2015 IL App (1st) 142429-U

No. 1-14-2429

Fifth Division
June 26, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SHARON E. JONES, Plaintiff-Appellee, v. LIVE NATION ENTERTAINMENT, INC., Defendant-Appellant (Merlo Kanofsky Gregg & Machalinski, Ltd, Contemnor-Appellant; United Center Joint Venture, Defendant).	)	Appeal from the Circuit Court of Cook County. No. 13 M1 303116 The Honorable James Snyder and Jerry A. Esrig, Judges Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held:* When a defendant objects to answering written interrogatories concerning prior claims arising from events which occurred from previous performances by defendant, the trial court did not abuse its discretion in ordering the interrogatories to be answered when

an issue in the case is defendant's knowledge of the risk of injury when defendant encouraged the crowd to leave their seats and approach the stage.

¶ 2 This is an interlocutory appeal from a friendly civil contempt order filed pursuant to Illinois Supreme Court Rule 304(b) (eff. Feb. 26, 2010). Although the contempt order was entered solely against the law firm of Merlo Kanofsky Gregg & Machalinski, Ltd. (Merlo) as the lawyer for defendant Live Nation Entertainment, Inc. (Live Nation), the notice of appeal, which was filed by the Merlo law firm, lists only defendant Live Nation as the appellant. Since the notice was filed by the Merlo law firm, we must presume that they are also appealing the contempt order that was entered against them, and we will treat it that way accordingly.

¶ 3 On appeal, appellants challenge the contempt order entered against them on August 4, 2014, and the underlying discovery order, entered by a different judge on July 8, 2014. Defendant contests the discovery order on the ground that the ordered discovery is not relevant and will create an undue hardship. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiff Sharon Jones filed her initial complaint on November 20, 2013, alleging that she suffered injuries after falling into a "crowd surge" at the United Center following a "Watch the Throne" concert promoted by defendant.

¶ 6 On February 25, 2014, she filed an amended complaint which alleged that the performers in the "Watch the Throne" show "encouraged the crowd to leave their assigned seats and move down the aisles toward the stage without any direction, assistance or guidance from the designated ushers" and that "upon the conclusion of the show [plaintiff] proceeded to make her way from her seat *** intending to exit the United Center," but was caught in the resulting "human tsunami" and was "knocked from her feet to the stairs" causing her injury.

The complaint alleges two counts of negligence, one against defendant and one against another defendant, United Center Joint Venture (United Center). The count against defendant alleges that defendant "acted in a reckless and careless manner without regard for the safety of their audience when they knew or should have known that any movement by a majority of their audience at the same time in the same direction would create a hazard" and that plaintiff sustained her injuries as a direct and proximate result of defendant's negligence.

¶ 7 On April 7, 2014, plaintiff served written interrogatories on defendant including interrogatory number 4, which asked:

> "Has this Defendant been named as a party to any other lawsuits allegedly arising from events which occurred during other performances by this Defendant within the last five years, and since the date of this occurrence? Please provide the caption, case number, county and state of filing, and the current status of each matter."

Interrogatory number 5 asked:

> "Has this Defendant received notice of any claims of alleged injury named arising from events which occurred during other performances within the last five years, and since the date of this occurrence? Please provide the name of the person making the claim, his or her attorney's name and address, and the status of said claim."

¶ 8 On May 9, 2014, defendant responded, objecting to interrogatory 5 on the ground that it was "vague, overbroad in time and scope, and [sought] information that is neither relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence." Defendant objected to interrogatory 4 on the same ground, additionally stating that "lawsuits against Live Nation are a matter of public record."

¶ 9 On June 27, 2014, plaintiff filed a motion to compel responses to written discovery, asking the court to compel defendant to respond to interrogatories 2, 4, 5, 6, 7, 8, 11, 12, and 13.

¶ 10 On July 8, 2014, plaintiff's motion was granted in part by Judge James Snyder. We provide the trial judge's name here only because defendant's motion for reconsideration was later heard by a different judge. The record contains neither a transcript nor a bystander's report of the July 8 hearing. The written order, dated July 8, 2014, compelled defendant to answer interrogatories 2, 4, 5, 11, and 13. However, interrogatories 4 and 5 were both modified to limit their scope. Interrogatory 4 was modified to state:

> "Live Nation shall identify all performance based lawsuits filed against Live Nation in the United States in the 5 years prior to the occurrence and since."

This modification limited interrogatory 4's scope to only the United States. Interrogatory 5 was modified to state:

> "Live Nation shall identify all claims for injuries made against it based in its performances in the United States in the 2 years prior to the event and since."

This modification limited the interrogatory to the United States and also reduced the applicable time span from five years "prior to the event and since" to only two years "prior to the event and since."

¶ 11 Following these modifications, defendant filed a motion on July 23, 2014, asking the court to reconsider its July 8 order. Attached to the motion was the affidavit of Jan Berger, defendant's vice president of risk management, in which he averred that "there are approximately 500 claims pending against defendant in jurisdictions around the United States," that "[i]n 2013 alone, Live Nation opened 227 claims/lawsuits," that "claims are not

categorized by specific claim type" and that complying with the order would cause defendant to "suffer a massive burden involving time, effort, and expense, as well as a disruption of business operations." The motion additionally argued that "sweeping discovery requests are considered an abuse of discretion."

¶ 12 On August 4, 2014, defendant's motion was heard before Judge Jerry Esrig, a different judge than the judge who had entered the July 8 discovery order. The record contains the transcript of that hearing, which shows that defendant argued: (1) that plaintiff failed to establish that the answer to the interrogatories would be relevant to the case and (2) that compliance would create an undue burden as shown by Berger's affidavit. Since the trial judge was not at the prior hearing, he inquired if, during the July 8 hearing, defendant had been aware of the number of claims that would be involved in answering the interrogatory. Defendant responded that, during the July 8 hearing, it did not have that information, and instead it had objected on "relevance and other grounds." The court then inquired if, during the July 8 hearing, defendant agreed to the content of the order. Defendant responded that it had only "agreed to the language in the order after the judge ruled." However, plaintiff responded that the language of the July 8 order was a result of the two parties, at the judge's direction, going into the hall to "work this out." The trial court denied defendant's motion for reconsideration, and then defendant's attorney asked the trial court to hold her in friendly contempt. After a discussion between both attorneys and the judge as to how to structure an order of friendly contempt, the trial court ordered that "[t]he law firm Merlo Kanofsky Gregg & Machalinski, Ltd [Merlo] is hereby held in contempt for failure to comply with the July 8, 2014 order and fined $1.00 per day until compliance."

¶ 13 On August 6, 2014, Merlo filed a notice of appeal, which stated in full:

"Defendant/ Appellant, LIVE NATION ENTERTAINMENT, INC., hereby appeals to the Appellate Court of Illinois, First District, pursuant to Illinois Supreme Court Rule 304(b)(5), the order entered August 4, 2014 holding Merlo Kanofsky Gregg & Machalinsky Ltd. in contempt and fining it $1 per day, and the order entered July 8, 2014, compelling Live Nation Entertainment, Inc. to answer plaintiff's interrogatory nos. 4 and 5. Copies of the August 4, 2014 order and the July 8, 2014 order are attached hereto.

Defendant-Appellant prays that the orders appealed from be reversed or such other relief as Defendant-Appellant is entitled to by law."

¶ 14 ANALYSIS

¶ 15 On appeal, defendant Live Nation argues that: (1) the circuit court erred in compelling it, in the July 8 order, to answer plaintiff's interrogatories 4 and 5, (2) the circuit court erred in the August 4 order by denying its motion to reconsider, and (3) the circuit court erred, in the August 4 order, by holding its law firm in contempt for failure to comply with the July 8 discovery order.

¶ 16 I. Interlocutory Appeal

¶ 17 This is an interlocutory appeal in which defendant seeks to challenge a discovery order; "because discovery orders are not final orders, they are not ordinarily appealable." *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). "However, it is well settled that the correctness of a discovery order may be tested through contempt proceedings." *Norskog*, 197 Ill. 2d at 69. When a finding of contempt is appealed, "review of the contempt finding necessarily encompasses a review of the propriety of the underlying order upon which the contempt

finding is based." *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009) (citing *Norskog*¸197 Ill. 2d at 69).

¶ 18 II. Standard of Review

¶ 19 The proper standard of review for the July 8 order is an abuse of discretion standard because "a trial court's discovery order is ordinarily reviewed for a manifest abuse of discretion." *Norskog*, 197 Ill. 2d at 70. An exception occurs when "the facts are uncontroverted and the issue is the trial court's application of the law to the facts," in which case the trial court's order will be reviewed *de novo*. *Norskog*, 197 Ill. 2d at 70. Prior to July 8, defendant objected to the interrogatories on the ground that they were not reasonably likely to produce admissible evidence, and the trial court's finding to the contrary was a finding of fact, and thus is subject to an abuse of discretion standard on review. With respect to the conduct of discovery, the trial court abuses its discretion only when "no reasonable person would take the view adopted by the trial court." *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003).

¶ 20 The August 4 order denying the motion for reconsideration is also reviewed under an abuse of discretion standard, since "[t]he grant or denial of a motion for reconsideration lies within the discretion of the circuit court, which will not be reversed absent an abuse thereof." *American National Trust Co. of Chicago v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill. App. 3d 106, 120 (1999). To test whether a trial court has abused its discretion in denying a motion to reconsider, the court must consider "whether the refusal violated the moving party's right to fundamental justice." *In re Marriage of Wilson*, 193 Ill. App. 3d 473, 478 (1990).

¶ 21 III. Sufficiency of the Record

¶ 22 Defendant argues that the first trial court abused its discretion when it issued the July 8 order. On appeal it is the appellant's burden to provide the court of review with a sufficient record in order to establish error on the claims that it raises. *Webster v. Hartman*, 195 Ill. 2d 426, 436 (2001). If the record is not sufficient to support its claims, a reviewing court will presume "that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 23 The record contains neither a transcript of the July 8 hearing, nor a bystander's report. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). Though the transcript of the August 4 hearing contains remarks about what occurred at the July 8 hearing, those remarks consist of: (1) questions by the trial judge asking what happened at the prior hearing which occurred before a different judge; and (2) responses by the parties who disagreed about what happened. Defendant argued that it had agreed to the language in the order only after the judge ruled, while plaintiff claimed that the language of the July 8 order was the result of the two parties going into the hall at the judge's direction to "work this out." As "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant," (*Foutch v. O'Bryant*, 99 Ill. 2d at 392), since the order was not entered as an agreed order, we must accept plaintiff's version of the July 8 hearing. The defense argues that the information requested consists of approximately 500 claims, in many states, against defendant which would not be relevant to plaintiff's issue, and defendant would suffer a massive burden involving time, effort, and expense which would cause a disruption of its business. Plaintiff's complaint alleges, among other things, that defendant "acted in a reckless and careless manner without regard for the safety of their audience when they knew or should have

known that any movement by a majority of the audience at the same time in the same direction would create a hazard." Part of plaintiff's proof in this negligence action based on that allegation would be notice and knowledge. As a result plaintiff would need to know what the defendant knew about what happens when it encourages a crowd to leave their seats and move down towards the stage. Therefore, we cannot say that the trial court abused its discretion ordering the production of information that would show what knowledge the defendant had. If defendant provides the claims requested, plaintiff would have the information to determine that knowledge.

¶ 24 IV. Motion to Reconsider

¶ 25 On appeal, defendant argues that the second trial judge abused his discretion by denying the August 8 motion for reconsideration because Jan Berger's affidavit was newly discovered evidence. A party may file a motion to reconsider "to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65 (2001). " 'Newly discovered' evidence is evidence that was not available prior to the hearing." *Landeros*, 321 Ill. App. 3d at 65. If evidence could have been obtained prior to the hearing, that evidence is not newly discovered. See *Landeros*, 321 Ill. App. 3d at 65. Defendant did not provide the second trial court with a reason why defendant could not previously obtain an affidavit from Berger, who is defendant's employee and vice president for risk management. At the August 4 hearing, defendant explained that its counsel did not know how many claims would be involved in answering the interrogatories when she was before the trial court on July 8. However, at the August 4 hearing, defendant did not argue that this information was

not previously available, only that it had not been obtained because defendant "objected on relevance and other grounds."

¶ 26 "Trial courts should not allow a litigant to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991). Nor should they allow a litigant to argue on certain grounds, lose a motion, and then gather evidentiary material to support a new ground. The record indicates that before filing its motion to reconsider, defendant objected to the interrogatories "on the grounds that [they were] vague, ambiguous, overbroad, and *** neither relevant to the subject matter involved in the pending action nor reasonably calculated to lead to the discovery of admissible evidence." It was only after the July 8 order granting the plaintiff's motion to compel that defendant argued that the interrogatories were "unduly burdensome." Berger was not previously unavailable, and his affidavit cannot be considered newly discovered.

¶ 27 In its reply brief, defendant argues that, since the July 8 order modified the original interrogatories, defendant had "no choice" but to present new evidence that the interrogatories were overly burdensome. However, defendant does not cite a single case suggesting that, when a trial court limits the discovery required from a defendant, a motion by defendant to reconsider is proper. The modifications limited the geographical and temporal scope of the interrogatories, making them less burdensome for defendant. We fail to see how this supports defendant's claim that these changes in its favor made a motion to reconsider necessary.

¶ 28 Though defendant's motion for reconsideration offered no newly discovered evidence, parties are not "limited to raising entirely new material in motions to reconsider, as it is

proper to argue that the court misapplied the cited law or misunderstood key facts." *Hager-Freeman v. Spircoff*, 229 Ill. App. 3d 262, 271 (1992). In its motion to reconsider, defendant argued that the previous court erred because "sweeping discovery requests are considered an abuse of discretion," and it cited in support *Leeson v. State Farm Mutual Automobile Insurance Co.*, 190 Ill. App. 3d 359, 366 (1989). It is true that when the information sought in a discovery request is not "at all material and relevant to the issue at hand," the trial court abuses its discretion by ordering compliance. *Leeson*, 190 Ill. App. 3d at 366. However, *Leeson* is distinguishable on its facts. In *Leeson*, the plaintiff's claim depended on whether it was reasonable for the defendant to deny insurance coverage; the discovery request was for information concerning thousands of unrelated medical examinations; and this court concluded that the contents of medical examinations from unrelated insurance claims could have no bearing on the plaintiff's claim. *Leeson*, 190 Ill. App. 3d at 363. By contrast, in the present case, the plaintiff's claim depends on whether defendant "knew or should have known" that allowing mass-movement of a crowd was dangerous; and the discovery request was for information concerning other lawsuits and claims against defendant which could have put defendant on notice that the mass-movement of a crowd towards the stage places people in danger. The trial court did not abuse its discretion in concluding that the information about other claims against defendant could reasonably lead to evidence that defendant "knew or should have known" of the danger. Defendant asserts in its appellate brief that answers to the interrogatories would not provide plaintiff with the information she seeks, because the answers would not reveal other times defendant was sued after Kanye West exhorted a crowd to move. However, if the interrogatories are properly answered, the information provided should illustrate what knowledge defendant had or should have had

about risks involved with asking a crowd to move, information which is relevant to plaintiff's issue regardless of whether Kanye West was implicated in other claims.

¶ 29 V. The Civil Contempt Finding

¶ 30 Finally, defendant asks us to vacate the contempt finding. We note that although the trial judge's order did not specify whether the contempt was civil or criminal, we can determine the nature of the contempt finding based on our reading of the record. See *People v. I.W.I., Inc.*, 176 Ill. App. 3d. 951, 954 (1988). Civil contempt can be distinguished from criminal contempt because civil contempt is coercive, not punitive, in nature. *I.W.I.*, 176 Ill. App. 3d at 955. Here, the contempt order was meant to coerce defendant to answer the interrogatories and the contempt citation was a civil one.

¶ 31 "Whether a contempt finding should be vacated is a question to be determined on the individual facts of the particular appeal." *Doe v. Township High School District 211*, 2015 IL App (1st) 140857, 121. In *Doe*, this court affirmed the ruling below and acknowledged that no issues of first impression were presented, and yet we nevertheless vacated the contempt finding because the noncompliance was "based on a good faith effort to secure an interpretation of an issue to serve [the] client." *Doe*, 2015 IL App (1st) 140857, 124.

¶ 32 Here, it appears that defense counsel acted in good faith. The transcript of the August 8 hearing shows that defense counsel believed that a finding of contempt, coupled with a nominal fine, was appropriate to help resolve an issue of law through an appeal and the trial court agreed. The serious consequences of contempt should not be considered lightly by this court, and weighing them against counsel's actions leads us to vacate the contempt finding and the fine entered against the Merlo law firm. See *Doe*, 2015 IL App (1st) 140857, 124.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the trial court. With respect to the July 8 order, defendant failed to provide a record sufficient to show error. With respect to the August 4 order, we cannot conclude that the second trial court abused its discretion by refusing to vacate the discovery order entered by an earlier judge. In addition, we vacate the civil contempt finding and the $1 a day fine imposed by the trial court on the Merlo law firm.

¶ 35 Affirmed; civil contempt finding and fine vacated.