

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
TERRY TUTOR,)	of Kendall County.
)	
Petitioner-Appellee)	
)	
and)	No. 01—D—132
)	
BRIAN TUTOR,)	Honorable
)	Linda S. Abrahamson,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: Where an agreed order entered in a bankruptcy proceeding was silent regarding postjudgment interest, the trial court did not abuse its discretion by awarding former wife postjudgment interest on unpaid marital property debt, when former husband breached the agreed bankruptcy order; and, thus, former wife had right to seek remedy in the trial court.

Where former husband did not yet owe postjudgment interest to former wife when bankruptcy court discharged former husband's debts, interest was not discharged and trial court did not abuse its discretion by subsequently awarding postjudgment interest to former wife.

Where an agreed bankruptcy order provided that, upon the former husband's failure to make timely payments, the former wife had the right to seek to enforce the judgment of dissolution in the trial court, the agreed bankruptcy order was not a final

judgment; thus, *res judicata* did not bar the former wife's action seeking postjudgment interest.

Where the the former husband's claim that he had to pay an extra \$40,000 to former wife and record showed that any additional payment was due only to his own wrongdoing, the former husband claim of *laches* failed because former husband did not establish that he was prejudiced due to the former wife's delay in bringing suit.

Respondent, Brian Tutor, appeals an order awarding petitioner, Terry Tutor, post-judgment interest for Brian's failure to make timely payments he owed Terry for her share of the parties' marital estate. On appeal, Brian argues that (1) the trial court erred by granting the petition for postjudgment interest because the parties entered into a settlement agreement that did not provide for interest on the marital property debt; (2) the trial court violated the agreed bankruptcy order by imposing interest on a non-discharged debt; (3) the trial court erred by failing to dismiss Terry's petition for postjudgment interest because it is barred by *res judicata*; (4) Brian was in full compliance with the agreed bankruptcy order; and (5) Terry was guilty of *laches* by failing to file a petition for interest for more than two years following the entry of the agreed bankruptcy order establishing a payment schedule. We affirm.

I. FACTS

On June 23, 2004, after a bench trial, the trial court entered a judgment of dissolution of marriage between the parties. Article 5.1C of the judgment provided:

“[Terry] shall receive a lump sum payment in the amount of \$88,929.73 within 60 days of the date of this order which represents her 65% share of the remaining marital estate of \$165,443.51 after \$28,628.55 has been paid from the marital estate to pay off the marital debts.”

Brian failed to pay Terry within sixty days of the date of the entry of the order of the judgment of dissolution of marriage.

On August 24, 2004, Brian filed for bankruptcy in the United States Court for the Northern District of Illinois. On January 5, 2005, Terry filed an adversary complaint in bankruptcy court asking the court to declare that Brian's marital estate debt owed to Terry was non-dischargeable.

On February 7, 2007, the bankruptcy court entered an agreed order stating that the marital property debt was non-dischargeable. The bankruptcy court then ordered that "the Debtor, Brian Tutor, shall satisfy the debt due and owing to Plaintiff [Terry] as follows:"

- (1) commencing February 15, 2007 through January 15, 2008, \$300 per month, in addition to maintenance;
- (2) from February 15, 2008, \$500 per month, until maintenance is terminated;
- (3) from the termination of maintenance until the marital property debt is paid in full, \$1,800 per month.

All monthly payments were due on or before the 15th of the month. The agreed bankruptcy order also provided the following:

"In the event the Defendant, Brian Tutor fails to make any payment within 10 days of the date any installment payment hereunder is due, the terms and provision of this order providing for installment payment be and are hereby terminated *instanter* and Plaintiff, Terry Tutor, upon notice, shall be entitled to appear before the Circuit Court of the Sixteenth Judicial Circuit, Kendall County, Illinois to seek immediate enforcement of the terms and provisions of Article 5.1C of the Judgment for Dissolution of Marriage."

On April 24, 2007, the bankruptcy court entered a discharge order. On April 9, 2009, Terry filed a petition in the trial court seeking postjudgment interest from the date of the entry of the agreed bankruptcy order due to “delay in paying the judgment.” Brian filed a motion to dismiss, arguing that Terry’s petition was barred by *res judicata*, accord and satisfaction, the bankruptcy court’s discharge order, the agreed bankruptcy order entered in the bankruptcy court, and *laches*. The trial court denied Brian’s motion to dismiss.

On January 26, 2010, after hearing arguments of counsel, the trial court granted Terry’s petition for postjudgment interest calculated pursuant to section 2–1303 of the Code of Civil Procedure (735 ILCS 5/2—1303 West 2010).

Brian filed this timely appeal.

II. ANALYSIS

We will not disturb a trial court’s award of postjudgment interest absent an abuse of discretion. See *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 141 (2008). A trial court abuses its discretion exists where no reasonable person would take the view adopted by the trial court. *In re Marriage of O’Brien*, 393 Ill. App. 3d 364, 382 (2009).

A. The Agreed Bankruptcy Order

On appeal, Brian first argues that the trial court erred by granting Terry’s petition for postjudgment interest because nothing in the agreed bankruptcy order obligated Brian to pay Terry interest on the marital property debt.

An agreed order is not a judicial determination of the parties’ rights; it is a recitation of an agreement between the parties which is subject to the rules of contract interpretation. *Advance Iron Works, Inc. v. ECD Lincolnshire Theater, L.L.C.*, 339 Ill. App. 3d 882, 887 (2003). When

construing a contract, the primary objective is to give effect to the intent of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The plain and ordinary meaning of the language of the contract is the best indication of the intent of the parties. *Gallagher*, 226 Ill. 2d at 233. A court may not add terms to a contract which the parties have not expressly included. *Chatham Corp. v. Dann Insurance*, 351 Ill. App. 3d 353, 359 (2004). Waiver is the “intentional relinquishment of a known right” and must be explicit. *Gallagher*, 226 Ill. 2d at 229.

In *Borrowman v. Prastein*, 356 Ill. App. 3d 546, 550 (2005), the appellate court held that the contract's silence on the issue of a workers' compensation lien meant that the employer chose to waive any such lien. In *Harder v. Kelly*, 369 Ill. App. 3d 937, 939 (2007), this court disagreed with *Borrowman*. In *Harder*, the trial court ruled, based on *Borrowman*, that an employer waived its workers' compensation lien even though the settlement agreement was silent regarding the issue. *Harder*, 369 Ill. App. 3d at 939. This court reversed the trial court, reasoning:

“[W]e see no reason under the Act or general contract principles why an employer should be required to include an affirmative reservation of rights in a settlement agreement when there is nothing in the agreement otherwise suggestive of an intent to waive the right to a lien.” *Harder*, 369 Ill. App. 3d at 939.

Further, in *Gallagher*, our supreme court held that, where there is silence in a contract regarding waiver, an assumption of waiver contravenes the explicit-waiver rule. *Gallagher*, 226 Ill. 2d at 238. The explicit-waiver rule provides that where an important right is at issue, “an explicit manifestation of intent is required before the right in question can be deemed waived.” *Gallagher*, 226 Ill. 2d at 239.

In this case, the agreed bankruptcy order did not contain an explicit waiver of Terry’s right to postjudgment interest. We see no reason under general contract principles why we should impute to Terry an intent to waive her right or a duty to affirmatively reserve her right to such postjudgment interest when the agreed bankruptcy order is silent regarding the issue. *Gallagher*, 226 Ill. 2d at 238; see also, *Harder*, 369 Ill. App. 3d at 939. Thus, the fact that the agreed bankruptcy order is silent regarding the issue of interest does not establish that the trial court abused its discretion by awarding interest.

Brian argues that this case is controlled by *Solar v. Weinberg*, 274 Ill. App. 3d 726 (1995). We disagree with Brian because in *Solar*, the appellate court did not reach the issue of whether silence in a contract regarding interest precludes the award of such. Further, the defendant in *Solar* did not breach the settlement agreement at issue as Brian did in this case. See *Solar*, 274 Ill. App. 3d at 732-33. Thus, *Solar* is not applicable to the case at bar.

Next, Brian argues that the terms and amounts Brian was ordered to pay on the marital property debt pursuant to the agreed bankruptcy order reveal that the parties could not have intended that he would have to pay interest. Brian cites to the following language contained in the agreed bankruptcy order: “Debtor, Brian Tutor, shall *satisfy the debt* due and owing to Plaintiff as follows. (Emphasis added.)” Because the agreed bankruptcy order is silent regarding the issue of interest, nothing indicates Terry’s intent to waive her right to such, including the language cited by Brian. The language cited by Brian introduces the schedule for payment and cannot reasonably be interpreted as a waiver of Terry’s right to seek interest.

B. Discharge Order

Next, Brian argues that nothing in the agreed bankruptcy order stated that interest on the property debt was non-dischargeable. Therefore, interest on the property debt was discharged, like Brian's other debt. This argument mistakenly assumes that the postjudgment interest was a debt that existed prior to the entry of the discharge order. Because the postjudgment interest debt did not exist until after the trial court ordered Brian to pay it on January 26, 2010, it could not have been discharged by the bankruptcy court in its order on February 7, 2007.

C. *Res Judicata*

Next, Brian argues that the trial court erred by failing to dismiss Terry's petition for postjudgment interest because it was barred by *res judicata*. "Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Hudson v. City of Chicago*, 228 Ill.2d 462, 467 (2008).

In this case, the agreed bankruptcy order was not a final judgment on the merits. "A judgment is deemed final, for purposes of *res judicata*, if it terminates litigation on the merits so that the only issue remaining is proceeding with its execution." *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (1999). In this case, the agreed bankruptcy order did not terminate the litigation; rather, it provided that if Brian failed to comply, Terry had the right to seek enforcement of the judgment of dissolution in the circuit court. Thus, the agreed bankruptcy order did not resolve all of the issues.

Accordingly, Terry's petition for postjudgment interest was not barred by *res judicata*.

D. Breach

Brian also argues that he was in full compliance with the agreed bankruptcy order. Brian states “the parties and trial court agree that [he] made his payments.” To support this contention, Brian cites Terry’s petition to award postjudgment interest and the trial court’s order granting Terry’s petition. However, these documents do not support Brian’s statement. Brian cites to the trial court’s order that provides only that “both parties agree that Brian is *current* on his payments. (Emphasis added.)” The fact that Brian was current on his payments does not mean that he was in compliance with the agreed bankruptcy order that required him to make payments of certain amounts each month. Further, Brian cites to nothing in the record to support his claim that he was in compliance with the agreed bankruptcy order. In fact, Brian failed to provide a complete record on appeal; most notably, he failed to include a transcript of the hearing on petition for postjudgment interest. “Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1982). Because the record is incomplete and Brian cites to nothing in the record to support his argument, there is no basis to determine that he complied with the agreed bankruptcy order. See *Foutch*, 99 Ill. 2d at 392.

Brian also cites to a chart attached to his reply brief to support his contention that he made all his payments. Because this chart is attached to Brian’s brief on appeal and is not contained in the record on appeal, we cannot consider it on review. See *Lake v. State*, 401 Ill. App. 3d 350, 352 (2010). Thus, Brian’s argument that he was in full compliance with the agreed bankruptcy order fails.

E. *Laches*

Brian also argues that the trial court erred by awarding interest to Terry because it was barred by *laches*. Brian argues that Terry waited over two years after the agreed bankruptcy order was entered before seeking interest on the marital property debt.

In order to prevail on the affirmative defense of *laches*, Brian was required to prove that: (1) Terry lacked due diligence in bringing suit; and (2) this delay in bringing the suit resulted in prejudice to Brian. See *Lozman v. Putman*, 379 Ill. App. 3d 807, 822 (2008). A trial court's determination of whether *laches* bars a claim depends on the facts and circumstances of each case. *Lozman*, 379 Ill. App. 3d at 822. We will not disturb a trial court's determination of *laches* unless it is clearly wrong and constitutes an abuse of discretion. *Lozman*, 379 Ill. App. 3d at 822.

In this case, Brian claims that because Terry waited two years to file her petition, he now has to pay \$40,000 in interest until 2014 instead of payments until 2012. Brian fails to cite to any page in the record to support his argument. See 210 Ill. 2d R. 341(h)(7) (providing that appellate argument must include, *inter alia*, citation to pages of the record relied on). Thus, this issue is forfeited. See *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001). Therefore, Brian has failed to establish that Terry's delay in filing the petition prejudiced him. Accordingly, Brian failed to establish that the award of interest was barred by *laches*.

III. CONCLUSION

For the reasons stated, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.