2019 IL App (1st) 181315-U

SIXTH DIVISION
May 3, 2019

No. 1-18-1315

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF SYLVIA MOSS,	)	Appeal from the
	)	Circuit Court of Cook County
Petitioner/Counter-Respondent-Appellee,	)	
	)	
and	)	16 D 4489
	)	
JONATHAN MOSS,	)	
	)	Honorable David E. Haracz
Respondent/Counter-Petitioner-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision to bar respondent from testifying at his dissolution trial regarding his financial information as a Rule 219 sanction was not an abuse of discretion; affirmed.

¶ 2 This appeal stems from the trial court's decision to impose sanctions against respondent, Jonathan Moss, for his failure to comply with discovery orders. Respondent argues that the trial court erred in prohibiting him from testifying at trial regarding his financial issues because the court did not institute progressive sanctions to effectuate discovery or a trial on the merits. Respondent also contends that the court's sanctions order was a product of the court's bias against him. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The parties were married on April 13, 2006, and have two minor children. On May 11, 2016, petitioner, Sylvia Moss, filed a petition for dissolution of marriage against respondent. Respondent filed a counterpetition for dissolution on June 9, 2016.

¶ 5 On July 14, 2016, respondent filed a notice of filing and service, reflecting that he served petitioner with a disclosure statement pursuant to Cook County Rules 13.3.1 and 13.3.2, and redacted bank statements for two Bank of America accounts for the period June 1, 2016, through June 30, 2016. Although the record on appeal contains respondent's notice of filing and service, it does not contain the disclosure statement or redacted bank statements, and thus we are unaware of their contents.

¶ 6 On August 11, 2016, petitioner served respondent with a Supreme Court Rule 214 notice to produce and interrogatories. Petitioner's request to produce asked for numerous documents, including, for example, copies of all of respondent's federal and state tax returns for the last three years, all records reflecting any and all income received by respondent from January 1, 2014, to the present, all documents pertaining to any assets in which respondent has had an interest, and all documents pertaining to real estate in which respondent has had an interest since 2004. Petitioner's interrogatories asked that respondent disclose, *inter alia*, his employer, any other source of income besides employment, any interest in real estate, any interest in corporate entities, and any person who has held cash or property on respondent's behalf in the past three years.

¶ 7 On August 26, 2016, the court entered an order appointing Lynn Wypych as the child's representative and granting parenting time pursuant to a temporary schedule.

¶ 8 On September 2, 2016, the court entered another order appointing Wypych as the child's representative to address who will be the primary parent and how to allocate parenting time. Wypych filed her appearance as child's representative on September 16, 2016.

¶ 9 On September 8, 2016, respondent filed his objections to petitioner's Rule 214 notice to produce.

¶ 10 On September 22, 2016, respondent's counsel was granted leave to withdraw. Respondent was given 21 days to file a *pro se* appearance or retain new counsel.

¶ 11 On November 22, 2016, respondent filed a *pro se* appearance.

¶ 12 On January 19, 2017, petitioner's counsel sent respondent a letter pursuant to Supreme Court Rule 201(k), asking that he provide, in writing, a date when he would turn over the documents requested in petitioner's requests to produce and interrogatories.

¶ 13 On February 2, 2017, petitioner filed a motion to compel, stating that she served her notice to produce and interrogatories on respondent on August 26, 2016, but as of February 2, 2017, had not received any responses.

¶ 14 On February 6, 2017, counsel from Katz & Stefani, LLC filed an appearance on behalf of respondent.

¶ 15 On February 7, 2017, respondent was granted 21 days to respond to the motion to compel. On February 28, 2017, respondent filed his response to the motion to compel, stating that "given the financial warfare Sylvia has waged against Jonathan, he was forced to close his office and relocate thousands of pages of records into his garage." The response also asserted that respondent was in the process of collecting the documents and working diligently to comply. Respondent also noted that his 2013, 2014, 2015, and 2016 tax returns had yet to be completed.

¶ 16 On May 22, 2017, Katz & Stefani, LLC was granted leave to withdraw as respondent's counsel. Respondent was again granted 21 days to file a *pro se* appearance or find new counsel.

¶ 17 Also on May 22, 2017, the court granted petitioner's motion to compel and ordered, "[respondent] shall comply with all outstanding discovery[.] Failure to timely comply shall result in the court considering sanctions pursuant to Rule 219."

¶ 18 On July 6, 2017, Wypych filed a petition for attorney fees for her work as the child's representative, requesting that the court order her to be paid $4,910.50.

¶ 19 On July 19, 2017, the court granted respondent an additional 30 days to comply with the court's May 22, 2017, order, and ordered respondent to pay Wypych $4181.75, which was the balance as of June 30, 2017. Also on that date, the court set the matter for trial on December 11, 12, and 13, 2017.

¶ 20 On August 21, 2017, petitioner filed a petition for rule to show cause that sought a finding of indirect civil contempt, stating that her motion to compel was granted on May 22, 2017, that respondent was granted an additional 30 days to comply with her discovery requests on July 19, 2017, but as of August 21, 2017, respondent had not provided any responses to the discovery that was issued over a year earlier, despite having been twice ordered to do so.

¶ 21 On September 6, 2017, Wypych filed a motion to enforce, arguing that respondent was ordered to pay her $4181.75 on July 19, 2017, but that as of the filing of her motion, he had refused to pay any amount.

¶ 22 On September 7, 2017, the court ordered respondent to pay Wypych $5000 within 14 days.

¶ 23 Also on September 7, 2017, the court entered an order holding respondent in indirect civil contempt for failing to comply with court's July 19, 2017, order that directed him to comply with

the court's May 22, 2017, order that required him to comply with outstanding discovery within 21 days. Commitment was stayed until September 22, 2017, and respondent could purge the contempt by "providing complete discovery compliance by said date." Additionally, respondent was ordered to appear in court on September 22, 2017, to address his purge.

¶ 24 On September 22, 2017, the court entered an order stating, "[Respondent] having not appeared in court and the court finding that he did not pay the $5000 fees to the child's representative, a body attachment shall issue (by separate order). All parenting time of [respondent] is suspended until further court order." In the separate body attachment order also entered on that date, the court found that respondent was ordered to appear but failed to do so. The order also stated that "[r]espondent failed to pay $5000 to the child representative. He also failed to provide complete compliance with all of petitioner's discovery requests."

¶ 25 On September 29, 2017, respondent filed an emergency motion to vacate the body attachment and order suspending parenting time.

¶ 26 On October 2, 2017, the court entered an order continuing the case to October 10, 2017, for a status report on respondent's compliance with discovery and to re-address respondent's emergency motion to vacate.

¶ 27 Thereafter, respondent filed an emergency motion to reconsider the court's October 2, 2017, order, which was denied on October 4, 2017.

¶ 28 On October 10, 2017, the court entered an order barring respondent from testifying "regarding all financial matters at the trial of this matter as a Supreme Court Rule 219 sanction for failure to comply with discovery rules." The court's October 10, 2017, order also reinstated respondent's parenting time.

¶ 29 On October 17, 2017, petitioner filed a petition for an order of temporary child support, contribution to the children's expenses, and other relief. The petition alleged that on October 7, 2017, respondent provided a financial affidavit that purported to be an accurate statement of his income and expenses and that also on that date, "[respondent] e-mailed select bank statements for some of [his] accounts." The petition noted that although the financial information provided by respondent was limited, it indicated that respondent earned "substantial income which exceeds $5000 of net income per month." The petition reflected that petitioner's net income was approximately $5000 per month.

¶ 30 On November 22, 2017, respondent filed three motions: an emergency motion to continue trial, a motion for substitution of attorneys, and a motion to vacate paragraph two of the court's October 10, 2017, order, *i.e.*, the court's order barring respondent from testifying about all financial matters at trial.

¶ 31 On November 29, 2017, the court denied respondent's emergency motion to continue trial and his motion to vacate the court's prohibition on his testimony.

¶ 32 On November 30, 2017, Kamerlink, Stark, Powers & McNicholas, LLC filed an additional or trial counsel appearance on behalf of respondent.

¶ 33 Prior to trial, the parties reached an agreement regarding the allocation of parenting responsibilities and parenting plan, and an agreed order reflecting the same was entered on December 13, 2017. The case proceeded to trial on December 11-13, 2017.

¶ 34 On January 29, 2018, the court entered an order containing its findings and judgment for dissolution. In relevant part, the court found that respondent "benefitted greatly from his failure to provide financial information in these proceedings." The court also noted that respondent

failed to provide information regarding his annual income and that it was unclear when he last filed tax returns.

¶ 35 On February 16, 2018, petitioner filed a motion to reconsider, arguing that the court failed to allocate proceeds from a sale of certain property.

¶ 36 The record contains a notice of motion for a motion to reconsider filed by respondent on February 26, 2018. However, the record on appeal does not contain respondent's actual motion to reconsider, and thus we do not know its contents.

¶ 37 On May 17, 2018, the court granted in part and denied in part petitioner's motion to reconsider. The court also granted in part and denied in part respondent's motion to reconsider. The court specifically set forth the portions of the motions to reconsider that were granted and denied all other relief sought.

¶ 38 Respondent filed his timely notice of appeal on June 15, 2018.

¶ 39 ANALYSIS

¶ 40 On appeal, respondent argues that the trial court erred in prohibiting him from testifying at trial as to all financial issues because the court did not impose progressive sanctions to effectuate discovery and a trial on the merits. He also asserts the trial court improperly imposed the sanctions as a punishment due to the court's bias against him. We disagree.

¶ 41 Rule 219(c) authorizes a trial court to impose a sanction, including barring a witness from testifying concerning a specific issue, upon any party who unreasonably refuses to comply with provisions of our supreme court rules or any order entered pursuant to these rules. Ill. S. Ct. R. 219(c)(iv) (eff. Jul. 1, 2002). Whether to impose a particular sanction under Rule 219(c) is within the trial court's discretion, and thus only a clear abuse of discretion justifies reversal. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998).

¶ 42 In this case, petitioner served respondent with Rule 214 requests to produce and interrogatories on August 11, 2016. A Rule 201(k) letter was sent to respondent on January 19, 2017, asking that he provide a date by which he would comply with petitioner's discovery requests. Respondent did not provide a date, and thus on February 2, 2017, petitioner filed a motion to compel respondent's compliance with discovery. Through his February 28, 2017, response to the motion to compel, respondent represented to the court that he was in the process of collecting documentation. On May 22, 2017, the court granted petitioner's motion to compel, and ordered that "[respondent] shall comply with all outstanding discovery[.] Failure to timely comply shall result in the court considering sanctions pursuant to Rule 219." On July 19, 2017, the court granted respondent an additional 30 days to comply. On August 21, 2017, after respondent failed to comply, petitioner filed a motion for rule to show cause. At this time, Wypych, the child's representative, also brought to the court's attention that respondent had not paid the balance for her services. On September 7, 2017, respondent was found to be in indirect civil contempt for failing to comply with the court's July 19, 2017, discovery order, and was also ordered to pay $5000 to Wypych within 14 days. Respondent was given the opportunity to purge the contempt order if he complied with the discovery requests by September 22, 2017. He was also ordered to appear in court on September 22, 2017, which he failed to do. As a result, on September 22, 2017, the court entered a body attachment order against respondent. On October 10, 2017, having still failed to comply with petitioner's discovery requests, the court ordered that respondent was prohibited from testifying at trial regarding any financial issues.

¶ 43 The foregoing sequence of events makes clear that respondent repeatedly ignored the court's orders requiring him to comply with petitioner's discovery requests. Respondent argues that on October 7, 2017, he provided discovery to petitioner. However, the documentation that

respondent provided on October 7, 2017, only purportedly[1] consisted of an updated version of his mandatory disclosure statement and two bank statements, and was not responsive to petitioner's Rule 214 requests to produce or her interrogatories. Thus, the trial court was clearly within its discretion in determining that respondent's repeated failure to produce was an unreasonable noncompliance with discovery rules.

¶ 44 Having determined that the trial court had authority to impose a sanction on respondent for his failure to comply with its discovery orders, we must next address whether prohibiting respondent from testifying about any financial issues was the appropriate sanction. "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. When imposing sanctions, the court's purpose is not to punish, but to coerce compliance with discovery rules and orders. *Id.*

¶ 45 Respondent argues that the trial court's sanction was improper because it was not progressive and was intended to punish him due to the court's bias against him. We will only reverse a trial court's imposition of a particular sanction if the record establishes a clear abuse of discretion. *Id.* In order to determine whether the trial court abused its discretion, we look to the criteria upon which the court relied when determining the appropriate sanction. *Id.* at 123-24. "The factors a trial court is to use in determining what sanction, if any, to apply are: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and

[1] We refer to the contents of respondent's production on October 7, 2017, as "purportedly" consisting of certain documents because, like respondent's original disclosure statement and redacted bank statements served on July 14, 2016, the October 7, 2017, documents are not contained in the record on appeal. In fact, the pages of the record to which respondent cites in support of his supposed October 7, 2017, production are the pages containing petitioner's petition for order of temporary child support contribution that merely references respondent's purported document production but does not actually contain the documents produced.

(6) the good faith of the party offering the testimony or evidence." *Id.* at 124. No single factor is determinative. *Id.*

¶ 46 Applying these factors to this case, we find the majority of the factors heavily weigh in favor of petitioner. As to the first and second factors, surprise to petitioner would have resulted if respondent were allowed to testify about his financial information. Prior to trial, respondent provided only the bare minimum of financial information, and thus respondent's testimony regarding his finances would have prejudiced petitioner because she would have had no way of confirming whether respondent's testimony was accurate without the requested discovery. Further, petitioner had to prepare her entire trial strategy around the limited public records that existed for the real estate respondent or one of his entities owned. Third, the nature of the testimony at issue, *i.e.*, respondent's finances, was significant and this factor weighs in favor of petitioner. The parties' financial issues were the most contested issue in this case and respondent's compliance with discovery was essential. As the trial court recognized, respondent's failure to comply benefitted him "greatly." Fourth, petitioner made numerous requests that respondent comply with her discovery requests. Additionally, petitioner sent a Rule 201(k) letter and filed multiple motions attempting to secure respondent's compliance. Despite petitioner's continued diligence, respondent refused to comply. Fifth, petitioner served respondent with discovery in August 2016, and this matter did not proceed to trial until December 2017. Thus, respondent had almost a year and a half to comply with discovery. Sixth, there is no evidence of any good faith on respondent's behalf. There is no evidence, beyond a generic statement that he was working "diligently" to gather documentation, that respondent ever exercised good faith in attempting to comply with petitioner's discovery

requests or the court's orders. Additionally, when he was ordered to appear in court on September 22, 2017, respondent failed to comply, which indicates a lack of good faith.

¶ 47 Respondent cites to *In re Marriage of Booher*, 313 Ill. App. 3d 356 (2000), as support for his contention that the trial court's sanction was too severe. In that case, the husband, who was acting *pro se*, failed to file his pre-trial discovery affidavit. *Id.* at 358. The wife requested that the husband's pleadings be stricken and he be prohibited from testifying. *Id.* The court granted the wife's request and "barred [the husband] from presenting *any* evidence." (Emphasis in original.) *Id.* On appeal, this court applied the above-referenced factors and found that the trial court abused its discretion by not allowing the husband to present "*any* evidence." (Emphasis in original.) *Id.* at 360. The court reasoned that custody and visitation were too important for the trial court to prevent the husband from presenting any evidence regarding those issues. *Id.* Additionally, the court noted that the husband failed to present an affidavit regarding his income, expenses, and property and such a failure should not have prevented him from presenting evidence concerning the best interests of his children. *Id.*

¶ 48 We find *Booher* presents a factual scenario in stark contrast to the case before us. In *Booher*, the husband was prohibited from presenting any evidence. Here, respondent was only barred from presenting his own testimony on a specific subject—financial issues. Respondent was not barred from testifying about custody issues or visitation, as was the husband in *Booher*. Respondent repeatedly failed to comply with petitioner's financial discovery requests, and thus he was barred from testifying about his finances. That the parties in this case eventually settled their parenting allocation issues prior to trial has no bearing on whether the trial court's sanction was properly tailored because the court imposed the sanction barring respondent's financial testimony on October 10, 2017, and the parties did not settle their parenting allocation issues

until just before trial in December 2017. Thus, at the time the court imposed the sanction, there were other issues remaining in the case and the sanction against respondent was not a total prohibition on his testimony. The sanction in this case was tailored to respondent's conduct, *i.e.*, the sanction was directly related and in proportion to the discovery violation. Thus, *Booher* is inapposite.

¶ 49 The trial court gave respondent numerous opportunities to comply with petitioner's discovery requests and the court's orders. On May 22, 2017, the court granted petitioner's motion to compel and ordered respondent to comply with outstanding discovery. He failed to do so. Then, on July 19, 2017, the court granted respondent an additional 30 days to comply. He failed to do so again. On September 7, 2017, the court ordered respondent held in indirect civil contempt, but allowed him the change to purge his contempt if he complied with discovery within 14 days. Not only did he fail to comply with discovery, but he also failed to appear in court when ordered to on September 22, 2017. It was not until October 10, 2017, which was approximately 14 months after respondent was served with petitioner's discovery, that the court barred him from testifying about financial issues at trial. Thus, respondent's argument that the court was biased against him is inherently unfounded where his contumacious conduct was apparent and occurred throughout the entirety of the case.

¶ 50 We further find no evidence of bias because the sanction bore a specific relationship to the conduct that gave rise to the sanction. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1004 (2007). Respondent was not barred from testifying entirely. Nor was he prohibited from presenting another witness to testify about his financial issues. Additionally, it was not until right before trial that the parties resolved the parenting issues, which left only the financial issues to resolve. Thus, the court's sanction when it was imposed was specifically and narrowly tailored to his

discovery violation and was entirely proper. *Shimanovsky*, 181 Ill. 2d at 127 ("a court must consider the unique factual situation that each case presents and then apply the appropriate criteria to these facts in order to determine what particular sanction, if any, should be imposed"). Respondent repeatedly refused to comply with petitioner's discovery requests regarding his finances, despite being well-aware that the parties' finances was the primary contested issue in the dissolution of marriage, and thus he was barred from testifying on the subject. The court gave respondent many opportunities to comply with petitioner's discovery request. He simply refused to do so. This court has recognized that, "[t]o allow a party to defy a discovery order without facing sanctions can be likened to a dog without teeth—all bark and no bite." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 37. Further, "[a] pattern of dilatoriness should not be tolerated, as it hurts the opposing party and is a burden on the court system." *Id.* Respondent's conduct in this case was unnecessary and thwarted the judicial process. It was not an abuse of discretion for the trial court to bar his testimony as a sanction.

¶ 51 CONCLUSION

¶ 52 Based on the foregoing, we affirm the trial court's decision to prohibit respondent from testifying about financial issues at trial, and find that respondent's argument that the court acted with bias lacks merit.

¶ 53 Affirmed.