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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
ALICIA STEPHENSON,)	of McHenry County.
)	
Petitioner and Counterrespondent-)	
Appellee,)	
)	
and)	No. 09-DV-851
)	
RICHARD STEPHENSON,)	
)	Honorable
Respondent and Counterpetitioner-)	James S. Cowlin,
Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court neither abused its discretion nor reached a decision contrary to the manifest weight of the evidence by finding respondent in indirect civil contempt where he did not meet his burden to show that his noncompliance was not willful or contumacious and that he had a valid excuse for his noncompliance; trial court affirmed.

¶ 2 Respondent, Richard Stephenson, appeals the trial court's order finding him in indirect civil contempt for failure to produce certain documents to respondent, Alicia Stephenson, in this dissolution of marriage case. On appeal, Richard argues: (1) the discovery order should be

reversed and remanded because the uncontroverted record shows that he did not have possession, custody or control of the binders in question; (2) the discovery order should be reversed and remanded because they seek irrelevant and immaterial information, and would countenance a fishing expedition; (3) the contempt order should be vacated because Richard's failure to comply with the discovery order was not unreasonable, willful, or contumacious, and the trial court violated due process when it *sua sponte* found him in contempt of court; and (4) the order denying Richard's motion to reconsider the contempt order should be reversed. We affirm and remand.

¶ 3

I. BACKGROUND

¶ 4 In September 2009, Alicia filed a petition for dissolution of her marriage to Richard. In December 2009, Richard filed a counterpetition for dissolution of marriage. In July 2010, Alicia requested production of a series of business book and records maintained in binders called the Stephenson Meeting Binders (binders). Richard responded to the request for the binders in January 2011, objecting that the binders were irrelevant and immaterial. Alicia filed a motion to compel production of the binders. Richard's response did not allege that he did not have possession or control of the binders. During the December 2, 2013, hearing on the motion to compel, Richard's counsel did not argue that the binders were not in his possession or control. On December 6, 2013, the trial court ordered Richard to produce the binders from 2007 to the present by January 2, 2014.

¶ 5 On January 8, a motion for protective order was filed by non-party movants, Cancer Treatment Center of America and International Capital Management Company, and 42 unidentified, unknown entities. The motion alleged that the binders contained "competitively sensitive and proprietary financial and operational information *** the disclosure of which would significantly prejudice these non-parties." The motion further alleged that Alicia had

failed to demonstrate why the binders were relevant to the issue of maintenance. The movants sought non-disclosure and, in the alternative, redaction. On February 6, 2014, after a hearing on the motion, the trial court ordered the binders be produced by February 20. The trial court further ordered that the binders “shall be subject to the designation ‘Highly Confidential’ under the confidential and protective order previously entered by the Court.”

¶ 6 Alicia argued in the trial court that the binders were records that an unincorporated entity calling itself the Stephenson Family Business council (FBC) distributed to members and guests at their quarterly meetings. Richard and his adult children were members of FBC. Alicia was present at these quarterly meetings though April 2007. She requested the binders from April 2007 to the present. Alicia argued that the binders contained records relating to numerous companies in which she and Richard held an interest. Alicia contended that many of the companies had extremely high financial values, meaning that even a small percentage of ownership would result in high dollar valuations. These binders were relevant to the determination of Richard’s financial status and information regarding these entities has been kept from Alicia. Alicia further argued that the binders were relevant to present evidence regarding maintenance and distribution of income that she earned during the marriage and the assets she earned and owned in accordance with the prenuptial agreement.

¶ 7 On March 4, 2014, Alicia filed a petition asking the trial court to find Richard guilty of indirect civil contempt for failing to produce the binders. On March 28, Richard filed a response to Alicia’s petition alleging, for the first time, that the binders “are not in his possession or control nor have they been at any relevant time.” Richard’s response referred to his attached affidavit.¹ Richard’s affidavit stated that at the conclusion of FBC meetings, Dennis Lynde,

¹Although Richard’s affidavit is not included in the record as an attachment to his March

FBC's Global Managing Director, "retained" the binders "in a locked room." Richard's affidavit also stated, "Accordingly, I do not have those [FBC] binders—which are the property the FBC and not myself—in my possession or control."

¶ 8 On March 17, after a hearing on the rule to show cause, without Richard's appearance, but being represented by counsel, the trial court issued the rule and ordered Richard to appear on April 3. On April 3, 2014, Richard failed to appear. Lynde had been subpoenaed by Alicia and was present but was not called by Richard's counsel to testify. No testimony was heard. After argument, the trial court stated:

"I'm not convinced [the binders] are not under [Richard's] control. I'm not convinced that he cannot order that those be produced.

There is a finding of contempt. Mr. Stephenson is found in indirect civil contempt for failing to comply with the Court's order. We had a hearing at that time. No one stepped forward at that time and said he—they are not under his control, he can never do it. He, in this Court's opinion, has the ability to tell people to produce them. That has not occurred.

The Court finds him in indirect civil contempt."

The trial court sentenced Richard to an indefinite term in the McHenry County jail.

¶ 9 On April 7, 2014, Richard filed a motion for reconsideration of the contempt order. On April 10, the trial court denied the motion and found Richard in indirect civil contempt for failure to produce the binders by the date ordered. Richard filed his notice of appeal the same

10 response, it is included in the record in Richard's motion to reconsider as an attachment to his March 10 response.

day. On April 14, 2014, Richard filed an emergency motion to stay enforcement of the contempt order pending appeal. The trial court granted Richard's motion to stay.

¶ 10 On or about July 11, 2014, Richard filed a motion to supplement the record on appeal, seeking to add: (1) Alicia's April 17, 2014, subpoenas to International Capital Investment Company (ICIC) for the binders; (2) Alicia's April 17, 2014, subpoena to Lynde for the binders; and (3) Richard's March 28, 2014, affidavit, that was allegedly "inadvertently omitted" from the record as an exhibit to Richard's response to Alicia's petition for indirect civil contempt. On July 17, Richard filed his initial appellant's brief and referenced these documents. On July 28, this court denied Richard's motion to supplement the record regarding all three documents. On October 6, Alicia filed a motion (1) to strike portions of Richard's reply brief that referenced the three documents and (2) for attorney fees incurred resulting from Alicia's motion to strike.

¶ 11

II. ANALYSIS

¶ 12 Initially, we address Alicia's motion to strike portions of Richard's reply brief. Alicia argues that we should strike Richard's references to Alicia's subpoenas to ICIC and Lynde for the binders and Richard's affidavit because this court denied Richard's motion to supplement the record with these documents before he prepared his reply brief. Alicia argues that Richard's references to these documents are in violation of Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013) because the documents are not contained in the record. Richard contends that Alicia "waived her right to object" because she discussed the three documents throughout her appellee's brief.

¶ 13 Alicia references to the two subpoenas are contained only in the statement of facts section of her brief. Further, her purpose is to explain that after issuing the subpoenas she received copies of the binders with the pertinent data redacted. Alicia then requests that we ignore Richard's arguments regarding the subpoenas because we denied Richard's motion to

supplement the record. Under these circumstances, we cannot say that Alicia forfeited her “right to object.”

¶ 14 Richard cites *People v. Jung*, 192 Ill. 2d 1 (2000), to support his argument regarding forfeiture. Nothing in *Jung* indicates that any party included facts *dehors* the record in their briefs or that any party filed a motion to strike at any time. See *id.* at 4-5. In this case, Richard included facts outside the record in his reply brief and Alicia filed a motion to strike. Thus, *Jung* is distinguishable from this case.

¶ 15 In this case, Richard references to the subpoenas in his reply brief violated Rule 341(j); the subpoenas were *de hors* the record. See *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 172 (2008). Further, the reply brief violated Rule 341(j) because Richard’s references to the subpoenas were not to reply to “argument presented in the brief of the appellee.” Illinois Supreme Court Rule 341(j) (eff. Feb. 6, 2013) (A reply brief “shall be confined strictly to replying arguments presented in the brief of the appellee”). However, rather than striking portions of Richard’s reply brief, we have disregarded the improper references to the subpoenas. See *Gehrett*, 379 Ill. App. 3d at 172.

¶ 16 Regarding Alicia’s motion to strike Richard’s references to the affidavit, it is referenced as an exhibit in Richard’s response to Alicia’s petition for indirect civil contempt and is included in the record on appeal as an exhibit to Richard’s motion to reconsider. Further, Alicia acknowledges in her brief that Richard submitted the affidavit at issue. Therefore, we deny Alicia’s motion. Further, we deny Alicia’s motion for attorney fees related to the motion to strike. We now address the merits of Richard’s appeal.

¶ 17 Richard argues that the trial court’s discovery orders should be reversed and remanded for further proceedings because “it was made clear to the trial court that [he] did not have possession, custody or control of the binders.” Discovery orders are generally subject to an

abuse of discretion standard of review. *Garvy v. Seyfarth Shaw LLP*, 2012 IL App. (1st) 110115, ¶ 29 “An abuse of discretion exists where the trial court's decision is arbitrary or fanciful, or where no reasonable person would agree with the court’s position.” *Seymour v. Collins*, 2014 IL App (2d) 140100, ¶ 21.

¶ 18 Alicia contends that Richard has forfeited these arguments because he failed to raise these arguments at any time before the trial court issued the discovery orders. We agree with Alicia. It is a well-established general rule that failure to raise an argument in the trial court forfeits the argument on appeal. See, e.g., *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010). Here, Richard forfeited his right to argue lack of possession or control in the trial court by failing to raise the issue before the rule to show cause had issued.

¶ 19 Regardless of forfeiture, at the time the trial court issued the discovery orders, Richard argued only that the binders were immaterial and irrelevant. The record indicates that the prenuptial agreement is silent regarding maintenance under the facts presented here.² Thus, the binders were relevant regarding certain factors listed in section 504(a) of the Illinois Marriage and Dissolution of Marriage Act, including, but not limited to, the parties’ non-marital income and non-marital property for the determination of maintenance. See 750 ILCS 5/504(a)(1) (West

²The relevant portion of the prenuptial agreement provides: “In the event a proceeding for legal separation or dissolution of marriage is initiated by either party after seven (7) years of the date of their marriage, then the amount and duration of [Richard’s] monthly contribution to ALICIA’s spousal maintenance, alimony and support shall be determined by negotiation of the parties or, failing same, by any court of competent jurisdiction.”

2014). Accordingly, the trial court did not abuse its discretion by ordering discovery of the binders.

¶ 20 Richard also argues that the discovery orders should be reversed and remanded because they seek irrelevant and immaterial information, and countenance a “fishing expedition,” because the binders at issue contain information regarding entities in which Richard has only a 1% interest in, at most, and the party’s valid prenuptial agreement provided that all property acquired after the marriage would be considered non-marital property.

¶ 21 Under the subheading “Scope of Discovery,” Illinois Supreme Court Rule 201(b)(1) (eff. July 1, 2002) provides that “a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party.” Relevant information, for purposes of Rule 201(b)(1), is either “that which is admissible at trial” or “that which leads to admissible evidence.” *Manns v. Briell*, 349 Ill. App. 3d 358, 361 (2004). Generally, we will not disturb a trial court’s discovery order absent an abuse of discretion. See *Wisniewski v. Kownocki*, 221 Ill. 2d 453, 457 (2006). For the reasons stated above, the binders are relevant regarding maintenance. Richard’s argument that he has only a 1% interest is specious because nothing in the record indicates what his 1% represents. That is the purpose of discovery. The trial court did not abuse its discretion by ordering Richard to produce the binders.

¶ 22 Richard cites *Borg v. Borg*, 32 Ill. App. 3d 1075 (1975), to support his argument. In *Borg*, the appellate court reversed the trial court’s contempt order reasoning that disclosure of the husband’s business records regarding two companies in which he had a 50% share was not relevant because the wife already had “all the information that the [wife needed] to have a clear understanding of [the husband’s] financial status.” *Id.* at 81. Further, the reasons given by the wife were based only on a “feeling” that the documents she had already received were

incomplete. *Id.* In this case, although Richard alleges that he has only a 1% interest in the entities disclosed in the binders, it is not known how many companies Richard has an interest in or what that 1% represents. In addition, unlike *Borg*, Alicia based her request for the binders on facts known to her from her presence at the family business meetings. Further, unlike *Borg*, Richard has not provided sufficient information to provide Alicia with a clear understanding of Richard's financial status. Thus, *Borg* is distinguishable from this case.

¶ 23 Next, Richard argues that the trial court's contempt order should be vacated because his failure to produce the binders to Alicia was not unreasonable, nor willful or contumacious.

¶ 24 Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) provides trial courts with authority to compel compliance with discovery orders by means of contempt proceedings. In this case, the trial court found Richard guilty of indirect civil contempt. Indirect contempt is contempt that is committed outside the presence of the court. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). Civil contempt ordinarily occurs when a party fails to comply with a court order. *Id.*

¶ 25 In contempt proceedings, the burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). If the petitioner meets this burden, the burden shifts to the alleged contemnor to show that his noncompliance with the court's order was not willful or contumacious and that he had a valid excuse for his noncompliance. *Id.* Contumacious conduct consists of "conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or lessening the authority and dignity of the court." *In re Marriage of Fuesting*, 228 Ill. App. 3d 339, 349 (1992). Whether a party is guilty of indirect civil contempt is a question for the trial court, and its decision will not be disturbed on appeal unless it is against the manifest

weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 26 On December 6, 2013, and February 6, 2014, the trial court ordered Richard to produce the binders. There is no doubt from the record that Richard failed to comply with the discovery orders at issue. Thus, Alicia met her burden and the burden shifted to Richard. See *In Re Marriage of Ray*, 2014 IL App (4th) 130326, ¶ 15.

¶ 27 Richard argues that the trial court abused its discretion by finding him in contempt when the uncontroverted evidence showed that his failure to comply was not unreasonable, wilful, nor contumacious, but rather showed that he did not control the binders. Richard argues that the trial court ignored his affidavit and failed to allow the non-party representatives to present evidence at the hearing. Alicia argues that the only evidence submitted by Richard was inadmissible hearsay that the trial court properly refused to consider.

¶ 28 In this case, the trial court had ordered Richard to appear for the hearing on the rule to show cause, but Richard failed to appear. The trial court issued the rule to show cause, with Richard *in absentia*, and ordered Richard to appear for the hearing on April 3. At the April 3 hearing, although Richard had the burden of proof to show that his noncompliance with the discovery orders was not willful or contumacious (see *Cetera*, 404 Ill. App. 3d at 41), Richard disobeyed the court's order and failed to appear. By failing to appear, Richard failed to avail himself of the opportunity to testify on his own behalf, and, instead, chose to stand on his answer and his attached affidavit. The trial court did not read his affidavit, later stating that it was hearsay. We agree with the trial court. Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls within a recognized exception. See IL Rule of Evidence 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

prove the truth of the matter asserted”); *In re Marriage of Kocher*, 282 Ill. App. 3d 655, 659 (1996) (a trial court cannot consider a financial affidavit as evidence where it is not subject to cross-examination); *People v. Sundling*, 2012 IL App (2nd) 070455-B, ¶ 82 (holding that an affidavit prepared in anticipation of litigation is inadmissible hearsay).

¶ 29 In this case, Richard failed to explain to the trial court and fails to explain to this court how the hearsay statements contained in his affidavit were admissible under any exception to the hearsay rule. Thus, the trial court did not abuse its discretion by failing to consider Richard’s affidavit.

¶ 30 The record indicates that after argument by counsel, the trial court found that Richard did not meet his burden; Richard failed to show that his noncompliance was not willful or contumacious and that he had a valid excuse for his noncompliance. After reviewing the record, we determine that the trial court neither abused its discretion nor reached a decision contrary to the manifest weight of the evidence by finding Richard in indirect civil contempt of court.

¶ 31 Next, Richard argues that the order denying his motion to reconsider the contempt order should be reversed for the same reasons that we should reverse the contempt order. “The purpose of a motion to reconsider is to bring to the trial court’s attention (1) newly discovered evidence not available at the time of the hearing (2) changes in the law, or (3) errors in the court’s previous application of existing law.” *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004). A trial court’s decision to grant or deny a motion to reconsider lies within its sound discretion, and this court will not disturb such a ruling absent an abuse of discretion. *Stringer*, 351 Ill. App. 3d at 1140. We have already determined that the trial court’s decision and finding of indirect civil contempt was not an abuse of discretion or against the manifest weight of the evidence. Thus, Richard’s argument fails and we decline to reverse the trial court’s denial of his motion to reconsider.

¶ 32 Finally, we note that in Richard’s reply brief, he argues that Alicia has received the binders and, thus, Richard should not remain in contempt because he does not have the keys to purge himself. This argument was improperly raised in Richard’s reply brief and we need not address it; an appellant’s arguments must be made in the appellant’s opening brief and cannot be raised for the first time in the appellate court by a reply brief. See Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (“Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.”); see also *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 40.

¶ 33 Further, even if Richard had not forfeited this issue, nothing in the record indicates that Alicia received the binders as ordered by the trial court. Richard disingenuously states that “Alicia notes in her Response [that] *** she subpoenaed the proper non-party custodians, who have since produced the Binders without any objection from Alicia.” Alicia actually states that she “subpoenaed Dennis Lynde and [ICIC] to produce the Binders. In response, *redacted copies* of the Binders were then produced to [Alicia’s] counsel digitally with *all the pertinent data deleted or redacted.*” (Emphases added.) Thus, the parties disagree regarding whether the binders were effectively produced. Accordingly, Richard cannot establish that he has purged himself of contempt.

¶ 34

III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court’s order and remand this case for further proceedings.

¶ 36 Affirmed and remanded.