

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-511

LORI A. JOHNSON

vs.

ROBIN L. JOHNSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant husband appeals from a judgment of contempt entered by a judge of the Probate and Family Court, dated June 16, 2017.<sup>1</sup> The defendant claims that he was not in contempt and that the distribution of the proceeds from the sale of the parties' marital home was erroneous and contrary to the parties' separation agreement.<sup>2</sup>

Contempt. We discern in the defendant's arguments no cause to disturb the finding of contempt, and affirm so much of the judgment as finds the defendant in contempt. To hold a party in

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<sup>1</sup> The judgment of contempt was entered on the plaintiff's first amended complaint for contempt, filed December 10, 2014. The judgment of contempt also incorporated the April 30, 2015 order that distributed the net sale proceeds from the sale of the parties' marital home.

<sup>2</sup> The separation agreement was incorporated into the parties' judgment of divorce nisi, and the relevant provisions survived as an independent contract.

contempt, the judge must find "clear and convincing evidence of disobedience of a clear and unequivocal command." Birchall, petitioner, 454 Mass. 837, 838-839 (2009). We review a finding of contempt for abuse of discretion. Smith v. Smith, 93 Mass. App. Ct. 361, 363 (2018).

It is undisputed that the defendant failed to pay both a \$15,000 lump sum to the mortgage holder and monthly mortgage payments as required by the judgment of divorce. The defendant argues that he was not in contempt because he did not purposefully disobey the orders. Specifically, the defendant contends that it was impossible to make the required payments because the mortgage holder would not accept a partial payment and because the mortgage holder was wrongly identified in the separation agreement. However, the defendant's argument ignores the fact that, when the misnomer of the mortgage holder and the refusal to accept partial payments were brought to the judge's attention, she ordered the defendant to make the required payments into an escrow account, which the defendant never did. The order to make payments toward the mortgage, whether directly to the mortgage holder or into an escrow account, was a clear and unequivocal command.

The judge also did not abuse her discretion in finding the defendant in contempt as to his failure to cooperate in good

faith in the sale of the marital home.<sup>3</sup> The defendant argues that the plaintiff did not present any evidence showing the defendant's failure to cooperate toward the sale of the house. However, the absence of evidence results from the parties' agreement to proceed by representation of counsel instead of holding an evidentiary hearing. Moreover, because the defendant has not provided us with a complete record (i.e., the record lacks a transcript of the hearing on February 4, 2015), we cannot know whether the judge heard other evidence or representations on the defendant's cooperation or lack thereof. See M.M. v. D.A., 79 Mass. App. Ct. 197, 205-206 (2011) (court unwilling to disturb contempt judgment without ability to review complete transcript). There was no error or abuse of discretion in the judge's finding of contempt.

Net sale proceeds. The defendant contends that the distribution of the net sale proceeds from the sale of the marital home is contrary to the judgment of divorce. Specifically, the defendant contends that the judge erred in

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<sup>3</sup> To the extent that the judgment of contempt incorporates the finding in the order, dated February 4, 2015, on the plaintiff's amended complaint for contempt, that the defendant failed to list the marital home for sale, the finding as to that issue is vacated. The record shows that the October 31, 2014 divorce judgment directed the defendant "forthwith" to list the property for sale, and that the defendant entered into a listing agreement on November 19, 2014. There was, accordingly, no clear and undoubted disobedience of a clear and unequivocal command.

"reimbursing" the plaintiff for the entirety of the amounts the defendant failed to pay toward the mortgage arrears, when the parties had agreed to split equally any net sale proceeds.

There appears to be some merit in the defendant's argument, and a possibility that the judge's decision to credit the entirety of those payments for the plaintiff's account was the result of a miscalculation.<sup>4</sup>

Conclusion. We vacate the portion of the judgment dividing the net sale proceeds of the marital home, as set out in the April 30, 2015 order. In addition, to the extent that the judgment incorporates the finding in the order dated February 4, 2015, that the defendant failed to list the marital home for sale, the finding as to that issue is vacated. We affirm the

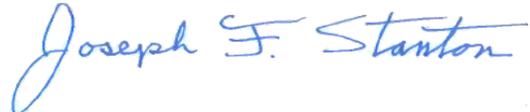
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<sup>4</sup> Because the defendant did not make payments toward the mortgage arrears as he was required to do by the separation agreement, the outstanding mortgage balance was higher than it would have been. The net sale proceeds of the marital home, after satisfaction of the mortgage, were approximately \$109,000, and one-half of the net sale proceeds would have been \$54,500. But had the defendant paid the required \$36,019.77 before the sale of the home (or made that amount available in escrow for application to the mortgage at the time of sale), the net sale proceeds would have been \$36,019.77 higher. Specifically, the net sale proceeds would have been \$145,019.77 (i.e., \$109,000 + \$36,019.77), and one-half of the net sale proceeds would have been \$72,509.89. Thus, the failure of the defendant to make the required payments toward the mortgage arrears reduced the plaintiff's proceeds from \$72,509.89 to \$54,500, a reduction of \$18,009.89.

remainder of the judgment. The matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Green, C.J.,  
Blake & Kinder, JJ.<sup>5</sup>),



Clerk

Entered: January 14, 2020.

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<sup>5</sup> The panelists are listed in order of seniority.