

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

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NISSIM KASSAB,

Plaintiff,

-against-

AVRAHAM KASAB, MALL 92-30 ASSOCIATES LLC
and CORNER 160 ASSOCIATES INC,

Defendants.
-----x

Index
Number 14428 / 2013

Motion
Date September 17, 2014

Motion Seq. No. 3

BY: Orin R. Kitzes, JSC

Dated: February 5, 2015

In this hybrid special proceeding and action, petitioner Nissim Kassab seeks an order (a) holding respondent Avraham Kassab in contempt for violating the temporary restraining order dated July 31, 2013; (b) directing Avraham Kassab to cure his violations of said order within 10 calendar days, and in the event that he fails to do so punish him by imposing a fine and/or imprisonment; (c) directing petitioner's counsel to return, within 10 calendar days, the attorney's fees improperly obtained through Avraham's violation of said order; (d) ordering Avraham Kassab and his agents not to commit any further or other violations of said

order; awarding Kissim Kassab costs and attorney's fees incurred in making this motion and directing Avraham to reimburse Nissim; directing Avraham to produce documents pertaining to the financial transactions of Mall 92-30 Associates LLC (Mall), and Corner 160 Associates Inc. (Corner), since March 26, 2103, and to continue to make such disclosure on a monthly basis until the final disposition of this proceeding. Respondents cross move in opposition and seeks an order vacating the temporary restraining order dated July 31, 2013, as it applies to Mall.

Petitioner Nissim Kassab and respondent Avraham Kassab are brothers. Nissim alleges that he has a 25% membership interest Mall and is a 25% shareholder of Corner 160 Associates, Inc. (Corner). Corner is the owner of two adjoining parcels of real property and Mall is the owner of another adjoining parcel of real property. These three properties, identified as Block 10101, Lots 79, 150 and 24 are located in Jamaica, New York. Corner acquired Lot 79 in 1992 and Lot 150 in 1994. Mall acquired Lot 24 in 2001. Lot 150 has continuously been operated as a parking lot. In 2011, the buildings on Lots 24 and 79 were demolished, and entire property became a commercial parking lot, with an outdoor flea market operated on a portion of Lot 79.

Nissim commenced this hybrid special proceeding and action on July 29, 2013, by way of an order to show cause and petition, and seeks judicial dissolution of Corner, pursuant to BCL §1104-a, and the appointment of a receiver; the dissolution of Mall pursuant to Limited Liability Company Law § 702 and the appointment of a receiver; in the alternative, seeks to withdraw from Mall, pursuant to Limited Liability Company Law § 606, and to recover distributions due to him at the time of the withdrawal and the fair value of his membership interest; the appointment of a receiver pursuant to Business Corporation Law § 1202(a)(1); to recover compensatory and punitive damages for breach of fiduciary duty; to recover damages for breach of contract; and declaratory judgment. This court signed said order to show cause on July 30, 2013, and granted a temporary restraining order (TRO) dated July 30, 2013, that provides, in pertinent part, that pending the determination of the within petition, respondent Avraham Kassab, and his agents are "enjoined from transferring, removing, hypothecating, secreting or in any way disposing of any and all income and property of the Companies [Mall and Corner], except in the ordinary course of business". Said order to show cause was served upon Hinman, Howard & Kattel, LLP (HHK), counsel for Avraham. On September 18, 2013,

Avraham and his counsel appeared in this part, pursuant to said order to show cause. The hearing of the motion was adjourned and the TRO was continued, with the consent of the parties. The parties, by their counsel entered into a so-ordered stipulation dated September 27, 2013, whereby they agreed, among other things, that said TRO shall remain in effect. Said so ordered stipulation was filed with the court on October 4, 2013.

On September 4, 2013, counsel for respondent Avraham served a pre-answer motion to dismiss the proceeding/action, at which time the TRO remained in effect. This court, in its order of March 12, 2014, granted Avraham's pre-answer motion to the extent that the second cause of action for the judicial dissolution of Mall, pursuant to Limited Liability Company Law § 702, the third cause of action to withdraw as a member of Mall, the fifth cause of action for breach of fiduciary duty, and the seventh cause of action for declaratory judgment, were dismissed. Although petitioner's request for an appointment of receiver was denied, this court denied Avraham's request to dismiss the first cause of action for judicial dissolution of Corner pursuant to Business Corporation Law § 1104-a, and found that a hearing was required with respect to said petition for dissolution, and

further denied the request to dismiss the sixth cause of action for breach of contract. This court further directed that the July 30, 2013 TRO shall remain in effect through the date of the hearing of said petition. A conference scheduled for May 13, 2014, has been adjourned several times and a hearing has not yet been held with respect to the cause of action for the dissolution of Corner.

Avraham Kassab commenced a related action against Nissim Kassab in the Supreme Court, Nassau County. That action has been consolidated with the within action for the purposes of a joint trial, pursuant to an order of the Hon. Steven Jaeger, Supreme Court, Nassau County, dated February 27, 2014. Said order and the entire file in said action was filed under the within index number on April 4, 2014. It does not appear that an index number has been assigned to said transferred action.

Petitioner's counsel asserts that on January 14, 2014, he received from respondents' counsel a disclosure of bank statements for Corner and Mall, with copies of paid checks, including two checks drawn on Corner's account made payable to Avraham's counsel, HHK. One check, dated November 1, 2013, was in the sum of \$18,131.40, and the other

check in the amount of \$18,053.91, was dated December 2, 2013. These checks, totaling \$36,185.31, were honored by Corner's bank. HHK also represented Avraham in the action he commenced against Nissim in the Supreme Court, Nassau County.

Petitioners' counsel assumed that said checks represented payments of respondents' legal fees in these two actions, and sent an email to HHK on January 14, 2014, in which he stated that Corner's payment of HHK's legal fees that were incurred in representing the respondents in this action and Avraham in the Nassau County action, were improper and violated the TRO, citing *Sparta Florida Musical Group, Ltd. v. Chrysalis Records, Inc.*, 566 F Supp 321, 322 (SDNY 1983). He demanded that the funds in question be returned to Corner's account within 10 days, and that the respondents' counsel provide complete financial disclosure of all financial transactions of Corner and Mall, following the execution of the TRO. Petitioner's counsel did not receive a response within said time period, and in an email dated January 28, 2014 stated that unless he received a response, he would seek sanctions for contempt. Respondents' counsel, in an email dated January 28, 2014, merely stated that "[w]e have reviewed relevant caselaw and disagree with your position." There was

no response to petitioner's counsel's email of the same day requesting the case law relied upon by respondents' counsel.

Petitioner now seeks an order holding respondent Avraham Kassab in contempt for violating the temporary restraining order dated July 31, 2013; directing Avraham Kassab to cure his violations of said order within 10 calendar days, and in the event that he fails to do so punish him by imposing a fine and/or imprisonment; directing petitioner's counsel to return, within 10 calendar days, the attorney's fees improperly obtained through Avraham's violation of said order; ordering Avraham Kassab and his agents not to commit any further or other violations of said order; awarding Kissim Kassab costs and attorney's fees incurred in making this motion and directing Avraham to reimburse Nissim; directing Avraham to produce documents pertaining to the financial transactions of Mall and Corner, since March 26, 2103, and to continue to make such disclosure on a monthly basis until the final disposition of this proceeding.

Respondents cross move in opposition and seeks an order vacating the temporary restraining order dated July 31, 2013, as it applies to Mall.

Civil contempt is governed by Judiciary Law § 753 which states, in pertinent part, "[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced..." (Judiciary Law § 753[A]).

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court." (*Hughes v Kameneva*, 96 AD3d 845, 846 [2d Dept 2012]; see also *El-Dehdan v El-Dehdan*, 114 AD3d 4, 10-11 [2d Dept 2013]; *Matter of Philie v Singer*, 79 AD3d 1041, 1042 [2d Dept 2010]; *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 [2d Dept 2009]). The party seeking to hold another in civil contempt bears the burden of proving the contempt by clear and convincing evidence (see *Hughes*, 96 AD3d at 846; *Town Bd. of Town of Southampton v R.K.N. Realty, LLC*, 91 AD3d 628, 629 [2d Dept 2012]; *Matter of Philie*, 79 AD3d at 1042; *Chambers*, 66 AD3d at 946; *Rienzi v Rienzi*, 23 AD3d 447, 448 [2d Dept 2005]). "To sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order which clearly expressed an unequivocal mandate, and that, as a result of the

violation, a right or remedy of a party to the litigation was prejudiced." (*Hughes*, 96 AD3d at 846, quoting *Matter of Philie*, 79 AD3d at 1042; see also *Town Bd. of Town of Southampton*, 91 AD3d at 629; *Casavecchia v Mizrahi*, 57 AD3d 702, 703 [2d Dept 2008]). Deliberate or willful disobedience is not required, instead, "the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party" (*Philie*, 79 AD3d at 1042; see also *Bais Yoel Ohel Feige v Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc.*, 78 AD3d 626, 626 [2d Dept 2010]; *Casavecchia*, 57 AD3d at 703). In addition, the charged party must have knowledge of the court's order. (See *Matter of Dept. of Env'tl. Protection of City of New York v Dept. of Env'tl. Conservation of State of New York*, 70 NY2d 233, 240 [1987]; *Town Bd. of Town of Southampton*, 91 AD3d at 629; *Gerelli Ins. Agency, Inc. v Gerelli*, 23 AD3d 341, 341 [2d Dept 2005]).

Notably, for civil contempt, there must be a finding that a "right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753 [A]). An order of civil contempt must include an express finding

that this element has been satisfied (see *Stempler v Stempler*, 200 AD2d 733, 734 [2d Dept 1994]). The element of prejudice to a party's rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation, but not criminal contempt, which aims to vindicate the authority of the court (see *McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *El-Dehdan v El-Dehdan*, 114 AD3d 10-11; *Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 [2d Dept 2012]; *Rose v Levine*, 84 AD3d 1206 [2d Dept 2011]; *Daleessio v Kressler*, 6 AD3d 57, 65-66 [2d Dept 2004]). A hearing is not mandated "in every instance where contempt is sought; it need only be conducted if a factual dispute exists which cannot be resolved on the papers alone" (*Jaffe v Jaffe*, 44 AD3d 825, 826 [2d Dept 2007], quoting *Bowie v Bowie*, 182 AD2d 1049, 1050 [2d Dept 1992]).

Here, the July 30, 2013 TRO clearly prohibited respondent Avraham Kassab, and his agents are "from transferring, removing, hypothecating, secreting or in any way disposing of any and all income and property of the Companies [Mall and Corner], except in the ordinary course of business" pending the determination of the within petition. Said TRO was in full force and effect, pursuant to the so-ordered.

stipulation dated September 27, 2013, at the time Avraham executed the subject checks drawn on Corner's account. It is undisputed that both Avraham and his counsel were aware of the TRO, and that the subject checks, made payable to HHK, were cashed and represent payment of legal fees incurred by HHK, Corner and Mall in connection with this hybrid special proceeding and action.

Avraham's counsel asserts the TRO did not preclude the payment of attorney's fees by either Mall or Corner, and that the payment of attorney's fees incurred in defending minority oppression actions are considered to be expenses in the ordinary course of business. Counsel further states, in his memorandum of law, that the respondents have incurred substantial legal fees in defending this action, which includes the making of the pre-answer motion to dismiss, and that Avraham paid \$80,799.60 in legal fees and that Corner and Mall paid \$45,985.31 in legal fees, and that said legal fees, upon the advice of counsel, have been paid and allocated between the companies and Avraham. Avraham states, in an affidavit, that he personally paid his attorney's the sum of \$80,799.60, and that he caused Corner to pay legal fees in the amount of \$45,985.31. He further states that he loaned the

funds to Corner, so that it could pay the legal fees without affecting its cash flow, and that he consulted with numerous attorney's as to whether such payments were in the ordinary course of business, and was repeatedly advised that such payments were proper.

The court notes that respondents have not submitted a copy of their retainer agreement with HHK, and thus have not established that each respondent was represented by HHK. In addition, respondents have not submitted copies of any bills they received for legal services incurred in the defense of the within hybrid special proceeding and action. The court notes that Avraham substituted counsel pursuant to a consent to change attorney form, dated June 17, 2014, which was filed with the court on July 1, 2014. No appearance or substitution has been filed with respect to Corner or Mall, although a corporation and a limited liability company can only appear by counsel.

Petitioner's claims for breach of fiduciary duty, breach of contract, and declaratory judgment were brought solely against Avraham, and the pre-answer motion to dismiss the within hybrid special proceeding and action was made by Avraham, and not by all of the respondents. It is further

noted that to the extent that Avraham asserts that he loaned unspecified funds to Corner for the payment of legal fees, he has failed to submit any documentary evidence demonstrating the transfer of funds to Corner.

The cases cited by respondent's counsel in his memorandum of law in support of the claim that the corporate respondent may pay attorney's fees in a dissolution action, is misplaced. Contrary to respondent's assertions, it is well established that attorney fees incurred by a shareholder in defending a dissolution proceeding are not payable out of corporate funds. Thus, in the usual dissolution proceeding, where the corporation appears as a nominal party and the proceeding amounts to a dispute between the shareholders, corporate funds may not be used in payment of counsel fees for the individual shareholder (see *Matter of Boucher v. Carriage House Realty Corp.*, 105 AD3d 951, 952 [2d Dept 2013]; *Matter of Dissolution of Public Relations Aids, Inc.*, Lee Levitt [Toohey], 109 AD2d 502, 511 [1st Dept 1985]). Here, Corner is a nominal party, as the claims alleged against Corner are solely for corporate dissolution and the appointment of a receiver. Therefore, as there is no authority for allowing counsel fees incurred in defending a dissolution proceeding of

this type to be paid out of corporate funds, respondent Avraham and his counsel's assertion that the payment of legal fees constituted payments in the ordinary course of business is indefensible and wholly lacking in merit (*Matter of Boucher v Carriage House Realty Corp.*, 105 AD3d at 952; *Matter of Dissolution of Public Relations Aids, Inc.*, Lee Levitt [Toohey], 109 AD2d at 511; *Matter of Park Inn Ford, Inc.*, 249 AD2d 307 [2d Dept 1998]; *Matter of Rappaport [Jileen Sec. Corp.]*, 110 AD2d 639; *Matter of Reinschreiber [Lipp]*, 70 AD2d 596 [2d Dept 1979]; see also *Matter of Penepent Corp.*, 198 AD2d 782 [4th Dept 1993]; *Matter of Cantelmo [Brewer-Cantelmo Co. -- Daru, Vischi & Winter]*, 278 App Div 800 [1st Dept 1951]).

The court further finds that as Corner and Mall are separate legal entities, to the extent that Corner paid any of Mall's legal fees, such payments were clearly not in Corner's ordinary course of business. Moreover, Avraham cannot, through the device of a loan to Corner, require Nissim to pay any portion of a debt created by Avraham, as each party is responsible for the payment of their own legal fees. To the extent that Avraham asserts that he loaned funds to Corner for the payment of legal fees, the use of said funds by Corner to

pay Abraham's legal fees violated the TRO, and impairs Nissim's interests as a minority shareholder in this dissolution proceeding.

This court has no objection to Avraham Kassab's payment of legal fees he has or will incur in defending this special proceeding and action. However, he may not funnel funds through Corner, or utilize Corner's funds in order to pay legal fees he, Corner, or Mall incurred or will incur, in defending this hybrid special proceeding and action.

"Civil contempt fines must be 'remedial in nature and effect' and awards should be formulated 'not to punish an offender, but solely to compensate or indemnify private complainants'." (*Town of Bd. of Town of Southampton*, 91 AD3d at 630-31, quoting *State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]; see also *Hinkson v Daughtry-Hinkson*, 31 AD3d 608, 609 [2d Dept 2006]; *Matter of Dept. of Hous. Preserv. & Dev. of the City of New York v DEKA Realty Corp.*, 208 AD2d 37, 43 [2d Dept 1995]). Under Judiciary Law § 773, fines may be awarded in a civil contempt proceeding where "actual damage has resulted from the defendants' contemptuous acts" or one where "there may be prejudice to a complainant's rights but it is not shown that such an actual loss or injury has been

caused" (*Town Bd. of Town of Southampton*, 91 AD3d at 631; see also *Unique Ideas*, 44 NY2d at 349; *Matter of Dept. of Hous. Preserv. & Dev. of the City of New York*, 208 AD2d at 43). Where, as here, no actual damages have been demonstrated, "a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner" (*Judiciary Law* § 773). The court may include in reasonable costs and expenses, reasonable attorney's fees (see *Glennon v Mayo*, 174 AD2d 600, 601 [2d Dept 1991]; see also *Manes v Manes*, 248 AD2d 516, 517 [2d Dept 1998]; *Gordon v Janover*, 121 AD2d 599, 600 [2d Dept 1986]).

As this court finds defendant in civil contempt of the TRO and so-ordered stipulation, a fine of \$250.00 is imposed, and Avraham Kassab and his counsel are further directed to restore all funds belonging to Corner that were paid to HHK. Petitioner is directed to submit an affidavit, in connection with the settlement of the order, an affidavit of its counsel as to reasonable attorneys' fees. Such affidavit shall recite the hourly rate for the legal services, the specific services rendered, and the time expended by petitioner's counsel for the work described, and all costs.

That branch of petitioner's motion which seeks an order directing Avraham and his agents not to commit further or other violations of this court's prior orders, is denied, as academic.

That branch of petitioner's motion which seeks an order directing Nissim to produce, within 10 calendar days, all documents pertaining to the financial transactions of Corner since March 26, 2013, and to continue to make such disclosure on a monthly basis, no later than the last day of each month, until the final disposition of the corporate dissolution proceeding, is granted. To the extent that petitioner seeks the identical relief with respect to Mall, this request is denied as moot, as petitioner's claims with respect to Mall have been dismissed.

In view of the fact that this court, in the order of March 12, 2014 dismissed petitioner's dissolution claim with respect to Mall and no other claims exist with respect to Mall, the cross motion to vacate the TRO with respect to Mall, is granted.

Settle order.



J.S.C.