2015 IL App (1st) 132477

FOURTH DIVISION
April 30, 2015

No. 1-13-2477

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	
	)	
DANIELW. LUNDAHL,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
v.	)	No. 2006 D3 30268
	)	
SUSAN LUNDAHL HOPPER,	)	Honorable
	)	Alfred L. Levinson,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment awarding respondent-appellant $15,000 in distribution of marital estate after *ex-parte* hearing valuing petitioner-appellee's corporation is affirmed, where respondent-appellant was defaulted, failed to present a motion to vacate the default order, and failed to timely object to petitioner-appellee's expert testimony.

¶ 2 This appeal flows out of the marriage dissolution proceedings between Susan Lundahl Hopper (Hopper), respondent-appellant, and Daniel W. Lundahl (Lundahl), petitioner-appellee. The trial court initially granted Hopper 100% of the marital assets and Lundahl 100% of the

nonmarital assets. After both parties filed motions to reconsider, the trial court reclassified the retained earnings of Lundahl's company, American Internet Services Network Corporation (AIS), from nonmarital property to marital property. Following the circuit court's reclassification and award of marital assets, Lundahl appealed arguing that (1) the trial court's original classification of Lundahl's retained earnings from AIS as nonmarital property was correct; (2) the amount of retained earnings found was incorrect; and (3) the trial court erred in awarding attorney fees to Hopper. This court affirmed in part, reversed in part, and remanded for further proceedings for a finding on the specific amount of retained earnings from AIS, as well as a reconsideration of the distribution of the marital estate based on such finding.

¶ 3 On remand, prior to the valuation hearing, Hopper was found to be in default. Thereafter, Hopper filed a motion to vacate the default order. Her motion was stricken when she failed to appear on the scheduled hearing date. Subsequently, the circuit court held the valuation hearing, determined the amount of retained earnings from AIS, and reconsidered the distribution of the marital estate. Hopper filed a post judgment motion, which was denied. Hopper now appeals arguing that the circuit court (1) should not have entered a default order against her; (2) should have vacated the default order; and (3) should not have based any valuation of Lundahl's retained earnings from AIS on undisclosed expert opinions. In the event this case is remanded to the circuit court, Hopper requests that a new judge be assigned the case. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The record reveals the following facts. Philip Nathanson (Nathanson) was one of Hopper's attorneys on appeal before the appellate court remanded the case on November 25,

2009. Nathanson had an appearance on file from May 7, 2009, and there is no indication in the record that his appearance was ever withdrawn. On November 9, 2010, Lawrence Starkopf (Starkopf) filed an appearance as additional or trial counsel in this matter. That same day, he also filed the motion to set remand from the appellate court for hearing, in which he listed his law firm and Nathanson as Hopper's attorneys. After that date, however, based on our review of the record, Nathanson took no action as Hopper's attorney until January 2013. Rather, Starkopf was the primary attorney during the remand litigation. On remand, the case was assigned to the same judge who had presided over the case prior to appeal. At some point in early 2012, the case was assigned to a different judge.

¶ 6 Subsequent to filing his appearance, over the course of almost two years, Starkopf filed several motions and consistently appeared in court on Hopper's behalf. Starkopf never sent notice of these motions to Nathanson and, after the motion to set remand, Nathanson's name did not appear on any of the pleadings filed by Starkopf. Furthermore, whenever Lundahl's attorneys filed motions, they never sent notice to Nathanson, apparently because they were not aware of Nathanson's appearance, and neither Starkopf nor Nathanson objected to the lack of notice. Additionally, Starkopf listed himself as Hopper's "attorney of record" and her "lead attorney" in his affidavits attached to his attorney fee petitions for himself and his partner, Susan Silverman. Nathanson was not listed as an attorney on the case in any of these fee petitions. Moreover, Nathanson was never present in court for any of the proceedings on remand. Consequently, there were no court documents or hearings to alert the newly assigned judge that, in addition to Starkopf, Hopper had another attorney.

¶ 7 On remand, in preparation for the court to make a finding on the specific amount of retained earnings from AIS, both parties obtained expert witnesses to provide opinion testimony on the value of the retained earnings. When Lundahl's first expert witness became ill, the court granted Lundahl's July 17, 2012, emergency motion to continue trial and disclose a second expert witness. The court ordered that the second witness be disclosed by August 20, 2012. The parties disagree over whether Lundahl's second expert witness was disclosed.

¶8 On October 25, 2012, after almost two years of additional litigation on remand, Starkopf sought and was granted leave to withdraw as Hopper's attorney. As evidenced from the order granting leave to withdraw, Starkopf did not inform the court that Nathanson had an appearance on file and that no additional appearance was necessary. Thus, in the order drafted by Starkopf, the court granted Hopper 21 days to have an attorney file an appearance on her behalf or to appear *pro se*. The case was then set for a status hearing on December 10, 2012.

¶ 9 On December 10, 2012, Hopper did not attend the status hearing and no attorney was present on her behalf. A future status hearing was set for December 19, 2012.

¶ 10 On December 19, 2012, Hopper did not attend the hearing and, again, no attorney was present on her behalf. The court entered a default order against Hopper for failure to appear, stating that it was advised that no appearance was filed. The court also set an evidentiary hearing for February 8, 2013, at 1:30 p.m. to determine the value of the retained earnings. That same day, notice of the default order and of the February 8, 2013, hearing was sent to Hopper.[1]

[1] There are no transcripts of the December 10th or the December 19th proceedings in the record on appeal.

¶ 11 On January 18, 2013, Nathanson filed a motion to vacate the December 19th default order pursuant to section 2-1301(e) of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-1301(e) (West 2012) and noticed the motion for hearing on February 8, 2013.[2] In that motion, Nathanson identified himself as Hopper's attorney. However, he did not direct the court's attention to his written appearance, nor did he attach a copy as an exhibit. Rather, he stated that "Respondent's prior trial counsel on remand, Lawrence Starkopf, withdrew. Attorney Nathanson did not know if he would be able to undertake the trial responsibility in view of the matters set forth on the attached affidavit. That is why he did not appear at the December 19, 2012, hearing." In the attached affidavit, Nathanson expounded upon numerous personal issues which prevented him from acting as Hopper's attorney.

¶ 12 On February 8, 2013, Nathanson did not attend the hearing to present his motion. Thus, the motion to vacate the default order was stricken. Still unaware of Nathanson's 2009 appearance, the court noted in its written order that there was no appearance on file and that no leave had been requested to file a motion to vacate or to file an appearance. After the motion was stricken, Nathanson did not re-notice the motion for another hearing date. Neither Hopper nor Nathanson were present in court for the later hearing which had been set for the earnings valuation on that same day.

¶ 13 The court proceeded with the valuation hearing and the redistribution of the marital estate. At that hearing, Lundahl presented his expert witness, Joseph Modica, a CPA, who testified that AIS had accumulated retained earnings of $159,899. The matter was continued to

[2] We note that throughout the record and their briefs the parties mislabel the December 19th default order as a "default judgment." Our examination of the record definitively reveals that the ruling on December 19th was a default order, not a default judgment.

February 22, 2013, for entry of a final judgment, at which time the court awarded Hopper an additional sum of $15,000.

¶ 14 On March 25, 2013, pursuant to section 2-1203 of the Code, (735 ILCS 5/2-1203 (West 2012)), Nathanson filed a post judgment motion on Hopper's behalf requesting a rehearing, a retrial, vacatur of the February 22, 2013, judgment, and a vacatur of the default order entered on December 19, 2012.

¶ 15 On April 16, 2013, David Hepplewhite filed an appearance on behalf of Hopper. On April 18, 2013, the trial court entered an order setting a briefing schedule on the previously filed post judgment motion, and a hearing date was set for July 2, 2013.

¶ 16 On July 2, 2013, the circuit court heard Hopper's post judgment motion. Hepplewhite, not Nathanson, appeared to present the motion. The court noted that this case was "stalled and stalled and stalled." Relying on *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986) and *In re Marriage of Ward*, 282 Ill. App. 3d 423 (1996), the court explained that it was up to Hopper and her attorneys to diligently follow the case. The court further stated, "She didn't show up. She stopped showing up. She wasn't here." Accordingly, the court denied Hopper's post judgment motion.

¶ 17 We note that, of significance to this appeal, the court did not deny the original motion to vacate the default order filed pursuant to section 2-1301(e). That motion was stricken when both Hopper and Nathanson failed to present it to the trial judge. Rather, the court denied Hopper's post judgment motion, filed pursuant to section 2-1203. In this appeal, Hopper has made no argument with regard to the disposition of her post judgment motion.

¶ 18 II. ANALYSIS

¶ 19 As an initial matter, we observe that Hopper's brief contains arguments that are unsupported by specific facts from the record, citation to relevant authority, or by sufficient argument in violation of Illinois Supreme Court Rule 341(h) (7) (eff. Feb. 6, 2013). Failing to cite to relevant facts and authority violates Rule 341 and results in the party forfeiting consideration of the issue. *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 72.

¶ 20 Moreover, Hopper has not supplied the court with a sufficient record on appeal to review all of the issues presented as required by Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). "This court has long held that in order to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). "[W]here an issue on appeal relates to the conduct of a hearing or proceeding, the issue is not subject to review absent a report or record of the proceeding." *Id.* Additionally, when there is no record of the proceeding, it is presumed that the court relied on adequate evidence to support its decision. *Skaggs v. Junis*, 28 Ill. 2d 199, 201-02 (1963). Any doubts which may arise from the incompleteness of the record will be resolved against the movant. *Foutch*, 99 Ill. 2d at 392. In our review, we will disregard any unsupported statements in Hopper's brief. We now turn to the substance of Hopper's appeal and address each issue in turn.

¶ 21 Hopper contends that the court's entry of the default order was improper. She additionally argues that the court erred when it did not vacate the default order and further, when the court struck the motion to vacate that order. Prior to addressing Hopper's claims regarding the entry of the default order, we believe it appropriate to first determine whether there was any error in the court's order striking that motion. We note initially that there is no question that Hopper's motion

to vacate the default order was timely filed pursuant to section 2-1301(e) of the Code of Civil Procedure. 735 ILCS 5/2-1301(e)(West 2012).

¶ 22 Striking the Motion to Vacate the Default

¶ 23 Hopper takes the position that the court's decision to strike the motion to vacate the default order was arbitrary and capricious, and denied her substantial justice. She urges our review of the trial court's actions here under the standard applied when reviewing a trial court's grant or denial of a motion to vacate a default judgment—for an abuse of discretion or for whether substantial justice has been done. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (2008).

¶ 24 A court's grant or denial of a motion to vacate a default order is appropriately reviewed under an abuse of discretion standard. *Venzor v. Carmen's Pizza Corp.*, 235 Ill. App. 3d 1053, 1059 (1992). Here, however, the motion to vacate the order was neither granted nor denied, but was instead stricken. The determination of the appropriate standard of review turns primarily upon the type of question or issue presented for review. *U.S. Steel Corp v. Illinois Pollution Control Board*, 384 Ill. App. 3d 457, 461 (2008). "Abuse of discretion," the most deferential standard of review, is traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial. *In re D.T.*, 221 Ill. 2d 347, 356 (2004). Thus, although Hopper's basis for urging our review under the abuse of discretion standard is erroneous, on these facts, application of that standard is, nonetheless, correct.

¶ 25 A trial court abuses its discretion when it makes an arbitrary decision, without using conscientious judgment, or when, in view of all the circumstances, the lower tribunal oversteps the bounds of reason, ignores the law, and thereby causes substantial prejudice. *U.S. Steel*, 384 Ill. App. 3d at 461 (citing *In re Marriage of Munger*, 339 Ill. App. 3d 1104, 1107 (2003)). In our

review of the trial court's exercise of discretion, we will not reverse a decision unless it is clear to us that the court's actions are "clearly against logic." *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000); see also *U.S. Steel*, 384, Ill. App. 3d at 461. The inquiry on appeal is not whether the reviewing court would have made the same decision if it were instead the trial court, but solely, whether the trial court abused its discretion. *U.S. Steel*, 384 Ill. App. 3d at 461.

¶ 26 Hopper contends that the court "refused" to hear the merits of the motion to vacate the default order. She mischaracterizes facts set forth in the record. In actuality, neither Nathanson nor Hopper was present in court to argue the motion to the judge. Consequently, the motion was stricken. Because the motion was stricken, the court had no occasion to either hear or to rule on its merits. When the court does not rule on a motion, it is not equivalent to the denial of the motion. *Intercontinental Parts, Inc. v. Caterpillar, Inc.*, 260 Ill. App. 3d 1085 (1994). Thus, the case law that Hopper cites regarding the denial of motions to vacate default judgments is unavailing.

¶ 27 Hopper additionally argues that the court's sole rationale for striking the motion was because Nathanson did not have a written appearance on file. We note that the motion to vacate the default was filed and noticed by Nathanson for hearing on February 8, 2013. Although the court's written order entered on the motion is included as a part of the record, no transcripts from that proceeding have been provided. Absent a report of the proceedings, we must presume that the trial court followed the law and any doubt that may arise from incompleteness will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Here, because we lack a transcript of the proceeding at which the motion was stricken, we are compelled to construe the absence of a

complete record against Hopper, and conclude that the court's reason for striking the motion to vacate the default order was proper.

¶ 28 Our conclusion is bolstered by a review of the court's written order and its subsequent comments regarding the motion. The court's written order, entered on February 8th, states as follows:

¶ 29 "This cause coming to be heard for hearing and on the Respondent's motion to vacate the default entered on December 19, 2012, and this Court being advised of the facts therein[;]

It is ordered that the motion to vacate the default is stricken[;]

That no appearance had been filed on behalf of Respondent, no leave has been requested to file a motion to vacate or to file an appearance[.]"

On that same date, at the valuation hearing, for which there is a report of proceedings, the trial judge stated, "I struck that motion [to vacate the default order] because without him being before the court, I don't know that he has a right to file that motion. And she certainly didn't file it herself and she's not here now. She wasn't here for the last couple of court appearances."

¶ 30 "Generally, the intention of the court is determined only by the order entered, and where the language of the order is clear and unambiguous, it is not subject to construction." *Belluomini v. Lancome*, 207 Ill. App. 3d 583, 585 (1990). "When it is necessary to construe a court order, it should be interpreted in the context of the record of proceedings and the situation which existed at the time of its rendition." *Id.* at 586. Clear from the court's written order and its comments at the valuation proceeding is that the court was not aware of Nathanson's 2009 appearance, and thus, whether Nathanson had any right to file the motion. Given the context of the proceedings—

that Nathanson was not in court to present the motion or to inform the court concerning his filed appearance—we find that the motion to vacate the default was stricken because Nathanson did not come to court to present it and not because of a belief that no appearance was on file.

¶ 31 Hopper mischaracterizes the procedural history of this case and argues, regarding the valuation hearing, that "there was no reason for the court to refuse to hear the case on the merits and to proceed instead to a default and an *ex parte* evidentiary hearing." In fact, the reason the court could not hear Hopper's evidence at the valuation hearing was because she failed to vacate the default order, despite having the opportunity, and failed to attend the February 8, 2013, valuation hearing, despite having notice that it would occur. Moreover, her attorney, Nathanson, had the duty to come to court and explain to the judge that he had an appearance on file and to present evidence on Hopper's behalf. Instead, Nathanson waited until March 25, 2013, to file a section 2-1203 post judgment motion in which he sought to vacate the December 19, 2012, default order after the February 8, 2013, final judgment had been entered.

¶ 32 Accordingly, Hopper's arguments that it was fundamentally unfair for the court to refuse to vacate the default pursuant to the motion and that substantial justice was not achieved when the default was not vacated are without merit. Hopper’s abandonment of the motion afforded the court no opportunity to either grant or deny the motion. Significantly, after the motion had been stricken, there was no attempt to have it renoticed for presentment. We also point out that Hopper could have attended the valuation hearing and clarified any issues with respect to an appearance with the court, or sought to be heard on her own behalf but, apparently, chose not to attend.

¶ 33 Accordingly, we hold that the trial court did not abuse its discretion when it struck the motion to vacate the default order.

¶ 34 Default Order

¶ 35 Having determined that the trial court did not abuse its discretion in striking the motion to vacate the default order, we next address Hopper's claims with respect to the default order in particular. Hopper argues that entry of the default order was improper because notice of the possibility of default is required in order to default a party and she had no prior notice. Additionally, she asserts that the trial court's reason for entering the default, that being that she had no appearance on file, was "legally false." By this appeal, Hopper challenges the propriety of the court's entry of the default order, a claim, which in the first instance, is appropriate for presentment in a motion to vacate. For the reasons that follow, we deem the issues challenging entry of the default order to have been forfeited.

¶ 36 The entry of a default order prior to a final judgment is a non final order. *In re Haley D.*, 2011 IL 110886, ¶ 64. Section 5/2-1301 of the Code of Civil Procedure provides the mechanism by which such an order may be vacated. 735 ILCS 5/2-1301 (West 2012). Within 30 days of the court's entry of a default order a party may file a motion to have a previously entered order of default vacated. *Id*.

¶ 37 The Code has similarly provided a mechanism with respect to final judgments. Within 30 days after the entry of a judgment, a party may file a motion for rehearing, retrial, or modification of the judgment, or to vacate the judgment, or for other relief. 735 ILCS 5/2-1203; See also *County of Cook v. Illinois Fraternal Order of Police Labor Council*, 358 Ill. App. 3d 667, 672 (2005). "Other relief" has been defined as relief that is similar to the preceding

remedies listed in the statute and must address the final judgment. *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 32 (citing *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 462-63 (1990)). Post judgment motions are limited in scope; a party cannot raise new claims that it failed to bring before the court prior to the final judgment. *Pyramid Dev., LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 24; *Zdeb v. Baxter Intern., Inc*., 297 Ill. App. 3d 622, 630 (1998).

¶ 38 Once filed, it is the moving party's responsibility to obtain a ruling on the motion from the trial judge. *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d, 628 (2008). A litigant's failure to obtain a ruling on a motion does not translate into a denial of the motion by the court. *Hadley v. Ryan*, 345 Ill. App. 3d 297, 303 (2003); *Intercontinental Parts, Inc.*, 260 Ill. App. 3d at 1085. When no ruling has been made on a motion, absent circumstances indicating otherwise, the motion is presumed to have been abandoned. *Commerce Trust Company v. Air 1st Aviation Companies, Inc.*, 366 Ill. App. 3d 135 (2006); *Mortgage Electronic*, 379 Ill. App. 3d at 628. Additionally, the issues raised within that motion are forfeited. See *Mohica v. Cvejin*, 2013 Il App (1st) 111695, ¶85 (2013) (Gordon, J. specially concurring) (citing *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007)) (A party's failure to obtain a ruling from the trial court on its motion results in an abandonment of the motion and "creates[s] a procedural default of any issue related to that motion for the purpose[s] of appeal.").

¶ 39 On January 13, 2013, Nathanson timely filed a motion to vacate the December 19th default order. On February 8, 2012, the date on which Nathanson spindled the motion for presentment, neither he nor Hopper attended court. Thus, the motion was stricken and no ruling was entered on the merits. As previously noted, neither Nathanson nor Hopper filed any

pleading to have the motion to vacate renoticed for hearing before the final judgment was entered. Instead, on March 25, 2013, Nathanson filed a post judgment motion, seeking, among other things, a vacatur of the December 19th default order.

¶ 40 Since the time of its filing, no ruling has been obtained on the January 2013 motion to vacate the default order and, therefore, the default order stands. For purposes of this appeal, the motion to vacate the default order is deemed to have been abandoned and any issues related to that motion, including Hopper's claims with respect to notice and the court's reason for entering the default, have been forfeited. Nathanson's inclusion of a request to vacate the default order in his post judgment motion was improper, as beyond the scope of a 2-1203 motion, and thus, even if considered timely, did not preserve the issue for appeal.

¶ 41 The Court's Reliance on Lundahl's Expert Witness

¶ 42 Next, Hopper argues that the court should not have relied on Lundahl's undisclosed expert witness' testimony at the *ex parte* hearing valuing AIS and that the court, in so doing, abused its discretion. The record reveals that the court ordered Lundahl to disclose his second expert and his opinions by August 20, 2012. Hopper alleges that Lundahl violated the court order and did not disclose his second expert witness by that date. In support of her argument, Hopper merely asserts that Lundahl's second expert was not disclosed and cites to *Boehm v. Ramey*, 329 Ill. App. 3d 357 (2002) and Illinois Supreme Court Rule 213 (f), without more. Ill. S. Ct. R. 213 (f) (eff. Jan. 1, 2007). Lundahl responds that there is nothing in the record that indicates that his expert was not disclosed.

¶ 43 In passing we note that *Boehm* stands for the proposition that, "[a]dmission of evidence pursuant to Rule 213 is within the trial court's discretion and the court's ruling will not be

reversed absent an abuse of discretion." 329 Ill. App. 3d at 363 (citing *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998)). That said, it warrants repeating that, a reviewing court is entitled to have issues on appeal clearly defined and supported by pertinent authority and cohesive arguments." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). Because Hopper fails to properly argue how the court abused its discretion, the issue is forfeited. Even had the issue been properly presented, we could find no abuse of discretion.

¶ 44 First, we can find nothing in the record to support Hopper's claim that Lundahl's second expert witness was not timely disclosed. Additionally, the record reveals that although the valuation hearing was *ex parte*, Hopper had notice of the hearing but did not attend and object to Lundahl's witness at that time, or attempt to bar the witness. Further, Nathanson himself noticed up his motion to vacate the default order for the same date and time of the valuation hearing, but was not present in court to challenge Lundahl's expert. In fact, Hopper did not object to the testimony of Lundahl's witness until filing her post judgment motion. At that point, however, because she failed to object either before or during the hearing, Hopper had forfeited the objection. ("A party must make a timely objection to present an issue on appeal."). *Spurgeon v. Mruz*, 358 Ill. App. 3d 358, 361 (2005). Thus, the issue was not properly preserved for appeal.

¶ 45 Hopper's Request for New Trial Judge

¶ 46 As a final matter, Hopper requests that, in the event this case is remanded to the circuit court, a new trial judge be assigned the case. Because we are not remanding the case, we do not reach Hopper's request for a different trial judge. See *People v. Lynch*, 151 Ill. App. 3d 987, 997 (1987).

¶ 47 III. CONCLUSION

¶ 48 Based upon the record supplied to this court, we conclude that the trial court did not abuse its discretion when it struck the motion to vacate the December 19, 2012 default order and that Hopper forfeited any claims of error related to the motion to vacate. Finally, the court did not abuse its discretion in relying on Lundahl's expert witness at the valuation hearing.

¶ 49 Affirmed.