

De Novo Review Writing Samples

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Motions

1. Motion: Motion For Contempt For Failure to Comply with Order (Family Law)

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
FAMILY DIVISION**

IN RE: THE MARRIAGE OF

PETITIONER ,

Petitioner/Father,

and

RESPONDENT,

Respondent/Mother,

CASE NO.:

DIVISION:

**RESPONDENT/WIFE'S MOTION FOR CONTEMPT
AGAINST PETITIONER/HUSBAND, FOR
FAILURE TO COMPLY WITH THIS COURT'S ORDER ISSUED
ON APRIL 9, 2015 ORDERING HIM TO PAY RESPONDENT/WIFE'S ATTORNEY'S
FEES AND COSTS AND FOR OTHER RELATED RELIEF**

COMES NOW, the Respondent/Wife, by and through undersigned counsel, and files this Motion for Contempt Against Petitioner/Husband, for Failure to Comply with this Court's Order Issued on April 9, 2015 Order Ordering him to Pay Respondent/Wife's Attorney's Fees and for Other Related Relief, and as grounds thereof states the following:

1. This Court issued an Order Granting Respondent/Wife's Amended Motion for Attorney's Fees and Costs and for Other Related Relief on April 9, 2015. (Exhibit ____).
2. Pursuant to this Order, the Husband was to pay the sum of \$63,865.94 to the Wife's attorney within thirty (30) days. (Exhibit ____).

3. As of this date, May 15, 2015, more than thirty (30) days after issuance of the Order, the Husband has willfully failed to comply with this Court's Order and has not made any of the ordered payments to the Wife's attorney. Affidavit of Mr. X. (Exhibit __).
4. The Wife respectfully requests that this Court issue an Order finding Petitioner in civil contempt. *Garcia v. Garcia*, 743 So. 2d 1225, 1227 (Fla. 4th DCA 1999) (underscoring that an order to pay attorney's fees and costs in a family law case is enforceable by contempt) (citing *Fishman v. Fishman*, 656 So. 2d 1250 (Fla. 1995)); *Hollander v. Vetrick*, 675 So. 2d 1047, 1048 (Fla. 4th DCA 1996).

BACKGROUND

5. This has been a high conflict case, involving multiple time-consuming litigation issues. The Wife has incurred significant attorney's fees and costs in her efforts to maintain access to the courts and to protect her interests and that of her Child in these proceedings.
6. This Court has found that the Wife has no assets or financial resources from which to draw to pay her attorney's fees and costs, that the Husband has the ability to pay the fees, and has ordered the Husband to do so within thirty days of April 9, 2015. *See* April 9, 2015 Order Granting Respondent/Wife's Amended Motion for Temporary Attorney's Fees and Costs and for Other Related Relief. (Exhibit __).
7. It is undisputed that the fees and costs sought by the Wife are reasonable. The Court issued an AGREED Order to that effect after the February 5, 2015 hearing on the Wife's Amended Motion for Temporary Fees. *See* Agreed Order Regarding Attorney's Fees, filed on February 6, 2015. (Exhibit __).

8. The Court held two hearings on the Wife's Amended Motion for Attorney's Fees and Costs, on February 12 and February 19, 2015, where the Court heard testimony of the parties and other witnesses and arguments of counsel. Thereupon, the Court determined that:
 - a. the Wife had no financial assets or resources from which to pay the attorney's fees;
 - b. although it appeared that the Husband was "purposely concealing his assets," the Husband had the ability to pay the fees;
 - c. the evidence clearly showed that the Wife needed to be awarded attorney's fees so that she could be "adequately represented in this highly contested case and so that she may be in financial parity with the Petitioner/Husband," who had already incurred and paid well over \$60,000 for his own attorney's fees; and
 - d. the parties had already agreed that the Wife's attorney's fees were reasonable.
9. Instead of complying with the April 9, 2015 Order, however, on April 17, 2015, the Husband filed a Motion to Stay Execution of Order Requiring Payment of Attorney's Fees and Motion for Reconsideration and to Revise Order Granting Respondent/Wife' Amended Motion for Temporary Attorney's Fees and Costs, challenging the accuracy of the amount that the Husband was ordered to pay for the Wife's attorney's fees.

While the Court found that the total fees and costs were of \$63,865.94, the inexplicably claimed that because the Wife had already paid her attorney \$13,813.33 of those fees from money that she had received as temporary support, that amount should be deducted from the money that the Husband should pay for the Wife's attorney's fees.

The Husband's position on this issue makes no sense. Regardless of who actually paid the attorney's fees, the Court found that the Husband was liable for and had the ability to pay for all of the Wife's attorney's fees (which, by the way, the Husband had already agreed to being reasonable). Therefore, even if there were any fees already paid to the attorney by the Wife, she was entitled to be reimbursed for that amount.

10. The Wife's Response to the Husband's motion makes clear that the only amount paid by the Husband for the Wife's attorney's fees is the \$5,000 that he paid at the commencement of this action. (Exhibit __, ¶¶2, 3). Accordingly, the Wife agrees that amount should be deducted from the total amount of her attorney's fees for which the Husband is liable since he has already paid the \$5,000. However, the Husband must reimburse her for the \$8,100 that she has paid her attorney with her own money because the Court has found him liable for all of her attorney's fees. Moreover, although the total amount now owed by the Husband for the Wife's attorney's fees is reduced by \$5,000, the forensic accountant's fees (who testified at the hearings on the Wife's Amended Motion for Attorney's Fees), which had not yet been added at the time the Court issued its April 9, 2015 Order Granting the Wife's motion of fees and costs, brings the amount due to a total of \$62,860.18.
11. In any case, if the Husband has any issue concerning the exact amount of fees to be paid by him to the Wife's attorney, he should pay the uncontested amount and place the contested amount in the Court's registry. This is yet another dilatory tactic by the Husband to hold onto his (his parents') money and to disadvantage his Wife of fourteen years and deprive her of access to the courts and the ability to protect her and her child's interests.
12. Based on the foregoing, the Wife respectfully requests that this Court enter an Order of Contempt Against the Husband for Failing to Comply with the Court's April 9, 2015 Order Granting Respondent/Wife's Amended Motion for Temporary Attorney's Fees and Costs and for Other Related Relief, and for any other related relief.

MEMORANDUM OF LAW

The wife in *Hollander v. Vetrick*, 675 So. 2d 1047, 1048 (Fla. 4th DCA 1996) filed a motion for civil contempt against her husband when he failed to pay part of her attorney's fees. First, the appellate court explained that attorney's fees were included in the "family support matters" subject to civil contempt. *Hollander v. Vetrick*, 675 So. 2d 1047 (citing *Fishman v. Fishman*, 656 So. 2d 1250 (Fla. 1995)); see also *Garcia v. Garcia*, 743 So. 2d at 1227 (explaining that such an order is correctly characterized as an order for specific performance rather one for payment of money). Accordingly, the court applied *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985), to determine the procedure to establish the wife's entitlement to civil contempt.

In *Bowen*, the court provided that the movant must show that a prior court order directed the party to pay the support and that the party in default has failed to make the ordered payments. The burden of producing evidence then shifts to the defaulting party who must dispel the presumption of the ability to pay by demonstrating that due to circumstances beyond that party's control that have intervened since the order directing payment was entered, the defaulting party no longer has the ability to meet the obligations required in the order. Then the court must evaluate all of the evidence to determine whether it is sufficient to support a finding that the defaulting party has willfully violated the court order. *Bowen*, 471 So. 2d at 1278-79.

Hollander v. Vetrick, 675 So. 2d 1047, 1047-48 (Fla. 4th DCA 1996). As in *Hollander*, the Respondent/Wife in this case, is entitled to seek a civil contempt order against the Petitioner/Husband, for his failure to comply with this Court's Order Granting her Motion for Temporary Attorney's Fees.

WHEREFORE, the Respondent/Wife respectfully requests the entry of an Order finding Petitioner/Husband in civil contempt for failure to comply with the Court's April 9, 2015 Order ordering him to pay her attorney's fees and costs and any other relief consistent with this Motion. The Wife also seeks any other related relief, including, but not limited to:

A. Ordering Petitioner to pay all fees and costs in connection with this motion and/or any additional compensatory damages and/or coercive fines. *Politz v. Booth*, 910 So. 2d 397, 398 (Fla. 4th DCA 2005).

1. This Court has the authority to issue fines for civil contempt. *Parisi v. Broward County*, 769 So. 2d 359, 363 (Fla. 2000).
2. Fines for civil contempt may be either coercive or compensatory. *Gregory v. Rice*, 727 So. 2d 251, 254 (Fla. 1999) (contempt fines may be coercive if intended to compel compliance with the terms of the Court's Order); *Garro v. Garro*, 347 So. 2d 418 (Fla.1977) (underscoring that the purpose of a civil contempt proceeding is to obtain compliance to the order of the court).
3. A valid civil contempt fine, however, must include a purge provision by which the violator may avoid the fine by compliance with the Court's Order. In setting the amount of the fine, the court must consider the violator's ability to pay the fine. *Parisi*, 769 So. 2d at 366.

B. Issuing an Order for incarceration of Petitioner with a purge. *Hollander v. Vetrick*, 675 So. 2d 1047, 1048 (Fla. 4th DCA 1996) ("if the court finds the defaulting party in contempt and orders incarceration, there must be a separate, affirmative finding of present ability to pay any purge amount, and under *Bowen* the moving party may be required to present additional evidence of present ability to pay.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished via electronic mail to the Petitioner's attorney listed below on this ___ day of May, 2015, and the original hereof was electronically filed with the Clerk of the Court.

Attorney for Petitioner/Husband
Co-counsel for Wife

LAW OFFICES OF Mr. X

Attorney for Respondent/Wife

Motions

2. Motion: Motion for Reconsideration (Commercial Litigation)

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

OWNER
PLAINTIFF, CORP. GENERAL JURISDICTION DIVISION

Plaintiff,

CASE NO.

vs.

MR. DEFENDANT, MRS. DEFENDANT and DEFENDANT CORPORATION,

Defendants.

MR. DEFENDANT and MRS. DEFENDANT,
Counter-Plaintiffs,

vs.

PLAINTIFF,

Counter-Defendant,

and

IMPLEADED DEFENDANTS, jointly and severally,
Impleaded Defendants.

MR. DEFENDANTS'
MOTION FOR RECONSIDERATION OF ORDER ON NON-JURY TRIAL

COMES NOW, Mr. Defendant, by and through his undersigned attorney, and files this
Motion for Reconsideration of Order on Non-Jury Trial and states as follows:

INTRODUCTION

On [Date], the Court entered its "Order On Non-Jury Trial" ("Order", attached as Exhibit
A) that ordered:

1. [Plaintiff] is a shareholder and thus permitted to maintain this action as a result of the judicial decree set forth in the Receivership Order. The Jury will be notified of her status as a shareholder. All other issues in the complaint will be determined by the jury.

Ex. A, Order at p. 1. The Order on Non-Jury Trial was issued by The Honorable Judge II who took over the case from The Honorable Judge I. The Order by Judge II contradicts the limited purpose for which the previous judge, Judge I, found that Plaintiff was a “shareholder.” Judge I’s ruling pertained only to the limited purpose of determining standing to appoint a receiver in order to protect the assets of a corporation. *See* Ex. B, Tr. at 3:23-25 (Transcript of [Date] Hearing before The Honorable Judge I) (hereinafter, “Tr.”). The factual question of whether Plaintiff is a shareholder is a key issue in the case and one that must be determined by the jury. Mr. Defendant requests that this Court reconsider the Order and clarify that while the Court legally determined that Plaintiff had standing to seek the appointment of a receiver, the ultimate issue of determining what ownership interest, if any, Plaintiff may have in the business, is a factual finding for the jury to consider.

PROCEDURAL BACKGROUND

Plaintiff filed a motion to appoint a receiver pursuant to Section 607.1430, Florida Statutes, on [Date] and a hearing was held on that motion on [Date]. Prior to the issuance of an order on the motion to appoint a receiver, the Court held a hearing on other pending motions (such as summary judgment) on [Date]. The issuance of an order appointing a receiver was delayed because the parties could not agree about who should serve as receiver, and no order regarding the appointment of a receiver was entered until after the [Date] hearing. *See* Ex. B at 6:14 to 12:1. At that June 7 hearing the Court was asked about the order granting a receiver and stated, “[t]he reason that I held off on the [Receivership] order is because I received your proposed order and I received an objection by eCourtesy. . . . I have requested, in an abundance of caution, a copy of the transcript. . . .” Tr. at 6:16-21).

At the [Date] hearing, Judge I found that as of that date, “there are genuine issues of material fact as to whether . . . Ms. Plaintiff has a 100 percent shareholder interest, whether she made an investment, whether a loan was made that was subsequently repaid.” Tr. at 5:8-16. Judge I further stated as follows:

And then the parties came before the Court and there was a motion for an appointment of a receiver. And there was certainly attempts to litigate the merits of this case, which during those earlier proceedings, was not the function or the purpose of those proceedings. . . . There have been no findings of fact or conclusions of law based on the testimony that has been presented at those earlier hearings. I stated it before, and let me state it very clearly: The only ruling that this Court made was regarding the legal basis for the appointment of a receiver. That hearing focused on the risk of loss of the assets to the corporation, the corporate entity, Plaintiff Corp. Just to be very clear, from this point forward, this Court has made no dispositive finding of fact that would relate to the causes of action or any defenses or counterclaims that may be interposed from this point forward. This Court never ruled as a matter of law or fact that [Plaintiff] was a 100 percent owner of [Plaintiff Corp.]

Tr. at 3:10 to 4:10 (emphasis added).

On [Date], Judge I issued the Order Appointing Receiver (“Receivership Order”) and found that for purposes of appointing a receiver under Florida Statutes, Section 607.1430, that there

is sufficient record evidence that [PLAINTIFF] is a shareholder. This includes the Department of Internal Revenue Service Form 2053 where [PLAINTIFF] is stated to be a 100% shareholder, and the 2010 Schedule K-1 reflecting [PLAINTIFF]’s shareholder status. Moreover, the Articles of Incorporation list both [PLAINTIFF] and [MR. DEFENDANT] as the directors of the corporation.

Ex. C, Receivership Order at p. 3. The Court “rejected” Defendants’ argument disputing that Plaintiff is a shareholder and thus unable to seek a judicial dissolution. *Id.*

Approximately two years later, Judge Miller issued her Order relying upon and expanding the scope of the finding in the Receivership Order of Judge I that Plaintiff is a shareholder, without

consideration of Judge Bloom’s clarifying statements from the bench regarding her preliminary legal finding that Plaintiff was a shareholder for purposes of standing to appoint a receiver.

ANALYSIS

“It is well settled in this state that a trial court has inherent authority to reconsider, as here any of its interlocutory rulings prior to the entry of a final judgment or final order in the cause.” *Bettez v. City of Miami*, 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987).

Mr. Defendant seeks the Court’s reconsideration of the Order finding that Plaintiff is a shareholder and notifying the jury of such, because that finding was for the limited purpose of determining standing to appoint a receiver only and has no bearing on the ultimate factual issues reserved for trial. The Order misstates that limited finding and essentially converts the limited legal finding into a conclusion that will improperly take that ultimate issue of fact out of the jury’s purview. A finding that Plaintiff is a “shareholder” for purposes of an order appointing a receiver does not bind the Court or take away the jury’s role in making factual findings regarding whether Plaintiff is, in fact, a shareholder. Moreover, the prior judge’s limiting statements regarding her legal finding that Plaintiff is a shareholder should be honored by the current presiding judge.

Judge I Made a Legal Finding That Plaintiff Was A Shareholder For Standing Purposes Only, In Order to Appoint A Receiver, And Such Finding Has No Binding Effect On The Factual Question of Plaintiff’s Possible Ownership at Trial

In a proceeding under Florida Statute Section 607.1430(2), a “circuit court may dissolve a corporation or order such other remedy. . . [i]n a proceeding by a shareholder if it is established” that certain requirements are met such as, among other things, deadlock in the management of corporate affairs, or that assets are being misapplied or wasted. The Court found such to be the case and appointed a receiver to manage the business affairs during the pendency of this case. Receivership Order at 3. A “Shareholder” is defined for purposes of appointing a receiver as “one

who is a holder of record of shares in a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.” § 607.01401(24), Fla. Stat. Courts have broadly construed the term “shareholder” in order to protect the assets of a corporation while a case is pending.

In *Acoustic Innovations, Inc. v. Shafer*, 976 So. 2d 1138, 1145 (Fla. 4th DCA 2008), the court recognized that “strict record ownership is not a prerequisite for the holders of equitable or beneficial interests in shares of stock to have standing to sue.” In order to protect the assets of a corporation, Florida courts have recognized that “strict record ownership is not necessary and that holders of equitable or beneficial interests in shares have standing to sue.” *Kaplan v. First Continental Corp.*, 711 So.2d 108, 111 (Fla. 3d DCA 1998). Thus a finding of standing to sue, or more specifically standing to seek appointment of a receiver, does not conclusively determine the shareholder status of the party seeking appointment of a receiver that binds the jury.

This Court has no basis for concluding that the preliminary finding that Plaintiff was a shareholder in the Receivership Order has preclusive effect. In *Klak v. Eagles’ Reserve Homeowners’ Association, Inc.*, 862 So. 2d 947 (Fla. 2d DCA 2004), the court found that an order appointing a receiver/custodian in a case involving a homeowner’s association dispute over repairs was “by its very nature a provisional order that should not be given binding effect in the subsequent proceedings.” In that case, the court found that the trial court was not bound by findings made in the order appointing a receiver/custodian, even though that order was affirmed by an appellate court without a written opinion. The appellate court found that the court’s “order appointing receiver/custodian was based on a less-than-full hearing” and therefore had no bearing on ultimate issues at trial. *Klak*, 862 So. 2d at 953.

In *Klak* the court stated that the order appointing receiver/custodian was based on a “prima facie case” and was not based on a full hearing, just as the limited hearing on the Receivership Order presented here. In *Klak*, the appellate court found that “the [receivership/custodian] order itself – by its statement that the Berger group ‘presented a prima face case’ – makes explicit that it was not based on a full hearing and consideration of all the relevant facts and legal issues.” *Klak*, 862 So. 2d at 953. Similarly, here Judge I stated clearly from the bench on [Date] that the Court had made no findings to date on the merits, including the nature of Plaintiff’s ownership interests, if any. Judge I stated that the “only ruling that his Court made was regarding the legal basis for the appointment of a receiver.” Tr. at 3:23-25.

The finding in the Receivership Order that Plaintiff is a shareholder was a legal conclusion made by the Court for purposes of standing only and has no preclusive effect.

CONCLUSION

WHEREFORE, Mr. Defendant respectfully requests that this Court reconsider its Order on Non-Jury Trial to delete the finding that Plaintiff is a shareholder and that the jury not be notified of her status as a shareholder. The issue of Plaintiff’s legal standing to maintain this action is a legal question that is not before the jury.

I HEREBY CERTIFY that a copy of the foregoing has been emailed to: