2019 IL App (1st) 171104-U

FOURTH DIVISION
March 28, 2019

No. 1-17-1104

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

3RED GROUP OF ILLINOIS, LLC and IGOR B. OYSTACHER,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	
v.	)	No. 14 CH 19726
EDWIN JOHNSON,	)	
Defendant-Appellant.	)	Honorables Margaret A. Brennan and Patrick J. Sherlock, Judges Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the litigation sanction imposed and the denial of defendant's request for additional discovery pursuant to Illinois Supreme Court Rule 191(b) were not an abuse of discretion.

¶ 2 Defendant Edwin Johnson appeals from four orders entered by the circuit court of Cook

County. The first order, entered June 1, 2015, granted plaintiffs 3Red Group of Illinois, LLC (3Red) and Igor Oystacher (Oystacher) (collectively plaintiffs) sanctions in the amount of $500 against defendant pursuant to Illinois Supreme Court Rule 219(a) (eff. July 1, 2002) for failing to comply with the circuit court's discovery order. The second order, dated October 22, 2015, required defendant to pay sanctions in the amount of $12,462 for the failure to abide by another discovery order. The third order, dated May 6, 2016, entered litigation sanctions against defendant, barring him from presenting evidence related to two counts of plaintiffs' complaint. Finally, the fourth order, denied defendant's motion to conduct additional discovery pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013). On appeal, defendant challenges the propriety of all four of these orders and maintains that, but for these improper orders being entered, summary judgment would not have been granted in plaintiffs' favor. For the reasons that follow, we conclude we lack jurisdiction to consider the orders imposing monetary sanctions and otherwise affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The circuit court's orders imposing sanctions against defendant arise from an underlying lawsuit between plaintiffs and defendant in a breach of contract action. According to the complaint, defendant was a manager, financial officer, and chief risk officer of 3Red, a proprietary trading firm that was founded by Oystacher. On June 17, 2013, 3Red terminated defendant's employment claiming he misrepresented his capital contribution to the company, withdrew funds in excess of $100,000 from the company for personal use, improperly used company funds for personal travel, and submitted a fraudulent operating agreement. On August 15, 2013, defendant and 3Red entered into a "Confidential Settlement Agreement and Reciprocal Release" (settlement agreement) consisting of various sections in order to resolve all

disputes and potential litigation regarding the termination of defendant's employment and affiliation with 3Red, including resolution of any membership interests held by defendant in the company.

¶ 5 On December 10, 2014, plaintiffs filed their complaint alleging the following four counts constituting breaches of the settlement agreement: (1) breach of section 10(a) requiring the parties to keep the settlement agreement confidential; (2) breach of section 10(c) prohibiting defendant from disclosing confidential information as defined in the agreement; (3) breach of section 10(d) requiring defendant to return certain property to 3Red; and (4) breach of section 10(f) requiring defendant to notify 3Red if any government authority requested information about 3Red. In regard to the disclosure of confidential information counts, plaintiffs specifically alleged that defendant violated the settlement agreement when he filed a copy of the agreement as an exhibit to a pleading in legal malpractice litigation against his former counsel (legal malpractice litigation).

¶ 6 Plaintiffs moved for a temporary restraining order and a protective order. On December 15, 2014, the circuit court entered a temporary restraining order, and based upon the substance of that ruling, the parties entered into an agreed order enjoining defendant from disclosing any of plaintiffs' confidential information in public litigation filings or to the press. The protective order further required that the confidential documents filed in the legal malpractice litigation be sealed. Thereafter, the matter was transferred from the chancery division to law division.

¶ 7 A drawn-out discovery process commenced, as demonstrated by the lengthy record in this cause totaling over 7,000 pages, which is primarily consumed by discovery issues. Over the course of this litigation, five motions for sanctions were granted, including one for attorney fees in the amount of $500 (June 1, 2015, order) and another in the amount of $12,462 (October 22,

2015, order) both due to defendant's noncompliance with the circuit court's discovery orders. Ultimately, due to his continuing disregard for these orders, defendant was prohibited from putting on a defense to the allegations set forth in counts I and II of the complaint (May 6, 2016, order). In contrast, each of the motions brought by defendant to block plaintiffs' discovery requests were denied. Due to the voluminous nature of the record, we recite herein only those facts relevant to the disposition of this appeal.

¶ 8 Plaintiffs served defendant with written discovery including interrogatories, a request for production, and requests to admit on January 28, 2015. When defendant failed to timely respond to all but the requests to admit, plaintiffs filed a motion to compel, which the circuit court granted. Thereafter, defendant filed his discovery responses, albeit not to plaintiffs' satisfaction.

¶ 9 On May 1, 2015,[1] plaintiffs filed their second motion to compel and for sanctions based on defendant's failure to properly respond to their discovery requests. Plaintiffs maintained that defendant's responses contained multiple false statements and were contradicted by defendant's own verified answers to plaintiffs' requests to admit. Specifically, in his requests to admit, defendant admitted he (1) disclosed the settlement agreement, (2) possessed and disclosed 3Red's confidential information, and (3) communicated with the press about 3Red. These requests to admit were subsequently contradicted by defendant's responses to the interrogatories wherein he stated he was "unaware of any information" regarding (1) his disclosure of the settlement agreement, (2) his possession and disclosure of 3Red's confidential information, and (3) his communications with the press.

¶ 10 On May 4, 2015, the circuit court granted in part and denied in part the relief sought by

[1] Plaintiffs' motion is file stamped with the date "May 1, 2016" but it is an apparent error where the motion itself is dated May 1, 2015, and addresses discovery violations occurring in April 2015.

plaintiffs. Defendant was ordered to respond to the requests to produce by May 18, 2015, and the motion for sanctions was denied. Defendant did not produce the discovery responses by May 18, 2015, and filed a motion for extension of time, which was scheduled for presentment on June 2, 2015.

¶ 11 As a result of defendant's failure to abide by the May 4, 2015, order, plaintiffs filed a motion for sanctions and a petition for indirect civil contempt on May 21, 2015. The matter was scheduled for presentment on June 1, 2015. On May 31, 2015, however, defendant served amended answers to plaintiffs' interrogatories and requests for production. Thereafter, on June 1, 2015, the circuit court granted plaintiffs' motion for sanctions and ordered defendant to pay $500 to plaintiffs' counsel due to defendant's noncompliance with the discovery order.

¶ 12 The following day, June 2, 2015, the circuit court entered orders regarding discovery and a pending motion to dismiss. The record does not disclose whether defendant ever presented his motion for extension of time as it is not referenced in the order and this court was not provided with a record of proceedings for that day.

¶ 13 In June 2015, the parties continued to engage in discovery, with defendant providing amended responses in which he stated that he received an email from Matthew Leising of Bloomberg News on September 17, 2014. Defendant also admitted that he had communicated with the press, but only to direct them to speak with his attorneys.

¶ 14 In order to confirm the veracity of these responses, plaintiffs served subpoenas on defendant's former counsel seeking documents identifying defendant's communications with the press. In response, defendant moved to quash the subpoenas arguing that the requests constituted a "fishing expedition." The circuit court denied defendant's motion to quash. Thereafter, defendant's former counsel identified multiple undisclosed emails, telephone communications,

and in-person meetings with members of the press that occurred prior to the filing of the action. Defendant amended his discovery responses on August 7, 2015, and August 24, 2015, to disclose and produce documents related to those press communications.

¶ 15 Finding these responses to be insufficient and defendant having failed to cure the deficiencies upon request, plaintiffs filed a fourth motion to compel and for sanctions on July 13, 2015. Plaintiffs alleged that defendant indicated that he would not amend the discovery responses and that it was his intention to stand on his assertion of the fifth amendment with regard to plaintiffs' request for information as it related to count IV of the complaint.

¶ 16 On July 27, 2015, the circuit court set a briefing schedule regarding the issues surrounding the fifth amendment and ordered defendant to comply with the discovery requests by August 4, 2015. Defendant, in the meantime, retained additional counsel and, after consultation regarding the issue of the fifth amendment, decided to withdraw the objections and not file a brief.

¶ 17 Plaintiffs having not received complete discovery responses, on August 19, 2015, filed their fifth motion to compel and for sanctions and a petition for indirect civil contempt with respect to defendant's continued deficient responses to plaintiff's written discovery requests and failure to comply with the court order. Plaintiffs further requested, as a sanction, that defendant be ordered to pay all attorney fees and costs incurred in connection with the discovery motions filed to date where plaintiffs were the prevailing party.

¶ 18 At a hearing on the fourth and fifth motions to compel on August 25, 2015, plaintiffs advised the circuit court that they received defendant's amended discovery at 1:30 a.m. that morning. While plaintiffs indicated they were unable to review the discovery they received, they argued that regardless these responses were due on August 4, 2015, and that certain discovery

responses received were incomplete. In response, defendant admitted to his late compliance with the court's order and that he provided incomplete responses. The circuit court ultimately awarded sanctions on the fourth and fifth motions to compel for attorney fees for preparation of these motions pursuant to Rule 219(a). In sanctioning defendant, the circuit court observed that the discovery answers were three weeks late and incomplete.

¶ 19 Thereafter, plaintiffs filed a petition for attorney fees and costs in the amount of $24,467.90 supported by an affidavit of plaintiffs' counsel. After the matter was fully briefed and argued, on October 22, 2015, the circuit court granted plaintiffs' petition for attorney fees in the reduced amount of $12,462.

¶ 20 In the interim, defendant had supplemented his verified discovery responses but failed to identify any additional press communications. Plaintiffs then subpoenaed defendant's home and cellular telephone records, which defendant moved to quash. In his motion, defendant maintained that he frequently received phone calls from members of the press seeking comment and that he cannot stop members of the press from calling him or his counsel. The circuit court denied defendant's motion to quash and authorized the discovery of defendant's telephone records. Shortly thereafter, defendant filed an unverified response to plaintiff's third set of requests for admission on October 29, 2015, that for the first time, disclosed the existence of communications between the press and defendant in 2015, after the protective order had been entered. Defendant maintained, however, that he did not provide any confidential information during these communications. Despite this unverified response, on November 6, 2015, defendant filed sworn and verified interrogatory responses that denied the existence of his communications to the press in 2015.

¶ 21 On December 15, 2015, plaintiffs received copies of defendant's cellular telephone

records from AT&T. The records disclosed numerous telephone communications between defendant and members of the press that were not disclosed in his discovery responses from November 2014 through October 2015. The phone numbers were identified as belonging to Bradley Hope (Hope) of the Wall Street Journal and Leising of Bloomberg News. While some of these communications were for less than 30 seconds, others were for over an hour.

¶ 22 On December 21, 2015, plaintiffs filed a combined third petition for rule to show cause why defendant should not be held in indirect civil contempt and a sixth motion for sanctions. In their motion, plaintiffs asserted that the AT&T telephone records demonstrated that defendant engaged in "extensive communications with members of the press" during the pendency of the litigation. Plaintiffs alleged that defendant participated in at least 60 calls with members of the press since the filing of the action, 30 of which were substantive discussions related to plaintiffs' confidential information. Moreover, none of these phone calls were disclosed by defendant as requested by plaintiffs in their discovery and were also in violation of the court's December 15, 2014, order mandating that he "shall not communicate" any confidential information as defined in the settlement agreement to any news or press-related agencies or personnel. Indeed, many of these communications occurred prior to defendant filing amended discovery responses which did not include references to these communications. Plaintiffs requested the court enter a substantive litigation sanction against defendant pursuant to Rule 219(c).

¶ 23 On January 4, 2016, the circuit court entered a rule to show cause why defendant should not be held in indirect civil contempt for failure to comply with the protective order. Thereafter, defendant filed a request for a jury demand as well as a motion to reconsider the issuance of the rule to show cause. A briefing schedule was entered regarding these motions and the matter set for hearing. Defendant then filed a motion for additional discovery and a request for leave to file

a bill of particulars.

¶ 24 At the hearing on these motions, defendant argued that this was a criminal contempt matter and therefore he was entitled to certain procedural rights, including to be heard before a jury and to file a bill of particulars. After an extensive hearing on the motion, the circuit court concluded that the matter was not one of criminal contempt. Based on that ruling, defense counsel voluntarily withdrew his request for a jury demand and a bill of particulars.

¶ 25 Defendant filed his answer to the rule to show cause maintaining that he responded to the interrogatories to the best of his knowledge and that he did not keep a diary of his phone calls. Defendant further asserted that the allegedly confidential information contained in the newspaper articles could have come from the filings in the legal malpractice litigation which was not sealed from the time it was filed in June 2014 until December 2014. Moreover, defendant maintained that the information he did provide was not confidential and did not violate the settlement agreement or any of the court's orders. In addition, defendant contended that this petition and its accompanying motion for sanctions was designed to prevent defendant from talking to the media about Oystacher and a potential regulatory action against him by the Chicago Mercantile Exchange. Lastly, defendant asserted that plaintiffs failed to engage in a Rule 201(k) conference prior to filing the combined motion and thus it should be stricken.

¶ 26 At the evidentiary hearing on this motion, defendant testified that between November 2014 and October 2015, he made and received at least 70 calls to and from reporters Hope and Leising. Defendant further testified that none of his phone calls with the reporters included a "substantive" discussion about 3Red or Oystacher. Defendant admitted he did not disclose in his April 2015 discovery responses that he had an in-person meeting with Hope regarding a complaint he was preparing to file against a separate party. In addition, defendant admitted that

he provided Hope with a copy of that complaint in November 2014 which he did not disclose, despite it containing information about 3Red and Oystacher's trading accounts.

¶ 27 Defendant further testified that he initiated a phone call with Hope on June 17, 2015, the same day he submitted his discovery answers, but did not disclose that phone call. Defendant maintained that not every call was about plaintiffs because there was "a lot going on in the media in terms of *** market manipulation." According to defendant, when reporters asked about plaintiffs he would direct them to speak to his attorney. Defendant also testified that the reason he did not answer discovery truthfully was due to his lawyer's advice and it was not until additional counsel became involved that he disclosed some of the communications he had with reporters. Defendant maintained it was "the best we could do at the time" in terms of answering the interrogatories under oath. Defendant also testified that the articles authored by Hope and Leising about 3Red and Oystacher were not based on information that he provided.

¶ 28 Defendant admitted to speaking with Leising for 16 minutes on September 15, 2015, and twice on September 16, 2015, for nine minutes. Thereafter, on September 18, 2015, Leising published an article about plaintiffs entitled "U.S. Looking at Chicago Trader as Probe Over Fake Orders Widens." Defendant testified he "had nothing to do with anything published in September" related to plaintiffs.

¶ 29 Defendant admitted he did not supplement his discovery answers with any of the 70 press communications identified in the subpoenaed phone records.

¶ 30 Plaintiffs also questioned defendant about an article published the day prior to the current hearing by Leising about plaintiffs which discussed and quoted sections of defendant's interrogatory responses in the current litigation. Defendant denied speaking to Leising and further denied that either he or his counsel provided a copy of his interrogatory answers to

Leising. Defendant reasserted he never provided confidential information about plaintiffs to the press after the protective order was entered.

¶ 31 On May 6, 2016, the circuit court entered a written order granting plaintiffs' motion for sanctions but declining to find defendant in contempt of court. The circuit court made findings that defendant admitted during the hearing that he (1) failed to disclose a meeting with the press, (2) disclosed a complaint that discussed 3Red and its relationship with defendant in that suit, and (3) engaged in over 40 phone calls with members of the press. The circuit court further found that defendant repeatedly violated the court's discovery orders despite prior monetary sanctions and a clear warning from the court that his misconduct must stop. The circuit court further noted that it progressively increased the sanctions against defendant, first requiring him to supplement his responses, then giving him more time to accurately answer, and when he failed to comply with the court's orders, entered monetary sanctions against him. The circuit court stated that, "[e]ach prior sanction entered by this Court was designed to compel cooperation, rather than dispose of the litigation." However, rather than comply with the orders, the court concluded defendant "failed to completely and truthfully answer the Plaintiffs' discovery requests." The circuit court further found that this failure to answer discovery "in a complete, timely and truthful manner has caused extreme prejudice to Plaintiffs" and has demonstrated defendant's "egregious and contumacious disregard for this Court's authority." Thus, for these reasons, the circuit court barred defendant "from introducing any and all evidence denying his disclosure of confidential information about Plaintiffs and the Confidential Settlement Agreement to the press, in lawsuits, or to any third party unless such disclosure was required by process of law" as a sanction pursuant to Rule 219(c).

¶ 32 Thereafter, defendant filed his answer to the complaint, which did not contain any

affirmative defenses. The parties then engaged in discovery in anticipation of the filing of a motion for summary judgment. Defendant requested to conduct discovery regarding the breach of confidentiality counts pursuant to Rule 191(b), which the circuit court denied citing the May 6, 2016, order. Plaintiffs then filed a motion for summary judgment on all four counts of the complaint. Despite being barred from denying disclosure of plaintiffs' confidential information and having failed to assert any affirmative defenses, defendant raised numerous arguments including whether (1) the term "confidential information" in the agreement was ambiguous, (2) plaintiffs' inaction to protect its confidential information constituted a waiver, (3) the agreement violated the Commodity Exchange Act, and (4) the agreement precluded him from retaining copies of any documents.[2] Defendant also argued that he was required by law to disclose the confidential documents in the legal malpractice litigation.

¶ 33 After the matter was fully briefed and argued, the circuit court rejected each of defendant's arguments in a written order and granted the motion on all counts. Following an evidentiary hearing, defendant was ordered to pay $356,249.90 in damages, $554,993.35 in attorney fees and costs, and return all of plaintiffs' property in compliance with the settlement agreement. This appeal followed.

¶ 34 ANALYSIS

¶ 35 On appeal, defendant maintains that the monetary sanctions orders, the litigation sanctions order, and the order denying his request for additional discovery pursuant to Rule 191(b) were entered in error. Defendant specifically maintains that, due to the litigation

[2] We note that on December 16, 2016, the circuit court granted plaintiffs' seventh motion for sanctions. As a result, defendant was also barred from introducing any and all evidence denying his violation of the notice requirements set forth in section 10(f) of the settlement agreement regarding contact with governmental authorities (count IV of the complaint), but he does not appeal from this order.

sanctions and the denial of his discovery request, the motion for summary judgment was improperly granted in plaintiffs' favor. For the reasons that follow, we conclude we do not have jurisdiction to consider the monetary sanctions orders and affirm the judgment of the circuit court on the remaining issues.

¶ 36 Jurisdiction

¶ 37 As a threshold issue, we must first define the scope of our review. Although neither party has specifically addressed whether we have jurisdiction over the various issues raised in defendant's brief, we have an independent duty to ensure that jurisdiction is proper. *Clark v. Gannett Co., Inc.*, 2018 IL App (1st) 172041, ¶ 54. The filing of a notice of appeal is the jurisdictional step that initiates appellate review. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). "Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obliged to dismiss the appeal." *Id.* at 176. Illinois Supreme Court Rule 303(b) (eff. July 1, 2017) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from." "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp.*, 242 Ill. 2d at 176.

¶ 38 The purpose of the notice of appeal is to notify the prevailing party that the other party seeks review of the circuit court's decision. *Id.* The notice of appeal is to be considered as a whole and will be found sufficient to confer jurisdiction on a reviewing court when it fairly and adequately sets out the judgment complained of and the relief sought, thus informing the prevailing party of the nature of the appeal. *Id.* Therefore, if the deficiency in notice is one of form, and not substance, and the appellee is not prejudiced, failure to strictly comply with the form of notice is not fatal. *Id.* In other words, an order that is not specified in a notice of appeal

may be reviewed if it is a step in the procedural progression leading to the judgment specified in the notice of appeal. *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864, ¶ 70. As such, we would have jurisdiction to review an order only if it was a step in the procedural progression leading to the orders that are specified in defendant's notice of appeal.

¶ 39 The notice of appeal filed by defendant does not confer jurisdiction on this court because, no matter how liberally construed, it cannot be said that the notice of appeal fairly and adequately sets out the judgments complained of – the sanctions orders of June 1, 2015, and October 22, 2015. Defendant's notice of appeal references the orders of (1) April 21, 2017, entering judgment and damages, (2) January 27, 2017, granting summary judgment in favor of plaintiffs on liability against defendant on all counts, and (3) the litigation sanctions entered on May 6, 2016. Copies of these orders were attached to the notice of appeal. There is no mention of the June 1, 2015, and October 22, 2015, monetary sanctions orders in the notice of appeal. While we are to liberally construe the notice of appeal to allow review of orders in the procedural progression of a case, the June and October monetary sanctions orders do not directly relate to defendant's ultimate challenge to the entry of summary judgment. The record discloses that these sanctions were separate and apart from the motion for summary judgment as they were based solely on defendant's violations of particular discovery orders.

¶ 40 Furthermore, defendant's inclusion of arguments regarding the propriety of the sanctions orders in his brief on appeal does not remedy our lack of jurisdiction. See *General Motors Corp.*, 242 Ill. 2d at 178. If defendant wanted to raise these issues he was required to amend his notice of appeal pursuant to Illinois Supreme Court Rule 303(b)(5) (eff. July 1, 2017) or file additional notices of appeal incorporating these orders, which he did not do. See *id.*

Accordingly, the notice of appeal does not confer jurisdiction on this court to review the sanctions orders. See *id.* at 177-78; see *cf. Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 30 (reviewing court had jurisdiction to review sanctions orders where those orders were specified in the notice of appeal).

¶ 41 The Propriety of the Litigation Sanctions

¶ 42 We now turn to the merits of defendant's appeal. Defendant contends the litigation sanctions entered by the circuit court on May 6, 2016, were improper because (1) the sanctions violated his right to due process, (2) he has not violated the circuit court's orders, (3) the circuit court has no basis to assert that he was untruthful, (4) plaintiffs suffered no prejudice as a result of any nondisclosure, and (5) the sanctions imposed were punitive and was disproportionate to any prejudice suffered by plaintiffs. We disagree and for the reasons that follow conclude that the circuit court did not abuse its discretion in imposing these sanctions.

¶ 43 Supreme Court Rule 219(c) (eff. July 1, 2002) authorizes a circuit court to impose litigation sanctions against a party who unreasonably refuses to comply with the applicable discovery rules or any order entered pursuant to those rules. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The rule sets forth a nonexclusive list of sanctions which a court may impose, where just, including that "the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue." Ill. S. Ct. R. 219(c)(iii) (eff. July 1, 2002). A just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits. *Shimanovsky*, 181 Ill. 2d at 123 (citing *Wakefield v. Sears, Roebuck & Co.*, 228 Ill. App. 3d 220, 226 (1992), and *White v. Henrotin Hospital Corp.*, 78 Ill. App. 3d 1025, 1028 (1979)).

¶ 44 The circuit court has broad discretion to fashion an appropriate sanction depending on the

particular facts and circumstances at hand. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464-65 (2006). "The determination of an appropriate sanction is circumstance specific." *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1052 (1998). "Consequently, the review of such an order must necessarily focus upon the particular behavior of the offending party that gave rise to the sanction and the effects that behavior had upon the adverse party." *Id.* We review a court's decision as to Rule 219(c) sanctions under an abuse of discretion standard. *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 42.

¶ 45 Our review of the record reveals that the circuit court did not abuse its discretion when it imposed the sanction of barring defendant from introducing any and all evidence denying his disclosure of confidential information about plaintiffs and the settlement agreement. We first observe that the circuit court declined to find defendant in contempt of court, and instead granted plaintiffs' motion for sanctions pursuant to Rule 219(c). In entering sanctions, the circuit court focused on defendant's repeated failure to respond to plaintiffs' interrogatory asking him to provide information regarding his communications with the press despite its numerous orders requiring him to do so. Defendant initially denied any communication with the press, then when confronted with information subpoenaed from his former counsel, admitted to some limited forms of communication. Thereafter, despite having an ongoing duty to amend his discovery answers, defendant again failed to amend those answers until he was presented with the telephone records obtained by plaintiff through a subpoena. Only then did defendant admit that he had other communications with the press. While defendant testified at the evidentiary hearing that he did not disclose any confidential information during these discussions, that was not the point. Plaintiffs' interrogatories sought information about any communications with the press. Defendant's failure to acknowledge the more than 60 phone calls with Hope and Liesing

demonstrated what the circuit court called his "repeated and contumacious disregard for the discovery process" and the circuit court's authority.

¶ 46 Due to defendant's complete disregard for the discovery process and the court's orders, we conclude the circuit court's order barring him from introducing any and all evidence denying his disclosure of plaintiffs' confidential information (counts I and II) was an appropriate sanction. See *Stevens v. International Farm Systems, Inc.*, 56 Ill. App. 3d 717, 720 (1978). Despite defendant's contention, this sanction is not tantamount to default, as defendant continued to put on a strenuous defense in spite of the sanction. In fact, defendant raised five arguments in defense of the motion for summary judgment including arguments related to counts I and II of the complaint, which the circuit court addressed. Based on defendant's conduct during discovery, we conclude that the circuit court did not abuse its discretion when imposing this sanction.

¶ 47 Defendant, however, maintains that this order was improperly entered where his right to due process was violated because he was not afforded the process of one participating in a criminal contempt proceeding. Defendant asserts that the combined motion clearly indicates that plaintiffs sought to have him found in criminal, not civil, contempt despite the circuit court's ruling otherwise.

¶ 48 Defendant's argument is premised on an inaccurate assertion of law. While defendant suggests we look to the content of the motion to determine whether the contempt is civil or criminal in nature, this court has stated that such a determination is made by reviewing the substance of the circuit court's finding. See *In re Marriage of O'Malley ex rel. Godfrey*, 2016 IL App (1st) 151118, ¶ 28 ("the substance of the contempt finding, not the label given, is what will determine whether the contempt finding was criminal or civil in nature"). In this case, the circuit

court declined to enter a finding of contempt and denied plaintiffs' motion. Defendant provides us with no authority that the circuit court's denial of a contempt motion requires the vacatur of the order without a finding of contempt. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 49 Indeed, defendant here requested the motion for contempt be denied and the circuit court granted that request. It is well-established that "a party cannot complain of error which does not prejudicially affect it, and one who has obtained by judgment all that has been asked for *** cannot appeal from the judgment." (Internal quotation marks omitted.) *Strategic Energy, LLC v. Illinois Commerce Commission*, 369 Ill. App. 3d 238, 245 (2006). "The general rule is that the successful party cannot appeal from those parts of a decree that are in its favor in order to reverse other aspects of the decree." *Id.* Moreover, defendant sets forth no argument as to how he is prejudiced by this alleged error. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Accordingly, we find this argument to be forfeited.

¶ 50 Defendant further maintains that plaintiffs' combined motion did not include the mandatory statement that counsel complied with the requirements of Rule 201(k) and thus were not entitled to seek sanctions against him. Rule 201(k) provides: "Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord ***." Ill. S. Ct. R. 201(k) (eff. May 29, 2014). Strict compliance with Rule 201(k) is generally required and litigants are not entitled to seek sanctions without first exercising reasonable attempts to resolve differences. *Illinois State Bar Association Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶ 48. In this instance, however, technical compliance with the rule was no longer an issue where defendant was obligated to comply with the circuit court's order compelling discovery. See *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 622 (2007); *In re*

Estate of Andernovics, 197 Ill. 2d 500, 512 (2001). Moreover, as discussed previously, defendant's persistent disregard of the court's discovery orders and his failure to fully answer the interrogatories over the course of nearly a year, warrants a less restrictive application of Rule 201(k). See *Hartnett v. Stack*, 241 Ill. App. 3d 157, 174 (1993) (the court concluding, "[i]n the face of such a demonstrated attitude of noncooperation, technical compliance with Rule 201(k) was not required in this case.").

¶ 51 Defendant further contends that the sanctions order was improper because the circuit court ignored his uncontroverted testimony and has no basis to have concluded defendant was untruthful. This contention is belied by the record which demonstrates that, even at the evidentiary hearing, defendant prevaricated in his responses. Moreover, the circuit court is in the best position to hear and view the witnesses and this court will defer to its determinations about witness credibility. See *In re Parentage of W.J.B.*, 2016 IL App (2d) 140361, ¶ 25 (quoting *Best v. Best*, 223 Ill. 2d 342, 350 (2006) ("Reviewing courts afford such deference because the trial court, as the finder of fact, 'is in the best position to observe the conduct and demeanor of the parties and witnesses.' ")).

¶ 52 Lastly, defendant argues that the sanction imposed was manifestly unjust where plaintiffs failed to demonstrate they were prejudiced by any noncompliance with the discovery orders. Defendant's contention is belied by the record. Plaintiffs served defendant with their discovery requests in January 2015. Despite admitting in his requests to admit that he disclosed confidential information and communicated to the press about 3Red, defendant failed to sufficiently answer interrogatories about his communications with the press until he was faced with the telephone records and responded to plaintiffs' combined motion in January 2016. Moreover, defendant's acknowledgement of these communications occurred after the circuit

court granted numerous motions to compel his responses to discovery. In light of this record, it is disingenuous for defendant to now argue plaintiffs were not prejudiced by his failure to abide by our supreme court rules and the discovery orders entered by the circuit court.

¶ 53 In the alternative, defendant asserts that the sanction imposed was punitive and disproportionate to any prejudice suffered by plaintiffs. We disagree. As detailed above, the circuit court's sanction was tailored to defendant's continued failure to properly respond to the discovery requests. See *Pickering v. Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 820-21 (1994) ("under Rule 219(c), the sanction imposed must bear some reasonable relationship to the information withheld in defiance of the discovery request or order"). The circuit court cautiously and carefully entered sanction orders which were specifically crafted to compel defendant to respond to the discovery, but to no avail. There is no question that defendant's refusal to comply with discovery was deliberate, contumacious, and constituted an unwarranted disregard of the circuit court's authority. Defendant was also warned prior to the imposition of the litigation sanction that his failure to comply might result in such sanctions. See *Gonzalez*, 369 Ill. App. 3d at 470. Moreover, despite being barred from presenting evidence regarding counts I and II, defendant still managed to put on a defense to those counts, which the circuit court addressed in its written order granting plaintiffs' motion for summary judgment. It is evident that the circuit court's sanction was to accomplish discovery rather than to inflict punishment, thus the sanction imposed was not punitive or disproportional to the prejudice suffered by plaintiffs. See *Pickering*, 265 Ill. App. 3d at 821 (finding the circuit court did not abuse its discretion in striking the defendant's answer and entering a default judgment).

¶ 54 The Propriety of the Order Denying Discovery Under Rule 191(b)

¶ 55 Defendant next contends that the circuit court abused its discretion when it denied his

motion for leave to conduct discovery pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013). Defendant asserts he was denied the opportunity to depose Oystacher and plaintiffs' counsel (whose affidavit was attached in support of the motion for summary judgment). In response, plaintiffs maintain the circuit court correctly denied the motion where it was geared towards the breach of confidentiality claims that were the subject of the litigation sanction order.

¶ 56 Rule 191(b) provides the circuit court with discretion to permit additional time or discovery in conjunction with responding to a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2016)):

> "[i]f the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief ***." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

"A trial court is afforded considerable discretion in ruling on matters pertaining to discovery, and thus its rulings on discovery matters will not be reversed absent an abuse of that discretion." *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11 (2009). We will find that a circuit court abused its discretion only where its ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the trial court. *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1150 (2005).

¶ 57 Here, defendant's request for additional discovery pursuant to Rule 191(b) was directly related to counts I and II of the complaint. The circuit court, however, expressly barred defendant from introducing any and all evidence denying his disclosure of confidential

information about plaintiffs and the settlement agreement which constituted counts I and II of the complaint. Thus, we conclude the circuit court did not abuse its discretion where defendant's Rule 191(b) request sought to circumvent the litigation sanction imposed by the circuit court. See *U.S. Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 39 (finding the circuit court did not abuse its discretion in denying defendant's Rule 191(b) discovery request where the defendant's pleadings failed to give rise to any issue of material fact).

¶ 58 In addition, defendant's supplemental affidavit in support of his motion for additional discovery does not comport to Rule 191(b). A Rule 191(b) affidavit "must state specifically what the affiant believes the prospective witness would testify to if sworn and reasons for the affiant's belief." *Giannoble v. P&M Heating and Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1065 (1992). "Rule 191(b) requires facts, not conclusions." *Id*; see also *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 456 (2000) (finding that allegations in a "general sense" of what relevant information proposed witnesses would provide for the plaintiff's claim was not sufficient to show compliance with Rule 191(b)). First and foremost, the supplemental affidavit does not name plaintiffs' counsel and thus does not provide us with any facts in regards to how he would testify. See *Koukoulomatis by Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 99 (1984). Second, defendant's supplemental affidavit does not set forth the reasons for his belief as to why any of the affiants would testify as stated in the affidavit. See *Olive Portfolio Alpha, LLC v. 116 West Hubbard Street*, LLC, 2017 IL App (1st) 160357, ¶ 29. Accordingly, the failings of the supplemental affidavit provide further support that the circuit court's determination was not arbitrary, fanciful, or unreasonable.

¶ 59 In sum, when viewed in the light of the entire record in this case, defendant's deposition request for information related to defenses (1) he failed to assert in his answer and (2) that had

been barred as a litigation sanction by the circuit court, "can only be viewed at best as a fishing expedition and at worst as a delaying tactic." *Avdic*, 2014 IL App (1st) 121759, ¶ 39. We find no abuse of discretion in the circuit court's ruling.

¶ 60 CONCLUSION

¶ 61 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 62 Affirmed.