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2012 IL App (3d) 110742-U

Order filed July 19, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

In re MARRIAGE OF)	Appeal from the Circuit Court
)	for the 10 th Judicial Circuit,
AGNES A. SORCE,)	Peoria County, Illinois
)	
Petitioner,)	
)	
and)	
)	
ROY A. SORCE,)	
)	Appeal No. 3-11-0742
Respondent,)	Circuit No. 05-D-586
)	
and)	
)	
AGNES A. SORCE,)	
)	
Plaintiff-Appellant,)	
Cross-Appellee,)	
)	
v.)	
)	
SORCE ENTERPRISES, INC.,)	Honorable
)	David J. Dubicki,
Defendant-Appellee,)	Judge, Presiding.
Cross-Appellant.)	

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it denied the plaintiff's motion to amend the pleadings because this motion was untimely, prejudiced the defendant, and could have been brought at an earlier time. Also, the trial court did not err by imposing a constructive trust on the defendant's assets, as this court previously remanded the cause with the specific directions to determine the proper amount the defendant must hold in constructive trust for the plaintiff.

¶ 2 After a remand from this court, the trial court determined that Sorce Enterprises, Inc. (Sorce), the third-party defendant and cross-appellant, must hold \$161,400 in a constructive trust for the benefit of Agnes Sorce (Agnes), the third-party plaintiff and cross-appellee. The trial court also denied Agnes's motion to amend and conform the pleadings to the proofs, which sought to increase the amount of money that the trial court could place in the constructive trust. Agnes appeals, contending that the trial court abused its discretion when it denied her motion to amend. Sorce also appeals, contending that the trial court erred by imposing a constructive trust on its assets. Roy Sorce (Roy), the respondent in the underlying dissolution action involving Agnes, has not raised any issues or submitted a brief in this appeal. We affirm.

¶ 3 **FACTS**

¶ 4 The underlying facts of this case are set forth in our prior order in *In re Marriage of Sorce*, No. 3-09-0416 (May 11, 2010) (unpublished order under Supreme Court Rule 23). We incorporate these facts into this order, and recount some for the sake of clarity.

¶ 5 Agnes and Roy were married in May 1985 in Arizona and moved to Peoria so that Roy could work at Sorce, a closely-held corporation controlled by Allen Sorce (Allen), Roy's father. In 1995, Roy became president and chief operating officer of the corporation. His base salary has remained at \$1,600 weekly since the mid-1990's. Roy's gross earnings were as follows: 1999- \$564,715; 2000- \$589,136; 2001- \$509,706; 2002 - \$590,441; 2003- \$539,831, all of which included substantial bonuses. In addition to those amounts, Roy also received rent from the corporation to the land partnership and distributions from the corporation that increased his income to the following: 2000- \$798,738; 2001- \$693,731; 2002- \$773,471; and 2003- \$688,536. Roy's W2's indicated wages and other compensation as only \$108,853 in 2004 and \$91,960 in 2005.

¶ 6 In September 2005, Agnes filed her petition for dissolution of the marriage. She subsequently sought temporary relief and Roy filed for custody of the couple's three minor children. At a later hearing on Agnes's petition, Roy testified that his only income was his net salary of \$59,500 per year. He was not paid a bonus in either 2004 or 2005. The trial court ordered Roy to pay \$5,221 in monthly expenses for the marital home, college tuition for the couple's daughter, and \$2,300 per month child support.

¶ 7 Agnes sought leave and filed a third-party complaint against Sorce. In her first amended third-party complaint, filed September 28, 2007, Agnes alleged that Sorce substantially reduced Roy's salary and bonuses to defraud the marital estate, and that the diverted funds were placed in certificates of deposit (CD's) owned by the corporation. In count I of the complaint, she sought the imposition of a constructive trust over the CD's for the benefit of the marital estate. Agnes specified that Roy's salary dropped to \$108,853.25 and \$91,959.93 in 2004 and 2005, respectively, and that "[f]rom January 2005 to August 2006, Sorce placed \$807,440 in [CD's]."

In her prayer for relief, Agnes specifically requested that the trial court find that Sorce held \$161,400 in CD's in constructive trust for the reimbursement of the marital estate. The record indicates that the amount alleged in the prayer for relief is 20% of the total amount in the CD's, representing Roy's former 20% ownership interest in Sorce. The trial court denied Sorce's motion to dismiss and the cause proceeded to a bench trial.

¶ 8 Agnes, Roy and Allen testified at trial. On March 24, 2009, the second day of the three-day trial, Agnes filed a motion to amend her first amended third-party complaint by increasing her prayer for relief to the imposition a constructive trust on the assets of Sorce up to \$2,073,733.49. In support of this request, Agnes contended that Roy and Sorce fraudulently reduced Roy's salary by over \$400,000 for the years between 2004 and 2008. The trial court denied this motion for the years of 2006-2008. The next day at trial, Agnes orally requested permission to substitute the amount of \$807,440, for the original amount of \$161,400 in her prayer for relief. The court stated that it would consider the motion to amend with the ultimate disposition of the case.

¶ 9 Pursuant to a motion filed by Agnes, the trial court took judicial notice of prior findings entered by the court as to Roy's income reduction. The previous judge determined that Roy acquiesced in Allen's program to reduce his income, that Roy's failure to question either the reduction in his income or his demotion evidenced his complicity and that Roy "either actively or passively is involved in his own reduction of income."

¶ 10 The trial court made its own findings, including that: (1) "the reason why these bonuses were cut off is because of the marital problems *** to try to make sure that there was, you know, not a lot of money passing through the marital estate"; (2) "all reasonable inferences indicate that there's no other explanation really for absolutely no bonus being paid at the end of '04"; (3)

Sorce paid over \$100,000 of estimated tax payments in 2004 and the court "cannot imagine anyone as savvy as Allen Sorce would let his accountant pay those kind of estimated tax payments if he knew at the end of the year that he wasn't going to pay a bonus to [Roy]"; (4) its "conclusion is that the clear and convincing evidence did show that the reason that no bonus was paid, certainly, a preponderance of the evidence showed that no bonus was paid to Roy for the years '04 and '05 is because Sorce Enterprises, Inc., which is basically Allen Sorce, with, at a minimum, that [*sic*] acquiescence of Roy, didn't want more money to be thrown into the marital pot [because] there were significant problems with the relationship"; and (5) there was "no contractual obligation to pay Roy a bonus[.]" but that "if the evidence had shown that these amounts were set aside for payment of the bonus, and I know perhaps that's part of the argument, well, they put them into a CD, and there's no question that if money pops up after this case is resolved, that that money could certainly be considered in, perhaps, post-judgment matters."

¶ 11 Despite its findings, the trial court held that under the facts, no constructive trust could be imposed because Roy's salary and bonuses were only expectancies and thus there was no transfer of a marital asset. Because Roy did not have an employment contract, the trial court further found that there was no wrongdoing by Sorce because as the majority shareholder, Allen could cut Roy's salary to deprive the marital estate. Due to the trial court's finding that it could not impose a constructive trust over Sorce's assets, it did not rule on Agnes's motion to amend.

¶ 12 Agnes appealed, and in case No. 3-09-0416, this court concluded that the trial court erred when it denied Agnes's request for the imposition of a constructive trust. We specifically stated "that efforts by Sorce Enterprises to decrease Roy's compensation in order to keep the funds out of the marital estate constitute[d] a wrongdoing sufficient for the imposition of a constructive trust." *Sorce*, No. 3-09-0416 at 12. We further stated that "[t]he evidence support[ed] the trial

court's factual findings that the failure of Sorce Enterprises, with Roy's complicity, to pay him bonuses in 2004 and 2005 was 'essentially collusive in nature' and sufficient to establish fraud." *Sorce*, No. 3-09-0416 at 14. We also noted that "Agnes presented evidence that funds were placed into CD's by Sorce Enterprises at the same time Roy ceased receiving bonuses. Although Allen testified that the CD's were depleted, the funds that purchased them remain traceable assets amenable to a constructive trust." *Sorce*, No. 3-09-0416 at 14.

¶ 13 Ultimately, we "[ou]nd that Agnes established actual fraud as evidenced in the trial court's factual findings." *Sorce*, No. 3-09-0416 at 14. We therefore "h[e]ld that the trial court erred in determining as a matter of law that Roy's at-will status precluded the imposition of a constructive trust." *Sorce*, No. 3-09-0416 at 14. We remanded the cause for the trial court to determine the amount held by Sorce in constructive trust for the marital estate based on its disposition of Agnes's motion to amend. Sorce filed a petition for leave to appeal in the Supreme Court, which was denied. *In re Sorce*, 237 Ill. 2d 591 (2010).

¶ 14 On remand, the trial court denied Agnes's motion to amend, finding that: (1) the proposed amendment was made near the end of trial and was therefore untimely; (2) previous opportunities to amend were available, as the amount of the alleged diversion to the CD's was known when Agnes filed her first amended third-party complaint, but the request to amend was not made until nearly 1½ years later; (3) Sorce would be prejudiced and surprised by the late amendment which would increase the prayer for relief fivefold because the case was tried upon the theory that Roy was entitled to 20%, not 100%, of the cash in the CD's; (4) the proposed amendment was based on Roy's salary history, which was known to Agnes before trial; (5) the only possible *res* was the CD's, and Agnes did not show that it was fair to increase Roy's share of the CD's from his 20 percent ownership interest in the company to 100%; (6) Agnes's argument

sought to expand the amount held in constructive trust beyond the only possible *res*; and (7) Agnes's request to amend is not one to conform to the proof. The court further held that even if it granted Agnes's motion to amend, it would not have awarded any more than the \$161,400 it ultimately awarded.

¶ 15 The trial court then noted its prior finding that Sorce's conduct was not of the nature that justified the imposition of a constructive trust, but acknowledged that this court reversed that determination. The court also stated "that Sorce could, on appeal, have argued that the evidence (which was closed) did not support the existence of a *res* and, assuming such *res* existed, that the proceeds of such were not traceable. It [did] not appear that such issues were fully presented on appeal, but the majority opinion appears to have concluded that a *res* did exist in the form of the CD's." The court thus read "the majority opinion to hold that the CD's constituted the *res*."

¶ 16 The trial court continued that "[a]s to whether the assets were traceable, the CD's were cashed. Cash is very fluid. Agnes did not present evidence to trace the exact location of that cash. The majority opinion, however, provide[d] in pertinent part: 'Although Allen testified that the CD's were depleted, the funds that purchased them remain[ed] traceable assets amenable to a constructive trust.'" The court thus found that after Sorce liquidated the CD's, it had sufficient liquid assets to place \$161,400 in trust for Agnes, the amount she sought in her first amended third party complaint. The trial court also noted this court's conclusion that Sorce and Roy benefitted from the wrongful activity of defrauding the marital estate, and the trial court "construe[d] such as a directive to impose a constructive trust on the assets of Sorce." The court further acknowledged that this court had specifically remanded the cause for the court to determine the amount held by Sorce in constructive trust.

¶ 17 The trial court imposed a constructive trust on \$161,400 of Sorce's assets and found that pursuant to Illinois Supreme Court Rule 304(a), there was no just reason to delay enforcement of appeal of its order. Agnes and Sorce appealed.

¶ 18 ANALYSIS

¶ 19 (A) Denial of Agnes's Motion to Amend

¶ 20 Agnes asserts that the trial court abused its discretion when it denied her motion to amend because "the elements of damage were included in [her] amended third party complaint"; Sorce would not be prejudiced or surprised by the amendment; her motion to amend was one to conform the pleadings to the proof; and the trial court improperly considered that the proposed amendment was untimely. Sorce contends that this issue is moot because the trial court indicated that it would not award Agnes any more money even if it had granted the amendment; the award of \$161,400 was not an abuse of discretion and this contention is nonetheless waived because Agnes has not raised it on appeal; and the trial court did not abuse its discretion in denying the motion to amend. Sorce also asserts that the proposed amendment would be prejudicial to it because they prepared for trial based on the much lower requested relief, and thus, they conducted only a "few short depositions" and did not retain an expert witness.

¶ 21 Pursuant to section 616(a) of the Code of Civil Procedure, an amendment to a pleading may be made at any time before the trial court enters a final judgment. 735 ILCS 5/2-616(a) (West 2008); see also 735 ILCS 2/616© (West 2008) (a pleading may be amended at any time before or after judgment to conform it to the proofs). Thus, in general, a trial court should liberally allow parties to amend their pleadings to permit them to fully present their cause. *Simon v. Wilson*, 291 Ill. App. 3d 495 (1997).

¶ 22 A reviewing court should consider four factors to determine whether the trial court abused its discretion in refusing an amendment to a party's pleading, namely: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992). Ultimately, the proper measure of whether the trial court abused its discretion in granting or denying the amendment is whether the decision furthers the ends of justice. *Hall v. Northwestern University Medical Clinics*, 152 Ill. App. 3d 716 (1987) (court concluded that the trial court's determination to deny a party's request to amend its pleading was proper as the amendment would not have furthered the ends of justice because the amendment went to the extent of the party's recovery, and not its right to recover). We review a trial court's determination to grant or deny an amendment to a pleading for an abuse of discretion. *Loyola Academy*, 146 Ill. 2d 263.

¶ 23 In this case, the trial court did not abuse its discretion when it denied Agnes's motion to amend her pleadings for two reasons. First, our review of the applicable factors supports the trial court's determination and second, Agnes has not shown that the ends of justice will be furthered by granting her petition to amend.

¶ 24 Looking first at the applicable factors, elements related to timeliness predominated with the trial court. The timeliness of a motion to amend is a discretionary determination on the part of the trial court. *Hall*, 152 Ill. App. 3d 716. "[W]here the facts sought to be alleged on the eve of or during trial are known to the party at the time of original pleading and no good reason is offered for their not having been filed at that time, leave to amend is properly denied. [Citation.]" *Carlisle v. Harp*, 200 Ill. App. 3d 908, 915 (1990).

¶ 25 The trial court correctly found that Agnes had prior opportunities to amend her first amended third-party complaint to seek damages of \$807,440. Our review of the record reveals that in that pleading, Agnes specifically alleged that Roy's salary decreased substantially in 2004 and 2005 and that the CD's were worth \$807,440. Thus, these facts did not suddenly come to light at trial so as to compel an amendment to Agnes's pleading. Also, as the trial court noted, the request to amend came 1½ years after Agnes filed her first amended third-party complaint, and it also came after the trial had already commenced. In light of these facts, the trial court correctly found that the motion to amend was untimely and thus, its determination regarding this factor was not improper.

¶ 26 Additionally, the timing of Agnes's request to amend prejudiced Sorce. As Sorce asserts, it prepared for trial based on requested relief of \$161,400. Therefore, Sorce presents a real concern about preparing for a trial based on one level of relief, only to be faced with a request on the second day of trial and to increase this amount fivefold to an amount for which it did not prepare. Overall, it would be unfair and prejudicial to expose Sorce to such a scenario.

¶ 27 The record also does not support Agnes's assertion that the amendment would cure a defective pleading. Specifically, Agnes has not alleged any particular defect in her pleading that needs to be cured in order to properly bring her suit; instead, she only wants to amend her pleading to seek an amount substantially greater than the original relief sought.

¶ 28 Second, Agnes has also not shown that the ends of justice would be furthered had the trial court granted her motion to amend. Rather, as another district of this appellate court noted, the request to amend went only to the amount of recovery sought, and not Agnes's right to recover. See *Hall*, 152 Ill. App. 3d 716. This fact, coupled with the facts that Agnes's request to amend came after the trial commenced and well after she was aware of the full amount of the

CD's, indicates that such an amendment would not further the ends of justice. Therefore, we conclude that the trial court did not abuse its discretion when it denied Agnes's motion to amend her first amended third-party complaint.

¶ 29 (B) Propriety of the Constructive Trust

¶ 30 On appeal, Sorce contends that the trial court erred as a matter of law by declining to enter a judgment in its favor because Agnes did not trace the proceeds of any wrongful conduct to any identifiable fund that could become the *res* of a constructive trust. Sorce also asserts that the trial court erred when it found that this court's prior order in case No. 03-09-0416 concluded "that Agnes had traced and that a *res* existed in the form of the CD's." Agnes asserts that this court found that the fraudulently diverted funds were converted to CD's and remained traceable assets of the trust. She further asserts that such findings are law of the case and may not be reopened at a later stage of the litigation. Sorce counters that if this court indeed made such findings, they were findings of fact and not binding in subsequent litigation.

¶ 31 The law of the case doctrine generally bars relitigation of an issue previously decided in the same case, as courts do not reopen issues that have already been decided. *People v. Tenner*, 206 Ill. 2d 381 (2002); see also *People v. Patterson*, 154 Ill. 2d 414 (1992). Our supreme court has recognized where "there have been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal." *In re Christopher K.*, 217 Ill. 2d 348, 365 (2005), quoting 5 Am. Jur. 2d *Appellate Review* § 605, at 300 (1995). The supreme court noted that the law of the case doctrine sought "to avoid indefinite relitigation of the same issues, to obtain consistent results in the same litigation, and to ensure that lower courts follow the decisions of appellate courts." *Christopher K.*, 217 Ill. 2d at 365.

¶ 32 When a reviewing court reverses a trial court's judgment, the determination of the reviewing court is final upon all questions decided. If the reviewing court remands the cause, the trial court may act only in conformity with the judgment of the reviewing court. *PSL Realty Co. v. Granite Inv. Co.*, 86 Ill. 2d 291 (1981). More specifically, where a reviewing court remands the cause with specific directions, the trial court must follow those directions exactly. *Zokoych v. Spalding*, 84 Ill. App. 3d 661 (1980). Thus, the "holding of the appellate court in the original appeal established the law of the case on th[at] question. This holding [is] binding on the circuit court on remand and [is] binding on the appellate court on appeal from the judgment of the circuit court entered on remand." *PSL Realty Co.*, 86 Ill. 2d at 312. Therefore, the trial court must follow the mandate of the reviewing court, and in construing the language of the mandate, matters that are implied by the court may be considered as embraced by the mandate. *Zokoych*, 84 Ill. App. 3d 661. The trial court's compliance with a directive of this court is an issue of law which we review *de novo*. *In re Marriage of Rogers*, 213 Ill 2d 129 (2004).

¶ 33 (I) Case No. 3-09-0416

¶ 34 Our review of our prior order clearly reveals that we directed the trial court to impose a constructive trust over designated Sorce assets in an amount to be determined by the trial court pending its resolution of Agnes's motion to amend. Also, given our statement that the funds that purchased the CD's were "traceable assets amenable to a constructive trust," it is equally clear that we concluded that the funds from the CD's were traceable assets that would comprise the *res* of the trust. Thus, we concluded that Agnes had sufficiently identified and traced funds from the CD's as Roy's fraudulently diverted bonus income. Therefore, Sorce's contention that the trial court should have entered a judgment in its favor is without merit, as it precisely followed this court's binding direction to impose a constructive trust.

¶ 35 (ii) Law of the Case

¶ 36 Sorce nonetheless contends that this court did “not even purport to make any factual findings regarding tracing or the identify [*sic*] of any *res*.” Sorce also asserts that factual findings must be made by the court that observed the witnesses and testimony and that here, any such findings were findings of fact, not findings of law, and thus, they are not binding on this court on appeal.

¶ 37 At the outset, we clarify for the parties that it was the trial court that made the requisite findings of fact to support the existence of a constructive trust. As evidenced in our disposition of the earlier appeal in this case, this court did not overturn or disturb any of the trial court's factual findings. Rather, we only concluded that based on the trial court's factual findings, it erred as a matter of law when it determined that Roy's at-will employment status precluded the imposition of a constructive trust and on remand, we directed the trial court to provide this legal remedy to Agnes pending its resolution of her motion to amend.

¶ 38 Additionally, we point out that once Agnes traced Roy's bonuses to the CD's, the dispersal of this money did not have to be traced. As the trial court noted, cash is fluid. Perhaps more to the point, cash is fungible. A CD may be easily converted to cash and used in a manner that defies efforts to trace the specific dollars. As we stated in the prior appeal, Agnes established actual fraud as shown by the trial court's findings and the proper remedy for this fraud is the imposition of a constructive trust. We now clarify that Agnes's ability to trace the bonus funds to the CD's is sufficient to support the imposition of a constructive trust—she does not need to prove where each dollar went after the CD's were cashed. Any dollars owned by Sorce can fund the trust.

¶ 39 The existence of a constructive trust is a matter of law. See *Metropulos v. Chicago Art Glass Inc.*, 156 Ill. App. 3d 727 (1987) (court rejected defendants' contention that trial court erred as a matter of law by imposing a constructive trust). A court's determination on a matter of law can become law of the case, while a court's determination on a matter of fact cannot. See *Zokoych*, 84 Ill. App. 3d 661. Our supreme court has noted that "[a] constructive trust is an equitable remedy that may be imposed to redress unjust enrichment caused by a party's wrongful conduct. [Citation.] The proceeds of the alleged wrongful conduct must exist as an identifiable fund traceable to that conduct, such that it can become the *res* of the proposed trust. [Citations.]" *Eychaner v. Gross*, 202 Ill. 2d 228, 274 (2002).

¶ 40 The foregoing jurisprudence leads to one of two conclusions. First, because this court found that the trial court erred as a matter of law by not imposing a constructive trust, such a finding was an issue of law that is now law of the case. Well-established Illinois law provides that in order for a court to find the existence of a constructive trust, the party seeking that remedy must identify and trace the funds that would comprise the *res* of the trust. See *Eychaner*, 202 Ill. 2d 228. By virtue of our disposition in the prior appeal, *i.e.* a direction to the trial court to impose a constructive trust, it is clear that Agnes sufficiently identified and traced the *res*. In fact, this court previously stated that Agnes had presented evidence that Sorce placed money in CD's at the same time Roy stopped receiving bonuses and that the money that purchased the CD's was a traceable asset amenable to a constructive trust. Were the *res* not identified and traced, this court could not direct the trial court to impose a constructive trust. Consequently, because the existence of a constructive trust is an issue of law, any findings accompanying our prior disposition are issues of law that are now law of the case.

¶ 41 Second, even if any finding pertaining to this court's legal determination to impose a constructive trust, or the identity or tracing of any *res*, were not issues of law, but are issues of fact, Sorce is still bound by them. In this case, the trial court stated "that Sorce could, on appeal, have argued that the evidence (which was closed) did not support the existence of a *res* and, assuming such *res* existed, that the proceeds of such were not traceable. It [did] not appear that such issues were fully presented on appeal." Additionally, the supreme court denied Sorce's petition for leave to appeal. Consequently, any challenge to the conclusions that a *res* existed, and was identified and traced by Agnes to the CD's, are either waived or *res judicata*, as Sorce could have attempted to assert these contentions at an earlier point in these proceedings, but did not. See *People v. Towns*, 182 Ill. 2d 491 (1998) (issues previously decided on direct appeal are *res judicata*, issues that could have been raised but were not are waived).

¶ 42 Thus, for all of the above-stated reasons, Sorce's contention that the trial court should have entered judgment in its favor as a matter of law is without merit and we conclude that the trial court properly imposed a constructive trust in the amount of \$161,400 in this instance.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Peoria County is affirmed.

¶ 45 Affirmed.