2017 IL App (1st) 152335-U

SIXTH DIVISION
MARCH 24, 2017

Nos. 1-15-2335 and 1-16-0908 (Consolidated)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re FORMER MARRIAGE of

MICHELE MILLER,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
and	)	No. 10 D 10195
	)	
JEFFREY WINTERKORN,	)	Honorable
	)	Raul Vega,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffmann and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by denying appellant's motion for judgment *nunc pro tunc* or by holding appellant in indirect civil contempt and setting a contempt purge.

¶ 2 Respondent-appellant, Jeffrey Winterkorn (Jeffrey), appeals from the circuit court of Cook County's denial of his motion for judgment *nunc pro tunc*, as well as from the court's judgment finding him in indirect civil contempt for violating the parties' marital settlement agreement and setting a contempt purge to pay petitioner-appellee, Michele Miller (Michele).

For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The parties were divorced on November 16, 2010. During the divorce proceedings, Michele was represented by counsel, and Jeffrey, who was Vice President of Asian Operations for SRAM, LLC (SRAM), was *pro se*. A 22-page marital settlement agreement (MSA) was incorporated into the judgment of dissolution. The MSA resolved issues of child support, property division, and maintenance. Relevant to this appeal, the MSA also specifically included language regarding Jeffrey's SRAM shares and his 2008 and 2009 SRAM incentive units:

> "§24. *** Jeffrey agrees that Michele shall have an ownership right in 660 shares of his total 1,320 shares in SRAM-SP2 Inc. Michele shall have the irrevocable right to cause Jeffrey to sell in part or in total, 660 of the SRAM-SP2 Shares whenever permitted by the terms of the Stockholders Agreement and other related documents, if any, and to cause Jeffrey to pay Michele the net proceeds realized from the sale ***.
>
> §25. *** Michele shall also be entitled to one half of the 10,363 Incentive Units (5,181.5 Incentive Units) in SRAM Holdings, LLC *** granted to Jeffrey in 2008 (hereinafter referred to as the '2008 Incentive Units') and one half of the 10,363 Incentive Units (5,181.5 Incentive Units) in SRAM Holdings, LLC granted to Jeffrey in 2009 (hereinafter referred to as the '2009 Incentive Units'") *** Jeffrey agrees that Michele shall have an ownership

> interests in 5,181.5 of his 2008 Incentive Units and in 5,181.5 of his 2009 Incentive Units. In this case, Jeffrey shall grant Michele the irrevocable right to cause Jeffrey to exercise his rights to liquidate any amount up to and including the total of 5,181.5 of the 2008 Incentive Units and 5,181.5 of the 2009 Incentive Units. Jeffrey shall pay to Michele all gross profits received by Jeffrey for exercising 5,181.5 of the 2008 Incentive Units and 5,181.5 of the 2009 Incentive Units upon his receipt of said profits.
>
> §26. *** [I]f Jeffrey should exercise any portion of either the 5,181.5 2008 Incentive Units or the 5,181.5 2009 Incentive Units ***, Jeffrey agrees to pay Michele an amount equal to the gross profits received by him for 50% of the total amount of the Incentive Units exercised at that time and will subtract this same number of 2008 Incentive Units and the 2009 Incentive Units from the total number of Incentive Units, respectively, to which Michele retains rights."

¶ 5 On or about December 1, 2014, SRAM offered to buy back all of Michele's interests in both Jeffrey's shares and his 2008 and 2009 incentive units. Michele directed Jeffrey to accept SRAM's buy-back offer on her behalf, and to provide her with all the *net* profits he received from the sale of the shares and all of the *gross* profits he received from the sale of the 2008 and 2009 incentive units, pursuant to the MSA.

¶ 6 On January 27, 2015, Jeffrey's counsel sent Michele a letter stating that Jeffrey would only tender the net, and not the gross, profits from the sale of the 2008 and 2009 incentive units. The letter explained this was because paragraphs 25 and 26 in the MSA "obviously contain typos, in that the amounts due to you should have read 'net' profits not 'gross' profits" and that Jeffrey would have to "pay significant taxes" on the sale of the incentive units if Michele were to receive the gross profits. Michele responded to Jeffrey's counsel the same day, and again directed Jeffrey to accept SRAM's buy-back offer immediately, as SRAM's deadline to accept was the following day. She also stated to his counsel: "The tax obligation issue can be negotiated or litigated at a later date if necessary." On January 28, 2015, Jeffrey's counsel informed Michele that Jeffrey would not accept SRAM's buy-back offer.

¶ 7 On February 17, 2015, Michele filed a petition for indirect civil contempt and for other relief in the circuit court of Cook County. The petition sought to have Jeffrey held in contempt for failing to abide by the MSA and alleged that his failure to do so resulted in a loss to Michele of $909,000.

¶ 8 On February 18, 2015, Jeffrey filed a motion for judgment *nunc pro tunc*. The motion alleged that the MSA provisions entitling Michele to half of the *gross* proceeds from the liquidation of Jeffrey's 2008 and 2009 incentive units did not reflect the true intentions of the parties, and that the MSA should be modified to reflect Michele's entitlement to half of the *net* proceeds instead.

¶ 9 On May 28, 2015, the trial court held a hearing on Jeffrey's motion. At the hearing, Michele testified that during the divorce proceedings, she and Jeffrey negotiated and ultimately agreed that she would have an irrevocable right to the *gross* profits from the incentive units in

exchange for Michele waiving any right to Jeffrey's 401(k). Jeffrey denied that this negotiation occurred. He further testified that he did not hire an attorney during the divorce proceedings or read the MSA before signing it. Jeffrey argued that paragraphs 25 and 26 of the MSA contain a typo, and that the word "gross" should be the word "net." Jeffrey argued that because of this alleged typo, the MSA should be modified so that Michele is entitled to half of the *net* proceeds of the incentive units instead of half of the *gross* proceeds. Jeffrey claimed that the rest of the MSA reflects the parties' intentions to divide the marital estate evenly, but that by giving Michele half of the gross proceeds, Jeffrey would have to pay a tax liability of $230,000, and Michele would essentially receive about 69% of the marital estate. At the conclusion of the hearing, the trial court denied Jeffrey's motion, stating that the difference between "net" and "gross" was not a typo or a clerical error by the court. The trial court said to Jeffrey: "That's the deal you made. If you want to modify [the MSA], that’s not *nunc pro tunc*. File something else." The court then set the hearing for Michele's civil contempt petition for June 1, 2015.

¶ 10 At the June 1, 2015 hearing, Michele testified that the incentive units were intentionally treated differently than the shares in the MSA, and that she and Jeffrey deliberately agreed to her irrevocable right to half of the *gross* proceeds from the incentive units. Jeffrey testified that he did not accept SRAM's buy-back offer as directed by Michele because the offer from SRAM was a package deal for both the shares and incentive units, and there was still some disagreement between him and Michele about the tax liability related to the incentive units. At the conclusion of the hearing, the trial court granted Michele's petition and found that Jeffrey had willfully and contumaciously violated the MSA. The court noted that Jeffrey could have accepted the buy-back offer and negotiated the tax liability issue later on, but that the offer had now expired and

Michele had lost the potential benefit of the buy-back offer because of Jeffrey's actions. The court stated "[Jeffrey] realizes he made a bad deal *** it's clear the [MSA] says *** Michele has the irrevocable right to cause Jeffrey to sell in part or in total. He didn't do it, because he didn't want to get tagged with a tax liability. I'm going to find him in indirect civil contempt."

¶ 11 On July 16, 2015, the trial court set a contempt purge for Jeffrey. The court directed Jeffrey to transfer 772.23 SRAM shares to Michele within 14 days, and directed Michele to thereafter sell the shares at a rate of $147/share, with Michele to be responsible for all taxes associated with the sale of the shares. The court further directed Jeffrey to transfer 3,390.20 SRAM vested 2008 incentive units and 4,145.20 vested 2009 incentive units to Michele within 14 days, and directed Michele to thereafter sell the incentive units at $96/unit, with Jeffrey to be responsible for all taxes associated with the sale of the incentive units.

¶ 12 On July 24, 2015, Jeffrey filed a notice of appeal, challenging the May 28th *nunc pro tunc* denial, the June 1st contempt finding, and the July 16th purge order.[1]

¶ 13 ANALYSIS

¶ 14 We initially address whether we have jurisdiction to reach the merits of this case. Jurisdiction is conferred upon this court only through the timely filing of a notice of appeal after a final judgment. *Affordable Housing Preservation Foundation v. Wiiams*, 375 Ill. App. 3d 305, 307 (2007). See Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015) (a notice of appeal must be filed within 30 days after entry of the final judgment appealed from). "A final judgment is defined as one that

[1] On March 30, 2016, Jeffrey filed a separate notice of appeal from an agreed order in the trial court on March 2, 2016, which withdrew all pending petitions related to child support, parenting time, and maintenance between the parties. Jeffrey requested this court to consolidate that appeal (No. 1-16-0908) with the instant matter, which we granted. However, Jeffrey does not raise any issues for our review from the March 2, 2016 order. Thus, he has forfeited any appellate review on those matters and we will not discuss them in this order.

fixes the rights of the parties in the lawsuit; it is final if it determines the litigation on the merits and, if affirmed, leaves only the execution of the judgment." *In re D.D.*, 212 Ill. 2d 410, 418 (2004) (citing *In re J.N.*, 91 Ill. 2d 122, 127 (1982)). Any order that is not final is interlocutory, and appellate jurisdiction extends only to final judgments except in those situations where a rule provides for an interlocutory appeal. *Id*.

¶ 15 Here, the purge order on July 16 was a final order as it disposed of all the issues between the parties and terminated all litigation related to the issues before the trial court. And because Jeffrey filed his notice of appeal within 30 days of that order, we have jurisdiction to review it. We also have jurisdiction to review the May 28, 2015 order denying Jeffrey's *nunc pro tunc* motion and the June 1, 2015, contempt order, although neither was a final order, as those orders were part of the procedural progression leading to the July 16 order. The June 1, 2015 and May 28, 2015 orders were interlocutory and not appealable until the final order was issued on July 16, 2015. Thus, we now have jurisdiction to review all three orders.

¶ 16 We first review the trial court's denial of Jeffrey's motion for judgment *nunc pro tunc.* An order granting or denying a motion for entry of a *nunc pro tunc* order is reviewed *de novo*. *People v. Jones*, 2016 IL App (1st) 142582, ¶ 12.

¶ 17 A *nunc pro tunc* order is entered to correct the record of the judgment, not to alter the actual judgment of the court. *First Bank of Oak Park v. Rezek*, 179 Ill. App. 3d 956, 959 (1989). A court has authority to enter a *nunc pro tunc* order at any time to amend a written record of judgment to conform with the accurate judgment rendered by the court. *Id*. The evidence in the record "must clearly show" that the order being modified failed to conform to the decree actually made by the trial court due to an error. *Jones*, 2016 IL App (1st) 142582, ¶ 12. The error must be

clerical and not judicial. *First Bank of Oak Park*, 179 Ill. App. 3d 956 at 959. The distinction between a clerical error and a judicial one does not depend upon the source of the error, but rather, upon whether it was the deliberate result of judicial reasoning and determination. *Id*.

¶ 18 Jeffrey argues that the trial court erred in denying his motion for judgment *nunc pro tunc* because he and Michele intended for Michele to receive half of the *net* proceeds from the 2008 and 2009 incentive units and not the half of the *gross* proceeds as was stated in the MSA. Jeffrey specifically requests this court to interpret the MSA as a whole and in light of the fact that the rest of the marital assets were divided evenly between the parties. However, Jeffrey did not ask the trial court to interpret the MSA, so he has now forfeited that argument before this court. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 (arguments not raised before the trial court are forfeited and cannot be raised for the first time on appeal). Instead, he only filed a motion for judgment *nunc pro tunc*, claiming that the word "gross" was a typo for the word "net." Our review is limited to whether the trial court erred when it denied that motion.

¶ 19 Nothing in the record supports a finding that this was a clerical error. Michele testified about the negotiations behind the intention of the word "gross." And Jeffrey testified that he did not hire a lawyer or *even read the MSA before signing it*. A *nunc pro tunc* judgment would only have been appropriate if it was clear that the judgment had incorrectly included the word "gross" when the parties and the court had intended to use the word "net." The trial court was correct when it denied Jeffrey's motion because there clearly was no clerical error in the MSA that needed to be modified.

¶ 20 We next review the trial court's order holding Jeffrey in indirect civil contempt and the trial court's order setting a contempt purge. We will reverse a contempt finding only if we find

that the trial court abused its discretion. *In re Marriage of O'Malley ex rel. Godfrey*, 2016 IL App (1st) 151118, ¶ 25. A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. *Id.*

¶ 21 Civil contempt is "a sanction or penalty designed to compel future compliance with a court order." *Felzak v. Hruby*, 226 Ill. 2d 382, 391 (2007) (quoting *People v. Warren*, 173 Ill.2d 348, 368 (1996)). A contempt finding is proper when one party willfully fails to do something which the court has ordered for the benefit of another party. *Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 628 (1991). Civil contempt is coercive in nature rather than punitive. *Felzak*, 226 Ill. 2d 382 at 391. For this reason, a valid purge condition is a necessary part of an indirect civil contempt order. *Id.* "A valid contempt order must contain a purge provision, which lifts the sanction when the contemnor complies with the order." *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 42.

¶ 22 Jeffrey argues that contempt was inappropriate here because his actions were done mistakenly, and not willfully, based on his belief of a clerical error in the MSA. Jeffrey further argues that Michele is "as much to blame, perhaps more, for the transaction not happening as" he is. He claims that Michele's actions caused the buy-back transaction to be delayed, and directs us to *In re Marriage of LaTour*, 241 Ill. 3d 500 (1993) (contempt petition denied because the petitioning party did not establish that the violating party was *solely* at fault). Unlike *LaTour* though, here Michele has established in the record that she made every effort to direct Jeffrey to accept SRAM's buy-back offer pursuant to the MSA. She was even willing to negotiate or litigate the tax liability at a later date. Jeffrey admitted that he refused to follow her directions

because he was concerned about the tax liability that would be associated with the transaction. The record demonstrates that Jeffrey is solely at fault in violating the MSA.

¶ 23 Jeffrey points out that the trial court stated that the contempt finding was "a difficult decision." Regardless of how difficult the decision may have been, the trial court did in fact find that Jeffrey had willfully and contumaciously violated the MSA, and it cannot be said that no reasonable person would agree with that holding.

¶ 24 The contempt purge set by the trial court was also proper. The record indicates that the court crafted the directions to sell SRAM shares and incentive units so as to compensate Michele for the lost benefit of the buy-back offer. This was a reasonable solution to address Jeffrey's failure to comply with the MSA. Thus, the trial court did not abuse its discretion by finding Jeffrey in indirect civil contempt and setting a contempt purge.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.