2017 IL App (1st) 170809-U

SIXTH DIVISION
Order filed: November 3, 2017

No. 1-17-0809

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LAKETA L. COLON, Plaintiff-Appellee, v. SIDNEY J. HOWELL, III; ELENA R. HOWELL; STATE FARM FIRE & CASUALTY COMPANY, an Illinois corporation; ZJACOBE SNYDER; WESTERN SURETY COMPANY, a South Dakota corporation; FIDELITY NATIONAL TITLE INSURANCE COMPANY f/k/a Ticor Title Insurance Company, merged and consolidated with Chicago Title Insurance Company, a New York corporation; URBAN PARTNERSHIP BANK, as assignee of the Federal Deposit Insurance Corporation, as receiver for ShoreBank, Defendants, and URBAN PARTNERSHIP BANK, as assignee of the Federal Deposit Insurance Corporation, as receiver for ShoreBank, Plaintiff, v.	)	Appeal from the Circuit Court of Cook County Nos. 12 CH 02175 13 CH 20977 (Cons.)

SIDNEY J. HOWELL, III; LAKETA L. COLON; CITY OF CHICAGO; JOANN CAIN; and UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,	)	
Defendants,	)	
(Sidney Howell, III; Elena R. Howell; Arvin Boddie, Contemnors-Appellants).	)	Honorable Anna Helen Demacopoulos, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court, finding contemnors in indirect civil contempt, is affirmed where its underlying order imposing sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) was not an abuse of discretion. The appellate court lacked jurisdiction under Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016) to review the denial of a motion for substitution of judge.

¶ 2 The contemnors, Sidney J. Howell, III, Elena R. Howell, and their attorney, Arvin Boddie, appeal from the trial court's order finding them in indirect civil contempt for refusing to comply with its prior order imposing sanctions pursuant Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). On appeal, the contemnors argue that the trial court (1) abused its discretion in imposing sanctions as a result of their alleged failure to comply with two discovery orders, and (2) erred in denying their motion for substitution of judge. For the reasons that follow, we affirm the trial court's order finding the contemnors in indirect civil contempt, but lack jurisdiction to review the order denying the contemnors' motion for substitution of judge.

¶ 3 On January 23, 2012, the plaintiff, Laketa L. Colon, filed her original complaint for declaratory relief against, *inter alia*, Sidney and Elena, alleging that they engaged in various acts of fraud, forgery, and identity theft in connection with the purchase and financing of a four-flat apartment building located at 7230 South Yates Boulevard in Chicago (subject property). Colon alleged that Sidney forged a power of attorney and Elena, a notary public, falsely certified that

Colon had personally appeared before her to sign the document. The power of attorney gave Sidney authority to act as Colon's attorney-in-fact and to enter into various financial and real estate transactions related to the purchase of the subject property. Based upon the forged power of attorney, Sidney executed a promissory note in the amount of $286,600, which was secured by a mortgage on the subject property. Colon's complaint sought an unspecified amount of money damages, plus attorney fees and costs.

¶ 4 On August 19, 2015, Colon served a notice of deposition upon Sidney seeking to depose him on September 8, 2015. The notice of deposition included a request for production of documents, including Sidney's bank and credit card statements, tax returns, and any records pertaining to the purchase and financing of the subject property.

¶ 5 On September 8, 2015, Sidney appeared at the deposition, but without any of the requested documents. During the deposition, Sidney testified that he gave the requested documents to Boddie. Boddie, in turn, stated that "we have provided you discovery via interrogatories and notice to produce." When counsel for Colon continued to question Sidney about the production of documents, Boddie objected "to this line of questioning as to what [Sidney] gave his counsel and what his counsel has," claiming that "[t]his is not a deposition of his counsel." Boddie reiterated that he produced the requested documents and instructed Colon's attorney to submit a supplemental request if he seeks additional documents. Also during the deposition, Sidney was asked to provide information about his business, Cornerstone Property Rehab, but he refused to provide some or all of the requested information.

¶ 6 On September 10, 2015, Colon's attorney advised Boddie in an email that he had not received any documents in response to discovery and requested that Boddie produce the

documents listed in Sidney's notice of deposition. The record does not contain a response from Boddie.

¶ 7 On October 29, 2015, Colon served a notice of deposition upon Elena, seeking to depose her on November 19, 2015. In the notice of deposition, Colon requested that Elena produce bank and credit card statements "on accounts on which you, your husband and/or your son, Sidney, are signatories for the period 2008 to the current date."

¶ 8 On November 19, 2015, Elena appeared at the deposition, but did not produce any of the requested documents. When Elena was asked about the requested documents, Boddie objected and instructed her not to answer on grounds that the information was protected by the attorney-client privilege. The deposition transcript reveals that Boddie had some documents in his possession but he did not give Colon the opportunity to make copies. Based upon Elena's failure to produce the requested documents and her refusal to answer questions, Colon adjourned the deposition.

¶ 9 On December 3, 2015, Colon filed a motion to compel and for sanctions, alleging that Sidney and Elena failed to comply with her discovery requests and refused to answer questions during their depositions. Colon sought an order compelling Sidney and Elena to produce the documents and complete their depositions. She also sought sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), including attorney fees, costs, and any other sanctions the court determined to be appropriate.

¶ 10 On December 10, 2016, following a hearing on Colon's motion to compel, the trial court ordered Sidney to provide all documents responsive to the production request in his notice of deposition by January 11, 2016, to Colon's counsel. Regarding Colon's request that Elena

produce bank and credit card statements, the court set a briefing schedule and continued the matter for a hearing.

¶ 11 Meanwhile, the record reveals that, on December 21, 2015, Boddie delivered documents to Record Copy Services and advised them that the documents should be made available for copying at Colon's "request and expense." Two days later, counsel for Colon advised Boddie in a written letter that the delivery of documents to Record Copy Services does not comply with the trial court's discovery order of December 10, 2015, and recommended that Boddie "retrieve those documents and produce them here *** so that I may review and copy the necessary documents." The record does not contain a response from Boddie.

¶ 12 On February 9, 2016, following a hearing on Colon's motion to compel and for sanctions, the trial court entered a written order compelling Sidney and Elena to produce all documents by February 16, 2016, and ordered their depositions to be completed by March 8, 2016. The written order also states that Colon's "motion for sanctions is continued."

¶ 13 On February 11, 2016, Sidney and Elena filed a motion for substitution of judge as a matter of right pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2016)), and for cause pursuant to section 2-1001(a)(3) of the Code (735 ILCS 5/2-1001(a)(3) (West 2016)). They argued that they complied with Colon's discovery requests and that Judge Demacopoulos "exhibited intimidation, hostility, and a prejudicial animus towards [Sidney, Elena] and their counsel." In particular, they alleged that Judge Demacopoulos addressed Boddie in a "dismissive and humiliating tone," accused him of "high-jacking" her courtroom, "ridiculed him," and threatened him with sanctions. As such, Sidney and Elena requested a new judge.

¶ 14 On February 23, 2016, after the parties fully briefed the issue, the trial court conducted a hearing on the motion for substitution of judge as a matter of right. Following arguments, Judge Demacopoulos denied the motion for substitution as a matter of right because she had already made substantive rulings compelling discovery. Sidney's and Elena's subsequent motion for substitution of judge for cause was assigned to a different judge, Judge Neil H. Cohen, who denied the motion on April 1, 2016. The matter then returned to Judge Demacopolous.

¶ 15 At a status hearing held on April 13, 2016, the trial court again ordered Sidney and Elena to comply with all outstanding production requests and ordered Boddie to produce his clients for depositions before May 18, 2016. The record reflects that Sidney and Elena complied with the trial court's order by producing the requested documents and completing their depositions.

¶ 16 On June 7, 2016, the trial court entered a written order directing Colon to "refile an amended motion for sanctions." On June 24, 2016, Colon filed an amended motion for sanctions, alleging that Sidney and Elena refused to answer questions during their initial depositions, failed to produce documents that were requested in the notice of depositions, and refused to comply with the court's discovery orders of December 10, 2015, and February 9, 2016. Colon asserted that Boddie's objections at the depositions were "done solely for the purposes of harassment and obstruction" and the failure to produce documents was "deliberate and calculated to obfuscate and delay these proceedings." Colon also cited the "defective and totally unsupported" motion for substitution of judge as further indicia of Sidney's and Elena's delay tactics. Accordingly, Colon sought reimbursement of attorney fees and costs she incurred as a result of having to file the motions to compel and retaking Sidney's and Elena's depositions.

¶ 17 In response, Elena and Boddie argued that "the evidence of record establishes that [they] timely complied with all Court Orders, and *** with [Colon's] discovery requests by appearing

for the noticed depositions only to be confronted with [Colon's] hostile, oppressive and humiliating examinations." They asserted that they complied with Colon's discovery requests by producing the requested documents for inspection and copying at both Sidney's and Elena's depositions, but Colon's attorney "threw the proffered document to [Boddie] in a hostile, provoking and humiliating manner."

¶ 18 On November 8, 2016, following a hearing on Colon's motion for sanctions, the trial court found that sanctions against Sidney, Elena and Boddie were appropriate pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). The court, therefore, granted Colon's request for attorney fees, but limited the amount of fees to $4,915.45. The court's written order provides that the fees shall be paid on or before December 23, 2016.

¶ 19 On December 22, 2016, Sidney, Elena and Boddie filed a motion requesting that the trial court hold them in contempt for failing to pay the court-ordered attorney fees. In the motion, Sidney, Elena and Boddie represented that they would voluntarily allow themselves to be held in contempt for the purpose of seeking appellate review of the trial court's order of November 8, 2016, directing them to pay $4,915.45 in attorney fees. They also waived their right to "formal contempt proceedings."

¶ 20 On March 2, 2017, the trial court found Sidney, Elena, and Boddie in indirect civil contempt for their failure to pay Colon's attorney fees pursuant to the court's order of November 8, 2016. The contempt order imposed 9% interest on the November 8, 2016, discovery sanction to begin accruing December 23, 2016. This appeal followed.

¶ 21 On appeal, the contemnors argue that the trial court abused its discretion in imposing sanctions pursuant to Rule 219(c). More specifically, they argue that the trial court abused its discretion because: (1) it failed to set forth with specificity the reasons for the sanction; and (2)

the "evidence of record clearly demonstrates that they timely complied with all court orders and discovery requests."

¶ 22 At the outset, we note that discovery orders are not ordinarily appealable because they are not final orders. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). Rather, they are reviewable on appeal from the final judgment. *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981). "However, it is well settled that a contempt proceeding is an appropriate method for testing the correctness of a discovery order." *Reda*, 199 Ill. 2d at 54; see also Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016). "When an individual appeals from a contempt sanction imposed for violating, or threatening to violate, a discovery order, the contempt finding is final and appealable and presents to the reviewing court the propriety of that discovery order." *Reda*, 199 Ill. 2d at 54; see also *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001).

¶ 23 Generally, "[t]he decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal." *Shimanovsky v. General Motors*, 181 Ill. 2d 112, 120 (1998). An abuse of discretion occurs "where the record shows that the party's conduct was not unreasonable or where the sanction itself is not just." *Kubian v. Labinsky*, 178 Ill. App. 3d 191, 196 (1988). A just order for sanctions under Rule 219(c) is one that seeks to attain the twin goals of compliance with discovery and a trial on the merits. *Shimanovsky*, 181 Ill. 2d at 123. "When imposing sanctions, the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party." *Id.* A sanction should be proportionate to the gravity of the violation. *Buehler v. Whalen*, 70 Ill. 2d 51, 67 (1977).

¶ 24 Rule 219 addresses the consequences of refusing or failing to comply with discovery rules or orders. Subsection (c) of the rule specifies that if a party:

> "unreasonably fails to comply with [the discovery rules] or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere provided, such orders as are just, including, among others, the following:
>
> * * *
>
> an appropriate sanction, which may include *** a reasonable attorney fee and when the misconduct is willful, a monetary penalty." Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 25 The contemnors first argue that the trial court failed to comply with the requirements of Rule 219(c) because it did not set forth with specificity the basis for the sanction. They contend that the court's failure to provide written reasons for the sanction order "clashes with the plain language of Rule 219(c)" and prevents this court from deciding the issues presented for review. We disagree.

¶ 26 An order imposing sanctions under Rule 219(c) "shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order or in a separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The purpose of this requirement is to allow the reviewing court to make an informed review of the decision to impose sanctions. *Kellett v. Roberts*, 276 Ill. App. 3d 164, 172 (1995). However, courts have upheld sanctions under Rule 219(c) even where a trial court has failed to specifically set out its findings. See *Peal v. Lee*, 403 Ill. App. 3d 197, 206 (2010); see also *Glover v. Barbosa*, 344 Ill. App. 3d 58, 63 (2003) (trial court's failure to set out the grounds for sanctions is not *per se* reversible error; upholding the imposition of sanctions where the basis was clear from the record); *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 528 (1997) (a court's failure to set forth the grounds for

sanctions under Rule 219(c) is not *per se* reversible error).

¶ 27 In this case, we are able to surmise from the record the basis for the trial court's decision: the contemnors' failure to comply with Colon's discovery requests and the trial court's discovery orders. Colon's motion for sanctions did not raise any other ground. Nor do the parties contend on appeal that the trial court's imposition of sanctions was grounded on a reason other than the contemnors' failure to produce documents and resume Sidney's and Elena's depositions. Although the November 8, 2016, order states only that the sanction was being imposed against the contemnors pursuant to Rule 219, we note that Rule 219(c) permits the basis for the sanctions to be stated in a "separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The trial court's orders of December 10, 2015, February 9, 2016, and April 13, 2016, make clear that the contemnors had not complied with its discovery orders and, as a consequence, the court continued Colon's motion for sanctions on at least three occasions. We conclude, therefore, that the trial court's failure to set forth with specificity the basis for imposing sanctions does not deprive this court of deciding the issues on appeal.

¶ 28 Having found that the parties' motions before the trial court and the court's written orders on those motions are sufficient to permit informed review, we next address the contemnors' argument that "the evidence of record clearly establishes that they timely complied with all court orders and discovery requests."

¶ 29 Before a sanction may be imposed, the burden initially falls on the party seeking sanctions to show that the alleged contemnor violated a court order. *In re Marriage of Latour*, 241 Ill. App. 3d 500, 508 (1993); see also *In re Marriage of Ray*, 2014 IL App (4th) 130326, ¶ 15 ("[n]on-compliance with a court order is *prima facie* evidence of contempt"). The burden then shifts to the alleged contemnor to show that noncompliance 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. *Ray*, 2014 IL App (4th) 130326, ¶ 15.

¶ 30 In this case, the record is replete with evidence that the contemnors disobeyed the trial court's orders to produce outstanding discovery. The record reveals that Colon was diligent in pursuing discovery but her efforts were fruitless, prompting her to file a motion to compel and for sanctions. The contemnors not only ignored their statutory responsibilities to respond to discovery in a timely manner, but they disregarded the trial court's orders of December 10, 2015, and February 9, 2016, compelling them to produce documents to Colon's attorney and complete Sidney's and Elena's depositions.

¶ 31 Although the contemnors assert that they "timely complied with all [c]ourt orders, and *** discovery requests," there is no record of any such compliance. Even if Boddie produced some documents at Elena's deposition and again at Record Copy Services, the contemnors have not shown that they ever fully complied with Colon's request to produce. On February 9, 2016, Sidney and Elena were ordered to produce all documents by February 16, 2016, and to complete their depositions by March 8, 2016. They failed to do so and, on April 13, 2016, they were again ordered to produce documents and complete their depositions. Thus, the contemnors' assertion that they timely complied with all court orders is rebutted by the record.

¶ 32 Where a party unreasonably fails to comply with a trial court's discovery order, the court may award reasonable attorney fees to the other party. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Here, the sanctions imposed by the trial court were not punitive in nature. Rather, they reimbursed Colon for the attorney fees she expended in filing the motions to compel and having to resume two depositions, which is a permissible sanction under Rule 219(c). We also observe that, prior to ordering sanctions, the trial court had already issued three orders compelling

discovery, but did not take any action on Colon's motion for sanctions, although it made clear that such sanctions would be considered in the future. The orders entered by the trial court reflect a measured response to the contemnors' evasive, inappropriate, and dilatory behavior in discovery.

¶ 33 In sum, we conclude that the trial court did not abuse its discretion by finding that the contemnors unreasonably failed to comply with its orders of December 10, 2015, and February 9, 2016, and awarding Colon reasonable attorney fees in the amount of $4,915.45.

¶ 34 Next, the contemnors argue that the trial court erred in denying their motion for substitution of judge as a matter of right because it was presented before Judge Demacopoulos had ruled on any substantial issues in the case. Colon, however, argues that this court lacks jurisdiction to entertain the contemnors' claim because an order denying a motion for substitution of judge is neither final nor appealable. We agree with Colon.

¶ 35 Illinois Supreme Court Rule 301 allows appeals from final judgments in civil cases as a matter of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "An order is final and appealable if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof." *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008).

¶ 36 The denial of a motion for substitution of judge is an interlocutory order, and is not final for purposes of appeal. *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 969 (2004). Rather, it is a preliminary order in a pending lawsuit, and is appealable on review from a final order. *Id.*

¶ 37 In this case, Colon's claims for declaratory relief against Sidney and Elena remain pending. As the denial of a motion for substitution of judge does not constitute a final judgment adjudicating all of the claims of the parties, this court has no jurisdiction to consider the

contemnors' claim. See *Inland Commercial Property Management, Inc. v. HOB I Holding Corp.*, 2015 IL App (1st) 141051, ¶¶ 20-21; *Gilkey v. Scholl*, 229 Ill. App. 3d 989, 992 (1992).

¶ 38 Nonetheless, the contemnors assert that we have jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016) because the denial of the motion for substitution of judge is related to the contempt finding by that same judge. We disagree. The contemnors have misconstrued the plain meaning of Rule 304(b)(5), which plainly states that the only order that is subject to review is the order finding them in contempt. See Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016). As noted above, our review of a contempt finding necessarily requires review of the order upon which it is based. *Norskog*, 197 Ill. 2d at 69. In the present case, therefore, our review of the trial court's contempt finding encompasses a review only of the order that the contemnors have refused to comply with, that is, the November 8, 2016, order imposing sanctions under Rule 219(c). Therefore, we do not have jurisdiction to consider the trial court's denial of the contemnors' motion for substitution of judge.

¶ 39 For the foregoing reasons, we affirm the trial court's order finding the contemnors in indirect civil contempt where its underlying order imposing sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) was not an abuse of discretion. We lack jurisdiction to review the trial court's denial of a motion for substitution of judge.

¶ 40 Affirmed in part; dismissed in part.