

STATE OF ILLINOIS

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3-94-0388
William Lappin v. Harold Gerard

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the year of our Lord
One Thousand Nine Hundred and Ninety Five, within and for the
Third District of Illinois:

Present -

HONORABLE ALLAN L. STOUWER, Presiding Justice

HONORABLE PEG BRESLIN, Justice

HONORABLE TOM M. LYTTON, Justice

X

HONORABLE MICHAEL P. MC CUSKEY, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

X

HONORABLE KENT SLATER, Justice

X

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on

May 31, 1995 the Order of the Court was filed

in the Clerk's Office of said Court, in the words and figures
following viz:

NOTICE

No. 3-94-0388

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 1995

BILL LAPPIN,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Henry County, Illinois
)	
v.)	No. 93-LM-142K
)	
HAROLD GERARD,)	Honorable
)	Clarke Barnes
Defendant-Appellant.)	Judge, Presiding

ORDER "Not To Be Published"

Defendant, Harold Gerard, appeals from an order finding him in civil contempt and directing him to pay Plaintiff, Bill Lappin, \$1,200, plus attorney fees. We modify, vacate and reverse.

Initially we note that no appellee's brief has been filed in this case. Nonetheless, we may reach the merits of the case because the record is simple and the claimed error is such that the court can easily decide it without the aid of an appellee's brief. First Capitol Mortgage Corp. v. Talandis Construction Corp. (1976), 63 Ill. 2d 128, 345 N.E.2d 493.

Plaintiff filed a complaint for forcible entry and detainer alleging that he was entitled to possession of certain leased premises and for past due rent. On June 25, 1993, the parties appeared pro se at the hearing and stipulated to a judgment

granting plaintiff possession, \$1,200 and costs. Defendant was also ordered to pay \$100 per month toward the judgment commencing July 2, 1993.

Defendant did not make the payments, and a rule to show cause was entered against him. At a hearing held on December 17, 1993, on the rule, the parties, pro se, agreed to another order requiring defendant to pay \$100.00 per month toward the judgment.

On March 4, 1994, another rule to show cause was entered against defendant for failure to make the payment. Defendant, now represented by counsel, filed a motion to vacate the earlier orders and a motion to quash plaintiff's pending rule to show cause, filed pursuant to sections 2-1401 and 2-1402(j) of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1992); 735 ILCS 5/2-1402(j) (West Supp. 1994)).

Evidence indicated that defendant's monthly income was \$762. His entire income came from social security and veteran's benefits. Defendant testified that he had agreed to the payment orders, but was unaware of any exemption rights.

The trial court noted that, under Illinois law, social security benefits and veteran's benefits are exempt from judgment, attachment, or distress for rent. 735 ILCS 5/12-1001(g)(1),(2) (West 1992). However, the court found that defendant's situation had not changed since he had entered into the original, voluntary agreements to pay. The court found the agreed orders to be enforceable, denied defendant's motions, found him in civil contempt of court and ordered him to pay \$150 in attorney fees.

I.

Defendant argues that the trial court abused its discretion in denying his motions to vacate and to quash. Specifically, he contends that his section 2-1401 petition should have been granted because the court could not have ordered installment payments if it had known that his monthly income was exempt from judgment. To support his contention, he notes that: (1) social security and veteran's benefits are exempt from judgment and attachment for rent (735 ILCS 5/12-1001(g) (West 1992)), and (2) courts are prohibited from ordering installment or other payments from any personal property which is exempt by statute (735 ILCS 5/2-1402(j) (West Supp. 1994)) (formerly 735 ILCS 5/2-1402(h) (West 1992)).

Section 2-1401 of the Code of Civil Procedure allows a judgment to be vacated more than 30 days after its entry, when a party can show the court that facts not appearing in the record, if known to the court at the time judgment was entered, would have prevented its rendition. (See McKnelly v. McKnelly (1976), 38 Ill. App. 3d 637, 348 N.E.2d 500.) However, a section 2-1401 petition is not intended as a remedy for a belated "change of mind." Lofendo v. Ozog (1983), 118 Ill. App. 3d 237, 454 N.E.2d 906.

In Lofendo, the court held that a personal injury plaintiff could not prevail on a section 2-1401 motion after she had settled a lawsuit, but later determined that she needed more money because she was still in pain. The court held that this "change of mind" was not sufficient to meet the factual allegations required for relief pursuant to section 2-1401. In this case, however, there

was no "change of mind". Instead, defendant stated a valid claim for relief, because, as a matter of law, the trial court could not have ordered installment payments to be made in the first place.

Although plaintiff's money judgment is valid (see French v. Director, Michigan Department of Social Services (1979), 92 Mich. App. 701, 285 N.W.2d 427; Tunnickliff v. Commonwealth of Pennsylvania Department of Public Welfare (1979), 483 Pa. 275, 396 A.2d 1168), the orders requiring the defendant to pay \$100 a month are not. Income from social security and veteran's payments are exempt from attachment under section 12-1001(g)(1) and (2). Under section 2-1402(j), a court is not empowered to order installment or other payments to be made from property which is statutorily exempt from attachment. Since all of the defendant's income was exempt from attachment, he could not be required to make payments toward the judgment. (See Cochannour v. Lofton (1978), 62 Ill. App. 3d 995, 379 N.E.2d 922.) Accordingly, we modify that portion of the judgment order requiring defendant to pay \$100 a month to plaintiff, and vacate the payment order of December 17.

II.

Defendant argues that although the court classified the contempt order as civil in nature, he was actually held in criminal contempt of court, which entitles him to certain procedural safeguards that he did not receive.

Civil contempt is coercive in nature and used to compel future action, while criminal contempt is punitive in nature and used to punish past misconduct. (Chicago City Bank & Trust Co. v. Drake

International, Inc. (1991), 211 Ill. App. 3d 850, 570 N.E.2d 765.) In the instant case, the record reflects that the purpose of the contempt order was to enforce compliance with the judgment entered against the defendant in June of 1993. Consequently, the contempt order was civil, not criminal, in nature.

Defendant also asserts that the trial court abused its discretion by finding him in contempt and assessing attorney fees for failing to comply with the court's prior orders. We agree. The trial court understandably held defendant in contempt, believing that the prior orders were proper; however, we have found that, under section 2-1402(j), court ordered payments from exempt income are not permitted. If a contempt citation is rendered on a mistaken premise, "the contempt judgment must be reversed." (People v. Shukovsky (1989), 128 Ill. 2d 210, 222, 538 N.E.2d 444, 448.) The contempt order cannot stand if the underlying orders upon which it is based are invalid.

The judgment order is modified; the order of December 17, 1993, is vacated, and the contempt order is reversed.

Modified, vacated and reversed.

LYTTON, J., with SLATER, J., concurring and HOLDRIDGE, J., concurring in part and dissenting in part.

NOTICE

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or corrected prior to the time for filing of a
Petition for Rehearing or the disposition
of the same.

DISSENT "Not To Be Published"

JUSTICE HOLDRIDGE, concurring in part and dissenting in part:

I agree with the majority's conclusion that the trial court abused its discretion in denying defendant's motion to vacate pursuant to section 2-1401 of the Code of Civil Procedure. I do not agree, however, with the majority's conclusion that the trial court abused its discretion in finding the defendant in contempt and assessing attorney fees for failing to comply with the court's prior order. I would instead uphold the contempt order.

I believe that People v. Huntley, cited by the majority is distinguishable. In Huntley, Supreme Court Rule 411 prevented discovery of police reports prior to a preliminary hearing. The trial court held the state's attorney in contempt for failing to produce police reports prior to a preliminary hearing. The court by operation of law and without the need to hear evidence, clearly did not have the authority to enter the order for which it held the state's attorney in contempt. In this matter however, the court had the authority to enter a payment order, and by all appearances at the time the order was entered it appeared to be valid. It was not until over a year later that it was determined, through the presentation of additional evidence, that the order violated the anti-attachment statutes and was therefore voidable. I believe this is a significant distinction. Litigants must respect the authority of the courts, and if they choose to ignore orders of the court, even orders that may have been mistakenly entered, they are exhibiting contempt for the

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court, and should face sanctions for contempt, unless the court clearly lacked jurisdiction or authority to enter the order being disregarded.

The payment order which the defendant chose to ignore was not void ab initio but instead was merely voidable in that it was entered unknowingly in violation of the anti-attachment statutes cited by the defendant in his subsequent motion to vacate. A voidable order remains in full force and effect, and must be obeyed, unless and until it is set aside by appropriate supplemental proceedings. (See George W. Kennedy Construction Co. v. Industrial Comm'n (1987), 152 Ill. App. 3d 114, 119.) Until defendant took appropriate steps to vacate the payment order, he was bound to comply with the order. The trial court did not abuse its discretion in finding defendant in contempt.

I would conclude that the trial court's payment order was merely erroneous, i. e. voidable, and not void ab initio, and therefore would affirm the trial court's finding of contempt.

Accordingly, I respectfully dissent from that portion of the decision vacating the contempt order.

STATE OF ILLINOIS,)
 APPELLATE COURT,) ss.
 THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 31st day of May in the year of our Lord one thousand nine hundred and ninety-five.



 Clerk of the Appellate Court