

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (3d) 110651-UB

Order filed December 18, 2012  
Modified Upon Denial of Rehearing April 4, 2013

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

FIRST CHICAGO BANK & TRUST, an	)	Appeal from the Circuit Court
Illinois state-chartered bank and successor	)	of the 12th Judicial Circuit,
to Labe Bank,	)	Will County, Illinois,
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-11-0651
	)	Circuit No. 10-CH-3107
JACK ZAUSA	)	
	)	
Defendant-Appellant	)	
	)	
(Zausa Development Corporation, an	)	
Illinois corporation; 2035 W. Arthur	)	
Development Company, an Illinois limited	)	
liability company; Unknown Owners; and	)	
Non-Record Claimants,	)	
	)	
Defendants).	)	Honorable Mark Thomas Carney,
	)	Judge, Presiding.

---

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Justice Wright concurred in part and dissented in part.

**ORDER**

¶ 1 *Held:* The trial court's imposition of a fixed 30-day sentence for indirect civil contempt was improper. Affirmed in part and reversed in part; cause remanded with directions.

¶ 2 Following a judgment against the defendant, Jack Zausa, the plaintiff, First Chicago Bank & Trust, pursued postjudgment supplemental proceedings in the circuit court of Will County, including a citation to discover assets.

¶ 3 The defendant testified at a citation examination as to certain assets owned or possessed by his other entities, namely Diamond Zausa, LLC, and 2035 W. Arthur Development Company. Following this examination, the plaintiff filed a motion for turnover order and contempt, alleging that defendant had testified falsely about assets owned by his various companies, and that he had transferred said assets in violation of the citation lien injunction pursuant to section 2-1402 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1402 (West 2012)).

¶ 4 The trial court granted plaintiff's motion for contempt on June 17, 2011, finding the defendant in indirect civil contempt and sentencing him to "a term of imprisonment in the Will County jail, not to exceed 30 days." The trial court further ordered that defendant could purge himself of that contempt by tendering \$18,200 to the plaintiff within 14 days. On August 17, the trial court heard arguments on defendant's motion to vacate the contempt order and, ultimately, modified the order to reflect that defendant could purge himself of the contempt either before or during his imprisonment.

¶ 5 The defendant appeals, claiming, *inter alia*, that the trial court erred in entertaining simultaneous criminal and civil contempt proceedings in violation of his fifth amendment right against self-incrimination and that due to the criminal nature of the proceedings, he was not

afforded proper due process. We affirm in part and reverse in part; cause remanded with directions.

¶ 6

#### BACKGROUND

¶ 7 The underlying case to this action was a commercial mortgage foreclosure filed by Northbrook's predecessor, First Chicago Bank and Trust (First Chicago), against Zausa Development Corporation (ZDC) as mortgagor, and Jack Zausa as guarantor. A monetary judgment was entered against Zausa and his corporation on November 16, 2010, for \$3,185,950.51. On December 15, 2010, First Chicago instituted postjudgment supplemental proceedings and filed a citation to discover assets.

¶ 8 Zausa was the member/manager for a number of different entities, including ZDC, Zausa/Diamond, Diamond Zausa, LLC, and 2035 W. Arthur Development Company. The record reflects that of those entities, all but ZDC were defunct and had been involuntarily dissolved by the Illinois Secretary of State.

¶ 9 At issue was an \$18,200 payment made on March 1, 2011, to Diamond Zausa, LLC, from John K. Trotter pursuant to a farm lease between the two parties. On March 2, 2011, that check was negotiated by 2035 W. Arthur Development Company. First Chicago argued that the negotiation of the check from Diamond Zausa, LLC, to 2035 W. Arthur Development was a transfer of assets that occurred in violation of the citation lien injunction under section 2-1402 of the Code (735 ILCS 5/2-1402 (West 2012)).

¶ 10 On March 15, 2010, Jack Zausa appeared at the offices of plaintiff's counsel to be deposed in a citation examination. According to Zausa's testimony, he owned 100% of the shares

of ZDC and ZDC, in turn, was the sole member of Zausa Diamond, LLC. Zausa was questioned about the property located at Berta Road and Route 13 in Grundy County, Illinois, as this was the subject property of the farm lease. In response, Zausa testified that Zausa Diamond, LLC, owned the property, but that he did not know if anyone was leasing the property. He further stated that he was not receiving rent payments from anyone, and when asked if someone else would have been leasing the property out, he stated "[n]ot that I recall."

¶ 11 Subsequent to Zausa's deposition, First Chicago brought a motion for turnover order and contempt on May 2, 2011, asking for among other things: (1) entry of a turnover order directing citation respondents Jack Zausa and ZDC to turn over to First Chicago certain funds obtained by them subsequent to the service of the citations to discover assets; (2) entry of an order of civil and/or criminal contempt against Jack Zausa for violating a citation lien and making knowingly false testimony in the course of a citation examination; (3) entry of an order requiring Jack Zausa to account for all cash he has received or possessed since the inception of the citation proceeding and turnover documents; and (4) entry of an order requiring Jack Zausa to pay the reasonable costs associated with the bringing of this motion.

¶ 12 In support of its motion, First Chicago attached a number of documents, including the lease between John Trotter and Diamond Zausa, LLC, on the Berta Road property that was executed by Jack Zausa on January 1, 2011, a copy of the \$18,200 check that was made payable to Diamond Zausa, LLC, and negotiated by 2035 W. Arthur Development, and documents from the Secretary of State showing that Jack Zausa was the manager of both Zausa/Diamond, LLC, and 2035 W. Arthur Development, and that both were involuntarily dissolved. Following this

motion, the court granted the defendant additional time to retain counsel and file a response to First Chicago's motion for turnover order and contempt. The trial court then set the motion for hearing on June 17, 2011.

¶ 13 On June 6, 2011, defendant filed a response in opposition to the plaintiff's motion for turnover and contempt, arguing that Zausa's responses at the citation examination were truthful with respect to Zausa individually. The defendant also argued that at no time had the plaintiff issued citations against 2035 W. Arthur Development or Zausa/Diamond, LLC, thus, those companies were not subject to any restriction on the transfer of assets pursuant to a citation lien.

¶ 14 Zausa appeared with counsel at the June 17 hearing. At no time did counsel object to the proceedings, either on fifth amendment grounds or procedural due process concerns. Zausa's counsel similarly did not request a stay of the hearing. After hearing arguments, the trial court issued a written order finding Zausa in indirect civil contempt and sentencing him to a term of imprisonment not to exceed 30 days in the Will County jail beginning on June 31, 2011. Per the order, Zausa could purge himself of the contempt and the sentence by paying First Chicago \$18,200 before June 31, 2011.

¶ 15 Zausa hired new counsel, who filed an appearance on Zausa's behalf along with a motion to vacate the June 17 order. The trial court denied the motion to vacate, but modified its earlier order to allow Zausa to purge his contempt at any time, either before or during his incarceration.

¶ 16 This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 The defendant first contends that the trial court violated his constitutional rights by

allowing the simultaneous pursuit of indirect criminal and civil contempt, thus, the contempt orders against him are void. Specifically, defendant alleges that the trial court should have stayed the civil proceedings pending the resolution of his parallel criminal case. In support of that contention, defendant cites to *People ex rel. Hartigan v. Kafka & Sons Building & Supply Co., Inc.*, 252 Ill. App. 3d 115, 120 (1993), where this court affirmed the stay of civil proceedings pending the resolution of the criminal proceeding because there was a nexus between the risk of criminal conviction and the information requested.

¶ 19 The defendant's contention is easily dismissed here, as the *Kafka* case presents a multitude of distinguishable facts. In *Kafka*, the defendant faced numerous violations of the Consumer Fraud and Deceptive Business Practices Act, as well as the Uniform Deceptive Trade Practices Act. *Id.* at 117. Following a rule to show cause filed by the Attorney General, the defendant filed a motion to stay the civil proceedings, stating that he had been indicted in Cook County on eight felony counts of forgery and theft deception stemming from his home repair and remodeling business. *Id.* at 118. In affirming the trial court, this court found that defendant had shown a reasonable fear of self-incrimination based on a nexus between the civil matter and the pending criminal indictment, thus, a stay of the civil proceeding was warranted. *Id.* at 119-20.

¶ 20 Here, there was no parallel criminal case pending in which defendant could have feared incriminating himself. Nor does the record contain evidence that defendant feared that criminal charges could have been brought against him in the future. Per the trial court's own language, Jack Zausa was found in indirect civil contempt, not criminal contempt. The fact that a jail sentence was involved does not serve to transform a civil proceeding into a criminal one.

Accordingly, we find that there were no improper parallel criminal and civil contempt proceedings.

¶ 21 The defendant's next argument focused on procedural due process. Specifically, the defendant contends he was not afforded an evidentiary hearing, that no testimony was taken, that he was not afforded the burden of proof beyond a reasonable doubt, and that the June 17, 2011, order levied criminal punishment against him. Had this been an instance of criminal contempt, or indirect criminal contempt, defendant's assertions would be correct. He would enjoy the same protections an actual criminal defendant would, including a presumption of innocence, the privilege against self-incrimination, and the charges of contempt would have to be proven beyond a reasonable doubt. It is well settled that "[i]ndirect criminal contempt proceedings must generally conform to the same constitutionally mandated procedural requirements as other criminal proceedings. One charged with indirect criminal contempt is entitled to \*\*\* know the nature of the charge against him, to have it definitely and specifically set forth by citation or rule to show cause, and \*\*\* [have] an opportunity to answer \*\*\*. [Citation.] Also applicable to a respondent in an indirect criminal contempt proceeding are the privilege against self-incrimination, the presumption of innocence, and the right to be proved guilty beyond a reasonable doubt." (Internal quotation marks omitted.) *City of Quincy v. Weinberg*, 363 Ill. App. 3d 654, 663 (2006) (quoting *In re Marriage of Betts*, 200 Ill. App. 3d 26, 58-59 (1990)). However, as we explained in the preceding paragraphs, this was not a case of criminal contempt, thus, the higher standard afforded procedural due process in criminal cases was inapplicable here.

¶ 22 Nonetheless, we do not believe we can fully address defendant's claims on this point

without taking a moment to analyze and distinguish indirect civil versus indirect criminal contempt. First, civil contempt proceedings have two fundamental attributes: (1) the contemnor must be capable of taking the action sought to be coerced; and (2) no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order. *In re Marriage of Betts*, 200 Ill. App. 3d at 44 (citing *People ex rel. Melendez v. Melendez*, 47 Ill. 2d 383, 387 (1971)). We find that *In re Marriage of Depew* succinctly presents the state of the law on this point:

"Civil contempt is coercive in nature rather than punitive; the finding of civil contempt results from failure to do something which the court has ordered for the benefit or advantage of another party to the proceeding, and the court acts to compel the contemnor to obey the order for the benefit of that other party. [Citation.] In civil contempt proceedings the contemnor must have the opportunity to purge the contempt, *i.e.*, be provided with the keys to his cell even after he has been imprisoned, and must also have the power to comply with the order. [Citation.] In contrast, criminal contempt is an act committed against the majesty of the law in disrespect of the court or its process, and the court acts to preserve its dignity by punishing the wrongdoer. [Citation.] Criminal contempt sanctions are imposed for the purpose of punishing past misconduct. [Citation.] The test for determining whether contempt proceedings are criminal or civil in nature is the dominant purpose for which sanctions

are imposed, and any incidental results or benefits of imposing the sanctions are of no consequence in making this determination." (Internal quotation marks omitted.) *In re Marriage of Depew*, 246 Ill. App. 3d 960, 966-67 (1993).

¶ 23 While this test may seem relatively straightforward, an analysis of the facts of any given case involving the imposition of civil or criminal contempt is crucial, as the two often share the same characteristics. "Criminal contempt sanctions may to some extent benefit parties to litigation, and civil contempt sanctions may vindicate judicial authority." *In re Marriage of Betts*, 200 Ill. App. 3d at 46. "For instance, civil contempt sanctions sometimes consist of a fine for each day a violation of a court order continues." *Id.* at 47; see *Madden v. Grain Elevator, Flour & Feed Mill Workers, International Longshoreman Ass'n, Local 418*, 334 F.2d 1014, 1017, 1020 (C.A. Ill. 1964), *cert. denied*, 379 U.S. 967 (1965); see generally *Spallone v. United States*, 493 U.S. 265 (1990); *United States v. Barnett*, 330 F.2d 369 (C.A. Miss. 1963). In such cases, the fines, once accrued, are punishment for past misconduct. *Betts*, 200 Ill. App. 3d at 47. But again, it is the dominant purpose for which sanctions are imposed that determines whether the contempt is criminal or civil in nature. *Id.* The *Betts* court went on to explain that while the accrued daily fines for civil contempt are a punishment for past misconduct, it does not alter the fundamentally coercive nature of a sanction consisting of the daily accumulation of fines. *Id.*

¶ 24 Finally, a reviewing court will not be bound by the trial court's designation of the classification of contempt but, rather, will examine the actual sanctions imposed. *Helm v. Thomas*, 362 Ill. App. 3d 331 (2005). A contempt will be considered civil if the sanction is: (1)

remedial and for the benefit of the complainant; (2) continuing in nature until the contemnor performs the affirmative act required by the court's order; (3) a continuing jail sentence and/or fine that can be avoided or discontinued by performing the affirmative act required by the court's order; or (4) conditional and can be purged by obeying the order of the court. On the other hand, a contempt will be considered criminal if the sanction is: (1) imposed to vindicate the authority of the court and the sentence is punitive; (2) limited to imprisonment for a definite period; (3) a determinate fine, payable to the court; or (4) unconditional and exclusively punitive in character. See *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988); see, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). Generally, whether a party is guilty of contempt is a question of fact for the trial court, and a reviewing court will not disturb the finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984). However, when the facts of a contempt finding are not in dispute, their legal effect may be a question of law, which we review *de novo*. *Busey Bank v. Salyards*, 304 Ill. App. 3d 214, 217 (1999).

¶ 25 Turning now to the case at bar, we begin by first noting that defendant does not contend that he did not transfer assets despite the citation lien. It also bears mentioning that part of the defendant's argument rests on the idea that First Chicago only issued citation notices to Jack Zausa, in his individual capacity, and Zausa Development, LLC. The defendant contends that because citation notices were not issued to Diamond Zausa, LLC, Zuasa/Diamond, LLC, or 2035 W. Arthur Development Company, he could not have violated any order or citation lien with respect to those companies. This argument holds no water, as all of Zausa's companies, with the

exception of Zausa Development, LLC, were previously involuntarily dissolved by the Illinois Secretary of State. As such, whatever assets or liabilities could be attributed to those companies belonged to Jack Zausa individually, and he was, therefore, properly noticed by the issuance of citation notices to him and ZDC.

¶ 26 We believe that while some of the procedural aspects of this case bear the markings of indirect criminal contempt, a review of the record and the application of the dominant purpose test as delineated in *In re Marriage of Betts, supra*, indicates that the trial court's finding was one of indirect civil contempt against defendant. First, the nature of the sanction was coercive. The goal of the term of imprisonment was to compel defendant's conformance with the citation lien, not as retroactive punishment for defendant's actions in transferring those assets. The purpose of First Bank's motion for turnover was to recover the money it was entitled to under the original foreclosure action, thus, the payment of the \$18,200 would have the effect of benefiting the complainant (First Bank). Furthermore, defendant did not indicate any inability to comply with the order and purge his contempt, either at the June 17 hearing, or at the August 17 hearing where the contempt order was ultimately modified. Upon the defendant's compliance, no further contempt sanctions would be levied. Thus, the trial court's order contained the fundamental attributes of indirect civil contempt.

¶ 27 Notwithstanding that analysis, the determinate nature of the sentence imposed was improper and must be vacated. The trial court sentenced Zausa to what it described as "an indeterminate period of time not to exceed 30 days in the Will County Adult Detention Facility." Longstanding precedent unequivocally states that sanctions levied for civil contempt must be

coercive, continuing, open-ended, and subject to being purged: “Imprisonment imposed for a criminal contempt is purely punitive and must be for a definite term. [Citations.] But in cases of civil contempt, the sentence being imposed as a remedial or coercive measure, the appropriate punishment is to commit the contumacious party to imprisonment until he has complied with the mandate of the court, since a fine or imprisonment for a specified term might not secure obedience to the order.” *People v. Redlich*, 402 Ill. 270, 277 (1949). As in *Redlich*, the trial court’s order in this case could allow the defendant to evade the coercive nature of the imprisonment. If the defendant is willing to sit in jail for 30 days rather than turn over the \$18,200 in assets to First Chicago, the coercive effect is lost. It is not hard to imagine a defendant who would find 30 days in jail worth \$18,200. We affirm the finding of indirect civil contempt, but remand to the trial court so that the order can be modified to reflect a continuing and indeterminate sentence, which provides that defendant can purge himself of the contempt either before or during his imprisonment.

¶ 28 We affirm the finding of indirect civil contempt. We vacate the sentence and remand for resentencing.

¶ 29 Zausa filed a timely petition for rehearing. We allowed the plaintiff to respond. Zausa's petition for rehearing, for the first time, raises the issue of Zausa's inability to pay \$18,200 to the bank. Zausa maintains that this amounts to a life sentence. Zausa never raised his ability to pay the sum either in the trial court below or in his original brief on appeal. The issue is forfeited. Furthermore, if compliance with the condition for discharge imposed by the trial court is, in fact, impossible, Zausa should make an application to the trial court for reduction of sentence along

with proof of the impossibility. *Debowski v. Shred Pax Corp.*, 45 Ill. App. 3d 891, 905 (1977). This can be done on remand and addressed at resentencing. There is nothing in the record on appeal supporting Zausa's argument that he is unable to pay. Additionally, in his petition for rehearing, Zausa reargues matters disposed of in our initial order. We deny Zausa's petition for rehearing.

¶ 30 CONCLUSION

¶ 31 The circuit court of Will County is affirmed in part, reversed in part and this cause is remanded for further proceedings consistent with this order.

¶ 32 Affirmed in part and reversed in part; cause remanded with directions.

¶ 33 JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 34 In this case, the majority's decision recognizes the trial court erroneously mingled criminal contempt sanctions into an order finding Zausa in indirect civil contempt. To remedy this error, the majority upholds the nonspecific findings of contempt and then excises the criminal sanctions from the order before remanding the matter to the trial court. This is not an approach I embrace due to the multiple difficulties with plaintiff's confusing written motion requesting both criminal and civil contempt sanctions in the same motion. This dual approach should not be upheld and is best discouraged by vacating the entire order.

¶ 35 Since there is no statute of limitations regarding contempt proceedings (*City of Rockford v. Suski*, 307 Ill. App. 3d 233, 243 (1999)), I prefer to set aside the order of contempt, and simply allow the court and counsel a "do-over." This approach would allow plaintiff to file a properly prepared petition for rule to show cause in the civil case, which does not request criminal

sanctions, and would allow the court to make specific detailed findings of the basis for contempt following a hearing. Such an approach would eliminate all confusion regarding the intentions of the court in this case and the proper sanctions, if any, to be imposed.

¶ 36 I submit, after careful review of the pleading itself, the allegations set out in plaintiff's "Motion for Turnover Order and Contempt" are more consistent with a complaint seeking an adjudication of *criminal* contempt, and inconsistent with a petition for rule to show cause pertaining to indirect civil contempt, because the allegations focused on conduct that had already occurred and could not be undone. Namely, the motion sought to punish Zausa for his allegedly false, but completed, testimony and his failure to freeze his assets prior to the date of his citation examination. In addition, during arguments on the motion, plaintiff's counsel argued "sanctions for violating a citation to discover assets is [*sic*] criminal contempt because it is intended to punish rather than compel compliance." Counsel also requested the court to apply the powers of criminal contempt so that "[Zausa] goes away for a short period of time." Under these circumstances, when the request for a finding of contempt seeks to punish past conduct rather than compel future compliance, the courts have viewed the proceeding as one rooted in criminal contempt. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 43 (1990). In fact, during arguments on plaintiff's motion focusing on criminal contempt sanctions, counsel went on to request an *additional* finding of civil contempt "to compel turnover of funds."

¶ 37 I agree with the majority that the court's order cannot be upheld as a criminal contempt order for many reasons. First, while not controlling, the trial court identified its ruling as a finding of indirect civil contempt. See *In re Marriage of Ruchala*, 208 Ill. App. 3d 971, 977

(1991). Second, the plaintiff's request for criminal contempt sanctions was not initiated, as required, in a separate proceeding. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (stating a criminal contempt proceeding is a separate and independent action at law that is not part of the original proceeding). Third, the court did not admonish Zausa regarding the nature of the charges, his right to counsel, or other considerations for procedural due process that attach in an indirect criminal contempt proceeding. *People v. Covington*, 395 Ill. App. 3d 996, 1009 (2009); *Betts*, 200 Ill. App. 3d 26 at 51. Fourth, the court's order was not preceded by a finding, based upon the evidence presented by plaintiff, declaring plaintiff's evidence proved the allegations beyond a reasonable doubt. *Betts*, 200 Ill. App. 3d at 51.

¶ 38 As initially stated, I do not agree the trial court's order should be upheld at all. First, the order does not contain specific detailed findings based upon the evidence presented to the trial court. *Central Production Credit Association v. Kruse*, 156 Ill. App. 3d 526, 534 (1987) (stating "[t]he court must enter a written contempt order, and this order must set forth the grounds which support the finding of contempt.") Moreover, I agree with Zausa's observation that a hearing did not precede the generic finding of contempt in this case. *People v. Faint*, 396 Ill. App. 3d 614, 619 (2009) ("[a] trial or a hearing involves the formal introduction of evidence and the sworn testimony of parties.") Perhaps the absence of an evidentiary hearing contributed to the lack of detail in the court's factual findings pertaining to the alleged contemptuous acts at issue.

¶ 39 I disagree with the majority's decision to uphold the purge provisions developed by the trial court before remand. The citation served on Zausa in his individual capacity did not require Zausa to pay anything to a private party, but rather to freeze his personal assets during the six

month citation injunction and appear to provide testimony under oath. Seeking a finding of contempt is not a private remedy but serves to vindicate the authority of the court. *Keuper v. Beechen, Dill & Sperling Builders, Inc.*, 301 Ill. App. 3d 667 (1998). The case law provides that an order requiring compensation to a private party for contemptuous conduct, such as ignoring or deliberately avoiding the citation injunction in this case, is not in order. *Id.*

¶ 40 The purge provisions selected by the trial judge are more akin to the primary relief plaintiff sought by motion, namely, an order to turnover assets discovered during the citation examinations. However, in this case the court did appear to rule on the motion for turnover, presumably because plaintiff alleged the funds were no longer held by Zausa and Zausa's attorney informed the court that \$18,200 “has subsequently been distributed.”

¶ 41 Finally, the purge provisions imposed by a court must be within the contemtor's ability to purge. *In re Marriage of Harvey*, 136 Ill. App. 3d 116, 118 (1985). Here, there was no showing that Zausa has the ability to pay \$18,200 or would be capable of purging the contempt in the event an indeterminate term of incarceration is imposed on remand.

¶ 42 For these reasons, I concur in part, and dissent in part, and would vacate the entire order.