FOURTH DIVISION
Order filed on September 30, 2015
Modified upon denial of rehearing February 18, 2016

No. 1-14-0123

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

M.B. FINANCIAL BANK, N.A., as successor to MID-CITY NATIONAL BANK, as Trustee Under Trust No. 2572, and TRACY ROBB CURCIO,	)	Appeal from the Circuit Court of Cook County
Plaintiffs,	)	
JOSEPH CURCIO,	)	
Plaintiff-Appellant,	)	No. 11 L 001975
v.	)	
LANDMARKS PRESERVATION COUNCIL OF ILLINOIS, an Illinois Not For Profit Corporation, ANDREW FISHER, an Individual, DAVID A. BAHLMAN, an Individual, PROPERTY VALUATION SERVICES, LLC, an Illinois Limited Liability Company, MITCHELL J. PERLOW, an Individual, and HARRY M. FISHMAN, an Individual,	)	Honorable Frank B. Castiglione Patrick J. Sherlock, Judges Presiding.
Defendants-Appellees.	)	

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's orders compelling plaintiffs to produce tax returns affirmed. Plaintiffs placed tax returns at issue by alleging that defendants' misconduct caused them to pay additional income tax and penalties. Order finding plaintiff in

contempt vacated, as plaintiff's effort to secure appellate review based on good-faith legal argument.

¶ 2 The question presented by this appeal is whether plaintiffs, who claim that defendants' misconduct caused them to pay more in income taxes, must turn over the their entire income tax information requested by defendants. The answer in this case is yes. The trial court acted well within its discretion in compelling plaintiffs to turn over this information, and it properly held one of plaintiffs in contempt for refusing to do so. We affirm the trial court's rulings and remand.

¶ 3 This action was brought by plaintiff Joseph Curcio, (the sole appellant), along with his wife, plaintiff Tracy Robb Curcio (collectively, the Curcios), and plaintiff M.B. Financial Bank, N.A, as successor to Mid-City National Bank, as Trustee Under Trust No. 2572 (the party who holds legal title to the Curcios' home) (collectively, plaintiffs). Plaintiffs are seeking to recover damages from defendants, Landmarks Preservation Council of Illinois, an Illinois Not For Profit Corporation, Andrew Fisher, David A. Bahlman, Property Valuation Services, LLC, an Illinois Limited Liability Company, Mitchell J. Perlow, and Harry M. Fishman for defendants' alleged wrongful conduct regarding a charitable deduction that plaintiffs' claimed on their tax returns that was disallowed by the Internal Revenue Service (IRS).

¶ 4 Plaintiff appeals from the December 9, 2013 order of the circuit court of Cook County holding him in contempt and assessing a monetary fine for violating court orders related to discovery that required him to produce his entire joint federal income tax returns and to execute forms authorizing the IRS to release tax returns and information. Plaintiff also appeals the underlying discovery orders of July 16, 2013, and September 4, 2013.

¶ 5 I. BACKGROUND

¶ 6 We take the facts from the allegations in the third amended complaint presently pending before the court below. Plaintiff is the beneficial owner of a historic home at 1421 N. Astor

Street in Chicago where he resides with his wife, plaintiff Tracy Robb Curcio. Defendant, Landmarks Preservation Council of Illinois (LPCI), promotes the preservation of historic landmarks and offers information regarding the donation of a preservation easement, which is a perpetual deed restriction limiting the demolition or modification of the structure and designated elements of historic properties. A taxpayer who donates a preservation easement to a qualified not-for-profit organization, such as LPCI, and who meets other requirements, may deduct the value of the easement as a charitable contribution on his federal tax return. Defendant, Property Valuation Services, LLC, performed appraisal services. The Curcios granted a preservation easement on their home, which they refer to as a charitable façade easement, to LPCI, and the "Conservation Right" deed was recorded in 2003. The Curcios claimed a charitable contribution for the façade easement donation on their tax return for the year 2002 and, because they could not use the entire value of the deduction for 2002, they carried it forward for tax years 2003 through 2007.

¶ 7 Plaintiffs allege that in 2009, the IRS notified the Curcios that the charitable deduction was disallowed in their 2002 tax return. As a result, the IRS assessed additional tax, interest and penalties. The IRS subsequently disallowed charitable deductions for the 2002-2007 tax years.

¶ 8 Plaintiffs' action, generally, is based on defendants' alleged misrepresentations regarding their knowledge, experience and expertise as to the requirements for obtaining income tax deductions for the charitable façade easement contributions, which the Curcios claimed caused them to participate in the façade easement program. Plaintiffs claim defendants gave them deficient information or documentation.[1]

[1] Although plaintiffs' allegations against each defendant are not identical, for purposes of the issues in this appeal, we refer to "defendants" generally.

¶ 9 Plaintiffs claim that they were damaged as a result of defendants' alleged wrongful conduct because they had to pay additional income taxes to the IRS on the amount represented by the disallowed deduction, interest to the IRS on those additional income taxes, penalties to the IRS for claiming the deduction, attorney fees and costs for IRS audits and appeal proceedings for tax years 2002 through 2007, and accountancy fees and costs in regard to the IRS audits and appeal proceedings for tax years 2002 through 2007.

¶ 10 In response to discovery requests regarding tax-return information, plaintiffs turned over to defendants certain information regarding the relevant tax years, including copies of their charitable-contribution forms, reflecting the Curcios' adjusted gross income and calculations of allowable charitable-contribution deductions, as well as some correspondence with the IRS regarding the charitable deductions and interest calculations on unpaid tax.

¶ 11 But defendants claimed they were entitled to "any and all of the Curcios' state and federal tax returns (including amendments) for the years 2001 to 2010." When plaintiffs refused to produce the documents, defendants filed a motion to compel, in which they further sought to have the Curcios execute IRS Forms 8821 and 4506, which would allow defendants to obtain, directly from the IRS, the Curcios' tax information for the years 2002 through 2007.

¶ 12 On July 16, 2013, the court granted defendants' motion to compel. Plaintiff was not present in court because he had misdiaried the hearing date. Apparently, there is no available transcript of the proceedings. According to the record, the trial court decided it could make its ruling based on the briefs it had read. The court ordered plaintiffs to produce their federal tax returns for the years 2001 through 2008, and to execute the IRS forms authorizing the IRS to release the information. As defendants note, the tax records would be protected from public disclosure by an agreed protective order that had been entered by the court on December 7, 2011.

¶ 13 Plaintiffs filed a motion to reconsider, and the record contains the transcript of the September 4, 2013 hearing at which plaintiffs were given the opportunity to present the argument they would have made at the July 16, 2013 hearing. Plaintiffs argued that tax returns are considered confidential and not generally discoverable unless the litigant puts his income in issue. Plaintiffs asserted that defendants had made no showing that plaintiffs' entire tax returns were relevant to the issue in the instant case.

¶ 14 Plaintiffs also raised a new argument. Plaintiffs noted that they had made a request to the IRS pursuant to the Freedom of Information Act (5 U.S.C.A. § 552) (2012)) (FOIA request) for all of their tax documents and were willing to provide some items and a privilege log for the others. Plaintiffs further offered to provide the documents for an *in camera* review as to the claimed privilege.

¶ 15 Defendants argued that plaintiffs had clearly injected into the case both their income and what their tax deductions would be by claiming they did not get the benefit of certain tax deductions because of defendants' errors. Defendants argued that it was "impossible to evaluate the case and to really see whether or not they're correct, whether or not there were other deductions available, whether or not there were other reasons they didn't get the deduction."

¶ 16 Defendants further noted that, included among the materials that already had been produced were references to other, seemingly critical documents that had *not* been produced by plaintiffs. Of specific note, defendants cited a reference in the produced IRS correspondence to an IRS notice to the Curcios in 2004, regarding the validity of the 2002 deduction. Defendants claimed that this undisclosed 2004 IRS notice would appear, at least potentially, to contradict plaintiffs' claim that the IRS first disallowed the 2002 deduction in February *2009*. Defendants argued that if, contrary to plaintiffs' allegations, the IRS had disallowed or disputed the 2002

deduction as far back as 2004, this information would be relevant to several possible defenses, including lack of causation, mitigation of damages, and the running of the statute of limitations on some or all of plaintiffs' claims. Defendants further characterized plaintiffs' new argument regarding the FOIA request to the IRS as "a last-minute attempt for [plaintiffs] to control what the defendants know about them and about their claims."

¶ 17 Plaintiffs clarified that, with respect to the communications with the IRS, they had not claimed to have produced everything but, rather, everything in their possession. Plaintiff stated that the purpose of the FOIA request was to obtain information that was no longer in their possession.

¶ 18 Plaintiffs' motion for reconsideration was denied. No written opinion was issued, and the court did not make any formal findings. The court ruled, however, that "it's not really even a close case. The Defendants are entitled to this material and all of it."

¶ 19 Plaintiff subsequently filed a motion for a finding of civil contempt and assessment of a nominal monetary sanction for failure to comply with the relevant court orders. The motion was granted on December 9, 2013, and plaintiff was assessed a monetary sanction of $20. The court also denied defendants' motion for a "substantial sanction." Plaintiff filed the instant appeal. We have jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010); see also *In re Marriage of Gutman*, 232 Ill. 2d 145, 153 (2008) ("[c]ontempt judgments that impose a penalty are final, appealable orders").

¶ 20 II. ANALYSIS

¶ 21 Generally, this court will not disturb a trial court's decision finding a party guilty of indirect civil contempt unless it is against the manifest weight of the evidence, or the record reflects an abuse of discretion. *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20.

Here, however, plaintiff himself sought what is known as a "friendly contempt" order, allowing him to appeal the court's otherwise unappealable, interlocutory discovery orders. It is well-settled that the correctness of a discovery order may be tested through contempt proceedings by exposing oneself to a finding of contempt. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 10; *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 57. When a party appeals a contempt order based on a discovery violation, the underlying discovery order is also subject to review. *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 6. Because a trial court is afforded considerable discretion in ruling on matters pertaining to discovery, its rulings will not be reversed absent an abuse of that discretion. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11 (2009). A trial court abuses its discretion when its ruling is arbitrary or fanciful, or where no reasonable person would take the view adopted by the trial court. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 10.

¶ 22 The goal of the discovery process in Illinois is a search for the truth. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118 (1982); *Jordan v. Knafel*, 378 Ill. App. 3d 219, 235 (2007). "The underlying philosophy which gave impetus to the expansion and liberalization of our discovery rules was the desire of the courts to replace the traditional 'combat' theory of litigation with the more equitable principle that litigation should be a joint search for the truth." *Payne v. Coates–Miller, Inc.*, 68 Ill. App. 3d 601, 606 (1979). Illinois Supreme Court Rule 201(b)(1) (eff. July 1, 2014), which addresses the scope of discovery, states 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." The Illinois Supreme Court has explained that a trial court is afforded "great latitude in determining the scope of discovery, as discovery presupposes a range of relevance and

materiality which includes not only what is admissible at trial, but also that which leads to what is admissible at trial." *D.C. v. S.A.*, 178 Ill. 2d 551, 561 (1997). In addition to enhancing the truth-seeking process, the other objectives of pretrial discovery are "to enable attorneys to better prepare for trial, to eliminate surprise and to promote an expeditious and final determination of controversies in accordance with the substantive rights of the parties." *Id.*

¶ 23 We agree with the trial court that defendants are clearly entitled to the full tax returns for the relevant time periods. There is no question that plaintiffs have placed the Curcios' tax returns at issue in this case. Plaintiffs claim that defendants' misconduct or negligence resulted in the disallowance of a charitable contribution on their tax returns. It would be manifestly unfair for plaintiffs to base their claim on their tax returns and then shield those returns, in part, from the parties they are suing.

¶ 24 We agree with defendants that several bases exist for which the full, not edited, tax returns could be relevant. The causes of action in this case include breach of contract, fraud in the inducement, consumer fraud, negligent misrepresentation, and promissory estoppel. The affirmative defenses defendants pleaded include, among others, the failure to mitigate damages; contributory negligence; the running of the relevant limitations period; and unclean hands and laches. Thus, if, in fact, the IRS notified the Curcios in 2004 that it would not allow the 2002 deduction—as the limited discovery to date at least suggests—then defendants could argue that the Curcios failed to mitigate their damages by continuing to carry forward the improper deduction beyond 2004. Likewise, if the Curcios were aware of the disallowance in 2004, defendants might be able to successfully assert statute-of-limitations, unclean-hands, or laches defenses to some or all of the claims. If the full tax returns show that the 2002 deduction was disallowed through the fault of the Curcios—for example, if they did not timely file the

necessary appraisal—then plaintiffs might have trouble proving many, if not all of their claims, whether based on a lack of causation or contributory negligence. And if the tax returns demonstrate that the Curcios prepared their returns through an accountant or tax preparer, such information could be relevant to the claims of consumer fraud and negligent misrepresentation, which generally presuppose a plaintiff's inferior level of knowledge vis-à-vis a more experienced and knowledgeable defendant. These are only some of the potential bases for which the full tax returns may be relevant, but they are more than enough for us to conclude that the minimal threshold for relevance has been met.

¶ 25 We emphasize that we are not ruling on any of these potential arguments, nor should anything we say here be interpreted as finding that any of these possible defense arguments would be meritorious. None of those issues have been fully briefed by the parties. And we have no way of knowing what the full tax returns will reveal, once disclosed. Neither do defendants, but they are clearly within their rights to attempt to support any possible defenses through available discovery procedures. See *Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 284-85 (1980) ("Without knowing what information was present in the return, this court cannot speculate on the use defense counsel might have made of plaintiff's federal income tax returns. Without those returns, defense counsel would have been denied the full scope of cross-examination to which he was entitled.").

¶ 26 As defendants note, plaintiff has not cited a single case in which the defendant was not allowed access to a plaintiff's tax returns when the returns were directly placed at issue by the complaint. For example, in *In re Estate of Blickenstaff*, 2012 IL App (4th) 120480, a case involving a will contest in which the children sought to remove the executor of their father's

estate and sought the estate executor's *personal* financial information, the executor had not placed his income, much less his income-tax returns, at issue. *Id*. ¶ 51.

¶ 27 Indeed, this court has held that, where a party places his or her *income alone* at issue, a trial court acts within its discretion to order the disclosure of the party's tax returns. See, *e.g.*, *Central National Bank in Chicago v. Baime*, 112 Ill. App. 3d 664, 669 (1982) (requiring party to produce tax returns where they were relevant to the subject matter of the litigation and "would show the amount of income he received in the years when he claimed to have lost money, and the amount of gain or loss he may have incurred from alleged liquidations"); *Freehill v. DeWitt County Service Co*., 125 Ill. App. 2d 306, 321 (1970) ("Where a litigant has put in issue [his] income, the privilege from discovery of his income tax returns is waived."). See also *Camphausen v. Schweitzer*, No. 10 C 3605, 2010 WL 4539452 (N.D. Ill. Nov. 3, 2010) (where plaintiff's economic losses were at issue in that he claimed he suffered loss of business prospects as result of alleged defamation, his tax returns were discoverable). These decisions only bolster our conclusion, as plaintiffs in this case have gone beyond placing their income at issue to actually placing the tax returns, themselves, at issue.

¶ 28 Our decision is yet further supported by the existence of the protective order entered in this case. Any privacy concern articulated by plaintiffs is greatly ameliorated by the fact that the parties have agreed to preserve the documents in confidence. We have no doubt that the able trial judge will studiously enforce that protective order to ensure the confidentiality of the documents.

¶ 29 We further conclude that the trial court did not abuse its discretion in ordering the Curcios to execute the IRS authorization forms 8821 and 4506 to allow the IRS to release its files regarding the Curcios' tax returns. As defendants argued, plaintiffs had not provided all of the IRS communications. Plaintiffs apparently possess an incomplete record of their dealings

with the IRS. It is irrelevant whether the IRS correspondence was never retained, lost or destroyed. Plaintiffs sought another approach, asking that they obtain the documents through a FOIA request and then use an *in camera* process to produce only certain of the information. The trial court did not accept that alternative, however, deciding instead to permit defendants direct and full access to the tax returns through the forms 8821 and 4506. We cannot say that the trial court's decision was so arbitrary or fanciful that no reasonable person would agree with its judgment. We uphold this decision as well.

¶ 30 Finally, though we affirm the trial court's rulings on the motion to compel, we find it appropriate to vacate the finding of contempt issued in this case, understanding that plaintiff had sought a "friendly contempt" citation in good faith. See *In re Marriage of Nash*, 2012 IL App (1st) 113724, ¶ 30 ("It is appropriate to vacate a contempt finding on appeal where the refusal to comply with the court's order constitutes a good-faith effort to secure an interpretation of an issue without direct precedent.") (quoting *In re Marriage of Radzik & Agrella*, 2011 IL App (2d) 100374, ¶ 67). Obviously, should plaintiff refuse to comply with the trial court's order on remand, the trial court would have at its disposal its full array of remedies, including its contempt powers, to secure compliance.

¶ 31 III. CONCLUSION

¶ 32 The trial court did not abuse its discretion in ordering the Curcios to produce their entire income tax returns, where they alleged that defendants' misconduct had caused them to pay more in income taxes. The trial court did not abuse its discretion in ordering the Curcios to execute forms authorizing the IRS to release information directly to defendants, where plaintiffs conceded they did not have all of the relevant information. We affirm the trial court's orders

granting defendants' motion to compel production and denying plaintiffs' motion for reconsideration. We vacate the order finding plaintiff in contempt and the accompanying fine.

¶ 33 Affirmed in part, vacated in part, and remanded.