2019 IL App (2d) 190049-U
No. 2-19-0049
Order filed May 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF SARAH MARSHALL, Petitioner-Appellee, and GREGORY MARSHALL, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 15-D-1543 Honorable Raymond D. Collins, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted Sarah's motion to strike Gregory's second emergency petition for failing to state a claim of indirect civil contempt for interfering with Gregory's parenting time in willful violation of court orders; because the trial court specifically did not rule on Gregory's other claim against Sarah for abuse of Gregory's parenting time pursuant to section 607.5 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607.5 (West 2014)), it is not a final order. Affirmed in part, dismissed in part, and remanded.

¶ 2 This appeal involves an emergency second petition filed by respondent, Gregory Marshall, against petitioner, Sarah Marshall, for a finding of indirect civil contempt (rule to show cause) and for abuse of allocated parenting time pursuant to section 607.5 of the Illinois

Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607.5 (West 2014)). The trial court found that the emergency second petition failed to state a cause of action and granted Sarah's amended motion to strike the claim for indirect civil contempt pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). The court did not rule on the section 607.5 claim for abuse of allocated parenting time, and the order included Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language.

¶ 3 On appeal, Gregory contends that (1) the trial court erred in striking his emergency second petition for a finding of indirect civil contempt, and (2) his claim alleging abuse of allocated parenting time should be remanded to the trial court to render a decision. We affirm in part, dismiss in part, and remand the cause for further proceedings.

¶ 4 I. FACTS

¶ 5 We first address Sarah's request to strike portions of respondent's brief. Sarah argues that we should strike Gregory's brief because the fact section contains instances of inappropriate argument and comment, fails to inform this Court of certain salient facts, and does not accurately cite to the record in violation of Supreme Court Rule 341(h)(6) (eff. May 25, 2018). As Sarah's brief points out, briefs that violate the aforementioned rules may be stricken in whole or in part, or offending portions of such briefs may be disregarded. See *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9 (where a brief fails to comply with the rules, the offending portions of the brief may be struck or the appeal may be dismissed, as the circumstances warrant). We agree in part that Gregory's fact section has some violations and thus, we will disregard any argumentative portions or facts that are not borne out by the record. Accordingly, there is no need to strike the brief and we therefore deny Sarah's request.

¶ 6 The parties were married on September 6, 1986, and three children were born to the parties, only one of whom is a minor, J.M., born in December 2002. On March 21, 2017, the parties entered into an allocation of parental responsibilities and parenting plan (allocation judgment), which provided Sarah with sole parenting responsibilities for J.M., and it set forth a parenting visitation schedule between J.M. and each parent. On May 24, 2018, the trial court entered a judgment for dissolution of marriage, incorporating a settlement agreement and the allocation judgment.

¶ 7 The allocution judgment provided, in part, that J.M. was to continue to attend schools within the Lake Forest school district until the completion of high school, and that any decision for a private school for the child, including but not limited to the choice of school and allocations of attendant costs such as tuition, travel to and from school, and the like, was only to be upon written agreement of both parties.

¶ 8 On June 20, 2018, Sarah filed an amended petition to modify the allocation judgment, requesting that the court modify the parties' plan to permit J.M. to enroll in a private high school, The Thacher School, in Ojai, California, and to modify the parenting schedule so that each parent received an equitable amount of visitation. Gregory filed a motion to strike and dismiss the amended petition to modify, which was granted by the trial court with prejudice on July 25, 2018.

¶ 9 On August 28, 2018, Gregory filed a petition for "a finding of indirect civil contempt (rule to show cause) and abuse of allocated parenting time" pursuant to section 607.5 of the Act. Gregory alleged that prior to the entry of the allocation judgment, he had indicated his objection to J.M. leaving Illinois to attend high school and that "[n]otwithstanding the fact that the [allocation judgment] expressly required that J.M. complete his high school education in the

Lake Forest, Illinois, school district, Sarah encouraged and supported J.M. in applying to an exclusive private high school in California." Gregory further alleged that, despite knowing that he was opposed to J.M. attending high school out of state, and despite knowing that the allocation judgment prohibited J.M. from doing so, Sarah filed her petition to modify, "intentionally creating and fostering a dispute between Gregory and J.M." Gregory alleged that "[s]ignificantly," as soon as he refused to agree to the modification to allow J.M. to attend school in California, various problems arose with his exercise of parenting time with J.M., and on repeated occasions, when Gregory arrived to pick up J.M. for his allocated parenting time, J.M. refused to accompany him. Gregory alleged that Sarah perpetrated a rift between J.M. and himself and she failed to facilitate parenting time, as required by the parenting schedule.

¶ 10 A rule to show cause was entered against Sarah finding that there was probable cause to believe that she had willfully violated the trial court's order by failing to abide by the parenting schedule set forth in the allocation judgment. Sarah was to take such steps as was necessary to encourage J.M. to attend the parenting time with his father. The rule was returnable on November 7, 2018, at which time Sarah was to show cause as to why she should not be held in contempt of court.

¶ 11 On October 22, 2018, Sarah filed a motion to strike Gregory's petition pursuant to section 2-615 for failing to state a cause of action. In sum, Sarah argued that Gregory offered no set of facts which showed that Sarah interfered with Gregory's parenting time or that she had done anything other than to encourage J.M. to engage in visitation with his father. Sarah further argued that, even if Gregory's allegations were taken as true, Sarah's support of J.M.'s application to Thacher did not constitute an action which denied Gregory parenting time with J.M. under the allocation judgment.

¶ 12 On the return of the rule to show cause, the trial court conducted a pretrial conference and continued the rule for hearing on February 4, 2019. The court also ordered that Gregory have immediate parenting time with J.M. and set forth a specific temporary parenting schedule as follows: November 7, 2018, after school, November 16 through November 18, 2018, November 20, 2018, and thereafter, as regularly scheduled per the allocation judgment, except the court changed parenting time to Tuesdays instead of Wednesdays.

¶ 13 On November 30, 2018, Gregory filed an emergency second petition for finding of indirect civil contempt (rule to show cause) and for abuse of allocated parenting time pursuant to section 607.5 on a similar basis as the first petition due to Sarah's alleged refusal to facilitate parenting time between Gregory and J.M.

¶ 14 Gregory specifically alleged that on November 17, Gregory dropped off J.M. at Sarah's house for J.M. to get clothes and books for the remainder of the weekend. Gregory returned to the house approximately 10 minutes later, however, J.M. indicated that he would not be spending the remainder of the weekend with Gregory. Gregory called Sarah, but she did not answer or return his phone call and Gregory was unable to exercise his parenting time from around 12 p.m. Saturday, November 17 through Sunday, November 18, 2018.

¶ 15 On the morning of Tuesday, November 20, 2018, Gregory texted J.M. and Sarah to remind J.M. that he would be picking up J.M. from school. Sarah responded to the text with "??"

¶ 16 On Tuesday, November 20, 2018, Gregory, through his attorney, contacted Sarah, through her attorney, in a reasonable attempt to address the missed parenting time from noon on November 17 through Sunday, November 18, 2018, and the scheduled parenting time for November 20, 2018. Gregory alleged that "Sarah did not attempt to encourage or facilitate

parenting time in response to the correspondence." Gregory further alleged that, on November 27, J.M. was not made available to Gregory for parenting time.

¶ 17 The petition was presented to the court on an emergency basis, but the court found it was not. The court then granted Sarah time to respond and set the matter for hearing.

¶ 18 Sarah filed an amended motion to strike the emergency second petition, which was brought on the same basis as her first motion, for failing to state a cause of action pursuant to section 2-615.

¶ 19 After a hearing on the amended motion to strike (for which respondent fails to provide a record), the trial court's order (1) granted Sarah's motion to strike Gregory's petition for a finding of indirect civil contempt, but (2) specifically did not rule on the section 607.5 claim for abuse of allocated parenting time. The order also included Rule 304(a) language that there was no just reason for delaying either enforcement or appeal or both.

¶ 20 Gregory timely appeals.

¶ 21 II. ANALYSIS

¶ 22 A. Failure to State a Cause of Action for a Finding of Indirect Civil Contempt

¶ 23 Gregory first contends that the trial court erred in granting Sarah's section 2-615 motion for failing to state a claim of indirect civil contempt for interfering with Gregory's parenting time in willful violation of court orders. A section 2-615 motion raises the threshold question of whether a cause of action has been stated. *Miner v. Fashion Industries, Inc.*, 342 Ill. App. 3d 405, 419 (2003). A section 2-615 motion attacks the legal sufficiency of the complaint based on defects apparent on the face of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). If it appears on the face of the complaint that no set of facts can be proved that will entitle plaintiff to recover, the cause of action should be dismissed on the pleadings. *Vernon v. Schuster*, 179 Ill.

2d 338, 344 (1997). In ruling on a section 2-615 motion, a court must accept all well-pleaded facts as true (*Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1081 (1998)), and disregard mere conclusions of law or facts which are unsupported by the facts alleged (*Capitol Indemnity Corp. v. Stewart Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 123 (1992)). This court reviews the dismissal of a claim under section 2-615 *de novo* and must determine whether the allegations, interpreted in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Hirsch*, 299 Ill. App. 3d at 1081.

¶ 24 The second emergency petition requested that Sarah be found in indirect civil contempt of court for her alleged interference with Gregory's parenting time. Indirect civil contempt requires the existence of a court order and proof of willful disobedience of that court order. See *Bank of American, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20. The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. The burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107-08 (2006). Accordingly, Gregory's emergency second petition must state a claim that Sarah willfully violated a court order regarding Gregory's parenting time.

¶ 25 Gregory alleged that Sarah encouraged J.M. to apply to Thacher, knowing that he would be accepted and that Gregory would refuse to allow him to attend, and that this created a rift between Gregory and J.M. Gregory further alleged that this rift resulted in J.M.'s refusal to attend parenting time with him. Gregory cites to the following orders which Sarah violated: (1) the allocation judgment; (2) September 14, 2018; and (3) November 7, 2018.

¶ 26 The November 7, 0rder, stated that Gregory was to have parenting time with J.M. on the following three dates: November 16 through 18, 2018, November 20, 2018, and November 27, 2018.

¶ 27 Regarding November 16 through 18, Gregory alleged that his parenting time began on Friday, November 16, 2018, and that he and J.M. spent the night together before he dropped off J.M. at home on Saturday, May 17, 2018, to get clothes and books for the remainder of the weekend. Gregory claimed that, when he returned to pick up J.M. 10 minutes later, J.M. refused to go with him. The only allegation Gregory makes with respect to Sarah's conduct on November 17, 2018, is that he called her and she did not answer or return his call.

¶ 28 Gregory now claims on appeal, that Sarah's "failure to take action or even respond to texts and phone calls" was "a violation of both the Allocation Judgment and the September 14, 2008(,) order." Gregory cites to the common law record, which is two pages of his emergency second petition and not to any document evidencing his claim that Sarah is ordered at all times to be accessible by phone and to immediately return Gregory's communications. A review of the September 14, 2008, order does not reveal such a requirement. Rather, it states that Sarah "shall take such steps as are necessary to encourage [J.M.] to attend the parenting time with his father." A review of the allocation judgment has no such requirement either. We find that Gregory's allegations concerning the events of November 17 through the 18, 2018, do not allege a single fact evidencing Sarah's alleged willful failure to comply with Gregory's court-ordered parenting time.

¶ 29 As to November 20, 2018, Gregory alleged that: (1) he texted J.M. and Sarah that morning to remind J.M. that he would be picking him up from school and, (2) rather than encouraging the parenting time, Sarah responded to his text with "??" Gregory further alleged

that "[i]n the balance of their correspondence[,] Sarah did not encourage or facilitate parenting time, but instead implied that Gregory had failed to exercise parenting time on November 14, 2018, notwithstanding that he was not scheduled for such time." Gregory did not attach an exhibit to his petition. The only explicit allegation made with regard to Sarah's conduct on that date is that she responded to his text message with two question marks. The allegations are vague, unsupported, and conclusory statements that Sarah did not encourage or facilitate parenting time. A plaintiff cannot rely on conclusory allegations of fact, but rather must allege specific facts that are sufficient to bring his claim within a legally recognized cause of action. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26. Conclusions of the pleader contained in challenged pleadings will not be taken as true unless they are supported by specific factual allegations. *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007). These unsupported conclusory allegations were insufficient to state a claim for Sarah's willful noncompliance with the order concerning the failure to comply with Gregory's parenting time.

¶ 30 Finally, Gregory alleged nothing concerning the November 27, 2018, parenting time order, except that J.M. "was not made available to Gregory for parenting time." Gregory made no allegations of any kind with respect to how Sarah's conduct allegedly violated the court's parenting time order.

¶ 31 In sum, Gregory's second emergency petition failed to state a claim that Sarah failed to comply with his parenting time in willful violation of a court order to support a finding of indirect civil contempt.

¶ 32 We find Gregory's reliance on *In re Marriage of Charous*, 368 Ill. App. 3d 99 (2006), unavailing. In *Charous*, the father filed two separate petitions—one for indirect civil contempt and the other pursuant to what was then known under the Act as visitation abuse. The father

alleged a myriad of facts regarding the mother's conduct to support his claims of contempt and abuse. Following a hearing, the trial court denied the father's petitions. We reversed, finding that the evidence was sufficient to establish that the mother violated the parenting agreement in numerous ways, that the mother failed to establish her behavior was not willful or contumacious, and that she had committed what was then known as visitation abuse. *Id.* at 107-09. We rebuffed the idea that the children's unwillingness to visit their father excused their mother's failure to comply with the visitation requirements. *Id.* at 111-12 (citing *In re Marriage of Reed*, 100 Ill. App. 3d 873, 877 (1981) (holding that a parent must comply with court-ordered visitations even where the child has expressed hostility toward the other parent). The *Charous* parenting agreement specifically imposed on the mother the obligation to have the children prepared for visitation and to have them ready to leave promptly at the scheduled time. The mother, however, acknowledged at the hearing that she had the children ready to go only five or six times over a period of almost two years. *Id.* at 112. Also, the mother did not even offer any explanation for her other violations of the parenting agreement. Because she lacked a legally sufficient excuse for her "numerous failures to comply" with the trial court orders, we concluded that the mother failed to prove her conduct was not willful or contumacious. *Id.* at 113. We further found that the trial court abused its discretion in denying the father's visitation abuse petition. *Id.* at 114.

¶ 33 Gregory relies on *Charous* based on the fact that a child's unwillingness to visit a parent can not eliminate the other parent's obligation from complying with visitation requirements. However, Gregory ignores that the finding in *Charous* was based on the mother's admissions at the evidentiary hearing that she had committed a host of specific violations of the parenting agreement. Here, there was no evidentiary hearing establishing a parent's admitted and repeated

conduct in violating court orders. Rather, the issue involves the sufficiency of Gregory's allegations.

¶ 34 B. Abuse of Allocated Parenting Time

¶ 35 Gregory next contends that his claim alleging abuse of allocated parenting time should be remanded to the trial court to render a decision. In the December 18, 2018, order, the trial court granted Sarah's section 2-615 motion to strike and denied Gregory's emergency second petition for a finding of indirect civil contempt, the court finding Gregory failed to state a sufficient cause of action. The order further stated that it "did not rule on 607.c (*sic*) alleged abuse of allocated parenting time," and the order found that there was no just reason for delaying either enforcement or appeal or both pursuant to Rule 304(a).

¶ 36 Under Rule 304(a), if multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the claims if the trial court makes an express written finding that there is no just reason for delaying either enforcement or appeal or both. S. Ct. R. 304(a) (eff. Feb. 26, 2010). A final judgment is a requirement for appealability under Rule 304(a). *City of Evanston v. Paden*, 221 Ill. App. 3d 1003, 1006 (1991). A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005).

¶ 37 " 'Where a dismissal is based upon a determination that the complaint is not sufficient to state a cause of action, the order is final and appealable by its nature.' " See *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 567 (1999) (quoting *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379, 385 (1991)). Accordingly, the claim for a finding of indirect civil contempt of court is a final judgment, as it was dismissed for failure to state a cause of action.

¶ 38 The section 607.5 claim for abuse of parenting time, however, is not final because the trial court specifically stated that it did not rule on it. Furthermore, the record does not show whether the pleading has been abandoned, remains pending, or has been ruled upon. Thus, it would be anticipatory, speculative, and purposeless to review the merits.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment striking Gregory's emergency second petition for a finding of indirect civil contempt. We dismiss the appeal concerning Gregory's claim of abuse of allocated parenting time and remand the cause for further proceedings on that claim.

¶ 41 Affirmed in part, dismissed in part, and remanded.