[Cite as *FirstMerit Bank, N.A. v. Xyran Ltd.*, 2016-Ohio-699.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102905

FIRSTMERIT BANK, N.A.

PLAINTIFF-APPELLEE

vs.

XYRAN LTD., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, VACATED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-726920

BEFORE: Laster Mays, J., Jones, A.J., and Keough, J.

RELEASED AND JOURNALIZED: February 25, 2016

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ANITA LASTER MAYS, J.:

{¶1} Defendants-appellants Dr. Bhupinder Sawhny ("Dr. Sawhny"), his wife Jaspreet Sawhny ("Mrs. Sawhny") (collectively the "Sawhnys"), and Xyran Ltd. ("Xyran") appeal the trial court's order finding: (1) personal jurisdiction over them, and (2) that FirstMerit Bank, N.A. (the "Bank") proved the Sawhnys jointly and severally violated the charging order relating to their interest in The Center for Neurosurgery, L.L.C. (the "Center") by clear and convincing evidence. We affirm the finding of personal jurisdiction and contempt as to Dr. Sawhny and Xyran, but we remand to the trial court to vacate the judgment of contempt against Mrs. Sawhny for violation of the charging order.

I. Facts and Procedure

{¶2} In 2004, Xyran issued a promissory note to the Bank in the amount of $480,000 that was personally guaranteed by the Sawhnys. The note was secured by real property. The Bank obtained a cognovit judgment against Xyran and the Sawhnys in May 2010.

{¶3} The Bank foreclosed on the real property, garnished Dr. Sawhny's salary, and attempted to attach certain assets of the Sawhnys. Dr. Sawhny formed the Center in 2011, and was its sole corporate member; he was also an employee. The Bank claimed that a balance of $221,937.71 plus interest of 11.93 percent per annum from March 12, 2012, remained outstanding.

{¶4} A debtor's examination was held and, in April 2012, the Bank filed for, and was granted, a charging order against the Center pursuant to R.C. 1705.19, without a hearing. The order provided:

> The interest of the judgment debtors, Bhupinder Sawhny and/or Jaspreet Sawhny in the limited liability company known as The Center for Neurosurgery, L.L.C. to satisfy the judgment owed to FirstMerit Bank, N.A. in the amount of $221,937.71 plus interest at the rate of 11.93% per annum from March 19, 2012 is so charged as it relates to any and all distributions, rights of distributions, profits, and/or rights of profits for which judgment debtors, receive, are entitled to receive or may be entitled to receive.

Judgment Entry for Charging Order, June 27, 2012.

{¶5} On March 21, 2013, this court released its opinion in *FirstMerit Bank, N.A. v. Xyran, Ltd.*, 8th Dist. Cuyahoga No. 98740, 2013-Ohio-1039, without order of remand ("*Xyran I*"). This court rejected appellants' assertion that the charging order should be revoked because the assignment of Dr. Sawhny's interest to other than a licensed physician was banned by the Center's operating agreement and constituted a violation of R.C. 4731.41 prohibiting the unauthorized practice of medicine. This court also overruled appellants' argument that the trial court erred in failing to hold an evidentiary hearing because "[a] trial court need not hold an evidentiary hearing when the materials submitted do not demonstrate that the movant is entitled to relief. *State Alarm, Inc. v. Riley, Indus. Servs.*, 8th Dist. Cuyahoga No. 92760, 2010-Ohio-900, ¶11." *Xyran I* at ¶ 8.

{¶6} The Bank filed a show cause order on May 30, 2013, as to why the Sawhnys should not be held in contempt for failure to honor the charging order. The motion was

served on counsel for appellants only. No affidavit or other evidence was attached, and the motion failed to allege that appellants were entitled to distributions or rights to profit from the Center.

{¶7} After a series of pretrials and failed settlement attempts, a hearing was conducted on November 7, 2013, with Dr. Sawhny as the sole witness. Appellants challenged service at the beginning of the hearing and the parties were asked to brief the issue at the conclusion of the hearing.

{¶8} At the close of the Bank's examination of Dr. Sawhny, appellants moved to dismiss on the ground that, "there is no evidence at all that there has been any profit paid or earned by the Center. Dr. Sawhny is receiving a salary. They can go garnish his salary, if they wish." (Tr. 15.) "The charging order doesn't apply to the salary. It applies to distribution[s] from the company over and above." *Id.*

{¶9} The Bank countered that the order applied to profits and that the $12,000 monthly salary drawn by Dr. Sawhny from the Center constituted a profit. Additional testimony by Dr. Sawhny established that the Center employed a physician's assistant, two secretaries, and an independent contractor practice manager. The Bank informed the trial court at the conclusion of the hearing that if the appellants had honored their mediation agreement to pay $150,000, which was made while the case was pending on appeal, the case would have ended.

{¶10} The trial court issued its findings on December 23, 2013. It determined (1) that service on appellants' counsel constituted valid service pursuant to Civ.R. 5, and

Quisenberry v. Quisenberry, 91 Ohio App.3d 341, 632 N.E.2d 916 (2d Dist.1993); (2) appellants had actual notice as they appeared for pretrial hearings for settlement conferences; (3) an order of remand from the appellate court was not required pursuant to App.R. 12 because the appellate court affirmed the trial court's decision; and (4) the Bank had established by clear and convincing evidence that Dr. and Mrs. Sawhny willfully disobeyed the charging order against their interests in the Center.

{¶11} The court issued a $250 sanction against appellants and awarded the Bank attorney fees. The parties subsequently agreed to $1,250 for the attorney fees. This appeal ensued.

II. Assignments of Error

{¶12} Appellants offer two assignments of error. The first assignment of error is that the trial court lacked personal jurisdiction because the Bank failed to serve appellants, and that appellants posed a timely jurisdictional challenge. The second assigned error is that the Bank failed to prove that appellants jointly or severally violated the charging order by clear and convincing evidence.

A. Personal Jurisdiction

{¶13} We first entertain the jurisdictional issue. Personal jurisdiction is a question of law that appellate courts review de novo. *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 27. *Kerger v. Dentsply Internatl., Inc*., 8th Dist. Cuyahoga No. 94430, 2011-Ohio-84, ¶ 11.

{¶14} Appellants contend that the trial court lost jurisdiction after *Xyran I* because the opinion did not contain an order of remand. As a result, the Bank was required to invoke jurisdiction through proper service via Civ.R. 4 to validly proceed with the motion to show cause. We disagree.

{¶15} As the trial court recognized, this court affirmed the judgment of the trial court. Pursuant to App.R. 12(B), where the court of appeals finds no prejudicial error, "the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly." There is neither a necessity nor a requirement to remand to direct the court to do what the appellate court determined was properly decided.[1]

{¶16} We concur with the trial court's analysis regarding service, finding that service on appellants' counsel was sufficient under Civ.R. 5(B) and *Quisenberry*, 91 Ohio App.3d 341, 346, 632 N.E.2d 916:

> Where contempt is civil in nature, the civil rules regarding notice apply. *Home S&L Co. v. Midway Marine, Inc.*, 7th Dist. Mahoning No. 10 MA 109, 2012-Ohio-2432, citing *Bierce v. Howell*, 5th Dist. Delaware No. 06 CAF 05 0032, 2007-Ohio-3050. Civ.R. 5 governs service of papers subsequent to the original complaint. *Scarnecchia v. Rebhan*, 7th Dist. Mahoning No. 05 MA 213, 2006- Ohio-7053.

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[1] Affirm is defined as "[t]o ratify, establish, or reassert. * * * In the practice of appellate courts, to declare a judgment, decree, or order valid and to concur in its correctness so that it must stand as rendered in the lower court. * * * A judgment, decree, or order that is not affirmed is either remanded (sent back to the lower court with instructions to correct the irregularities noted in the appellate opinion) or reversed (changed by the appellate court so that the decision of the lower court is overturned)." *West's Encyclopedia of American Law*, (2d Ed. 2008).

> Under Civ.R. 5(B), subsequent to successful service of the complaint, service by mail is complete upon mailing. *Home S&L Co., supra*. No return of service is required under the civil rules, under the contempt statute, or under case law. *Id.* Contrary to [appellant's] assertion, no Ohio court has held that personal service is required to perfect a contempt motion, unless personal service is ordered by the court pursuant to Civ.R. 5. *Id.*
>
> Further, there is no specified manner of process required for the filing of a motion for civil contempt; a person serving such a motion may do so in any manner authorized by the Ohio Rules of Civil Procedure. *In re I.U.*, 2d Dist. Champaign No. 2007 CA 9, 2007- Ohio-6264, citing *Quisenberry v. Quisenberry*, 91 Ohio App.3d 341, 346, 632 N.E.2d 916 (2d Dist.1993).
>
> In the instant case, the record reveals that [appellant] was duly served with the summonses and complaints for the 23 cases that resulted from the multitude of code violations in and about its numerous properties. Given that the show-cause orders or contempt citations were services of papers subsequent to the original complaint, pursuant to Civ.R. 5, these could be served by ordinary mail. This is exactly what happened in the instant case. As such, the trial court did not lack jurisdiction as [appellant] has asserted.

Cleveland v. Bryce Peters Fin. Corp., 8th Dist. Cuyahoga Nos. 98006-98024, 98078, 98079, 98163, 98164, 2013-Ohio-3613, ¶ 29-32.

{¶17} We further uphold the trial court's jurisdictional conclusion that appellants had actual knowledge of the proceedings, based on *Kerr v. Iozzo*, 6th Dist. Fulton No. F-10-019, 2011-Ohio-1836 and *Hiscox v. Hiscox*, 7th Dist. Columbiana No. 06-CO-18, 2007-Ohio-1124. The appellant in *Kerr* argued that he was never officially served and therefore, summary judgment could not be granted against him due to lack of personal jurisdiction. *Id.* at ¶ 13. However, the record demonstrated that the appellant was not only aware of the pending litigation but personally participated in pretrial settlement conferences. Therefore, he had actual notice and jurisdiction was perfected. *Id.* at ¶ 14-15.

{¶18} The Seventh District Court of Appeals determined in *Hiscox* that where actual notice is established, service is sufficient:

> Due process requires that an alleged contemnor be given notice of such a hearing and that such notice be reasonably calculated to reach an individual alleged to be in contempt. *Hansen v. Hansen* (1999), 132 Ohio App.3d 795, 799, 726 N.E.2d 557. Proper service is not required if the alleged contemnor has actual notice of the contempt charges pending against her. *Tandon v. Tandon*, 7th Dist. Jefferson No. 00JE16, 2001-Ohio-3157, at ¶ 19, footnote 1, citing *Rose v. Rose* (Mar. 31, 1997), 10th Dist. Franklin No. 96APF09-1150 and 96APF11-1550, 1997 Ohio App. LEXIS 1235.

Id. at ¶ 47; *Ontario Teachers Plan Bd. v. Endurance Partners, LLC*, 7th Dist. Mahoning No. 12 MA 66, 2013-Ohio-2267.

{¶19} Appellants appeared at, and participated in, at least four pretrial hearings where settlement negotiations took place, and Dr. Sawhny later testified at the November hearing. The purpose of notice is to provide constitutional due process to the contemnor and an opportunity to be heard. *Hanson* at 799. Appellants had actual notice of, and participated in, the proceedings.

{¶20} The Bank dismissed the contempt action against Mrs. Sawhny at the hearing. (Tr. 25.) The matter is remanded to vacate the judgment as to Mrs. Sawhny. Appellants' second assignment of error is overruled as to the remaining appellants.

B. The Bank Failed to Prove that Appellants Jointly or Severally Violated the Charging Order by Clear and Convincing Evidence.

{¶21} We reiterate that the contempt claim was withdrawn as to Mrs. Sawhny. Therefore, we proceed with analysis of the propriety of the contempt finding as to the remaining appellants.

{¶22} A court has inherent and statutory authority over contempt proceedings. *Cleveland v. Bank of N.Y. Mellon*, 8th Dist. Cuyahoga No. 99559, 2013-Ohio-3157, ¶ 18. The statutory contempt powers are set forth in R.C. 2705.01 and 2705.02, which govern direct contempt and indirect contempt, respectively:

> "Disobedience to court orders may be punished by contempt." *Ware v. Ware*, 12th Dist. Warren No. CA2001-10-089, 2002-Ohio-871, 2002 WL 336957, *1, citing R.C. 2705.02(A); *In re C.P.*, 12th Dist. Butler No. CA2004-10-259, 2005-Ohio-3888, ¶ 13. Pursuant to R.C. 2705.02(A), contempt results "when a party before a court disregards or disobeys an order or command of judicial authority." *Spickler v. Spickler*, 7th Dist. Columbiana No. 01CO52, 2003-Ohio-3553, ¶ 38. "The law surrounding contempt was created to uphold and ensure the effective administration of justice, secure the dignity of the court, and affirm the supremacy of law." *Id., citing Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 1994-Ohio-404, 637 N.E.2d 882 (1994).

Cottrell v. Cottrell, 12th Dist. Warren No. CA2012-10-105, 2013-Ohio-2397, ¶ 11.

{¶23} A trial court's contempt finding must be based on clear and convincing evidence and is reviewed for an abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 573 N.E.2d 62 (1991). "An abuse of discretion implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983). *Id.* at ¶ 12.

{¶24} This court has observed that:

> In order to hold a litigant in contempt, the movant must produce clear and convincing evidence that shows that 'he violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.' [*NLRB*] *v. Cincinnati Bronze*, 829 F.2d [585], at 591 [6th Cir. 1987] (quotation and brackets omitted). * * * Once the movant establishes his prima facie case, the burden shifts to the contemnor who may defend by coming forward with evidence showing that he is presently unable to comply with the court's

> order. *United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) ('[w]here compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production.'). To meet this production burden in this circuit 'a defendant must show categorically and in detail why he or she is unable to comply with the court's order.' *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996) (quotation omitted). When evaluating a defendant's failure to comply with a court order, we also consider whether the defendant 'took all reasonable steps within [his] power to comply with the court's order.' *Peppers* [*v. Barry*], 873 F.2d [967] at 969 [6th Cir. 1989].

Lahoud v. Tri-Monex, Inc., 8th Dist. Cuyahoga No. 96118, 2011-Ohio-4120, ¶ 53-54.

{¶25} As this court discussed in *Xylan I,* R.C. 1705.19[2] governs charging orders against members of limited liability companies. The statute provides, "the judgment creditor has only the rights of an assignee of the membership interest as set forth in section 1705.18 of the Revised Code. Nothing in this chapter deprives a member of the member's statutory exemption." R.C. 1705.19(A). "An order charging the membership interest is the sole and exclusive remedy that a judgment creditor may seek to satisfy a judgment against the membership interest of a member or a member's assignee." R.C. 1705.19(B).

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[2] The motion for the order was filed April 3, 2011 and the entry granting the order was issued on June 27, 2012. The current version became effective on May 4, 2012. The 2012 amendment added "as set forth in section 1705.18 of the Revised Code" to the end of the second sentence of (A), and added (B) through (D). However, prior case law provides the now statutorily defined result. *See, e.g., FirstMerit Bank, N.A. v. Washington Square Ent.*, 8th Dist. Cuyahoga No. 88798, 2007-Ohio-3920, *infra*.

{¶26} "An assignment entitles the assignee only to receive, to the extent assigned, the distributions of cash and other property and the allocations of profits, losses, income, gains, deductions, credits, or similar items to which the assignee's assignor would have been entitled." R.C. 1705.18(A); *Xyran I* at ¶ 5, 9. The scope of a charging order may not exceed the statutory boundaries. *Knollman-Wade Holdings, LLC v. Platinum Ridge Props., LLC*, 10th Dist. Franklin No. 14AP-595, 2015-Ohio-1619, ¶ 16.

{¶27} The June 28, 2012 charging order in this case provides that,

> "[T]he interest of the judgment debtors * * * in the * * * Center to satisfy the judgment owed to FirstMerit Bank, N.A. * * * is so charged as it relates to any and all distributions, rights of distributions, profits, and/or rights of profits for which judgment debtors, receive, are entitled to receive or may be entitled to receive." As was explained in *Xylan I*, the entitlement of the assignee is to the financial interest, i.e., profits, pursuant to statute.

Id. at ¶ 9.

{¶28} The trial court's December 20, 2013 hearing entry held:

> This court finds, upon proper consideration of all of the evidence submitted at the hearing, that there is clear and convincing evidence of debtor's willful disobedience of this court's 06/28/12 order granting creditor a charging order as to all interest of the judgment debtors, Bhupinder Sawhny and/or Jaspreet Sawhny, in the limited liability company known as The Center for Neurosurgery, L.L.C. to satisfy the judgment owed to the creditor. Creditor's 05/02/13 motion to show cause is granted.

In light of the statutory prescription as to the effective scope of the charging order, we reject appellants' argument that the order is ambiguous and lacks specificity.

{¶29} Further, as to the scope of the charging order, appellants argue that Dr. Sawhny received a salary but did not receive a distribution subject to the charging order. (Tr. 24.) In effect, appellants contend that it was impossible for them to comply.

{¶30} While impossibility is a valid defense to a civil contempt charge, "'in raising this defense, the defendant has a burden of production.'" *Lahoud v. Tri-Monex, Inc.*, 8th Dist. Cuyahoga No. 96118, 2011-Ohio-4120, ¶ 54, quoting *United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). The defendant "must show 'categorically and in detail' why [he or] she is unable to comply with the court's order. *Briggs v. Moelich*, 8th Dist. Cuyahoga No. 97001, 2012-Ohio-1049, ¶ 15, citing *Lahoud* at ¶ 54." *Allan v. Allan*, 8th Dist. Cuyahoga No. 101700, 2015-Ohio-2037, ¶ 12.

{¶31} Dr. Sawhny testified during examination by the Bank's counsel that he is the sole member of the limited liability company. The limited liability company is for the neurosurgery practice. (Tr. 10.) Counsel asked him to provide a total revenue figure for 2012 based on the doctor's "best recollection of what those numbers were." (Tr. 11.) Dr. Sawhny estimated that the total revenue for 2012 was about $500,000 and that his 2012 tax return income was $112,000 and he also received benefits. (Tr. 11.) In response to counsel's inquiry as to the total amount of benefits, Dr. Sawhny responded that he could submit a copy of the tax return to FirstMerit. *Id.*

{¶32} The doctor's year-to-date salary for 2013 was $12,000 bi-weekly, gross. Counsel inquired whether the $12,000 was taken out as a distribution or a salary. (Tr. 12.) The following exchange occurred:

> [Doctor] That was taken out — I had a salary in 2011 of about $5,000 a month because we had just started in 2011, July. So we really didn't have an income of a certain amount. We didn't know how much it was going to generate.

> So, I started taking an income of about $5,000 a month before tax. That continued, $5,000 until the middle of 2012, and now we have increased it to $12,000.
>
> [Counsel] The $12,000 that you were taking out a month are profits of the Center for Neurosurgery?
>
> [Counsel for Doctor] Objection.
>
> [Court] You can answer.
>
> [Doctor] That's the money that I have which is available for me, yes.
>
> [Counsel] As a profit, correct?
>
> [Doctor] What else would it be? I can't imagine.
>
> [Counsel] Right. It wouldn't be anything else. You pay your expenses and you take your profit.
>
> [Doctor] Yes.

(Tr. 11 and 12.)

{¶33} The doctor also testified that he paid the Bank $5,000 in July, August, and September pursuant to arrangements between the parties and that there were no other payment arrangements between them prior to that time. (Tr. 13.) His car payment is not a received benefit but he does receive health insurance and malpractice insurance benefits from the L.L.C. (Tr. 13 and 14.)

{¶34} At the close of the Bank's examination, Dr. Sawhny's counsel argued that the evidence demonstrated that the doctor receives a $12,000 biweekly salary that is subject to garnishment but that "[t]here is no evidence at all that there has been any profit paid or earned by this company. * * * The charging order doesn't apply to the salary. It

applies to distribution[s] from the company over and above." (Tr. 15.) The trial court allowed additional testimony on the issue.

{¶35} Dr. Sawhny stated, in response to questioning by his counsel, that he has never taken any distribution other than his salary from the Center and the Bank has not attempted to garnish his Center wages. He also reiterated that he is the sole member and, in addition to his position, the Center employs two secretaries, a physician's assistant, and an independent contractor who handles the accounts. (Tr. 24 and 25.)

{¶36} "A 'membership interest' is defined as 'a member's share of the profits and losses of a limited liability company and the right to receive distributions from that company.' R.C. 1705.01(H)." *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, 857 N.E.2d 583, ¶ 14. We recognize that a creditor covered by charging order against a member of a limited liability company is only an assignee of the member's distribution of profits per R.C. 1705.19, subject to exemptions. *See, e.g., Firstmerit Bank, N.A. v. Washington Square Ent.*, 8th Dist. Cuyahoga No. 88798, 2007-Ohio-3920, ¶ 15 ("a member's judgment creditors have only the rights of assignees of a membership interest.") R.C. 1705.19; *Xylan I* at ¶ 5.

{¶37} In addition, assignees of membership interests do not become members themselves, but only have the right to receive distributions that would have been paid to the member-assignor. R.C. 1705.18. Distributions are as set forth in the operating agreement. R.C. 1705.11 and 1705.10. *See, e.g., Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 25 (8th Dist.).

{¶38} However, in the case before us, Dr. Sawhny testified that he received payments from the Center's profits. (Tr. 11 and 12.) That statement provides competent and credible evidence of contempt of the charging order, shifting the burden to appellants who argue that no distribution was received so, in effect, it was impossible for them to comply.

{¶39} Other than a verbal refutation during the examination by Dr. Sawhny's counsel that the payment out of profits was not a payment subject to the charging order, appellants failed to demonstrate "categorically and in detail" why it could not comply with the charging order. In spite of the pressing nature of the action, appellants offered no evidence to support their position, such as a tax return as referenced by Dr. Sawhny during the hearing (tr. 11), or other evidence of the Center's accounting.

{¶40} We find that appellants failed to meet their burden of demonstrating impossibility of compliance. Appellant's second assignment of error is overruled.

III. Conclusion

{¶41} The judgment is vacated as to Mrs. Sawhny. We affirm the trial court's finding of personal jurisdiction and contempt against the remaining appellants. We remand to the trial court to vacate the judgment of contempt against Mrs. Sawhny.

It is ordered that appellant and appellee equally split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR