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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1006**

In the Matter of: Sally Ann Ekman, petitioner,
Respondent,

vs.

Lee McFadden Miller,
Appellant.

**Filed March 22, 2011
Affirmed in part and reversed in part
Stauber, Judge**

Crow Wing County District Court
File No. 18FX06002761

David L. Olson, Edina, Minnesota (for respondent)

John G. Westrick, Kristian L. Oyen, Westrick & McDowall-Nix, P.L.L.P., St. Paul,
Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stauber, Judge; and
Randall, Judge.*

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from the district court's grant of respondent's request to extend an order
for protection (OFP) and denial of appellant's request to have respondent held in

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

contempt, appellant argues that the district court (1) abused its discretion by extending the OFP for ten years when the district court failed to follow the statutory extension procedures and (2) erred by applying the doctrine of laches. We affirm the application of laches and reverse the extension of the OFP.

FACTS

Appellant Lee Miller and respondent Sally Ekman were involved in a romantic relationship lasting approximately 11 years. During this time, the parties resided together and built a house, an attached garage, and a large pole barn on property owned by respondent in Pequot Lakes. Respondent purchased most of the building materials used for the construction and appellant provided most of the labor and tools.

The parties' relationship ended, and an OFP was granted against appellant. The OFP, issued in October 2006, required appellant to remove his personal property from respondent's property within 60 days. Appellant subsequently commenced an action against respondent for claims of partition and unjust enrichment. Appellant also moved to amend the OFP and requested additional time to remove his personal property.

The district court granted appellant's request for additional time to remove his property and, following a bench trial, awarded him \$47,800 for his unjust enrichment claim. The parties then signed a stipulation "to provide for an orderly exchange of their personal property and payment of the judgment awarded to [appellant]." The terms of the stipulation required that (1) respondent pay \$40,000 to appellant by March 28, 2008; (2) in April of 2008, appellant was to begin removing his personal property under the supervision of law enforcement; (3) on or before May 18, 2008, again under law

enforcement supervision, appellant was to remove the balance of his belongings from respondent's property; and (4) after appellant removed his belongings, respondent was to pay the remaining \$7,800 of the judgment.

Respondent paid \$40,000 to appellant, but appellant failed to remove his personal property by the May 18, 2008 deadline. Respondent then filed a motion to modify the OFP, requesting that the court order appellant to remove his personal property or declare the property abandoned. The district court granted the motion, ordering appellant "to remove remaining property [on July 5, 2008, between the hours of 8 a.m. to 12:00 p.m.]—to be accompanied by Crow Wing Sheriff."

On July 5, 2008, Deputy Pat Pickar accompanied appellant to retrieve his property. Appellant, who had purchased property adjacent to respondent's property, proceeded to remove some, but not all, of his belongings from respondent's property. Deputy Pickar, after talking to appellant, stated in his incident report that appellant "didn't want any of the stuff listed anyway and that he was just trying to do the courteous thing and remove it." Respondent then paid appellant the final \$7,800 in satisfaction of the judgment.

In August 2008, respondent filed an application for extension of the OFP and requested that the court find appellant in contempt of court for stalking behavior. Following a hearing, the district court found that appellant violated the OFP because of the stalking behavior.

In December 2009—about one-and-a-half years after appellant was ordered to finally remove his personal property from respondent's property—appellant filed a

motion seeking to hold respondent in contempt of court for disposing of his remaining personal property. The district court denied the motion, concluding that it “is not supported by the facts.” The district court also found that appellant “is estopped by the equitable doctrine of laches from asserting any claims against [respondent], regarding any right to obtain or possess any property that allegedly remains on [respondent’s] property, or at her residence.” Finally, the district court stated that “[c]ommencing this frivolous and unfounded action for the purpose of harassing [respondent] constituted a violation of the Order that [appellant] ‘have no contact, either direct or indirect, with [respondent].’” The district court extended the OFP an additional ten years. This appeal followed.

D E C I S I O N

I.

The decision to grant or extend an OFP is discretionary with the district court. *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007). A district court abuses its discretion when its findings are unsupported by the record or when it misapplies the law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006).

Appellant argues that the district court’s ten-year extension of the OFP was an abuse of discretion because the statutory procedures for extending an OFP were not followed. Specifically, appellant argues that under section 518B.01, subdivision 6a(a) of the Domestic Abuse Act, an extension of an OFP may only occur upon “application, notice to all parties, and hearing.” Minn. Stat. § 518B.01, subd. 6a(a) (2010). A review of the record reveals that there was no application or notice to the parties regarding an extension of the OFP, and that the district court sua sponte extended the OFP for ten

years. Respondent concedes that the statutory requirements set forth in section 518B.01, subdivision 6a(a) are applicable and were not satisfied. Therefore, because the procedures for extending an OFP were not followed, the district court abused its discretion by extending the OFP for an additional ten years.

II.

“Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.” *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002) (quotation omitted). “The standard of review of the district court’s decision on an issue of laches is whether the court abused its discretion.” *In re Marriage of Opp*, 516 N.W.2d 193, 196 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). A district court has abused its discretion when its decision is arbitrary, capricious, or not in conformity with law. *In re Ruth Easton Fund*, 680 N.W.2d 541, 547 (Minn. App. 2004) (citing *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950)).

“Application of the doctrine of laches depends on a factual determination in each case.” *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996). When determining whether laches bars a claim, a court must determine “whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for.” *Id.* (quotations omitted). The courts must consider the following factors when deciding whether the doctrine of laches applies: (1) the availability of the defense as determined by the nature of the action, (2) the reasons for the delay, (3) prejudice, and (4) policy considerations. *M.A.D. v. P.R.*,

277 N.W.2d 27, 29 (Minn. 1979). Laches is an affirmative defense that should be raised in the pleadings. Minn. R. Civ. P. 8.03.

Appellant argues that the district court erred by applying the doctrine of laches because respondent waived the defense by failing to raise the defense in her pleadings. *See Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). (stating that “[a]n affirmative defense must be pleaded specifically and the failure to do so results in a waiver of the defense”). Indeed, the record reflects that respondent failed to raise the doctrine of laches in her responsive pleadings. But respondent argues that the defense of laches was properly before the district court because she raised the doctrine of laches in her memorandum, argued the issue before the district court, and appellant never objected to the doctrine being raised as a defense.

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Minn. R. Civ. P. 15.02. Thus, issues litigated by consent are treated as though they were raised in the pleadings. *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954).

Here, the record reflects that respondent argued in her memorandum to the district court that appellant’s “claims are also barred by the doctrine of laches.” The record also reflects that the district court specifically questioned appellant as to why he did not bring his motion in the late summer or early fall of 2008 and that respondent argued the doctrine of laches in her closing argument. The record further reflects that facts relevant to the defense were placed on the record, and appellant raised no objection to the laches

defense argued by respondent. The district court did not err by considering the defense of laches. *See* Minn. R. Civ. P. 15.02.

Appellant also contends that the district court erred by applying the doctrine of laches because respondent failed to demonstrate any prejudice that would justify the application of laches. We disagree. The record reflects that personal-property issues were an ongoing issue since the parties' relationship ended in the fall of 2006, despite repeated resolution efforts by respondent. The record also reflects that local authorities warned respondent to clean up her property, but she was afraid to discard anything out of fear that appellant would sue her. The record further reflects that respondent "honestly believe[d]" the issue was resolved when appellant took his property in July 2008 and she wrote him the \$7,800 check as required by the stipulation. On this record, respondent was able to demonstrate prejudice that justified the application of laches.

Affirmed in part and reversed in part.