2017 IL App (1st) 162569-U

SIXTH DIVISION
Order filed: September 15, 2017

Nos. 1-16-2569 and 1-16-3190, cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re MARRIAGE OF FRANK PHILLIPS,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County
	)	
and	)	No. 10 D 1784
	)	
SARAH PHILLIPS,	)	Honorable
	)	Mary Trew,
Respondent-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justice Rochford concurred in the judgment.
Justice Delort specially concurred.

ORDER

¶ 1 *Held*: We: (1) affirm the circuit court's judgment which granted in part the respondent's motion to reconsider the denial of her petition for adjudication of indirect civil contempt and found that the petitioner owes her $100,000; and (2) dismiss as moot the petitioner's appeal from the circuit court's order denying his emergency motion to set an appeal bond.

¶ 2 The petitioner, Frank Phillips (Frank), appeals from various orders entered by the circuit court in the instant post-decree dissolution of marriage proceeding brought by the respondent, Sarah Phillips (Sarah), seeking to hold him in indirect civil contempt for failing to make his

required payments under the dissolution judgment. On appeal, Frank contends that the circuit court erred by: (1) denying his motion to dismiss Sarah's petition for adjudication of indirect civil contempt under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)); (2) granting in part Sarah's motion to reconsider the denial of her petition for adjudication of indirect civil contempt and finding that he owes her $100,000 under the dissolution judgment; and (3) denying his emergency motion to set an appeal bond. For the reasons which follow, we affirm in part and dismiss in part.

¶ 3 The following factual recitation is taken from the pleadings, testimony, and exhibits of record.

¶ 4 Frank and Sarah were married on February 17, 2001. On March 9, 2010, a judgment for dissolution of marriage was entered by the circuit court of Cook County dissolving their marriage. The judgment incorporated a Memorandum of Agreement (Agreement), which, relevant to this appeal, addresses maintenance and property distribution in paragraphs 4 and 11, respectively.

¶ 5 On June 23, 2011, Sarah filed a petition for adjudication of indirect civil contempt (first contempt petition) based on Frank's failure to pay her maintenance under paragraph 4 of the Agreement. On August 2, 2011, Frank filed a petition to terminate his maintenance obligation.

¶ 6 On October 20, 2011, the circuit court entered an "Agreed Order for Modification and Termination of Maintenance and Support" (Agreed Order). The Agreed Order's preamble states that two petitions were before the court: Sarah's first contempt petition and Frank's petition to terminate his maintenance obligation. The decretal portion of the order vacates paragraph 4 of the Agreement and replaces it with a new section, which provides that Frank will pay Sarah $73,000 in two installments and, upon receipt, Sarah will "waive*** her claim to maintenance

and support[ ] ***." The Agreed Order further states that, upon entry, "all the financial issues have been satisfied to date, and each party shall withdraw with prejudice[ ] their respective petitions as the issues in controversy as set forth therein have been settled[ ] ***."

¶ 7 On September 26, 2013, Sarah filed a second petition for adjudication of indirect civil contempt (second contempt petition) for Frank's failure to comport with paragraph 11(G) of the Agreement, which provides that she will receive $200,000 from the "Moloney Securities Company, Inc. Portfolio." Sarah alleged that, following the dissolution judgment, Frank paid her $100,000 under paragraph 11(G) of the Agreement and "represented" that he would pay her the remaining $100,000 upon the sale of the marital residence. According to Sarah, the marital residence was sold in April 2011, but Frank did not pay her the remaining $100,000.

¶ 8 On November 4, 2013, Frank filed a motion to dismiss Sarah's second contempt petition under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). In his motion, Frank argued that the Agreed Order settled all of the parties' financial issues, not just those contained in paragraph 4 of the Agreement, and, as such, operated as a prior judgment that barred Sarah's petition under the doctrine of *res judicata*. Sarah, in her response, contended that the parties intended to modify only the maintenance provisions of the Agreement and that the Agreed Order did not mention Frank's obligations under paragraph 11(G). The circuit court denied Frank's section 2-619 motion to dismiss on June 19, 2014, finding that the Agreed Order was "ambiguous" as to which financial issues were settled.

¶ 9 On October 5 and 6, 2015, the circuit court held a hearing on Sarah's second contempt petition. At the hearing, Frank introduced a series of emails between the parties from February 16 and 17, 2011. In one email, Frank asked Sarah to agree that proceeds from the sale of the marital residence would be divided "equally" and that, after the sale, he "will not have to make

any monetary adjustments to you." In response, Sarah wrote that "we agree to split the money from the sale price equally. You do not have to make any monetary adjustments to me."

¶ 10 Frank called Sarah as an adverse witness. During examination by her counsel, Sarah testified that the phrase "monetary adjustments," as used in the emails, referred to certain payments that Frank was required to provide her under paragraph 11(A) of the Agreement, which controlled the sale of the marital residence. That provision, in relevant part, states that both parties will receive a 50% share from the net proceeds of the sale of the marital residence, but that, prior to the sale, Frank can secure a line of credit or home equity loan against the property. If the net proceeds from the sale of the marital residence are insufficient to equalize the distribution of funds between the parties after Frank secures a line of credit or loan, paragraph 11(A) requires him to provide an additional payment to Sarah in order to equalize their distributions. Sarah testified that this additional payment was the "monetary adjustment" that she waived in her February 2011 email.

¶ 11 Frank also called Regina Phillips, the attorney who managed the sale of the marital residence, as a witness. She testified that, prior to the sale, Frank obtained a $500,000 home equity loan.

¶ 12 On December 23, 2015, the circuit court denied Sarah's second contempt petition and ruled that the Agreed Order settled "all financial issues between the parties," including Frank's obligation as to the remaining $100,000 under paragraph 11(G) of the Agreement.

¶ 13 On January 22, 2016, Sarah filed a motion to reconsider the denial of her second contempt petition. Therein, she argued that: (1) the Agreed Order is not ambiguous, but addresses only maintenance and not the division of property under the Agreement; (2) her property rights under the Agreement are non-modifiable; and (3) the parol evidence heard by the

circuit court during the hearing did not establish that the Agreed Order settled Frank's obligation to pay her the remaining $100,000 under paragraph 11(G) of the Agreement. Frank filed a response on May 2, 2016, contending that Sarah's arguments were inappropriate for a motion to reconsider.

¶ 14 On August 26, 2016, the circuit court entered an order granting in part Sarah's motion to reconsider. The circuit court noted that the Agreed Order's preamble specified that only Sarah's first contempt petition and Frank's petition to terminate his maintenance obligation were before the court when the Agreed Order was entered. According to the circuit court, "the pleadings resolved by the Agreed Order *** did not involve, or even mention" the division of property under paragraph 11 of the Agreement. To the contrary, "[t]he Agreed Order was very specific as to which portion [of the Agreement] it was amending, that being only [p]aragraph 4 [relating to maintenance]," and, therefore, "was not ambiguous as a matter of law." The circuit court denied Sarah's second contempt petition, but found that "Frank still owes Sarah the balance of $100,000" under paragraph 11(G) of the Agreement. On September 23, 2016, Frank timely appealed from the circuit court's order and its finding that he owes Sarah $100,000 under paragraph 11(G) of the Agreement (appeal No. 1-16-2569).

¶ 15 On October 19, 2016, Frank filed an emergency motion in the circuit court to set an appeal bond. On October 21, the circuit court ruled that the matter was not an emergency. On November 16, the circuit court entered an order finding that "[t]he $100,000 is a money judgment" for purposes of Illinois Supreme Court Rule 305 (eff. July 1, 2004), and that, under Rule 305, Frank's motion to set an appeal bond was untimely. Frank timely appealed from that order (appeal No. 1-16-3190). On January 5, 2017, we granted Frank's motion in this court to consolidate the appeals and set an appeal bond.

¶ 16 Frank argues initially that the circuit court erred by denying his motion to dismiss Sarah's second contempt petition under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). However, we need not address the merits of this argument because the denial of a section 2-619 motion to dismiss is not generally reviewable on appeal. See *Ovnik v. Podolskey*, 2017 IL App (1st) 162987, ¶¶ 19-21. Any error in the denial of a motion to dismiss merges into the final judgment and it is from that judgment that an appeal is taken. See *id.*; *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 22; *In re J.M.*, 245 Ill. App. 3d 909, 919-20 (1993); *Paulson v. Suson*, 97 Ill. App. 3d 326, 328 (1981). Here, the circuit court's denial of Frank's section 2-619 motion to dismiss merged with the final judgment of August 26, 2016, which granted in part Sarah's motion to reconsider the denial of her second contempt petition and determined the parties' rights as to the $100,000 in controversy under section 11(G) of the Agreement. See *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008) (" '[a]n 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.' [Citation.]"); see also *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 24 ("In determining when a judgment or order is final, one should look to its substance rather than its form."). Therefore, this court will not review the denial of Frank's section 2-619 motion to dismiss, but, rather, will address his appeal from the circuit court's order of August 26, 2016.

¶ 17 As to the August 26, 2016, order, Frank contends that the circuit court erred by granting in part Sarah's motion to reconsider the denial of her second contempt petition where: (1) on reconsideration, the circuit court interpreted the Agreed Order based on its preamble and not its decretal portion in finding that he owes her $100,000 under paragraph 11(G) of the Agreement; (2) Sarah's property rights under the Agreement were modifiable and, further, she waived

consideration of the issue by raising it for the first time in her motion to reconsider; and (3) her motion to reconsider did not introduce new evidence.

¶ 18 Turning to Frank's first contention, he argues that the circuit court improperly relied on language from the preamble of the Agreed Order in determining that it did not settle his obligation to pay Sarah the remaining $100,000 under paragraph 11(G) of the Agreement. More specifically, he argues that the circuit court erroneously concluded that the preamble restricted the Agreed Order's scope to the issue of maintenance when, in fact, the decretal portion of the order stated that it settled "all the financial issues" between the parties. Therefore, according to Frank, the circuit court erred as a matter of law in interpreting the Agreed Order based on its preamble and not its decretal portion, and, as such, improperly granted Sarah's motion to reconsider in part and found that he owes her $100,000.

¶ 19 An agreed order entered by the circuit court, also termed a consent decree, "is not an adjudication of the parties' rights but, rather, a record of their private, contractual agreement." *Commonwealth Edison Co. v. Elston Avenue Properties*, LLC, 2017 IL App (1st) 153228, ¶ 13; see also *In re M.M.D.*, 213 Ill. 2d 105, 114 (2004) ("A consent decree is based upon the agreement of the parties and is contractual in nature."). Accordingly, agreed orders are interpreted under the law of contracts. *People v. Scharlau*, 141 Ill. 2d 180, 195 (1990). Like all contracts, agreed orders must be construed to give effect to the parties' intentions, which are determined from the language of the order alone when there is no ambiguity in its terms. *Commonwealth Edison Co.*, 2017 IL App (1st) 153228, ¶ 13. As with other contracts, we review *de novo* the construction, interpretation, and effect of an agreed order. See *Draper and Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 27 (citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005)).

¶ 20 In this case, Frank does not contend that the Agreed Order was, in fact, ambiguous. Instead, relying on *Green v. Green*, 21 Ill. App. 3d 396 (1974)), he maintains that the circuit court erred by interpreting the Agreed Order based on language in its preamble rather than its decretal portion. Frank's reliance on *Green* is misplaced for two reasons. First, unlike in *Green*, the recitals contained in the Agreed Order in this case did not purport to adjudicate any rights or obligations of the parties. Second, although *Green* states that the decretal portion of a judgment sets forth the parties' rights, it is well-established that an agreed order " 'must be interpreted in its entirety, considering all facts and circumstances surrounding its execution, as well as all pleadings and motions from which it emanates.' " *Draper and Kramer, Inc.*, 2014 IL App (1st) 132073, ¶ 27 (quoting *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 729 (1992)).

¶ 21 Following these principles of interpretation, we find that the Agreed Order is not ambiguous as to which financial issues it settled between the parties, but, rather, addressed only the issue of maintenance under paragraph 4 of the Agreement. The Agreed Order's preamble states that only Sarah's first contempt petition and Frank's petition to terminate his maintenance obligation were before the court when the order was entered. Those pleadings do not mention the division of property under paragraph 11 of the Agreement, but only address the issue of maintenance. The decretal portion of the Agreed Order, in turn, provides that "all the financial issues have been satisfied to date, and each party shall withdraw with prejudice[ ] their respective petitions as *the issues in controversy as set forth therein* have been settled[ ] ***." (Emphasis added.) Thus, like Sarah's first contempt petition and Frank's petition to terminate his maintenance obligation, the Agreed Order's scope is limited to the issue of maintenance under paragraph 4 of the Agreement. The Agreed Order did not settle the issue of the remaining $100,000 that Frank owed to Sarah under paragraph 11(G) of the Agreement. Consequently, we

find no error in the circuit court's order which granted in part Sarah's motion to reconsider the denial of her second contempt petition and found that Frank owes her $100,000.

¶ 22 Because we find that the circuit court properly interpreted the Agreed Order in ruling upon Sarah's motion to reconsider, we also reject Frank's argument that the Agreed Order modified Sarah's property rights. Likewise, Frank's contention that Sarah's motion did not introduce new evidence is not determinative because her motion was properly decided based upon a purely legal question, *i.e.*, the interpretation of the Agreed Order. See *In re Marriage of Sanda*, 245 Ill. App. 3d 314, 320-21 (1993).

¶ 23 Next, Frank argues that the circuit court erred in entering its order of November 16, 2016, which denied his emergency motion to set an appeal bond under Illinois Supreme Court Rule 305 (eff. July 1, 2004). This issue, however, is moot because, on January 5, 2017, we entered an order granting Frank's motion to set an appeal bond. "The existence of an actual controversy is an essential requisite to appellate jurisdiction, and *** [a]n appeal is considered moot where it presents no actual controversy or where the issues have ceased to exist" due to intervening events that prevent the reviewing court from "grant[ing] effectual relief to the complaining party." *In re Andrea F.*, 208 Ill. 2d 148, 156 (2003). This is precisely the situation in the present case, where Frank's motion for an appeal bond was granted in this court, rendering moot the denial of his motion to set an appeal bond in the circuit court.

¶ 24 In view of all the foregoing, we: (1) affirm the judgment of the circuit court, which granted Sarah's motion to reconsider in part the denial of her second contempt petition and found that Frank owes her $100,000 under paragraph 11(G) of the Agreement; and (2) dismiss Frank's appeal from the circuit court's order of November 16, 2016, which denied his emergency motion to set an appeal bond.

¶ 25 No. 1-16-2569, Affirmed.

¶ 26 No. 1-16-3190, Dismissed.

¶ 27 JUSTICE DELORT, specially concurring:

¶ 28 Frank moved to dismiss Sarah's second contempt petition pursuant to section 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2012). The circuit court denied the motion to dismiss. At a later evidentiary hearing, the parties fully litigated the issues which had been framed by that motion. After the evidentiary hearing, the circuit court eventually ruled in favor of Sarah and against Frank. On appeal, Frank presents arguments regarding both the denial of his motion to dismiss and the relief granted following the evidentiary hearing.

¶ 29 The majority finds that it need not address Frank's argument regarding the denial of his motion to dismiss because the denial of a section 2-619 motion merges into the ultimate judgment. See *supra* ¶ 16. The majority relies on several cases which so hold, including *Ovnik v. Podolskey*, 2017 IL App (1st) 162987.

¶ 30 In *Ovnik*, I specially concurred, noting that the merger rule as applied to the denial of section 2-619 motions has not been adopted by the Illinois Supreme Court and has not always been uniformly enforced by this court. *Id.* ¶ 38 (Delort, J., specially concurring). I maintain that position and am thus unable to join in the analysis in ¶ 16 of the majority's opinion. However, since in this case, the defense framed in the section 2-619 motion was fully litigated and resolved in the context of a subsequent evidentiary hearing, I agree that the appropriate course is to review the issue in the context of Frank's appeal from the August 26, 2016 order.

¶ 31 With that understanding, I join the remainder of the majority's opinion.