Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - June 3, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2010-08639 DECISION & ORDER

Joseph Collins, appellant, v Telcoa International Corp., et al., defendants-respondents, et al., defendants; Martin P. Unger, et al., nonparty-respondents.

(Index No. 23796/97)

Bailey & Sherman, P.C., Douglaston, N.Y. (Edward G. Bailey and Anthony V. Gentile of counsel), for appellant.

Martin P. Unger, Garden City, N.Y., nonparty-respondent pro se.

Certilman Balin Adler & Hyman, LLP, East Meadow, N.Y. (Thomas J. McNamara, Candace Reid Gladston, and Donna-Marie Korth of counsel), nonparty-respondent pro se.

Blank Rome, LLP, New York, N.Y. (Leonard D. Steinman of counsel), nonparty-respondent pro se.

In an action, inter alia, for dissolution of two corporations and to recover damages for breach of fiduciary duty, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Agate, J.), dated June 18, 2010, as denied that branch of his cross motion which was to hold the defendants Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin, and nonparty attorneys Martin P. Unger and Certilman Balin Adler & Hyman, LLP, in civil contempt for their alleged violation of a court-ordered escrow arrangement, and denied that branch of his separate motion which was to hold nonparty attorneys Blank Rome, LLP, in civil contempt for its alleged violation of the same court-ordered escrow arrangement.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

Where, as here, a party seeks an adjudication of civil contempt based upon a violation of a court order, he or she must establish a willful and deliberate violation of a lawful court order expressing a clear and unequivocal mandate (*see* Judiciary Law § 753; *McCain v Dinkins,* 84 NY2d 216, 226; *Matter of McCormick v Axelrod,* 59 NY2d 574, 583; *Delijani v Delijani,* 73 AD3d 972, 973; *Rupp-Elmasri v Elmasri,* 305 AD2d 394, 395). The burden of proof is on the party seeking the contempt adjudication, and the facts constituting the basis of the contempt must be proved by clear and convincing evidence (*see Miller v Miller,* 61 AD3d 651, 652; *Denaro v Rosalia,* 50 AD3d 727; *Rienzi v Rienzi,* 23 AD3d 447, 448; *Vujovic v Vujovic,* 16 AD3d 490, 491). The question of whether to then grant a civil contempt motion and, if so, the fixing of the appropriate remedy, is addressed to the sound discretion of the motion court upon consideration of the surrounding circumstances (*see Matter of Philie v Singer,* 79 AD3d 1041, 1042; *Bais Yoel Ohel Feige v Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc.,* 78 AD3d 626; *Educational Reading Aids Corp. v Young,* 175 AD2d 152; *Matter of Storm,* 28 AD2d 290).

Contrary to the plaintiff's contention, he failed to sustain his burden. Given the differences between the terms of the court orders at issue and of the stipulation entered into by the parties, the Supreme Court properly determined that the respondents did not willfully violate a clear and unequivocal mandate of the court (*see generally Quick v ABS Realty Corp.,* 13 AD3d 1021, 1022; *Muwwakkil v Metropolitan Suburban Bus Auth.,* 289 AD2d 309).

In view of the foregoing, we need not reach the parties' remaining contentions.

MASTRO, J.P., FLORIO, BELEN and CHAMBERS, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court