2016 IL App (3d) 150628-U

Order filed July 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

ROBERT H. KUPPER II, KEVIN I. KUPPER, ALAN KUPPER, and DAVID G. KUPPER, as Beneficiaries of the Heritage Bank of Central Illinois, as Trustee Under the Provisions of a Trust Agreement dated the 27th day of January, 2006, Known as Trust No. 20-101,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiffs and Counterdefendants-Appellees,	)	Appeal No. 3-15-0628 Circuit No. 14-LM-106
v.	)	
ROBERT L. POWERS,	)	
Defendant and Counterplaintiff-Appellant.	)	Honorable James Mack, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: The trial court's finding of contempt was not against the manifest weight of the evidence. The trial court erred in awarding compensatory damages in an indirect civil contempt proceeding.

¶ 2 Defendant appeals the trial court's order finding him in indirect civil contempt for failing to comply with a prior order not to remove items affixed to or integral to the operation of an apartment building. Specifically, defendant argues that the trial court erred in: (1) finding defendant to be in contempt; and (2) awarding compensatory damages to plaintiffs following its finding of contempt. We affirm in part, reverse in part, and remand with directions.

¶ 3 FACTS

¶ 4 Plaintiffs, Robert H. Kupper II, Kevin I. Kupper, Alan Kupper, and David G. Kupper, as beneficiaries of the Heritage Bank of Central Illinois, as trustee under the provisions of a trust agreement dated January 27, 2006, known as trust No. 20-101 (plaintiffs) entered into an Agreement for Warranty Deed (Agreement) with defendant, Robert L. Powers. Under the Agreement, plaintiffs agreed to convey an apartment building to defendant if defendant made payments as provided in the Agreement. Plaintiffs filed a complaint for possession of the premises under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2014)) and for rent pursuant to the Agreement. The complaint alleged that defendant failed to make the final payment under the Agreement.

¶ 5 Plaintiffs subsequently filed a motion for appointment of a receiver. A hearing was held on plaintiffs' motion on April 15, 2015. The trial court granted the motion and ordered that Core 3 Property Management (Core 3) be appointed as receiver. Defendant's attorney stated that defendant had personal property in the apartment building that he needed to remove. Defendant and his attorney indicated that this personal property was located in the basement, hallway, and stable garage. The trial court directed defendant to remove his property within seven days. The following exchange occurred:

"MS. WILBURN [plaintiffs' attorney]: Well, [Y]our Honor, I would just want to know exactly what personal property they're talking about. I mean, if it's tools, okay. If we're–I just want to be sure that no fixtures of the building or anything like that are going to be removed.

THE COURT: I guess it would be this Court's understanding that if something is affixed to the building, it's not personal property at this point.

MR. MORRIS [defendant's attorney]: Right. It would be something–

THE COURT: If a water heater was put in and it's piped into the system, it's not personal property. It's–

MR. MORRIS: Mainly tools.

THE COURT: –part of the property. If it's a saw and hammer or whatever else sitting there, or extra materials, or if you had other additional water heaters that were never piped in–I don't know what else would be there.

MR. MORRIS: It would have to be unattached items.

THE COURT: Those things would be removed. But anything that's been affixed to the building or is integral to the operation of the building can't be removed."

¶ 6 The trial court entered a written order stating: "Defendant has 7 days in which to remove his personal property from the Premises at 255 N.E. Randolph Ave. He shall provide a list to Plaintiffs of all property removed with a value of over $20.00."

¶ 7 On May 1, 2015, plaintiffs filed a petition for rule to show cause, alleging that defendant removed 10 stoves and 5 refrigerators from apartment units, some of which were currently occupied. Defendant filed a response in which he denied removing 10 stoves and 5 refrigerators and claimed that he provided information regarding the items removed from the property. In their reply, plaintiffs alleged that defendant provided a list on May 19, 2015, that included some of the appliances plaintiffs claimed he removed from the property. Plaintiffs further alleged that defendant had not returned the appliances he took from the premises and that plaintiffs had to purchase appliances to replace the ones that defendant removed. Plaintiffs further claimed that the refrigerators and stoves were fixtures of the apartment building.

¶ 8 At the hearing on the petition for rule to show cause, plaintiffs stated that 10 stoves and 5 refrigerators were missing from the 13 apartment units when Core 3 gained access to the building, and defendant admitted to taking 4 stoves and 2 refrigerators. Plaintiffs argued that the appliances were fixtures and should not have been removed. The trial court noted that only 9 of the 13 apartments on the premises were authorized for use as apartments by the zoning code. The trial court stated that it "would issue the rule and to have the defendant verify that the stoves and refrigerators remained in those nine units. Or if they did not remain, which ones didn't remain and the reason why they didn't remain."

¶ 9 The trial court entered a written order for rule to show cause directing defendant to appear on August 7, 2015, and show cause as to why he should not be held in contempt for

failing to obey the order entered on April 15, 2015, "with respect to any and all appliances removed after April 15, 2015 from any of the nine rentable apartments."

¶ 10 At the August 7 hearing, defendant testified that he removed personal property from the building, including building materials and appliances that were on loan to him from a friend. Defendant stated that he borrowed the appliances on October 1, 2006, because the property did not have a full set of appliances functioning when defendant purchased it. Defendant stated that he removed three stoves and two refrigerators after April 15, 2015. He removed an additional stove prior to April 15, 2015. Defendant returned the appliances to the person he borrowed them from. Defendant testified that some of the units never had a full set of appliances. Defendant testified that when he was in charge of the building, he believed one unit lacked a stove and refrigerator and four units, including unit seven, lacked only a stove. Defendant testified that the stoves and refrigerators were not affixed to the building when he removed them and he considered them to be personal property rather than fixtures.

¶ 11 Javier Silva testified for plaintiffs. Silva testified that he resided in an apartment in the building in question and defendant was his former landlord. Silva stated that he had lived at that apartment since 1998. On April 18, 2015, defendant sent a text message to Silva stating that he needed access to Silva's apartment. Specifically, defendant stated that he needed to access behind the wall, the sink, and the stove. On April 20, 2015, Silva returned to his apartment in the evening and found a document on his door stating that defendant would no longer be his landlord and he was to communicate with and pay rent to Core 3. When Silva went inside his apartment, the stove was gone. Silva informed Core 3 that his stove was missing, and a different stove was subsequently installed in his apartment.

¶ 12 Matthew Smith testified that he was a property manager for Core 3. Smith stated that he was first able to access the premises on April 24, 2015. He went to all the units in the "main house" and noted that some were missing stoves and refrigerators. Out of the nine rentable apartment units in the main house, six were missing appliances. Specifically, six stoves and three refrigerators were missing. Four of the apartments missing appliances were occupied at the time.

¶ 13 Smith contacted plaintiffs regarding the cost to replace the appliances and obtained approval from plaintiffs to purchase replacement appliances. Core 3 purchased four apartment-sized gas stoves and one refrigerator for the apartments that were currently occupied. The cost of the replacement appliances was $2,658.97. When the new gas stoves were installed, they were connected to the building's gas lines. Smith believed that the stoves defendant removed from the building were gas stoves.

¶ 14 Smith testified that two of the nine rentable apartments, which were currently unoccupied, were still missing both stoves and refrigerators. Smith stated that Silva rented unit seven.

¶ 15 David Kupper testified that he inherited the apartment building from his parents when they died, and he was one of the plaintiffs. Kupper testified that he went to the premises on April 26, 2015. A tenant approached Kupper and showed Kupper where the refrigerator used to be in the tenant's apartment. At the time he entered into the Agreement with defendant, Kupper believed that most of the units had appliances because they were rented. Kupper stated that at least 10 units had working stoves and refrigerators. Kupper stated that gas stoves and refrigerators were in the apartments when he entered into the Agreement with defendant, and they were in working order.

¶ 16 After hearing arguments, the trial court found defendant in contempt with respect to the order of April 15, 2015, concerning the removal of appliances from the premises. The trial court found that defendant's testimony lacked credibility. The trial court noted that defendant did not mention at the hearing on April 15 that there were borrowed appliances in the apartment units. With regard to the appliances, the trial court reasoned: "Call them fixtures, call them personal property, call them whatever you want, they are affixed to the building."

¶ 17 The trial court ordered defendant to pay $2,658.97 to plaintiffs for the replacement appliances plaintiffs purchased. The trial court also ordered defendant to provide stoves and refrigerators, either new or used, to the two apartment units still missing them. Alternatively, the trial court ordered defendant to pay $2,252.32 to Core 3 if he was unable to find stoves and refrigerators for the two apartments. The trial court also ordered defendant to reimburse Core 3 for time spent cleaning, refurbishing, and installing the appliances for the two apartments. Additionally, the trial court ordered defendant to pay plaintiffs' attorney fees in the amount of $4,310.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues that the trial court erred in: (1) finding defendant in contempt for removing stoves and refrigerators from the apartment units; and (2) ordering defendant to pay for new appliances for the occupied apartment units and to furnish appliances for the unoccupied apartment units after finding him in contempt. We find that the trial court's contempt finding was not against the manifest weight of the evidence, but the court erred in improperly awarding plaintiffs compensatory damages in the contempt proceedings.

¶ 20 I. Finding of Contempt

¶ 21 We first address defendant's claim that the trial court erred in holding him in contempt for removing the appliances. Contempt can be either direct or indirect, and either criminal or civil. *People v. Coupland*, 387 Ill. App. 3d 774, 777 (2008). This case involved indirect contempt, as the alleged contemptuous conduct took place outside the presence of the judge. *Id.* at 778. (direct contempt involves offending conduct that occurs in the presence of the judge whereas indirect contempt does not occur before the judge). The parties agree that this case involved civil contempt, as opposed to criminal contempt. See *id.* ("Criminal contempt consists of punishment of a defined duration directed towards reprimanding past conduct while civil contempt is usually coercive and seeks to modify conduct."). The parties merely dispute whether the trial court's contempt determination was against the manifest weight of the evidence. See *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 22 "The existence of an order of the trial court and proof of willful disobedience of that order is essential to any finding of indirect civil contempt." *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). Initially, the burden is on the petitioner to prove by a preponderance of the evidence that the respondent has violated a court order. *Id.* The burden then shifts to the respondent to show that his failure to comply with the court's order "was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order." *Id.*

¶ 23 Here, the trial court, on April 15, 2015, ordered defendant to remove his items of personal property from the apartment building within seven days, but stated: "[A]nything that's been affixed to the building or is integral to the operation of the building can't be removed." At the contempt hearing, the testimony of plaintiffs' witnesses established that defendant removed gas stoves and refrigerators from several apartment units after April 15, 2015, in violation of the trial court's order. At that point, the burden shifted to defendant to show that his removal of the

appliances "was not willful or contumacious and that he *** had a valid excuse for failure to follow the court order." *Id.*

¶ 24 Defendant admitted to removing four stoves and two refrigerators from the building, but stated that he removed one of the stoves prior to April 15, 2015. While defendant testified the appliances had been on loan to him from a friend since 2006, and he returned the appliances to his friend, the trial court found that defendant's testimony lacked credibility. We defer to the trial court's credibility determination. See *Traveler's Insurance Co. v. Webster*, 251 Ill. App. 3d 46, 49 (1993). Thus, defendant's testimony failed to establish that his violation of the trial court's order was not willful or that he had a valid excuse for violating the order. In light of the above facts, the trial court's contempt finding was not against the manifest weight of the evidence.

¶ 25 In coming to this conclusion, we reject defendant's argument that the appliances were personal property rather than fixtures, so their removal did not violate the written order. First, even if we were to accept defendant's argument that the appliances were personal property rather than fixtures, it is clear that their removal still violated the trial court's order. At the hearing on April 15, the trial court stated that defendant was not to remove anything "integral to the operation of the building." Stoves and refrigerators are clearly integral to the operation of an apartment building. This is especially true where, as here, many of the units from which appliances were removed were occupied by tenants.

¶ 26 Defendant does not contest that the appliances were integral to the operation of the building but, rather, relies on the fact that the trial court did not explicitly state in its written order that defendant was not to remove items integral to the building's operation. Such reasoning defies logic. Defendant was not free to ignore the court's oral directive merely

because it was not included in the written order. See *In re Taylor B.*, 359 Ill. App. 3d 647, 651 (2005) ("When a conflict exists between the court's oral pronouncement and its written order, the oral pronouncement prevails.").

¶ 27 Additionally, case law supports the position that refrigerators and gas stoves in an apartment building are fixtures. "A fixture is an item of personal property which is incorporated into or attached to realty." *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 889 (2010). "Whether something is a fixture rather than a piece of personal property depends upon the nature of its attachment to the real estate, its adaptation to and necessity for the purpose for which the premises are devoted, and whether or not it was intended that the item should be considered to be a part of the realty." *Nokomis Quarry Co. v. Dietl*, 333 Ill. App. 3d 480, 484 (2002). Illinois courts have held both refrigerators and gas stoves in apartment buildings to be fixtures in at least some circumstances. See *Lyle v. Rosenberg*, 192 Ill. App. 378, 383 (1915) (holding that gas ranges and gas stoves in apartment buildings "properly fall within the terms 'fixtures, apparatus or machinery' " under the Mechanic's Lien Act of 1903); *Guardian Life Insurance Co. of America v. Swanson*, 286 Ill. App. 278, 288-89 (1936) (holding that electric refrigerators were fixtures rather than personal property where they were "essential equipment" to the apartment building and they had been conveyed with the building by various prior owners).

¶ 28 II. Remedy

¶ 29 Having found that the trial court properly found defendant in contempt for removing the stoves and refrigerators from the apartment units, we turn to defendant's argument that the trial court improperly awarded compensatory damages to plaintiffs in the contempt proceedings.

¶ 30 "Generally, civil contempt is recognized as a sanction or penalty designed to compel future compliance with a court order." *People v. Warren*, 173 Ill. 2d 348, 368 (1996). In a civil contempt proceeding, "[t]he court seeks only to secure obedience to its prior order." *Logston*, 103 Ill. 2d at 289. Because sanctions imposed in civil contempt proceedings are strictly coercive, "a court may imprison or fine for contempt of its orders but is without authority to recompense an aggrieved party for his damages." *Harper v. Missouri Pacific R.R. Co.*, 282 Ill. App. 3d 19, 30 (1996). "[I]t is well established that civil contempt is an affront to the authority of the court and not a private remedy, that any fine imposed pursuant to the contempt is payable to the public treasury and not a plaintiff, and that a plaintiff may not recover compensatory damages in a civil contempt proceeding." *Keuper v. Beechen, Dill & Sperling Builders, Inc.*, 301 Ill. App. 3d 667, 669-70 (1998).

¶ 31 We find that the contempt order in the instant case improperly awarded compensatory damages to plaintiffs. The content of the underlying order directs our analysis. See *Logston*, 103 Ill. 2d at 289. Here, the underlying order with regard to which the trial court found defendant to be in contempt provided that defendant could not remove items integral to the operation of the apartment building. The trial court's contempt order directing defendant to reimburse plaintiffs for replacement appliances they purchased and ordering defendant to provide appliances for the two unoccupied apartments did not coerce defendant's compliance with its prior order *not to remove* the items. Rather, the contempt order improperly recompensed plaintiffs for losses they suffered as a result of defendant's noncompliance. See *Harper*, 282 Ill. App. 3d at 30.

¶ 32 Additionally, since civil contempt is intended to coerce future conduct rather than punish past conduct, a purge condition must be a part of an indirect civil contempt order. *Felzak v.*

Hruby, 226 Ill. 2d 382, 391 (2007). That is, the "contemnor must be able to purge the civil contempt by doing that which the court has ordered him to do." *Id.* In the instant case, the trial court's contempt order improperly lacked a purge condition. That is, the order did not allow for defendant to purge his contempt and avoid punishment by complying with the underlying order.

¶ 33 We reject plaintiffs' specific argument that the trial court's contempt order requiring defendant to reimburse plaintiffs for the replacement appliances was proper because it forced defendant to obey the court's order. The order defendant violated prohibited *removal* of the appliances. The trial court's contempt order directing defendant to *pay for* or *replace* items he removed did not compel defendant to comply with the order not to remove the items in the first place. Hypothetically, if defendant had been found in contempt for violating an order to *provide* appliances for each apartment, the trial court could have ordered that defendant be jailed or fined until he provided the appliances. See *Harper*, 282 Ill. App. 3d at 30 (jail and fines are appropriate civil contempt remedies).

¶ 34 We note that this case does not present a typical civil contempt situation where a party fails to do something required by a court order. See *Central Production Credit Ass'n v. Kruse*, 156 Ill. App. 3d 526, 531 (1987) ("Civil contempt is coercive in intent and ordinarily consists of failing to do something ordered to be done by a court in a civil action for the benefit of an opposing litigant."). If the remedy plaintiffs seek is compensation for losses they suffered when defendant removed the appliances, there may well be legal avenues available to them to obtain such compensation. However, plaintiffs may not recover compensatory damages in the civil contempt proceeding; rather, the court may only impose sanctions to compel future compliance with its prior order. *Warren*, 173 Ill. 2d at 368.

¶ 35 As we have found the remedy imposed by the trial court to be improper, we remand this cause to the trial court with directions to impose a proper civil contempt sanction to compel compliance with the underlying order, if one is found to exist.

¶ 36 Lastly, we note that in his prayer for relief, defendant asks that we reverse the attorney fees awarded by the trial court. As we have found the trial court's contempt finding to be proper, we will not disturb the trial court's order that defendant pay plaintiffs' attorney fees. See *Harper*, 282 Ill. App. 3d at 30 ("It is appropriate in both civil and criminal contempt cases to require the contumacious party to bear the reasonable costs and attorney fees of a contempt proceeding, especially where *** a private litigant brings before the court the fact of an indirect contempt."). Alternatively, as defendant made no substantive argument regarding the awarding of attorney fees, he forfeited the claim. See *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297-98 (2010).

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County finding defendant to be in indirect civil contempt. The portion of the contempt order requiring defendant to reimburse plaintiffs for replacement appliances they purchased and requiring defendant to provide or pay for additional appliances is reversed. The cause is remanded to the circuit court with directions for further proceedings consistent with this order.

¶ 39 Affirmed in part and reversed in part.

¶ 40 Cause remanded with directions.

¶ 41 JUSTICE HOLDRIDGE, specially concurring.

¶ 42 I agree that the trial court's finding of contempt was not against the manifest weight of the evidence. I also agree that the trial court improperly awarded compensatory damages in the

contempt proceeding by ordering the defendant to reimburse the plaintiffs for the appliances he removed and for the replacement appliances purchased by the plaintiffs. Unlike the majority, however, I do not believe that it was improper for the trial court to order the defendant to provide stoves and refrigerators for the two unoccupied apartment units. That portion of the trial court's contempt order merely sought to compel the defendant's compliance with the court's prior order not to remove such appliances from the apartment units. As such, it was a proper contempt order, not an award of compensatory damages.

¶ 43 I join the majority's judgment and analysis in all other respects.