

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

2019 APR 30 PM 12:32 SUPERIOR COURT DIVISION

18-CVS-5645

WAKE COUNTY

WAKE CO., C.S.C.

THE NORTH CAROLINA STATE BAR,

Petitioner

v.

ORDER

ALAN G. PHILLIPS, Attorney,

Respondent

This matter was heard by the undersigned Superior Court Judge on 29 April 2019 upon Petitioner’s Motion to Hold Respondent in Civil Contempt. Petitioner, the North Carolina State Bar, was represented by Deputies Counsel Joshua T. Walthall and Carmen H. Bannon. Respondent Alan G. Phillips appeared *pro se*. Based upon the pleadings herein, the evidence presented, and arguments of counsel, the undersigned hereby makes the following:

FINDINGS OF FACT

Findings of Fact 1 through 4 in this Court’s 12 February 2019 Order are incorporated herein by reference. In addition, upon review of the file and consideration of the evidence and argument presented in open court on 29 April 2019, the Court finds as follows:

1. On 7 May 2018, Petitioner filed its Petition for an Injunction and to Enforce the Subpoena in the above-captioned matter.
2. On or around 11 July 2018, Respondent filed an Answer to Petitioner’s Petition.
3. On 31 August 2018, Petitioner served Respondent with its Discovery Requests.
4. On or around 10 September 2018, Respondent moved this Court for an extension of time to respond to Petitioner’s Discovery Requests “for the reason that Defendant [sic] has not had sufficient time to prepare a response.”
5. On or about 7 November 2018, Petitioner received Respondent’s “responses” to Petitioner’s Discovery Requests.
6. In his Discovery Responses, Respondent refused to respond to any of Petitioner’s Discovery Requests.
7. On 8 November 2018, pursuant to Wake County Civil Superior Court Local Rule 5.4, Petitioner sent Respondent a letter via e-mail and by hard-copy mail in a good faith effort to address the deficiencies in Respondent’s Discovery Responses. Petitioner’s letter detailed the

deficiencies with Respondent's Discovery Responses, requested that the parties meet and confer on or before 14 November 2018, and requested that Respondent respond to Petitioner's Discovery Requests no later than 19 November 2018.

8. Respondent failed to respond to Petitioner's 8 November 2018 letter and continued in his refusal to respond to Petitioner's Discovery Requests.

9. On 20 November 2018, Petitioner sent an email to Respondent requesting again that the parties meet and confer to make "diligent attempts to resolve differences," pursuant to Wake County Civil Superior Court Local Rule 5.4.

10. Respondent still refused to respond to Petitioner's attempts to meet and confer.

11. Respondent provided only one reason for his refusal to respond to Petitioner's Discovery Requests, indicating only that "due to Petitioner's conflict of interest in this action, Respondent OBJECTS" to Petitioner's Discovery Requests.

12. Respondent claimed that, because of this "conflict of interest," Petitioner's Discovery Requests constituted unreasonable annoyance, embarrassment, oppression and undue burden and expense within the meaning of Rule 26(c) of the North Carolina Rules of Procedure.

13. Petitioner filed a Motion to Compel on 29 November 2018, and a hearing on that Motion was held before this Court on 7 February 2019.

14. This Court held that there was no conflict of interest in this matter in its 12 February 2019 Order to Compel, noting that "Respondent's objections to the State Bar's discovery are without merit and constitute no good faith basis to refusing to answer the" discovery requests.

15. In its 12 February 2019 Order to Compel, this Court ordered Respondent to deliver complete and full answers to the discovery requests within thirty days. The Court ordered that "[s]uch responses shall not be qualified or conditioned upon objection or any other avoidance."

16. Respondent did not comply with this Court's 12 February 2019 Order to Compel, but, instead, on or about 7 March 2019, Respondent filed the following motions: (1) "Motion in the Cause (2)"; (2) "Motion in the Cause (3)"; (3) Motion to Stay; (4) Motion to Stay Pending Appeal; (5) Motion for Judgment on the Pleadings; (6) Motion for Declaratory Judgment; and (7) Motion for Leave to Amend. These motions sought, among other things, to stay the proceedings in this action.

17. On 21 March 2019, Petitioner filed a Motion to Hold Respondent in Civil Contempt for willfully violating this Court's 12 February 2019 Order to Compel.

18. On 25 April 2019, when Respondent's various motions were heard, this Court, *inter alia*, denied Respondent's Motion to Stay and Motion to Stay Pending Appeal and stated, from the bench, that Respondent was still required to comply with his discovery obligations and the Court's 12 February 2019 Order to Compel.

19. Respondent did not comply with this Court's 12 February 2019 Order to Compel.

20. On or around 22 April 2019, Respondent moved to continue the hearing on Petitioner's Motion to Hold Respondent in Civil Contempt, claiming that he had not received notice of Petitioner's calendar request¹ and that Petitioner's motion was not ripe because Respondent had appealed the Court's 12 February 2019 Order to Compel.

21. On or around 5 April 2019, Respondent published a "tweet" on his Twitter account with a link to an article he had drafted and posted online.

22. In this article, Respondent claimed that the Court's 12 February 2019 Order to Compel is "blatantly illegal" and a "judicial cover-up of State Bar corruption."

23. Respondent also noted the following in this article, with the parenthetical and emphasis in the original: "The judge also ordered Phillips to provide discovery (documents, answers to questions, etc.). Phillips refused, because the entire proceeding has been unlawful from the start, and the Bar will simply make up more facts and law to use against him. So, Phillips is in contempt of court for violating the court's order. Potential penalties include *going to jail*."

24. At the hearing in this matter, on 29 April 2019, Respondent admitted in open court that he is, in fact, in contempt of court and that he has not complied with the Court's 12 February 2019 Order to Compel; however, Respondent expressed new-found willingness and intention to comply with the Court's 12 February 2019 Order to Compel.

Based on the foregoing FINDINGS, the Court enters the following:

CONCLUSIONS OF LAW

1. Respondent's arguments for the continuance are unavailing; he was properly served with a copy of Petitioner's calendar request and, in fact, responded to the same.

2. The Court is not divested of jurisdiction by Respondent's appeal of an unappealable interlocutory order.

3. "Interlocutory orders and judgments are those 'made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.'" *Sharpe v. Worland*, 351 N.C. 159, 161-62 (1999). The 12 February 2019 Order compelling Respondent to produce discovery is an interlocutory order.

4. "Generally, there is no right of immediate appeal from interlocutory orders." *Sharpe*, 351 N.C. at 162. There are several exceptions to this general rule, N.C. Gen. Stat. § 7A-27(b), but the order from which Respondent seeks to appeal does not fall into any of those exceptions.

5. When a litigant attempts to appeal a unappealable order, the appeal is a nullity, does not operate to divest the trial court of jurisdiction, and does not stay the underlying proceedings. *See Cox v. Cox*, 246 N.C. 528, 532 (1957); *see also Utilities Comm. v. Edmisten*, 291 N.C. 361

¹ Respondent acknowledged in open court that he had, in fact, received notice of Petitioner's calendar request.

(1976)) (“An attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction.”).

6. In light of this well-settled law, Respondent’s attempt to appeal this Court’s 12 February 2019 interlocutory order does not create any cause to stay these proceedings, does not divest this Court of jurisdiction of this matter, and does not justify a continuance.

7. By failing to respond to Petitioner’s discovery requests, Respondent has violated and is violating this Court’s 12 February 2019 Order to Compel.

8. This Court’s 12 February 2019 Order to Compel is still in force.

9. The purpose of this Court’s 12 February 2019 Order to Compel – to require Respondent to comply with his discovery obligations and to allow the State Bar to access and review discoverable information so that it may fulfill its statutory obligation to investigate and prosecute attorney misconduct – may still be served by Respondent’s compliance with the same.

10. Respondent’s noncompliance with the Court’s 12 February 2019 Order to Compel is willful.

11. Respondent is able to comply with the Court’s 12 February 2019 Order to Compel.

12. By willfully failing to comply with a valid court order, Respondent is in civil contempt of court as defined by N.C. Gen. Stat. § 5A-21(a).

13. Pursuant to N.C. Gen. Stat. § 5A-21(d), Respondent “is not subject to the imposition of a fine.”

14. The appropriate remedy to compel compliance with this Court’s 12 February 2019 Order to Compel is imprisonment.

15. Pursuant to N.C. Gen. Stat. § 5A-21(b2), “the period of imprisonment for a person found in civil contempt shall not exceed 90 days[.]”

16. Respondent’s continuing contempt may be purged by his fully and accurately responding to Petitioner’s Discovery Requests consistent with this Court’s 12 February 2019 Order to Compel.

17. In the interests of justice and to facilitate Respondent’s production of the documents and information sought by Petitioner’s Discovery Requests, the Court, in its discretion, concludes that, at this stage, Respondent should only be subjected to a brief period of imprisonment, followed by an opportunity to access his files and prepare full and complete Discovery Responses.

18. In ten days, this Court should review this matter to determine Respondent’s compliance with the 12 February 2019 Order.

19. If Respondent has not purged his contempt by fully complying with the 12 February 2019 Order at the time this matter is reviewed, he will be subject to an additional period of confinement for his ongoing contempt.

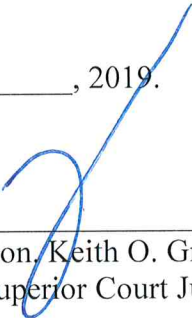
Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED**:

(1) Respondent's Motion to Continue is DENIED;

(2) Petitioner's Motion to Hold Respondent in Civil Contempt is GRANTED. Respondent is in civil contempt of court. Respondent is ordered to be imprisoned in the custody of the Wake County Sheriff for forty-eight (48) hours. After serving forty-eight (48) hours in the custody of the Wake County Sheriff, Respondent is to be released from custody so that he may purge himself of his contempt by fully and accurately responding to Petitioner's discovery requests consistent with this Court's 12 February 2019 Order to Compel; and

(3) Respondent is ordered to appear before this Court, in Wake County Superior Court, Courtroom 10-C on 9 May 2019 at 10:00 a.m. to show that he has purged his contempt. If Respondent has not, in the eyes of the Court, purged his contempt by the start of the hearing on 9 May 2019, this Court will consider what additional prison sentence is appropriate for Respondent's continuing contempt.

This the 30 day of April, 2019.



Hon. Keith O. Gregory
Superior Court Judge Presiding