2018 IL App (2d) 170496
No. 2-17-0496
Order Filed April 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INDEPENDENT BANK,	)	Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 2016-MR-521
	)	
	)	
SHERMAN A. BAARSTAD, GWENDOLYN BAARSTAD, and RICHARD C. NELSON,	)	
	)	
	)	
Defendants	)	Honorable
	)	Bonnie M. Wheaton,
(Richard C. Nelson, Defendant-Appellant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Where appellee's brief was stricken for violations of supreme court rules, and where appellant presented a *prima facie* case that his individual retirement account (IRA) was exempt from judgment under Illinois law, the judgment of the trial court was reversed.

¶ 2 Defendant, Richard C. Nelson, a judgment debtor, appeals the trial court's order finding that his IRA lost its exempt status from enforcement of the judgment amount under the Internal Revenue Code (IRC) when defendant used funds from his IRA to support a personal investment.

See 26 U.S.C. § 4975 (2012); see also 735 ILCS 5/2-1402 (West 2016); see also 735 ILCS 5/12-1006 (West 2016). Defendant argues before this court that he did not use assets of his IRA, but that he took permissible distributions and used the resulting personal funds to support his investment, and that those were not prohibited transactions under the IRC. Plaintiff, Independent Bank, states before this court that the trial court did not err because defendant failed to present any evidence that he took permissible distributions. We strike plaintiff's brief for failure to comply with the substantive requirements of Illinois Supreme Court Rule 341 (eff. Nov. 1, 2017), and determine that defendant presented a *prima facie* case for error. *Epstein v. Davis*, 2017 IL App (1st) 170605, ¶ 22; *First Capitol Mortgage Corp., v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Accordingly, we reverse the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 On February 9, 2013, the circuit court of Grand Traverse County, Michigan, entered judgment in favor of plaintiff and against defendant and others in the amount of $961,416.25. On April 21, 2016, the circuit court of Du Page County, Illinois, granted plaintiff's petition to register a foreign judgment against defendant. Thereafter, plaintiff filed a petition for a citation to discover assets against defendant.

¶ 5 On June 20, 2016, plaintiff deposed defendant. On that date, defendant turned over numerous financial documents to plaintiff, including a "declaration of exempt assets." Defendant averred that his checking account at JP Morgan Chase Bank, which he used to deposit social security checks, as well as his IRAs at TD Ameritrade and UBS Financial Services (UBS), were exempt assets from collection under Illinois law. Defendant also disclosed that he had a one-third interest in Mistwood Golf Course in Lake Ann, Michigan.

¶ 6 On February 9, 2017, plaintiff served third-party citations to discover assets on JP Morgan Chase Bank, TD Ameritrade, and UBS. The citations included restrictions that effectively froze all accounts belonging to defendant at these institutions. On March 3, 2017, the court held an evidentiary hearing to determine the exempt status of defendant's assets. At the conclusion of testimony on that day, plaintiff conceded that the checking account at JP Morgan Chase Bank and the IRA at TD Ameritrade were exempt from judgment, leaving only the IRAs with UBS at issue.

¶ 7 During the hearing, defendant offered Nelson exhibit no. 4, which he identified as a combined monthly statement of his four IRAs at UBS. Defendant testified that these rollover accounts were established as IRAs, had always been IRAs, and that they were exempt from satisfying this judgment pursuant to section 2-1402(b)(5) of the Illinois Code of Civil Procedure (Code). Defendant self-directed the investments of one of his IRAs at UBS (IRA 337). Defendant further testified that he wrote checks against IRA 337, and that he used some of those funds to pay expenses of Mistwood Golf Course, in addition to his own living expenses.

¶ 8 Following defendant's testimony, the court took judicial notice of defendant's declaration of exempt assets and entered the account statements of the UBS IRAs into the record. Plaintiff presented no witnesses. During closing arguments, defendant reasserted his claim of exemption for all of the IRAs and stated that plaintiff had not presented evidence to the contrary. Plaintiff countered that defendant's testimony that he had used funds from his IRA for non-living expenses caused the accounts to lose their exempt status, indicating that it had "ample case law" to support this contention. The court found, without objection, that defendant's testimony narrowed the issue of exemption to IRA 337. It removed the restrictions as to all other accounts

at UBS, TD Ameritrade, and JP Morgan Chase Bank. It ordered the parties to submit written memoranda in support of their arguments and continued the matter to May 5, 2017.

¶ 9 In its memorandum, plaintiff argued that defendant failed to meet his burden to demonstrate that IRA 337 was exempt, and that IRA 337 lost its exempt status when defendant used funds from the account to cover expenses in connection with his personal investment. Defendant answered that the cases cited by plaintiff were distinguishable, non-binding, or both. He asserted that all of the withdrawals from IRA 337 were permissible under the IRC and that he was free to use the withdrawn funds in any manner.

¶ 10 On May 5, 2017, the court made an oral ruling: "Mr. Nelson's testimony, I clearly recall, was that he used the funds from the IRA to pay the debts of the golf course as they became due. I believe that under the Internal Revenue Code that strips the account of its protections and essentially turns it into an investment account." Accordingly, in its written order of the same date, the court found "that the entire [IRA 337] lost its exempt status and that those funds are available to plaintiff to apply to the judgment." The court stayed execution of its order for 30 days to allow defendant time to file a notice of appeal.

¶ 11 On May 31, 2017, defendant filed a motion to reconsider, asserting that the court misapplied the law. Defendant contended that he was not acting as a fiduciary when he took "distributions" from IRA 337, which meant that the account never lost its status as an IRA pursuant to the IRC. As such, it remained exempt under Illinois law. Plaintiff argued that defendant never testified that he took distributions from the IRA, but that he withdrew funds by writing checks. This, according to plaintiff, was a new legal theory not supported by the evidence, and should be rejected. The court denied defendant's motion to reconsider. Defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Before we address the merits of this appeal, we must first confirm our jurisdiction. Illinois Supreme Court Rule 341(h)(4) (eff. Nov. 1, 2017) requires that the appellant provide a precise statement of jurisdiction which relates "the basis of the appeal including the supreme court rule or other law which confers jurisdiction upon the reviewing court." Additionally, the appellee is required to provide a statement of jurisdiction when the appellant's statement is unsatisfactory. Ill. S. Ct. R. 341(i) (eff. Nov. 1, 2017). "The purpose of requiring a jurisdictional statement is not merely to tell this court that it has jurisdiction, but to provoke counsel into making an independent review of the right to appeal, before writing the brief." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 8. An accurate and complete statement of jurisdiction is essential to the orderly administration of justice. While defendant points to orders of the court below where he believes error occurred and appears to mirror language from Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), the record reflects that this appeal arose from a final order in a supplemental proceeding under section 2-1402 of the Code. Accordingly, jurisdiction is conferred upon this court by Illinois Supreme Court Rule 304(b)(4) (eff. Mar. 8, 2016).

¶ 14 Turning to the merits, defendant argues to this court that IRA 337 was an exempt account pursuant to section 12-1006 of the Code, in part because it was intended in good faith to qualify as a retirement plan under the IRC. Defendant additionally asserts that IRA 337 was never disqualified as an IRA under 26 U.S.C. § 408 (2012), because he did not engage in prohibited transactions as described in 26 U.S.C. § 4975.

¶ 15 In its appellate brief, plaintiff begins by incorporating by reference its "arguments and case law support" in its written and oral submissions before the trial court "as if the same were

argued herein verbatim." Plaintiff then goes on to contend: (1) the trial court did not err when it denied defendant's motion to reconsider, because defendant improperly raised "new legal theories and arguments" by claiming that he took "distributions" from IRA 337, even though he testified that he made "withdrawals" from IRA 337; and (2) the trial court properly found that IRA 337 lost its exempt status, because there is no evidence in the record that supports defendant's claim that he took distributions from IRA 337 and used them to pay his business debts.

¶ 16 Plaintiff's appellate brief is replete with procedural errors that we cannot possibly overlook. As defendant notes in his brief, plaintiff's statement of facts is improper on several fronts. Rule 341(h)(6) requires that a statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017). Generally, an appellee is not required to provide a statement of facts, but when it does so, it must be in conformance with Rule 341(h)(6). See Ill. S. Ct. R. 341(i) (eff. Nov. 1, 2017). Throughout its 19-page statement of facts, plaintiff is argumentative, misrepresents facts from the record, offers facts irrelevant to the issues on appeal, and provides citations to the record that do not support the facts as stated. For example, at page seven of its brief plaintiff inaccurately states that defendant "provided no testimony regarding information contained in the unsworn Declaration of Exempt Assets." Defendant testified extensively regarding these assets,[1] both on direct and cross examination. He testified as to when they were established, the rollover process after his retirement, how the accounts were managed, the type of funds contained within them, and his methods and reasons for withdrawals.

[1] The assets included in the declaration were defendant's four IRAs at UBS, one IRA at Ameritrade, and his checking account at Chase Bank.

At page nineteen, still within the statement of facts, plaintiff stated that defendant's exhibits in his motion to reconsider were "woefully insufficient to support [defendant's] new legal theories." The statement is argumentative, cites only its own memorandum as support, and does not accurately reflect the oral or written findings of the trial court. Moreover, plaintiff's statement of facts incorporates the legal arguments made to the trial court and does nothing to aid this court in our effort to properly address the merits of the appeal.

¶ 17 Even if we were to overlook plaintiff's disregard of supreme court rules in its statement of facts, we cannot ignore that plaintiff's argument section of its brief utterly fails to comply with Rule 341(h)(7), which requires that arguments with contentions and reasons therefor be put forth with citations to authority, as well as pages of the record. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). While Rule 341(h)(7) applies only to appellants on its face, Illinois Supreme Court Rule 341(i) (eff. Nov. 1, 2017) imposes those same requirements on appellees and other parties.

¶ 18 Defendant urges this court to disregard or forfeit any arguments made by plaintiff that were incorporated by reference. We agree that it is necessary to do so. Plaintiff's attempt to incorporate by reference 122 additional pages from its briefs, filings, and arguments before the trial court as reflected in the record is a vague and unacceptable effort to address the issues argued below without making cogent legal arguments with citations to authority before this court. See *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). "One sentence in a brief indicating that defendant 'incorporated' all claims made in earlier proceedings [was] not sufficient to satisfy Rule 341, resulting in forfeiture of claims." *Vancura*, 238 Ill. 2d at 370 (citing *People v. Guest*, 166 Ill. 2d 554, 565 (2005)). Moreover, Rule 341(b) limits an appellee's brief to 50 pages or 15,000 words. Ill. S. Ct. R. 341(b) (eff. Nov. 1, 2017). Plaintiff cannot circumvent this rule by incorporating by reference large chunks of the record.

¶ 19 There are additional deficiencies in plaintiff's brief. In the first part of its argument section on the merits, plaintiff fails to articulate a cogent legal argument that is responsive to the issues raised by defendant on appeal, asserting repeatedly and only generally that defendant raised new legal theories in his motion to reconsider and that he failed to substantiate that he received "distributions" from IRA 337, which he then used to pay his business debts. Plaintiff cites no legal authority to support that there is a legally meaningful distinction between withdrawals and distributions. It fails to mention any of the applicable statutory provisions, let alone discuss them. In the second part of its argument section on the merits, plaintiff reiterates that the trial court properly found that IRA 337 lost its exempt status because defendant never established that he took distributions from the account to pay his business debts. In support, plaintiff cites *In re Marriage of Henke*, 313 Ill. App. 159 (2000), which it says is similar to the present case. The husband respondent in *Henke* argued that his constitutional right to notice was violated with regard to the issue of his dissipation of marital assets in an IRA. There, the court found that the respondent was on notice when he was questioned at trial by opposing counsel about an IRA he had previously failed to disclose in interrogatories. Here, defendant fully disclosed all of his accounts from the outset. There was no question as to notice by either party. The issue on appeal here is whether funds remaining in an IRA after certain withdrawals remained exempt from judgment. *Henke* is a divorce case concerning a completely different issue than is presently before this court. Accordingly, this case is clearly distinguishable from *Henke*. The only other cases plaintiff cites concern incomplete records on appeal and evidentiary presumptions, none of which has any bearing on the substance of the issues presented here. Thus, plaintiff has cited no relevant legal authority in its argument section. A

party risks forfeiture of its argument when it cites irrelevant authority and makes no sincere attempt to comply with Rule 341(7). *Vancura*, 238 Ill. 2d at 370.

¶ 20 Supreme court rules are not aspirational suggestions, but requirements that carry the force of law. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002). "[W]e must emphasize that the supreme court rules are rules of procedure and that it is incumbent upon litigants to follow them." *Roth*, 202 Ill. 2d at 495. Failure to follow supreme court rules is not an inconsequential matter, as their purpose is to ensure that this court has clear and orderly arguments that it may use to properly ascertain and dispose of the issues at hand. *Hall*, 2012 IL App (2d) 111151, ¶ 7. This court has inherent authority to strike a brief that does not comply with Rule 341. *Epstein v. Davis*, 2017 IL App (1st) 170605, ¶ 22. While we recognize that striking a brief for noncompliance with Rule 341 is a harsh sanction, plaintiff's lack of compliance here actually hinders our review of the issues as it has provided us with no applicable legal authority on the merits of this appeal. See *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 19. This court is entitled to have issues clearly defined with citations to relevant authority, and is not a dumping ground into which a party may pass the burden of argument and research. *Lake County Grading Co. v. Village of Antioch*, 2014 IL 115805, ¶ 36.

¶ 21 To summarize, plaintiff's statement of facts improperly contains numerous misrepresentations, misstatements, and arguments. In what purports to be the argument section of plaintiff's brief, arguments made before the trial court are improperly incorporated by reference, are nonresponsive to the issues raised by defendant, and are not supported by any relevant legal authority. Thus, plaintiff's brief fails to comply in the most basic sense to the substantive requirements of Illinois Supreme Court Rule 341 (eff. Nov. 1, 2017). We are constrained to strike plaintiff's brief.

¶ 22 We note that there is now effectively no appellee's brief in this case, but we may proceed to consider the claimed errors on appeal under the guidelines of *First Capitol Mortgage Corp., v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). Under *Talandis*, a reviewing court may proceed without an appellee's brief either when the record is simple and the issues can be easily decided, or, if the appellant demonstrates *prima facie* reversible error that is supported by the record, we may reverse the judgment of the trial court. *Talandis*, 63 Ill. 2d at 133. We proceed here under the latter situation to determine if appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Talandis*, 63 Ill. 2d at 133. "*Prima facie* means, at first sight, on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." *Talandis*, 63 Ill. 2d at 132.

¶ 23 Defendant first argues that IRA 337 was exempt pursuant to section 12-1006 of the Code because it was intended in good faith to qualify as an IRA pursuant to § 408 of the IRC. Section 12-1006 of the Code provides that a debtor's interest in an IRA shall be exempt from judgment and seizure for the satisfaction of debts so long as it is "intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986." The IRC defines an IRA as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries." 26 U.S.C. § 408(a).

¶ 24 Defendant testified that he established the original IRA as an employee at Morgan Stanley. He "rolled over" the IRA from Morgan Stanley upon his retirement into several new IRAs, one of which became IRA 337. IRA 337 had been continuously maintained as an IRA since the rollover. Defendant's testimony was corroborated by Nelson exhibit 4 from the evidentiary hearing, which included an account summary from UBS that identified IRA 337 as

an IRA and named defendant as the owner. UBS is named as an authorized custodian of IRAs by the Department of the Treasury according to a letter included as part of exhibit H from defendant's motion to reconsider.

¶ 25 Defendant further argues that IRA 337 was not disqualified as an IRA pursuant to § 4975 of the IRC, because he used personal funds rather than plan assets to pay expenses in connection with his personal investment, and his decision to withdraw funds was not a fiduciary act. The IRC identifies circumstances under which an IRA may be disqualified:

> "If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year." 26 U.S.C. § 408(e)(2)(A).

Section 4975, in turn, defines a prohibited transaction as, "transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan," or "act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account." 26 U.S.C. § 4975(c)(1)(D, E).

¶ 26 Defendant testified that he self-directed the investments of IRA 337. He did not contest that he was a fiduciary for the account. He also testified that he wrote checks against IRA 337, in part to pay expenses of Mistwood Golf Course. Defendant argues that this was not a use of "assets of the plan," but rather a permissible withdrawal, whereby he took a distribution from IRA 337 and used those withdrawn funds to pay the expenses of the golf course. He contends that his use of the funds post-withdrawal meant that they were no longer assets of the plan, and therefore, not prohibited. In support, defendant cites *In re Cherwenka*, 508 B.R. 228 (Bankr.

N.D. Ga. 2014), where a creditor seeking to disqualify a claimed exemption argued that the debtor engaged in prohibited transactions under § 4975(c)(1)(D, E) when he withdrew funds from his IRA and used a portion of those funds to pay non-living expenses, such as his secretary's salary and contributions to his church. *Cherwenka*, 508 B.R. at 233, 37. It was undisputed in *Cherwenka*, as it is in the present case, that the debtor was a fiduciary and a disqualified person under § 4975. *Cherwenka*, 508 B.R. at 235. The court noted that self-directed IRAs are authorized by federal law, and that owners of IRAs who are also fiduciaries are permitted to make withdrawals without disqualifying the entire plan. *Cherwenka*, 508 B.R. at 236-37. Moreover, the court recognized that funds withdrawn from an IRA are no longer assets of the IRA. *Cherwenka*, 508 B.R. at 237.

¶ 27 As noted above, defendant does not contest that he is a fiduciary, and thus, a disqualified person under § 4975. Defendant explains, however, that his status as a fiduciary does not disqualify him *per se* in all transactions with regard to IRA 337. He points out that the act of withdrawing funds is that of a participant, one that any other participant in an IRA would be permitted to make, and that such an action is not that of a fiduciary, and therefore not prohibited. In support, defendant directs us to § 4975(d)(9), which provides exemptions to prohibited transactions listed in § 4975(c)(1): "*the prohibitions provided in subsection (c) shall not apply to receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan*, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries[.]" (Emphasis added.) 26 U.S.C § 4975(d)(9). Defendant's assertion is further supported in the record by Advisory Opinion, *Seymour Goldberg, Esq.*, Opinion No. 2009-02A (Dep't of Labor 2009), a

Department of Labor advisory opinion[2] that addressed the question of distributions from an IRA to an otherwise disqualified person. In *Seymour*, the Department of Labor opined:

> "[N]otwithstanding the Trust's status as a disqualified person under Code section 4975(e)(2), neither the trustee's decision to take a benefit distribution from the IRA in accordance with the terms of the IRA, nor the Trust's receipt of the benefit distribution as the IRA beneficiary, is a prohibited transaction under Code section 4975(c). *** Furthermore, although a plan participant or IRA owner also may be a fiduciary of the plan or IRA, it does not necessarily follow that all decisions made by a participant or IRA owner with respect to the plan or IRA are fiduciary decisions. Rather, just as a plan participant's decision to elect to take a permissible benefit distribution from an employer-sponsored plan is not a fiduciary act by the participant, an IRA owner's decision to make an otherwise permissible benefit distribution to himself or herself in accordance with the terms of the IRA is not an act by the IRA owner as a fiduciary within the meaning of the prohibitions in Code sections 4975(c)(1)(D) and (E)." *Seymour*, Opinion No. 2009-02A at 3.

¶ 28 Accordingly, we determine that defendant has presented a *prima facie* case of reversible error that is supported by the record. Specifically, he has demonstrated that (1) IRA 337 was established in good faith as an IRA pursuant to the IRC; and (2) the account was not disqualified

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[2] The Department of Labor is responsible for managing regulatory policies, including interpretive matters, under Title I of E.R.I.S.A., as well as related provisions of the Internal Revenue Code. United States Department of Labor, Office of Regulations and Interpretations, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/organization-chart#section8 (last visited Mar. 28, 2018)

as an IRA pursuant to § 4975 of the IRC, because he used personal funds withdrawn from IRA 337, rather than plan assets to pay the bills of Mistwood Golf Course, and his act of withdrawing funds was not the prohibited act of a fiduciary. Because defendant established a *prima facie* case that this account was still a retirement plan under the applicable provisions of the IRC, it remained exempt from enforcement of the judgment amount under Illinois law. See 735 ILCS 5/12-1006 (West 2016).

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County.

¶ 31 Judgment reversed.