 3d at 164. Whether a trial court has jurisdiction is a question of law that we review *de novo*. *In re Marriage of Hall*, 404 Ill. App. 3d at 164.

¶ 21 In this case, the trial court had jurisdiction to enforce the MSA. To that end, it could enforce the property-settlement provisions via a contempt proceeding. See *In re Marriage of Berto*, 344 Ill. App. 3d 705, 711 (2003); *In re Marriage of Admire*, 193 Ill. App. 3d 324, 328 (1989). Therefore, the court had jurisdiction to rule on petitioner's petition for a rule to show cause, including deciding whether respondent acted contumaciously in failing to refinance the two properties. As stated, it found that respondent was not in contempt. Petitioner has not appealed that ruling.

¶ 22 Although the trial court had jurisdiction to decide whether respondent was in contempt, it lacked the jurisdiction to modify the property-settlement provisions of the MSA. The MSA required that respondent refinance the two properties. It did not provide that if he failed to do so he must sell the properties. When the court ordered respondent to sell the properties, it engrafted a new obligation onto the dissolution judgment.[2] It lacked jurisdiction to do so. See *In re Marriage of Hubbard*, 215 Ill. App. 3d at 117. Because the court had no jurisdiction to modify the MSA, we vacate that part of the order that required respondent to sell the properties in the event he is unable to refinance them.[3]

¶ 23 Although we vacate the order to the extent that it required respondent to sell the two properties, we emphasize that respondent has a continuing duty under the dissolution judgment to make all good-faith efforts[4] to refinance both properties. Should he fail to do so, petitioner may seek enforcement of that obligation pursuant to a rule to show cause. The trial court, if it

---

[2] To the extent that the court's ruling required it to interpret the MSA, our review is *de novo*. See *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1017 (2011).

[3] Although respondent has not challenged expressly the trial court's jurisdiction to order him to sell the properties, any waiver or forfeiture in that regard is not a limitation on our jurisdiction and we may disregard it. See *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29; *West Suburban Bank v. Lattemann*, 285 Ill. App. 3d 313, 318 (1996).

[4] Because an MSA is considered a contract (*In re Marriage of Hendry*, 409 Ill. App. 3d at 1017), it includes an implied covenant of good faith and fair dealing (*Pielet v. Hiffman*, 407 Ill. App. 3d 788, 799 (2011)). Thus, respondent must perform reasonably and with proper motives and not arbitrarily, capriciously, or inconsistently with the parties' reasonable expectations. See *Pielet*, 407 Ill. App. 3d at 799.

were to find that respondent acted contumaciously in failing to refinance the two properties, may impose all appropriate sanctions to compel respondent's compliance.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we vacate that part of the order of the circuit court of McHenry County requiring respondent to sell the two properties.

¶ 26 Affirmed in part and vacated in part.