

2013 IL App (2d) 120762-U  
No. 2-12-0762  
Order filed March 29, 2013

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|   |   |                               |
|---|---|-------------------------------|
| FIRST AMERICAN BANK,                        | ) | Appeal from the Circuit Court |
|   | ) | of Du Page County.            |
| Plaintiff-Appellee,                         | ) |                               |
|   | ) |                               |
| v.  | ) | No. 11-CH-4152                |
|   | ) |                               |
| KINGLAKE, INC., KINGBROOK, INC.,            | ) |                               |
| KINGBRIDGE 2130, INC., KINGBRIDGE           | ) |                               |
| 511, INC., DUPAGE CENTRAL PARK              | ) |                               |
| FOR BUSINESS ASSOCIATION,                   | ) |                               |
| UNKNOWN OWNERS, and NONRECORD               | ) |                               |
| CLAIMANTS,                                  | ) |                               |
|   | ) |                               |
| Defendants                                  | ) | Honorable                     |
|   | ) | Bonnie M. Wheaton,            |
| (Christopher E. King, Defendant-Appellant). | ) | Judge, Presiding.             |

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Jorgensen and Spence concurred in the judgment.

**ORDER**

¶1 *Held:* Because the trial court's contempt sanction was a money judgment, the contempt was criminal, not civil, and thus the court erred in imposing the sanction without the process due for criminal contempt; we remanded for the court to evaluate whether to hold defendant in civil contempt.

¶ 2 Plaintiff, First American Bank (the Bank), filed a complaint in the circuit court of Du Page County against five affiliated corporations to foreclose mortgages on commercial real estate owned by four of the corporations and to enforce the fifth corporation's guaranty of the mortgage debt. Christopher E. King, who was alleged to be the "principal and owner" of each of the corporate defendants, was joined as a defendant for claims seeking to enforce his personal guaranty of the mortgage debt. During the course of the proceedings, the Bank filed a petition for a rule to show cause why King should not be held in contempt of court for disobeying orders appointing a receiver with authority to collect rents from tenants occupying the mortgaged premises. The Bank alleged, *inter alia*, on information and belief, that "King, on behalf of the respective mortgagors, has been collecting and retaining rents from tenants during the Receiverships." The trial court granted the petition and found King in direct civil contempt. As a sanction, the trial court entered a judgment for the Bank and against King in the amount of \$60,333.23. King filed a timely notice of appeal from the order finding him to be in contempt and entering judgment against him. We reverse the judgment and remand for further proceedings.

¶ 3 The Bank filed its complaint on August 20, 2011. On September 14, 2011, the Bank moved for appointment of a receiver. On September 27, 2011, the trial court entered an order appointing Barry C. Missner to be the receiver. The order provided that it would not take effect until the court had approved the receiver's bonds. The record reflects that the bonds were approved on or before October 26, 2011. On January 12, 2012, the Bank filed its petition for a rule to show cause. The Bank alleged that the foreclosure action was one of four that "involve[d] loans made by First American Bank to entities owned and controlled by Christopher E. King," and that, in each case, King had improperly collected rents after Missner's appointment as receiver had taken effect. On

March 1, 2012, the court entered an order requiring the defendants to provide the court with an affidavit “confirming \*\*\* that the Obligors have not collected any rents during the Receivership; and that any rents collected during the Receivership shall be and have been surrendered and turned over to the Receiver on or before March 22, 2012.” King submitted an affidavit stating that “[n]o rent funds remain in Defendants’ possession [and] an accounting of all rents collected and funds expended in relation to the properties has been provided to the receiver.” On April 17, 2012, Missner filed a report indicating that he had “received a ledger for rent collected by King” and that “[t]he income received by Mr. King after the effective order date ha[d] not been turned over to [Missner].” The record reflects that King’s attorney provided Missner with a document entitled “Rent Collection Report” indicating that King collected \$56,333.23 in rent for October 2011 and \$4,000 in rent for the following month. The report does not indicate the dates on which King received the rent payments for the various properties in the four foreclosure actions. King’s attorney also provided Missner with a itemized report of expenditures related to the properties from September 25, 2011, to March 21, 2012. Those expenditures totaled \$84,875.62 (including more than \$41,000 in loan payments to the Bank).

¶ 4 We initially note that, although the Bank has not filed an appellee’s brief, the record and the issues raised on appeal are such that review of the merits is appropriate under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 5 Contempt of court can be either civil or criminal. The proper classification as civil or criminal “is essentially a function of the purpose for which the contempt sanctions are imposed and where the allegedly contemptuous conduct occurred.” *SKS & Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 15. Contempt is civil when the sanction is designed to coerce the contemnor to

perform a particular act. *Id.* Because the penalties for civil contempt are designed to coerce compliance with a court order, the penalty must cease upon compliance by the contemnor. *People v. Covington*, 395 Ill. App. 3d 996, 1006 (2009). “A party held in civil contempt must be given the keys to his or her cell, meaning that the contempt order should give the contemnor the ability to purge at any time.” *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 283 (2006).

¶ 6 Sanctions for criminal contempt are imposed as punishment for past conduct. *SKS & Associates, Inc.*, 2012 IL App (1st) 103504, ¶ 15. “The conduct that may be punished by criminal contempt includes the entire range of disrespectful, disruptive and disobedient acts, including disobedience of a court order.” *Id.* ¶ 16. A person charged with indirect criminal contempt—a contemptuous act that occurred outside the trial court’s presence—is entitled to the constitutional protections and procedural rights afforded to criminal defendants. *Id.* ¶¶ 18, 20.

¶ 7 King argues that the trial court imposed a punitive sanction without affording him the requisite procedural protections. Although the trial court held King in “direct civil contempt,” we are not bound by the trial court’s characterization. *Id.* ¶ 14. The acts of contempt that King was charged with committing—collection of rent after a receiver had been appointed—did not occur in the trial court’s presence, so King could not be guilty of *direct* contempt. Moreover, the sanction imposed by the trial court—a money judgment for the Bank—was not coercive. The sanction did not serve to compel a future act; it merely gave the Bank an unconditional right to a sum of money. Thus, King was given no means of purging himself of contempt and avoiding the sanction.

¶ 8 Inasmuch as the dollar amount of the judgment was equal to the rents that King collected for October and November 2011, it might appear that the judgment was intended to be remedial, *i.e.*, to provide reimbursement for the rents that King misappropriated. Were that the case, however, the

judgment should have been entered in favor of the receiver, whose duty it was to hold the rents on the court's behalf during the pendency of the proceedings. See *In re Cadwell's Corners Partnership*, 174 B.R. 744, 754 (Bankr. N.D. Ill. 1994) ("Under Illinois law, the appointment of a receiver does nothing more than place the rents in the custody of the court until the rights of the parties have been determined."). Placing the properties in receivership did not vest the Bank with title to, or even a possessory interest in, the rents generated during the receivership. *Id.* ("The appointment of a receiver merely denies the mortgagor-assignor the use of the rents *pendente lite*. But, the debtor's ownership rights in the property, and in the rents stemming therefrom, are not altered by the appointment of a receiver."). In any event, "whether a sanction imposed is 'remedial' is not what distinguishes civil and criminal contempt sanctions." *Helm v. Thomas*, 362 Ill. App. 3d 331, 334 (2005).

¶ 9 King correctly argues that he was not afforded the procedural protections attendant to an indirect criminal contempt proceeding. For instance, King was not given notice that he might be subject to a criminal sanction. See *SKS & Associates, Inc.*, 2012 IL App (1st) 103504, ¶ 22. Consequently, the judgment entered as a sanction cannot stand. The question that remains is whether a sanction for *civil* contempt is, or might be, appropriate. According to King, the answer is no. King maintains that "any judgment of civil contempt is inappropriate because the Defendant did not have the capacity to further comply with any order entered by the trial court." King argues that, insofar as the purpose of holding him in contempt was to coerce him to turn over rent to Missner, any sanction would be futile because neither he nor the other defendants are in possession of the rents. The argument is based on evidence that, during the relevant time frame, expenditures related to the property exceeded the rent that was collected.

¶ 10 Significantly, King does not argue that he is incapable of paying Missner a *sum equal* to the rents. Rather the argument seems to be merely that he cannot return funds that are *specifically identifiable* as the rents paid by the tenants of the subject properties. It is not clear, however, that that matters. Property in the possession of a receiver is held in *custodia legis*. *Bleck v. Cosgrove*, 32 Ill. App. 2d 267, 274 (1961). In other words, property in the possession of a receiver “is in legal effect in the custody of the court for the benefit of all parties in interest.” *Id.* Even though, as noted earlier, appointment of a receiver does not affect title to the property, interference with the right to possession can be sufficient to constitute conversion. See *Guice v. Sentinel Technologies, Inc.*, 294 Ill. App. 3d 97, 112 (1997) (“Under general tort principles, a conversion action can be brought by any person who has the right to immediate possession of the property regardless of whether that person owns the property.”). If King did in fact collect rents knowing that a receiver had been appointed to perform that function, then King would be guilty of converting those rents. Moreover, to the extent that King actively participated in the collection of the rents, it would be no excuse that the payments were formally made to one of the corporate defendants, not to King personally. See *National Acceptance Co. of America v. Pintura Corp.*, 94 Ill. App. 3d 703, 706 (1981).

¶ 11 We see no apparent reason why the trial court should not have the power to hold King personally liable for the amounts converted (even if the converted funds can no longer be specifically identified). Accord *Camden v. Virginia Safe Deposit & Trust Corp.*, 78 S.E. 596 (Va. 1913) (branch manager of financial institution who released \$2,183.33 to a depositor after receivers had been appointed for the institution was guilty of contempt and could purge himself by paying that sum or by showing that he was unable to do so because of poverty, insolvency, or other cause brought about without fault on his part). That said, we need not definitively resolve the question at this point. The

premise of King's argument is that neither he nor the corporate defendants are in possession of the rents. The argument seems to be based entirely on records indicating that, after the receiver was appointed, property-related expenditures exceeded the amount of the improperly collected rents. It does not necessarily follow, however, that any part of the funds paid out can be identified as rent payments received from tenants. In this respect, the record does not indicate whether rents were segregated from, or were commingled with, other funds belonging to King or the corporate defendants. If the rents were commingled in one or more accounts, the lowest-intermediate-balance rule would create a presumption that the converted rents remained in an account unless the balance dropped below the amount of the rents deposited in the account. See *C.O. Funk & Sons, Inc. v. Sullivan Equipment, Inc.*, 89 Ill. 2d 27, 31-32 (1982). We note that it was King who bore the burden to show that return of the converted rents was impossible. *City of Mattoon v. Mentzer*, 282 Ill. App. 3d 628, 636 (1996) ("the contemnor bears the burden of demonstrating a legitimate inability to comply with the imposed terms").

¶ 12 For the foregoing reasons, we hold that the judgment entered against King was a sanction for criminal contempt and must be reversed. The case must be remanded to the trial court to determine whether King should be held in indirect civil contempt. We do not hold that the trial court must impose a sanction. Whether to impose a sanction for contempt is a discretionary matter. *In re Marriage of Metz*, 233 Ill. App. 3d 50, 57 (1992). If the trial court determines that a sanction is appropriate, the trial court must specify the manner in which King may purge himself of contempt.

¶ 13 Reversed and remanded with directions.