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2013 IL App (3d) 120047-U

Order filed November 12, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
THOMAS S. PAVEK,)	Will County, Illinois
)	
Petitioner-Appellant,)	
)	Appeal No. 03-12-0047
and)	Circuit No. 09-D-2131
)	
ARLENE L. PAVEK,)	
)	Honorable Bennett Braun,
Respondent-Appellee.)	Judge Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Petitioner absented himself from the trial proceedings after providing two days of his own testimony and did not return until respondent rested her case after three additional days of testimony. As a result of his absence, respondent did not have an opportunity to cross-examine petitioner. When petitioner returned to the courtroom on the day scheduled for closing arguments, the trial court refused to continue the matter to allow petitioner's rebuttal testimony or to reopen petitioner's case-in-chief. The trial court's ruling did not constitute an abuse of discretion.

¶ 2 Petitioner, Thomas Pavek, appeared for the first two days of a bench trial and then failed to appear to complete his testimony on the third day of trial. Thomas also missed the following

three days of respondent, Arlene Pavek's, testimony after the trial continued in spite of his absence. On October 19, 2011, the date scheduled for closing arguments, Thomas filed a written motion to reopen his case and requested a continuance to allow him testify in rebuttal following Arlene's evidence. The trial court refused to postpone closing arguments, and denied Thomas' request to reopen his case and to continue the matter for rebuttal testimony. On appeal, Thomas argues the trial court abused its discretion by denying his request for an additional opportunity to provide testimony to the court, before closing arguments. We affirm.

¶ 3

FACTS

¶ 4 On November 13, 2009, Thomas filed a petition for dissolution of marriage against Arlene. On December 1, 2009, Arlene filed a response and counter-petition for dissolution of marriage. After numerous failed attempts to reach a settlement for more than one year, the trial began in September 2011.

¶ 5 Opening arguments occurred on September 6, 2011, and counsel for Thomas called his client to testify before the court beginning on September 8. The direct examination of Thomas continued on September 21, 2011. Unable to complete Thomas' direct examination by the end of the day, the parties agreed to continue the trial on the next day, September 22. Negotiations continued and on September 22 the parties indicated to the court the matter should be scheduled the following day, to present a proposed settlement.

¶ 6 However, by agreement, the September 23 court date was rescheduled to September 28. On September 28, the parties advised the court their settlement discussions were unsuccessful and the trial should resume. Accordingly, the court set the trial to continue on October 3.

¶ 7 On October 3, 2011, Arlene and her counsel appeared before the court. Thomas' counsel appeared as well, but Thomas was not present to complete his direct testimony. The court continued the matter for hearing the next day on its own motion due to scheduling difficulties.

¶ 8 On October 4, 2011, again, Arlene and her counsel were present before the court. Thomas' counsel appeared as well, however, Thomas was not present. Due to Thomas' absence, his counsel requested a continuance, explaining that Thomas believed his employment would be jeopardized if he did not leave the state on business. Counsel acknowledged his request for a continuance was not supported by an affidavit from Thomas. Arlene's counsel objected to Thomas' request for another court date to complete his case-in-chief.

¶ 9 Before ruling, the court first noted Thomas had "backed out" of a settlement previously reached between the parties. The court then observed Thomas had not personally appeared in the courtroom since the negotiated settlement failed. According to the court, it appeared that Thomas was "manipulating the situation." The court emphasized that even if the court allowed this continuance, the court had not received any assurance from Thomas' counsel that his client would be available to appear before the court in the near future. In addition, the court explained that this dissolution case was one of the oldest cases pending before the court because multiple trial dates that had been continued and rescheduled. After making these findings, the court denied the request for a continuance to complete Thomas' testimony.

¶ 10 Following the court's ruling denying a continuance, Thomas' counsel stated that he "won't be able to call" Arlene and immediately rested his case. The trial court entered a written order denying Thomas' motion to continue and granted Arlene's request to continue the case to begin her case-in-chief the next day, October 5, 2011.

¶ 11 On October 5, Arlene testified on her own behalf. Her testimony continued on October 6 and 17. Thomas was not personally present before the court during the three days of Arlene's testimony. However, Thomas' counsel had an opportunity to cross-examine Arlene.

¶ 12 At the close of Arlene's case on October 17, Thomas' counsel informed the court he

would like to call Thomas as a rebuttal witness but indicated his client was unavailable to appear before the court after being admitted to a hospital that day for chest pains and shortness of breath. Thomas' counsel requested a continuance to secure his client's testimony as a rebuttal witness. Arlene's counsel objected to the request to continue the matter.

¶ 13 The trial court denied the request to continue the matter, emphasizing that Thomas' excuses for not being present in court have "worn thin" and "all of the other side's testimony has been exhausted." The court noted that due to Thomas's absence beginning on October 3, 2011, Arlene's counsel was unable to cross-examine Thomas at any point in time. The trial court stated it would not be "appropriate for [Thomas] to be allowed to testify at this point when in fact he has not been present for the conclusion of his cross-examination during his case in chief." In addition, the court noted it had "no assurance" Thomas would be present to testify if the court granted the motion to continue beyond October 17 for purposes of offering his own testimony in rebuttal.

¶ 14 After learning the court would not allow a continuance for Thomas' rebuttal testimony, his attorney moved to reopen Thomas' case-in-chief. Counsel argued a decision to reopen proofs would allow additional direct testimony from Thomas and provide Arlene's attorney an opportunity to cross-examine him. The court denied the oral motion and instructed counsel to file a written motion. The court set the matter over to October 19, 2011 for closing arguments.

¶ 15 On October 19, 2011, the parties both appeared with their respective counsel. Prior to closing arguments, Thomas' counsel filed a written "Motion to Reopen Case-in-Chief and Motion to Continue for Rebuttal Testimony" with an attached affidavit signed by Thomas. The motion requested that Thomas be permitted to reopen his case-in-chief and requested a continuance to allow Thomas to provide rebuttal testify before the court at a later court date.

¶ 16 Thomas' affidavit in support of the motion made three claims. First, Thomas stated his

employment required him to travel out of state from October 3-7, 2011 in order to maintain his position with his employer. Second, Thomas alleged he was admitted to the hospital for a heart condition on October 17, 2011 and was not released until the evening of October 18, 2011.

Third, Thomas argued his testimony was necessary to clarify the financial needs asserted by Arlene and the status of certain non-marital property and gifts made during the marriage.

¶ 17 The court denied the written motion to reopen his case-in-chief finding there was not “good cause” to reopen Thomas’ case-in-chief. The court found Thomas previously failed to submit “anything that the Court deemed to be a credible reason for continuing the case.” The court noted that once the written settlement was presented to, and rejected by, Thomas, the proceedings “went south.” The court commented on the number of trial days and extensive amount of attorney time that had been expended in Thomas’ absence after the failure of the settlement negotiations. Additionally, the court stated it would not require the attorneys to determine how allowing Thomas to testify at this stage of the proceedings would impact “recalling other witnesses that have testified and readdressing their testimony.” The court then received closing arguments from the parties and took the matter under advisement.

¶ 18 On November 3, 2011, both parties appeared with counsel for announcement of the court’s decision. Again, with both parties present on November 23, 2011, the trial court entered a written judgment dissolving the marriage.

¶ 19 Thomas filed a motion to reconsider the denial of his motion to reopen his case-in-chief and a notice of appeal¹ on January 12, 2012. After hearing arguments on June 29, 2012, the trial court denied Thomas’ motion to reconsider the request to reopen proofs and continue the matter for Thomas to testify in rebuttal.

¹This court entered an order on May 10, 2012, allowing the circuit court to be re-vested with jurisdiction to hear Thomas’ motion to reconsider.

¶ 20 The court stated it did not “believe that [Thomas] has ever supplied credible substantiation for his claim regarding unavailability. I would have expected in this case to have seen live or heard live testimony regarding [Thomas’] absences, that’s live testimony regarding reasons for [his] absences and the testimony from third parties, particularly when it’s alleged that [Thomas] had no choice but to go to New York.” The court continued, “I don’t even know that he went to New York, frankly, for work. But I haven’t heard credible evidence to – substantiating that claim, so I don’t think we even get to the – get to the point whether there is credible evidence of the reason for the absence, let alone whether the absence in the context of this case justifies reopening the case.” Thomas appeals.

¶ 21 ANALYSIS

¶ 22 On appeal, Thomas argues the trial court abused its discretion when it denied his written motion to reopen his case-in-chief following Arlene’s testimony and declined to continue the case for Thomas’ rebuttal testimony. Arlene contends the trial court properly denied Thomas’ motion to reopen his evidence because Thomas failed to substantiate the reasons for his purported employment-related absence with evidence. In addition, Arlene submits a decision allowing Thomas to reopen his proof, after her evidence, would have greatly prejudiced Arlene. Finally, Arlene contends Thomas failed to assert any of the additional evidence was of the utmost importance to determining the merits of his petition.

¶ 23 The case law provides the trial court should consider certain factors when considering whether to allow a party’s request to reopen evidence. These factors include: (1) whether there is an excuse for the failure to previously introduce the evidence at trial; (2) whether the other party will be surprised or unfairly prejudiced by the new evidence; (3) whether the evidence is of the utmost importance to the movant’s case; and (4) whether there are cogent reasons for denying the motion. *In re Marriage of Drone*, 217 Ill. App. 3d 758, 766 (1991). The denial of a motion to

reopen evidence is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *In re Marriage of Davis*, 215 Ill. App. 3d 763, 776 (1991). A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable or when no reasonable person could take the court's view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 24 In the case at bar, the court found Thomas failed to provide a "credible reason" for failing to complete his case-in-chief and make himself available for cross-examination. Noting that the court believed Thomas' absences were an attempt to "manipulat[e] the situation," the court denied counsel's request for a continuance on October 4. Thereafter, Thomas again failed to appear or assist his attorney by being present in the courtroom during the three days of Arlene's testimony and the remainder of the trial on the counter-petition.

¶ 25 On October 19, 2011, more than ten days after Thomas returned from his purported business trip out of state, Thomas' counsel filed a written motion requesting the court to reopen his case-in-chief and to continue the matter for his client's rebuttal testimony. Thomas was present in court when his counsel argued the written motion on the date originally scheduled for closing arguments.

¶ 26 Before denying counsel's motion to reopen the case and for a continuance, the trial court noted, Thomas made general claims in his affidavit but did not submit any independent corroborative evidence from his employer verifying the absences from court on October 3-7 were required for purposes of Thomas' employment. The trial court observed Thomas' repeated absences from court began after the proposed settlement failed. Recognizing both attorneys expended a considerable amount of time to complete the trial while Thomas was not available, the court considered the potential for inconvenience and additional expenses necessitated if Thomas' reopened evidence required recalling witnesses who previously appeared and provided their testimony to the court.

¶ 27 We additionally note the written motion did not allege that Thomas, who was present before the court on October 19, 2011, would be prepared to offer his rebuttal testimony that same day. Instead, the motion requested the trial court continue the matter to another date, after Arlene's testimony had already been completed in spite of Thomas' repeated absences. Therefore, the court's denial of Thomas' request to reopen his case-in-chief and to continue the matter for rebuttal testimony was neither arbitrary nor unreasonable based on the sequence of events in this case.

¶ 28 Consequently, we conclude the court did not abuse its discretion by denying Thomas' motion to reopen proofs on the date scheduled for closing arguments. Similarly, we conclude the trial court did not abuse its discretion by denying Thomas' request to continue the matter for the rebuttal testimony of Thomas with respect to his petition for dissolution.

¶ 29 **CONCLUSION**

¶ 30 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 31 Affirmed.