2013 IL App (2d) 121120-U
No. 2-12-1120
Order filed May 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

S. LOUIS RATHJE, as Trustee of the S. Louis Rathje Trust U/T/A dated February 24, 1984,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CH-3589
HORLBECK CAPITAL MANAGEMENT, LLC, TODD HORLBECK, STACY KELLOGG, and HCM L.P.,	)	
Defendants	)	
and	)	
CANTELLA & CO.,	)	
Respondent in Discovery-Appellant	)	
(Thomas E. Henderson, Respondent in Discovery).	)	Honorable James R. Murphy, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court's order holding Cantella in contempt was vacated; the $100-per- day discovery sanction was modified; and the appellate court lacked jurisdiction over anything other than the contempt order and the underlying order granting sanctions.

¶ 2 Respondent in discovery, Cantella & Co. (Cantella), appeals from an order of the circuit court of Kane County holding it in contempt for its refusal to obey a discovery order. We affirm in part as modified, vacate in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 In October 2002, plaintiff, S. Louis Rathje, as trustee of the S. Louis Rathje trust, invested in a hedge fund operated by Todd Horlbeck. Under the subscription agreement, plaintiff was required to open an investor account at Cantella, a securities broker/dealer located in Boston, Massachusetts, which he did. In a series of monthly financial statements, Horlbeck admittedly misrepresented the value of plaintiff's assets in the fund, allegedly causing plaintiff to suffer monetary damages. On October 7, 2011, plaintiff filed suit against Horlbeck and others in which he named Cantella a respondent in discovery pursuant to section 2-402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-402 (West 2010)). Cantella was served with a copy of the complaint and a summons for discovery.

¶ 5 On October 12, 2011, plaintiff served Cantella with a deposition notice, interrogatories, and a document request. Cantella produced a handful of documents and then filed numerous motions and engaged in maneuvers aimed at extricating itself from any obligation to comply with discovery, culminating in Cantella's request that it be held in contempt rather than comply.

¶ 6 On January 6, 2012, Cantella filed a "special and limited appearance" and a motion to quash and for a protective order. In the motion, Cantella asserted that plaintiff was required to arbitrate its discovery requests pursuant to the terms of an arbitration agreement plaintiff signed in connection

with his brokerage account. Cantella further maintained that, because it could not be named as a party to the lawsuit due to plaintiff's agreement to arbitrate, the scope of discovery was limited to discovering other proper parties to the suit. On April 10, 2012, the trial court denied the motion and ordered Cantella to provide any additional objections it had to the discovery requests by May 2, 2012. On May 9, 2012, over plaintiff's objections, the trial court extended the deadline for additional objections for 14 days. Cantella did not provide further objections to the discovery requests as ordered. Instead, Cantella, represented by new counsel, filed a motion to stay the May 9, 2012, order on the basis that Cantella wished to file a petition to certify questions for appeal, or in the alternative, to file a motion to impose limits on discovery. On May 30, 2012, Cantella filed two motions, one for a protective order to limit the scope of discovery, and the other requesting that the trial court certify a question regarding the April 10, 2012, order for appeal. On June 12, 2012, the trial court denied Cantella's motions and ordered Cantella to comply with outstanding discovery by July 3, 2012.

¶ 7 According to the affidavit of one of plaintiff's attorneys, furnished in later proceedings seeking discovery sanctions against Cantella, Cantella then agreed to give plaintiff additional time in which to convert Cantella from a respondent in discovery to a defendant in exchange for plaintiff's agreement to give Cantella an additional two weeks past the July 3, 2012, deadline to respond to discovery. According to plaintiff's counsel's affidavit, upon the expiration of the two-week discovery extension, Cantella "reneged" on the "deal" and opposed plaintiff's request for additional time to convert Cantella to a defendant. Cantella also proposed that it provide "rolling" production, as it had over 50,000 documents responsive to the outstanding discovery requests. The trial court ordered Cantella to propose a rolling production schedule by July 16, 2012. In an order entered on

July 20, 2012, the trial court gave Cantella five weeks to complete production, the final installment of documents to be produced by August 24, 2012. Cantella did not comply with the July 20 order but instead filed a motion to terminate its status as a respondent in discovery on the basis that, the six-month period for converting Cantella to a defendant having expired, the trial court lost jurisdiction over Cantella.

¶ 8 On September 6, 2012, the trial court denied Cantella's motion to terminate its status as a respondent in discovery. On September 6, 2012, the trial court also heard plaintiff's motion for discovery sanctions against Cantella. The trial court granted the motion for sanctions and ordered Cantella (1) to pay plaintiff's fees associated with his efforts to obtain discovery; (2) to make a full document production by September 14, 2012; (3) to pay plaintiff the sum of $25,300 by October 6, 2012 ($100 per day from January 6, 2012, through September 14, 2012); and (4) to pay $250 per day after September 14, 2012, for every day of nonproduction. The trial court continued the matter for status to September 14, 2012.

¶ 9 On September 14, 2012, Cantella informed the trial court that it would not comply with the September 6, 2012, order. The trial court held Cantella in contempt and fined it $250. Cantella filed its notice of appeal on October 4, 2012. The notice of appeal specified the following orders as those appealed: (1) the September 14, 2012, order finding Cantella in contempt; (2) the order of September 6, 2012, denying Cantella's motion to terminate its status as a respondent in discovery; (3) the order of September 6, 2012, imposing discovery sanctions on Cantella; (4) the order of April 10, 2012, denying Cantella's motion to quash discovery and for a protective order; and (5) "all such other interim orders which are related to the orders specified above."

¶ 10 ANALYSIS

¶ 11 Cantella raises four arguments. It first contends that the trial court erred in failing to refer the discovery dispute to arbitration. Cantella's second contention is that the trial court erred in denying its motion to terminate its status as a respondent in discovery. The third issue raised is whether the trial court erred in sanctioning Cantella during the time period between January 6, 2012, and May 23, 2012. Fourth, Cantella maintains that the fine imposed against it for contempt should be vacated.

¶ 12 Initially, we must sort out this court's jurisdiction. According to Cantella's jurisdictional statement, the instant appeal is brought pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. July 1, 2004). Rule 304(b)(5) governs appeals from final judgments that do not dispose of entire proceedings and provides that an order finding a person or entity in contempt of court, and which imposes a fine or other penalty, is appealable without the finding required under paragraph (a) of the Rule. Ill. Sup. Ct. R. 304(b)(5); *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 967 (2004). The rule plainly states that the only order subject to our review is the order finding Cantella in contempt. Ill. Sup. Ct. R. 304(b)(5); see *Nettleton*, 348 Ill. App. 3d at 967. However, the review of a contempt finding necessarily requires the review of the order upon which it is based. *Nettleton*, 348 Ill. App. 3d at 967. In *Nettleton*, the appellant filed an appeal from a contempt order and then attempted to challenge rulings on a motion for substitution of judge and a motion to dismiss. *Nettleton*, 348 Ill. App. 3d at 967. This court held that it lacked jurisdiction to consider anything other than the contempt order and the order with which the appellant had refused to comply. *Nettleton*, 348 Ill. App. 3d at 967.

¶ 13 Cantella contends that it was held in contempt for violation of the April 10, 2012, ruling that the cause was not subject to arbitration and for violation of the September 6, 2012, ruling that denied

its motion to terminate its status as a respondent in discovery so that those orders are properly before us. The record belies this assertion. On September 6, 2012, the issue of the appealability of the orders denying the motion to dismiss Cantella as a respondent in discovery and the April 10, 2012, order ruling that the matter was not subject to arbitration arose only in the context of appealing the sanctions order. Cantella asked for, and did not get, permission to take an immediate appeal from the sanctions order. Then counsel for Cantella said that his client might accede immediately to a contempt finding rather than produce documents in compliance with the sanctions order. Contempt, though, was not discussed again until September 14, 2012. At the hearing on September 14, 2012, the trial court addressed Cantella's counsel, James Knippen, as follows:

> "[Court]: Okay. In other words, Mr. Knippen, the contempt that would be sought would be pursuant to [p]aragraph 2 for a failure to—or a refusal to provide that full document production under [p]aragraph 2 that was supposed to be done today, I believe?"

It is clear that the trial court was referring to paragraph 2 of the September 6, 2012, sanctions order that provided, *inter alia*, that Cantella "is ordered to make a full document production by September 14, 2012." In response to the trial court's question, counsel answered, "That's correct, Judge, and the sanctions that you've imposed pursuant to that." Presumably, counsel's reference to "sanctions" included the $100-per-day sanctions in effect until September 14, 2012, as well as the $250-per-day sanctions that began accruing on September 14, 2012. Accordingly, we hold that we lack jurisdiction to consider any orders other than the September 14, 2012, order of contempt and the September 6, 2012, order requiring full production and imposing discovery sanctions. See *Nettleton*, 348 Ill. App. 3d at 967. In *Nettleton*, we refused to expand the scope of Rule 305(b) to include any

other orders. *Nettleton*, 348 Ill. App. 3d at 970. We review the trial court's finding of contempt for abuse of discretion. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 62 (2008).

¶ 14 The September 6, 2012, order imposing sanctions on Cantella was entered pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), which authorizes a trial court to impose a sanction, including dismissal of the cause, upon any party who unreasonably refuses to comply with any provisions of supreme court rules. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353 (2007) (quoting *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998)). The imposition of sanctions against a party for noncompliance with discovery rules is a matter within the trial court's discretion. *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill. App. 3d 554, 562 (2007). In determining whether noncompliance with discovery rules is unreasonable, the standard is whether the offending party's conduct can be characterized as a deliberate and pronounced disregard both for the discovery rules as well as for the court. *Cyclonaire*, 378 Ill. App. 3d at 562. Here, Cantella was not a party but was named a respondent in discovery. Section 2-402 of the Code provides that persons or entities named as respondents in discovery shall be required to respond to discovery propounded by the plaintiff in the same manner as are defendants. 735 ILCS 5/2-402 (West 2010); *Robinson v. Johnson*, 346 Ill. App. 3d 895, 904 (2004).

¶ 15 The only argument Cantella advances with regard to the September 6, 2012, order is that it should not have been sanctioned $100 per day from January 6, 2012, through May 23, 2012, because during that time, Cantella had on file a motion to quash discovery and a motion for a protective order. Plaintiff argues that the trial court "made it clear" that it was not implying that Cantella had been in violation of a court order as far back as January 6, 2012, but merely used January 6, 2012, as a "starting date" based on Cantella's overall conduct of avoiding discovery. The transcript of the

September 6, 2012, hearing on plaintiff's motion for sanctions reveals that plaintiff requested that the $100-per-day sanction date from January 6, 2012, because that date, according to plaintiff's counsel, was the first date upon which Cantella's refusal to comply with discovery occurred. The trial court ruled that it "would grant penalties in the amount of $100 a day from January 6 and through today or through whenever" the production was to be completed. At the September 14, 2012, contempt hearing, the trial court clarified that the $100-per-day sanction was not a contempt sanction for violation of any court orders going back to January 6, 2012, but was solely a discovery sanction under Rule 219(c). Thus, the trial court's choice of January 6, 2012, as the date to begin the sanction was not arbitrary but was based on plaintiff's assertion that Cantella's refusal to comply with discovery first occurred on that date.

¶ 16 According to plaintiff's counsel's affidavit in support of the motion for sanctions, Cantella produced six documents on January 6, 2012, all of which related to Cantella's position that plaintiff was required to arbitrate. Also on January 6, 2012, Cantella served its motion to quash the discovery requests based upon the alleged agreement to arbitrate such disputes. The record contains the trial court's order of April 10, 2012, which gave Cantella until May 2, 2012, to file its objections to plaintiff's discovery requests. According to plaintiff's counsel's affidavit, he had a conference with counsel for Cantella on May 1, 2012, in which Cantella proposed an alternative to filing objections that was rejected by plaintiff. By written order of May 9, 2012, the trial court extended Cantella's deadline for completing written discovery to May 23, 2012. In *Vision Point*, our supreme court equated unreasonable refusal to comply with discovery rules with recalcitrance. *Vision Point*, 226 Ill. 2d at 352-53. The dictionary defines "recalcitrance" as "obstinate noncompliance." Webster's Third New International Dictionary 1893 (1993). Here, the record shows that Cantella (1) produced

some documents on January 6, 2012; (2) took the position that the dispute was subject to arbitration on January 6, 2012; (3) engaged in at least one discovery conference with plaintiff's counsel; and (4) obtained court-ordered extensions relating to its discovery obligations. Under these circumstances, we cannot say that Cantella's behavior, between January 6, 2012, and May 23, 2012, demonstrated obstinate noncompliance. Nor can we say that Cantella's conduct could be characterized as a deliberate and pronounced disregard for both the discovery rules and for the court during that time period. Consequently, we agree with Cantella that the trial court abused its discretion in imposing the $100-per-day sanction between the dates of January 6, 2012, and May 23, 2012. However, we also agree with plaintiff's alternative suggestion—which Cantella does not dispute—that Cantella is responsible for the balance of the sanction in the amount of $11,400. Upon remand, the trial court is directed to modify the sanction in accordance with this order.

¶ 17 Next, Cantella requests that we vacate the $250 fine imposed for contempt. A party may expose itself to contempt as an appropriate method of testing a court order's validity. *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 1009 (2008). A contempt citation is properly vacated on appeal where a party's refusal to comply with a court order is a good-faith effort to secure an interpretation of an issue that lacks precedent. *J.S.A.*, 384 Ill. App. 3d at 1009.

¶ 18 Here, at the conclusion of the September 6, 2012, hearing, after the trial court granted plaintiff's motion for sanctions, counsel for Cantella indicated that Cantella might subject itself to contempt rather than comply with the discovery order. The matter was continued to September 14, 2012, at which time Cantella announced that it wished to be held in contempt for purposes of appealing the sanctions order. The trial court found that Cantella's refusal to provide discovery as required by the September 6, 2012, order was contemptuous. The transcript reflects the following:

"I will find that [Cantella is] *** in direct—I'm sorry—in direct civil contempt of court and that there's an additional fine of $250 payable within seven days." The written order provided as follows:

> "(1) Cantella's counsel has advised the court that it does not intend to produce documents today and desires to be held in civil contempt[.]
>
> (2) For the reasons set forth on the record, Cantella is found to be in indirect civil contempt, and, in addition to the Rule 219(c) sanctions ordered on September 6, a monetary fine of $250 is imposed against Cantella for its contempt[.]
>
> (3) The Rule 219 sanction of $250 per day of non-production that was awarded on September 6, 2012, is stayed pending completion of an appeal by Cantella, or pending further order of court."

It appears as though the trial court on the record might have held Cantella in direct contempt[1], although the written order states that the citation was for indirect civil contempt. However, both the transcript and the written order unambiguously set a "fine" at $250 for contempt without a provision for a purge.

¶ 19 Before we deal with the nature of the contempt, we will address Cantella's argument that it accepted the contempt citation in a good-faith effort to appeal the trial court's previous interlocutory orders, in other words, that this case presents a "friendly contempt." First, the orders denying

[1]In transcribing the judge's remarks, the court reporter separated "in" and "direct," making them two words. Reading the cold transcript, it is impossible to tell if the judge meant "in" "direct" contempt or if he meant "indirect" contempt.

Cantella's motion to arbitrate and motion to terminate its status as a respondent in discovery are not appealable as part of the contempt order, as discussed fully above. Second, Cantella does not dispute the propriety of the September 6, 2012, order imposing sanctions but disputes only the amount of the sanctions. Consequently, we agree with plaintiff that Cantella concedes that its conduct was contemptuous. Therefore, the finding of contempt will stand unless it must be vacated for other reasons.

¶ 20 *In re Marriage of Betts*, 200 Ill. App. 3d 26 (1990), provides a virtual treatise on the law of contempt. If contempt sanctions are imposed for coercive purposes—to compel the contemnor to perform certain acts—the contempt is civil in nature. *Betts*, 200 Ill. App. 3d at 43. On the other hand, criminal contempt sanctions are imposed to punish past misconduct. *Betts*, 200 Ill. App. 3d at 43. A civil contemnor must have an opportunity to purge itself of contempt by complying with the pertinent court order. *Betts*, 200 Ill. App. 3d at 44. In contrast to the coercive purpose of civil contempt, the punishment for criminal contempt is retribution, deterrence, and vindication of the norms of socially acceptable conduct. *Betts*, 200 Ill. App. 3d at 44. Contemptuous conduct is also categorized on the basis of whether it is direct or indirect. *Betts*, 200 Ill. App. 3d at 47. Direct contempt is conduct that occurs in front of a judge. *Betts*, 200 Ill. App. 3d at 47. Refusal to produce documents can be direct civil contempt where the trial court has knowledge of the facts establishing noncompliance. *Betts*, 200 Ill. App. 3d at 47.

¶ 21 In *Cangelosi v. Capasso*, 366 Ill. App. 3d 225 (2006), this court affirmed a finding of direct civil contempt. *Cangelosi*, 366 Ill. App. 3d at 230. In *Cangelosi*, an attorney defending a hospital in a medical malpractice suit refused to turn over the notes of a nurse, asserting privilege. *Cangelosi*, 366 Ill. App. 3d at 226-27. The trial court ruled that the notes were not privileged and ordered the

attorney to turn the notes over to the plaintiff. *Cangelosi*, 366 Ill. App. 3d at 227. In open court, the attorney advised the judge that he would not turn over the notes, and the judge held the attorney in direct civil contempt. *Cangelosi*, 366 Ill. App. 3d at 227. Here, the September 6, 2012, order set September 14, 2012, as the deadline by which Cantella would produce documents responsive to the outstanding discovery requests or face further sanctions. On September 14, 2012, in open court, Cantella refused to produce any documents. As in *Cangelosi*, Cantella was in direct civil contempt.

¶ 22 However, whether Cantella's civil contempt was direct or indirect, Cantella was entitled to an order that specified what it was required to do to purge itself from contempt. See *Pancotto v. Mayes*, 304 Ill. App. 3d 108, 112 (1999). In *Pancotto*, we held that a sentencing order in a civil contempt proceeding must contain an effective purging provision. *Pancotto*, 304 Ill. App. 3d at 112. For instance, in *Cangelosi*, the contemnor was fined $50 but the order further provided that he could purge himself by producing the nurse's notes. *Cangelosi*, 366 Ill. App. 3d at 227. Here, the contempt order merely fined Cantella $250. As in *Pancotto*, the instant contempt order must be vacated. Fining Cantella $250 did not fulfill the coercive nature of the contempt. In addition to the fine, the order had to contain language that Cantella could purge itself of the contempt by furnishing the discovery. ("[T]he contemnor must have an opportunity to purge himself of contempt by complying with the pertinent court order." *Betts*, 200 Ill. App. 3d at 44.)

¶ 23 For the foregoing reasons, we affirm as modified the judgment of the circuit court of Kane County as to that part of the September 6, 2012 order imposing sanctions, and we vacate the September 14, 2012, order of contempt. We remand for the purpose of entering an order modifying the $100-per-day sanction to reflect that the $100 per day sanction began on May 24, 2012, and ended on September 14, 2012.

¶ 24 Affirmed in part as modified; vacated in part; remanded with directions.