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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
CAROL FLYNN,)	of Du Page County.
)	
Petitioner-Appellee,)	
)	
and)	No. 10-D-1538
)	
JAMES FLYNN,)	Honorable
)	Brian R. McKillip,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: This court lacked jurisdiction to review trial court's order striking from the call husband's petition for a rule to show cause because it was not a final order. Trial court correctly determined that it lacked jurisdiction to hear motion to enforce a settlement agreement relating to judgment that was on appeal. Trial court did not abuse its discretion in awarding attorney fees pursuant to 750 ILCS 5/508(b).

¶ 1 The circuit court of Du Page County entered a judgment dissolving the marriage of the parties, James and Carol Flynn. On August 5, 2011, James filed a notice of appeal challenging certain aspects of that judgment. In the months thereafter, the parties continued to raise various disputes in court. James now appeals the trial court's resolution of those disputes. Carol filed a

motion to dismiss some aspects of the appeal, asserting a lack of jurisdiction, which we took with the case. We agree that we lack jurisdiction to review one of the rulings that James appeals. As to the remaining orders, we affirm.

¶ 2

BACKGROUND

¶ 3 A short recounting of the procedural history of this case is in order. On June 24, 2011, the trial court entered a judgment of dissolution. Among other things, the judgment provided that James was to pay Carol permanent maintenance in the amount of \$1,750 per month, and that certain personal property, including the property in the home, the property held within two storage units, and “the money in the jug,” was to be divided equally. Carol was to return one of the parties’ two computers to James. James was to pay Carol \$1,400 toward her attorney fees, in equalization of those fees. Regarding the marital home, which was subject to a home equity loan, the judgment provided as follows:

“The parties’ residence *** will be sold and the proceeds shall be used to retire the home equity loan and any other credit card debt or other liability existing at the present time ***. *** The home will be listed for sale with a realtor chosen by the parties and the parties will cooperate with the realtor to sell the home. [The following sentence was written in the margin by hand.] Any disputes related to the sale of the home shall be reserved for court determination.

While the home is listed for sale, Respondent [James] will have exclusive possession of the home and shall be responsible for the real estate taxes to closing and all utilities. The parties will equally contribute to the monthly payment as obligated by the home equity loan. If it is interest-only, that is all the parties will be required to pay until the home is sold. Any

proceeds after the home equity loan, other liabilities, and customary closing costs are paid, shall be divided equally between the parties.”

¶ 4 On August 5, 2011, James filed a notice of appeal attacking the judgment. On September 19, Carol filed a petition for a rule to show cause, stating that James had failed to list the marital home for sale, had not given her an accounting of the money in the jug nor half of those funds, and had not paid her \$1,400 for attorney fees as ordered. In her petition, Carol sought, under section 508(b) of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(b) (West 2010)), attorney fees arising from the necessity of filing the petition. On September 29, the trial court entered an order giving James 28 days to file a response to the petition, setting a hearing on the petition for November 7, and providing that the rule to show cause would be returnable *instanter* on the date of the hearing if it were issued.

¶ 5 On November 3, 2011, James filed his own petition for a rule to show cause, in which he alleged that Carol had not paid her half of the monthly home equity loan payments, had not returned one of the parties’ computers to him, and had not given him half of the property contained in the storage units. James also sought attorney fees under section 508(b). On that same date, James filed a response to Carol’s petition, in which he argued that: the judgment of dissolution did not contain any date by which he was supposed to have listed the home for sale; under Illinois law he was entitled to an opportunity to purge any finding of contempt; and he had now listed the home for sale with a licensed real estate agent. James sought a hearing and asked that the court deny Carol’s petition in whole, including her request for attorney fees.

¶ 6 On November 7, the date set for the hearing on Carol’s petition, no hearing was held. Instead, an order containing the following provisions was entered:

“1) The petitioner’s petition for rule to show cause is hereby withdrawn.

2) Respondent’s oral motion to file untimely response to petition for rule to show cause is granted.

3) Respondent’s petition for rule to show cause filed herein is hereby set for status on 12/14/11 at 9:25 a.m., petitioner granted 21 days to respond. Respondent withdrawing the portions pertaining to the computer & home equity line.

4) Respondent shall pay to petitioner \$1,400 and one-half of the amount in the jug within 30 days.

5) Petitioner’s obligation under paragraph J of the judgment to pay ½ of the home equity payment is abated for the period of June 2011 to November 2011, hereby crediting [*sic*] petitioner for the months of November 2011 and December 2011.

6) Because the liabilities were to be paid from the sale of the home, the issue of the responsibility for the interest for the time period of June 2011 to November 2011 is hereby reserved.

7) The petitioner is granted leave to file a fee petition against respondent for enforcement of the judgment.”

This order was written out by the parties’ attorneys.

¶ 7 On November 28, 2011, Carol filed a petition for attorney fees pursuant to section 508(b), contending that she had incurred attorney fees as a result of James’s failures to obey the judgment of dissolution alleged in her earlier petition for a rule to show cause.

¶ 8 On December 8, 2011, James filed a “motion to enforce.” In that motion, James alleged that on November 7, 2011, after the written order was entered, the parties met without their attorneys to

discuss the case. They drafted a one-page document which was handwritten by Carol and bore both parties' signatures. The document contained the following statements, among others: "\$100 wk for 5 years"; "drop the appeal"; "you keep contents of house/I keep contents of storage"; "you refinance home and truck in your name"; "pay \$23,000 to Carol"; "pay off truck"; "I continue to pay student loan/you continue to pay credit cards"; "Carol has sole rights to lawsuit"; "you do not pay me \$1400 legal fees"; and "you do not give me any change from jar." James alleged that the document was an enforceable settlement agreement and that, in reliance on it, he had instructed his attorney to stop working on the appeal, but two weeks after the parties signed the agreement Carol told James that she had changed her mind after talking to her attorney. James sought to enforce the alleged agreement. On January 3, 2012, following a hearing, the trial court denied the motion to enforce on the ground that the agreement was a modification of the judgment of dissolution and that, because that judgment was currently on appeal, the trial court had no jurisdiction to make such a modification.

¶ 9 On January 17, 2012, Carol's petition for section 508(b) attorney fees was heard. James argued that it should be denied because (a) the petition for a rule to show cause had been withdrawn and there was no finding that he had willfully disobeyed the judgment; (b) he had never had an opportunity to present his defense to the petition because it was withdrawn before being heard, and so it would be unfair now to impose fees; and (c) in fact he had good cause for his actions because the judgment was vague as to who bore the burden of listing the house for sale and the date by which the house was to be listed. The trial court granted the petition for fees in the amount of \$1,300, stating, "If I am required to make a finding [prior to awarding fees under section 508(b)], I will make a finding that Mr. Flynn's conduct is without cause or justification." The trial court stated that its

finding was based not only on James's failure to list the house, but also on his failure to pay Carol \$1,400 toward her attorney fees and his failure to give her one-half of the money in the jug.

¶ 10 James then asked that his own petition for a rule to show cause be heard. After clarifying that James had withdrawn (via the November 7 order) some but not all of the allegations in that petition, the trial court inquired as to whether the rule had issued. James's attorney repeatedly maintained that the rule had issued on November 7, but the trial court, growing irate at what it viewed as a misstatement of the facts, pointed out that the order only set James's petition for status and did not include any language to the effect that the rule had issued. James's attorney continued to assert that the rule issued on November 7. The trial court then said:

“THE COURT: Well, okay. We are done for today. We are done for today. Draw an order with respect to fees.

Your Petition for Rule was not ruled upon. Therefore, a Rule did not issue. And I don't know how you can read that order any other way. The Petition for Rule was set for status.

* * * [James's attorney continues to argue the point.]

Okay. Thank you. I am done. I am done.

JAMES'S ATTORNEY: I am asking that the Rule issue today, your Honor.

THE COURT: No. You re-notice your Petition for Rule.

JAMES'S ATTORNEY: Okay.

THE COURT: File a new one, in fact. I looked at your Petition for Rule. And it's about 14 paragraphs and all sorts of different allegations. I want to know what you're seeking a rule on.”

The written order entered on January 17, 2012, ordered James to pay Carol \$1,300 in attorney fees pursuant to section 508(b) and stated that James's petition for a rule to show cause was "stricken from today's call." On February 1, 2012, James filed a notice of appeal, identifying the trial court's orders of January 3 and 17, 2012, as the orders from which he was appealing.

¶ 11

ANALYSIS

¶ 12 On appeal, James challenges three aspects of the trial court's orders: the trial court's ruling in its January 3 order that it had no jurisdiction to consider James's motion to enforce his settlement agreement with Carol; the January 17 striking of James's petition for a rule to show cause; and the January 17 grant of \$1,300 in section 508(b) attorney fees. As part of his first argument that the trial court erred in concluding that it had no jurisdiction to enforce the settlement agreement, James argued that if in fact the trial court was correct about this then it also had no jurisdiction to enter the order of November 7, 2011, in which it abated for six months Carol's obligation to pay one-half of the home equity loan payment.

¶ 13 The brief filed by James on appeal does not comply with Supreme Court Rule 341(h)(4) (eff. July 1, 2008), which requires the appellant to include a statement explaining why this court has jurisdiction to consider the appeal. Carol filed a motion to dismiss portions of the appeal. She argued that James could not challenge the provision of the January 17 order striking James's petition from the call because it was not a final and appealable order, as it did not terminate the litigation with respect to James's petition. She also argued that James could not challenge the trial court's jurisdiction to enter the November 7, 2011, order for two reasons: first, because any appeal of that order would be untimely and so we would lack jurisdiction over such an appeal; and second, because

it should be viewed as an agreed order and as such is not appealable. We ordered the motion to dismiss taken with the case. We now grant it in part and deny it in part.

¶ 14 Carol is correct that we lack jurisdiction to review the trial court's order that James's petition for a rule to show cause was stricken from the call on January 17, 2012, because it was not a final order and hence was not appealable. As our supreme court has explained, apart from narrow exceptions created by statutes and supreme court rules, the jurisdiction of the appellate court is limited to reviewing final orders only. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). "A final order is one that 'disposes of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.'" *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1069 (2008), quoting *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1103 (1991). An order is final as to a particular issue, and therefore appealable, if it contains a determination of the issue on the merits or else terminates consideration of the issue in such a way that the issue no longer remains subject to future action in the trial court. *Id.*; *Verdung*, 126 Ill. 2d at 553. Here, contrary to James's arguments, the provision of the January 17 order striking James's petition from the call for that day merely required James to re-notice the petition for hearing, and in no way terminated the trial court's consideration of the issues raised in that petition. Indeed, the trial court's verbal comments make it clear that the trial court was not refusing to hear James's petition. Rather, given the amount of time already devoted to the case on that day, the trial court was simply directing James to set the petition for hearing on another day. Similarly, although the trial court's comments suggested that it would prefer James to file a new petition containing only the allegations he still wished to raise (in light of his November 7, 2011, withdrawal of certain allegations in the old petition), the trial court never stated that it would not consider James's old petition further.

Accordingly, James's petition remains pending in the trial court and we have no jurisdiction to hear James's appeal of the order striking it from the call on January 17, 2012. We therefore grant Carol's motion to the extent that it seeks to dismiss this portion of the appeal.

¶ 15 We deny the remainder of Carol's motion to dismiss. Leaving aside Carol's suggestion that we dismiss the entire appeal because we lack jurisdiction over one portion (an approach unsupported by any law), her arguments regarding James's references to the November 7, 2011, order are misplaced. James is not directly appealing that order, and thus he was not required to file a notice of appeal within 30 days of that order. Rather, James seeks to buttress his arguments regarding the January 3 order by suggesting that the trial court's basis for that order—that it lacked jurisdiction to decide the motion—was inconsistent with its entry of the November 7, 2011, order. Nothing about this argument requires us to dismiss any portion of the appeal. Moreover, to the extent that James *is* attempting to argue that the November 7, 2011, order should be vacated on the ground that the trial court lacked jurisdiction to enter it, he may do so within the context of a timely appeal in the same case. If a court lacks jurisdiction to enter an order, that order is void and may be attacked at any time. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). We also reject Carol's arguments that the November 7, 2011, order cannot be appealed because it was an agreed order. Regardless of the correctness of this characterization (and in our view it is far from clear that this order was simply the judicial entry of a private agreement), the fact that parties agreed to the entry of an order does not completely preclude review of its provisions. See *In re Matter of Haber*, 99 Ill. App. 3d 306, 309 (1981) (listing grounds upon which an agreed order may be challenged, including fraudulent misrepresentation, coercion, incompetence, newly discovered evidence, etc.). We therefore deny the remainder of the motion to dismiss, and turn to a consideration of James's appeal.

¶ 16 James argues that the trial court erred in concluding, on January 3, 2012, that it lacked jurisdiction to entertain his motion seeking to enforce the parties' alleged settlement agreement reached on November 7, 2011. James concedes that a trial court cannot modify a judgment when an appeal of that judgment is pending. *Moening v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866 ¶ 22. However, he contends that, despite the pendency of his appeal from the judgment of dissolution, the trial court retained jurisdiction over the parties' settlement agreement because it was "independent of or collateral or incidental to" the judgment. *Id.* James argues that the settlement agreement was "a separate cause of action" because it was a contract, and it was entered into after the appeal from the judgment of dissolution. What this argument ignores is that the settlement agreement cannot be characterized as separate from or incidental to the judgment of dissolution because the entire purpose of the settlement agreement was to modify the terms of that judgment. Specifically, the settlement agreement contained statements that would modify the judgment's allocation of the marital property including personal property and debts, rewrite the trial court's award of maintenance and attorney fees to Carol, and mandate that James dismiss the appeal. A trial court has no jurisdiction to enforce an agreement that purports to settle a matter currently on appeal. *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 375 (2005); *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 431-32 (2005). We therefore affirm the trial court's order of January 3 finding that it had no jurisdiction to hear James's motion to enforce the settlement agreement.

¶ 17 James suggests that, if the trial court lacked jurisdiction to consider his motion to enforce, then by the same token it lacked jurisdiction to enter the order of November 7, 2011, which he contends "modified" Carol's obligation under the judgment of dissolution to pay one-half of the

monthly home equity loan payments until the marital home was sold. However, we do not read the language of the November 7, 2011, order as modifying Carol's obligation under the judgment of dissolution. Rather, it merely temporarily suspended ("abates") that obligation for six months. Abating an obligation is not the same thing as terminating or modifying it. See *In re Marriage of Bothe*, 309 Ill. App. 3d 352, 356 (1999) (trial court properly abated obligation rather than terminating it). Here, the record does not demonstrate that the trial court intended to permanently relieve Carol of her obligation, and the six-month time limit on the abatement of that obligation indicates that it was intended as a temporary suspension of the obligation during a period when James had not performed his own obligations. James cites no law supporting his argument that a temporary suspension of an obligation is the equivalent to the modification of that obligation. Accordingly, we reject his arguments that the trial court lacked jurisdiction to enter the order of November 7, 2011.

¶ 18 James's final argument on appeal is that the trial court erred in granting Carol's motion for attorney fees pursuant to section 508(b) of the Act, because Carol had withdrawn her petition for a rule to show cause and he had no opportunity to present his defenses to that petition. James also argues that his failure to list the marital home for sale did not amount to noncompliance with the judgment of dissolution because the judgment did not set any deadline by which the listing must occur.

¶ 19 Section 508(b) states, in pertinent part:

"In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay

promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2010).

In considering whether to grant a motion for section 508(b) attorney fees, the trial court has discretion in determining whether the nonmovant's alleged noncompliance was justified or unjustified. *In re Marriage of Berto*, 344 Ill. App. 3d 705, 716 (2003). Accordingly, we review a trial court's findings regarding justification for abuse of discretion. However, if the trial court finds that the nonmovant did not comply with a court order and that the noncompliance was without compelling cause or justification, the language of the Act mandates that the court award attorney fees to the movant. *Id.* A finding of contempt, such as that produced by a rule to show cause proceeding, "is sufficient to require an award of fees under section 508(b), but such a finding is not necessary." *Id.* at 717. Once the movant demonstrates that the nonmovant has not complied with a court order, the burden of showing that the noncompliance was justified is on the nonmovant. *Id.*

¶ 20 Here, James initially attacks the process by which attorney fees were imposed upon him. James argues that he cannot be subject to section 508(b) fees because Carol withdrew her petition for a rule to show cause and he was never found in contempt. It is well-established, however, that a finding of contempt is not necessary for an award of fees under section 508(b). *Id.* (citing cases). The record reflects that Carol's withdrawal of her petition rested not on any weakness in the petition, but on James's decision to begin complying with the judgment of dissolution: as of the date set for the hearing on Carol's petition, James had listed the house for sale, and entered into an order promising to comply with the other provisions of the judgment within 30 days by paying Carol the \$1,400 in attorney fees relating to the dissolution and giving her one-half of the money in the jug. However, the mere fact that a party eventually complies with a court order does not mean that the

other party cannot recoup the fees expended in bringing the noncompliance to the court's attention. As we stated in *Berto*, "Respondent placed petitioner in the inexorable position of having to engage the services of counsel and litigating this matter so that she could receive what was rightfully owed her" (*id.* at 719), and she was therefore entitled to reimbursement under section 508(b). The fact that James was never found in contempt does not preclude the award of attorney fees under section 508(b).

¶ 21 James also argues that he was never given an opportunity to "purge his contempt" as required, citing *In re Marriage of Harvey*, 136 Ill. App. 3d 116, 118 (1985). Here James appears to confuse the trial court's finding that his failure to comply with the judgment of dissolution was without compelling cause or justification with a finding of contempt. The two are not the same. A finding of contempt typically arises as the result of a petition for a rule to show cause, involves a specific procedure, and can result in a variety of sanctions being levied. By contrast, a court may issue a finding of no compelling cause or justification whenever the evidence presented in a section 508(b) petition for attorney fees supports such a finding. See generally *Berto*, 344 Ill. App. 3d at 716-17 (explaining the difference between the two). James was never given an opportunity to "purge his contempt"—a step that must be taken once a person has been found in contempt but before the person can be punished for that contempt—because he was never found in contempt. Thus, the requirement to allow a purge did not arise. James also argues that, because the petition for a rule to show cause was withdrawn, he was never afforded "an opportunity to defend himself." However, the record refutes this contention. At the hearing on January 17, 2012, James had the opportunity to argue why he should not have section 508(b) attorney fees imposed, and he in fact took that opportunity, arguing that the judgment of dissolution did not set a deadline for listing the house, and

thus his failure to do so did not constitute willful noncompliance. We find no error in the procedure used by the trial court in granting Carol's motion for section 508(b) attorney fees.

¶ 22 James's final contention regarding the award of attorney fees is that the trial court abused its discretion in finding that his failure to comply with the judgment of dissolution was without compelling cause or justification, because there was no deadline by which he was required to list the house for sale. The trial court rejected this argument, noting that James evidently had not taken any steps to list the house until immediately before the November hearing date for Carol's petition, despite the fact that the judgment had been entered in June, and Carol's attorney stated that they had contacted James repeatedly in the interim about listing the house. Moreover, it was undisputed that James also had failed to pay Carol the \$1,400 in attorney fees and half of the money in the jug as required by the judgment, and James offered no justification for his noncompliance in that respect. Accordingly, we hold that the trial court did not abuse its discretion in finding that James's noncompliance with the judgment of dissolution was without compelling cause or justification, and we affirm its award of \$1,300 in attorney fees to Carol pursuant to section 508(b) of the Act.

¶ 23 **CONCLUSION**

¶ 24 We lack jurisdiction to hear an appeal from that portion of the trial court's order of January 17, 2012, striking from the call James's petition for a rule to show cause, and therefore dismiss that portion of the appeal. We affirm the remainder of the order of January 17, 2012, and the order of January 3, 2012.

¶ 25 Dismissed in part and affirmed in part.