2015 IL App (2d) 141008
No. 2-14-1008
Order filed November 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KAREN Z. GRAY, Petitioner-Appellant, and J. DOUGLAS GRAY, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-D-1087 Honorable Charles D. Johnson, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed petitioner's pleading seeking to enforce judgment of dissolution and an order of contempt where the pleading did not seek enforcement of any existing order and did not allege a violation of any existing order.

¶ 2 On June 12, 2013, the circuit court of Lake County entered a written judgment of dissolution of marriage, as modified on October 24, 2013, from which neither the petitioner, Karen Z. Gray, nor the respondent, J. Douglas Gray (Doug), appealed. On December 12, 2013, Karen accepted $1,965,143 from Doug owed to her under the judgment of dissolution. On April 10, 2014, Karen filed an "Amended Motion to Enforce Judgment and Petition for Contempt for

Adjudication of Indirect Civil Contempt and Other Relief." Doug moved to dismiss on the grounds that Karen's motion to enforce and petition for contempt did not sound in the enforcement of any existing order and was barred by her acceptance of the benefits. Karen argues on appeal that the trial court erred in dismissing her motion and petition because (1) the acceptance of benefits doctrine does not apply in this case where Doug would not be placed at a disadvantage by paying Karen the amount she is entitled to under the judgment, and (2) she properly alleged a claim for indirect civil contempt.

¶ 3 We affirm.

¶ 4 I. BACKGROUND

¶ 5 The parties married in 1984, and on May 28, 2008, Karen filed a petition for dissolution of marriage. The trial court entered an agreed order regarding temporary maintenance on October 3, 2008, and an agreed order modifying temporary maintenance on July 24, 2009; on June 15, 2009, the trial court reinstated its October 3, 2008, order regarding temporary maintenance. A trial regarding the division of property began on May 17, 2011, and proofs were closed on or about May 11, 2012. On January 31, 2013, the trial court granted Karen's motion to reopen proofs and the trial court heard evidence on the reopened proofs on March 16, 2013.

¶ 6 The trial court, Judge David Brodsky, presiding, entered a judgment of dissolution of marriage on June 12, 2013. Regarding the division of marital property, the judgment provided, in relevant part, "The specific allocation of property is set forth in Schedule A attached to and made part of this judgment." Schedule A included Chase account 3009 (the Chase account) containing $539,405 on March 6, 2012. Karen was awarded 55% of this account, and Doug was awarded 45%.

¶ 7 Doug and Karen filed timely postjudgment motions on July 11, and July 12, 2013, respectively, pursuant to section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2014)).

¶ 8 Further, on October 16, 2013, Karen filed an "Emergency Motion to Compel the Production of Updated Discovery Relevant to the Distribution of Marital Assets" (emergency motion to compel discovery). This motion alleged that "the valuation dates of the assets listed on Schedule A are extremely outdated [and] [t]hese dates do not accurately represent the current value of the assets to be allocated between the parties." Karen also alleged, "It is impossible for the parties to divide marital assets pursuant to Schedule A without the updating of discovery concerning those assets."

¶ 9 On October 24, 2013, the trial court disposed of all three pending postjudgment motions. The trial court amended the judgment of dissolution, in relevant part as follows:

> "A. On or prior to November 6, 2013, *** both parties shall exchange updated statements for the time periods set forth below for all accounts listed on Schedule A attached to the Judgment and all new accounts currently in existence in the names of either party *** which were not funded solely with assets the Court found to be non-marital *** .
>
> * * *
>
> C. Statements for both Marital Accounts and all accounts listed on Schedule A shall be produced from the period of May 11, 2012 (the date on which proofs were closed), through and including the most current statement and balance information as of the date of production.
>
> D. All assets allocated to the parties on Schedule A and all funds on deposit in Marital Accounts shall be calculated and divided as of the date of entry of the Judgment

(June 12, 2013), with each of the parties additionally being apportioned their pro rata share of appreciation or depreciation on the assets awarded to each party, accruing between the date of entry of Judgment through the date of actual division."

¶ 10 On November 6, 2013, Doug provided account statements to Karen, including statements for the Chase account. On December 6, 2013, Karen's attorney sent a letter to Doug's attorney "confirming that Doug will retain the following bank accounts, subject to making the payments to Karen set for below for her percentage interest in these accounts pursuant to the terms of the Judgment entered on June 12, 2013 (the 'Judgment'): (1) Doug shall retain [the Chase account], and shall make a cash payment to Karen in the amount of $6,363 *** In satisfaction of the above transfers, Doug shall authorize an immediate cash payment to Karen[.] *** This letter is intended to effectuate the transfers set forth in the Judgment *** we believe this letter is consistent with our agreement."

¶ 11 Two days later Doug's attorney wrote Karen's attorney stating that Doug agreed with the terms of the December 6 letter from Karen's attorney and that Doug would make all the requested financial transfers. On December 12, 2013, Karen's attorney wrote Doug's attorney stating that Karen had "received $1,965,143 for her division of the cash and brokerage accounts, and other cash transfer[s] owed to Karen under the Judgment."

¶ 12 On March 17, 2014, Karen filed a "Motion to Enforce Judgment and For Other Relief" that was withdrawn. On April 10, 2014, Karen filed an "Amended Motion to Enforce Judgment and Petition for Contempt for Adjudication of Indirect Civil Contempt and Other Relief" (motion to enforce judgment and petition for contempt). Karen's motion to enforce and petition for contempt alleged the following. The judgment of dissolution awarded Karen 55% of the Chase account. That account "contained $539,405 as of March 6, 2012." Doug "improperly withdrew $247,381 from [the Chase account]" between "March 6, 2012 and the entry of the judgment." In

violation of certain temporary support orders[1] and the judgment of dissolution, Doug "spent this money on medical expenses, individual therapy, and legal fees incurred in connection with an intentional infliction of emotional distress case ancillary to the divorce." *** Doug owes Karen $136,059.55, which represents her 55% interest in the money Doug withdrew." While all of Doug's improper withdrawals violated the temporary support orders and the judgment of dissolution, Doug's payment "for legal fees incurred in connection with the [intentional infliction of emotional distress] case" specifically violated paragraph 88 of the judgment of dissolution.

¶ 13 Karen requested the court to: (1) issue a rule requiring Doug to show cause why he should not be held in indirect civil contempt for his failure to comply with the October 3, 2008, order and judgment of dissolution; (2) find Doug to be in indirect civil contempt for failure to comply with the October 3, 2008, order and judgment of dissolution of marriage; (3) compel Doug to reimburse Karen $136,059.55, which equates to 55% of the money he improperly withdrew from the Chase account from May 2012 through May 2013; and (4) require Doug to pay Karen's attorneys' fees and costs incurred in the preparation, presentation and litigation of her petition.

¶ 14 On April 30, 2014, Doug filed a motion to strike and dismiss Karen's motion to enforce judgment and petition for contempt, pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). Doug argued Karen's motion to enforce and petition for contempt should be dismissed pursuant to section 2-615 because Karen "seeks to 'enforce' temporary orders entered prior to entry of Judgment" and temporary orders "cannot be enforced after entry of [final] Judgment, as those orders have been terminated." Doug argued that Karen's motion to

[1] Karen alleged that Doug violated temporary support orders entered on October 3, 2008, July 24, 2009, June 2010, and July 24, 2010.

enforce and petition for contempt should be dismissed pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2014)) because Karen failed to timely file her motion to enforce and petition for contempt, as it was filed more than five months after entry of the October 24, 2013, order disposing of all postjudgment motions (and more than nine months after entry of judgment and 115 days after November 25, 2013, the date on which the judgment became final and appealable). In addition, Doug argued that, pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), Karen's motion should be dismissed because she is estopped from maintaining her motion to enforce and petition for contempt based on her acceptance of the benefits and under the doctrine of accord and satisfaction. Finally, Doug argued that Karen cannot establish the elements required for a section 2-1401 petition. See 735 ILCS 5/2-1401 (providing relief from final orders and judgment after 30 days from entry).

¶ 15 On June 4, 2014, the trial court, Charles D. Johnson, presiding, granted Doug's motion to strike and dismiss. The trial court found that that Karen's motion to enforce judgment did "not sound in enforcement of any existing order." The court found that the "petition for indirect civil contempt" did "not sound in any existing order" and that Karen accepted the benefits of the judgment of the dissolution and the October 24, 2013, order and "is barred from further attacking that order." The trial court stated:

> "For the reasons set for in the Court's findings, the Court finds that the petition is, in fact barred under [section] 2-619 [of the Code] by the acceptance of the benefits of the underlying Judgment and under [section] 2-615 for failure to state an order that was violated by the means set forth in [her] petition.
>
> For these reasons, the Motion to Strike and Dismiss are granted."

¶ 16 Karen filed a motion to reconsider on July 7, 2014. The trial court denied Karen's motion on September 4, 2014, and Karen filed her notice of appeal on October 3, 2014.

¶ 17 II. ANALYSIS

¶ 18 Karen argues that the trial court erred by dismissing her motion to enforce and petition for contempt. The trial court dismissed Karen's motion and petition under sections 2-615 and 2-619 of the Code after determining that Karen's pleading did not sound in the enforcement of any existing order and was barred by her acceptance of the benefits.

¶ 19 When determining whether a cause of action is stated for purposes of a section 2-615 motion to dismiss, courts must view the allegations in the light most favorable to the nonmovant and accept as true all well-pleaded facts and reasonable inferences derived from those facts. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). We review *de novo* an order granting a section 2-615 motion to dismiss. *Oliveira*, 201 Ill. 2d at 147-48. When ruling on a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation,* 176 Ill. 2d 179, 189 (1997). The motion should be granted only if the plaintiff can prove no set of facts that would state a cause of action entitling him to relief. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago,* 189 Ill. 2d 200, 206 (2000). However, "[a] dismissal order may be affirmed 'if it is justified in the law for any reason or ground appearing in the record regardless of whether the particular reasons given by the trial court, or its specific findings, are correct or sound.'" *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 923 (2008) (quoting *Natural Gas Pipeline Co. of America v. Phillips Petroleum Co.*, 163 Ill. App. 3d 136, 142 (1987)).

¶ 20 In this case, the trial court properly dismissed Karen's motion to enforce because it did not sound in enforcement of any existing order. Karen alleged that Doug owed Karen $136,059.55 because Doug withdrew money from the Chase account in violation of temporary trial court orders entered prior to entry of judgment of dissolution. However, the temporary

orders that Karen sought to enforce terminated upon the entry of the dissolution judgment (see 750 ILCS 5/501(d)(3) (West 2012)).

¶ 21 Karen also alleged that Doug violated the judgment of dissolution which apportioned 55% of the Chase account to her and valued her share at $296,672 of that account on March 6, 2012. Karen argues that Doug violated the judgment of dissolution because she did not receive her share as reflected in the judgment of dissolution entered on June 11, 2013. Karen ignores that on October 24, 2013, in response, in part, to posttrial motions filed by Karen for updated discovery, the trial court amended the judgment of dissolution ordering that the Chase account was to be valued and divided as of the date of entry of the judgment of dissolution, June 12, 2013, and that Doug was to provide Karen with updated statements of the Chase account. The record shows that Doug provided the statements at issue to Karen's counsel and that the parties, through counsel, exchanged correspondence reflecting an agreement regarding, *inter alia*, the Chase account. Karen did not allege nor does she argue that she is owed money from Doug pursuant to the October 24, 2013, superseding order or that Doug committed fraud or misrepresentation.

¶ 22 Karen also alleged that Doug violated the June 11, 2013, judgment of dissolution when Doug paid $144,000 from the Chase account for legal fees and costs related to the ancillary litigation. The judgment of dissolution provides that the parties "shall be responsible for all of their own attorneys' fees and costs *** associated with the [intentional infliction of emotional distress] ancillary litigation." However, Karen alleged that Doug made payments from the Chase account for the ancillary litigation before the judgment of dissolution was entered and therefore before the date of valuation for the Chase account according to the October 24, 2013, order. Therefore, there was no existing order that Karen identified that the court could enforce. See 750 ILCS 5/501(d)(3) (West 2012) (temporary orders terminate upon the entry of the dissolution of

judgment). Accordingly, the trial court properly determined that Karen's motion to enforce did not sound in any existing order.

¶ 23 Karen argues that the trial court erred in dismissing her motion to enforce and petition because the acceptance of benefits doctrine does not apply in this case where Doug would not be placed at a distinct disadvantage by paying Karen the amount she is entitled to under the judgment. We need not address this argument because we have determined that the trial court properly dismissed Karen's motion to enforce based on the determination that the motion did not seek enforcement of an existing order.

¶ 24 We further note that Karen's motion, filed 30 days after final judgment, essentially sought to modify or revoke certain provisions in the judgment of dissolution regarding property distribution. More than 30 days after entry of judgment, provisions in a dissolution of marriage judgment that constitute property distribution are generally not modifiable or revocable, and, therefore, a trial court has power to modify property distribution only if circumstances exist to reopen a judgment as in other civil cases. See *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010). Accordingly, whether a trial court has power to modify a property distribution provision pursuant to section 510(b) of the Act should be construed within the confines of section 2-1401 of the Code. *Id.* To be entitled to relief pursuant to section 2-1401, the petitioner must plead specific allegations supporting each of the following elements: (1) the existence of a meritorious claim; (2) due diligence in presenting the claim in the original action; and (3) due diligence in seeking relief under section 2-1401. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000). In this case, Karen's motion to enforce contains no allegations establishing any of these elements. Therefore, Karen was not entitled to modification of the judgment of dissolution regarding property distribution pursuant to section 2-1401 of the Code.

¶ 25 Karen argues that the trial court erred in dismissing her motion to enforce and petition for contempt because she alleged a claim for indirect civil contempt. Indirect civil contempt is committed when a party fails to comply with a court order. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). The review of a contempt finding necessarily requires review of the order upon which it is based. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 277. (2006). In contempt proceedings, the burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). In this case, the temporary orders that Karen sought to enforce terminated upon the entry of the dissolution judgment (see 750 ILCS 5/501(d)(3) (West 2012)); therefore, Doug could not have been forced to comply with these orders. *See In re Marriage of Blankshain*, 346 Ill. App. 3d 750, 752 (2004).

¶ 26 Karen argues that Doug violated the judgment of dissolution because Karen was awarded 55% of the Chase account, or $296,672, valued on March, 2012, but that between March 6, 2012, and the entry of the judgment of dissolution, June12, 2013, Doug withdrew $247,381 from the account.

¶ 27 Karen ignores that on October 24, 2013, the trial court clarified the judgment of dissolution ordering that the parties' shares of the Chase account was to be valued and divided as of the date of entry of the judgment of dissolution, June 12, 2013. Further the court ordered the parties to provide updated statements of all accounts. Karen did not allege that Doug violated this superseding order.

¶ 28 Further, Karen argues that Doug violated the judgment of dissolution because it provided that the parties "shall be responsible for all of their own attorneys' fees and costs *** associated with the [intentional infliction of emotional distress] ancillary litigation." Karen argues that Doug paid $144,000 from the Chase account for legal fees and costs related to this ancillary

litigation. Karen fails to recognize that she alleged that Doug made payments from the Chase account for the ancillary litigation before the judgment of dissolution was entered. Karen's argument is flawed because Doug cannot be held in contempt for violating an order that had not yet been entered. Accordingly, the trial court properly dismissed Karen's motion to enforce and petition for contempt.

¶ 29 III. CONCLUSION

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

¶ 31 Affirmed.