

No. 1-11-0612, 1-11-0613 (cons.)

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
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	
v.)	Nos. 06 M1 402211
)	06 M1 401883
CHESTER BORSUK, et al.,)	
)	Honorable
)	James M. McGing,
)	Judge Presiding.
Defendants-Appellants.)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *HELD:* Because defendant failed to timely appeal the denial of his section 2-1401 petitions, we are without jurisdiction to consider those claims. Moreover, because defendant failed to meet his burden of providing a valid excuse for failing to comply with a court order, the circuit court's finding of indirect civil contempt was valid.

¶ 2 In 2006, plaintiff, the City of Chicago (“the city”), filed suit against defendant, Chester Borsuk, in his individual capacity and doing business as Union Auto Sales (“Borsuk”), for

1-11-0612, 1-11-0613 (cons.)

allegedly violating several city zoning ordinances. The circuit court entered a judgment in favor of the city on those claims in a pair of agreed orders which enjoined Borsuk from storing automobiles on his property. Borsuk petitioned to vacate those orders, but the circuit court rejected his petitions. Several years later, the circuit court found him in indirect civil contempt for failing to comply with those orders. It is from this contempt finding which Borsuk now appeals.

¶ 3 I. BACKGROUND

¶ 4 The record indicates Borsuk does business as Union Auto Sales, which is licensed to sell motor vehicles at 2427-2435 East 87th Street, Chicago, IL. Borsuk has been operating Union Auto Sales there since approximately 1973. In late 2006, the city filed two separate complaints against Borsuk concerning 2 adjacent properties located immediately west of Union Auto Sales at 8700-8736 S. South Chicago Avenue and 8701-8721 S. South Chicago Avenue (“the subject properties”), alleging violations of the city’s zoning ordinances and seeking injunctive relief. In its complaints, the city alleged that Borsuk had engaged in the sale of motor vehicles without a license and failed to comply with zoning ordinances regarding off-street parking, construction of signs, and the operation of a business outdoors.

¶ 5 On November 2, 2007, the circuit court entered judgment in favor of the city pursuant to an “Agreed Order of Settlement with Permanent Injunction” (“agreed orders”) in each case. Both orders were signed on behalf of Borsuk’s by his attorney at the time, F. Ronald Buoscio. In those orders, Borsuk admitted the city’s allegations, “agreed to plead liable” on all counts in the complaints, and waived his right to appeal. The agreed orders permanently enjoined Borsuk

1-11-0612, 1-11-0613 (cons.)

from using the subject properties to store motor vehicles outdoors or to maintain or erect any sign without a permit until he brought the subject properties into compliance with the city's zoning ordinances. The orders further provided that Borsuk would pay between \$500 to \$1000 per day to the city for every day he was in violation. The circuit court retained jurisdiction over the injunctions "solely for the purposes of enforcement or modification.

¶ 6 On February 8, 2008, the circuit court granted Buoscio's leave to withdraw as Borsuk's counsel and Anthony Peraica, Borsuk's current counsel, appeared on his behalf. The parties appeared before the circuit court several times over the following months and engaged in negotiations regarding possible amendments to the agreed orders. No settlement was reached and on October 3, 2008, Borsuk filed "amended motions" in each matter, in which he argued that the city's complaints should be dismissed because the subject properties either conformed with applicable zoning regulations or were not subject to those regulations because they constituted a continuous nonconforming use. In its response, the city argued first that the subject properties failed to comply with applicable zoning regulations, and second, that its complaint was already dismissed pursuant to the agreed orders, prohibiting Borsuk from parking or storing vehicles on the subject properties.

¶ 7 On December 1, 2008, Borsuk filed petitions to vacate the agreed orders pursuant to 735 ILCS 5/2-1401 (West 2008), in which he alleged that he felt "coerced" and "directly pressured into entering into the agreed order[s]," and that they did not "reflect[] [his] actual feelings on the issues." Specifically, he alleged that "[i]t cannot be emphasized strongly enough that at no time did Mr. Borsuk feel as though he had any other option but to enter into the agreed order."

1-11-0612, 1-11-0613 (cons.)

Borsuk admitted, however, that he did not express his concerns to Buoscio prior to the entry of the agreed orders. Borsuk further alleged in these petitions that, unbeknownst to him, Buoscio was “facing a life threatening illness” at the time, and consequently made “very little attempt” to investigate the city’s claims.

¶ 8 In its response, the city argued Borsuk failed to allege a meritorious claim or defense, or meet any of the other criteria necessary to sustain a section 2-1401 petition. Following a hearing, the circuit court denied Borsuk’s petitions on August 14, 2009, and granted the city leave to enforce the terms of the agreed orders through indirect civil contempt proceedings. Borsuk did not file any motions to reconsider the denial of his petitions.

¶ 9 On September 4, 2009, the city filed its “Petition for Adjudication of Indirect Civil Contempt and to Enforce Terms of Agreed Order of Settlement,” alleging that Borsuk, by continuing park and store motor vehicles on the subject properties, had failed to comply with the terms of the agreed orders. Submitted with that petition were photographs of the subject properties supporting the city’s contention that Borsuk had failed to remove the automobiles from them. In his response, Borsuk alleged that he had been attempting to comply with the agreed orders and should not be held in indirect civil contempt.

¶ 10 On November 12, 2010, the circuit court ordered Borsuk to show cause why he should not be held in contempt for failing to comply with the agreed orders’ requirement that he “keep the subject property clear of all motor vehicles, including an injunction not to park or store motor vehicles outdoors.” On February 18, 2011, the circuit court held Borsuk in indirect civil contempt for failing to comply with the agreed orders, and imposed a \$500 day fine for each day

1-11-0612, 1-11-0613 (cons.)

that he failed to comply.¹

¶ 11 On February 22, 2011, Borsuk filed notices of appeal in both matters, seeking “reversal of court’s finding of indirect civil contempt as well as reversal of injunction and fine of \$500.00 per day.” The two appeals were subsequently consolidated on motion of the city.

¶ 12 II. ANALYSIS

¶ 13 Borsuk raises two separate arguments on this appeal. First, he alleges that the circuit court’s August 14, 2009 denial of his section 2-1401 petitions to vacate the agreed orders under 735 ILCS 5/2-1401 (West 2008) was against the manifest weight of the evidence because he did not, in fact, agree to those orders. Second, he contends that the circuit court’s finding of indirect civil contempt was erroneous because he “does not have the means to purge himself of such contempt.” For the reasons that follow, we affirm.

¶ 14 A. Motion to Vacate

¶ 15 Borsuk first alleges that because his petitions to vacate the November 2, 2007 orders sufficiently established that he was entitled to relief under 735 ILCS 5/2-1401 (West 2008), the circuit court’s decision denying those motions constituted an abuse of discretion. Specifically, he claims that he did not enter the agreed orders voluntarily and that he failed to present defenses below due to Bouscio’s illness. The city, however, asserts that this court lacks jurisdiction to consider these arguments because Borsuk did not timely appeal the denial of his 2-1401 petitions. Borsuk did not address this jurisdictional argument on appeal. We also note that Borsuk did not

¹Although the orders holding Borsuk in contempt do not appear in the record on this appeal, the half-sheets, which are part of the common law record, indicate that Borsuk did not contest his failure to comply with the agreed orders.

1-11-0612, 1-11-0613 (cons.)

file a reply brief. For the reasons that follow, we agree with the city.

¶ 16 This court “has an independent duty to consider its jurisdiction before proceeding to the merits of the case. When jurisdiction is lacking, the court must dismiss the appeal on its own motion.” *Almgren v. Rush-Presbyterian-St. Luke’s Medical Center*, 162 Ill. 2d 205, 210 (1994).

¶ 17 “Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days.” *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). A petition seeking relief under section 2-1401 “must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof.” 735 ILCS 5/2-1401(b) (West 2008). Pursuant to Supreme Court Rule 304(b)(3), an order resolving a section 2-1401 petition is a final judgment which is immediately appealable. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002); Ill. S. Ct. R. 304(b)(3) (eff. Jan. 1, 2006) (“A judgment or order granting or denying any of the relief prayed in a petition under section 2–1401 of the Code of Civil Procedure” is appealable without a special finding). “Indeed, because a section 2--1401 petition begins a separate action,[citation.], the resolution of the petition ends the entire action, so no other time to appeal could exist.” *Washington Mutual Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427, 430 (2008). Consequently, an appeal of the denial of a section 2-1401 petition must be made within 30 days in order to comply with Supreme Court Rule 303(a)(1). *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35, 39 (1998); *Schacht v. Katten Muchin & Zavis*, 294 Ill. App. 3d 42, 46 (1997) (“Orders within the scope of Supreme Court Rule 304(b) must be appealed within 30 days of their entry”).

¶ 18 Pursuant to that rule, a party appealing a final judgment must file his notice of appeal

1-11-0612, 1-11-0613 (cons.)

within 30 days of that judgment's entry. Ill. S. Ct. R. 303(a)(1) (eff. May 1, 2007). A party may, however, toll this deadline by filing a motion "directed against the judgment," such as a "motion for rehearing, retrial, modification, *** or vacation." *Djikas v. Grafft*, 344 Ill. App. 3d 1, 7-8 (2003). Our compliance with this, and all other Supreme Court rules, is mandatory.

Accordingly, when an appeal of a final judgment is filed outside the 30 day window mandated by rule 303(a)(1), this court lacks subject matter jurisdiction to consider that appeal. *Wauconda Fire Protection Dist. v. Stonewall Orchards*, 214 Ill. 2d 417, 428 (2005) ("as applied to the *** appellate court, our rules are jurisdictional and must be strictly observed").

¶ 19 In this case, there is no dispute that more than 30 days elapsed between the circuit court's denial of Borsuk's section 2-1401 petitions to vacate on August 14, 2009 and his February 22, 2011 notices of appeal. Nor is there any dispute that Borsuk failed to file any motion directed against the judgment which would extend the 30 day filing deadline.

¶ 20 We note that Borsuk's attack on the circuit court's indirect civil contempt finding cannot be recharacterized so as to circumvent this jurisdictional bar. Much like section 2-1401 proceedings, contempt proceedings are "collateral to and independent of the case in which the contempt arises." *Busey Bank v. Salyards*, 304 Ill. App. 3d 214, 218 (1999). A party held in contempt "may not collaterally attack the underlying final judgment in an appeal from an order of contempt based on a violation of that judgment." *Busey Bank*, 304 Ill. App. 3d at 218.

¶ 21 Accordingly, we lack jurisdiction to consider Borsuk's claims regarding his section 2-1401 petitions. See *Dus v. Provena St. Mary's Hospital*, 2012 IL App (3d) 91064, ¶10 (quoting *People v. Lyles*, 217 Ill. 2d 210, 217 (2005)) ("When an appeal is untimely under a supreme court

1-11-0612, 1-11-0613 (cons.)

rule, the appellate court has ‘no discretion to take any action other than dismissing the appeal’’).

¶ 22 B. Indirect Civil Contempt

¶ 23 We turn next to Borsuk’s second contention, namely that the circuit court erred when it found him in indirect civil contempt. Specifically, Borsuk argues that because neither the circuit court or the city demonstrated that Borsuk was able to purge himself of his contempt, the finding was erroneous. We disagree.

¶ 24 A finding of indirect civil contempt is appropriate where a party fails to do something ordered by the trial court, outside of its presence, resulting in the loss of a benefit or advantage to the opposing party. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 479 (1997). In order to establish contempt, our courts have held that:

“The existence of an order of the trial court and proof of willful disobedience of that order are essential to any finding of indirect civil contempt. [Citation.] The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. [Citation.] The burden then shifts to the alleged contemnor to show that noncompliance with the court’s order was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order. [Citation.] Contumacious conduct consists of ‘conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or lessening the authority and dignity

1-11-0612, 1-11-0613 (cons.)

of the court.’ [Citation.]” *In re Marriage of Charous*, 368 Ill. App.

3d 99, 107-08 (2006).

¶ 25 “It is well established that whether a party is guilty of contempt is an issue of fact for the trial court to decide, and a reviewing court will not disturb the trial court's finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion.” *In re Anderson*, 409 Ill. App. 3d 191, 210 (2011).

¶ 26 Here, the record indicates that the city provided sufficient evidence in its petition, in the form of photographs of the subject properties, to meet its burden of proving that Borsuk had failed to comply with the agreed orders. The photographs and affidavits submitted with its contempt petition indicate that Borsuk continued to park and store vehicles on the subject properties for several years, in violation of the terms of the agreed orders. The record further indicates that Borsuk failed to excuse his failure to comply with the agreed orders. Borsuk, in his response to the city’s petition, conceded this failure, stating that he had removed some of the vehicles off some portions of the subject properties, but offering no explanation as to why he had not removed all of the vehicles as required. In fact, the photographs submitted with Borsuk’s response indicate that vehicles were still being parked on the subject property. In light of this, the circuit court was presented with ample evidence to conclude that Borsuk did not have a valid excuse for failing to comply with the agreed orders.

¶ 27 Moreover, Borsuk has cited no authority to support his proposition that the city was obligated to “demonstrate exactly how [he] would be able to pay a fine of \$500.00 per day.” As stated above, the burden on a plaintiff in a contempt proceeding is simply to establish, by a

1-11-0612, 1-11-0613 (cons.)

preponderance of the evidence, that a defendant failed to comply with a court order, which the city here did. As the city correctly points out, Borsuk seems to conflate his compliance with the agreed orders, the conduct necessary to purge himself of contempt, with the fines imposed for failing to comply with them. The city merely had to show Borsuk's ability to comply with the agreed orders, rather than his ability to pay a fine, in order to support a finding of contempt, which it did. See *Charous*, 368 Ill. App. 3d at 107-08.

¶ 28 Borsuk further asserts that the orders finding him in contempt make “no mention whatsoever that the finding is indeed conditional.” We note that Borsuk has failed to include copies of these contempt orders in the record on appeal. While attached to his briefs, these attachments “cannot be used to supplement the record,” (*Jones v. Police Board*, 297 Ill. App. 3d 922, 930 (1998)) and, consequently, we must presume “that the order entered by the trial court was in conformity with [the] law.” *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 29 Even if we were to consider the contempt orders attached to his brief, we would nevertheless find that they gave Borsuk adequate specifics by which to purge himself of his contempt, as they explicitly state that he was “found in indirect civil contempt of Court” for failing to comply with an order requiring him to “keep the subject property clear of all motor vehicles, including an injunction not to park or store motor vehicles outdoors,” and that a \$500 per day fine would be imposed “until contempt is purged.” Given this language, we fail to accept Borsuk's argument that the orders lack the “requisite specifics regarding the means by which [he] can purge [himself] of such contempt.”

1-11-0612, 1-11-0613 (cons.)

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the decision of the circuit court.

¶ 32 Affirmed.