2019 IL App (1st) 191030-U

SIXTH DIVISION
May 31, 2019

No. 1-19-1030

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN ALHOMSI and NAWWAR ALHOMSI, individually, directly, and derivatively on behalf of the BELL AND ARTHUR CONDOMINIUM ASSOCIATION, Plaintiffs-Appellees, v. BELL AND ARTHUR CONDOMINIUM ASSOCIATION, MICHAEL MENTO, LISA MIJATOVIC, DRITON RAMUSHI, RAM TRUST, THREE BROTHERS TRUST, and SELI BENKO, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 17 L 3486 The Honorable Sanjay Tailor, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held***: The circuit court erred in refusing to dissolve a temporary restraining order which had prohibited an individual from serving on a condominium board.

¶ 2 Plaintiff Alan Alhomsi (Alhomsi) and his wife, Nawwar Alhomsi, own a single unit in a 16-unit condominium building. They filed a sprawling *pro se* 27-count third amended complaint

against the defendants, Bell and Arthur Condominium Association, Michael Mento, Lisa Mijatovic, Driton Ramushi, Ram Trust, Three Brothers Trust, and Seli Benko. The complaint contains a host of causes of actions against the condominium association and other unit owners. This interlocutory appeal concerns only the circuit court's order denying Mento's motion to dissolve a temporary restraining order (TRO), which had barred Mento from serving as a director of the condominium association. We hold that the court erred in refusing to dissolve the TRO and therefore reverse.

¶ 3 The limited record before us reveals the following. The circuit court had a dispute before it regarding who could serve on the condominium association board (board). On June 11, 2018, the court entered a lengthy agreed order providing, among other things, that Mento, Mijatovic, and two others were removed from the board; establishing a special election for board members; that only unit owners who resided at their units could vote at the election (specifying that the only such owners were Benko, the Alhomsis, and three others); and appointing William Chatt as a neutral election supervisor.

¶ 4 On July 11, 2018, the circuit court entered an order declaring that an election for board members had been held on July 2 which resulted in Alhomsi being elected as the sole member of the board and thus could solely exercise all powers of the board. On July 19, the court ordered Mento and Mijatovic to turn over certain board records to Alhomsi. It again rejected the theory that non-resident owners could serve on the board, citing Article XIV of the condominium declarations, which provides in part:

> "[e]ach member of the Board shall be one of the unit owners and shall reside on the property, provided, however, that in the event a unit owner is a * * * trust, or other legal entity other than a natural person or persons, then any * * * beneficiary

> or other designated agent of such trust or manager of such legal entity, shall be eligible to serve as a member of the Board, provided such person must reside on the property unless he is a Board member nominated by the trustee."

The court also based its decision to bar non-residents from serving on its June 11, 2018 agreed order, noting that it specifically listed which unit owners resided in their units, and "The court will hold the Defendants to that agreement." The July 19 order also provided that the association would hold a special election meeting to fill two vacancies on the board, and that Chatt would again administer the election.

¶ 5 The special election was held on August 3. Chatt issued a detailed report listing the voting percentage of each unit and whether the owner of the unit appeared at the special election. The report shows that 10 of the 18 units were represented at the meeting as follows: 6 through Mento as proxy, 1 through Mento as trustee of a trust which owned the Three Brothers Trust, 1 through Ramushi as proxy, Benko, and Alhomsi. The ballots apparently contained the pre-printed names of five unit owners other than Alhomsi (who was already on the board). However, after Mento demonstrated sufficient proof of residency to Chatt, Chatt declared him eligible to run and counted votes cast for him. The results of the election were that Benko and Mento were elected, they having received the only votes cast for the two open seats, and each having received a weighted vote of over 50% of the owners. Alhomsi objected, but Chatt overruled his objection.

¶ 6 Benko and Mento called an emergency meeting of the board which was held immediately. Minutes of the meeting are in the record. The two new board members passed motions establishing themselves as board officers and essentially taking control of the property away from Alhomsi. Alhomsi was present throughout the emergency meeting, but he objected and abstained from the various motions which the board adopted.

¶ 7 Alhomsi then brought his objection to Mento's residency into the judicial forum. On August 13, 2018, Alhomsi filed an affidavit stating in pertinent part:

> "4. To this date, Mr. MICHAEL MENTO does not reside and has not resided in the condominium unit owned by THREE BROTHERS TRUST (6455 N. BELL UNIT 3 CHICAGO IL 60645) or any other unit member of BELL AND ARTHUR CONDOMINIUM ASSOCIATION.
>
> 5. The condominium unit where Mr. MICHAEL MENTO falsely claimed that he resides for the purpose of the elections meeting on August 03, 2018 is inhabited by his tenant SEAN WEATHERS.
>
> 6. I am willing to provide all available evidence to support the aforementioned statement including 24 hours security video footage of all the building entrances."

¶ 8 On January 10, 2019, the circuit court held a hearing on various pending motions at which it considered the issue of Mento's residency and his ability to serve on the board. The only evidence before the court at that time on the issue was Alhomsi's affidavit. The court noted that it would have expected Mento to submit a counter-affidavit. In response, an attorney for the defendants noted that Alhomsi's affidavit was defective because it did not indicate how Alhomsi would have personal knowledge of where Mento resided, and that Mento had been in court on several prior occasions without being questioned regarding his residency. The court responded:

> "Well, look on this record, it seems to me that Mr. Mento is not qualified to serve as a director or officer of the association in that he may no longer exercise those powers. * * * I am highly suspect of Mr. Mento. He has repeatedly failed to comply with the court's order. We were never given a sufficient explanation for his non-compliance. And this question of his residency has been out there for

> some time. The fact that he's not here, the fact that he did not submit an affidavit disputing Mr. Alhomsi's affidavit in which he avers that Mr. Mento does not reside on the property, it says to me that he doesn't reside on the property."

¶ 9 The circuit court then entered a TRO temporarily restraining Mento from acting on behalf of the association and from serving as a board officer. The written order contains no findings, but merely refers to the transcript of proceedings. The order also does not contain any ending date. The court's removal of Mento resulted in a deadlocked board consisting of Alhomsi and Benko.

¶ 10 On January 31, 2019, Mento filed a motion to dissolve the TRO. The motion argued that the court entered the TRO without notice and without there being any pending motion requesting such relief. The motion to dissolve included an affidavit from Mento stating that he resided in the building in the third-floor unit owned by the Three Brothers Trust from July 24, 2018 to the present, including August 3, 2018 and December 28, 2018.

¶ 11 On May 16, 2019, the circuit court held an evidentiary hearing on the issue of Mento's residency in the context of Mento's motion to dissolve the TRO. Mento called Alhomsi as his first witness. Questioned by Mento's attorney, Alhomsi testified in a conclusory manner that Mento did not reside at the property. When pressed for details or documentation to back up his conclusion, Alhomsi presented nothing. Instead, he was evasive, making statements such as "there has been witnesses" and conceding that "[t]here's no document that says [Mento] doesn't live [there]." He stated that he had cameras trained on all building entrances 24 hours a day which automatically triggered when someone passed into view. However, Alhomsi presented no videos, logs, or other evidence of this surveillance. Mento's attorney strategically cut off his own questioning without asking Alhomsi what the cameras revealed. Crucially, because Alhomsi did

not call himself as a witness, the record contains no testimony regarding what the cameras showed that supported a conclusion that Mento did not live at the property.

¶ 12 Mento testified that he has resided in the third-floor unit owned by the Three Brothers Trust, a trust he established for the benefit of his children but which he controlled, since July 2008[1]. He presented a copy of a July 23, 2018 lease under which the Three Brothers Trust leased the unit to himself and Sean Weathers. Mento stated that he had not lived anywhere except the subject unit since the date of the lease, and that he slept at the unit "the majority of the time", save for weekends which he often spends at his girlfriend's home. He presented his original Illinois driver's license showing the unit address, and utility bills in his name for the unit. He also stated that he preferred to receive his mail at a suburban post office box. He and Weathers are roommates in a large one-bedroom unit, with Weathers using the bedroom and Mento sleeping on the sofa in the living room.

¶ 13 Sean Weathers testified that he works as a chef at a downtown restaurant on a night shift and has lived in the "really huge" unit for about eight years. Weathers stated that Mento moved in the previous summer after Weathers's prior roommate moved out, leaving Weathers in financial difficulty with respect to his lease obligations. He testified that when Mento moved in, he brought laundry, shoes, towels, and "personal items." He also stated that he has seen Mento's laundry and detergent in the unit.

¶ 14 Chatt testified regarding his administration of the board elections. He stated that he allowed Mento to run for the board at the second election, despite his name not being included in the list of eligible unit owners in the agreed order, because Mento had demonstrated sufficiently to him that Mento had moved into a unit since the agreed order had been written.

[1] The transcript states "2008," but shortly thereafter the court characterized Mento as having just testified that he moved into the unit in "July of 2018." We assume the "2008" reference is a typographical error.

¶ 15 The circuit court indicated that it was not "persuaded by the evidence * * * that Mr. Mento's a resident," that his testimony was "vague," and it was "odd that a grown man would be sleeping in a living room particularly where by his own admission he owns four properties that are vacant." The court characterized him as a "temporary visitor, that he actually does live somewhere else as his permanent abode or usual place of abode." The court entered an order denying the motion to dissolve the TRO against Mento.

¶ 16 On May 20, 2019, Mento filed a notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(d) (eff. Nov. 1, 2017), stating that he sought review of the May 16 order. Rule 307(a)(1) specifically allows an interlocutory appeal as a matter of right from an order refusing to dissolve an injunction, and Rule 307(d) requires that an appeal from an order refusing to dissolve a TRO is perfected by filing a petition in the appellate court and a notice of interlocutory appeal in the circuit court within two days of the circuit court order in question. Since May 16 was a Thursday, the two-day deadline fell on Saturday, May 18. Under section 1.11 of the Illinois Statute on Statutes (5 ILCS 70/1.11 (West 2016)), however, the Saturday deadline was automatically extended to Monday, May 20.

¶ 17 Also on May 20, at 10:54 p.m., just an hour before the deadline, Mento attempted to electronically file in this court a document which was titled, "brief," as well as a supporting record and various other documents. The supporting record was certified by the electronic signature of Mento's attorney. The Odyssey e-file records show that the clerk of this court rejected the filing after the clerk's office re-opened on May 21, stating: "Can not process. Does not comply with rule 307D." On May 21, Mento filed a motion which referred to the clerk's rejection and requested leave to file a memorandum in support of the petition in lieu of the brief *instanter*. The Presiding Justice of this Division granted the motion on May 22. The order stated

that it appeared that the clerk rejected the timely May 20 filing because it was labeled as a "brief" rather than a "memorandum," and that since the brief was the "functional equivalent of a petition in support of reversal and sufficed for jurisdictional purposes," Mento's motion for leave to file the petition *instanter* was granted and the court would consider the appeal "based on the memorandum [meaning the petition] rather than the brief." The order also noted that, due to the upcoming holiday weekend, the time for Alhomsi to file his response and the deadline for this court's disposition were extended pursuant to Rule 307(d)(5).

¶ 18 Alhomsi responded. Rather than address Mento's points directly, he devoted most of his response to the following technical attacks on Mento's filings: (1) no January 10, 2019 report of proceedings was included with the petition (but Alhomsi then included a copy of the report with his response); (2) the TRO was entered on the circuit court's own motion; (3) Mento made misrepresentations regarding what transpired in the circuit court and omitted certain items from his supporting record; (4) Rule 307(d) does not apply to orders refusing to dissolve a TRO; (5) the notice of interlocutory appeal and petition in support were untimely because they were not filed until May 21; (6) the supporting record was not properly authenticated by the attorney filing it; (7) the notice of interlocutory appeal was not duly filed in the circuit court because it was filed in the Law Division rather than the Chancery Division where the case was pending.

¶ 19 We address these objections first. A copy of the January 10 report of proceedings is contained in the supporting record beginning at page 325. The fact that the original TRO was entered on the court's own motion has no relevance to whether the subject of the TRO may appeal either it or an order refusing to dissolve it. We have relied on our own review of the record with respect to what transpired in the circuit court and find that the supporting record contains sufficient material for us to meaningfully review the order refusing to dissolve the TRO.

Rule 307(d) explicitly applies to appeals from orders refusing to dissolve TROs. The rule states in part: "review of the granting or denial of a temporary restraining order or an order modifying, dissolving, or *refusing to dissolve or modify a temporary restraining order* as authorized in paragraph (a) shall be by petition filed in the Appellate Court * * *." (Emphasis added.) Ill. S. Ct. R. 307(d) (eff. Nov. 1, 2017). As explained above, Mento's filings were timely for jurisdictional purposes.

¶ 20 Rule 307(d) provides that:

> "[a]n appropriate supporting record shall accompany the petition, which shall include the notice of interlocutory appeal, the temporary restraining order or the proposed temporary restraining order, the complaint, the motion requesting the granting of the temporary restraining order, and any supporting documents or matters of record necessary to the petition. The supporting record must be authenticated by the certificate of the clerk of the trial court or by the affidavit of the attorney or party filing it." *Id*.

Page 1 of the supporting record is a certificate electronically signed by Mento's attorney, listing the various volumes of documents contained in the record, and stating that the certificate is made pursuant to Illinois Supreme Court Rule 324 (eff. July 1, 2017). While the certificate is not in the precise form of an affidavit, the reference to Rule 324 with the signature of the attorney—who is always under oath and subject to professional obligations as an officer of the court—suffices.

¶ 21 Alhomsi's last objection is that the clerk of the circuit court's electronic records show that the notice of interlocutory appeal was filed in the Law Division of the circuit court rather than the Chancery Division. Alhomsi originally filed the case in the Law Division (hence the "L" in the case number), and the case was assigned to Judge John Griffin in that division, but the case

was transferred to the Chancery Division because Alhomsi was requesting equitable relief. The case was then assigned to Judge Sanjay Tailor. Alhomsi apparently bases this objection on the fact that his search on the circuit court clerk's web site showed the notice of interlocutory appeal listed only after searching under the Law Division search option rather than the Chancery Division search option. However, this is to be expected since the clerk's custom and practice is to organize files by the division indicated in the case number even though the case may have been transferred to a new division. Someone searching for a court record can only expect to find it in the division corresponding to the assigned case number. Additionally, there is only one circuit court and one circuit court clerk, so for jurisdictional purposes there is no such thing as "filing in the wrong division." Alhomsi's complaint is really with how the clerk of the circuit court organizes court records. In sum, none of Alhomsi's technical objections are meritorious.

¶ 22 That brings us to the merits of the appeal. The Illinois Supreme Court Rules require this court to act with extreme expedition. See Ill. S. Ct. R. 307(d)(4) (eff. Nov. 1, 2017) ("the Appellate Court shall consider and decide the petition within five business days" of the deadline for filing responding memoranda). Consequently, we have not recited the facts or arguments in exhaustive detail. Nonetheless, this court has thoroughly considered the submissions of the parties.

¶ 23 "A temporary restraining order is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue." *Delgado v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 481, 483 (2007) (citing *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 545 (1983)). To be entitled to temporary injunctive relief, plaintiffs must demonstrate that they (1) possess a protectable right, (2) will suffer irreparable harm without the protection of an injunction, (3) have

no adequate remedy at law, and (4) are likely to be successful on the merits of their action. *Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081 (1993). "The plaintiff is not required to make out a case which would entitle him to judgment at trial; rather, he only needs to show that he raises a 'fair question' about the existence of his right and that the court should preserve the status quo until the cause can be decided on the merits." *Stocker Hinge*, 94 Ill. 2d at 542. Generally, we will affirm the circuit court's denial of a temporary restraining order unless the court abused its discretion. *C.D. Peters Construction Co. v. Tri-City Regional Port District*, 281 Ill. App. 3d 41, 47 (1996). An abuse of discretion exists where the circuit court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court. *Seymour v. Collins*, 2015 IL 118432, ¶ 41. It follows that if the original TRO was entered in error, then the court must dissolve that TRO.

¶ 24 On appeal, Mento argues that the circuit court erred by refusing to dissolve the TRO on three bases: (1) he was eligible to serve as a board member merely because he was nominated by the trustee of the Three Brothers Trust, thus falling into the exception in Article XIV of the condominium declaration; (2) any prohibition against non-resident board members in the declaration violates section 2.1 of the Condominium Property Act (765 ILCS 5-605/2.1 (West 2016)); (3) the court's finding of fact regarding Mento's residency was based on insufficient and improperly admitted evidence and contrary to the established principles of residency under Illinois law. Because we resolve this appeal on the third ground, we will not reach the other two grounds.

¶ 25 Our supreme court has explained that when considering whether someone resides at a location, it must examine: (1) physical presence; and (2) an intent to make the property a permanent home. *Maksym v. Board of Election Commissioners of the City of Chicago*, 242 Ill. 2d

303, 319 (2011). The court further explained that once someone has established a residence, he can be away from it an indeterminate length of time without having abandoned it. *Id.* "[B]oth the establishment and the abandonment of a residence is principally a question of intent." *Id.* Further, "while intent is gathered primarily from the acts of a person a voter is competent to testify as to his intention, though such testimony is not necessarily conclusive. * * * [O]nce a residence has been established, the presumption is that it continues, and the burden of proof is on the contesting party to show that it has been abandoned." (Internal quotations marks and citation omitted.) *Id*.

¶ 26 The circuit court erred by relying on Alhomsi's affidavit when it entered the January 10, 2019 TRO. The portion of the affidavit dealing with Mento's residency was nothing more than a single legal conclusion. As such, it was insufficient to justify a finding that Mento did not live at the subject property, even for the purposes of a TRO.

¶ 27 On May 16, the court held a lengthy evidentiary hearing at which it heard the testimony of Alhomsi, Mento, Mento's roommate, and Chatt. The only evidence adduced that suggested that Mento did not reside at the property was Alhomsi's testimony that he had the building entrances monitored by 24-hour triggering cameras. But he did not testify what those cameras observed. While we appreciate the able trial judge's doubt about whether Mento was sharing an apartment with his tenant as a roommate, where he slept on a sofa, the fact remains that Alhomsi had an evidentiary burden to show that Mento did not meet the *Maksym* residency test, and he failed to do so. As noted by the *Maksym* court, an individual's stated intention is crucial to a residency analysis. 242 Ill. 2d at 319.

¶ 28 To obtain a TRO, the movant must establish a likelihood of success on the merits. See *Murges*, 254 Ill. App. 3d at 1081. In the end, there remained no admissible or competent

evidence contradicting Mento's stated residency, even after a formal evidentiary hearing involving four witnesses, including Alhomsi himself. Therefore, we find that the circuit court erred in refusing to dissolve the January 10, 2019 TRO, so as to permit Mento to serve on the board to which a majority of unit owners elected him.

¶ 29 In this order, we have determined only that the circuit court erred in refusing to dissolve the January 10, 2019 TRO. We do not intend to restrain the circuit court from proceeding differently once a fuller record is produced in support of a preliminary injunction, dispositive motion, or trial. That being said, we note that this dispute over the governance of a relatively small condominium building in a modest neighborhood has undoubtedly required the expenditure of considerable time, effort, and money, to say nothing of judicial resources. It is clear that the relationship among the unit owners has deteriorated to the point of utter dysfunction. If the circuit court has not done already done so, we recommend that it appoint a receiver to run the building if the evidence so warrants, refer this dispute to a mediator, and/or promptly resolve the case by dispositive motions or trial in short order.

¶ 30 We also caution against entering temporary restraining orders of indeterminate length, because those orders are actually preliminary injunctions and should be denominated and handled as such. See *Jurco v. Stuart*, 110 Ill. App. 3d 405, 409-410 (1982) (TROs are drastic remedies which may only be entered for periods of limited duration; TROs of indefinite duration are contrary to the statutory scheme).

¶ 31 We reverse the May 16, 2019 order refusing to dissolve the January 10, 2019 TRO and remand with instructions to grant the motion to dissolve the January 10 order. We direct the clerk of the appellate court to issue the mandate *instanter*.

¶ 32 Reversed and remanded with directions; mandate to issue *instanter*.