STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0562

Fannie Mae,
Respondent,

vs.

Heather Apartments Limited Partnership
d/b/a Vintage Lakes Apartments, et al.,
Defendants,

Andrew C. Grossman,
Appellant.

Filed December 2, 2013
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CV-07-20736

Frank W. Visciano (pro hac vice), Senn Visciano Canges P.C., Denver, Colorado; and

Charles F. Webber, Adam M. Nodler, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for respondent)

Lewis A. Remele, Jr., Mark R. Bradford, Bassford Remele P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Smith, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

On appeal from an order holding him in constructive civil contempt of court and ordering him to be confined with purge conditions to pay judgments in excess of $10 million to respondent, appellant argues that the district court: (1) erred by entering an order requiring him to deliver the judgment amount to respondent; (2) abused its discretion by finding him in constructive civil contempt of court; and (3) abused its discretion by awarding reasonable attorney fees to respondent. We affirm.

FACTS

In 2007 and 2008, an Oklahoma district court entered two judgments against appellant Andrew C. Grossman in favor of respondent Fannie Mae to enforce Grossman's personal guarantee of a commercial mortgage loan. Fannie Mae docketed the judgments in Hennepin County District Court.

In February 2010, Fannie Mae moved the district court for a temporary restraining order to prevent Grossman from transferring or disposing of any interest in money, property, or other assets he had received or was due to receive as a result of his father's death the previous month. In support of its motion, Fannie Mae submitted a copy of a 2008 deposition where Grossman testified that he might be a beneficiary of his father's trust and that he had transferred assets to a foreign trust after the Oklahoma judgments were entered against him. The district court granted the temporary restraining order and later converted it to a temporary injunction. Grossman appealed the district court's order and this court reversed. In March 2012, the Minnesota Supreme Court affirmed this

court, holding that the district court abused its discretion when it issued the temporary injunction because the trust proceeds were not yet in Grossman's possession. *Fannie Mae v. Heather Apartments Ltd. P'ship*, 811 N.W.2d 596, 601 (Minn. 2012).

On July 24, 2012, Grossman testified in a deposition that his father's trust distributed approximately $11 million to him on May 22, 2012, and that he immediately transferred the money to an account solely in his name at Coutts Bank in Zurich, Switzerland. Grossman testified that he did not have plans to transfer the money and there were no pending orders requiring him to do so. Based on his testimony, Fannie Mae immediately moved the district court for a temporary restraining order. The district court granted the temporary restraining order, which prohibited Grossman from transferring or disposing of any interest he had in the Coutts account. After a hearing, the district court converted the temporary restraining order into a preliminary injunction and ordered Grossman to disclose certain information about the funds in the Coutts account.

In August, Fannie Mae moved the district court under Minn. Stat. § 575.05 (2012) for an order to apply some of Grossman's property in satisfaction of the judgment against Grossman. During the same time period, Grossman provided Fannie Mae with a letter that disclosed the information about the Coutts account required by the district court's preliminary injunction order. In response to the question of whether Grossman "presently has funds with Coutts & Co. in accounts held solely in his name," Grossman responded, "Yes." Later that same day, Grossman amended his answer to that question, stating, "To the best of my knowledge, yes." In response to the question of "[w]hether

any such funds have been transferred since Grossman's July 24, 2012 deposition," Grossman responded, "No."

In September, the district court ordered Grossman to issue a request to Coutts Bank to transfer the judgment amount from Grossman's account to Fannie Mae. Grossman sent a letter to Coutts Bank requesting that it wire $7,099,620.16, plus $835.30 per day from August 15 through September 4, from his account to Fannie Mae. Coutts Bank responded by letter in October, stating that it was "not in any position to do the requested payment as your account has not sufficient balance." An attached balance statement revealed that the account had a zero balance.

Fannie Mae filed an emergency motion requesting that the district court reaffirm its preliminary injunction order, order Grossman to deliver the money under threat of contempt, and require Grossman to provide information to the district court about when, by whom, and to where the money was transferred. After a hearing, the district court issued an order on November 8 requiring Grossman to deliver $10,533,489.83, plus $1,299.59 per day, to Fannie Mae within 48 hours.

Shortly afterward, Grossman reported to the district court that he sent a letter to the financial manager of the entity where Grossman's funds were invested asking for information about the funds in his Coutts account and requesting that the funds be transferred to Fannie Mae. In response, the financial manager sent a letter to Grossman stating, "Pursuant to the recommendation of your investment advisor, your Coutts account funds were used on 23 May 2012 to purchase membership units in your name in a limited liability company . . . [t]he Company engages in long-term fixed income

investments . . . ." The financial manager attached a copy of the operating agreement for the limited liability company, called LSPG Shoreline 2012, LLC.

Fannie Mae moved the district court to hold Grossman in contempt of court and for an award of attorney fees. At an evidentiary hearing on December 19, Grossman testified that he established an account at Coutts Bank in December 2011 in anticipation of receiving funds from his father's estate, and he assumed that Coutts Bank would invest the money for him. He testified that in July 2012 he was not aware that the money from the Coutts account had been invested in LSPG Shoreline. Grossman claimed that he first found out that he did not have any funds in the Coutts account when he received the letter from the bank in October 2012. He testified that he had not received any bank account statements from Coutts Bank or any documents regarding the investment in LSPG Shoreline. Following the hearing, the district court granted both of Fannie Mae's motions.

Grossman moved the district court to amend its findings and to stay enforcement of the contempt order pending appeal. The district court denied Grossman's motion to amend its findings, but granted his motion to stay enforcement of the order upon the posting of a bond. This appeal follows.

D E C I S I O N

I. The district court's order requiring Grossman to deliver the judgment amount to Fannie Mae is supported by clear and convincing evidence.

Under Minn. Stat. § 575.05, a district court "may order any of the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the

judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment." On review of proceedings that are supplemental to execution of a judgment, appellate courts examine whether there was clear and convincing proof that the judgment debtor "had in her possession or under her control, at the time of the proceedings, sufficient property not exempt from execution to satisfy the judgment, as ordered by the [district] court." *Johnson v. Brajkovich*, 229 Minn. 529, 531, 40 N.W.2d 273, 274 (1949). "Clear and convincing proof will be shown where the truth of the facts asserted is 'highly probable.'" *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

Grossman argues that the district court's November 8 order requiring him to deliver the judgment amount to Fannie Mae was not supported by clear and convincing evidence because there was no evidence that he actually had the money in his possession or control. *See Hanson v. Daniel Hayes Co. of Idaho*, 161 Minn. 251, 252, 201 N.W. 603, 603 (1924) (holding that the record did not sustain the district court's order for payment of $300 because "[t]here is an absence of a showing that he had money in his personal possession or under his control or concealed").

We are not persuaded by Grossman's argument. Our examination of the record establishes that there was significant evidence that the money was under Grossman's possession or control. The record includes the following evidence that was before the district court at the time it issued the November 8 order: (1) Grossman's July 2012 testimony where he admitted receiving a distribution from his father's trust of approximately $11 million that was transferred to an account in his name at Coutts Bank, and he had no plans or pending orders to transfer the money out of that account; (2) in

August 2012, Grossman asserted that the money remained in his Coutts account; (3) Grossman sent a letter to Coutts Bank in September 2012 asking the bank to wire the judgment amount to Fannie Mae; (4) in October 2012, Coutts Bank sent a letter to Grossman stating that there was no money in his account; and (5) at a November 2012 hearing, Grossman's counsel told the district court that when Grossman established the Coutts account, he gave complete discretion to the bank and an investment advisor to invest the money. At the time of the November 8 proceedings, it was not clear where the money that was in the account had been transferred. But because Grossman was the only accountholder, it was highly probable that he continued to have possession or control over the money. The fact that Grossman disclosed information about where the money was transferred after the district court issued its November 8 order requiring Grossman to pay the judgment amount does not nullify that order.

Moreover, this case is distinguishable from *Hanson*. In that case, the district court ordered the defendant to pay $300 based on his testimony in another proceeding but without any evidence that the defendant currently possessed $300. Here, in contrast, the district court ordered Grossman to pay the judgment amount based on several factors, including Grossman's own testimony in these proceedings. Accordingly, we conclude that the district court's November 8 order is supported by clear and convincing evidence.

II. The district court did not abuse its discretion by finding Grossman in constructive civil contempt of court.

A district court may find an individual in constructive contempt of court for "disobedience of any lawful judgment, order, or process of the court." Minn. Stat.

§ 588.01, subd. 3(3) (2012). "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it, and in such case the act shall be specified in the warrant of commitment." Minn. Stat. § 588.12 (2012). A district court may secure an individual's compliance with a valid order through civil contempt proceedings. *Hopp v. Hopp*, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968); *see Robbinsdale Clinic, P.A. v. Pro-Life Action Ministries*, 515 N.W.2d 88, 91 (Minn. App. 1994). This court will only reverse a district court's decision to invoke its contempt power if the district court abused its discretion. *Mower Cnty. Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). We will reverse a district court's factual findings only if they are clearly erroneous. *Id.*

A. The contempt order does not improperly order Grossman to be imprisoned for failing to pay a debt.

Grossman contends that the contempt order is invalid because it impermissibly imprisons him for failing to pay a debt. *See Hampton v. Hampton*, 303 Minn. 500, 503, 229 N.W.2d 139, 141 (1975) (stating that contempt proceedings are an "extraordinary remedy" that "are not available to enforce payments of accrued child support after the child reaches majority"); *Burgardt v. Burgardt*, 474 N.W.2d 235, 237 (Minn. App. 1991) (holding that contempt proceedings were not available to enforce a property settlement requiring the payment of money). We disagree. The district court did not find Grossman in contempt for failing to pay a debt; instead, the district court found Grossman in contempt for failing to comply in good faith with its November 8 order. The district court is explicitly authorized by statute to hold a defendant in constructive civil contempt

of court for "disobedience of any lawful judgment, order, or process of the court." Minn. Stat. § 588.01, subd. 3(3); *see In re Burt*, 56 Minn. 397, 399-400, 57 N.W. 940, 941 (1894) (holding that the defendant was not imprisoned for debt but for refusing to comply with the court's order to pay money to his creditors). The district court did not impermissibly order Grossman to be imprisoned for failure to pay a debt.

B. Grossman had the ability to comply with the November 8 order.

Grossman next argues that he did not have the ability to comply with the district court's November 8 order because the money invested in LSPG Shoreline is not liquid. There are several limitations on a district court's ability to exercise its civil contempt powers. *Hopp*, 279 Minn. at 174, 156 N.W.2d at 216. Among other things, a district court must not confine a defendant to compel him "to do something which he is wholly unable to do." *Id.* at 175, 156 N.W.2d at 217. It is the defendant's burden to demonstrate an inability to comply with the order and he "should not be held to have sustained it when he has failed to make a good-faith effort to conform." *Id.* A district court may "refuse to accept [a] defendant's inability to perform as an excuse for failure to comply if it is satisfied that the party directed to pay has not made a reasonable effort by means of his own election to conform to an order within his inherent, but unexercised, capacities." *Weinand v. Weinand*, 286 Minn. 303, 305, 175 N.W.2d 506, 508 (1970).

Here, the district court found that Grossman did not meet his burden of establishing his inability to comply in good faith with the November 8 order. The district court found that: (1) Grossman was the only member of LSPG Shoreline; (2) the company was formed to shield Grossman's distribution from his father's trust from

collection by Fannie Mae; (3) nothing legally prevented Grossman from accessing his investment in the company; and (4) his conditional confinement was reasonably likely to produce compliance with the order.

The district court's findings are supported by the record. First, shortly after the district court issued its November 8 order, Grossman provided Fannie Mae and the district court with a copy of the operating agreement for LSPG Shoreline. According to the agreement, Grossman was the only member of the company. In support of his motion for amended findings, Grossman later submitted a second version of the operating agreement listing three members of the company. However, the district court may not consider new evidence on a motion for amended findings. *See* Minn. R. Civ. P. 52.02; *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). Further, the second version of the operating agreement has authenticity issues; the additional members' names are blacked out, and the manager's signature line simply says "[s]ignature on file."

Second, by Grossman's own admission, he has a history of transferring his assets to foreign outposts to prevent Fannie Mae from collecting on its judgment against him. Grossman also testified that he opened the Coutts account in anticipation of receiving a distribution from his father's trust and, in fact, the account received a distribution of approximately $11 million from his father's trust in May 2012.

Third, the record establishes that the Coutts account was solely in Grossman's name, and Grossman opened the Coutts account with the expectation that an investment

advisor would invest his money on his behalf. Further, the operating agreement for LSPG Shoreline provides:

> No Member is entitled to withdraw any portion of his, her, or its paid-in capital contribution, and no Member has any right to a return of capital, except through distributions as provided in Articles IV and VII of this Agreement. A Member who withdraws in breach of this Agreement shall be liable to the Company for damages for breach of this Agreement, which damages shall include the cost of replacement capital, and the company may offset the damages against any amounts otherwise distributable to the breaching Member.

The plain language of the agreement states that Grossman may be liable for damages if he withdraws his investment, but it does not state that it is impossible for Grossman to do so. For this reason, the record also supports the district court's finding that conditionally confining Grossman is reasonably likely to compel his compliance with the order.

Finally, the district court found Grossman's testimony that he had no control over the money not credible and that he did not prove he was unable to comply with the order in good faith. We will not disturb the district court's credibility and good-faith findings. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating appellate courts defer to district court's credibility findings); *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (stating the trier of fact determines credibility of a good-faith claim).

C. A charging order was not Fannie Mae's only remedy.

Finally, Grossman argues that Fannie Mae's only remedy is to obtain a charging order under Minn. Stat. § 322B.32 (2012). But this argument fails because that statute only applies to Minnesota limited liability companies. Chapter 322B defines a "limited liability company" as "a limited liability company, other than a foreign limited liability

company, organized or governed by this chapter." Minn. Stat. § 322B.03, subd. 28 (2012). Because LSPG Shoreline was organized in, and is governed by, the laws of the Cook Islands, chapter 322B does not apply.

III. The district court did not abuse its discretion by awarding reasonable attorney fees to Fannie Mae.

Grossman argues that the district court abused its discretion by awarding attorney fees to Fannie Mae because (1) the evidence does not support the conclusion that Grossman deliberately misrepresented the location of the funds; and (2) the district court did not make any findings to support the award of attorney fees as a sanction. This court reviews a district court's award of attorney fees for an abuse of discretion. *Lappi v. Lappi*, 294 N.W.2d 312, 316 (Minn. 1980).

The district court has the authority to impose sanctions, including attorney fees, under statute and as part of its inherent power. *Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454, 462 (Minn. App. 2010). "Attorney fees may be an appropriate sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (quotation omitted). To award attorney fees under its inherent power, the district court must find that the party against whom fees were awarded acted in bad faith. *Id.*

Here, the district court did not explicitly state that Grossman acted in bad faith. But the district court specifically found that Grossman did not prove that he was unable to comply in good faith with the district court's order, and his testimony that he had no control over the money was not credible. The district court also found that Grossman formed LSPG Shoreline in an attempt to shield his assets from collection by Fannie Mae,

and he was able to legally access his investment in the company. As discussed previously, these findings are supported by the record. Based on the district court's findings, and its ultimate decision to hold Grossman in constructive civil contempt of court, the only reasonable conclusion is that the district court determined that Grossman acted in bad faith. *See Warwick v. Warwick*, 438 N.W.2d 673, 677-78 (Minn. App. 1989) (affirming a district court's implicit finding that a party acted in bad faith where district court found the party's conduct was "egregious," "outrageous," constituted contempt of court, and sentenced the party to the workhouse). Thus, we conclude that the district court did not abuse its discretion by awarding reasonable attorney fees to Fannie Mae.

Affirmed.