

PITTSBURGH LEGAL JOURNAL

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CAPSULE SUMMARY

PLJ

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OPINIONS

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**John DeSantis v. Zoning Board of Adjustment of the City of Pittsburgh v.
City of Pittsburgh v. Thomas W. Schweitzer**

Vested Rights in Building Permits—Appeal

When no one appealed the issuance of building permit an occupancy permit was issued subject to conditions. Owner satisfied the five factors set forth in *Commonwealth, Department of Environmental Resources v. Flynn*, 344 A.2d 720 (Pa. Cmwlth 1975) determining whether one has vested rights as a result of permits issued by government as follows:

1. his due diligence in attempting to comply with the law;
2. his good faith throughout the proceeding;
3. the expenditure of substantial unrecoverable funds;
4. the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
5. the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use.

(Lynn E. MacBeth)

Joel P. Aaronson for John DeSantis.

Lawrence H. Baumiller for City of Pittsburgh.

Arnold M. Horovitz for Thomas W. Schweitzer.

No. SA08-768. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

James, J., October 5, 2009—This appeal arises from the decision of the Zoning Board of Adjustment of the City of Pittsburgh, (hereinafter “Board”) dealing with a 3-story structure which was originally constructed as a large single-family residence owned by Thomas W. Schweitzer (hereinafter “Owner”) and located at 920 North Lincoln Avenue in the City’s Allegheny West neighborhood of the City of Pittsburgh (hereinafter “Subject Property”). The Subject Property is located in a Multi-Family-Moderate Density (hereinafter “RM-M”) zoning district. The Owner who lives on the third floor of the Subject Property seeks a variance for the use of the first and second floors of the structure on the Subject Property as commercial offices, a use not permitted in the RM-M zoning district.

On January 31, 2008, a hearing was held at which time the Owner amended his appeal to the Board to include a claim of vested rights to proceed based upon building permits issued prior to a change in the City of Pittsburgh zoning map from an NDI-Neighborhood Industrial zoning district to the RM-M. On March 3, 2008, Owner’s counsel notified the Board that it had reached a settlement with Allegheny West Civic Council (hereinafter “AWCC”); that he and opposing counsel would not be submitting proposed findings of fact and conclusions of law; and that they would not be ordering a transcript of the proceedings.

On March 27, 2008, the Board issued an Opinion sustaining the Owner’s appeal and ordering the Chief of the Bureau of Building Inspection to issue an occupancy permit for the use of the first and second floors of the Subject Property for office use (limited) subject to conditions. Soon after the issuance of the March 13, 2008 opinion, John DeSantis (hereinafter “Appellant”) notified the Board that he had not agreed with the settlement and wished to order a transcript and file proposed findings.

On April 2, 2008, the Board notified all parties that it would hold a second hearing on May 8, 2008. On June 5, 2008, the Board issued an Opinion sustaining the Owner’s appeal and ordering the Chief of the Bureau of Building Inspection to issue an occupancy permit for the use of the first and second floors of the Subject Property for office use (limited) subject to conditions.

Before this Court is the appeal of the Appellant from the decision of Board. Where the trial court takes no additional testimony, the scope of review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987).

An abuse of discretion will be found only where the findings are not supported by substantial evidence. *Larson v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286, 288 (Pa 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Hearing Board of Adjustment*, 462 A.2d 637 (Pa. 1983).

In *Petrosky v. ZHB of Upper Chichester Twp.*, 402 A.2d 1385 (Pa. 1979) the Pennsylvania Supreme Court set forth the following test to determine whether a property owner has vested rights with respect to permits, adopting the Commonwealth Court’s reasoning in *Commonwealth, Department of Environmental Resources v. Flynn*, 344 A.2d 720 (Pa. Cmwlth. 1975).

The Commonwealth Court in *Flynn*, *supra*, outlined five factors that must be weighed in determining whether one has acquired vested rights as the result of permits issued by government. These factors are:

1. his due diligence in attempting to comply with the law;
2. his good faith throughout the proceeding;
3. the expenditure of substantial unrecoverable funds;
4. the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
5. the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

Petrosky, 402 A.2d at 1388.

The Board found that, even though the Owner proceeded at a “glacial pace” preparing the Subject Property for commercial occupancy, the Owner proceeded under a building permit which he reasonably believed covered commercial improvements. The Owner’s belief was based on the advice of the building inspector who routinely visited the Subject Property. The issuance of the building permit was never appealed despite the fact that it was common knowledge in the community what the Owner intended to do with the Subject Property. The objectors in this case took positive steps to oppose the commercial occupancy only after it was apparent that a commercial tenant had been found and a lease was imminent. Finally, the Board found that there will be no adverse

effect on either individual property rights or the public health or safety.

The Board heard the witnesses and reviewed the exhibits. It is the duty of the Board in the exercise of its discretionary power to determine whether a party has met its burden. *A.A. Shaniah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299, 1304 (Pa. Cmwlth. 1994). The record supports findings and the decision of the Board will be affirmed.

ORDER OF COURT

AND NOW, this 5th day of October, 2009, it is ORDERED, ADJUDGED and DECREED that the decision of the Board is hereby affirmed and the Appeal is dismissed.

BY THE COURT:

/s/James, J.

**Jacquelyn E. King and Phyllis Walton, Executrixes
by and on behalf of the Estate of Naomi Ruth Brown v.
Jonathan D.C. Brown and Maggie A. Brown, husband and wife**

Orphans' Court Division Jurisdiction—Civil Division Jurisdiction—20 Pa. C.S.A. §711—20 Pa. C.S.A. §712(3)—Judgment on the Pleadings—Fraudulent Inducement

1. Plaintiffs, two of decedent's surviving children, alleged that Defendants, the decedent's son and his wife, fraudulently induced decedent to execute a deed to her house on her deathbed, based on Defendants' statements that it was needed in order for them to obtain financing to pay for the house.

2. The court entered judgment on the pleadings in favor of Plaintiffs, in the amount of \$75,000 against Defendants.

3. The answer filed by Defendants contained no specific denials or responses to the allegations made by Plaintiffs, simply stating that the case belonged in Orphans' Court and requesting that the court strike the action.

4. 20 Pa. C.S.A. §711 provides a list of circumstances in which the Orphans' Court Division should exercise mandatory jurisdiction over an issue. 20 Pa. C.S.A. §712 (3) provides that any issue not enumerated by §711 may be handled by the Orphans' Court Division or by any other appropriate division.

5. Because this case raises a breach of contract claim, which is not an enumerated issue, the Civil Division has proper jurisdiction over this matter.

(Lynn E. MacBeth)

C. Christopher Hasson for Plaintiffs.

Jonathan & Maggie Brown, *Pro se*.

No. GD 08-2633. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Hertzberg, J., March 3, 2010—This Opinion explains the December 16, 2009 Order of Court granting Plaintiffs' Motion for Judgment on the Pleadings, which Defendants have appealed to the Superior Court.

On July 7, 2009 Plaintiffs filed their first Amended Complaint in the above action. The essence of the Amended Complaint alleges that Defendants fraudulently induced the decedent, Naomi Brown, into transferring ownership of her house to Defendants for consideration of \$1. Plaintiffs, Jacquelyn King and Phyllis Walton, and Defendant, Jonathan Brown, are the children of the decedent, Naomi Brown. Plaintiffs allege that Defendants and the decedent signed a Standard Agreement for the Sale of Real Estate establishing that the decedent would sell her home to Defendants for \$75,000.

Plaintiffs allege that Defendants repeatedly assured the decedent that they would pay her \$75,000 for the sale of her home, but that they were having trouble obtaining the financing. Plaintiffs allege that finally, with the decedent on her deathbed, Defendants convinced the decedent that in order to obtain the necessary financing to complete the sale of the house, she needed to sign the Deed over to Defendants. *See* Amended Complaint filed July 7, 2009. The Deed with which Defendants presented the decedent indicated consideration of \$1 for the transfer of the property. After decedent's death, Defendants refused to pay the \$75,000 to the Estate for the purchase of the home causing Plaintiffs to bring this Breach of Contract action seeking the \$75,000 in damages.

On October 16, 2009 Plaintiffs filed a Motion for Judgment on the Pleadings. Argument was held on the Motion on December 14, 2009 with both parties appearing. On December 16, 2009 an Order was entered granting Plaintiffs' Motion and entering a judgment of \$75,000 against Defendants. Defendants filed a Notice of Appeal on January 15, 2010. On January 21, 2010 the undersigned issued an Order directing Defendants to file a Concise Statement of Errors Complained of on Appeal (Concise Statement) within 21 days. The Order explained that any issues not included in the timely filed Concise Statement would be deemed waived. Meanwhile, on January 21, 2010 the Superior Court returned the appeal for amendment because Defendants failed to identify to which Court they were appealing. Defendants filed an Amended Notice of Appeal on January 25, 2010. The Superior Court once again returned the appeal on January 27, 2010 for failure to provide proof of notice to opposing counsel, the trial court and the court reporter. On February 11, 2010 Defendants' time to file a Concise Statement expired.

Without a Concise Statement for reference, one cannot be sure of Defendants' complaints on appeal; therefore, this Opinion will provide a brief explanation of the December 16, 2009 Order. On August 4, 2009 Defendants filed their Answer to Amended Complaint. The Answer contains no specific denials or responses to the allegations made by Plaintiffs in their Amended Complaint. Defendants' Answer simply claims that the case belongs in the Orphans' Court Division and requests that the Court strike the action. Relative to Defendants' limited response, 20 Pa. C.S.A. §711 provides a list of circumstances in which the Orphans' Court Division should exercise mandatory jurisdiction over an issue. 20 Pa. C.S.A. §712(3) provides that any issue not enumerated by

§711 may be handled by the Orphans' Court Division or *by any other appropriate division*. (emphasis added). The Pennsylvania Supreme Court has affirmed the position that any issue unenumerated in 20 Pa. C.S.A. §711 is properly within the jurisdiction of the Civil Division when brought before it. *Baskin & Sears v. Edward J. Boyle Co.*, 506 Pa. 62, 66, 483 A.2d 1365, 1367 (1984). The case at bar raises a Breach of Contract claim, which is not an enumerated issue in §711; therefore, the Civil Division has proper jurisdiction over this matter.

On October 16, 2009 Plaintiffs filed a Motion for Judgment on the Pleadings, Defendants filed no response to the Motion. Defendants are required to file an Answer to the Complaint, which admits or denies each averment of fact in the Complaint. A failure to deny averments to which a pleading is required has the effect of an admission. Pa.R.C.P. No. 1029 (a-b). Because Defendants effectively admitted all of Plaintiffs' allegations, a Judgment in favor of Plaintiffs was appropriate. In fact, the Superior Court has supported the position that a Judgment on the Pleadings is appropriate where a Defendant fails to respond to the allegations in a Complaint pursuant to Pa.R.C.P. 1029(b). *See Swift v. Milner*, 371 Pa.Super. 302, 538 A.2d 28 (1988). Therefore, granting Plaintiffs' Motion for Judgment on the Pleadings was proper.

BY THE COURT:
/s/Hertzberg, J.

BMC—The Benchmark Management Company v. Bedford Resort Partners, Ltd.

Pa. R.C.P. 2179(a)—Venue—Preliminary Objections—Transfer to Another County

1. Action brought in Allegheny County was transferred to Bedford County on Defendant's preliminary objections raising improper venue because Defendant does not regularly do business in Allegheny County.

2. A plaintiff may bring an action against a corporation or similar entity in a county where its registered office or principal place of business is located, where it regularly conducts business, where the cause of action arose, and/or where a transaction or occurrence took place out of which the cause of action arose. Pa. R.C.P. 2179(a).

3. The mere solicitation of business within a certain county does not render venue there appropriate. The fact that one of Defendant's agents, not an employee, has an office in the county is a tenuous connection and would not be a reasonable basis for proper venue.

(Lynn E. MacBeth)

Jacqueline Koscelnik for Plaintiffs.

Kevin P. Allen for Defendants.

No. GD 09-3976. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., March 10, 2010—Plaintiff BMC—The Benchmark Management Company (“BMC”) filed a complaint on February 27, 2009 against Defendant Bedford Resort Partners (“Bedford”) for breach of contract. On January 28, 2010, I sustained Defendant's preliminary objections raising improper venue because Bedford does not regularly do business in Allegheny County, and transferred the case to the Court of Common Pleas of Bedford County. Plaintiff appeals from that order.

The standard of review for an order sustaining preliminary objections to improper venue is abuse of discretion. “On review of a trial court decision regarding venue, [the Superior Court] will reverse only for an abuse of discretion. The determination depends on the individual facts of each case and will not be disturbed if the trial court's decision is a reasonable one in view of those facts.” *Battuello v. Camelback Ski Corp.*, 598 A.2d 1027, 1028 (Pa.Super. 1991) (citations omitted).

A Plaintiff may bring an action against a corporation or similar entity¹ in a county where its registered office or principal place of business is located, where it regularly conducts business, where the cause of action arose, and/or where a transaction or occurrence took place out of which the cause of action arose. *See* Pa.R.C.P. 2179(a). In this case, the parties essentially agree that the only issue before this court is whether Bedford regularly conducts business in Allegheny County. Bedford contends that although it does advertise to Allegheny County residents, those acts are merely incidental to doing business and do not rise to the quantity or quality of acts required to constitute regularly doing business. BMC contends that not only does the amount of advertising and selling by Bedford to Allegheny County residents exceed the levels required to constitute regularly doing business, but it alleges that Bedford also maintains a key employee in Allegheny County.

In *Purcell v. Bryn Mawr Hospital*, 579 A.2d 1282, 1285 (Pa. 1990), our Supreme Court reiterated the rule that “business contacts must be judged on the basis of their ‘quality’ and ‘quantity.’” Those “acts of the corporation must be distinguished: those in ‘aid of a main purpose’ are collateral and incidental, while ‘those necessary to its existence’ are ‘direct.’” *Id.* Furthermore, “[t]he mere solicitation of business within a certain county does not render venue there appropriate.” *Battuello*, 598 A.2d at 1029.

Plaintiffs contend that the fact that 23.64% of Defendant's annual room revenue comes from Allegheny County residents makes Allegheny County an appropriate venue. In *Battuello*, the Superior Court held that advertisement aimed at solicitation of business of Philadelphia residents to go to the Monroe County ski resort was insufficient in both quality and quantity to constitute doing business in Philadelphia County. *Id.* Similarly, in *Braun v. Seven Springs Farm, Inc.*, 147 P.L.J. 80 (C.P. Allegh. 1998), *aff'd* 745 A.2d 34 (Pa.Super. 1999), Plaintiffs also attempted to assert venue in Allegheny County because Seven Springs solicits the business of Allegheny County residents. Judge Bernard McGowan² held that “Seven Springs conducts its business where its products and services are located not where its hoped for customers live - that business, and proper venue, are outside Allegheny County.”

These two ski resort cases are analogous and indistinguishable from the case at bar. It makes only logical business sense for Defendant to solicit the business of Allegheny County residents, as it is located just two hours away. Additionally, Allegheny County is the most populous county within that distance from the resort, so it is no surprise that almost a quarter of Defendant's business is related to Allegheny County residents. This fact, in itself, is not enough to confer venue in Allegheny County.

Plaintiffs also contend that the fact that one of Defendant's agents has an office in Allegheny County makes venue appropriate in Allegheny County. "Since at least January 1, 2009 to the present date, the regional manager for Omni, the outside company which has managed the Bedford Springs Resort from January 1, 2009 to the present date, has maintained an office in Pittsburgh, Pennsylvania. That regional manager, who is not an employee of the defendant, has the responsibility for not only the Bedford Springs Resort but also multiple other Omni-run properties unrelated to the Bedford Springs Resort or this dispute." Stipulation 13.

Following Plaintiff's logic, if that regional manager, over whom Defendant exerts no control, relocated tomorrow to another county, then venue would be proper in that county as well. It is unreasonable for proper venue to be based on such a tenuous connection.

For the foregoing reasons, the Superior Court should affirm the decision of this court sustaining Defendant's preliminary objection raising improper venue.

Strassburger, A.J.

Dated: March 10, 2010

¹ The parties have stipulated that Bedford is a Pennsylvania Limited Partnership. *See* Stipulation Regarding Certain Facts Related to Venue ("Stipulation") 1.

² Judge McGowan preceded me as Calendar Control Judge for the Civil Division in the Allegheny County of Common Pleas.

Michael J. Tomczak v. Michelle Tomczak

Enforcement of Child Support Agreement

1. The parties entered into a Marriage Settlement Agreement that included a provision for the payment of child support by the father. The Agreement did not have any reference to the incomes of the parties, was based on the needs of the children, and did not include language as to the modifiability of the child support provision. When the father stopped paying the agreed upon amount and filed a petition for modification, the mother filed a petition to enforce the agreement.

2. The father indicated that he had lost his employment, with the mother indicating that the agreement was an enforceable contract absent proof that performance was impossible. The father did not demonstrate an inability to comply and, therefore, enforcement was ordered.

3. The settlement agreement was recognized to be a separate, enforceable agreement that would be modifiable only upon the father showing an impossibility of performance. Child support is modifiable in situations where enforcement of a non-modifiable provision would result in the incarceration of the obligor who is unable to pay.

4. The father in this case did not show a substantial and material change in circumstances that would render him unable to comply with the child support agreement. He had other sources of income and the court was to consider all sources of income, including property and investments, and the father's earning capacity. Capital gains must also be included in the calculation of income for such child support enforcement procedures.

(Christine Gale)

Timothy G. Uhrich for Plaintiff/Father.

Carol S. Mills McCarthy for Defendant/Mother.

No. FD 03-007578. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

OPINION

Bubash, J., November 23, 2009—In this matter, Plaintiff Michael Tomczak ("Father") appeals from this Court's June 23, 2009 Order which dismissed his exceptions to the Master's Report and Recommendation dated February 19, 2009. For the reasons that follow, this Court's decision should be affirmed.

Factual and Procedural History

Father is the Obligor in this child support matter. He and Michelle Tomczak (Mother) married on February 17, 1996. Two children were born of the marriage. During the marriage, Father was a professional football player. The parties separated in 2003, and Father filed the divorce action. In order to resolve all economic as well as child custody matters in the divorce, the parties entered into a comprehensive written Marital Settlement Agreement (MSA) dated April 24, 2007. That Agreement was incorporated but not merged into the parties May 3, 2007 divorce decree. The MSA provides that Father pay \$4250.00 per month for support of the couple's 2 minor children, said sum to be reduced to \$2125.00 when the oldest child becomes emancipated. There is no reference in the MSA to the income of either party; instead, it is based on the determined need of the children.

It is that MSA which is the subject of the current dispute. In the summer of 2008, Father ceased paying the support provided for in the MSA and filed a petition for modification pursuant to 23 Pa.C.S. 3105(b). Mother filed a petition to enforce the MSA. The two petitions were consolidated and Special Master Patricia Miller heard the matter on January 20, 2009.

Father, to support his petition for modification, presented evidence to the Master that he had lost his wage-paying job with Wheeling Pittsburgh Steel on August 8, 2008 through no fault of his own. Mother's argument against the modification was that the MSA, as a contract, was enforceable absent proof that performance by Father was impossible. Finding that Father had not demonstrated the inability to meet his contractual obligation, the Master denied Father's petition for modification and enforced the Agreement.

Father filed exceptions, which were denied by this Court on June 23, 2009. Father appealed and, in response to this Court's Order of August 3, 2009, timely filed his Concise Statement of Matters Complained of on Appeal as follows:

"A. Whether the Court erred in denying Father's petition for modification where Father established a substantial change in circumstances when his job was eliminated due to a merger of his former employer with a larger corporation.

B. Whether the Court erred in attributing capital gains to Father's income calculations when capital gains considered by the Court were clearly realized in the parties' equitable distribution determination, and as such, subsequent consideration in a support proceeding is contrary to law.

C. Whether the Court erred in determining that Father had substantial separate assets as a basis to deny modification when Father's assets were encumbered by the parties' marital debt that Father assumed in equitable distribution and are therefore unavailable to father to supplement his support obligation."

Opinion

First, this Court notes that this matter is governed by the terms of the parties' MSA. It is well established that the law of contracts applies to Marital Settlement Agreements. Under the law of contracts, the court must ascertain the intent of the parties when interpreting a contractual agreement. *Kripp v. Kripp*, 849 A.2d 1159 (Pa. 2004). The language of this contract is clear and unambiguous. Where, as here, a property settlement agreement did not merge into the divorce decree, it stands as a separate contract, is subject to the law governing contracts and is to be reviewed as any other contract. *Simeone v. Simeone*, 525 Pa. 392, 399, 581 A.2d 162, 165-166 (1990). There is no language in the instant contract regarding the income of the parties nor is there language allowing for modification due to a "substantial change in circumstances." Therefore, Father may prevail in his request for modification only if he can demonstrate the impossibility of performance or that he is otherwise entitled to modification under 23 Pa.C.S. 3105(b).

As a general matter, when a litigant challenges the decision of a Master, this Court must perform an independent review of the matter to determine if the record adequately supports the Master's findings and recommendation. *Neil v. Neil*, 731 A.2d 156 (Pa.Super. 1999). The trial court's subsequent decision will be upheld if supported by competent evidence and if no clear abuse of discretion occurred. An abuse of discretion is more than an error of judgment; it must entail a misapplication or overriding of the law or a manifestly unreasonable exercise of judgment or one based on bias, ill will, prejudice or partiality *Fennell v. Fennell*, 753 A.2d 866 (Pa.Super. 2000). The reviewing court may affirm the order of the trial court on appeal where it is correct on any legal ground or theory, regardless of the reason relied on by the trial court. *Purdy v. Purdy*, 715 A.2d 473 (1998).

The Master in this matter correctly determined that when faced with the request to reduce a support award while at the same time being asked to enforce contracted for support at a higher amount, the court must consider the entire picture of the obligor's income and the needs of the children.

In Father's first matter on appeal, he argues that, having demonstrated a change in circumstances – the loss of his wage-paying job – he is entitled to modification. In doing so, Father relies on arguments he made in his exceptions concerning support, but ignores the law on the enforceability of contractual child support payments. The two must be viewed together and, when that is done, Father's arguments fail.

In drafting 23 Pa.C.S. 3105(b), the legislature provided that contractually bargained for child support payments are subject to modification by the Court upon a showing of changed circumstances. However, as the Supreme Court pointed out in *Nicholson v. Combs*, 703 A.2d 407 (Pa. 1997), this change in the law was enacted to prevent the enforcement of a non-modifiable contractual provision for child support which would result in incarceration of a payor whose circumstances had changed such that he was unable to pay. "Because failure to comply with a support order can lead to incarceration, the court must be able to reduce the amount if the payor establishes an inability to pay." *Nicholson* at 416-417 (emphasis added). *Nicholson* does not require a guidelines analysis, as Father seems to imply. Rather, the holding in *Nicholson* requires that when downward modification of the child support obligation in an MSA is sought, the Court "must be able to reduce the amount if the payor establishes an inability to pay." *Nicholson* also specifically holds that the "family court's determination of a payor's inability to pay does not preclude the court sitting in law or equity from determining that the terms of the agreement are enforceable." *Nicholson* at 417.

In this case, Father has not demonstrated that the change in his income was "substantial and material" as required by *McClain v. McClain*, 872 A.2d 856 (Pa.Super. 2005) so as to demonstrate an inability to pay. The facts set forth before the Master demonstrated the opposite. Father's expert's testimony established that his current monthly net income was approximately 97% of what it was the previous year, which is greater than his income in the year the contract was signed. See, Master's Recommendation, Explanation pg. 2.

Here, Father has substantial income from sources other than wages from which the Master determined he could meet his obligation. In fact, the wages earned from the job lost made up a small percentage of his entire income, as the majority came from other sources. A parent's "earning capacity" for child support purposes includes funds from all sources, not just actual earnings. *Darby v. Darby*, 686 A.2d 1346 (Pa.Super. 1996). For the purposes of calculating support, a party's financial condition is determinative and the Court must consider every aspect of the party's financial ability to pay, including property interests, stocks and other forms of investment. When actual net earnings do not reflect earning capacity, the court should investigate a variety of sources to determine a party's true wealth. See, *Hoag v. Hoag*, 646 A.2d 578 (Pa.Super. 1994); *DeWalt v. DeWalt*, 529 A.2d 508 (Pa.Super. 1987). Control over funds more than cash flow or federal tax returns should be considered income for support purposes. *Fennel v. Fennel*, 753 A.2d 866 (Pa.Super. 2000). In the Instant case, the Master found that Father had over \$1,000,000.00 in his separate estate based on uncontradicted evidence. See, Masters Recommendation, Explanation, pg. 3.

In *Arbet v. Arbet*, 863 A.2d 34 (Pa.Super. 2006), the Court held that Father's entitlement to access income from a non-marital annuity was income, regardless of whether or not he actually accessed it. In this case, Father has access to an NFL defined benefit plan. (T.T. 73-75) Based on all of the above evidence, the Master, and this Court, found Father has the ability to meet his obligation under the contract. Father is not unable to meet the financial obligation, which he knowingly bargained for when he signed the parties' MSA, therefore, section 3105(b) is not triggered and Father is not entitled to a modification.

Secondly, Father argues that it was error to include his capital gains in the calculation of his income and, that if it were not included, he would be entitled to the modification. He contends that the Court, in accepting the Master's recommendation, is "double-dipping" by considering his gains from the sale of property acquired in equitable distribution, which is impermissible pursuant to *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super. 1998). The *Rohrer* Court held "money included in an individual's income for the purpose of calculating support payments may not also be labeled as a marital asset subject to equitable distribution." In *Miller v. Miller*, 783 A.2d 832 (Pa.Super. 2001), the Court held that the reverse of *Rohrer* was also true. However, contrary to Father's position, the *Miller* Court also concluded "the single caveat to this rule is that any gain realized in the sale of the asset may, indeed must, be included in the calculation of income" for child support purposes. A gain would occur if the sale of the asset resulted in proceeds in excess of the value at the time of equitable distribution. See, *Miller* at 835, fn 4.

In this matter, it was not only Father's modification petition that was before the Master, but also Mother's petition to enforce. The analysis in *Rohrer* did not encompass a contract enforcement case, where the standard becomes impossibility of performance. Additionally, Father has income and access to income from other numerous sources, in addition to the capital gains testified to before the Master, from which to pay pursuant to the MSA. Even without contemplation of the gains received from the sale of assets he received in equitable distribution, Father's earning capacity, his separate non-marital assets and his ability to access his NFL pension argue against modification. Therefore, regardless of whether or not the Master relied on Father's income from capital gains, other competent evidence adduced at trial supported her decision.

In Mother's petition for enforcement, Father had the burden to demonstrate that he was entitled to a reduction in the amount of his contractually bargained for child support since the MSA did not contemplate such a reduction and did not rely on his income when setting his monthly obligation. It was Father's burden to show that he was unable to perform, that he did not have the ability to pay. He did not meet this burden.

Father's last argument fails as well, for the same reasons as set forth above. He argues that the Court erred in looking to his "separate assets" when those assets were encumbered by debt Husband assumed in equitable distribution. Father was aware that he was assuming the referenced debt at the time the monthly support amounts for the children were set. Both parties in this case were represented by counsel of their choosing and both parties stated that the MSA was "just, fair, adequate and reasonable as to each of them and accordingly, both Husband and Wife freely and voluntarily accept all of the terms, conditions and provisions set forth" in the MSA.

The record demonstrates that the MSA encompassed the entire economic relationship – including equitable distribution, alimony, child support, custody, insurance, and many other matters. The Agreement clearly states that it "contends the entire understanding of the parties." Without being able to demonstrate an inability to perform, Father was properly found to be bound by the terms to which he agreed.

For the reasons set forth above, this Court's June 23, 2009 Order should be affirmed.

BY THE COURT:
/s/Bubash, J.

Cassandra Abel v. Richard Sciubba

Child Support Enforcement

1. Mother appeared at a child support hearing; father did not appear, but objected to the Hearing Officer's recommendation that his lump sum settlement from a civil law suit be used first to satisfy his retroactive child support arrears, with the remainder being placed in escrow to be available to satisfy the child support obligation until the children were no longer minors. The Hearing Officer found the father to be capable of full-time minimum wage employment, but recognized that he was not working and was receiving public assistance.

2. The father filed exceptions to this recommendation stating that there was no statutory or case law supporting the establishment of such an escrow.

3. The trial court agreed, indicating that the case was not similar to cases where such escrow accounts were permitted. In equitable distribution cases, the court may impose an injunction to prevent a party from alienating property in an effort to defeat a child support obligation. An escrow account is permitted when there is a history of non-payment, prior removal of marital funds from the jurisdiction, a lack of income on the part of the obligor, or where an obligor is likely to squander money. Workers compensation funds have been escrowed to assure alimony payments in situations where there was a history of noncompliance.

4. The court found the afordescribed situations not to be similar as there was no divorce pending, the obligor had not been found to be in contempt of a support order, and the obligor had no notice that an escrow might be used to secure future payments. No applicable authority was found and the case was remanded for an appropriate determination of the monthly support and payment on arrears.

(Christine Gale)

Cassandra Abel, Plaintiff/Mother, *Pro Se*.

Jerome DeRiso for Defendant/Father.

No. FD 01-4352-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

MEMORANDUM

Wecht, J.—Defendant Richard Sciubba ["Father"] filed Exceptions to Recommendations issued by Hearing Officer Bingman following a July 15, 2009 child support hearing. Plaintiff Cassandra Abel ["Mother"] appeared for that hearing. Father did not. The hearing officer developed the record, and subsequently recommended an attachment of Father's lump sum settlement payment from a civil law suit, with the amount in excess of the arrears going into escrow. The escrow would cover Father's support obligation at the current support rate until the children are no longer minors. The hearing officer found that Father was capable of full-time minimum wage employment, but that he currently was not working and was on assistance.

Father argued on exceptions that the hearing officer erred in establishing the escrow for the lump sum payment and that the order is not "within the range of the appropriate guidelines." Father asserts that there is no statutory or decisional law supporting establishment of this escrow. Father acknowledges that there are decisions allowing escrow in support cases. But Father argues that these cases are inapposite because the escrow in those instances was established through equitable distribution, and also because there is no history of non-payment here as there was in those cases. Father also complains that the hearing officer deviated upward from the guideline amount because Father was receiving the lump sum.

In the *Petto* case, the mother was directed to pay the father \$12,419 as part of equitable distribution. *Petto v. Petto*, 539 A.2d 1337, 1338 (Pa.Super. 1988). The mother filed a petition asking the trial court to use the amount due the father from equitable dis-

tribution to ensure future child support payments. *Id.* The trial court denied the request. *Id.* At the time of that denial, the father had been sporadically employed for years prior to entry of the divorce decree, had moved to Brazil after the separation, had taken money from the parties' and children's bank accounts without the mother's knowledge or consent, and had failed to report any income since his move to Brazil. *Id.* Additionally, at the time of the denial, the father was months in arrears on his child support payments. *Id.* at 1339.

The Superior Court reversed, finding authority in 23 Pa.S. § 403 (a) (now 23 Pa.C.S.A. § 3505 (a)), which allows issuance of an injunction to prevent a party from alienating property in order to defeat a child support award. *Id.* The Superior Court found §403 (a) applicable through Pa.R.C.P. 1910.43, which allowed the mother's petition for special relief. *Id.* Relying on the father's history of not making payments and of removing marital funds from the jurisdiction, and recognizing his lack of income, the Superior Court ordered the money the mother owed through equitable distribution to be paid into a sequestered account to ensure future child support payments. *Id.* at 1340.

In the *Nika* case, the trial court ordered that the husband's proceeds from the sale of the marital home were to be held by his attorney to pay off his support arrearages. *Nika v. Nika*, 555 A.2d 133, 1339 (Pa.Super. 1989). The trial court further ordered that any amount over his arrearages was to be held in escrow by the attorney and was not to be paid directly to the husband due to husband's continued contempt and failure to pay. *Id.* The trial court further asserted that the husband was a gambler who was likely to squander the proceeds and had caused his business to fail in order to discourage claims for support. *Id.* The trial court ordered that the money be deposited with the domestic relations office to create a credit from which the wife's alimony could be paid. *Id.* at 1340.

The Superior Court upheld the trial court's decision under the court's equity power to protect the interests of the parties, in accordance with 23 Pa. S. § 401 (c), now 23 Pa.C.S.A. § 3323 (f). *Id.* at 1341. In so ruling, the Superior Court relied upon the wife's history of mental problems that affected her economic opportunities as well as the husband's record of failing to meet his support obligations. *Id.*

In another case, the Supreme Court allowed workers' compensation lump sum payments to be placed in escrow to ensure alimony payments. *Dudas v. Pietrzykowski*, 849 A.2d 582, 586 (Pa. 2004). The husband had not paid alimony for over a year and a half prior to paying off his arrearages from his lump sum payment. *Id.* at 584. The trial court put the rest of the lump sum into escrow to ensure future payments. *Id.* at 584-85. The Court relied on parts of the alimony statute that allow income to be attached when there are arrearages, and considered the workers' compensation award to be an income substitute. *Id.* at 586. The Supreme Court concluded that the trial court had the authority to place assets in escrow to ensure alimony payments, even though it concluded that the trial court had not exercised that authority properly. *Id.*

In the instant case, Mother argued that the escrow would save Father from worrying about contempt exposure that she predicted he would face because, as she testified, "he's on drugs" [Tr., at 4] and "[h]e's always in jail" [Tr., at 6].

There is not enough similarity to the above-discussed cases to allow the escrow here. This court cannot rely on the statutory provisions cited in those appellate cases, which deal with the court's equity powers concerning divorce and property rights, to find authority for the escrow. There are two prior contempt Orders in this case. But both of those Orders are almost five years old. Further, there was no notice to Father that an escrow account might be used to secure future payments. The Superior Court has held that an obligor was not afforded a full and fair opportunity to air all his claims when he had no notice of an attempt to guarantee future child support payments through an escrow account. *Rittel v. Rittel*, 485 A.2d 30, 35 (Pa.Super. 1984). While it is plain and understandable that the hearing officer sought in this case to ensure support for the children, there was no applicable authority for her to do so.

The case will be remanded, but only for re-calculation. Because Father failed to appear, he waived any opportunity for a *de novo* hearing.

An Order in accordance with this Memorandum follows.

ORDER OF THE COURT

AND NOW, this ??? day of January, 2010, following due consideration, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED, ADJUDGED, and DECREED that Defendant's Exceptions to the Recommendations of Hearing Officer Bingman, Esquire dated July 15, 2009 are GRANTED. The hearing officer shall determine Defendant's monthly support obligation and arrears based upon his earning capacity, and shall make a recommendation for his monthly payment, including a payment on arrears.

SO ORDERED.
BY THE COURT:
/s/Wecht, A.J.

CAPSULE SUMMARY

Louise O'Brien Scully v. Henry Crocker Scully

Foreign Support Order

1. The mother and father were divorced in Bermuda, with the mother and child remaining in Bermuda. The mother registered the child support order in Allegheny County for enforcement purposes. The father then filed for modification of child support.

2. The mother argued that the order could not be modified if the issuing tribunal retained jurisdiction. The father argued that Pennsylvania could not even register the order because Bermuda was not a state under UIFSA, did not have a similar law for support, and did not have reciprocal agreements with the United States.

3. The issue of modification became moot as the father was pursuing modification in Bermuda. The remaining issue to be addressed was the father's objection to the mother's registering of the order.

4. The court determined that a support order could be registered and enforced even if the originating country or jurisdiction did not have a reciprocal agreement with the United States. Support orders would be recognized unless the decree was tainted by fraud or prejudice or was contrary to Pennsylvania law or public policy.

(Christine Gale)

David S. Pollock for Plaintiff/Mother.

Mark R. Alberts for Defendant/Father.

No. FD 09-4807-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Wecht, J., January 8, 2010.