

2018 IL App (2d) 180326-U
No. 2-18-0326
Order filed September 6, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
ELIZABETH A. McDONALD,)	of Du Page County.
)	
Petitioner-Appellee,)	
)	
and)	No. 04-D-2121
)	
THOMAS McDONALD,)	Honorable
)	Robert E. Douglas,
Respondent-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* Trial court did not abuse its discretion in denying motion to vacate TRO.
- ¶ 2 On April 30, 2018, the trial court denied the motion of the appellant, Thomas McDonald, to vacate a court order entered on February 27, 2018 (February 2018 Order), which he contended improperly extended a temporary restraining order (TRO). Thomas appeals from this denial pursuant to Illinois Supreme Court Rule 307(a), which permits an interlocutory appeal from a trial court order “granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.” Ill. S. Ct. R. 307(a) (eff. Nov. 1, 2016). Thomas argues that the trial court abused

its discretion in entering the February 2018 Order because too much time had passed without the trial court holding a hearing on whether injunctive relief was warranted. We affirm the trial court's decision.

¶ 3

I. BACKGROUND

¶ 4 The parties were married in 1991 and had two children, who were born in 1998 and 2001. In 2004, the petitioner, Elizabeth A. McDonald, filed for dissolution. The marriage was dissolved in 2008, and a modified judgment was entered in 2009. That judgment was appealed (docket no. 2-10-0079), and we affirmed in part and vacated in part, and remanded.

¶ 5 Even apart from the issues raised in the appeal, numerous issues relating to the distribution of the marital estate remained, and the parties filed numerous motions relating to support and visitation as well, all of which have been pending before the trial court. In the course of preparing for the hearing of remaining financial issues, an independent financial expert was appointed and the parties continued to exchange supplemental discovery.

¶ 6 On October 23, 2017, Elizabeth filed a motion seeking the imposition of sanctions on Thomas for failing to disclose various assets and accounts in excess of \$1 million which were in existence for at least two years before his September 1, 2017, supplemental discovery responses revealed them. Thomas's response did not dispute the existence or previous nondisclosure of the assets, although he denied certain details and characterizations and made some corrections to the amounts and dates in the motion.

¶ 7

A. November 2017 TRO: Entry, Modifications, and Extensions

¶ 8 On November 9, 2017, Elizabeth filed an emergency petition for TRO and preliminary injunction regarding a Bank of America safe deposit box in Thomas's name, the existence of which she had recently discovered. The petition sought an *ex parte* hearing on the ground that if

Thomas were given notice of her petition he would be likely to remove or otherwise conceal the contents of the box. The trial court conducted the *ex parte* hearing that same day and issued a TRO prohibiting Thomas from “entering the safe[] deposit box ***, [or] transferring, withdrawing, secreting[,] encumbering[,] or otherwise disposing of the contents, until the parties can jointly appear, through attorneys, to inventory the contents and to provide placement of the contents into a safe place during the pendency of the proceedings.” The TRO also enjoined the Bank of America from allowing Thomas or anyone acting on his behalf from taking any of the prohibited actions. The TRO set the hearing on the issuance of a preliminary injunction for 18 days later.

¶ 9 A copy of the TRO was served on Thomas. Elizabeth’s attorney contacted Thomas’s attorney, seeking to arrange a time prior to the preliminary injunction hearing to open the safe deposit box and inventory its contents. Thomas’s attorney refused, arguing that the *ex parte* TRO should never have been entered and that no inventory should occur. Elizabeth immediately filed a motion to enforce the inspection and inventory of the box contents. Thomas filed a response to the petition for TRO and an affidavit, in which he averred that the box contained “only personal effects and paperwork that are sentimental to [Thomas] and are not germane to the pending proceedings including birth certificates, confidentiality agreements between Thomas and his clients, and documents that are protected by attorney/client privilege. Nothing of value and no assets are contained within the safe deposit box.”

¶ 10 On November 27, 2017, the parties appeared for the hearing on the preliminary injunction. After a conference, the hearing was continued pursuant to Elizabeth’s motion. The trial court did hear argument on Elizabeth’s motion to enforce an inspection and inventory of the safe deposit box contents. It found that the TRO required an inventory and granted her motion,

ordering the parties' counsel to meet within 14 days to conduct the inspection and inventory of the box contents "on an agreed date and time." The order set out the specific manner in which the inspection and inventory was to take place. If Thomas asserted a claim of privilege or confidentiality as to any items, those items were to be presented on December 14, 2017, for an *in camera* inspection by the trial court so that it could rule on the claim. The hearing on the preliminary hearing would be held on December 18, and the TRO would remain in effect until then. The order noted that it was entered over Thomas's objection.

¶ 11 On December 11, 2017, Elizabeth moved to continue the hearing on the preliminary injunction because the independent expert witness who was scheduled to testify in a separate matter—the parties' hearing on pending financial matters—was only available to testify on December 18. She asked that the December 18 court date be repurposed to hear his testimony. On December 12, the trial court granted the motion over Thomas's objection, extending the November 2017 TRO and stating that it would set a new preliminary injunction hearing date when the parties were next in court on December 18. The trial court also ordered the safe deposit box inspection, which had not yet taken place, to occur on December 18.

¶ 12 On December 18, several matters were heard by the trial court, including a different preliminary injunction relating to a TRO entered in December 2017. The hearing was not completed and the trial court set February 5, 2018, as the continued hearing date on that and certain other matters. Regarding the safe deposit box, the parties reported that they had been unable to open the safe deposit box because Thomas did not have his key on the scheduled date. The trial court ordered the parties' counsel to appear at the bank on January 4, 2018, for the opening of the box, and ordered that the box should be drilled if the key was still missing. A status hearing on the safe deposit box would be held the day after that, January 5, 2018. The

order also provided that the November 2017 TRO was extended for good cause found by the trial court until “a full and complete hearing on the preliminary injunction.” The order did not reflect any objection by Thomas to these provisions.

¶ 13 As of January 5, the safe deposit box still had not been opened. The trial court entered an order rescheduling the opening and possible drilling of the box for January 16, 2018, and set a status on the matter for the next day, January 17. The order further provided that “any and all items that are claimed as privileged shall be placed in a box and sealed in the presence of the attorneys,” and that Thomas’s attorney must deliver the box to the trial court at the following day’s status hearing. The order stated that, upon good cause found by the trial court, the November 2017 TRO would remain in effect until the hearing on the preliminary injunction. The order does not reflect any objection by Thomas.

¶ 14 On January 17, 2018, the parties appeared in court. As recited in the written order entered that day, they advised the court that the safe deposit box had been opened the previous day. An inventory of the contents was apparently read into the record. No transcript from that date is included in the record on appeal. However, the order states that “no cash, gold bars, cashiers checks or the like were found in the box.” The box did contain documents, compact discs, and “jump” or “flash” drives. The attorney for the bank would not allow Thomas’s attorney to view the electronically stored information. As relevant here, the order set out the following procedures:

“(1) All documents, CDs, compact discs [*sic*] and the like that are claimed by [Thomas] to be privileged or otherwise irrelevant to these pending proceedings shall be placed in a sealed envelope by [Thomas’s attorney] and delivered to the court herein (specifically Judge Douglas) for *in camera* inspection.

(2) In furtherance of Paragraph 1, and over objection of [Thomas's attorney], the procedure for the sealed envelope is as follows:

(i) one attorney for each party shall return to the [bank] to facilitate and witness the privileged/irrelevant items being placed in the sealed envelope. *** [A bank employee] shall be present ***;

(ii) the sealed envelope shall be delivered to the Judge by [Thomas's attorney] for *in camera* review;

(iii) and, immediately upon the privileged/irrelevant items being removed from the safe deposit box, the *** TRO shall be lifted.

* * *

(4) To the extent [Elizabeth's counsel] seeks to view any of the items from the safe deposit box ***, they shall issue *** a notice to produce.

(4) [*sic*] All matters are entered and continued to the previously set date of February 5, 2018 (including the issue of the *in camera* review referenced herein).

(5) [*sic*] The court is mindful of [Thomas's attorney's] concern that as no one was allowed to actually view the contents of any compact discs or the like, any claim of privilege or irrelevance may be speculative at this juncture.”

On January 24, Elizabeth served a notice to produce. It is not part of the record, but the parties state that it requested the production of essentially all of the safe deposit box contents.

¶ 15 In the written order entered on February 5, 2018, the sole mention of the safe deposit box was the statement that “the inspection relative to the 1/17/18 court order is continued for status to March 20, 2018.” On February 20, 2018, an agreed order was entered in which the parties

agreed that Thomas would either produce the documents requested in the notice to produce, or provide his objections to production, within 7 days of his gaining access to the documents.

¶ 16 On February 23, Elizabeth filed an emergency motion. In it, she asserted that, earlier that same day, the parties had returned to the bank to remove the contents of the box and place the privileged or irrelevant materials into a sealed envelope to be forwarded to the court. However, a dispute arose after Thomas's counsel stated that they no longer asserted privilege over any of the compact discs, audio tapes, flash drives, or other documents previously claimed as privileged. Thus, Thomas asserted, there was no need to forward anything to the court for review, and he could simply take possession of the contents of the box. Elizabeth's attorney objected, and the removal of items did not proceed. Elizabeth's motion argued that Thomas's new position regarding the production of the box contents (1) was inconsistent with his prior position that the contents were privileged or irrelevant and (2) did not conform to the intent of the prior court orders (which she asserted was to prevent the disappearance of the box contents before anyone else knew what they were). She sought an order requiring all of the contents to be forwarded to the court for review.

¶ 17 Three days later, Thomas filed two items of his own: a motion against Elizabeth seeking to enforce the January 17, 2018, order, which he contended permitted him to choose which items to assert privilege over (to be conveyed to the court for review) and allowed him to take possession of the remainder; and a petition for a rule to show cause against the bank, requiring it to allow him to take possession of the box contents. Thomas complained that, because Elizabeth and the bank had not complied with the January 17, 2018, order, he had been unable to remove any items from the box and was consequently unable to achieve the lifting of the TRO's restrictions on his access to the box.

¶ 18

B. February 2018 Order

¶ 19 The trial court heard all of these motions and petitions on February 27, 2018. As with almost all of the other relevant hearings and court dates relating to the November 2017 TRO, there is no report of proceedings in the record on appeal. The written order entered that day instructed Elizabeth's attorney and the bank to set a date for removal of the box contents "as soon as possible." All of the items on Elizabeth's notice to produce (this appears to include essentially all the items in the box) were to be removed, placed in a FedEx box, and shipped directly to the trial court for review. The TRO would be lifted when the items were removed from the safe deposit box. Once the FedEx box arrived at court, the trial court would notify the parties and set a date to open the box in the presence of both parties' counsel. Thomas and his attorney would have the opportunity to view any electronically stored information on a computer in the presence of court personnel and indicate to the court the items that Thomas asserted were privileged, confidential, or irrelevant. Thomas would then have seven days to file objections to the disclosure of any items requested in Elizabeth's notice to produce. All of the items would continue to be held by the trial court in a sealed container. After receiving Thomas's objections, the trial court would hear arguments on those objections and rule on them. Any responsive, non-privileged documents ordered for turnover would be made available for copying and production to Elizabeth. The order noted that it was entered over Thomas's objections.

¶ 20 The parties complied with the February 2018 Order, and the FedEx box was opened by the trial court in the presence of the parties' counsel on March 20, 2018. Thomas and his attorney were given approximately two hours to review the electronically stored information on a computer. Thomas filed an emergency motion seeking more time to file his objections, but the trial court found that the matter was not an emergency and set it for hearing at a later date.

Thomas then submitted his written objections to the notice to produce (these are not contained in the record on appeal). The matter was set for status and the setting of an oral argument date.

¶ 21 C. Motion to Vacate February 2018 Order

¶ 22 On March 27, 2018, Thomas filed a motion to vacate the February 2018 Order. As later amended, the motion argued that the *ex parte* November 2017 TRO had been improperly extended six times and had become, in effect, a preliminary injunction improperly entered without a hearing. The motion also asserted that the February 2018 Order interfered with Thomas's ability to review the safe deposit box contents to prevent disclosure of items that were not responsive to the notice to produce, by placing the contents in the hands of the trial court. Thomas argued that the order essentially represented a decision on the issue of whether he should have access to the contents of the safe deposit box without ever granting him a full opportunity to be heard on the issue. The trial court set a briefing schedule, and set April 30, 2018, for hearing both the motion to vacate and Thomas's objections to production.

¶ 23 Elizabeth filed a response, arguing that the TRO was a proper restraint on Thomas's unfettered access to the safe deposit box contents because the history of the litigation between the parties demonstrated that Thomas had attempted to conceal assets in the past and had not always complied with court orders. In fact, she argued, Thomas's own actions substantially contributed to the delay in identifying the contents of the box so that a meaningful argument regarding a preliminary injunction could occur. For instance, even after the TRO was entered, Thomas would not allow inspection and inventorying of the box until ordered to do so by the court; he failed to bring the key for the box on the date set for opening; and after the box was ordered to be drilled, he asserted and then withdrew blanket claims of privilege.

¶ 24 Elizabeth further argued that the February 2018 Order contained multiple provisions designed to safeguard Thomas’s potential claims of privilege, confidentiality, and irrelevance. Elizabeth also noted that, under the terms of the February 2018 Order, the TRO itself had been lifted once the contents of the box were removed for shipping to the court. Thomas countered that, even if the TRO itself was technically lifted when the contents were removed, certain of its terms remained in effect as the box contents were held by the trial court and he still did not have access to them.

¶ 25 On April 30, 2018, the trial court held a conference in chambers with the parties’ attorneys and heard oral argument on Thomas’s motion to vacate and his objections to discovery. The trial court denied the motion to vacate on the grounds that the TRO was properly extended, because some knowledge about the contents of the safe deposit box was necessary before the issues inherent in a preliminary injunction hearing—for instance, the likelihood of success on the merits—could be argued or determined:

“The Court indicated to counsel that it couldn’t have a preliminary hearing because it *** could not opine or make a ruling on one of the key issues of both a temporary and a *** preliminary injunction, which was the possibility of prevailing on the merits because the Court doesn’t know what is in the documents.”

The court stated that it would review the box contents and Thomas’s objections to production and would issue a line-by-line ruling on all of those objections on May 9, 2018. In the course of ruling on other pending matters, the trial court also granted Elizabeth’s October 2017 motion for sanctions against Thomas, finding that he had failed to reveal to either Elizabeth or the independent financial expert the existence of funds which he later transferred into an irrevocable trust.

¶ 26 Thomas filed a notice of appeal from the denial of his motion to vacate that same day. He also moved for a stay, seeking to stop the court from conducting its *in camera* review of the box contents or issuing a ruling on his objections until the appeal was decided. Although the record on appeal does not contain any ruling on this motion, Elizabeth states (and Thomas does not dispute) that the trial court granted the stay.

¶ 27

II. ANALYSIS

¶ 28 Before we address the substance of Thomas's appeal, we must first determine whether we have jurisdiction to hear this appeal. Elizabeth argues that we do not, because the TRO was entered in November 2017 and Thomas did not take any immediate appeal from it. Thomas responds that we have jurisdiction under Illinois Supreme Court Rule 307(a)(1), which allows the interlocutory appeal of any order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. July 1, 2017). He contends that the February 2018 Order was in effect a preliminary injunction, and thus he can appeal from the April 30, 2018, order denying his motion to vacate or dissolve that injunction.

¶ 29 Thomas is correct that a party need not appeal a TRO or injunction immediately or else risk losing all right to challenge that injunction, because Rule 307 allows parties to seek a later dissolution of the injunction and then to immediately appeal the denial of that relief. Further, while we ordinarily might have some concern over whether our jurisdiction properly arises under Rule 307(a) (permitting appeals from orders regarding injunctions within 30 days) or Rule 307(d) (governing appeals from orders regarding TROs, which must be brought within two days), here we would have jurisdiction under either subsection of the rule because Thomas filed his notice of appeal on the same day as the order being appealed was entered, and thus his appeal is timely under either subsection.

¶ 30 Despite finding that this appeal is timely under Rule 307, we have some doubt over whether any TRO even existed when Thomas filed his motion to vacate, as the February 2018 Order provided that the TRO was lifted once the contents of the safe deposit box were removed. It does not appear that Thomas was any longer bound by any prohibition against accessing the box after that point, or that the bank was any longer involved in regulating that access. Further, prior to the entry of the February 2018 Order, Elizabeth filed a notice to produce directed toward the contents of the box, and she had earlier moved for sanctions related to Thomas's past concealment of assets. Thus, the restrictions contained in the February 2018 Order (such as the requirement to turn the contents of the box over to the trial court for *in camera* review of any objections to production) could be viewed merely as a discovery order rather than as an extension of the November 2017 TRO. Nevertheless, the trial court itself appeared to accept Thomas's characterization of the February 2018 Order as an extension of the TRO, as reflected in its comments when ruling on his motion to vacate. Accordingly, we too accept this characterization and turn to the substance of Thomas's appeal.

¶ 31 Thomas's sole argument on appeal is that the trial court erred in denying his motion to vacate the February 2018 Order because its repeated extensions of the November 2017 TRO in essence transformed the TRO into a preliminary injunction, but such an injunction was improper because no full hearing was ever held on the issue of whether injunctive relief was warranted. Accordingly, he argues, the trial court should have granted his motion to vacate the TRO.¹

¹ We stress that this is the only argument before us and that Thomas has not sought any review of the trial court's initial entry of the TRO or its later modifications of the TRO in response to the concerns raised by Elizabeth. Even if Thomas had sought it, our ability to conduct any such review would be foreclosed by the lack of transcripts for any proceedings other than the April 30, 2018, hearing on the motion to vacate. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 32 A TRO is an emergency remedy entered to preserve the status quo until the trial court can hold a hearing on whether a preliminary injunction should issue. *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 416 (1987). Thus, a TRO should be of brief duration, lasting only as long as necessary for the court to hold the preliminary injunction hearing. Section 11-101 of the Code of Civil Procedure (735 ILCS 5/11-101 (West 2016)) sets out various requirements for the issuance of a TRO and provides that “the motion for a preliminary injunction shall be set for hearing at the earliest possible time.”

¶ 33 The grant, denial, modification, or dissolving of injunctive relief such as a TRO, or the refusal to grant, modify, or dissolve an injunction is a matter within the trial court’s discretion, and “its determination should not be overturned on review unless there has been an abuse of [that] discretion.” *Abdulhafedh*, 161 Ill. App. 3d at 416. Where, as here, a party appeals not from the issuance of the TRO but from the denial of a motion to dissolve the TRO, our review is limited to the question of whether the trial court’s decision not to dissolve the TRO was an abuse of discretion. *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081 (1993). An abuse of discretion occurs when the trial court’s ruling is arbitrary, fanciful, or unreasonable, or no reasonable person would take the view adopted by the trial court, or when its ruling rests on an error of law. *People v. Olsen*, 2015 IL App (2d) 140267, ¶ 11.

¶ 34 In support of his argument that the TRO should have been vacated because it had been extended too long without holding a hearing, Thomas cites *Abdulhafedh* and *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259 (1993). In *Abdulhafedh*, the reviewing court held that the trial court’s extension of a TRO for 98 days without setting a date for the hearing of the preliminary injunction had the effect of creating “a preliminary injunction without allowing the defendant a fair opportunity to show why an injunction should not be issued.” *Abdulhafedh*, 161 Ill. App. 3d

at 417. In *Passon*, the trial court conducted a non-evidentiary hearing on a TRO but then advised the defendant after the hearing that it would be issuing a preliminary injunction instead of a TRO. The reviewing court found that the trial court's decision to skip the step of holding an evidentiary hearing before issuing a preliminary injunction was reversible error. *Passon*, 242 Ill. App. 3d at 265.

¶ 35 We have no quarrel with the holdings of *Abdulhafedh* and *Passon*, but neither of them apply to this case, which rests on different facts. In *Abdulhafedh*, there is no indication that the trial court ever set a date for a hearing on a preliminary injunction, choosing instead to simply keep extending the TRO for additional periods of time without providing the opportunity for a hearing. The trial court in *Passon* similarly chose to skip holding a full hearing before entering a preliminary injunction.

¶ 36 Here, by contrast, when entering the TRO in November 2017, the trial court properly set a prompt date for the hearing on the preliminary injunction. The occurrence of that hearing was repeatedly delayed primarily because of Thomas's efforts to prevent the parties from entering and inventorying the contents of the safe deposit box. In fact, the February 2018 Order that was the subject of Thomas's motion to vacate itself provided for the lifting of the TRO as soon as the contents of the box were removed, and for the expeditious review of Thomas's objections to the production of those contents. Thomas himself, through his motion to stay the trial court's review of the box contents and ruling on his objections, has prevented the trial court from promptly hearing his case for why the contents should not be produced. A party cannot complain of delay when he himself has been the cause of that delay. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) ("a party cannot complain of error which that party induced the court to make or to which that party consented").

¶ 37 Thomas argues that the trial court was mistaken in its belief that it (and the parties) needed to know the contents of the safe deposit box before it could assess the likelihood of Elizabeth prevailing on the merits of her petition for injunctive relief. He contends that the trial court could have proceeded without knowing those contents, by simply assessing whether Elizabeth could show that the contents should be preserved. But the contents of the box were squarely at issue in the petition for injunctive relief: Elizabeth posited that the box contained either physical assets of value (or evidence regarding the location of assets) that should be disclosed pursuant to previously-served discovery. Thomas denied that the box contained anything of value and asserted that it contained only items of purely sentimental value or items that were confidential or privileged. Because the contents of the box were at issue, any hearing on whether to issue a preliminary injunction to preserve them would necessarily involve evidence regarding the actual nature of those contents. Further, as a legal matter, Elizabeth's right to seek preservation of the box contents would depend on whether those contents were relevant in any way to the matters still pending before the trial court. There is no merit to Thomas's contention that information about the contents of the box was irrelevant to any preliminary injunction hearing. And as Thomas himself thwarted the trial court's efforts to obtain that information so that the preliminary injunction hearing could proceed in a prompt fashion, the trial court did not abuse its discretion in denying his motion to vacate.

¶ 38

III. CONCLUSION

¶ 39 For the reasons stated, the trial court's order denying Thomas's motion to vacate the February 2018 Order is affirmed, and the matter is remanded for further proceedings including a prompt ruling on Thomas's objections to production of the contents of the safe deposit box.

¶ 40 Affirmed.