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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MANUEL DE FREITAS,
Plaintiff and Respondent,
v.
M.J.B. PIPELINE,
Defendant and Appellant.

A133946
(Alameda County
Super. Ct. No. RG09435478)

In an earlier appeal, we affirmed the trial court’s order appointing a provisional director (the provisional director order) to break a corporate deadlock between two brothers, John De Freitas (John) and Manuel De Freitas (Manuel),¹ each of whom owns a one-half interest in a corporation—M.J.B. Pipeline (MJB)—that is in the process of being dissolved. Thereafter, Manuel brought a contempt action against John alleging John had failed to comply with the provisional director order. The trial court denied Manuel’s request but issued further orders requiring John to comply with the decisions of MJB’s Board of Directors (Board) “on pain of contempt.” The trial court also awarded attorney fees to Manuel for having to bring the motion. In the instant appeal, John, “on behalf of [MJB],” contends the trial court: (1) had no authority to award attorney fees absent a finding of contempt; (2) had no authority to order him to comply with the Board’s decisions; and (3) erred in considering Manuel’s “late filed pleadings.” For the reasons

¹ For clarity and ease of reference, we refer to John De Freitas and Manuel De Freitas by their first names. The record is inconsistent as to the spelling of their last name. We will spell it as it is spelled in the trial court’s orders.

set forth below, we reverse the order awarding attorney fees to Manuel but affirm the order in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Prior appeal

In 2010, we resolved MJB’s first appeal in a nonpublished opinion. (*De Freitas v. M.J.B. Pipeline* (Sept. 30, 2010, A125151) [nonpub. opn.].) To obtain context, maintain consistency and conserve judicial resources, we hereby take judicial notice of our prior opinion. (Evid. Code, § 451, subd. (a); see *In re Luke L.* (1996) 44 Cal.App.4th 670, 674, fn. 3.) The essential facts underlying the prior proceeding are as follows:

Manuel and John each own one-half interest in MJB and serve as MJB’s only directors. On February 18, 2009, while MJB was in the process of being voluntarily dissolved, Manuel filed a petition for the appointment of a provisional director. He alleged there was a deadlock regarding the “management of corporate affairs” and asked the court to appoint a provisional director who would “have all the rights and powers of a director . . . until the deadlock in the board is resolved and broken.” Manuel declared that he and John had been unable to agree regarding “many of the issues that must be resolved in order to complete the dissolution,” including the appointment of a third director, layoffs, deciding “who should perform the accountings and maintain the records,” “disputes as to monies owed,” “how remaining employees should be compensated,” and “even . . . how to divide up the Oakland Raiders tickets.” He declared that as a result of “the deadlock,” the voluntary dissolution “is at a standstill” and MJB’s “current projects cannot be conducted advantageously and there is a risk that [its] property or business may be impaired.” On February 20, 2009, the trial court issued an order to show cause why a provisional director should not be appointed.

John opposed the motion on various grounds. He declared, among other things, that there was no deadlock regarding most of the issues set forth in Manuel’s declaration.

Three witnesses testified at hearings on Manuel’s petition for the appointment of a provisional director. A former operations manager for MJB described hostility and conflict between John and Manuel, including an incident during which John leaned over

Manuel's desk, "was kind of in [Manuel's] face," "was very aggravated," and "was swearing a lot." She also testified the employees were "a little bit fearful" due to the "tension [that] was created" and that during another incident, a co-worker "wondered if she should call the police because things were so heated during that encounter" and it appeared John might try to hurt Manuel.

Manuel also took the stand and described the tasks that remained before MJB could be dissolved. He testified that he wished to dissolve MJB "as soon as possible" because it was costing \$125,000 per month on overhead to fund the company. He described the various disagreements he and John had. He testified that another partner, Bunny Chang, used to have a 10 percent interest in MJB before he retired in or about 1998.

John testified he had not had any discussions with Manuel in the last two years about appointing a third director. During cross-examination, Manuel's attorney introduced into evidence an August 2008 letter in which Manuel suggested to John that they appoint a provisional director due to disagreements they were having. He also introduced into evidence a February 2009 letter in which Manuel asked for John's cooperation in agreeing on a third party to "make decisions and oversee the windup."

The trial court issued an order on April 13, 2009, entitled "Order Appointing Provisional Director [¶] Cal. Corporations Code § 308." The order stated, "the Court finds that Petitioner has established by a preponderance of the evidence that the allegations of the Petition are true, and that the two equal shareholders are and have been unable to agree in a timely, orderly way on important decisions that must be made to effectuate the mutually desired wind-up of the Defendant corporation's business affairs. As a result, the property and/or business of the corporation are manifestly at risk. Accordingly, the Court concludes that a provisional director empowered under the law to break the frequently occurring deadlocks between the two brothers should be appointed." The trial court appointed Chang "to serve as a provisional director of [MJB] as prescribed by Section 308 of the California Corporations Code." The court ordered that Chang "shall have all the rights and powers of a director of [MJB] until the deadlock in the

board is resolved and broken” and that he “shall be entitled to reasonable compensation for the performance of the duties imposed on him.”

John’s attorneys filed a notice of appeal on behalf of MJB. On appeal, MJB argued, among other things, that there was no basis to appoint a provisional director and that the trial court erred in sealing certain records. We remanded the matter to the trial court for the limited purpose of providing the parties with the option of requesting admission of confidential records into evidence for the trial court to determine their admissibility. We affirmed the trial court’s order appointing a provisional director.

Instant appeal

After the trial court resolved the issue of whether certain records should be sealed, John, “on behalf of [MJB],” filed a case management conference (CMC) statement on July 5, 2011, stating, “The case has been tried, was remanded on appeal as to the propriety of sealing certain evidence, and the trial court has ruled on the sealing issue. There is nothing left to resolve.” On July 11, 2011, Manuel filed a CMC statement in which he asserted that John was “acting in violation of the Court’s order appointing the provisional director by refusing to accept the decisions of the MJB . . . Board of Directors . . . on the ground that the provisional director . . . has a ‘conflict of interest’ when he votes in line with Manuel” He asserted that John had refused to sign checks for payments to Chang for his work as the provisional director and had voided checks issued by MJB to Chang. Manuel also alleged that John was claiming he “ ‘won’ the litigation” and was “demanding reimbursement in the sum of \$100,000 which he incurred on behalf of MJB in connection with his unsuccessful defense of the petition for appointment of provisional director.” Manuel asserted there were “other outstanding issues with the dissolution of MJB, including MJB’s retrieval of a GPS system.” He stated, “The parties had agreed to put the GPS on consignment for sale with a third party in Los Angeles. [John] arranged this. Now, as evidenced in the attached email correspondence and MJB minutes, [John] now cannot locate the third party’s contact information and advised [Manuel] to consider the GPS as lost.” The CMC was apparently continued, and John submitted a second CMC statement on October 7, 2011, reiterating that there was

“nothing left to resolve” and adding, “It’s not clear why this matter was continued after the last case management conference. The case is over.”

On October 25, 2011, Manuel’s attorney filed a declaration “in support of indirect contempt proceedings for violation of court order” stating his client was expected to incur “at least \$5,600 through the Court’s hearing on the contempt proceeding” That same day, Manuel filed a declaration stating that John had disobeyed the order appointing a provisional director “in that he has refused to comply with and follow [the Board’s directions] with Chang serving as provisional director, and has repeatedly refused to acknowledge the authority of Chang as provisional director of MJB. Specifically, [John] (1) has delayed the signing of checks for months at a time initially refusing to acknowledge the validity of the Board’s decisions to issue the checks, (2) has refused, and continues to refuse, to sign an authorization from Wells Fargo Bank adding Chang as a signatory to the corporate bank accounts of MJB in defiance of the Board’s decision to add Chang as a signatory thereto, and (3) has refused, and continues to refuse to follow the decision of the Board with respect to MJB’s GPS.” Manuel set forth details relating to each alleged violation and attached documentary evidence in support of his allegations. On October 28, 2011, the trial court issued an order to show cause ordering John “to show cause . . . why you should not be adjudged in contempt of court and punished accordingly for willfully disobeying the order of this Court made on April 13, 2009.”

On November 14, 2011, John filed a memorandum of points and authorities in opposition to Manuel’s contempt action, arguing he had not violated any court order because the order did no “more than authorize the appointment of a provisional director” and did not “require compliance by [him], or anyone else, with resolutions of [the MJB Board].” He argued that even if the provisional director order had required him to comply with Board resolutions, there was no basis for a finding of contempt against him. He argued the contempt action was “frivolous on its face,” and requested attorney fees as sanctions. He submitted objections to Manuel’s declaration and also submitted documentary evidence in support of his position that he had not violated any court order.

On November 23, 2011, Manuel filed a reply brief, a reply declaration, objections to evidence submitted by John, and a response to John's objections.

At a hearing on the motion on November 29, 2011, the court stated, "To be candid with everybody here, I believe that I probably could grant the application to hold John in contempt. I believe that he has clearly defied the intent of the Court's order way back when, appointing a provisional director to resolve the exact deadlock that he quite clearly intends to maintain. And, in doing that, the record is quite clear that he refuses to obey or to comply with the lawful, appropriate decisions of the board of directors. He questions the authority of the provisional director to vote on various matters, which the provisional director is clearly entitled to vote on, that's why he was appointed by the Court. And by doing this, he has prolonged unnecessarily and clearly intentionally the dissolution of this corporation. [¶] I say I believe I could hold him in contempt as of now, but in an abundance of caution and in taking into consideration the arguments of [John's attorney] that the order appointing a provisional director may not specifically reach some of the conduct that John De Freitas is engaging in, I propose to issue the order that I had drafted and have given counsel and to give John a few days, a week at most, to comply with the order, having been put clearly on notice what the Court requires. If he doesn't do so, I will hold him in contempt and find him or otherwise act upon him as I feel is necessary to get him to comply with the Court's order."

Manuel's attorney stated he believed it was a "reasonable way to approach it." John's attorney raised various objections, including an objection to "all of the reply papers, all of which were filed late" and "in violation of the statute in the way they were both served and filed." The court took note of the objection and ordered the parties to "meet and confer about the attorney's fees number" to see if they could "agree on what the reasonable fees and costs are."

On November 29, 2011, the trial court issued a written order denying Manuel's contempt request. The court further stated, "However, John is HEREBY ORDERED on pain of contempt to do the following: [¶] a. Cooperate fully with any Board of Directors decision necessary to the sale or other disposition of the Trimble GPS; [¶] b. Execute the

Certificate of Authority; [¶] c. Cease and desist from any further refusal to act in accordance with any and all decisions of the Board of Directors including but not limited to those already enacted and/or those properly enacted in the future pending the wind-up of MJB's affairs; and [¶] d. Pay the reasonable costs and attorney's fees incurred by Manuel in this proceeding in the amount of \$16,565.50." John, "on behalf of [MJB]," filed a timely notice of appeal.

DISCUSSION

Attorney fees

MJB contends the trial court had no authority to award attorney fees absent a finding of contempt. Manuel essentially concedes the issue by failing to address it, other than to state in a footnote, "The record is replete with factual support for the award of the attorneys' fees and costs [Manuel], however, is not addressing [John's] appeal of the award of attorneys' fees and costs This brief, therefore, concentrates on the validity of the remainder of the Order properly issued to compel [John's] obedience of the [Provisional] Director Order."

As a general rule, "fees paid to attorneys are not recoverable from the opposing party either as costs, damages or otherwise in the absence of express statutory or contractual authority. [Citations.]" (*Viner v. Utrecht* (1945) 26 Cal.2d 261, 272; Code Civ. Proc., § 1021.) Although attorney fees may be awarded in a contempt proceeding where there is a finding of contempt (Code Civ. Proc., § 1218, subd. (a)), here, as noted, the trial court found John was not in contempt of the provisional director order and denied Manuel's contempt motion. Manuel has not cited—and we have not found—any authority to support an award of attorney fees under the circumstances of this case. We therefore reverse the portion of the order awarding attorney fees to Manuel.

Compliance with Board decisions

MJB contends the trial court had no authority to order John to comply with the Board's decisions because "[t]his was an action for the appointment of a provisional director, not a receiver or a court supervised dissolution and liquidation," and "[n]o application was ever made for a higher degree of court involvement and supervision

beyond the appointment of a provisional director under Corporations Code §[308.” We reject the contention.

Corporations Code section 308, authorizes the trial court to appoint a provisional director where corporate directors are unable to agree as to the management of the corporation’s affairs. There is nothing in the statute indicating—and MJB has provided no authority to support its position—that the court is prohibited from thereafter enforcing or overseeing orders issued under that section. In fact, every court has the inherent authority to “compel obedience to its judgments, orders, and process” (Code Civ. Proc., § 128, subd. (a)(4)) and to adopt “any suitable process or mode of proceedings” in order to carry out its orders (Code Civ. Proc., § 187). (See also *Brown v. Brown* (1971) 22 Cal.App.3d 82, 84 [“a court of equity retains inherent jurisdiction to oversee and enforce execution of its decrees”]; *Vallelunga v. Gomes* (1951) 102 Cal.App.2d 374, 382 [court has “inherent power to supervise the execution of its orders, even after they have become final”]; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 267, [a court’s inherent powers are neither confined by nor dependent on statute].)

In *Los Angeles v. Silver* (1979) 98 Cal.App.3d 745, 752, for example, the Court of Appeal held that the trial court properly exercised its inherent authority by seizing a party’s property, where the party had persistently refused to abide by the trial court’s prior order prohibiting it from using the property. And in *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 402, the Court of Appeal, noting that trial courts “retain[] jurisdiction to make such further orders as are appropriate to compel obedience to its judgment,” concluded the trial court acted well within its authority in ordering a party to directly deposit funds with the court, where that party had repeatedly failed to make payments to the opposing party as required by the court’s prior order.

Similarly, here, John’s refusal or reluctance to abide by the Board’s decisions whenever Chang voted in line with Manuel thwarted the purpose and intent of the court’s provisional director order—“to break the frequently occurring deadlocks between the two brothers” in order to “effectuate the mutually desired wind-up of [MJB’s] business affairs”—and rendered it essentially meaningless. Under those circumstances, the trial

court's subsequent order requiring John to abide by the Board's decisions with Chang as provisional director was a proper exercise of the court's inherent authority to implement and compel compliance with a prior order, and did not exceed the scope of the court's authority. (*E.g., Los Angeles v. Silver, supra*, 98 Cal.App.3d at p. 752.)

Finally, MJB spends a considerable amount of its opening brief arguing that John did not act in contempt of the provisional director order. As noted, however, the trial court *never found John in contempt of that order*. Because there was no finding of contempt—and in any event, contempt orders are not appealable orders, (*Heller v. Heller* (1964) 230 Cal.App.2d 679, 681 [contempt orders can be reviewed only by writs of certiorari, habeas corpus or prohibition])—we do not address whether a finding of contempt against John would have been proper. To the extent MJB's argument is that there was no evidentiary basis for the court to find that John was uncooperative, and therefore order him to be compliant with the Board's decision, we conclude that Manuel's declaration and supporting evidence setting forth the various ways in which John refused to comply with the Board's decisions provide substantial evidence supporting such a finding.

“Late filed” pleadings

MJB contends the trial court erred in considering Manuel's “late filed pleadings.” We reject the contention.

Code of Civil Procedure section 1005, subdivision (b), provides that all reply pleadings must be filed and served at least five court days before a hearing. Trial courts, however, have broad discretion to consider late filed pleadings. (Cal. Rules of Court, rule 3.1300(d) [no paper may be rejected for filing on the ground that it was untimely submitted, although the court may in its discretion refuse to consider a late filed paper]; *e.g., McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282 [court considered untimely filed demurrer].)

Here, the record shows that Manuel filed his reply pleadings on November 23, 2011, less than five court days before the November 29, 2011 hearing. His pleadings were therefore untimely under Code of Civil Procedure section 1005, subdivision (b).

However, John’s attorney argued only that the papers “should not be considered” because they were not timely filed and served. He did not suggest that MJB had been prejudiced, or even affected, by the late filing. Under those circumstances, the trial court did not abuse its discretion in considering the reply pleadings.

MJB argues in its reply brief that it was prejudiced because its attorney “did not have time to prepare an opposition because of the untimely reply papers.” However, MJB provides no explanation as to how the lack of time affected the result, e.g., what arguments or issues it would have raised had it had the opportunity to “prepare an opposition” to the reply papers. Thus, even assuming there is any basis to support MJB’s position that the trial court abused its discretion in considering the pleadings, we conclude MJB has failed to meet its burden of demonstrating prejudice. (Code Civ. Proc., § 475 [no judgment shall be reversed without a showing of prejudice]; *Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865 [it is the appellant’s burden to affirmatively demonstrate prejudicial error].)

DISPOSITION

The award of attorney fees to respondent Manuel De Freitas is reversed. The order is affirmed in all other respects. The parties shall bear their own costs on appeal.

McGuinness, P. J.

We concur:

Siggins, J.

Jenkins, J.