

NOTICE
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2016 IL App (5th) 150410-U

NO. 5-15-0410

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
LINDA FORBES,)	Madison County.
)	
Petitioner-Appellee,)	
)	
and)	No. 15-D-113
)	
ROBERT FORBES,)	Honorable
)	Martin J. Mengarelli,
Respondent-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the September 1, 2015, order of the circuit court from which respondent appeals and remand for a full and adequate hearing.

¶ 2 The instant litigation is part of acrimonious dissolution proceedings between petitioner, Linda Forbes, and respondent, Robert Forbes. Respondent appeals from an order of the circuit court of Madison County denying his motion to vacate a temporary restraining order (TRO) entered on July 27, 2015, and ordering petitioner, Linda Forbes, to have sole decision-making ability and control over the sale of the parties' marital residence, with the exception of the signing of any sales contract. The issues raised in

this interlocutory appeal are: (1) whether the trial court erred in granting petitioner injunctive relief; and (2) whether the trial court erred in refusing to vacate the temporary restraining order. We reverse and remand.

¶ 3

BACKGROUND

¶ 4 The parties were married on May 31, 1986. The parties separated in January 2015, when petitioner moved from the marital residence. Petitioner filed a petition for dissolution on February 5, 2015.

¶ 5 On June 8, 2015, petitioner filed for temporary and exclusive possession of the marital residence and for its sale. On June 26, 2015, the parties agreed to an order allowing the marital residence to be listed for sale with a local realtor, Kathy Malawy. That order further provided each party access to one respective floor of the home in which they could each live, required them to keep their floor in "broom sweep" condition, and set the matter for a case management conference on July 15, 2015, "for status of listing home."

¶ 6 At the case management conference, neither party had yet to sign the listing agreement. The trial court then ordered the parties to sign the listing agreement by July 17, 2015. Both parties signed the listing agreement, but petitioner was unaware respondent signed the agreement. Accordingly, petitioner filed a petition for rule to show cause on July 21, 2015, after which respondent's counsel informed petitioner's attorney that respondent signed the agreement and it was in counsel's office. The listing began on July 22, 2015.

¶ 7 On July 27, 2015, petitioner filed a petition for temporary restraining order and/or petition for preliminary injunction in which she alleged *inter alia*:

"That since signing the listing agreement, the following events have occurred:

a. That on or about July 24, 2015, [r]espondent contacted Kathy Malawy and stated that she could not put a lock box on the door of the home, and further, that if she did not remove it, he would cut it off himself with bolt cutters.

b. That [r]espondent has continued to call Kathy Malawy with various interferences to the sale of the home, including prohibiting Ms. Malawy from posting any pictures of the home online.

c. That [r]espondent has cancelled all four (4) of the showings for the home that were scheduled over the weekend of July 24-26. Any of those showings could have resulted in a potential buyer.

d. That [r]espondent has been verbally abusive and threatening to Ms. Malawy to the point that she has notified both parties that she intends to terminate her involvement with the listing contract due to [r]espondent's behavior."

Petitioner further alleged she believed respondent would continue his "erratic and aggressive" behavior to stall the sale of the home and stated respondent "has been equally aggressive toward" her "to the point where she does not feel comfortable being in the same residence as [r]espondent." Petitioner asked for a temporary restraining order barring respondent "from residing and/or being present at the marital residence during the pendency of the home sale" and for her to be granted sole possession of the home while it is on the market.

¶ 8 On the same day the petition was presented, the trial court entered a TRO by signing a handwritten order written by petitioner's attorney. No evidence was submitted. The TRO granted petitioner the sole decision-making power over the sale of the marital home, including being "the sole signatory on any necessary documents including but not limited to listing agreement, lock box authority, pictures on internet/MSL and any decisions associated with selling property." The TRO required respondent to be absent from all showings of the home upon one hour notice.

¶ 9 On August 4, 2015, respondent filed a motion to vacate the TRO. On August 5, 2015, a hearing was conducted on a preliminary injunction. When the hearing began, respondent's attorney noted that he filed a motion to vacate the TRO, and asked the trial court if it wanted to take that up first because "it goes to the very essence of the Order that was entered." The trial court replied, "No; we can address that later."

¶ 10 The only witness who testified at the hearing was Kathy Malawy. A review of her testimony makes it clear respondent disagreed with Malawy as to the listing price of the home. Malawy recommended a listing price between \$525,000 and \$615,000, depending on whether recommended repairs and changes were made to the home. Ultimately, the home was listed at \$525,000, without making any changes or repairs. Respondent was given the opportunity to cross-examine Malawy. After her testimony, the trial court adjourned for the day, and no further testimony was taken.

¶ 11 It appears from the record respondent was not allowed to present testimony. Respondent, did, however, submit five exhibits. Exhibit A is a letter from Kathy Malawy

to respondent in which Malawy makes recommendations for "changes/repairs" to be made to the marital residence prior to sale. Exhibit B is a letter from Malawy to petitioner making essentially the same recommendations, including repairs to the roof, cleaning or replacing carpeting, and decluttering. Exhibit C is a series of text messages between Malawy and respondent pertaining to the sale of the home, including disagreements as to the listing price of the home and the placement of a lock box on the home. The texts also indicate respondent agreed to show the home to two interested parties, but cancelled the showings on the day they were scheduled "due to [s]cheduling issues." After cancelling the showings, respondent explained via text, "In the meantime, I am getting estimates on the repairs to the roof and damage to the rooms that should have been obtained previously. The sale of this house is going to be handled in a way to maximize my return. It is not a foreclosure." Exhibit D is feedback from a realtor who showed the home on Thursday, July 30, 2015. It indicates the property showed poorly and was priced too high. Exhibit E is a copy of text messages between Sharon Joiner, the realtor who showed the home on July 30, 2015, and respondent.

¶ 12 On August 12, 2015, the trial court ordered, "Both parties to submit proposed Orders in regard to TRO and Motion to Vacate by August 24, 2015." The record reveals petitioner filed a proposed order on August 24, 2015, but does not indicate respondent submitted a proposed order. However, on August 28, 2015, the trial court entered an order stating, "Court has proposed orders from each party relative to August 5, 2015 hearing. Parties to verbally advise court By Friday, August 28, 2015 at 4 pm if agreed order is reached or Court shall issue order." On September 1, 2015, the trial court entered

an order denying respondent's motion to vacate and giving petitioner "sole decision-making ability and control over the sale of the marital residence ***, with the exception of signing any sales contract."

¶ 13 That order specifically stated that the trial court "heard partial testimony and attorney argument" before entering the order. The trial court specifically noted, "It is not necessary to enter a preliminary injunction to address the issues relative to selling the marital residence which can be addressed by the terms of the order herein." In addition to giving petitioner sole authority over the sale of the home, the order further provided that petitioner would be "responsible for communicating with the realtor, scheduling showings of the house, negotiating with potential buyers regarding a sales contract and/or any other tasks associated with selling the home." The order limited showings for the home to Wednesdays, Saturdays, and Sundays from 9 a.m. until 9 p.m. upon 24 hours' notice, and allowed respondent's attorney's office to communicate with the realtor on updates on the progress of the sale, but ordered respondent not to have contact with the realtor. Respondent then filed this interlocutory appeal.

¶ 14

ANALYSIS

¶ 15 The first issue on appeal is whether the trial court erred in granting petitioner injunctive relief. Respondent contends the trial court erred in granting petitioner injunctive relief because the trial court made no findings of fact and failed to give him the opportunity to present evidence before entering its September 1, 2015, order from which he now appeals. Petitioner replies the trial court did not commit reversible error by

granting injunctive relief to her because the plain language of the September 1, 2015, order indicates injunctive relief was not granted, and even assuming *arguendo* injunctive relief was granted, the trial court engaged in adequate procedure and based its findings on sufficient evidence presented by her.

¶ 16 Despite the trial court's attempt to label the September 1, 2015, order as something other than a preliminary injunction, we agree with respondent that the order is in fact injunctive. The pleading which prompted the hearing and the resulting order was a petition for TRO and/or preliminary injunction, and the September 1, 2015, order specifically retained the provisions of the TRO which gave petitioner "sole decision-making ability and control over the sale of the marital residence." Furthermore, the order prohibits respondent from contacting the realtor and keeps in effect "all prior Orders not specifically modified herein," which would include the terms of the TRO entered on July 27, 2015. Therefore, the trial court's order constitutes a restraint on respondent which is injunctive in character and will be reviewed accordingly.

¶ 17 Section 501 of the Illinois Marriage and Dissolution of Marriage Act (Act) allows parties to dissolution proceedings to seek temporary relief in the form of a TRO or a preliminary injunction "proper in the circumstances." 750 ILCS 5/501(a)(2)(iv) (West 2012). However, it must be noted that a preliminary injunction is an extraordinary remedy applicable only in situations where an extreme emergency exists and serious harm would result if it were not issued. *In re Marriage of Slomka*, 397 Ill. App. 3d 137, 143, 922 N.E.2d 36, 40 (2009). In order to be entitled to a preliminary injunction, the moving party bears the burden of showing: (1) a certain and clearly ascertainable right in

need of protection; (2) irreparable injury without injunctive relieve; (3) an absence of adequate legal remedies; and (4) a likelihood of success on the merits. *In re Marriage of Centioli*, 335 Ill. App. 3d 650, 654, 781 N.E.2d 611, 614 (2002).

¶ 18 The purpose of a preliminary injunction is to preserve the status quo until the case can be resolved on the merits. *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 397, 626 N.E.2d 199, 202 (1993); *Slomka*, 397 Ill. App. 3d at 143, 922 N.E.2d at 41. The party seeking a preliminary injunction "must plead facts that clearly establish a right to injunctive relief." *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 371, 747 N.E.2d 524, 533 (2001). It is not enough to set forth allegations of mere opinion, conclusion, or belief. *Slomka*, 397 Ill. App. 3d at 144, 922 N.E.2d at 42. The trial court's decision to issue a preliminary injunction, based upon the assessment of the evidence with respect to the above factors, is subject to reversal on appeal if the ruling is an abuse of discretion as against the manifest weight of the evidence. *Slomka*, 397 Ill. App. 3d at 143, 922 N.E.2d at 41; *In re Marriage of Joerger*, 221 Ill. App. 3d 400, 405, 581 N.E.2d 1219, 1224 (1991).

¶ 19 In the instant case, petitioner sought to have sole decision-making ability over the sale of the marital residence. The trial court granted petitioner that authority in its TRO. Respondent filed a motion to vacate the TRO. The following day, the trial court began a hearing on petitioner's motion for a preliminary injunction and, at the outset, refused respondent's attorney's request to consider his motion to vacate the TRO and instead allowed petitioner to present her witness, Kathy Malawy. Respondent's attorney was afforded the opportunity to cross-examine Ms. Malawy. A recess was then taken. The

transcript thereafter notes, "Proceedings concluded." The hearing failed to resume another day.

¶ 20 A full and adequate hearing must be conducted prior to granting a preliminary injunction. *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 262-63, 608 N.E.2d 1346, 1349 (1993); *Hoda v. Hoda*, 122 Ill. App. 2d 283, 258 N.E.2d 386 (1970). The record before us indicates that requirement failed to be completed. While petitioner was afforded the opportunity to present witnesses, the record before us fails to show respondent was given the same opportunity. Moreover, the trial court's order specifically states it only "heard *partial* testimony and attorney argument." (Emphasis added.) Nevertheless, petitioner claims respondent was given "adequate process" prior to the trial court's entering the injunctive order. In support of her argument she cites *In re Marriage of Grauer*, 133 Ill. App. 3d 1019, 479 N.E.2d 982 (1985); however, we find that case distinguishable.

¶ 21 In *Grauer*, the wife moved for an order restraining the husband from using or disposing of funds received from his law practice during the pendency of dissolution proceedings. Originally, the wife filed an emergency motion for TRO seeking to enjoin the husband from using \$100,946.61 due to be paid to him for legal services. The trial court granted the TRO prohibiting the husband from using the entire amount for 10 days, and following a hearing, entered a preliminary injunction to prohibit him from disposing of \$60,000, but allowing him to utilize the remaining \$40,946.39. *Grauer*, 133 Ill. App. 3d at 1021-22, 479 N.E.2d at 984. The husband filed an interlocutory appeal, arguing *inter alia*, that the trial court denied him a full and adequate hearing prior to granting the preliminary injunction. Our colleagues in the First District disagreed, finding the

husband received an adequate hearing after he was allowed to file a memorandum in opposition to the preliminary injunction, allowed to file an itemized statement indicating his business and personal financial needs, and was not denied his opportunity to speak at the hearing. Most importantly, the record revealed the husband chose to accept the preliminary injunction as a compromise which allowed him to obtain immediate use of 40% of the money in question. *Grauer*, 133 Ill. App. 3d at 1025-26, 479 N.E.2d at 987. The *Grauer* court refused to allow the husband to challenge the trial court's order after accepting a benefit from it. *Grauer*, 133 Ill. App. 3d at 1025-26, 479 N.E.2d at 987.

¶ 22 Here, respondent received no benefit from the trial court's September 1, 2015, order. The record reveals a real issue as to how much the marital residence is worth. Ms. Malawy admitted during cross-examination that she is not an appraiser. Nevertheless, she valued the marital residence between \$525,000 and \$615,000, depending on whether the parties followed her recommendations with regards to repairs and changes to be made to the property.

¶ 23 It is clear petitioner seeks a quick sale while respondent is ready to make repairs and invest additional money in the house in order to obtain a higher price. We point out that the injunctive relief petitioner requests seeks to alter the status quo (no sale) by allowing the house to be sold at a reduced price over what respondent believes it is worth. Preliminary injunctions are improper where they tend to change the status quo of the parties rather than to preserve it. *In re Marriage of Schwartz*, 131 Ill. App. 3d 351, 354, 475 N.E.2d 1077, 1080 (1985). However, we find it unnecessary to address the merits of the preliminary injunction or the TRO at this stage since it is clear from the record before

us that respondent did not receive a full and adequate hearing. Respondent must be given the opportunity to present witnesses and additional evidence. If for some reason he chooses not to do so, the record must reflect that he was at least given the opportunity to fully present his side of the case.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we reverse the September 1, 2015, order of the circuit court of Madison County and remand for full hearing on the matter. We encourage both parties to work toward amicable resolution of not only the sale of the marital residence, but all other remaining issues.

¶ 26 Reversed and remanded with directions.