

2015 IL App (2d) 140297-U
No. 2-14-0297
Order filed March 12, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE of)	Appeal from the Circuit Court
CATHERINE SHUFF,)	of Lake County.
)	
Petitioner-Appellee and Cross-)	
Appellant,)	
)	
and)	No. 97-D-1191
)	
THOMAS SHUFF,)	
)	Honorable
Respondent-Appellant and Cross-)	Charles D. Johnson,
Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held:* The trial court: (1) considered the proper factors in denying Thomas's petition to modify/terminate maintenance; (2) properly found that Thomas had failed to establish a substantial change in his circumstances; (3) properly denied his motion to amend his petition to allege a substantial change in Catherine's circumstances; and (4) properly awarded attorney fees to Catherine. On Catherine's cross-appeal, the trial court had jurisdiction to award attorney fees; therefore, we vacated and remanded the case for a hearing on that issue.

¶ 2 In March 2011, respondent, Thomas Shuff, filed a petition to modify or terminate maintenance¹ to petitioner, Catherine Shuff, on the basis that his retirement constituted a substantial change in circumstances. Thomas also moved, during the hearing on his petition to modify maintenance, to amend his petition to allege a substantial change in Catherine's circumstances. The trial court denied Thomas's motion to amend his petition as well as his petition to modify maintenance based on a substantial change in his circumstances. The trial court also awarded Catherine attorney fees.

¶ 3 Thomas appeals: (1) the denial of his petition to modify maintenance, arguing that the court should have considered factors relating to Catherine's income and property and that he established a substantial change in his circumstances; (2) the denial of his motion to amend his petition to allege a substantial change in Catherine's circumstances; and (3) the award of attorney fees to Catherine. The trial court did not abuse its discretion in any of the above rulings; therefore, we affirm.

¶ 4 Catherine has filed a cross-appeal, arguing that the trial court erred by denying her request for attorney fees related to a separate proceeding in Cook County. Catherine filed suit against Thomas in the Chancery division of the Cook County circuit court for the allegedly fraudulent transfer of three pieces of real estate to his current wife, Peggy. Catherine sought attorney fees for the Cook County case in the instant case, and the trial court denied her request. Because the trial court had jurisdiction to consider Catherine's request for attorney fees incurred in the Cook County case, we vacate and remand for a hearing on that issue.

¶ 5 I. BACKGROUND

¹ For simplicity, we refer to Thomas's petition as a petition to modify maintenance.

¶ 6 Respondent, Thomas Shuff, and petitioner, Catherine Shuff, were married for 34 years and had three children. In June 1998, a dissolution of marriage/marital settlement agreement was entered when the parties were in their mid-50's. Pursuant to the marital settlement agreement, Thomas, who worked as an independent broker and trader at the Chicago Board of Trade, paid Catherine maintenance of \$6,250 per month. Thomas petitioned to modify his maintenance obligation, and in 2004, the court reduced his maintenance payments to \$3,300. In the meantime, Thomas had married Penny, and they had one child together.

¶ 7 In 2010, Catherine filed a petition for rule to show cause based on Thomas's failure to pay maintenance. On February 3, 2011, the trial court entered a judgment of \$173,322.07 against Thomas for unpaid maintenance. To collect on that judgment, Catherine filed, in May 2011, a complaint in the Cook County chancery division, alleging that Thomas had fraudulently transferred property interests to Penny (Cook County case).

¶ 8 On March 3, 2011, Thomas filed a (fourth)² petition to modify maintenance, alleging as follows. When the dissolution judgment and marital settlement agreement was entered in 1998, he was employed at the Chicago Board of Trade, earning \$197,000 per year. However, a substantial change in Thomas's employment status had occurred due to his retirement. Thomas alleged that his retirement was done in good faith; that his future earning capacity was severely impaired by his age and health issues; and that the marital settlement agreement was 13 years old and had already provided Catherine a disproportionate share of the marital estate.

¶ 9 Catherine filed a response to Thomas's petition to modify maintenance, arguing that he still owed \$170,000 of maintenance, as reflected in the February 2011 maintenance judgment;

² Thomas filed his first petition to modify maintenance in 2000, his second petition in July 2002, and his third petition in August 2002.

that her motion for discovery sanctions based on Thomas's failure to comply with discovery was still pending; and that because his petition to modify maintenance was not brought in good faith, he should be ordered to pay her attorney fees and costs under section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 508(b) (West 2010)).

¶ 10 On May 20, 2011, Thomas paid \$50,000 towards the \$173,322.07 February 2011 maintenance judgment. After Catherine moved for summary judgment in the Cook County case, Thomas paid Catherine the balance of the February 2011 maintenance judgment (\$136,092.08) on January 20, 2012.

¶ 11 A. Hearing on Petition to Modify Maintenance

¶ 12 On April 17, 2012, the court conducted a hearing on Thomas's petition to modify maintenance. Prior to the hearing, Thomas's attorney pointed out that Catherine had still not provided a financial affidavit in compliance with Lake County's local rules (19th Judicial Cir. Ct. R. 11.02 (eff. Dec. 1, 2006)), despite requests by letter and by phone. Catherine's attorney objected to her completion of a financial affidavit on the basis that Thomas's petition to modify maintenance was predicated solely on his retirement, which had nothing to do with Catherine's financial position or needs. Thomas's attorney responded that every petition to modify maintenance needed to take into consideration the financial abilities of both parties, the ability to pay maintenance, and the need to receive maintenance. Thomas's attorney pointed out that when maintenance was last modified in 2004, Catherine was not receiving social security payments. However, now that Catherine was 70 years old and receiving social security payments, Thomas needed to know the amount. Thomas's attorney argued that Catherine's financial need was "absolutely at issue" and that maintenance should be reduced, at the very least, commensurate with her social security payments.

¶ 13 Though Catherine's attorney reiterated that "the issue" was framed by the pleadings, the court advised Catherine to complete the financial affidavit, because the local rule required it. The court stated that the hearing could commence, but if there was a point "where the existence of an 11.02 [financial affidavit] or lack thereof makes further proceeding improbable or impossible I guess, then we will either adjourn or do whatever is necessary."

¶ 14 Dennis Flynn, who testified first on behalf of Thomas, stated that he had worked with Thomas at the Chicago Board of Trade over the past 10 years. Dennis testified that Thomas "wasn't doing well" and was forgetting things and transposing numbers.

¶ 15 Thomas testified next. Thomas, who was 71 years old, testified that he stopped trading for customers in 2007 and then stopped trading altogether in January 2010. Thomas could no longer trade; he could not work in the pit and lift his arms because of his "titanium shoulders," and he had trouble hearing. Thomas had taught Penny, age 44, how to trade, and she was doing so in his former seat at the Chicago Board of Trade.

¶ 16 Thomas testified that Penny was paying the family's expenses and that he had no income other than \$1,285 per month in social security and the interest in a \$7,000 mutual fund. Thomas admitted selling 10,251 shares of Chicago Mercantile Exchange stock for \$4 or \$4.5 million. With that money, Thomas bought three properties: a \$525,000 condominium in Chicago, a \$1 million house in Michigan, and a \$1.85 million house in Florida. Thomas admitted transferring two of the properties to Penny and owning the Florida house with Penny as joint tenants. He did so on the advice of his estate planning attorney.

¶ 17 At this point, the hearing was continued. The court ordered Catherine to complete her financial affidavit within 21 days, and she completed it in May 2012. In August 2012, Catherine provided her tax returns from 2008 to 2010.

¶ 18 The hearing resumed on September 19, 2012, and Catherine testified that she was 71 years old. When Thomas's attorney asked about her social security payments, Catherine's attorney objected on the basis that Thomas's petition to modify maintenance was based on his retirement and stated nothing about Catherine's income, assets, or financial state. Thomas's attorney responded that the court had already heard "this objection the last time we were here and overruled it." After the court reviewed Thomas's petition to modify maintenance, it sustained the objection of Catherine's attorney on the basis of relevance.

¶ 19 Thomas's attorney then argued that Catherine, by the court's order, had filed her financial affidavit and could be questioned regarding it. The court allowed questioning to the extent that it was relevant to the issues framed by the pleadings. When Thomas's attorney argued that the "ability in every maintenance case of the person receiving maintenance to sustain herself on her assets and income" was relevant, the court agreed with that principle "in the formative stages of a maintenance case." Thomas, however, had requested to modify maintenance "only on the basis of a change" on his side of the equation, which was his retirement and the distribution of property in the original judgment. According to the court, whether or not Catherine was receiving social security payments was not relevant to Thomas's pleadings.

¶ 20 Thomas's attorney responded that pleadings could be amended "at any time on just terms," and that he would not question Catherine beyond what she provided in the financial affidavit. The court allowed the questioning "[o]nly as it [went] to [Catherine's] credibility" compared to her financial affidavit. Thomas's attorney stated, "We're talking about amending a pleading to say that she has the ability to support herself based on her income," to which the court replied it would give him "a little bit of latitude." Catherine's attorney made a continuing objection on the basis that Thomas's petition to modify maintenance "had nothing to do with

her.” The court ruled that it was sustaining the objection but also allowing “a little bit of latitude with regard to what’s contained in [Catherine’s] 11.02 [financial] affidavit.” At this point, Thomas’s attorney stated:

“Judge, for the record, too, I’m going to move to *** following the hearing of evidence, to amend the petition for modification [of maintenance], which you can or cannot grant or deny. I realize that, but it’s on conditions just, and what I’m limiting the amendment to is what’s in her affidavit she’s filed with the court record.”

The court responded, “That’s the reason I’m giving you that latitude.”

¶ 21 Catherine was questioned regarding her financial affidavit, which indicated a gross income of approximately \$6,600 per month and social security payments of \$508.50 per month. Thomas also sought to introduce Catherine’s tax returns from 2008 to 2010.

¶ 22 Following Catherine’s testimony, her attorney moved for a directed finding, arguing that Thomas had failed to establish a substantial change in his circumstances. Before ruling on the motion for a directed finding, the court inquired about Thomas’s proposed amendment to his petition to modify maintenance. Thomas’s attorney responded that the amendment would consist of Catherine’s increased income since the prior maintenance judgment in 2004, as reflected in her financial affidavit and tax returns. The alternative, according to Thomas’s attorney, was filing another petition to modify maintenance based on a substantial change in Catherine’s finances. Catherine’s attorney objected to any amendment based on a change in Catherine’s finances.

¶ 23 The court then ruled on Catherine’s motion for a directed finding. According to the court, Thomas had made a *prima facie* case for the relief requested, which was a substantial change in his circumstances. The court stated:

“There may also have been a change in [Catherine’s] circumstance - this is being stated in the context of [her attorney’s] oral request to modify - or should I say amend the pleadings to reflect the change in her circumstances. The - so that’s a *prima facie* showing of a change in circumstances.

Now, weighing the testimony, the Court finds that almost all of the change in circumstances is a result of [Thomas] moving assets around so that everybody owns them but him. There may also have been a change in income or change in the financial circumstances of *** Catherine, but frankly, that hasn’t been flushed out much before the Court.”

For these reasons, the court denied the motion for a directed finding.

¶ 24 After the motion for a directed finding was denied, Catherine’s attorney stated that he would not be calling any witnesses. Noting that the parties were scheduled to be in court the next day, Thomas’s attorney stated that he would be filing a written motion to amend Thomas’s petition to modify maintenance, and that the amendment would be based solely on Catherine’s financial affidavit and tax returns. The court stated that if it allowed the amendment, it would give Catherine the opportunity “to present any additional evidence.”

¶ 25 B. Motion to Amend

¶ 26 The next day, September 20, 2012, Thomas filed a written motion under section 2-616(c) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(c) (West 2012)) to amend his pleading to conform to the proof at the hearing. Thomas argued as follows in his motion to amend. When he filed his petition to modify maintenance, he was unaware of Catherine’s financial condition, such as whether she was employed, receiving social security payments, or had any sources of income. Because Catherine did not provide her financial affidavit at the April 17, 2012, hearing

on his petition, Thomas could not allege a substantial change in Catherine's circumstances prior to the hearing. The hearing was continued from April 17, 2012, to September 19, 2012, and was still pending. The court ordered Catherine to complete a financial affidavit, and after Thomas received her affidavit and federal income tax returns, he learned for the first time the amount of her social security payments. Thomas argued that the documents showed a substantial change in Catherine's circumstances. He also argued that Catherine could not claim surprise by the amended pleading, because it was based on her own financial documents. Thomas also argued that Catherine would not suffer prejudice by the amended pleading because she had not rested her case-in-chief and was free to introduce evidence.

¶ 27 Attached to the motion to amend was an amended motion to modify maintenance based on a substantial change in Catherine's circumstances. In addition to Catherine receiving social security payments, Thomas alleged that her Medicare benefits reduced her need for maintenance; that their son Kevin was now self-sufficient and married and no longer in need of her " 'routine support....during vacation periods' "; that income from her investments and various assets constituted a substantial change in circumstances; and that she owned her residence without a mortgage.

¶ 28 The court allowed Catherine to respond to Thomas's motion to amend his petition. In her response, Catherine argued that the relevant case was *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992), which identified four factors to consider: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.

¶ 29 According to Catherine, the first factor was either inapplicable or did not favor Thomas because he never pled a change in Catherine's circumstances, meaning there was no defective pleading that he could cure. For the second factor, Catherine admitted that her own financial documents did not surprise her, but that she had prepared and proceeded to trial on a pleading stating one cause of action, a change in Thomas's circumstances based on retirement. Also, Catherine argued that she would be prejudiced by allowing the proofs to be reopened on this issue. Finally, Catherine argued that both the third and fourth factors weighed against Thomas. Catherine argued that Thomas could have sought leave to amend his petition in April 2012, when he stated in court that he suspected that Catherine was receiving social security, and then in May 2012, upon receipt of her financial affidavit. However, Thomas waited until the close of the evidence in September 2012 to seek leave to amend.

¶ 30 On November 16, 2012, the court denied Thomas's motion to amend. Finding *Loyola* to be governing, the court found that factors one and two were satisfied but that factors three and four weighed against allowing the amendment.

¶ 31 C. Further Pleadings & Rulings

¶ 32 On December 3, 2012, Thomas filed a (fifth) petition to modify maintenance, this time alleging a substantial change in Catherine's circumstances.

¶ 33 On January 18, 2013, the court issued a written ruling on Thomas's (fourth) March 2011 motion to modify maintenance, finding as follows. Thomas partially retired from the Chicago Board of Trade in 2007 and then fully retired in 2010. Since his retirement, he had acquired property in Florida, Michigan, and Chicago, all of which had been transferred directly or indirectly into Peggy's name. Stock interests were also transferred into Peggy's name, such that she was "conducting income-producing business utilizing assets previously belonging to

Thomas.” As a result, Thomas’s only income was from social security, and his living expenses were paid by Peggy.

¶ 34 Regarding his request to modify maintenance based on retirement, the court found that the change in his current and future income was not exclusively the result of retirement, but rather his manipulation of his assets in such a way as to intentionally avoid his maintenance obligation. Because the change in Thomas’s circumstances was brought about by his own actions, it could not be the basis of a modification of maintenance, as held in *In re Marriage of Smith*, 77 Ill. App. 3d 858 (1979). To the extent that the court “had previously determined that Catherine’s income” was “not relevant due to Thomas’s failure to plead a change in *her* circumstances,” the court found that the issue was “moot, because any change in Thomas’s circumstances was self-created.” (Emphasis in original.) Therefore, the issue of Catherine’s income was “of no relevance.”

¶ 35 On March 26, 2013, Catherine filed an “amended supplement to second petition for award of attorney fees” under section 508(b) of the Act. Overall, Catherine sought attorney fees from January 31, 2012, to December 31, 2012. Catherine specifically sought fees incurred in the defense of the instant (fourth) petition to modify maintenance based on Thomas’s retirement, in which the trial court found that Thomas intentionally manipulated assets in order to avoid paying maintenance. Catherine argued that given the court’s finding, she was entitled to attorney fees under section 508(b). Catherine further noted that Thomas had filed a fifth petition to modify maintenance based on a change in *her* circumstances, which was still pending and would result in additional fees being incurred.

¶ 36 In addition, Catherine sought attorney fees for another law firm, Schwartz & Kanyock, LLC, that she had hired to prosecute the Cook County case. Catherine argued that she incurred these attorney fees to collect unpaid maintenance.

¶ 37 On October 28, 2013, Catherine moved to dismiss Thomas's (fifth) petition to modify maintenance based on a change in her circumstances. Catherine argued that all of the alleged changes of circumstances in her financial position existed when he filed the instant (fourth) petition and were barred by *res judicata*. According to Catherine, had Thomas exercised due diligence and inquired about her finances either before he filed his (fourth) petition to modify maintenance or at the start of the hearing in April 2012, he would have discovered these grounds. She argued that Thomas should not be allowed to profit by his lack of due diligence. As a second ground for dismissal, Catherine argued that Thomas failed to state a cause of action because "any substantial change required to support a new motion for modification" had to occur subsequent to the last judgment, which was on January 18, 2013.

¶ 38 On November 22, 2013, the court granted Catherine's motion to dismiss Thomas's (fifth) petition to modify maintenance, which alleged a substantial change in her circumstances, on the basis of *res judicata*.

¶ 39 A hearing on Catherine's request for attorney fees occurred on February 28, 2014. Rather than file a response to Catherine's request for attorney fees, Thomas orally made "a general denial on the cause." The court awarded Catherine attorney fees under section 508(b) of the Act for her defense of the instant (fourth) petition to modify maintenance. According to the court, the filing of Thomas's petition "was done without compelling cause or justification" in that he "knowingly transferred his own assets around in such a fashion as to attempt to defeat the right to maintenance under the judgment." The court likewise found that Catherine was entitled

to fees under section 508(b) for her defense of Thomas's (fifth) motion to modify maintenance, which alleged a substantial change in her circumstances. The court ruled that of the \$137,767.50 in fees requested, \$90,000 and \$4,131.64 were reasonable.

¶ 40 Regarding Catherine's request for attorney fees incurred in the Cook County case, her attorney argued that the Cook County case was a "collection action" for unpaid maintenance, as reflected in the February 2011 maintenance judgment of \$173,322.07. Thomas's attorney responded that the court did not have the jurisdiction or authority to award fees in that separate action. The court denied Catherine's request for fees incurred in the Cook County case, stating that "any fees attendant to the matter in Cook County [were] a matter for Cook County." In response to Catherine's attorney's argument that there was no statutory authority under the Uniform Fraudulent Transfer Act to award attorney fees, the court stated "Guess you're out of luck then." The fees were not "compensable in this domestic relations case."

¶ 41 Thomas timely appealed, and Catherine timely cross-appealed.

¶ 42 II. ANALYSIS

¶ 43 A. Petition to Modify Maintenance

¶ 44 On appeal, Thomas makes several challenges regarding the trial court's ruling on his petition to modify maintenance. The relevant statute, section 510(a-5) of the Act, states:

"An order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances. *In all such proceedings *** the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors:*

(1) any change in the employment status of either party and whether the change has been made in good faith;

(2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;

(3) any impairment of the present and future earning capacity of either party;

(4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;

(5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;

(6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and

(9) any other factor that the court expressly finds to be just and equitable.”

(Emphases added.) 750 ILCS 5/510(a-5) (West 2010).

¶ 45 Referenced above is section 504(a) of the Act, which pertains to a trial court's initial award of maintenance “after consideration of all relevant factors[.]” including “(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance; (2) the needs of each party[.]” as well as several other factors. 750 ILCS 5/504(a)(1), (2) (West 2010).

¶ 46 A “substantial change in circumstances” as required under section 510(a-5) means that either the needs of the spouse receiving maintenance or the ability of the other spouse to pay that maintenance has changed. *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198 (2011). The party seeking modification bears the burden of establishing a substantial change of circumstances. *Id.* In addition, the trial court is to consider only the facts that occurred since the last modification hearing, which in this case was in 2004, and to alter the award only upon a substantial change in circumstances since that date. *Id.* at 198-99. A trial court’s ruling on a petition for modification of maintenance will not be reversed absent an abuse of discretion. *In re Marriage of Viridi*, 2014 IL App (3d) 130561, ¶ 25.

¶ 47 1. Applicable Factors

¶ 48 Thomas’s first argument on appeal is that the trial court abused its discretion by not considering “all applicable factors” set forth in sections 504(a) and 510(a-5) of the Act during the hearing on his petition to modify maintenance. Contrary to Catherine’s position that her financial condition was not relevant and not “applicable” because Thomas alleged only a substantial change in his circumstances, Thomas argues that the trial court was required to consider the income and property of each party, the needs of each party, and the increase or decrease in each party’s income since the prior judgment. See 750 ILCS 5/504(a)(1), (2), 510(a-5)(7) (West 2010)). According to Thomas, the overall issue before the court was whether maintenance should be reduced or terminated, and this was sufficient to put Catherine on notice that her financial condition was one of the “applicable” factors to consider.

¶ 49 In support of his position, Thomas cites *Blum v. Koster*, 235 Ill. 2d 21 (2009). There, the supreme court stated that “[w]hen deciding whether to reduce or terminate an award of unallocated maintenance, a court must consider all of the factors set forth in sections 504(a) and

510(a-5)” of the Act. *Id.* at 41. He also cites *In re Marriage of Reynard*, 378 Ill. App. 3d 997 (2008), where the court stated that “although the trial court must consider all the relevant statutory factors [under both sections 504(a) and 510(a-5)], it need not make specific findings as to the reasons for its decisions.” *Id.* at 1004. Similarly, we note that *Viridi* states “[w]hen determining whether a modification is appropriate,” a court shall consider the factors under sections 504(a) and 510(a-5) of the Act. *Viridi*, 2014 IL App (3d) 130561, ¶¶ 27-28.

¶ 50 The problem with Thomas’s argument is his view of the word “applicable.” As stated, the plain language of section 510(a-5) provides that “the court shall consider the *applicable* factors” set forth in that section as well as section 504(a). (Emphasis added.) 750 ILCS 5/504(a) (West 2010). See *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 144 (2006) (the plain language of a statute is the best indication of the legislature’s intent, and we give undefined statutory terms their ordinary meanings). “Applicable” is defined as “capable of being applied: having relevance” or “fit, suitable, or right to be applied: appropriate.” *Webster’s Third New International Dictionary* 105 (7th ed. 1986).

¶ 51 As Catherine argues, the pleadings in a petition to modify maintenance govern what statutory factors are “applicable” or relevant. In this case, Thomas did not allege a substantial change in Catherine’s financial circumstances, he alleged only a substantial change in his financial condition, *i.e.*, retirement. See *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 34 (the purpose of pleadings is to present, define, and narrow the issues and limit the proof needed at trial; the object of pleadings is to produce an issue asserted by one and denied by the other so that a trial may determine the actual truth); see also *Zygmuntowicz v. Pepper Construction Co.*, 306 Ill. App. 3d 182, 184 (1999) (the purpose of the pleadings is to frame the issue or issues for the court and set forth the relief the court is empowered to order). Because

Thomas's pleading was limited to a substantial change in *his* circumstances and made no allegation regarding a substantial change in Catherine's circumstances, factors relating to Catherine's income and need were not "applicable" in this case.

¶ 52 For this reason, the cases relied on by Thomas are distinguishable. Rather than involve a petition to modify maintenance, as in the case at bar, the cases relied on by Thomas involved initial maintenance awards, where the financial condition of both parties was relevant but where the trial court abused its discretion by failing to consider certain relevant factors. See *In re Marriage of Dea*, 2013 IL App (1st) 122213, ¶ 20 (the trial court abused its discretion by not considering social security payments received by the husband); *In re Marriage of Bratcher*, 383 Ill. App. 3d 388, 392 (2008) (the trial court abused its discretion in the amount of maintenance it awarded the wife).

¶ 53 We agree that had Thomas alleged a substantial change in Catherine's circumstances, the factors that the court refused to consider would have been relevant. For example, in *Blum* and *Reynard* cited above, the party petitioning for a modification/termination in maintenance alleged substantial changes in the circumstances of both parties. *Blum*, 235 Ill. 2d at 34; *Reynard*, 378 Ill. App. 3d at 999-1000. However, the "applicable" factors in this case were the ones pertaining to a substantial change in Thomas's circumstances.

¶ 54 In addition, had Thomas established a substantial change in circumstances, which is the subject of Thomas's next argument, we agree that factors relating to Catherine's financial condition would have been relevant to determine whether to modify maintenance at all or the degree in which to modify maintenance. The problem here is that Thomas's pleading, which alleged only a substantial change in his circumstances, did not open the door to factors relating to

Catherine's financial condition until he established a substantial change in circumstances, which, as we discuss below, he failed to do.

¶ 55 2. Substantial Change in Circumstances

¶ 56 Thomas next argues that the trial court abused its discretion by determining that he failed to establish a change in his circumstances. Thomas points out that Catherine concedes that he retired in good faith. Arguing that the court collapsed the steps in the analysis, Thomas argues that the court should have first determined whether there was a substantial change in circumstances and only then considered whether maintenance should have been modified in light of the statutory factors. Assuming that there “could be no legitimate dispute that Thomas’s retirement was a substantial change of circumstances,” Thomas argues that the court erred by not proceeding to the next step of weighing all of the factors, including Catherine’s income and needs.

¶ 57 The essence of this argument is the same as the last argument, which is that the trial court erred by not considering factors relating to Catherine’s financial condition. However, it is Thomas who conflates the steps of the analysis. Under Thomas’s analysis, any retirement in good faith automatically equates to a substantial change in circumstances, which is inaccurate. “Whether a spouse may rely on his retirement as a change in circumstances to justify the modification of maintenance depends upon the circumstances of each individual case.” *In re Marriage of Waller*, 253 Ill. App. 3d 360, 362 (1993). For Thomas to show a substantial change in his circumstances, it was not enough for him to show that he retired in good faith, he needed to show that his ability to pay maintenance had changed. See *Anderson*, 409 Ill. App. 3d at 198 (a “substantial change in circumstances” under the Act means that either the needs of the spouse receiving maintenance or the ability of the other spouse to pay that maintenance has changed).

¶ 58 In this case, although the trial court found that Thomas had retired in good faith, it did not find that his ability to pay maintenance had changed. As the court stated, any “change” in his current and future income was not exclusively the result of retirement, but rather his manipulation of his assets in such a way as to intentionally avoid his maintenance obligation. For this reason, the trial court determined that Thomas failed to establish a substantial change in circumstances. The court’s determination was not an abuse of discretion. Accordingly, even assuming that factors relating to Catherine’s financial condition would have been relevant in determining the degree of a maintenance modification had Thomas succeeded in showing a substantial change in his circumstances, we are not presented with that scenario. Once the court found no substantial change in Thomas’s circumstances, the court’s analysis ended there.

¶ 59 B. Motion to Amend Pleading

¶ 60 Next, Thomas argues that the court abused its discretion by denying his motion to amend his petition to allege a substantial change in Catherine’s circumstances. Section 616(c) of the Code states that “[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.” 735 ILCS 5/2-616(c) (West 2012). The trial court has broad discretion in ruling on motions to amend pleadings prior to final judgment, and a reviewing court should not reverse the denial of a motion to amend unless there has been an abuse of discretion. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008).

¶ 61 In *Loyola Academy*, our supreme court stated that in order to determine whether the trial court has abused its discretion, we must look to four factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely;

and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy*, 146 Ill. 2d at 273. These four factors apply to amendments proposed prior to final judgments (*Compton*, 382 Ill. App. 3d at 331), as was the case here.

¶ 62 The trial court denied Thomas's motion to amend. According to the court, the first two factors weighed in favor of allowing the amendment, but the second two factors weighed against allowing it. For the following reasons, the trial court did not abuse its discretion by denying Thomas's motion to amend.

¶ 63 We begin with factors three and four, which is whether the amendment was timely and whether previous opportunities to amend the pleading could be identified. As the trial court found, both of these factors, as evidenced by the sequence of events, weighed against allowing the amendment.

¶ 64 Thomas filed the instant petition to modify maintenance, based on a substantial change in his circumstances, on March 3, 2011. Between March 2011 and the opening date of trial, April 17, 2012, a span of 13 months, Thomas did not conduct any discovery. At the opening date of trial in April 2012, Thomas's attorney pointed out that Catherine was receiving social security payments, and he requested that she be ordered to complete a financial affidavit, which she provided in May 2012. Catherine then provided three years of tax returns in August 2012. According to Thomas, he could not allege a substantial change in Catherine's circumstances until he received these financial documents. However, upon receipt of Catherine's financial affidavit and tax returns, Thomas did not request a continuance or amend his pleadings to allege a substantial change in her circumstances. Rather, he simply appeared at the next trial date, September 19, 2012, assuming that evidence relating to Catherine's financial condition was relevant and therefore admissible. When he discovered otherwise, Thomas announced that he

would be seeking to file an amended pleading the following day, September 20, 2012. By this time, the parties had rested, in that Catherine had moved for a directed finding and stated that she would not be presenting any witnesses.

¶ 65 Thomas explains his failure to move to amend his pleadings until September 20, 2012, in two ways. First, he argues that Catherine delayed turning over her financial documents until May 2012 (financial affidavit) and August 2012 (tax returns). Second, he argues that he had a “reasonable belief” that the trial court was going to permit evidence of Catherine’s financial condition over her objection. The problem with Thomas’s argument is that his plan from the beginning, at least as early as April 2012, was to introduce evidence of Catherine’s changed financial condition, but he never sought to amend his pleading. If Thomas needed Catherine’s financial documents to allege a substantial change in her circumstances, he could have demanded them sooner or, at the very least, amended his pleading once he received them, or asked for a continuance to do so. The fact that Thomas gambled on the trial court’s decision to allow such evidence without formally amending his pleading was to his own peril, and we agree with the trial court that these two factors weighed against allowing the amendment.

¶ 66 In addition, although the trial court found that the first two factors weighed in favor of allowing the amendment, we are not convinced as to factor two, which is whether Catherine would be surprised or prejudiced by the amendment. Catherine, as she admits, would not have been surprised by the amendment, in that she was aware of her financial documents. However, we believe that she would have suffered prejudice, in that she prepared for trial based on one theory only, which was a substantial change in Thomas’s circumstances. While the trial court stated that it would allow her to present additional evidence in the event it allowed Thomas to

amend his petition, Catherine would have been required to prepare or defend against the claim of a substantial change in her circumstances after she had rested her case.

¶ 67 The case cited by Thomas, *Banks v. United Insurance Co.*, 28 Ill. App. 3d 60 (1975), for the factor of prejudice is distinguishable. In *Banks*, the court stated that the complaining party must rely on something more than mere inconvenience caused by the delay in the amended pleading to show prejudice. *Id.* at 64. The facts in *Banks* differ greatly from the facts in the case at bar, because the defendant in *Banks* was prevented from amending its answer to add a meritorious affirmative defense. *Id.* Here, Thomas wished from the start to put Catherine's financial condition at issue but did not take the necessary steps to do so. Thus, the trial court did not abuse its discretion in denying Thomas's motion to amend his petition to modify maintenance.

¶ 68 C. Attorney Fees

¶ 69 Thomas next argues that the trial court abused its discretion by awarding attorney fees to Catherine under section 508(b) of the Act. The trial court awarded attorney fees of \$90,000 for Catherine's defense of Thomas's instant (fourth) petition to modify maintenance and \$4,131.64 for Catherine's defense of Thomas's fifth petition to modify maintenance based on a change in her circumstances.

¶ 70 Section 508(b) provides:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. *** If at any time a court finds that a hearing under this Act was precipitated or conducted for any

improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.” 750 ILCS 5/508(b) (West 2012).

¶ 71 “Section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party’s conduct was without cause or justification.” *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992). We will not disturb a trial court’s decision to award or deny attorney fees absent an abuse of discretion. *In re Marriage of Harrison*, 388 Ill. App. 3d 115, 120 (2009).

¶ 72 There are two bases under which to award fees under section 508(b), and both parties acknowledge that the trial court never made a finding regarding the first basis; namely, Thomas’s failure to comply with a court order. Regarding the second basis, Thomas argues that the court never found that the hearing on his petition to modify maintenance was predicated or conducted for any improper purpose. We disagree.

¶ 73 Although the trial court did not use the explicit language “improper purpose,” it is clear that it awarded fees under the second basis of section 508(b). Under the second basis, “[i]mproper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.” 750 ILCS 5/508(b) (West 2012). Here, the trial court specifically stated that Catherine was entitled to attorney fees because the filing of Thomas’s petition “was done without compelling cause or justification” in that Thomas “knowingly transferred his own assets around in such a fashion as to attempt to defeat the right to maintenance under the judgment.” A petition to modify maintenance that is based on the intentional manipulation of assets as opposed to a legitimate change in circumstances constitutes

an improper purpose. The trial court did not abuse its discretion when making this ruling, and once it did, it was required to award attorney fees under section 508(b). See *In re Marriage of Walters*, 238 Ill. App. 3d at 1098 (section 508(b) of the Act is mandatory, not discretionary).

¶ 74 D. Cross-Appeal

¶ 75 Catherine’s sole argument in her cross-appeal also pertains to attorney fees. Specifically, Catherine argues that the trial court erred by denying her request for attorney fees related to the Cook County case. She argues that the court had jurisdiction and authority to award these fees under the same section of the Act set forth above, section 508(b), and specifically the first line:

“*In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney’s fees of the prevailing party.*” (Emphasis added.) 750 ILCS 5/508(b) (West 2012).

¶ 76 After the trial court entered a judgment of \$173,322.07 against Thomas for unpaid maintenance in February 2011, Catherine filed the Cook County case. In particular, she alleged that Thomas had fraudulently transferred properties to Penny because the transfers occurred at a time he owed back maintenance. It was not until Catherine moved for summary judgment in the Cook County case that Thomas paid the balance of the February 2011 judgment, and she argues that the Cook County case was filed to enforce the February 2011 judgment.

¶ 77 At the hearing on Catherine’s request for attorney fees, Thomas responded with “a general denial on the cause” as opposed to a pleading. Thomas’s attorney argued that the court did not have the authority or jurisdiction to award fees incurred in the Cook County case. The trial court apparently agreed with Thomas, stating that “any fees attendant to the matter in Cook

County [were] a matter for Cook County,” and that the fees were not “compensable in this domestic relations case.”

¶ 78 For her argument, Catherine relies on *In re Marriage of Kent*, 267 Ill. App. 3d 142 (1994), where this court held that the trial court had jurisdiction to award attorney fees incurred in a bankruptcy proceeding under section 508(b). In *Kent*, the marital settlement agreement required the husband to pay the wife \$20,000 in exchange for her share of the equity in their home. *Id.* at 143. Seeking discharge of his obligation to pay \$20,000, the husband filed for bankruptcy in federal court. *Id.* The wife hired an attorney to represent her in the bankruptcy proceeding, and the husband’s suit was dismissed. *Id.* Under section 508(b), the wife requested that the trial court award her the attorney fees she incurred in the bankruptcy proceeding. *Id.* at 143-44. The husband argued against awarding the wife attorney fees on the basis that the trial court lacked jurisdiction to award fees from the bankruptcy proceeding. *Id.* at 144. The trial court agreed that it lacked jurisdiction to award attorney fees, and this court reversed. *Id.*

¶ 79 This court noted that section 508(b) authorizes fee awards “ ‘[i]n every proceeding for the enforcement of an order.’ ” (Emphasis in original.) *Id.* Because the plain meaning of section 508(b) allowed the recovery of fees incurred in any proceeding that had as its goal the enforcement of an order or judgment entered in a dissolution proceeding, the trial court had jurisdiction to award fees incurred in a federal court. *Id.* at 144-45.

¶ 80 Likewise, in *In re Marriage of Sanda*, 245 Ill. App. 3d 314, 321 (1993), this court held that the trial court erred by automatically denying attorney fees in a proceeding brought in a different forum than the dissolution court. As in this case, the wife filed a cross-appeal that the trial court erred in denying her request for attorney fees associated with a Cook County case that was brought to enforce the dissolution judgment and to prevent the dilution of assets that were

the subject of the dissolution judgment. *Id.* This court found no authority for the trial court's denial of the wife's request for attorney fees under section 508(b). *Id.* This court remanded the case for a determination of whether the Cook County case was brought to enforce the dissolution judgment. *Id.*

¶ 81 Clearly, the trial court possessed subject matter jurisdiction to consider Catherine's request for attorney fees incurred in the Cook County case under section 508(b). See *In re Luis R.*, 239 Ill. 2d 295, 301 (2010) (Illinois circuit court possesses subject matter jurisdiction as a matter of law over all "justiciable matters" brought before it). Moreover, section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification. *In re Marriage of Walters*, 238 Ill. App. 3d at 1098. As Catherine points out, the trial court found that Thomas's failure to pay the February 2011 judgment (\$173,322.07) of unpaid maintenance was without cause or justification. Therefore, we vacate the trial court's denial of attorney fees and remand with instructions for the trial court to determine whether the Cook County case was brought to enforce the February 2011 judgment.

¶ 82 In reaching this result, we necessarily reject Thomas's argument that Catherine misunderstands the trial court's ruling. Thomas argues that the trial court did not rule that Catherine was barred from recovering attorney fees under section 508(b); rather, he argues that such a request needed to occur in Cook County. Thomas cites no authority for this proposition, and it runs counter to this court's decisions in *In re Marriage of Kent* and *In re Marriage of Sanda*.

¶ 83 We similarly reject Thomas's argument that the supreme court's decision in *Illinois Department of Financial & Professional Regulation v. Rodriguez*, 2012 IL 113706, renders *In re*

Marriage of Kent and *In re Marriage of Sanda* no longer good law. *Rodriquez* dealt with a different statutory provision, section 10-55(c) of the Illinois Administrative Procedure Act (5 ILCS 100/10-55 (West 2008)), which provided, “In any case in which party has any administrative rule invalidated *** the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney’s fees.” *Id.* ¶ 12. While the plaintiff in *Rodriquez* argued that this section provided an independent cause of action, the supreme court held that the fees were to be awarded by the court that invalidated the rule. *Id.* ¶¶ 15-16. *Rodriquez* did not involve section 508(b) of the Act and thus has no application to the case at bar.

¶ 84 Finally, Catherine argues that the remainder of Thomas’s arguments, which is that her request for attorney fees did not include the necessary details, lacked the necessary attachments, and was barred by *res judicata*, are forfeited based on his failure to raise them in the trial court. See *Johnson v. Hilton Hotel Corp.*, 190 Ill. App. 3d 197, 200 (1989) (the plaintiff cannot raise a theory for the first time on appeal); *Miscevich v. Commonwealth Edison*, 110 Ill. App. 3d 400, 405 (1982) (same). We note that the cases Catherine cites for this proposition involve the plaintiff/appellant’s failure to raise an issue in the trial court, whereas Thomas argues that we may affirm the trial court’s decision denying her request for attorney fees on any basis that appears in the record. See *In re Guardianship of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 19 (the appellate court may affirm on any basis appearing in the record, whether or not the trial court relied on that basis); see also *Downes Swimming Pool, Inc. v. North Shore National Bank*, 124 Ill. App. 3d 457, 462 (1984) (an appellee may defend a judgment by any argument and upon any basis appearing in the record, whether or not it was advanced at trial).

¶ 85 It would not be fair to affirm the trial court's denial of attorney fees based on Thomas's arguments that Catherine's fee request lacked the necessary details and attachments. Thomas's arguments are forfeited in the sense that his failure to raise them in the trial court deprived Catherine of the opportunity to cure any alleged defects. Given that the trial court accepted Thomas's argument that it did not have jurisdiction or authority to award fees in the Cook County case, and that Thomas made no additional arguments regarding the fee request, it is up to the trial court whether Thomas may pursue the above arguments on remand.

¶ 86 The same is not true for Thomas's *res judicata* argument, however. *Res judicata* is an affirmative defense (*Village of Maywood Board of Fire & Police Commissioners v. Department of Human Rights of State of Illinois*, 296 Ill. App. 3d 570, 578 (1998)), and the failure to timely file an affirmative defense results in forfeiture (*Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 76 (2010)). Accordingly, Thomas is barred from raising a *res judicata* defense to Catherine's request for attorney fees on remand. As previously stated, on remand, the trial court is instructed to determine whether the Cook County case was brought to enforce the February 2011 judgment of \$173,322.07 for unpaid maintenance.

¶ 87 III. CONCLUSION

¶ 88 For the foregoing reasons, we affirm the Lake County circuit court judgment denying Thomas's petition to modify maintenance, denying his motion to amend the petition, and awarding Catherine attorney fees. For the cross-appeal, we vacate the denial of attorney fees and remand the case with instructions.

¶ 89 Affirmed in part; vacated in part; cause remanded.