2012 IL App (5th) 100477-U

NO. 5-10-0477

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
STEPHEN E. BROWN,	)	Saline County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 05-D-182
	)	
ELLEN D. BROWN,	)	Honorable
	)	Joseph M. Leberman,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* Where the motion to compel was untimely, the order based upon that motion and subsequent petition for rule to show cause were inappropriate, and the order based upon the motion to compel must be vacated. Contempt of court for compliance with that order must be reversed. The order of contempt based upon failure to appear at a hearing is contrary to the manifest weight of the evidence and is reversed.

¶ 2 FACTS

¶ 3 Stephen and Ellen Brown were divorced in 2007. Part of the dissolution judgment required Stephen to pay Ellen nonmodifiable monthly maintenance in the amount of $500. Stephen sustained a rotator cuff tear in a work injury that was surgically repaired in May 2010. Because Stephen was going to be off work for a period of three to four months during which he would not be paid by his employer, he filed a motion to terminate the maintenance award. Stephen's amended petition to modify was filed on June 22, 2010. A hearing on this

motion was set for July 28, 2010.

¶ 4 The next day, June 23, 2010, Ellen's attorney filed a subpoena *duces tecum* upon Stephen's employer, Big Ridge, seeking a complete copy of his worker's compensation file. Legal counsel for Big Ridge advised Ellen's attorney that Big Ridge could not release the requested documents without wage and HIPAA authorizations signed by Stephen. On July 8, 2010, Ellen's attorney sent the authorizations to Stephen's attorney with a cover letter in which she asked that the authorizations be signed and returned as soon as possible. Ellen's attorney did not file a formal discovery request seeking the documents or seeking the signed authorizations pursuant to any of the methods outlined in Supreme Court Rule 201(a) (eff. July 1, 2002)). On July 26, 2010, Ellen's attorney filed a motion to compel in order to obtain these signed authorizations. Ellen's attorney filed the motion to compel before sending a Supreme Court Rule 201(k) (eff. July 1, 2002)) letter to Stephen's attorney.

¶ 5 On July 26, 2010, Ellen filed a motion to continue the hearing on Stephen's modification petition because the employment and medical documents she needed to analyze his claim had not been provided. Stephen agreed to the continuance, and an order was submitted to the court.

¶ 6 On July 28, 2010, the order on the motion to continue had not yet been entered. Ellen's attorney appeared at the motion hearing, while Stephen's attorney did not. At this hearing, the court took up the motion to continue the petition to modify, as well as the unnoticed motion to compel. The court granted both motions and granted Stephen two days to provide the requested authorizations.

¶ 7 The deadline to provide the authorizations passed and no authorizations were provided. On August 10, 2010, Ellen's attorney filed a petition for rule to show cause, asking the court to hold Stephen's attorneys in contempt of court for failing to comply with the July 28, 2010, order. She asked the court to order incarceration and award attorney fees. The

court entered a rule to show cause ordering Stephen's attorneys to be present in court on August 19, 2010. Following that hearing, the court entered an order on August 26, 2010, holding Stephen's attorneys in contempt for failing to appear at the July 28, 2010, hearing and for failing to comply with its order compelling production of the authorizations for work records. As a sanction, the court entered an attorney fee award in the amount of $540. The judge acknowledged in his order that Ellen's motion to compel was not timely, but determined that the motion became timely when Stephen's attorneys failed to show at the July 28, 2010, hearing.

¶ 8 Stephen filed a motion to vacate the order on Ellen's motion to compel arguing that there was no notice given to indicate that the motion to compel would be heard on July 28, 2010; that he had only received the motion two days before and that he needed additional time with which to respond; and that the discovery matter was not handled in accordance with supreme court rules. Stephen also filed a motion to reconsider the court's contempt order.

¶ 9 The trial court denied both of Stephen's motions on September 13, 2010. From these orders, Stephen appeals.

¶ 10 ISSUES, LAW, AND ANALYSIS

¶ 11 Stephen raises two issues on appeal. He argues that the trial court erred in denying his motion to vacate. He also argues that the trial court's order of contempt was erroneous and should be reversed.

¶ 12 Motion to Compel

¶ 13 The procedural path that resulted in the motion to compel began with a subpoena *duces tecum* directed to a nonparty–Stephen's employer. Disregarding the propriety of the subpoena *duces tecum* served upon Stephen's employer, Big Ridge, once Big Ridge stated that it could not legally provide those documents without appropriate authorizations,

obtaining those authorizations from Stephen should have occurred by way of discovery or agreement.

¶ 14 Supreme Court Rule 214 provides: "Any party may by written request direct any other party to produce for inspection, copying, reproduction *** specified documents ***. *** The request shall specify a reasonable time, which shall not be less than 28 days except by agreement or by order of court, and the place and manner of making the inspection and performing the related acts. *** Any *** refusal to respond shall be heard by the court upon prompt notice and motion of the party submitting the request." Ill. S. Ct. R. 214 (eff. Jan. 1, 1996). Supreme court rules also require that before a party asks the court to address a party's refusal to respond to a production request, the party seeking the discovery must "make reasonable attempts to resolve differences over discovery" and in "[e]very motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences." Ill. S. Ct. R. 201(k) (eff. July 1, 2002). If a party refuses to comply with a request for production, "the party serving the request may on like notice move for an order compelling *** compliance with the request." Ill. S. Ct. R. 219(a) (eff. July 1, 2002). If the court determines that refusal to provide the documents was without substantial justification, the court may sanction the offending party by ordering the payment of a reasonable attorney fee. *Id.*

¶ 15 In this case, after being rebuffed in her attempts to obtain the employment records with the subpoena *duces tecum,* Ellen's attorney informally asked Stephen's attorneys to produce the authorizations. The need for these workers' compensation and other employment records is not in dispute. Stephen was using his injury and his alleged loss of income during his recovery from surgery as the foundation for his request to terminate Ellen's maintenance.

Without question, the records sought were important and necessary for preparation for the hearing on Stephen's modification petition. In order to utilize the court system to force production of the authorizations, Ellen needed to send out a formal discovery request. If the supreme court rule time limit of 28 days would not have provided sufficient time prior to the modification petition hearing, Supreme Court Rule 214 allows the party to seek an order setting an earlier deadline for production of the documents. In this case, there was no formal records production request. Even if the informal letter to Stephen's attorney constituted a formal discovery request, Ellen's attorney failed to certify to the court, pursuant to Supreme Court Rule 201(k), that reasonable attempts had been made to resolve discovery differences. Despite the fact that Ellen's attorney had not made a formal discovery request and had made no attempts to resolve the discovery disputes pursuant to Supreme Court Rule 201(k), Ellen's attorney filed a motion to compel on July 26, 2010. Two days later, while in court for the hearing on the motion to continue and the petition to modify, Ellen took the opportunity to call up her motion to compel. Ellen's attorney did not provide notice to Stephen's attorney that she intended to have the court hear this motion to compel. The local rule for the First Judicial Circuit about pretrial motion practice specifically provides that the clerk will not send the motion to the court for disposition until expiration of a 10-day period, which provides the opposing party an opportunity to respond to the motion. 1st Judicial Cir. Ct. R. 2.1(C) (July 1, 1995).

¶ 16 Because the motion to compel lacked an appropriate foundational basis under Supreme Court Rules 214 and 201(k), the trial court abused its discretion in granting the motion to compel on July 28, 2010. The court's rationale that Stephen's failure to appear at the July 28 hearing excused Ellen's failure to give timely notice under local rules of her intent to call up the motion to compel on the same date cannot overcome these supreme court requisites. Because we find that the order on the motion to compel was improper, the trial

court's order denying Stephen's motion to vacate that order was erroneous.

¶ 17 Contempt Order

¶ 18 The court's order of August 26, 2010, holding attorney Cockrum and the law firm of Drew and Drew in "contempt of court" was based on two occurrences–counsel's failure to appear in court on July 28, 2010, and counsel's failure to comply with the order entered that date on Ellen's motion to compel.

¶ 19 While the court did not specify the type of contempt involved, the parties agreed on appeal that the contempt was indirect civil contempt.

¶ 20 Indirect contempt refers to contempt that occurs outside of the courtroom. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107, 855 N.E.2d 953, 961 (2006).

¶ 21 Contempt of court is classified as either civil or criminal. Civil contempt is considered coercive in its nature–to obtain compliance with the court's order. *In re Marriage of Depew*, 246 Ill. App. 3d 960, 966, 616 N.E.2d 672, 677 (1993). Civil contempt is not a punishment. *Id*. Civil contempt has two fundamental requirements. First, the contemnor must have the ability to do what the court asked, and second, upon doing so, there can be no further sanctions imposed. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279, 860 N.E.2d 539, 547 (2006). Civil contempt is considered a prospective remedy–structured to compel future compliance with the court's order. *Id*. In contrast, while criminal contempt also involves conduct that is calculated to obstruct a court's authority, the purpose of criminal contempt is to punish the contemnor. *People v. Goleash*, 311 Ill. App. 3d 949, 956, 726 N.E.2d 194, 199 (2000); *In re Marriage of Ruchala*, 208 Ill. App. 3d 971, 977, 567 N.E.2d 725, 729 (1991). Criminal contempt requires intent–willful conduct by the contemnor. *D'Agostino v. Lynch*, 382 Ill. App. 3d 960, 968, 887 N.E.2d 590, 597 (2008). An attorney's failure to comply with a court order can be criminally contemptuous. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 45, 558 N.E.2d 404, 417 (1990) (citing *People v. Graves*, 74 Ill.

2d 279, 284-85, 384 N.E.2d 1311, 1314 (1979); *People v. Townsend*, 183 Ill. App. 3d 268, 270-71, 538 N.E.2d 1297, 1299 (1989)).

¶ 22 In analyzing the court's contempt order to determine if the contempt was considered to be civil or criminal in nature, we look to the purpose for which the contempt sanctions were imposed. *In re Marriage of Sharp*, 369 Ill. App. 3d at 278-79, 860 N.E.2d at 547. The penalties imposed by the court also shed light on the nature of the contempt. If the sanctions are imposed to coerce a certain behavior or act, the contempt is civil in nature. *In re Marriage of Betts*, 200 Ill. App. 3d at 43-44, 558 N.E.2d at 415-16. If the punishment is purely punitive–to vindicate the court's authority–the contempt is criminal in nature. *Goleash*, 311 Ill. App. 3d at 956, 726 N.E.2d at 199.

¶ 23 The individual found to be in contempt of court bears the burden to establish that his noncompliance was not willful and that he has a valid reason for failing to comply with the court's order. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 480, 688 N.E.2d 864, 871 (1997).

¶ 24 We will not overturn a trial court's finding of contempt unless that finding is contrary to the manifest weight of the evidence. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 108, 855 N.E.2d 953, 961 (2006); *Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 628, 579 N.E.2d 432, 439 (1991).

¶ 25 We disagree with the parties' assessment that this was an indirect civil contempt order. We agree that the contempt was indirect, but disagree that the contempt order was civil in nature. If the contempt order was civil, the punishment must have been structured to allow Stephen's attorneys the opportunity to purge themselves of the contempt. In this case, by the date that the contempt order was entered–August 26, 2010–the releases sought by Ellen in order to obtain the sought-after employment documents had already been produced. Counsel for Stephen presented these releases to Ellen's attorney on August 19, 2010. Already having

delivered the authorizations listed in the court's July 28, 2010, order, there was nothing to purge at the contempt hearing on August 19, 2010. Furthermore, with respect to that portion of the contempt order addressing counsel's failure to appear in court on July 28, 2010, the court had already entered its order continuing the case on that same date. Overall, there simply was nothing for Stephen's attorneys to purge, and therefore the contempt order and the attorney fees for time spent by Ellen's attorney in filing the discovery-related motion and the rule to show cause was criminal in nature.

¶ 26 Having determined the type of contempt order issued by the trial court, we turn to the propriety of this order.

¶ 27 Contempt for Failing to Appear at the July 28, 2010, Hearing. In the order of contempt, Judge Leberman states that the agreed-to motion to continue the hearing had not yet been entered "as it was the Court[']s intention to enter an Order on the Motion to Modify." At the hearing on Ellen's petition for rule to show cause, Stephen's attorneys explained to the court what happened on the date of the hearing that led to their absence. One of the attorneys in the firm, Daniel K. Cockrum, notified attorney Bryan A. Drew, of the same firm, that they had an agreed-to continuance of the July 28, 2010, hearing setting. Upon the erroneous assumption that the continuance would be timely processed, attorney Drew directed attorney Cockrum to go to a hearing in Williamson County.

¶ 28 Attorneys Drew and Cockrum filed affidavits with the court explaining how they came to be absent from the July 28, 2010, hearing. Although the continuance had been agreed to by both attorneys, on July 27, 2010, Judge Leberman contacted Ellen's attorney to tell her that all attorneys were expected to appear in his courtroom the next morning. As both attorneys were scheduled to appear in other counties on other matters on the morning of July 28, 2010, attorney Drew directed attorney Cockrum to set up a three-way conference call with Judge Leberman and Ellen's attorney on the morning of the hearing. By the time that attorney

Cockrum learned that his presence was required in Judge Leberman's courtroom the next morning, it was approximately 4 p.m., and although he and Ellen's attorney were amenable to the conference call with the judge, because of the late hour, they were not able to set that up on July 27. The next morning, attorney Cockrum called the judge's chambers in Saline County to request the conference call. A woman named Lisa, who answered that call, promised to contact attorney Cockrum as soon as the judge arrived. However, no one from the Saline County court called attorney Cockrum when Judge Leberman arrived.

¶ 29 In upholding his order of contempt, Judge Leberman explained that the agreement of the attorneys to continue the court date was not binding upon the court. He stated that the reason that Stephen's attorneys chose not to appear in his courtroom on July 28, 2010, was made clear to him by Ellen's attorney in her petition for rule to show cause. In our review of that pleading, we note that Ellen acknowledged that the parties agreed to continue the case, but that the order had not yet been entered, and stated that the court had "rather suggested to the parties' attorneys that they were expected to appear at said hearing." The remainder of Ellen's petition for rule to show cause deals with compliance with the order on her motion to compel, and so has no bearing on this aspect of the contempt order.

¶ 30 As stated earlier, to prove indirect criminal contempt, the alleged contemnor's intent must have been willful. *D'Agostino*, 382 Ill. App. 3d at 968, 887 N.E.2d at 597; *In re Marriage of Tatham*, 293 Ill. App. 3d at 480, 688 N.E.2d at 871. He bears the burden of establishing that his actions were not intentional–that he had a valid reason for not complying. *Id.*

¶ 31 In this case, Stephen's attorneys did not intend to show up at court and were relying upon the eventuality that the motion to continue would be granted. The hearing was on Stephen's petition to modify. Both parties agreed that the documents critical to establishment and defense of the petition had not yet been obtained, and that there was no point in going

forward with the hearing on July 28, 2010. Certainly, the court has the power and the right to disregard the attorneys' requests to continue the hearing. Apparently, that is what Judge Leberman intended to do, by notifying Ellen's attorney that both sides needed to be present the next date. By the time of the late afternoon notification by the court, Stephen's attorneys were committed to other hearings in other counties. Stephen's attorneys made efforts in the late-afternoon of July 27, and early in the morning of July 28, to reach Judge Leberman to explain the time conflicts. Despite these attempts, contact with Judge Leberman never occurred.

¶ 31 While the court has the power to hold an attorney in contempt of court for failing to appear at a hearing, in this case, we find that the court's order was contrary to the manifest weight of the evidence. Notwithstanding the fact that the court did grant the motion to continue, Stephen's attorneys were not present in Judge Leberman's courtroom when the order was entered. However, the attorneys fully explained where they were, and why they were not able to be present, and also made adequate contact with opposing counsel about the scheduling conflict, as well as the need for the continuance. There were no witnesses present for the hearing on the petition to modify. No one suffered any prejudice by the fact that Stephen's attorneys did not appear in court on July 28, 2010. See *People v. Adam*, 15 Ill. App. 3d 669, 304 N.E.2d 711 (1973) (attorney held in contempt for failing to appear due to the presence of a witness and the attorney's failure to explain why he was unable to appear at the hearing); *Davis v. Sprague*, 186 Ill. App. 3d 249, 541 N.E.2d 831 (1989) (attorney held in contempt when there was no advance notification to the court or to opposing counsel of the attorney's inability to be present at the hearing). Based upon the record and the arguments of counsel, we do not find that noncompliance in this particular case was willful. The contempt order for failure to appear at the July 28, 2010, hearing date must be reversed.

¶ 32 Contempt for Failing to Comply With the July 28, 2010, Order. We have already held

that the trial court's order granting Ellen's motion to compel was erroneous, because there was no underlying discovery request. The petition for rule to show cause was based on Stephen's failure to comply with this order. The trial court's August 26, 2010, order of contempt is based upon the lack of compliance with the order compelling production of the authorizations and the filing of the petition for rule to show cause. Therefore, a finding of contempt for failing to comply with the July 28, 2010, order is inappropriate. The trial court's order of contempt for failing to comply with the July 28, 2010, order is contrary to the manifest weight of the evidence and must be reversed.

¶ 33 The order denying Stephen's motion to reconsider the contempt order is reversed.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Saline County is hereby reversed.

¶ 36 Reversed.