THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0216, In the Matter of Steven R. Cotran and Diane M. Cotran, the court on August 6, 2012, issued the following order:

The petitioner, Steven R. Cotran, appeals an order of the family division granting the petition for contempt filed by the respondent, Diane M. Cotran, and awarding her interest and reasonable attorney's fees. He argues that he did not violate an agreement executed by the parties to sell real estate and that because he made the payment required by the agreement prior to the established deadline, the respondent suffered no damages. We affirm.

The record reflects the following facts. The parties were divorced in 2006. They executed a permanent stipulation, which was incorporated in the divorce decree, that required the petitioner to make certain payments to the respondent by specific dates. In May 2009, the petitioner still owed the respondent $50,000 which, under the terms of the decree, he was supposed to have paid to her on or before July 31, 2007. In May 2009, the parties executed an agreement that provided that the outstanding property settlement would be paid in part as follows: "Steven's land in Antrim, NH shall be immediately placed on the market for sale. Upon sale of the Antrim property, but in no event later than December 1, 2010, the balance of $40,000.00 shall be paid to Diane."

At the hearing on the motion for contempt, which was held on offers of proof, the petitioner's counsel proffered that, following execution of the settlement agreement, the petitioner put a "for sale" sign on the property, executed an exclusive listing agreement with his agency making the property immediately available for sale, but delayed entering it into the Multiple Listing Service (MLS) until the spring of 2010. Respondent's counsel proffered that he had a real estate agent in court that day available to testify "that it is industry practice when you enter a listing for property to put it in MLS. That is how it is sold."

In its order finding the petitioner in contempt, the trial court found the petitioner's argument, "that he did not place the property on the MLS until after April 1, 2010 for the reason that it is an undeveloped piece of property that has some timber value and needs to be 'walkable' and therefore it made no sense to place it on the MLS during winter months, and also for the reason that he did not wish to 'age' the property, lacks credibility."

The trial court also reasoned that the "issue of whether the Petitioner is to be found in contempt for failure to comply with May 19, 2009 Agreement turns on the question of whether or not his having executed an Exclusive Listing Agreement with his own real estate agency and as broker, without placing the property on the MLS, constitutes placing the property 'on the market for sale' as required by the May 19, 2009 Agreement." The trial court found that it did not. In doing so, the court also found "that the parties included the language requiring the Petitioner to immediately place the Antrim, NH property on the market for sale and pay the Respondent out of the proceeds from the sale if sold in advance of the 'drop dead date' of December 1, 2010, for the reason that they recognized that this was a payment that had been long outstanding and due to the Respondent and ought to be paid at the earliest possible date."

We have long held that evidence of usage of trade is admissible in interpreting the meaning of an agreement. See Farnsworth v. Chase, 19 N.H. 534, 541 (1849); see also Restatement (Second) of Contracts § 222(3) (1981); RSA 382-A:1-302 (2011) (defining "usage of trade"). Moreover, the "existence and scope of a usage of trade are to be determined as questions of fact." Restatement (Second) of Contracts, supra § 222(2); see Farnsworth, 19 N.H. at 541.

Given the record before us, including the proffered expert testimony as well as the trial court's specific finding that the petitioner's explanation for his one-year delay in placing the property in MLS lacked credibility, we affirm the decision of the trial court. See In the Matter of Stall & Stall, 153 N.H. 163, 168 (2005) (proper inquiry on appeal is not whether we would have found petitioner in contempt but whether the trial court's exercise of discretion in doing so is sustainable).

Affirmed.

HICKS, CONBOY and LYNN, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Manchester Family Division, 216-2006-DM-00382
Honorable John C. Emery
Honorable Edwin W. Kelly
Marital Master Jennifer A. Lemire
Joshua L. Gordon, Esquire
Jeanmarie Papelian, Esquire
Kevin A. Chenelle, Esquire
Timothy A. Gudas, Supreme Court
Allison R. Cook, Supreme Court
Lorrie Platt, Supreme Court
Irene Dalbec, Supreme Court
File