2017 IL App (2d) 170054-U
No. 2-17-0054
Order filed December 4, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF CHRISTINA R. YOLICH, Petitioner-Appellee, and JAMES A. YOLICH, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 01-DV-904 Honorable Mary H. Nader, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly rejected respondent's discovery objections (and thus properly found respondent in contempt), as those objections were untimely (and thus did not show good faith).

¶ 2 Respondent, James A. Yolich, appeals from an order of the circuit court of McHenry County finding him in indirect civil contempt for failing to comply with an order compelling the production of his income tax returns for the years 2002 through 2012. The trial court sentenced James to up to six months in the McHenry County jail unless he purged himself of contempt by producing the documents in question. On appeal, James seeks review of the discovery order

underlying the contempt finding. James argues that the trial court erred in compelling compliance with Christina's request to produce bank records and tax returns, because, according to James, the request was an improper "fishing expedition" and the material sought is not relevant to any matter properly before the court. James further argues that the trial court erred in overruling, as untimely, his objection to Christina's request for production. Finally, James argues that, in failing to comply with the trial court's discovery order, he acted in good faith to obtain appellate review of the order. Thus, according to James, the finding of contempt should be vacated. We affirm.

¶ 3 On April 15, 2002, the trial court entered a judgment dissolving the parties' marriage. The judgment incorporated a marital settlement agreement under which James was obligated to pay child support for the parties' two children in the amount of $498.08 semi-monthly plus 25% of all overtime pay and bonuses that James received. The agreement also provided that James would maintain a life insurance policy with a face value of not less than $100,000 naming the children as beneficiaries and would carry a major medical insurance policy for the children. On October 4, 2007, Christina filed a petition for a rule to show cause why James should not be held in contempt. The petition alleged, *inter alia*, that James "has failed and refused, and continues to fail and refuse, to pay child support in a timely fashion and to pay [Christina] her share of his bonuses" and that James had failed to maintain life insurance. The trial court issued a rule to show cause, but Christina's attorney withdrew while it was pending, and no order was entered on the rule to show cause.

¶ 4 On July 11, 2011, the Department of Healthcare and Family Services (Department) filed petitions to intervene and to modify child support. The Department alleged that it was providing child support services to Christina and that James's income had substantially increased. The

Department also filed a motion for an accounting to determine whether child support was in arrears. On August 5, 2011, the trial court entered an order increasing child support to $796.83 semi-monthly. The order also required James to supply "tax returns or other proof of overtime and bonuses from 2001 to present." On October 7, 2011, the trial court entered a rule to show cause why James should not be held in contempt for failing to provide tax returns or other proof of overtime pay and bonuses. On November 4, 2011, the trial court entered an order indicating that the motion for an accounting and the rule to show cause were withdrawn.

¶ 5 On December 8, 2015, attorney Paula Rieghns entered her appearance as counsel for Christina. Three days later, Rieghns filed a petition for a rule to show cause, alleging that James had paid no child support since July 2015. Rieghns withdrew as Christina's attorney without a rule to show cause being issued. On February 11, 2016, attorney Christopher Haaff entered an appearance for Christina. On the same date, Christina filed what was styled a "First Petition for Adjudication of Indirect Civil Contempt." The petition alleged, *inter alia*, that James had never paid 25% of his bonuses and overtime pay as child support. In his response, James stated that he "was paid a set salary and was never paid overtime nor bonuses."

¶ 6 On May 18, 2016, Christina served interrogatories and a request to produce on James. James's response was due June 17, 2016. On July 15, 2016, Christina filed a motion to compel James to respond to discovery. The trial court set the motion and other matters for a hearing on August 8, 2016. James's attorney, James Macchitelli, was unable to attend that hearing due to a medical issue. However, he did not notify Haaff that he would not attend. Haaff later filed a motion for sanctions for Macchitelli's failure to attend the hearing. The trial court continued the matter to August 22, 2016. On that date the trial court continued the matter to August 29, 2016. On August 29, 2016, the trial court entered an order continuing the hearing on the motion to

compel and other matters to September 19, 2016. The order further provided that "[James], via counsel, *shall* provide complete discovery compliance [and] affidavits for discovery at [Attorney] Haaff's office by 5:00 p.m. on *** [August 31]. [James] shall also provide explanations for any discovery requested but not provided." (Emphasis in original.)

¶ 7 At the September 19, 2016, hearing, Haaff advised the court:

> "[W]ith respect to the notice to produce, Judge, I have no documents still. It was basically the [*sic*] 'we object' or 'he doesn't have it' or 'we're still working on it," and the things we requested were things like the W-2s, tax returns, pay stubs, bank statements.
>
> So basically I got nothing from counsel, I got nothing from them in the last three weeks."

The trial court advised Macchitelli that the time to object to Christina's discovery requests had passed. The court stated, "you can't object, so you've got to answer." Macchitelli responded that the last tax return James filed was for 2013. Furthermore, Macchitelli indicated that James did not have copies of his tax returns for 2013 and earlier; he would need to get them from the tax professional who prepared them. The trial court entered a written order indicating that "[James's] discovery objections are overruled as untimely" and that James was to comply with the notice to produce by October 3, 2016. On September 29, 2016, Christina amended the previously filed motion for sanctions. In addition to the sanctions sought for Macchitelli's failure to attend the August 8, 2016, hearing, the amended motion sought sanctions for James's failure to comply with Christina's discovery requests.

¶ 8 At a hearing on October 4, 2016, Haaff indicated that James had produced his 2013 tax return and his W-2s for 2014 and 2015. Haaff added, however, "I still have a request for 2002

through 2012, inclusive, that remains outstanding because there is an issue in terms of extra child support that [James] potentially may owe, that we can't proceed on that issue and that part of the contempt petition without those items." The trial court entered a written order providing, in pertinent part:

> "By October 18, 2016, [James] *** shall order or obtain copies of [his] W-2s, 1099s, 1040s, and income tax returns from the years 2002 through 2012 by subpoena to the Internal Revenue Service and the Illinois Department of Revenue or by ordering copies of the returns or the tax transcripts."

The court also gave James 21 days to respond to the amended motion for sanctions. James filed his response on October 25, 2016. He argued that "[Christina's] actions in this case have been unethical as [Christina] is on a harassing fishing expedition as legitimate issues do not exist from 2002 through 2011 as this court has already adjudicated [James's] potential for arrearage."

¶ 9 On November 28, 2016, Christina filed a "Second Petition For Adjudication of Indirect Civil Contempt." The petition alleged that James had not complied with the October 4, 2016, order. On December 21, 2016, the trial court entered an order finding James in indirect civil contempt. The court sentenced defendant to up to six months in the McHenry County jail, but stayed the mittimus until January 20, 2017. The order provided that James could purge himself of contempt by providing Christina with proof of compliance with the October 4, 2016, order. Furthermore, the trial court expressly found "no just reason for delaying enforcement or appeal of [the December 21, 2016,] order." On January 20, 2017, James filed his notice of appeal.

¶ 10 Initially, in light of the First District's recent decision in *In re Marriage of Teymour*, 2017 IL App (1st) 161091, we feel obliged to discuss the basis of our jurisdiction. When James filed his notice of appeal, there were still claims pending in the trial court, most notably the

underlying petition for contempt for, *inter alia*, failure to pay child support. In addition, Christina filed a petition for attorney fees in connection with the contempt proceedings at issue here. That petition was also pending. Appeals from judgments disposing of fewer than all of the claims in an action are governed by Illinois Supreme Court Rule 304 (eff. Mar. 8, 2016). Rule 304(a) (eff. Mar. 8, 2016) provides, in pertinent part, "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both."

¶ 11 In *Teymour*, the First District held that, where other claims were pending and there was no Rule 304(a) finding, an order finding a party in contempt was not appealable. In that case, however, the trial court had not imposed a penalty for contempt. *Id.* ¶ 5. The decision implies that a Rule 304(a) finding would have changed the outcome. However, our supreme court has held that "only contempt judgments that impose a penalty are final, appealable orders." *In re Marriage of Gutman*, 232 Ill. 2d 145, 153 (2008). Thus, a Rule 304(a) finding would have made no difference in *Teymour*. On the other hand, under Illinois Supreme Rule 304(b)(5) (eff. Mar. 8, 2016), "[a]n order finding a person or entity in contempt of court which imposes a monetary or other penalty" is appealable *without* a Rule 304(a) finding. Here, as seen, the order does contain a Rule 304(a) finding. However, contrary to *Teymour*, that finding does not make the order appealable. Rather, the order is appealable under Rule 304(b)(5) because, unlike in *Teymour*, the contempt order imposed a penalty for contempt.

¶ 12 Before proceeding, we note that, although Christina has not filed an appellee's brief, the record and the issues raised on appeal are such that review of the merits is appropriate under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) ("the

record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief").

¶ 13 Turning to the merits, James challenges the finding of contempt by asserting that the October 4, 2016, order requiring production of his tax returns was erroneous. "Where an individual appeals a contempt judgment imposed for violating a discovery order, that discovery order is also subject to review." *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723 (1998). James argues that Christina's allegation that he failed to pay 25% of overtime pay and bonuses as child support is an unsupported conclusion. According to James, in the absence of any evidence that he did, in fact, receive any such income, the request for tax returns is an improper "fishing expedition." James also argues that, because prior rules to show cause did not establish any child support arrearages for failure to pay a percentage of overtime pay and bonuses, he should not now be required to produce his tax returns. The trial court ruled that James's objections to the request to produce were untimely. Accordingly the trial court refused to consider the objections. James argues that the trial court erred in refusing to consider his objections. For the reasons stated below, we disagree. Consequently, we likewise refuse to consider the objections, because to do otherwise would permit James to circumvent a proper trial court ruling.

¶ 14 Requests to produce are governed by Illinois Supreme Court Rule 214 (eff. July 1, 2014), which provides in pertinent part:

> "(a) Any party may by written request direct any other party to produce for inspection, copying, reproduction photographing, testing or sampling specified documents, *** objects or tangible things *** whenever the nature, contents, or condition of such documents, objects, [or] tangible things *** is relevant to the subject matter of the action. The request shall specify a reasonable time, which shall not be less than 28

days except by agreement or by order of court, and the place and manner of making the inspection and performing the related acts.

***

(c) *** A party served with the written request shall (1) identify all materials in the party's possession responsive to the request and copy or provide reasonable opportunity for copying or inspections *** or (2) *serve upon the party so requesting written objections on the ground that the request is improper in whole or in part.* *** Any objection to the request or the refusal to respond shall be heard by the court upon prompt notice and motion of the party submitting the request." (Emphasis added.)

¶ 15 The request to produce was served on May 18, 2016, and that request required compliance within the 30-day period ending on June 17, 2016. At a hearing on August 29, 2016, Christina's attorney advised the trial court that Christina had still received no response to the request. At the next hearing, which took place on September 19, 2016, Christina's attorney indicated that he had received objections from James.[1] Thus, the first objections were at least 11 weeks late. The first written objections *found in the record* appear in James's October 25, 2016, response to Christina's amended motion for sanctions.

¶ 16 In challenging the trial court's refusal to consider his objections, James relies on this court's decision in *Defilippis v. Gardner*, 368 Ill. App. 3d 1092 (2006). In that case, the plaintiffs brought a medical malpractice and loss-of-consortium action against the defendant. In their interrogatories to the defendant, the plaintiffs sought the names and addresses of, and other information concerning, nonparty patients who had undergone a particular medical procedure.

[1] Apparently, the objections were shown to the trial court, but they are not part of the record on appeal.

The plaintiffs also requested production of those patients' medical records. The defendant objected on the basis that the information and records sought were subject to the physician-patient privilege. The trial court granted the plaintiffs' motion to compel the defendant to answer the interrogatories and produce the requested records. The defendant requested to be found in contempt. The trial court granted the request and the defendant appealed. On appeal, the plaintiffs argued that the defendant's response to discovery was untimely and the defendant therefore waived his objections. This court disagreed:

> "[W]e reject the plaintiffs' argument that the defendants waived their right to object to the discovery requests by failing to timely respond. The plaintiffs have not cited any decision holding that the trial court may not allow discovery responses or objections beyond the deadlines in the rules. *** Furthermore, the plaintiffs have failed to cite any case that holds that a doctor has the power to waive a patient's right to confidentiality. The privilege is for the patient's benefit, not the physician's. [Citation.] Accordingly, we reject the plaintiffs' claim that the defendants' untimely objection to the plaintiffs' discovery requests results in waiver of their objection." *Id.* at 1095.

¶ 17 James's reliance on *Defilippis* is misplaced. *Defilippis* noted the lack of authority that the trial court "may not allow" (*id.*) late discovery responses or objections. This means that the trial court may allow late responses or objections. It does not mean that the trial court *must always* do so, regardless of the circumstances. In this respect it is obviously significant that, unlike in *Defilippis*, the discovery request at issue here did not implicate the interests of nonparties. James's objections—that the documents requested are irrelevant or that Christina is on a "fishing expedition"—bear mostly on considerations of convenience. Given, in particular, the length of

James's delay in objecting to Christina's discovery requests, we cannot say that the trial court erred in refusing to consider those objections.

¶ 18 Finally, James argues that his refusal to comply with the request for production was "made in good faith as it merely sought appellate review of his unsuccessful assertions of discovery objections." James contends that the finding of contempt should therefore be vacated. See, *e.g.*, *Lindsey v. Butterfield Health Care II, Inc.*, 2017 IL App (2d) 160042, ¶ 19. We disagree. If James sought appellate review in good faith, he would not have waited so long to voice his objections. The delay here is antithetical to good faith.

¶ 19 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 20 Affirmed.