

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

D33539
Y/prt

_____AD3d_____

Argued - December 16, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2011-03271
2011-03272

DECISION & ORDER

In the Matter of Anthony E. Formosa, respondent,
v Karen Tina Litt, appellant.

(Index No. 15171/02)

Anne Serby, Long Beach, N.Y., for appellant.

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from (1) an order of the Supreme Court, Nassau County (Falanga, J.), dated February 8, 2011, and (2) an amended order of the same court dated February 10, 2011, which denied her motion to hold the father in contempt for allegedly violating two prior orders of the same court (Stack, J.).

ORDERED that the appeal from the order dated February 8, 2011, is dismissed, without costs or disbursements, as that order was superseded by the amended order dated February 10, 2011; and it is further,

ORDERED that the amended order dated February 10, 2011, is affirmed, without costs or disbursements.

“A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court” (*Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946). “To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had actual knowledge of its terms” (*Delijani v Delijani*, 73 AD3d 972, 973 [emphasis omitted]; *Ottomanelli v Ottomanelli*, 17 AD3d 647, 648; *Kawar v Kawar*, 231 AD2d 681,

682). Moreover, it must be demonstrated by clear and convincing evidence that there was a willful violation of a prior court order (*see Penavic v Penavic*, 88 AD3d 671; *Bulow v Bulow*, 121 AD2d 423, 423-424). Furthermore, it must be demonstrated that the violation “defeated, impaired, impeded, or prejudiced the rights of a party” (*Vider v Vider*, 85 AD3d 906, 907, quoting *Manning v Manning*, 82 AD3d 1057, 1058). The movant has the burden of proof (*see Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d at 946; *Vujovic v Vujovic*, 16 AD3d 490, 491).

Here, the mother failed to meet her burden in seeking to hold the father in contempt. The relevant provisions of the two court orders that the father allegedly violated directed him to make every effort to provide reasonable accommodation to the mother when she could not drive to visit the daughter on a regular visitation date because of a religious holiday. Due to a religious holiday on the mother’s scheduled visit on Wednesday, May 19, 2010, she requested the father to permit her to visit the child on one of the dates she specified. The father allegedly denied the request because the child had activities scheduled on those dates. The subject provisions only required the father to “make every effort to accommodate” the mother when it was “feasible.” Accordingly, the father’s failure to accommodate the mother on this occasion did not constitute the willful violation of a clear and unequivocal mandate (*see Matter of Rothschild v Edwards*, 63 AD3d 744, 745-746; *see also Matter of Cotter v Brown*, 17 AD3d 587; *Sklover v Sklover*, 11 AD3d 527, 528; *Matter of King v King*, 249 AD2d 395).

DILLON, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court