DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GERALD ROBERT SMITH,

Appellant,

v.

CHERYL ANN SHORT,

Appellee.

No. 2D20-3506

December 29, 2021

Appeal from the Circuit Court for Lee County; John S. Carlin, Judge.

Matthew P. Irwin of Men's Rights Law Firm, Cape Coral, for Appellant.

Luis E. Insignares of Luis E. Insignares, P.A., Fort Myers, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Gerald Robert Smith (the Former Husband) appeals from the trial court's final order granting Cheryl Ann Short's (the Former Wife) motion to enforce the parties' marital settlement agreement (MSA), global postjudgment settlement agreement, and

noninterference agreement and for attorney's fees and costs. He also appeals from the court's entry of an injunction restricting his social media activities. We conclude that the injunction is overbroad and must therefore be reversed and remanded to be more narrowly tailored to the harm that it is intended to prevent, and we conclude that the award of attorney's fees and costs must be reversed and remanded for an evidentiary hearing. In all other respects, we affirm without further discussion.

A. Factual and Procedural Background.

In May 2019, the trial court entered a final judgment of dissolution between the parties. That judgment adopted and incorporated the parties' MSA, pursuant to which the Former Wife bought out the Former Husband's interest in a marine towing company (the LLC). Going forward, the Former Wife would own the LLC with two other partners.

In August 2020, the parties entered into a global postjudgment settlement agreement to resolve issues that had arisen following the entry of the final judgment. This broader agreement incorporated separate noncompete and noninterference agreements. Pursuant to the noninterference agreement, the Former Husband agreed, among

other things, "that the reputation, competence, qualifications, and standing in the business community is very important to the success or the business of the LLC" and that he would not "make any derogatory comments or other oral or written statements that would be detrimental to the business of the LLC or to the [Former Wife] individually or which could adversely [a]ffect the business of the LLC and the [Former Wife]." The agreement provided further that the period of noninterference would span from May 2, 2019, until April 30, 2024, and that the Former Wife could seek injunctive relief in the event of a breach. The trial court adopted the global postjudgment settlement agreement and reserved jurisdiction to enforce its terms.

In her Verified Motion for Enforcement, Injunctive Relief, Contempt, All Available Sanctions, Attorney's Fees, Costs and Other Relief ("the contempt motion"), the Former Wife asserted that in violation of the MSA and the noninterference agreement, the Former Husband had, among other things, disparaged the LLC by posting on his Facebook page a comment regarding the ongoing failure of the "owner" to address what was "easily the most dangerous

situation in Bokeelia" involving a damaged fuel tank "at the marina on the end of Porto Bello Street."

The MSA and the global postjudgment settlement agreement were already part of the trial court record. The Former Wife attached additional documents as exhibits to her contempt motion, including copies of the signed noninterference agreement, the comment posted on the Former Husband's Facebook page, and a listing of the Former Husband's Facebook friends, which, she asserted, included "eight (8) past Captains, three (3) Captain's wives, a Tow BoatUS business owner, and a marina, all of who either do business with or are clearly aware of the [LLC]."[1]

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[1] On appeal, the Former Husband argues that the trial court could not consider any of the documents that the Former Wife attached to her motion because her counsel neglected to formally move them into evidence at the hearing on the contempt motion, which was conducted via Zoom. At the hearing, however, the Former Husband never objected to the Former Wife's references to these documents or to the court's consideration of them; to the contrary, he unhesitatingly referred to them himself. Given the Former Husband's failure to object, we decline to reverse on this basis. *See Carroll v. Carroll*, 936 So. 2d 706, 707 (Fla. 4th DCA 2006) (concluding that the wife's technical failure to formally place the parties' financial affidavits into evidence did not preclude an award of attorney's fees to the wife when the affidavits were in the court file and both parties argued extensively regarding their contents without objection); *Kerper v. NCNB Nat'l Bank of Fla.*, 496 So. 2d 199, 200–01 (Fla. 4th DCA 1986) (concluding that the bank's

In support of the Former Wife's request for attorney's fees, her counsel filed an affidavit averring that the Former Wife had incurred $3,832.25 in attorney's fees and costs from August 21 through September 23, 2020, including $3,740 in fees for counsel (8.8 hours x $425/hour), $18.75 in fees for the legal assistant (.25 hours x $75/hour), and a total of $73.50 in costs for copying, printing, and service of process. Counsel attached to the affidavit a copy of the retainer and fees agreement between his firm and the Former Wife and copies of his billing records. The affidavit contemplated that additional time and costs would need to be discussed at the hearing on the contempt motion.

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technical failure to formally place the formal judgment and closing statement from an earlier lawsuit into evidence was harmless when the parties stipulated to their authenticity, they were shown to the trial judge without objection, and they were otherwise part of the record); *cf. G.E.G. v. State*, 417 So. 2d 975, 976–77 (Fla. 1982) (rejecting a juvenile's challenge to his adjudication of delinquency although the State failed to introduce into evidence the "substance marked for identification and about which there was testimony that it was marijuana" and "hold[ing] that when a defendant is charged with possession of a controlled substance, that substance, if available, must be introduced into evidence but that a defendant who fails to object to its nonintroduction may not be heard to complain of the error on appeal").

At the hearing, the Former Wife testified that she had blocked the Former Husband on Facebook and had learned about his post from other people. She testified that as of the time of the hearing, the post had not been removed and had, in fact, been reposted by one of the Former Husband's friends. The Former Wife reiterated that the post was "very damaging" to the LLC, especially because many people with access to the post were involved in the marine industry. She also testified that the post was consistent with anonymous, baseless complaints that had been made against the LLC over the course of the dissolution proceedings, commenting that she was now on a first-name basis with the county employee tasked with investigating them.

The Former Husband admitted that he had posted the comment and that he had not taken it down. He testified, however, that he had been referring to *another* business at the marina at the end of Porto Bello Street in Bokeelia.

Plainly finding the Former Husband not credible, the trial court entered an order finding him in breach of the noninterference agreement and ordering him to remove the post from Facebook. The court further ordered that the Former Husband would be held

responsible for any other person sharing the post. The court also ordered the Former Husband to pay the claimed amount of $3,832.25 in attorney's fees "based on a reasonable hourly rate of $425.00 for [the Former Wife's attorney] and $75.00 for [the attorney's legal assistant], and 9.05 hours, which the Court finds as reasonable."

By separate order, the trial court entered an injunction directing that the Former Husband

> immediately and permanently cease any and all social media posts, remove existing posts within twenty-four (24) hours of the date and time of this Order and further contact any and all other of his Facebook friends who reacted to and/or commented and/or shared his post, notifying them of the entry of this Permanent Injunction.

The injunction was to "continue for as long as Former-Wife or her business partners continue to operate their business in Southwest Florida." The Former Husband unsuccessfully moved for rehearing. This appeal followed.

B. Analysis.

"[A] court should not issue an injunction broader than necessary to protect the injured party under the particular circumstances." *Smith v. Wiker*, 192 So. 3d 603, 604 (Fla. 2d DCA

2016) (citing *Clark v. Allied Assocs., Inc.*, 477 So. 2d 656, 657 (Fla. 5th DCA 1985)). Rather, "[t]he order should be adequately particularized, especially where some activities may be permissible and proper." *Id.* (quoting *Clark*, 477 So. 2d at 657). We readily conclude that the injunction is overbroad. As the Former Husband contends, this provision in the injunction is intended to prevent him from interfering with the LLC, as contemplated by the noninterference agreement, but its plain language precludes him from posting *anything* on social media, regardless of what it concerns, and requires him to remove all existing posts, regardless of what they concern. Accordingly, we reverse the injunction and instruct the trial court on remand to narrowly tailor this provision to prevent interference with the LLC. *See Neptune v. Lanoue*, 178 So. 3d 520, 522-23 (Fla. 4th DCA 2015) (recognizing that an injunction must be narrowly tailored to balance the desire to protect the person seeking the injunction with the need to safeguard the First Amendment rights of the person whose activities are being restricted); *cf. Pediatric Pavilion v. Agency for Health Care Admin.*, 883 So. 2d 927, 930 (Fla. 5th DCA 2004) ("An injunction 'may not be drawn to enjoin all conceivable breaches of the law; it

must instead be carefully tailored to remedy only the specific harms shown.' It may be no broader than is necessary to restrain the unlawful conduct and should constitute the least intrusive remedy that will be effective." (first quoting *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 670 (Fla. 1993); and then citing *id.*)).

With regard to the trial court's award of the Former Wife's attorney's fees and costs, the Former Husband argues that reversal is warranted because no evidence on the matter was admitted at the contempt hearing. Indeed, we note that there was no discussion of the matter at all at the hearing. "[The] argument that there was simply no competent, substantial evidence to support the award [of attorney's fees] may be raised for the first time on appeal." *Diwakar v. Montecito Palm Beach Condo. Ass'n,* 143 So. 3d 958, 961 (Fla. 4th DCA 2014).

As noted above, however, the record on appeal includes the affidavit from the Former Wife's counsel, a copy of the retainer and fees agreement, and copies of counsel's billing records. Accordingly, although we reverse the trial court's award of fees and costs, we

remand for an evidentiary hearing on the matter. As the Fourth District explained in *Diwakar*:

> Generally, when the record on appeal is devoid of competent substantial evidence to support the attorney's fee award, the appellate court will reverse the award without remand for additional evidentiary findings. However, when the record contains some competent substantial evidence supporting the fee or cost order, yet fails to include some essential evidentiary support such as testimony from the attorney performing the services, or testimony from additional expert witnesses, the appellate court will reverse and remand the order for additional findings or an additional hearing, if necessary.

Id. (citations omitted) (internal quotation marks omitted); *see also Colson v. State Farm Bank, F.S.B.,* 183 So. 3d 1038, 1041 (Fla. 2d DCA 2015) ("Remand for 'an evidentiary hearing on the amount of attorney's fees and costs sought by the bank' is necessary and proper where the only evidence of the fees and costs 'was an affidavit filed by the bank's counsel prior to trial.' " (quoting *Wagner v. Bank of Am., N.A.*, 143 So. 3d 447, 448 (Fla. 2d DCA 2014))).

In sum, we reverse the portion of the injunction requiring that the Former Husband "immediately and permanently cease any and all social media posts" and "remove existing posts" and remand with instructions that the trial court narrowly tailor this provision to prevent interference with the LLC. We also reverse the award of

attorney's fees and costs to the Former Wife and remand for an evidentiary hearing. In all other respects, we affirm.

Affirmed in part; reversed in part; remanded with instructions.

CASANUEVA and STARGEL, JJ., Concur.

Opinion subject to revision prior to official publication.