2016 IL App (2d) 150672-U
No. 2-15-0672
Order filed August 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF TRACEY PRATE, Petitioner-Appellee, and SHAWN PRATE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 04-D-2180 Honorable Charles D. Johnson, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it sanctioned respondent for refusing to comply with discovery orders.

¶ 2 The respondent, Shawn Prate, appeals from an order sanctioning him $16,000 for refusing to comply with discovery orders, contending that the trial court abused its discretion by ordering him to produce documents he was not required to produce, failing to conduct an evidentiary hearing, failing to state with specificity the basis for the sanction, and sanctioning him as punishment rather than to coerce compliance. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married on November 4, 2000. One child was born during the course of the marriage. On November 12, 2004, the petitioner, Tracey, filed a petition for dissolution. On June 29, 2005, a judgment for dissolution was entered. The parties were awarded joint legal custody with Tracey having residential care of the child. Shawn was ordered to pay child support.

¶ 5 On January 28, 2013, Tracey filed a petition to increase child support. On September 26, 2013, Tracey served upon the respondent, Shawn, a request for production of documents. The request sought, among other things, statements and other documents relating to Shawn's credit card accounts, from January 1, 2005, to the present. Shawn did not file a timely response.

¶ 6 On November 1, 2013, Tracey sent a letter to Shawn pursuant to Illinois Supreme Court Rule 201(k). Ill. S. Ct. R. 201(k) (eff. Jan. 1, 2013). On November 19, 2013, Shawn served upon Tracey a response that included several documents. On November 27, 2013, Tracey sent a second Rule 201(k) letter to Shawn, stating that the production was not complete.

¶ 7 On December 13, 2013, Tracey filed a motion to compel, contending that Shawn's inadequate responses to discovery requests were "a willful attempt to delay, hinder, and prevent petitioner from obtaining documents and information" relevant to the litigation. The motion sought sanctions pursuant to Illinois Supreme Court Rule 219(c), (Ill. S. Ct. R. 219(c) (eff. July 1, 2002)), including attorney fees and any other sanctions that the court determined to be appropriate. On January 10, 2014, Tracey received more of the requested documents.

¶ 8 On January 16, 2014, the trial court ordered Shawn to produce the remaining documents responsive to the production request within 35 days. On February 28, 2014, the trial court ordered Shawn to "fully comply with outstanding discovery, as outlined in the 201(k) letter." The trial court set the matter for "hearing on the Motion to Compel, specifically on the request

for sanctions, including, but not limited to, attorneys fees and/or any sanctions permitted under Rule 219."

¶ 9 On March 7, 2014, Tracey sent a third Rule 201(k) letter. Among other things, Tracey sought credit card statements from Capital One, Discover, Barclay's, Best Buy and HSBC. Tracey received some of the requested documents on March 14 and April 4, 2014.

¶ 10 On April 16, 2014, the trial court again ordered Shawn to comply with all outstanding production requests, "specifically credit card statements of [Shawn] for the last three years to the extent not previously produced." Tracey received several additional documents on May 15, 2014.

¶ 11 On June 2, 2014, the trial court ordered Shawn to "tender all documents requested in the March 7, 2014 201(k) correspondence as previously ordered on April 16, 2014," by the close of business on June 13, 2014. The order warned that if Shawn failed to comply with the deadline he would be "fined the amount of $100.00 per day of non-compliance, made payable to the Clerk of Court."

¶ 12 On July 9, 2014, the trial court ordered the parties to prepare a joint submission "identifying what if any documents ha[d] not been produced" by Shawn. The order stated, "a fine of $100.00 per day payable to the Clerk of the Court shall be imposed for any continued failure to comply if so determined at a hearing. * * * The court shall also consider further sanctions if there is a determination of non-compliance." The record reflects that Tracey prepared a listing of outstanding discovery and forwarded it to Shawn. Shawn did not respond.

¶ 13 On December 5, 2014, after several continuances, the trial court heard oral arguments on the motion to compel and for sanctions, and found "an award of attorney's fees to be an appropriate sanction as a result of discovery matters." The trial court reserved the issue of the

amount of attorney fees until the next court date. The order entered on that date stated that "the previous order citing $100.00 per day sanctions remains in full force and effect."

¶ 14 On February 17, 2015, "finding that there had been an unreasonable failure to comply with discovery and court orders pursuant to Rule 219," the trial court ordered Shawn to pay $12,000 in Tracey's attorney fees. The trial court also terminated the $100-per-day sanction ordered on July 9, 2014. The total amount of the sanction payable to the clerk of the court was not specified in writing. No report of proceedings for that date is included in the record on appeal.

¶ 15 On March 17, 2015, Shawn filed a motion to reconsider or to modify the order dated February 17, 2015. In that motion, Shawn argued that: (1) the trial court did not specify the reasons for the sanctions in writing, thereby violating Rule 219; (2) there was insufficient evidence for the trial court to make a finding of reasonableness of the sanctions; and (3) ordering two sanctions for the same violation acted as punishment and was not a just sanction. Shawn also argued generally that most of the documents not produced were only requested after the initial request to produce. However, he did not identify any specific documents that had not been within the initial request. Shawn alleged that the outstanding documents were not needed, as Tracey's counsel had said that he had everything he needed related to the underlying litigation. Additionally, he argued that many of the documents were not within his possession, although again he did not specifically identify any such documents. As to the award of attorney fees, Shawn argued that the opposing counsel did not provide sufficient information for the court to determine whether or not the attorney fees incurred in seeking outstanding discovery were reasonable, and that Tracey should have filed a petition for attorney fees rather than simply request sanctions in her motion to compel. Shawn also argued that the $16,000 sanction payable

to the clerk of the court should be vacated or lessened because it was grossly disproportionate to the alleged violation, especially in light of the $12,000 in attorney fees he was also ordered to pay.

¶ 16 On May 8, 2015, Tracey filed a response to the motion to reconsider. In her response, Tracey argued that the trial court did not commit any legal error in its February 17, 2015, order. Tracey noted that the $16,000 fine, which dated back to July 9, 2014, was based on Shawn's continued refusal to comply with discovery and the court's orders. That amount was not arbitrarily determined, was not punishment, and was entirely within Shawn's control. As to the attorney fees, Tracey stated that her counsel submitted billing statements to opposing counsel and the court during the December hearing. She pointed out that Illinois Supreme Court Rule 137 requires a hearing on the reasonableness of the fees, but Rule 219 does not. Tracey further argued that sanctions under Rule 219 could be as severe or drastic as necessary to enforce the court's orders and to impress upon the parties the seriousness of the violations. Further, a sanction was just when it was a means of discouraging discovery violations as a litigation strategy. Tracey flatly denied that the March 7, 2014, 201(k) letter sought any documents beyond those requested in the discovery she propounded. Finally, Tracey clarified her counsel's previous statements: although the discovery which remained outstanding was relevant and necessary for a fair determination of the litigation, given the cost and emotional distress resulting from Shawn's delay tactics and the unlikeliness that Shawn would produce anything further, she was willing to proceed to trial with the discovery that had already been tendered.

¶ 17 On May 28, 2015, Shawn filed a reply that largely focused on the award of attorney fees. Conceding that some award of fees was appropriate, he again argued that the court needed to review documents and affidavits to determine whether or not the attorney fees were reasonable.

Shawn also contended that two sanctions totaling $28,000 in fees and fines was "a punishment disproportionate to the gravity of any discovery violation."

¶ 18 On June 4, 2015, the trial court heard oral argument on Shawn's motion to reconsider and issued its ruling. The trial court began by noting that the $100-per-day sanction had been accruing since the July 9, 2014, order and was intended as an incentive for Shawn to comply with previous court orders regarding discovery. The trial court found that there was sufficient evidence to support the amount of attorney fees Shawn was ordered to pay. The court noted that, in its discretion, it had only awarded a portion of the requested attorney fees. The trial court stated that the basis for its February 17, 2015, order was that "[Shawn] had, in the Court's opinion, intentionally but at the very least substantially failed to comply with discovery that was outstanding at that time despite the existence of the $100 a day penalty." However, the trial court acknowledged that it had failed to include that basis in the written order from that date. Therefore, the February 17, 2015, order was amended "*nunc pro tunc* to state that the basis for the award was the Respondent's continued and apparently willful failure to comply with outstanding discovery requests as of that date despite multiple prior orders and despite the existence of the additional sanction, the $100 a day that was alluded to earlier." All other aspects of the motion to reconsider were denied.

¶ 19 In the written order entered on June 4, 2015,[1] the trial court made the following findings:

[1] We note that the order of June 4, 2015, that appears in the record is unsigned. In the appendix to his brief, Shawn includes a copy of the order that bears a stamped signature. However, none of the materials contained in the appendix have been certified by the clerk of the circuit court, and no signed or stamped version of the order appears in the record. Ordinarily, materials not properly part of the record will not be considered by the reviewing court. *Jenkins*

"A) As of the date of 2/17/15 hearing the Court reviewed the fees presented by [Tracey] and determined that said fees were reasonable for the purposes stated[] and necessary;

B) The court determined that [Shawn's] behavior in not complying with the Discovery requests and multiple court orders was willful and purposeful despite the ordered $100.00 a day sanction, which was not adequately stated on the 2/17/15 order."

The order further stated that the February 17, 2015, order was modified *nunc pro tunc* to "reflect the Court's finding in paragraph B above that [Shawn's] discovery violations were willful and purposeful." The trial court ordered Shawn to pay, within 45 days, both the $12,000 attorney fees sanction and the $16,000 sanction. Shawn timely filed a notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 On appeal, Shawn argues that the trial court abused its discretion in imposing the $16,000 sanction and that the sanction should be vacated or, in the alternative, the matter should be remanded for an evidentiary hearing. (Shawn expressly states that he does not challenge the award of attorney fees.) Specifically, he argues that the trial court abused its discretion by: (1) sanctioning him for failing to produce the documents requested in the March 201(k) letter; (2) failing to conduct an evidentiary hearing before imposing the sanction; (3) failing to set forth with specificity the reasons and basis for the sanction; and (4) wrongfully imposing the $16,000 sanction as punishment.

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v. Wu, 102 Ill. 2d 468, 483 (1984). Nevertheless, we may overlook technical irregularities in the record where, as here, the record demonstrates that the unsigned written order reflects the trial court's ruling. *Gile v. Gile*, 333 Ill. App. 3d 1161, 1165 (2002).

¶ 22 "The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal." *Shimanovsky v. General Motors*, 181 Ill. 2d 112, 120 (1998). An abuse of discretion occurs "where the record shows that the party's conduct was not unreasonable or where the sanction itself is not just." *Kubian v. Labinsky*, 178 Ill. App. 3d 191, 196 (1988). A just order for sanctions under Rule 219(c) is one which seeks to attain the twin goals of compliance with discovery and a trial on the merits. *Shimanovsky*, 181 Ill. 2d at 123. "When imposing sanctions, the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party." *Id*. A sanction should be proportionate to the gravity of the violation. *Buehler v. Whalen*, 70 Ill. 2d 51, 67 (1977).

¶ 23 Rule 219(c) states, in pertinent part, as follows:

> "If a party *** unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
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> * * * [listing sanctions including barring of testimony or pleadings and dismissal]
>
> In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, *and when the misconduct is wilful, a monetary penalty*. * * *

> Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." (Emphasis added.) Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

¶ 24 We note as a preliminary matter that Tracey filed no brief in this court. However, as the issue is relatively straightforward, we may consider the argument without the appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (a reviewing court should decide the merits of an appeal where the record is simple and the claimed error is such that a decision can be made easily without the aid of an appellee's brief).

¶ 25 Shawn's first argument on appeal is that the trial court abused its discretion when it required him to produce the documents requested in Tracey's March 2014 201(k) letter, and then sanctioned him for failing to do so. Generally speaking, a trial court is afforded great latitude in rulings on discovery matters, and a court of review will not disturb such rulings absent an abuse of discretion. *D.C. v. S.A.*, 178 Ill. 2d 551, 559 (1997).

¶ 26 As an initial matter, it does not appear that Shawn properly raised this argument to the trial court. A reviewing court will not consider arguments that were not presented to the trial court. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010). Here, Shawn has not provided us with a transcript of the hearing on April 16, 2014, and nothing in the record on appeal shows that Shawn objected to any of the requests contained in the March 201(k) letter. In the absence of any objection, it is not an abuse of discretion for a trial court to order the production of discoverable documents. From our own review of the March 201(k) letter, the documents requested therein were relevant to the issue of Shawn's net income, a central issue in the determination of child support. It is the responsibility of the appellant to provide a sufficient

record and absent such a record the reviewing court will presume a legal justification and sufficient facts to support the trial court's ruling. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). As there is no indication to the contrary, we presume that the trial court's April 16, 2014, order compelling production of the documents requested in the March 201(k) letter was proper.

¶ 27 Further, although Shawn raised this argument in a general fashion in his motion to reconsider, asserting that "many of the items" sought in the March 201(k) letter had not previously been requested, there is no record that he ever identified those items to the trial court with specificity. If a party resists producing documents on the ground that they are beyond the scope of the production request, the burden is on that party to clearly identify the relevant category of documents so that the trial court can make an informed decision. Here, Shawn did not do so. Thus, the trial court did not err in rejecting his general argument.

¶ 28 Finally, Shawn has not shown that he ever fully complied with Tracey's initial request to produce. Shawn was ordered to produce all outstanding discovery, not merely the documents identified in the March 201(k) letter. If *any* requested documents remained outstanding, then sanctions could be imposed regardless of the proper scope of the March 201(k) letter. As Shawn has not shown that he had produced all of the documents requested in the initial production request, he has not shown that he was not properly subject to the sanction.

¶ 29 Shawn's second argument on appeal is that the trial court abused its discretion when it failed to conduct an evidentiary hearing. It is not clear from Shawn's argument what the purpose of this evidentiary hearing would be. Shawn cites *North Shore Sign v. Signature Design Group*, 237 Ill. App. 3d 782, 790-91 (1992), for the proposition that, generally, the court should hold an evidentiary hearing on Rule 137 sanctions. However, Shawn has cited no authority that Rule

137 standards should apply to Rule 219 sanctions. Although Rule 137 and Rule 219 are similar in language and remedy, they perform different functions: "Rule 137 concerns the pleadings stage of litigation and is intended to be punitive [or compensatory] in nature, while Rule 219 specifies the consequences of a litigant's abuse or disregard of the discovery rules and discovery-related court orders, and is coercive in nature." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 33. Thus, the requirements of Rule 137 do not necessarily govern proceedings under Rule 219.

¶ 30 Even assuming, without deciding, that the same procedural requirements of Rule 137 apply to Rule 219, an evidentiary hearing is not necessary "if the requirements can be satisfied by looking at the pleadings, trial evidence, or other matters appearing in the record." *Beno v. McNew*, 186 Ill. App. 3d 359, 366 (1989). Although parties should be given an opportunity to present any evidence that may be necessary, (*In re Estate of Henley*, 2013 IL App (3d) 110264, ¶86), a hearing is not necessary if the record contains all of the information needed to make an informed decision *(Kellett v. Roberts*, 276 Ill. App. 3d 164, 174-75 (1995)).

¶ 31 Before a sanction may be imposed, the burden initially falls on the party seeking sanctions to show that the alleged contemnor violated a court order. *In re Marriage of Latour*, 241 Ill. App. 3d 500, 508 (1993); see also *In re Marriage of Ray*, 2014 IL App (4th) 130326, ¶ 15 ("[n]on compliance with a court order is *prima facie* evidence of contempt"). The burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order. *Ray*, 2014 IL App (4th) 130326, ¶ 15. Here, the record is replete with evidence that Shawn disobeyed the trial court's orders to produce outstanding discovery. On no fewer than four occasions prior to imposing the $100-per-day sanction, the trial court had ordered such

production (January 16, February 28, April 16, and June 2, 2014). What does not appear in the record is any argument by Shawn that he had in fact fully complied with these orders, or that he had a valid excuse for his noncompliance. Thus, the trial court had all of the evidence it needed to find Shawn's failure to comply with court orders to be willful. Shawn has not identified any relevant evidence he would have put before the court if an evidentiary hearing had been held. The trial court did not abuse its discretion by not holding an evidentiary hearing on whether and to what extent Shawn deserved the sanction.

¶ 32 Shawn's third contention on appeal is that the trial court failed to comply with the requirements of Rule 219(c) because it did not set forth with specificity the basis for the sanctions. Rule 219(c) states that, "[w]here a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order or in a separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The purpose of this requirement is to allow the reviewing court to make an informed review of the decision to impose sanctions. *Kellett*, 276 Ill. App. 3d at 172. However, courts "have upheld sanctions under Rule 219(c) even where a circuit court has failed to specifically set out any of its findings." *Peal v. Lee*, 403 Ill. App. 3d 197, 206 (2010); see also *Glover v. Barbosa*, 344 Ill. App. 3d 58, 63 (2003) (trial court's failure to set out the grounds for sanctions is not *per se* reversible error; upholding the imposition of sanctions where the basis was clear from the record). The February 17, 2015, order states that the sanction was based on a finding of "an unreasonable failure to comply with Discovery and court orders pursuant to Rule 219." We find that this was a sufficient statement of the reason and basis for the sanction. Further, Rule 219(c) permits the basis for the sanctions to be stated in a "separate written order." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The trial court's order of June 4, 2015, clearly states that it had found

Shawn's noncompliance with its orders to be willful. This statement is sufficient to permit informed review. *Kellett*, 276 Ill. App. 3d at 172.

¶ 33 Shawn's final argument on appeal is that the sanctions were improper in form and were unjust because they were imposed as punishment rather than to coerce compliance with court orders. Specifically, Shawn argues that ordering payment to the clerk of the court was improper because the court was not an injured party and the $16,000 was not a reasonably-incurred expense resulting from the purported misconduct. He also argues that the sanction was not aimed at coercing compliance with discovery rules. Finally, he argues that the amount of the fine, $16,000, was arbitrary because it is unclear when it began accruing. None of these arguments have merit.

¶ 34 Shawn is correct that one type of Rule 219(c) sanction, an award of attorney fees, must be directly related to the purported misconduct. *Dyduch v. Crystal Green Corp*., 221 Ill. App. 3d 474, 480 (1991). Such fees are appropriately paid to the party injured by the discovery violation. However, a monetary penalty is imposed under a different clause of Rule 219(c), which only requires the misconduct to be willful. A monetary penalty is essentially a fine, which is normally deposited with the public treasury. See *Multiut Corp. v. Draiman*, 359 Ill. App. 3d 527, 542 (2005). Here, as the fine arose from Shawn's noncompliance with repeated court orders, the dignity of the court itself had been injured. Payment to the clerk of the court was properly within the trial court's discretion, especially as the injuries to Tracey had been addressed through the separate sanction of attorney fees.

¶ 35 Further, the graduated nature of the fine demonstrates that its purpose was to coerce compliance with discovery rules and court orders, not to punish Shawn. On June 2, 2014, Shawn was told that a $100-per-day fine would be implemented if he did not comply. On July 9, 2014,

the trial court advised Shawn that the fine had begun accruing. Threatening and then implementing a fine which accrues over the time of continued non-compliance is a valid method of coercing compliance with discovery rules and court orders. See *Profesco Corp. v. Dehm*, 196 Ill. App. 3d 127, 131 (1990) ($100-per-day fine for discovery violation was not an abuse of discretion). A coercive order must provide a contemnor with the "keys to his cell." *In re Marriage of Logston*, 103 Ill. 2d 266, 289 (1984). The accrual of the fine was within Shawn's control at all times, as it would have ceased whenever the trial court found that he had complied with its orders.

¶ 36 Nor was the total amount arbitrary. The $16,000 total here is equal to 160 days of $100-per-day, which appears to have been based on the number of business days between July 9, 2014, and February 17, 2015. The choice by the trial court to count only business days rather than all days was within its discretion and operated in Shawn's favor. Thus, he cannot now be heard to argue that it was an abuse of discretion. Nor do we find that the total amount, $16,000, was disproportionate to the gravity of the misconduct, even when the $12,000 in attorney fees is taken into account. Shawn's continued refusal to comply with multiple court orders warranted a sanction strong enough to compel compliance. Further, the total amount was only as high as it was because of Shawn's continued misconduct; it could have been far less had he promptly complied with the trial court's orders.

¶ 37 We find that it was within the trial court's power and discretion to order the $100-per-day sanction to be deposited with the clerk of the court, that the sanction was imposed to coerce compliance with the court's orders, and that the total amount of $16,000 was not arbitrary or disproportionate to the gravity of the misconduct.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 40 Affirmed.