2013 IL App (2d) 130519-U
No. 2-13-0519
Order filed November 27, 2013



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| *In re* THE MARRIAGE OF | ) | Appeal from the Circuit Court |
| OLGA BARUFFI, | ) | of McHenry County. |
| | ) | |
| Petitioner-Appellee, | ) | |
| | ) | |
| and | ) | No. 11-DV-833 |
| | ) | |
| THOMAS BARUFFI, | ) | Honorable |
| | ) | Mark R. Gerhardt, |
| Respondent-Appellant. | ) | Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the appellant failed to comply with this court's order directing him to correct rule violations in his brief, where the appellant failed to support his arguments on appeal with relevant authority, and where, regardless of the appellant's rule violations, his arguments were meritless, the trial court's judgment of dissolution was affirmed.

¶ 2 Respondent, Thomas Baruffi, appeals from the judgment dissolving his marriage to petitioner, Olga Baruffi. Because Thomas's counsel has failed to comply with this court's orders and with the supreme court rules governing the format and content of briefs, and because, even overlooking the rule violations, Thomas's arguments are meritless, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in 1985 and had two children during the marriage, both of whom are emancipated. Olga petitioned for dissolution of marriage in September 2011. A three-day bench trial began on February 13, 2013, with Thomas representing himself. Called as a witness during Olga's case-in-chief, Thomas testified that he had been self-employed "for several years." In 2005, Thomas's employment at AT&T had been terminated. The company had offered to transfer him to Texas, but Thomas had declined. He had earned approximately $120,000 per year working for AT&T. Thomas testified that he never had been employed by Centrex Global Technologies, which was a company owned by a friend of Thomas's named Marcela Berner, but that he had "been given work by" that company, beginning in 2008, including work fixing computers and building networks. Centrex paid him between $65 and $85 per hour. Thomas worked three days per week most weeks, but not all of that time was billable time. Centrex had never sent him an IRS 1099 form. Berner was also Thomas's landlord. In exchange for living rent-free in an apartment building owned by Berner, Thomas performed approximately 15 hours per week of renovation work to the building. One of the apartments in the building rented for approximately $1,000 per month.

¶ 5 Thomas was asked about discrepancies between the income he reported on his tax returns and the total deposits into his checking account during each of the years 2007 through 2011. Thomas explained that the discrepancies must have been due to transfers of funds between his checking and savings accounts. He was also asked about other aspects of his tax returns. For example, in 2007, a year during which Thomas testified he was unemployed, he deducted $11,710 in business expenses, including $5,110 in parking and tolls and $2,500 in meals and entertainment. He testified that those were expenses he incurred in looking for a job and networking. In 2009 and 2010, years during which Thomas testified he was self-employed and receiving work from Centrex, he deducted no business expenses and he listed his occupation on

his tax returns as "unemployed." In 2011, Thomas's adjusted gross income on his tax return was $9,600. Although he was self-employed that year, he paid no self-employment tax. In 2011, Thomas deposited a total of approximately $27,000 into his checking account. He explained that $11,000 was a payment from his insurance company for hail damage to his roof. He could not explain the source of the remainder of the deposits that exceeded his reported income.

¶ 6 Olga testified that she was disabled due to a heart attack she suffered in 2010. She did not work, and she received Social Security disability benefits of $856 per month. She also received $367 per month in food stamps. Olga testified that, during 2009, 2010, and the first half of 2011, Thomas would be gone from the house five days per week. He would tell her he was at Centrex working.

¶ 7 Regarding her debts, Olga testified that she had to repay a portion of the long-term disability payments she received from Hartford Insurance. Her financial affidavit listed a balance of $5,877 owed to Hartford. She also had credit card debt of $15,000 on a United Visa card, $10,000 on a Citibank card, $4,344 on a U.S. Airways card, $2,881 on a Nebraska Bank card, and $300 on a Chase Visa. She took out a loan from Wells Fargo to pay for a new furnace in 2010, which had a balance of $2,534. She also owed $1,300 to her dentist and $6,000 to her brother.

¶ 8 Thomas testified in the narrative on his behalf. He testified that he elected to be terminated from AT&T, rather than accept a transfer to Texas, because his son had just started high school, and he did not want to disrupt his family. He thought he would be able to find a new job within weeks. After three years of job searching, he contacted Berner for work, who gave him sporadic work on a casual basis.

¶ 9 Thomas attempted to introduce into evidence a number of documents pertaining to the deposits he made into his checking account. He described the documents, which are not

contained in the record, as reports printed from his checking account showing all credits posted to the account for the last two years, a spreadsheet classifying each credit, and backup documentation. Olga's attorney objected to the documents, because Thomas had not tendered them prior to trial. The court sustained the objection.

¶ 10 Although Thomas did not testify about his debts, his financial affidavit listed debts of $25,000 owed on a Chase credit card, $800 owed to Sherman Hospital, $15,000 in federal student loans, $500 owed to AT&T, $4,933 owed to the IRS for an audit, and $3,600 owed to Eileen Baruffi for a loan to pay property taxes.

¶ 11 The parties submitted written closing arguments, and, on March 21, 2013, the court rendered an oral decision. The court found that Thomas's testimony was evasive, measured, suspect, and inconsistent with the written evidence submitted. Regarding Thomas's income, the court found that Thomas's income tax returns were "works of *** fiction." The court found that "there were gaps of unknown amounts" between Thomas's reported income and his bank records. Based on Thomas's bank records, the court determined that Thomas had averaged approximately $17,000 per year in income for "the last few years." Thomas also received income in the form of a rent-free apartment, which the court valued at $1,000 per month or $12,000 per year in income. The court found that Thomas had "the ability to make significantly more during those years." The court found that Olga was unable to work and was receiving disability payments. After noting that it had considered the factors in section 504 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504 (West 2012)), the court ordered Thomas to pay $1,680 per month to Olga in permanent maintenance. Addressing the parties' debts, the court stated:

> "Regarding debts, Mrs. Baruffi will be responsible for the Hartford Insurance repayments, her student loan, [the] bill to Sherman Hospital, [and] the indebtedness to AT&T. That is approximately $21- to $22,000.
>
> Mr. Baruffi will be responsible for the IRS [debt], the debt to Eileen Baruffi for the property taxes[,] and the Chase account. That is approximately $33,000 ***.
>
> Other debts not specifically enumerated now *** will be kept by the party in whose name they currently are."

At the conclusion of its oral ruling, the court instructed Olga's counsel to draft a judgment consistent with the terms of the court's decision. The court directed that Thomas would have the opportunity to review the proposed judgment and that any discrepancies would be addressed at the next court date.

¶ 12 On April 25, 2013, the parties appeared for entry of the written judgment.[1] The court asked Thomas whether he had reviewed the written judgment and whether it was consistent with the court's oral decision. Thomas responded affirmatively to both questions and indicated that he had no objections to the judgment being entered. The court entered the written judgment, which awarded Olga $1,680 per month in permanent maintenance and distributed the parties' debts as follows: Olga would be liable for debts of approximately $22,000 consisting of the Hartford Insurance debt, her federal student loan, the Sherman Hospital balance, and the AT&T balance. Thomas would be responsible for debts of approximately $33,000 consisting of the IRS debt, the Eileen Baruffi loan, and the "Chase credit card accounts."

¶ 13 Thomas timely appealed. He is represented by counsel on appeal.

[1] Thomas did not include the transcript of the April 25, 2013, hearing in the record on appeal. Olga supplemented the record on appeal with the transcript.

¶ 14 II. ANALYSIS

¶ 15 Before we reach Thomas's arguments, we must address his failure to comply with this court's September 4, 2013, minute order. Thomas's counsel timely filed an appellant's brief on August 26, 2013. However, the brief contained an incomplete statement of facts in violation of Rule 341(h)(6) and an incomplete appendix in violation of Rule 342(a). Specifically, the three-paragraph statement of facts contained an irrelevant discussion of an order of protection, did not discuss any of the evidence or testimony from trial, and did not discuss the trial court's findings or judgment. Rule 341(h)(6) requires that a statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal *** or to the pages of the abstract." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). The appendix did not include the notice of appeal or an index to the report of proceedings, both of which Rule 342(a) requires. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005).

¶ 16 On September 4, 2013, this court *sua sponte* entered a minute order directing Thomas's counsel to file, by September 19, 2013, an amended statement of facts that complied with Rule 341(h)(6) and a supplemental appendix that complied with Rule 342(a). The order specifically instructed that the amended statement of facts should address "the proceedings at trial, particularly the witnesses' testimony, with page references to the record." The order further instructed that the supplemental appendix should include "the names of all witnesses and the pages on which their examinations begin." The order directed Thomas's counsel to consult the rules to ensure compliance.

¶ 17 On September 24, 2013, the court received from Thomas's counsel a motion for extension of time to comply with the September 4, 2013, order. The motion sought an extension to September 30, 2013. On September 25, 2013, this court denied without prejudice the motion

because it failed to comply with local rule 103 (Ill. App. Ct., Second Dist., R. 103 (June 4, 2013)), which, among other things, requires a party moving for an extension of time to include specific information in an affidavit attached to the motion. A copy of the local rules was included with the copy of the minute order mailed to Thomas's counsel. Thomas's counsel did not file another motion for extension of time. Nevertheless, on September 30, 2013, the court received from Thomas's counsel an amended appellant's brief, which he did not ask for leave to file, and which the court had not granted him leave to file.

¶ 18 Based on this procedural history, Thomas's counsel has failed to comply with this court's September 4, 2013, order directing him to file an amended statement of facts that complies with Rule 341(h)(6) and a supplemental appendix that complies with Rule 342(a). Although this court denied without prejudice his motion for extension of time, specifically directing Thomas's counsel to local rule 103 and even mailing to counsel a copy of the local rules, counsel failed to seek an extension of time to comply with the September 4, 2013, order in accordance with the procedures outlined in local rule 103. "Like supreme court rules, local court rules are meant to be followed, as written, and are not mere suggestions or guidelines from which deviations may be made by the litigants." *VC & M , Ltd. v. Andrews*, 2013 IL 114445, ¶ 26. "[T]he appellate court, in its discretion, has the authority to sanction a party for violating a court rule." *VC & M, Ltd.*, 2013 IL 114445, ¶ 26. Because Thomas's counsel had ample opportunity to comply with the court's September 4, 2013, order but failed to do so, we will not consider Thomas's amended brief, which counsel neither sought nor was granted leave to file.

¶ 19 Even if we were to consider Thomas's amended brief, the amendments Thomas's counsel made to the statement of facts and appendix failed to remedy the rule violations contained in the original brief. The statement of facts in the amended brief contains only five additional paragraphs, three of which vaguely summarize very limited portions of the evidence and

testimony at trial. In total, only three sentences in the statement of facts purport to summarize the testimony of the two witnesses at trial:

> "Specifically, Wife was questioned about her debts listed on her financial affidavit. R164-170."
>
> "Wife's attorney questioned Husband thoroughly about his tax returns and regarding the number of bank accounts Husband had access to during the marriage. R. 53, 54, 87."
>
> "At hearing, Husband repeatedly testified about his job search after leaving AT&T, and Wife offered no evidence that work was available to Husband. R. 25, 41, 121-2, 137-8, 205."

Furthermore, the statement of facts does not address the court's findings at the conclusion of trial, simply stating that "[a] written Judgment of Dissolution of Marriage was entered on April 25, 2013." The amended brief violates Rule 341(h)(6), which, again, requires that a statement of facts "contain the facts necessary to an understanding of the case." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). The reader is left with only a vague and incomplete understanding of what occurred at trial. The statement of facts contained in this disposition is based on this court's independent review of the record.

¶ 20 Regarding the appendix to the amended brief, the index to the report of proceedings Thomas's counsel provided is incomplete and in violation of Rule 342(a)(3), which requires the table of contents of the record on appeal to include "the names of all witnesses and the pages on which their direct examination, cross examination, and redirect examination begin." Ill. S. Ct. R. 342(a)(3) (eff. Jan. 1, 2005). Thomas's counsel simply typed the following at the end of the table of contents to the common law record:

> "Thomas Baruffi Testimony R-20

Olga Baruffi Testimony R-139

Thomas Baruffi Testimony R-202."

The amended table of contents fails to comply with Rule 342(a)(3), because it does not specify the pages on which the direct examination, cross examination, and redirect examination of each witness begin. Moreover, the pages Thomas's counsel provided are inaccurate.

¶ 21 Because Thomas's counsel has failed to remedy the rule violations contained in his original brief, this court would be acting within its authority to strike the brief and dismiss the appeal. However, striking an appellate brief and dismissing an appeal is a harsh sanction. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶15 (citing *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005)). Rather than impose such a harsh sanction, we will address the issues Thomas raises on appeal. We note that the argument section of Thomas's original brief is identical to the argument section in the amended brief, so the fact that we have disregarded his amended brief is immaterial to our analysis of the issues on appeal.

¶ 22 We now turn to Thomas's arguments. Thomas raises two issues: (1) that the trial court's written judgment of dissolution entered on April 25, 2013, conflicted with the court's oral ruling rendered on March 21, 2013, and (2) that the court abused its discretion when it awarded Olga permanent maintenance of $1,680 per month.

¶ 23 Thomas's first argument materially misrepresents the proceedings in the trial court. As we noted above, Thomas failed to include in the record on appeal the report of proceedings from the April 25, 2013, hearing. Olga's counsel supplemented the record with the report of proceedings from that day. The transcript begins with the court asking Thomas whether he had reviewed the written judgment and whether it was consistent with the court's oral decision rendered on March 21, 2013. Thomas responded affirmatively to both questions and had no objections to the written judgment. As Olga argues, Thomas cannot invite the court to enter a

written judgment, make no objection, and then argue for the first time on appeal that the written judgment contained an error. *Forest Preserve District v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27 ("A party may not urge a trial court to follow a course of action, and then, on appeal, be heard to argue that doing so constituted reversible error."); *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 ("[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal."). We cannot condone Thomas's counsel's flagrant lack of candor with this court.

¶ 24 Further, Thomas's argument regarding the alleged discrepancy between the written judgment and the oral ruling borders on the frivolous. The only discrepancy Thomas raises in his brief is that, in its oral ruling, the court stated that Thomas would be responsible for the "Chase account," while the written judgment assigned to Thomas the "Chase credit card accounts." Apparently, the plural "accounts" in the written judgment assigned to Thomas a $300 balance on a Chase credit card that Olga listed in her financial affidavit, in addition to the $25,000 balance on Thomas's own Chase credit card listed in his financial affidavit. We agree with Olga that the $300 discrepancy has "no practical effect" on the judgment. Both the oral ruling and the written judgment assigned to Thomas approximately $33,000 in debts.

¶ 25 When we turn to Thomas's second argument—that the court abused its discretion in awarding Olga $1,680 per month in permanent maintenance—we again find fundamental problems with Thomas's brief that frustrate our review. In the 6 ½ pages of his brief addressing the court's award of maintenance, Thomas's counsel fails to cite a single dissolution of marriage case, let alone a single case involving the issue of maintenance.

¶ 26 Supreme Court Rule 341(h)(7) requires that the argument section of an appellant's brief "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Supreme court

rules are not mere suggestions and compliance is mandatory. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. "The purpose of the rules is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved." *Hall*, 2012 IL App (2d) 111151, ¶ 7. "A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue." *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. " 'The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *Kic*, 2011 IL App (1st) 100622, ¶ 23 (quoting *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)). "[T]his court will not become the advocate for, as well as the judge of, points an appellant seeks to raise." *Skidis v. Industrial Comm'n*, 309 Ill. App. 3d 720, 724 (1999).

¶ 27 Under the heading "Wife did not establish any hidden income," Thomas's counsel argues that Olga failed to establish that Thomas had "any other financial accounts." The only case counsel cites is *Bucktown Properties v. Johnson*, 119 Ill. App. 3d 346, 353 (1983), which he cites for the proposition that "[t]he unimpeached and uncontradicted testimony of a witness cannot be arbitrarily disregarded by a finder of fact." Counsel does not explain how the purported lack of "hidden income" or "other financial accounts" relates to the issue on appeal. Counsel never indicates whether the trial court found that Thomas was concealing income, or whether that consideration played a role in the court's award of maintenance. Because his argument regarding the purported lack of "hidden income" is conclusory and unsupported by developed legal analysis or by citation to relevant legal authority, it is forfeited. See *Kic*, 2011 IL App (1st) 100622, ¶ 23 ("A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue."); *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348 (2006) ("A conclusory assertion, without supporting analysis, is not enough [to satisfy the requirements of Rule 341].").

¶ 28 Another heading in the argument section states, "The trial judge inappropriately advanced legal arguments in his oral decision for which there was no supporting evidence offered by the Wife." Counsel's only citations in this section are to a 1969 Illinois Appellate Court case discussing a trial court's duty to control the proceedings and to three United States Supreme Court cases discussing the nature of the adversary system and the "principle of party representation." Thomas's counsel asserts that the court improperly based the maintenance award on its "own notion that Husband *could have* earned more money at some point in time." Apparently, Thomas is taking issue with the fact that the court imputed income to him in calculating maintenance. However, again, counsel does not cite a single dissolution of marriage case or a single case involving the issue of imputed income. Just as Thomas forfeited his "hidden income" argument by failing to cite relevant authority or to support his conclusory assertions with developed legal analysis, Thomas has forfeited his argument regarding the court's "notion that Husband *could have* earned more money."

¶ 29 Even if we were to overlook Thomas's forfeiture of his arguments concerning "hidden income" and improperly imputed income, the arguments are meritless. The court's finding that Thomas's tax returns were "works of *** fiction" finds strong support in the record. Also finding support in the record was the court's finding that there were large, unexplained gaps between the annual deposits into Thomas's checking account and his reported income. The court calculated Thomas's income by averaging the annual deposits into his checking account (which was $17,000) and adding to that number the value of the rent-free apartment in which Thomas lived (which was $12,000). Based on the record before us, the court's method of calculating Thomas's income was not error. We also do not find error in the court's decision to impute income to Thomas, which was based on its finding that Thomas, who had earned $120,000 per year as recently as 2005, had "the ability to make significantly more" than $29,000 per year. In

short, the court based its maintenance award on its calculation of Thomas's income and on its decision to impute income to Thomas, not on a finding of "hidden income" or of some "other financial accounts." Thomas's arguments addressing these issues are meritless.

¶ 30 Finally, under the heading, "Husband attempted to introduce evidence showing income/deposits, but his exhibit was not allowed into evidence," Thomas argues that the court abused its discretion in not allowing him to admit documents that he failed to disclose prior to trial. In this section, Thomas cites relevant authority, but his argument nevertheless lacks merit. The exhibits that Thomas sought to admit are not contained in the record. At trial, Thomas described the documents as reports printed from his checking account showing all credits posted to the account during the prior two years, a spreadsheet classifying each credit, and backup documentation. We note that Olga admitted into evidence copies of Thomas's monthly checking account statements from January 2007 to December 2012, which listed every transaction, including deposits. Moreover, Thomas had ample opportunity at trial to explain the source of the deposits into his checking account and was questioned repeatedly about his deposits, but failed to offer any credible explanation. Accordingly, even assuming *arguendo* that the court erred in refusing the exhibits, the error is not reversible. See *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 758 (2010) (explaining that an erroneous evidentiary ruling is not reversible error unless the error was prejudicial and the result of the trial was materially affected).

¶ 31 Regardless, the trial court was within its authority to exclude from evidence the documents that Thomas failed to disclose prior to trial. Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) permits a trial court to exclude evidence as a sanction for a party's unreasonable failure to comply with discovery rules or orders. The decision to impose a particular sanction is within the court's discretion and will be reversed only in the case of a clear abuse of discretion. *Rosen v. Larkin Center, Inc.*, 2012 IL App (2d) 120589, ¶ 16. The purpose of imposing

sanctions is to coerce compliance with discovery rules and orders, not to punish the offending party. *Rosen*, 2012 IL App (2d) 120589, ¶ 17. Here, pursuant to Illinois Supreme Court Rule 218 (eff. Oct. 4, 2002) and local rule 11.08 (22nd Judicial Cir. Ct. R. 11.08), the court conducted a pretrial conference at which the parties were required to exchange copies of all exhibits that would be used at trial. When Thomas attempted to offer the documents at issue into evidence at trial, the following exchange occurred:

"THE COURT: *** Mr. Baruffi, did you ever share these documents with Mr. Poper [Olga's counsel] before?

MR. BARUFFI: I have not, Your Honor.

THE COURT: Do you recall the day we set the trial conference and I told you what a trial conference consists of?

MR. BARUFFI: Yes, I do.

THE COURT: Do you remember me telling you that you were to bring all the exhibits that you want to offer at trial; and if you did not, that you may be barred from entering exhibits?

MR BARUFFI: Yes, I remember, Your Honor.

THE COURT: Mr. Poper's objection is sustained.

***

THE COURT: The basis is in essence these documents were never tendered to Mr. Poper in discovery or brought to the trial conference.

For me to allow their admission into evidence would come as a surprise and would not have allowed Mrs. Baruffi to properly prepare her case."

Thomas has not established that the court abused its discretion in excluding the exhibits from evidence. The record does not suggest that the court improperly excluded the exhibits to

penalize Thomas. Rather, the court reasonably believed that allowing Thomas to enter the previously undisclosed exhibits into evidence late in the trial, after Olga had rested her case, would have been prejudicial to her. The court did not abuse its discretion.

¶ 32 III. Conclusion

¶ 33 Based on the foregoing, the judgment of the circuit court of McHenry County is affirmed.

¶ 34 Affirmed.