2019 IL App (2d) 180345-U
No. 2-18-0345
Order filed April 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CAROL M.,	)	Appeal from the Circuit Court
	)	of DuPage County.
Petitioner-Appellant,	)	
	)	
v.	)	No. 01-F-424
	)	
LARRY W.,	)	
	)	
Respondent-Appellee,	)	Honorable
	)	Timothy J. McJoynt,
(Jerry W. Kinnan, Appellant).	)	Judge Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Where petitioner was seeking contribution for attorney fees, the trial court properly denied petitioner's motion for summary judgment where there were genuine issues of material fact regarding the parties' current financial circumstances; the trial court properly dismissed petitioner's motion for attorney fees where there was no evidence regarding the parties' current financial information; the trial court did not abuse its discretion by sanctioning petitioner for failing to comply with discovery after the trial court granted respondent's motion to compel; trial court affirmed.

¶ 2 Petitioner, Carol M., appeals the trial court's orders denying summary judgment on her motion for attorney fees, granting respondent, Larry W.'s motions to compel discovery and for

discovery sanctions, and the trial court's order dismissing Carol's motion for attorney fees. For the following reasons we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties are the parents of J.W., born in 2001. The parties never married. From the time of J.W.'s birth, J.W. lived with Carol. However, in August 2015, J.W. began living with his godparents after Carol allegedly threatened to kill J.W. and herself and was taken to a nearby hospital, where she remained for several days. On September 14, 2015 Larry filed a "Petition to Modify Custody, to Remove Child to Maryland, and for other Relief" (petition to modify custody). On September 21, 2015, attorney Jerry Kinnan filed his appearance on behalf of Carol.

¶ 5 On March 3, 2016, the trial court held a hearing on Larry's petition to modify custody. On March 8, 2016, Carol, by and through Kinnan, filed her "Third Motion for Interim Attorney Fees" pursuant to sections 501(c-1) and 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/501, 508 (West 2014)) and section 17 of the Illinois Parentage Act of 1984 (750 ILCS 45/17 (West 2016)). Carol alleged that, thus far, Kinnan had expended 71.15 hours in representing Carol and, based on *quantum meruit*, was owed $21,385 for attorney fees and costs. Kinnan estimated an additional $2500 in attorney fees and costs. Kinnan attached his affidavit, wherein he averred, in part:

> "2. [Carol] *** engaged my law firm *** to represent [her] in her ongoing custody dispute with [Larry] on September 19, 2015.
>
> 3. [Kinnan] provided valuable legal services to Carol including drafting numerous pleadings, researching legal matters, consulting with [Carol,] and representing [Carol in court on several occasions.]
>
> 4. [Carol] and Counsel have been unable to come to a meeting of the minds regarding the hourly rate that [Carol] is to be charged for legal services rendered. I

informed [Carol] that my hourly billing rate is $300.00. However, [Carol] has indicated that she is unable to pay Counsel for legal services rendered ***.

5. [Carol] has not paid me a retainer fee nor has she paid me any amount towards the accrued and unpaid legal fees.

6. Counsel is not providing [Carol] any legal services on a *pro bono* basis and Counsel has so informed [Carol] that he is not working *pro bono* and that he wants to be paid for legal services rendered.

7. Notwithstanding that [Carol] is apparently unable to pay Counsel for services rendered and there has been no meeting of the minds regarding legal fees [Carol] must pay, Counsel is nevertheless entitled to be paid for services rendered on a *quantum meruit* basis. [Citation]."

¶ 6 In addition, Carol attached her affidavit to her third motion for attorney fees, wherein she averred, in part, the following:

"2. I met with [Kinnan] *** on September 19, 2015, to discuss with him [Larry's] custody and removal petitions that were pending before the court. I asked Counsel to represent me in the custody disputes.

3. I informed Counsel that I could not pay him a retainer fee, but that I would try to pay him for the legal services that he would render on my behalf. Counsel informed me that he was not going to represent me *pro bono* and that he wanted to be paid for services rendered. Counsel and I have not agreed on an hourly rate that Counsel would charge for services rendered. Counsel informed me that his billing rate is $300.00 per hour.

4. Due to my limited financial resources, I have not paid Counsel a retainer fee or any fees for the services that he has rendered and I do not have the financial resources to pay for Counsel's legal services.

* * *

8. Counsel has sent me an invoice indicating that I currently owe him in excess of $21,000 for the legal services that he has rendered to date.

9. I do not have the financial wherewithal to pay Counsel the legal fees that he is owed."

¶ 7 On March 11, 2016, the trial court issued an opinion and order granting Larry custody of the parties' child. The trial court also entered an agreed order granting Larry leave to relocate the parties' child to Maryland. On March 24, 2016, the trial court entered an agreed order resolving all remaining issues related to Larry's petition to modify custody.

¶ 8 On June 14, 2016, the trial court granted Larry's motion to dismiss Carol's third motion for interim attorney fees. Although Carol's motion for fees was filed as an interim fee petition under section 501 of the Act (750 ILCS 5/501 (West 2016)), the trial court recharacterized Carol's fee petition as a final fee petition governed by sections 508(a) and 503(j) of the Act. 750 ILCS 505(j), 508(a) (West 2016)). The trial court determined that "section 5/508[c] [of the Act] required an agreement, a written engagement agreement as a prerequisite to a final hearing for attorney's fees and court costs." Kinnan, on behalf of Carol, appealed the trial court's judgment.

¶ 9 We reversed the trial court's dismissal of Carol's motion for fees and ordered "the cause remanded to the trial court for a hearing on Carol's motion seeking contribution to attorney fees and costs pursuant to section 508(a) and 503(j) of the Marriage Act." *In re Parentage of J.W.*, 2017 IL App. (2d) 160554, ¶ 44. We held that the trial court was required to conduct a hearing

on Carol's motion for attorney fees even though there was no written agreement between Carol and Kinnan. *In re Parentage of J.W.*, 2017 IL App. (2d) 160554, ¶ 44.

¶ 10 On remand, on June 27, 2017, the trial court set Carol's motion for attorney fees to be heard on September 11, 2017.

¶ 11 On July 26, 2017, Larry served Carol with interrogatories and a request for production of documents, pursuant to Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. July 1, 2018)). On August 15, 2017, Larry served Carol with a Supreme Court Rule 237 (Ill. S. Ct. R. 237 (eff. July 1, 2005)) notice to produce at trial. Because Carol failed to answer discovery, on August 31, 2017, Larry served Carol with a motion to compel discovery and a motion for discovery sanctions pursuant to Supreme Court Rules 201 and 219, respectively (Ill. S. Ct. R. 201 (eff. July 30, 2014), Ill. S. Ct. R. 219 (eff. July 1, 2002)).

¶ 12 On September 5, 2017, Kinnan, on behalf of Carol, filed a "Motion for Appellate Fees" under section 508(a) of the Marriage Act (750 ILCS 5/508(a) (West Supp. 2017)). On September 11, 2017, Kinnan, on behalf of Carol, filed a motion for summary judgment as to Carol's motion for contribution to attorney fees. Neither motion was signed by Carol.

¶ 13 On January 19, 2018, after a hearing on Larry motion to compel discovery, the trial court ordered Carol to fully comply with Larry's discovery requests within 30 days.

¶ 14 On February 13, 2018, after hearing argument, the trial court denied Carol's motion for summary judgment after determining that there were genuine issues of material fact "that can't be covered by pleadings that were filed two and a half years ago." The trial court also stated that it must consider the factors contained in section 503 of the Marriage Act (750 ILCS 5/503 (West Supp. 2017)), which include "the current economic circumstances of the [parties]."

¶ 15 On February 23, 2018, Larry filed a second motion for discovery sanctions pursuant to Rule 219. On March 22, 2018, Larry filed a second Rule 237 notice to produce.

¶ 16 On April 10, 2018, the court held a hearing on Larry's motions for discovery sanctions. Carol was not present. Kinnan stated that he did not know where Carol lived, that he had tried to contact Carol, and that he had sent her two or three emails but that Carol had not responded. The trial court found that "Larry is absolutely entitled to discovery." The trial court awarded Larry $500 in expenses against Carol. The trial court also dismissed Carol's pending motions for fees with prejudice, pursuant to Supreme Court Rules 219(a) and (c).

¶ 17 Kinnan, on behalf of Carol, filed a notice of appeal on May 7, 2018.

¶ 18 II. ANALYSIS

¶ 19 A. Summary Judgment

¶ 20 Kinnan argues that the trial court erred by denying Carol's motion for summary judgment.[1] Summary judgment should be granted "if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitle to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016)). Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Yarbrough v. Northwestern Memorial Hospital*, 2017 IL 121367, ¶ 79. The movant has the burden of production on a summary judgment motion. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review *de novo*, a trial

[1] The motion states that summary judgment is requested by petitioner, Carol, "by and through her attorney." Kinnan then identifies himself as the "real party in interest" in the fee dispute and prays that the court grant "counsel's motion." The trial court, however, references the motion as "petitioner's" or "Carol's." For consistency's sake, we will also identify the motion for summary judgment as "Carol's motion."

court's decision to grant or deny summary judgment. See *Cohen v. Chicago Pak District*, 2017 IL 121800, ¶ 17.

¶ 21 Here, Carol's petition for contribution for attorney fees was subject to sections 508(a) and 503(j) of the Marriage Act. See *In re J.W.*, 2017 IL App (2d) 160554, ¶ 44. Section 508(a) provides that attorney fees and costs may be awarded to an attorney in connection with the attorney's representation of his client in postdecree proceedings (such as in "[t]he modification of any order or judgment under this Act" and in the "prosecution of any claim on appeal (if the prosecuting party has substantially prevailed)." 750 ILCS 5/508(a)(2), (a)(3.1) (West 2016). The attorney can obtain a judgment for attorney fees from an opposing party, pursuant to a petition for contribution. 750 ILCS 5/508(a) (West 2016). Section 503(j)(2) requires that "[a]ny award of contribution to one party from the other party shall be based on the criteria *** under this Section 503[.]" 750 ILCS 5/503(j)(2) (West 2016). The relevant criteria include: the value of the property of each party; the relevant economic circumstances of each party; obligations from prior marriages; the age, health, occupation, amount and sources of income; employability, job skills, liabilities, and needs of the parties; custodial provisions for any children; and the reasonable opportunity for future acquisition of assets and income. 750 ILCS 5/503(d) (West 2018).

¶ 22 Here, the trial court properly denied Carol's motion for summary judgment because neither Carol nor Kinnan offered information regarding the current financial circumstances of the parties. See *In re Parentage of Rocca*, 2013 IL App (2d) 121147, ¶ 17 (holding that the trial court did not err in denying a contribution petition because there was no evidence of the parties' current financial circumstances). The financial information Kinnan provided was taken from pleadings and affidavits on file from as late as March 8, 2016. The hearing on the motion for summary judgment, however, was held on February 13, 2018, nearly two years later. Indeed, as

Kinnan explained to this court in his brief, "[s]hortly after losing her child support, Carol quit her job and moved to an unknown location where she might be better able to support herself." Kinnan also told the trial court on February 13, 2018, "at this point, I don't even know if Carol has a job." Further, the information Kinnan provided in his motion for summary judgment was insufficient because it failed to inform the trial court regarding the relevant criteria, such as the value of the parties' property, any obligations from prior marriages, and the parties' health, liabilities, and financial needs. See 750 ILCS 5/503(d) (West 2018). Accordingly, the record establishes that there were genuine issues of material fact that precluded summary judgment. Thus, the trial court properly denied Carol's motion for summary judgment.

¶ 23 Kinnan contends that the trial court's requirement of current financial information is contrary to section 503(j) of the Act. Section 503(j) provides:

> "After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:
>
> * * *
>
> (2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." 750 ILCS 503(j) (West Supp. 2017).

¶ 24 When interpreting a statute, the court must ascertain and give effect to the intent of the legislature. *Oswald v. Hamer*, 2018 IL 122203, ¶ 10. Indeed, this is the "cardinal rule" of statutory interpretation, to which all others are subordinate. *Id.* To that end, the court must first look to the language of the statute, giving the terms their plain and ordinary meaning. *Id.* Words

and phrases in a statute should not be construed in isolation; rather, the statute is viewed as a whole. *Id.*

¶ 25 Kinnan argues that section 503(j) envisions that the parties' financial situation should be determined at the time of the close of the proofs and not at a future date. We disagree with Kinnan's interpretation.

¶ 26 Section 503(j)(2) requires that "[a]ny award of contribution to one party from the other party shall be based on the criteria *** under this Section 503[.]" 750 ILCS 5/503(j)(2) (West 2016). The criteria include the relevant economic circumstances of each party; the age, health, amount and sources of income; and needs of the parties. 750 ILCS 5/503(d) (West 2018). Reading the statute as a whole, we determine that the legislature indicated that the trial court should base its determination on the current circumstances of the parties, that is, the circumstances of the parties at the time of the hearing. See *In re Parentage of Rocca*, 2013 IL App (2d) 121147, ¶ 17 (the trial court did not err where it denied contribution on the basis that there was no evidence presented regarding [the petitioner's] current financial circumstances"). Thus, we reject Kinnan's interpretation of section 503(j).

¶ 27 Kinnan also argues that the trial court erred when it ruled that (1) Carol had to be present to testify, (2) Carol needed to show an inability to pay, and (3) an evidentiary hearing was needed to determine whether Carol was entitled to contribution of attorney fees.

¶ 28 The statutory language of section 503(j) is clear and unambiguous. *In re Marriage of Suriano & LaFeber*, 324 Ill. App. 3d 839, 847 (2001). Section 503(j) does not mandate an evidentiary hearing in connection with the trial court's determination of the allocation of attorney fees and costs. *Id.* However, when a party files a petition for contribution in accordance with section 503(j), a trial court is required to hear, through testimony or otherwise, additional proofs.

Id. at 848. Further, the trial court has the discretion to hold a separate and distinct hearing on the petition. *Id*.

¶ 29 The statements made by the trial court at issue here are consistent with the plain and ordinary meaning of section 503(j). The trial court made the statements at issue while ruling on particular allegations contained in Kinnan's motion for summary judgment. Kinnan alleged in his motion that Carol did not have the financial ability to pay her attorney fees. The trial court stated that it had "currently before it no evidence as to either parties' current ability to pay fees." The court determined that Carol's ability to pay attorney fees was "a fact issue [and that Carol had] to be here to testify to that, subject to cross examination." The trial court also stated the obvious; that the parties' current and prospective incomes, current economic circumstances, ages, health, and the other relevant factors listed in section 503 of the Act, were all genuine issues of material fact, precluding summary judgment. Further, the trial court correctly determined that these issues could not be determined based on the pleadings and exhibits of record that were more than two years old and were factually insufficient to establish that Kinnan was entitled to judgment as a matter of law.

¶ 30 B. Discovery

¶ 31 Kinnan argues that Larry was not entitled to discovery upon remand by this court because Larry had ample time to engage in discovery prior to when the trial court issued its ruling on Larry's motion to dismiss, and Larry chose not to engage in discovery at that time. Kinnan fails to recognize that he, on behalf of Carol, filed a third "interim" fee petition and Larry filed a motion to dismiss arguing that Carol was not entitled to contribution because there was no written agreement between Carol and Kinnan. The trial court, albeit erroneously, dismissed Carol's third fee petition, on the basis argued by Larry. Therefore, Larry had no reason to conduct discovery as to Carol's current financial circumstances at that time.

¶ 32 Kinnan also argues that Larry was not entitled to discovery upon remand because section 503(j) of the Parentage Act provides that a party's petition for contribution for fees shall be heard "after proofs have closed in the final hearing on all other issues between the parties [and] before judgment is entered." However, nothing in section 503(j) prohibits discovery in cases such as this where the parties have not engaged in financial discovery, unlike dissolution of marriage cases involving the distribution of property.

¶ 33 Kinnan argues that Larry is not entitled to a second opportunity to obtain discovery that he previously could have obtained. As we have already determined, prior to remand, Larry had no reason to conduct discovery because he asserted that Carol was not entitled to contribution to attorney fees based on an issue of law. In addition, Illinois Supreme Court Rule 201(b)(1) (eff. July 1, 2002) provides for broad discovery and warrants "full disclosure regarding any matter relevant to the subject matter involved in the pending action." We conclude that, in this case, Carol's financial status was relevant and material and, therefore properly discoverable.

¶ 34 Kinnan also contends that Larry's "discovery claims [are] barred by the doctrine of *res judicata*." However, if Kinnan wished to raise *res judicata*, he should have done so in the trial court. *Res judicata* is an affirmative defense, which a defendant forfeits if not raised. Because Kinnan failed to raise this argument below, he is barred from raising this defense for the first time on appeal. See *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 18. Absent forfeiture, Kinnan's tortured argument would fail. Kinnan's argument is essentially that, because Larry asserted prior to remand that Carol's fee petition should be dismissed because of a lack of a written agreement between Kinnan and Carol, Larry cannot now argue that he should prevail because he did not receive discovery from Carol. This has nothing to do with the doctrine of *res judicata*. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the same

parties or their privies involving the same claim, demand, or cause of action. The bar extends not only to all matters that were actually decided but also to those matters that could have been decided in the prior action. *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 12. Here, the matter of discovery was not decided in the case prior to remand, and it was not necessary for the issue to be decided. More importantly, there has been no final judgment entered in this case to effectuate *res judicata*.

¶ 35 Kinnan argues that the trial court erred by granting Larry's Rule 219 motion for discovery sanctions. It is well settled that a trial court may order sanctions against a party refusing to comply with discovery. S. Ct. R. 219(c) (eff. July 1, 2002). Illinois Supreme Court Rule 219 addresses the consequences of a party's refusing or failing to comply with rules or court orders regarding discovery. Rule 219 affords a trial judge broad discretion in fashioning a sanction appropriate under the specific circumstances. *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 26. The decision to impose a particular sanction is within the discretion of the trial court, and therefore only a clear abuse of discretion will justify a reversal. *Rosen v. Larkin Center, Inc.*, 2012 IL App (2d) 120589, ¶ 15.

¶ 36 In addition, the trial court recharacterized Carol's petition as a final petition for contribution to attorney fees and we remanded for a hearing on the matter. Because no discovery had occurred on this matter, Larry sought relevant financial information through proper discovery. However, Carol failed to answer and failed to comply with the trial court's order granting Larry's motion to compel.

¶ 37 On appeal, Kinnan repeats the contentions he asserted in the trial court: discovery of Carol's current financial circumstances and other pertinent economic factors were not relevant to deciding Carol's petition for contribution of attorney fees. As we already determined, the trial court must base its determination on the circumstances of the parties at the time of the hearing.

See *In re Parentage of Rocca*, 2013 IL App (2d) 121147, ¶ 17. Accordingly, the trial court did not abuse its discretion by dismissing Carol's petition for contribution of attorney fees and by awarding $500 to Larry and against Carol for failure to comply with a reasonable discovery order.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's order.

¶ 40 Affirmed.