

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MEYER AHARON JOSHUA,

Appellant

vs.

TRAVIS KECK,

Appellee

No. 16-1927

Cynthia S. Yurchak, Esquire

Counsel for Appellant

Carole J. Walbert, Esquire

Counsel for Appellee

MEMORANDUM OPINION

Matika, J. - January 28, 2021

This memorandum opinion is written in response to the appeal filed by the Appellant, Meyer Aharon Joshua, (hereinafter "Joshua") from the decision this Court rendered on the underlying petition for contempt filed by Joshua against the Appellee, Travis Keck (hereinafter "Keck"), in which this Court adjudicated Keck not guilty of willfully violating the Order of Court dated September 17, 2018 and the terms of the stipulation entered into by the parties and incorporated into that Order. For the reasons stated herein, this Court requests the Appellate Court affirm its decision.

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FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2016, Joshua filed an Action to Quiet Title complaint against Keck over an alleged encroachment into Joshua's property located at 40 West Market Street, Weatherly, Pennsylvania. A non-jury trial was initially scheduled for September 15, 2017. A series of continuances were granted rescheduling that trial a number of times. Eventually on September 14, 2018, the parties entered into a stipulation to resolve the underlying litigation. The stipulation was incorporated into an order of court dated September 17, 2018.

On August 17, 2018, Joshua filed a petition for contempt alleging that Keck, in violation of the stipulation and order " . . . began erecting a new addition to his home which invades Plaintiff's property, approximately as much as the 'existing porch.'"¹ Joshua also claims that Keck removed Joshua's fence in violation of the order, and has not made all payments due and owing to Joshua under the terms of that stipulation and order.

In relevant and pertinent parts relating to the petition for contempt, the following paragraphs from the stipulation were at issue in the hearing on the underlying petition:

3. The parties, intending to be legally bound, without admission of wrongdoing, hereby agree as follows:

¹ Joshua resides at 40 West Main Street, Weatherly, Pennsylvania and Keck lives at 28 Race Street, Weatherly, Pennsylvania. These properties share a boundary line where the encroachment is located.

* * *

B. Each party shall enjoy quiet use, title and enjoyment of their respective properties on either side of said agreed line, without interference, harassment, disturbance, trespass, or encroachment of any kind, but for Defendant's existing porch, which encroaches upon Plaintiff's property, which may remain.

C. Plaintiff will re-erect the common fence on or near the previous fence location which was at or near the agreed upon boundary line. However, the fence shall not be erected over the existing covered and open porches, it shall be erected along the sides of the porches, leaving sufficient space for defendant to access for maintenance purposes.

D. Defendant shall pay the sum of \$1200.00 to Plaintiff in monthly installments of \$50.00, commencing the first day of October, 2018, and continuing the first day of each month thereafter, until the full amount is paid.

A hearing was held on Joshua's petition for contempt on October 13, 2020. At that hearing, Joshua testified that Keck, after the execution of the stipulation, began to construct on a concrete pad abutting his house, a structure which appears to resemble an enclosed porch. Additionally, Joshua testified that some of the trusses from the roof structure of the addition as well as the replacement roof Keck was putting on the other structure actually went beyond the perimeter of that area and in fact encroached further into the Joshua property than that allowed by the terms of the stipulation.² By Joshua's calculations, this

² Keck acknowledged that in the picture presented by Joshua that this was accurate, however, that was temporary. Keck testified that those boards were eventually cut back evenly to a location that did not extend beyond the boundary

structure amounted to an additional 99 square foot encroachment into his property.

Joshua also testified that a fence was removed three times by Keck in violation of the stipulation and order. Joshua indicated that the fence was placed one foot back onto his property, suggesting it was one foot off of the common boundary line. Joshua also testified that Keck failed to comply with that portion of the agreement that required Keck to pay him a total of \$1,200.00, claiming that as of the filing of the contempt petition, he was still owed \$100.00 under that stipulation and order.³ As a result of all these alleged contemptuous actions, Joshua requested this Court find Keck in contempt, order him to remove this structure, replace the fence and pay the last installment of the agreement as well as his attorney fees.

In turn, Keck testified that when he purchased his home, there was a covered porch on the very concrete pad in question that he previously removed because of its bad condition. The construction that Keck was engaged in was to replace that which he had taken down years earlier. Keck testified that any construction did not

line. This, Keck stated did not cause a further encroachment into the Joshua property.

³ This Court must note that this agreement required Keck to pay Joshua twenty-four (24) incremental payments of \$50.00 per month beginning in October 2018. If payments were made as required, the last payment would be due on September 1, 2020. This contempt was filed on August 17, 2020, prior to the due date of that last scheduled payment, however Joshua testified that he believed he was owed \$50.00 for the month of October, 2020, a date beyond the last due date.

extend beyond the foot print of the concrete pad and was in fact set back from the edge of the concrete pad. Keck also testified that the trusses that actually extended beyond the boundary line as testified to by Joshua were temporarily placed there for the sole reason of assuring that when the time came to place the fascia board on, everything would be straight and level. As per Keck's testimony those trusses were eventually cut back and were not an additional encroachment into the Joshua property.⁴

On the issue of the fence, Keck testified that the fence placed there by Joshua impeded Keck's ability to access his property and maintain the same. The fence, according to Keck consisted of old wire mesh and was held in place by concrete blocks and stones. Keck acknowledged that he removed it because when Joshua replaced it, he did so in such a manner that it was placed "right across the patio or the porch" and blocked his access to his property. Keck acknowledged that after he removed it, he rolled it up and placed it in a pile for Joshua.⁵

After the hearing concluded, both parties were given the opportunity to lodge briefs in support of their respective positions, which both parties took advantage of. This Court then

⁴ Keck testified that his understanding of the encroachment area included that existing building and the concrete pad.

⁵ Keck also testified he left it in this pile at the property line, but since Joshua was not moving it, he was having difficulty mowing his grass. Thus, after a month he disposed of it.

found Keck not guilty by order of court dated December 14, 2020.

On January 4, 2021, Joshua filed his notice of appeal from that order. Also on January 4, 2021, this Court issued an order directing Joshua to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P 1925(b). On January 11, 2021, Joshua filed that concise statement. In that concise statement Joshua claims in essence that the Court erred:

- 1) " . . . by permitting defendant [Keck] to enlarge the 'existing porch' to a larger size, contrary to the plain language of paragraph 3B of the said stipulation" and
- 2) "In finding the Defendant [Keck] 'not guilty', failing to award Plaintiff [Joshua] attorney fees and costs and failing to order the new structure to be removed.

On January 25, 2021, Joshua filed an addendum to the previously filed concise statement claiming:

- 1) the court erred by not finding the Defendant in contempt for entering upon the lands of Plaintiff and removing a portion of Plaintiff's fence and fence posts, despite the defendant admitting he removed Plaintiff's fence and/or fence posts; and
- 2) the Court erred by not ordering defendant to replace Plaintiff's fence and/or fence posts.

This Court finds that these perceived errors are inter-

related and will address them together.

LEGAL DISCUSSION

In order to find a person guilty of civil contempt, the moving party must establish by a preponderance of the evidence that the alleged contemnor, in this case Keck, had notice of the order he is alleged to have disobeyed, that his conduct was volitional and that he acted with wrongful intent. *Cunningham v. Cunningham*, 182 A.3d 464, 471 (Pa. Super. Ct. 2018). There is no dispute that Keck had notice of the stipulation and order dated September 17, 2018. There is also no dispute that Keck's actions were volitional. What is at issue is whether that volitional conduct rises to a level of contempt and whether it was done with wrongful intent. Wrongful intent can be inferred when it is clear from the language of the order that Keck's conduct in question did in fact violate the order and that Keck knowingly failed to comply with that order. *Commonwealth v. Reese*, 156 A.3d 1250, 1258-1260 (Pa. Super. Ct. 2017). Since Joshua generally alleges this Court erred in finding Keck not guilty, it will *seriatim* address each of the aspects of the stipulation and order set forth in the contempt petition that Joshua claims Keck violated.

A. Monthly Payments

Joshua alleges Keck failed to comply with paragraph 3D regarding payments totaling \$1,200.00. This Court found Keck not

guilty as to this allegation as it believed Joshua was mistaken or confused as to when the last payment was due him. Joshua claimed that Keck still owed him the \$50.00 payment for October, 2020 even though the last payment owed to him was due and payable on September 1, 2020. Joshua never alleged that Keck missed that payment or was behind on making any payments under this stipulation and order. Thus, this Court found that Keck had complied *in toto* with his payment obligations under paragraph D of the stipulation and order and thus, found him not guilty accordingly.

B. Removal of Fence

Next, Joshua alleged that Keck removed the fence he installed in violation of paragraph 3C of the stipulation. Keck testified that he did in fact remove the fence but did so because its physical location impaired not only his ability to maintain his property, but also impeded access to the concrete pad where he was constructing his new structure. Keck testified that he took the makeshift fence and posts down and placed them at the lower part of the common boundary line. After a month passed and when Joshua did not remove it, Keck disposed of it as it was impeding his ability to mow his grass.

Paragraph 3C makes reference to the fence in question indicating that it "shall not be erected over the existing covered and open porches" but rather "along the sides of the porches,

leaving sufficient space for Defendant [Keck] to access for maintenance purposes." If the intent was to allow Plaintiff to "re-erect the common fence on or near the previous fence location, which was at or near the agreed-upon boundary line" but with the above limitations, Keck's actions in removing the fence only appear to be consistent with the intent to relocate it away from Keck's home and in an area which would allow Keck to maintain his property, including both the covered and open porch areas. Thus, this Court did not believe Keck, in taking down this fence, engaged in contemptuous behavior but rather was acting in concert with the intent to allow Joshua to re-erect it as provided for in the stipulation.⁶

C. "Existing Porch"/Encroachment

Joshua's last contention supporting his argument that the court erred in finding Keck not guilty is in dealing with the construction undertaken by Keck. This issue is the primary crux of his petition for contempt. In order to fully explain our reasoning for finding Keck not guilty, it is first necessary to

⁶ Joshua claims that Keck admitted he violated the stipulation and order when he admitted to removing the fence. This Court agrees with that assertion that Keck volitionally removed the fence but it does not find it to be conduct resulting in willful misconduct as Keck's testimony, determined credible by the Court, was that Joshua replaced it at a location which itself violated the stipulation and order and impeded Keck's access to his property.

This Court also notes that Joshua claimed the Court erred in not requiring Keck to replace Joshua's fence. This Court did not direct this as it did not find that the removal was contemptuous. Perhaps Joshua has an action against Keck for the value of the fence Keck subsequently disposed of, however, that was not part of the relief sought here.

examine certain terminology set forth in the agreement, apply that terminology to the situation at issue and ascertaining the intent of the parties

In paragraph 3B of the stipulation, there is reference to the Defendant's [Keck's] "existing porch." In paragraph 3C, in a handwritten addendum to that paragraph and initialed by the parties, there is a reference to "existing open and covered porches." Joshua claims that the reference to existing porch in paragraph 3B was that which encroached over the common boundary line and into his property. Joshua also contends that since the existing porch was allowed to remain, the construction undertaken by Keck violated this stipulation. Keck, on the other hand, claims the "existing porch" is not where Joshua claims it is in his petition, nor as referenced in the stipulation. Attached to Petitioner's exhibit #1 was a drawing depicting a "porch", but does not identify that it is the one referenced by Joshua, the other one referenced by Keck or both combined.

In order for the Court to determine if the encroachment has been enlarged in violation of this stipulation, this Court must first look to the definition of the word "porch" and then, if possible, identify where the "existing porch" is actually located.

1 Pa. C.S.A. §1903 reads as follows:

- (a) Words and phrases shall be construed according to rules of grammar and according to their

common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

- (b) General words shall be construed to take their meanings and be restricted by preceding particular words.

Additionally, courts of the Commonwealth use dictionaries as source materials in determining common and approved usage of certain words or phrases. *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. Super. Ct. 2003); *Fogle v. Malvern Courts, Inc.*, 722 A.2d 680, 882 (1999). Accordingly, this Court scoured the internet and other available sources searching for definitions of the word "porch." In vocabulary.com, porch is defined as "a structure attached to the exterior of a building forming a covered entrance." Dictionary.com defines porch as "an exterior appendage to a building, forming a covered approach or vestibule to a doorway." Merriam-Webster.com establishes the definition as "a covered area adjoining an entrance to a building and usually have a separate roof."⁷ Dictionary.Cambridge.org sets forth the definition as "a covered structure in front of the entrance to a building", while Lexico.com explains that a porch is "a covered shelter projecting in front of

⁷ This is the definition cited by Joshua in his legal memorandum supporting his petition for contempt.

the entrance to a building. Lastly, Webster's Third New International Dictionary, identifies a porch as "a covered entrance to a building usu[ally] with a separate roof and often large enough to serve as an outdoor seating or walking space; a place for waiting before entering." A common theme running through these definitions is that whatever a porch is: 1) it is usually covered; and 2) this space acts as an entryway into a building.

Dissecting Joshua's argument, he would have the court believe that the structure to the west is the "existing porch." Testimony shows that this structure is clearly covered; in fact, it is also enclosed. In addition, the testimony suggests that access can be gained to the home through this structure. While this structure has some characteristics of being a porch, it goes beyond that which could be considered as such because it is a completely enclosed structure. Keck testified that this enclosure is used for storage, not a passageway into the house. Converse to this argument is Joshua's allegation in his concise statement that "[T]he Court erred in permitting defendant to enlarge the "existing porch to a larger size" . . .'. This would seem to suggest, contrary to Joshua's original argument that the existing porch is

not the enclosed structure but rather the open concrete pad upon which Keck is constructing.⁸

Keck argues that the existing porch is the "open porch." This "open porch" is nothing more than a concrete pad without any covering over top of it. Keck testified that this area did in fact have a covering over it not too long prior, but it had to be removed because of its condition. In terms of this proposed porch, it appears that the only characteristic of a porch would be the fact that this area was a covered porch in the past which still allows access to the home.⁹

This Court does not believe that either party's position with regard to what constitutes a porch based on the facts of this case truly meet any of the definitions found by our researching of various internet sources for a definition. The closest that either of these two "porches" may come to a true porch definition is that which comes from Webster's Third New International Dictionary, a hard book copy located in the Chambers of the undersigned. This definition of porch, albeit without a roof, allows for outdoor seating or walking space (although if Keck is permitted to complete

⁸ At times throughout his testimony Joshua also described this structure by various terms including "building", "shed", "closet" or "whatever it is", suggesting he may not even understand it to be a porch.

⁹ Joshua's exhibit #7 appears to show a door allowing access to the home from this concrete pad.

his construction, it will no longer be an 'outside' space). It is also a place for waiting before entering the house and provides for entrance thereto. Ultimately, this Court believes that "porch" was a poorly chosen word to describe either the fully enclosed structure or completely opened concrete pad. The ambiguity resulting therefrom creates a scenario requiring the Court to use its discretion in choosing which was contemplated as the "existing porch." For purposes of determining, without more, which should be considered the "existing porch", we determined it to be the concrete pad area.¹⁰

Having now determined that the open porch is the existing porch which encroaches into Joshua's property, this Court must now determine if Keck's construction on that concrete pad violates the stipulation. Reference is made to the second and third paragraphs contained in the footnote to our December 14, 2020 Order finding Keck not guilty. Those paragraphs read as follows:

Pursuant to Black's Law Dictionary (11th Ed. 2019) "encroachment" is defined as: 1) an infringement of another's right; 2) an interference with or intrusion onto another's property. Clearly, the existing porch referenced throughout was an encroachment onto Plaintiff's property. Plaintiff argues that the building by the Defendant of the enclosed structure, though on the existing and encroaching porch, is a "further" encroachment. We disagree.

What the Defendant has done here is to "build up, not out." In other words, the defendant has not enlarged the

¹⁰ This Court also considered Joshua's reference in his concise statement regarding "permitting Defendant to enlarge the "existing porch." The only enlargement of anything was occurring on the concrete pad, the open porch.

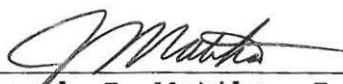
footprint of the encroachment. Building up and not expanding the size of the encroachment into the Plaintiff's property does not infringe upon Plaintiff's rights, nor does this new structure interfere with or intrude further into Plaintiff's property any more than the parties agreed the Defendant could by virtue of the stipulation. Had the parties intended to prevent a particular use of the encroachment, that should have been made part of the stipulation. Here Defendant is "using" the existing porch which encroaches into Plaintiff's property and can do so without restriction provided it otherwise complies with the law.

This Court also notes that Joshua never established a dimensional description of where exactly either porch is located *vis-à-vis* the boundary line. While including a notation of a "porch" on the drawing attached to the Petitioner's exhibit #1, it does not differentiate between the "covered porch" or "open porch" which both parties agree exist on the Keck property.

CONCLUSION

In Order to find Keck guilty, this Court must find his conduct to be volitional and with wrongful intent. This Court did not find that wrongful intent was present but rather conduct consistent with the intent of the stipulation. Therefore, we ask that the Superior Court affirm our decision finding Keck not guilty.

BY THE COURT:



Joseph J. Matika, J.