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COURT OF APPEALS

STATE OF NEW YORK

JACQUELINE EL-DEHDAN,

Respondent,

-against-

SALIM EL-DEHDAN,
a/k/a SAM REED,

No. 90
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 90.

2 Counselor, do you want any rebuttal time?

3 MS. ALDEA: Yes, Your Honor, two minutes,
4 please.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MS. ALDEA: Your Honors, may it please the
8 court, my name is Donna Aldea and together with Alex
9 Klein, we represent the appellant.

10 Your Honors, this is a case where the
11 defendant stands before you, having already been
12 incarcerated for fifteen days for allegedly violating
13 an order and being held in contempt - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but this is a
15 separate order, right, that we're dealing with now?

16 MS. ALDEA: It is a sep - - -

17 CHIEF JUDGE LIPPMAN: I - - - I get - - - I
18 get you on the fairness issues. He's been
19 incarcerated in relation to an order that never
20 existed - - -

21 MS. ALDEA: Yes. Initially.

22 CHIEF JUDGE LIPPMAN: We get that. But
23 what about the second order and the contempt and
24 civil versus criminal and all of that?

25 MS. ALDEA: So they are related, the two

1 orders, is where I want to start, because - - -

2 CHIEF JUDGE LIPPMAN: In what sense?

3 MS. ALDEA: The same misrepresentations - -
4 - and I when I say that, I'm not imputing bad faith;
5 it doesn't really matter. There are material
6 misrepresentations - - - in other words, falsehoods -
7 - - that were put before the - - - the court - - -

8 CHIEF JUDGE LIPPMAN: On the 2010?

9 MS. ALDEA: Correct. The same ones that
10 furnished the basis for the finding that the property
11 is actually - - - that he should have deposited the
12 money for the properties, those are the same ones - -
13 - the fir - - - the same misrepresentations that
14 furnish the basis for the first contempt - - -

15 CHIEF JUDGE LIPPMAN: In 2008, yeah.

16 MS. ALDEA: - - - also furnish the basis
17 for the decretal paragraph in that same order that
18 said, and ordered that the defendant deposit the
19 proceeds of the sale - - -

20 JUDGE STEIN: But that - - -

21 MS. ALDEA: - - - of those properties.

22 CHIEF JUDGE LIPPMAN: What's the
23 misrepresentation?

24 MS. ALDEA: The misrepresentation is, Your
25 Honor, first of all, the properties themselves were

1 actually sold prior to the equitable distribution
2 inquest actually being - - - being held at all.

3 JUDGE PIGOTT: And that's because he knew
4 it was coming, and he wanted to do this to - - - to
5 frustrate the court.

6 MS. ALDEA: Your Honor, that may be. That
7 may be. And I'm not - - - you know, I'm not actually
8 talking about in terms of his conduct; we're just
9 dealing with the issue of whether it's a contempt and
10 the standards for there. I don't know what his
11 motivations are. There wasn't actually a
12 determination to determine what his motivations are.

13 JUDGE PIGOTT: What - - - sorry.

14 JUDGE STEIN: But did he ever move to set
15 aside the second order, regardless of how it was
16 obtained?

17 MS. ALDEA: Yes, Your Honor, he did.

18 JUDGE STEIN: He did.

19 MS. ALDEA: So that second order - - -
20 actually what happened after he was incarcerated for
21 purportedly violating a restraining order that had
22 actually been X-ed out on the order to show cause, he
23 had an attorney that came in - - - a new attorney;
24 actually our firm came in at that point - - - and we
25 looked at the order, we got a copy of it from the

1 clerk's office. It was clear that the provision had
2 been crossed out.

3 And so the attorney came in and said,
4 listen, you put him in on this nonexistent order.
5 That was a motion to vacate that entire order. So
6 what Justice Prus did at that point is he came in and
7 said, okay, I'm releasing him; you're right; there
8 was no order here. What he didn't specifically do,
9 though, is find that that ordered paragraph, that
10 immediate - - - I guess it would be injunctive,
11 although partially - - - it's kind of unclear what it
12 was - - - that that paragraph that ordered him to
13 deposit the proceeds of the funds, he didn't
14 explicitly vacate that.

15 So after - - - without ruling on whether or
16 not that should be vacated as all - - - at - - - as -
17 - - as well, because counsel moved to vacate the
18 whole order, Justice Prus - - - on the next day,
19 appellee's counsel came in - - - the wife's counsel
20 came in and said, well, wait a second; there's still
21 that one paragraph out there that he be required to
22 deposit the funds.

23 The problem is that that order was procured
24 based on the same misrepresentations. He couldn't
25 have been asked to deposit the funds from those

1 properties unless there was a restraining order
2 precluding him from transferring the property.

3 CHIEF JUDGE LIPPMAN: So the later one was

4 - - -

5 MS. ALDEA: And there was not.

6 CHIEF JUDGE LIPPMAN: - - - dependent on
7 the first one?

8 MS. ALDEA: Correct, Your Honor. And - - -

9 CHIEF JUDGE LIPPMAN: That's your argument?

10 MS. ALDEA: And that's exactly what counsel
11 argued. That's part of my argument.

12 JUDGE ABDUS-SALAAM: Do you - - - do you
13 have an argument, also, counsel, that this second
14 order was ambiguous because it both ordered him to
15 turn over the funds, as well as then come in and - -
16 - and argue against whether he should turn over the
17 funds?

18 MS. ALDEA: Correct, Your Honor.

19 JUDGE ABDUS-SALAAM: So which - - - which
20 part of that order was he supposed to adhere to or
21 comply with?

22 MS. ALDEA: That's the problem.

23 JUDGE PIGOTT: Well, why wouldn't he just
24 turn the funds over and then go argue that they got
25 to give it back, because he's the one that took the

1 funds in the first place that he was supposed to give
2 to the attorney?

3 MS. ALDEA: Well, the - - - the - - -

4 JUDGE PIGOTT: They just turned the tables
5 on him.

6 MS. ALDEA: Well, the reason for that is,
7 of course, he didn't have the funds at that point - -
8 -

9 JUDGE PIGOTT: He didn't - - -

10 MS. ALDEA: - - - because we're talking
11 over a year - - -

12 JUDGE PIGOTT: He didn't say that, though.

13 MS. ALDEA: - - - after the fact.

14 JUDGE PIGOTT: He didn't say that, did he?

15 MS. ALDEA: He didn't have an obligation
16 to, Your Honor.

17 JUDGE PIGOTT: Well, that's the - - - that
18 - - - that - - -

19 MS. ALDEA: That's the problem.

20 JUDGE PIGOTT: You know, at some point,
21 this - - - this - - - this funniness gets serious
22 when you start talking about the court and processes
23 and what people are entitled to. And it seems to me
24 that he's doing everything he possibly can to make a
25 joke out of - - - out of the court system and what

1 they're trying to do in this case.

2 And so it - - - I - - - I understand where
3 the - - - where the courts get a little ticked off
4 that people are arguing, well, there were misrep - -
5 - he wasn't there. If he'd been there when he was
6 supposed to, he could have straightened anything out.
7 If he'd moved to vacate timely, he could have
8 straightened it out. If he'd showed up at the
9 referee hearing, he could have straightened it out.

10 There were so many opportunities, it seemed
11 to me, that he could have cleared this up, instead of
12 people being in - - - in Albany in the Court of
13 Appeals arguing the niceties of some of these orders
14 - - -

15 MS. ALDEA: Well - - - well - - -

16 JUDGE PIGOTT: - - - as meritorious as they
17 may be.

18 MS. ALDEA: Well, Your Honor, I think part
19 of the problem is - - - I - - - I mean, I certainly
20 don't agree. I think this record is a little bit of
21 a mess. I would note that he went through several
22 lawyers. And, you know, I mean, just putting on - -
23 - I'm going to use the language in the record - - -
24 one of the lawyers actually didn't read the order
25 that his client was being held in contempt for. The

1 first lawyer actually moved to be relieved and
2 thereafter, our client - - - it's in the record - - -
3 had said that he never got notice of the subsequent
4 proceedings and he was unrepresented.

5 The second lawyer that came in, came in on
6 a contempt action with an order to show cause that
7 had been signed that had a paragraph X-ed out. He
8 shows up in court and he says, oh, can I have time to
9 file papers? And the judge says no, we're holding
10 this hearing right now; let's go. And he was clearly
11 unprepared, so much so that the client got thrown in
12 jail.

13 So how much of this is the fault of the
14 client and how much of it is the fault of the system?
15 I don't disagree with Your Honor that this record is
16 something of a mess. However, to go back to the
17 prior question, in this case, what is required
18 preliminarily for a finding of civil contempt is that
19 the - - - the order on its face be a lawful,
20 unequivocal order, that it be clear and unambiguous.

21 JUDGE STEIN: What's unequivocal about turn
22 this over? I mean, is it - - - isn't the only thing
23 missing from that saying "pending the determination
24 of this motion, you should turn this over"? But
25 that's - - - I mean, every - - - I shouldn't say, but

1 yes - - - every order to show cause that has a TRO in
2 it, has a similar, what you're calling, an ambiguity.
3 It says show cause why you shouldn't have to, and in
4 the meantime, do it.

5 MS. ALDEA: Except here - - -

6 JUDGE STEIN: That's what this did and - -

7 -

8 MS. ALDEA: Except here's the problem.
9 That language was not there, so there was nothing
10 temporary about it. He was deprived to - - -

11 JUDGE STEIN: But - - - but you could have
12 challenged that later on. It the meantime, it says
13 to do it.

14 MS. ALDEA: But Your Honor - - - but Your
15 Honor, the problem with it is that he wasn't even
16 given notice of that order to show cause. And the
17 court's rules specify that if you're going to move
18 for a temporary order like that requiring the deposit
19 of funds - - - which actually is a due process issue,
20 because you're asking him to give up his property
21 without a hearing; a million dollars of his property
22 without a hearing. If you're going to do that in an
23 order - - -

24 JUDGE STEIN: Did he ever ask for a
25 hearing? When did he ask for a hearing on that

1 issue? Did he - - -

2 MS. ALDEA: Well, he didn't have to, Your
3 Honor, because here's the problem. If we interpret
4 that as being a temporary provision as Your Honor has
5 done and we're just missing the language, then as
6 soon as he came to court on March 3rd to respond to -
7 - - it was really a contempt motion - - - to respond
8 to the contempt motion, that temporary provision
9 terminated, because it would end at the moment - - -
10 it would end at the moment that he actually came to
11 show cause as to why it should not be provided.

12 Now, on that date, if Your Honor's looking
13 at the record - - -

14 JUDGE STEIN: To show cause; I - - - I've
15 seen end - - - when the motion is determined, not on
16 the initial return date.

17 MS. ALDEA: But - - - but when he came to
18 court on that date, Your Honor, what happened is that
19 the court started by saying in the record, we have
20 several issues before us, so I'm going to take them
21 one at a time. He then addressed the contempt issue,
22 and never went on to ever hold a hearing, make a
23 determination, anything, on the question of whether
24 or not the money should be deposited or the proceeds
25 were available.

1 JUDGE STEIN: I guess my question is, isn't
2 there some obligation then on his part to say, okay,
3 well, wait a minute; am I still required to turn this
4 money over?

5 MS. ALDEA: Well, Your Honor, whatever the
6 obligation may be, what I would note is this; the
7 obligation in finding a person guilty of civil
8 contempt and throwing him in prison indefinitely for
9 failing to pay money, for failing to comply with the
10 monetary judgment, is entirely on the party that is
11 seeking the contempt.

12 JUDGE STEIN: Can you address the Fifth
13 Amendment issue?

14 MS. ALDEA: Yes, Your Honor. So Fifth
15 Amendment issue, actually, this - - - it's a sort of
16 interesting issue. This is a joint criminal and
17 civil proceeding. And there's no question that the
18 Fifth Amendment on its face says that in any criminal
19 proceeding whatever, the party has a right against
20 compelled self-incrimination. He has the right to
21 refuse to testify. He has the right not to take the
22 stand at all.

23 JUDGE ABDUS-SALAAM: Counselor, did your
24 client - - -

25 MS. ALDEA: This is a criminal proceeding.

1 JUDGE ABDUS-SALAAM: Did you client have
2 any obligation to ask to bifurcate these two contempt
3 proceedings? There was a civil contempt and a
4 criminal contempt. So did he have any obligation to
5 ask the court to bifurcate, hold the criminal
6 contempt first and hold the civil contempt in - - -
7 in abeyance.

8 MS. ALDEA: I don't believe that he had
9 that obligation. He may have had that opportunity
10 and he certainly didn't do it. I'm not arguing that
11 he asked for the bifurcation. However, the attorney
12 didn't have - - - I mean, really, if you're counsel
13 representing a client, this attorney came in, Judge
14 Henderson - - - I'm sorry; Judge Prus had already
15 said on the record twice that the element of
16 willfulness has to be established both for criminal
17 and civil contempt. He said that twice.

18 So the attorney came in thinking, okay,
19 we've got a hearing. The element of willfulness is
20 required for both criminal and civil contempt. My
21 client, since we're in a criminal proceeding, is not
22 going to be compelled to testify against him - - -
23 against himself - - - is not going to be compelled to
24 testify, and so the wife, the plaintiff, will have to
25 prove all of these allegations, including

1 willfulness.

2 Now, interestingly, what happens is, if the
3 element of willfulness is for both civil and criminal
4 contempt, as indeed it should be, and as this court
5 held that it is, there's no reason to move to
6 bifurcate, because at that point, the obligation or
7 the burden of proof of showing that he was able to
8 comply - - - in other words, that he had the ability
9 to comply with the order - - - would have still been
10 on the party seeking contempt - - -

11 JUDGE PIGOTT: Well, would it - - -

12 MS. ALDEA: - - - on Ms. El-Dehdan.

13 JUDGE PIGOTT: Would it be - - - would it
14 be that he had the ability or at some point had the
15 ability? Because we - - - we still have to go back
16 to the point where he - - -

17 MS. ALDEA: That's - - -

18 JUDGE PIGOTT: - - - he transferred this in
19 - - - to avoid - - -

20 MS. ALDEA: Your Honor, that's an essential
21 question. It is a key question. And it actually
22 goes to the heart of this, which is interesting. The
23 - - - the question of when he had the obligation is
24 the divergence between civil and criminal contempt.
25 That's the difference - - - the key difference

1 between the two. For a criminal contempt - - -

2 JUDGE FAHEY: You don't think willfulness
3 is a distinction at all, then?

4 MS. ALDEA: No, Your Honor, I don't,
5 because this court said twice that willfulness - - -
6 the only difference between them is the level of
7 willfulness required, not whether willfulness is an
8 element of civil contempt.

9 JUDGE FAHEY: Yeah, the - - - you - - - you
10 may be right that there's - - - there are - - - there
11 is language in some of our decisions, but there's
12 never been a test promulgated by this court that
13 reflects willfulness and - - - and the statute itself
14 only uses the word "willful" in the criminal statute.
15 And the civil tests that have been applied when we
16 set out the three, four steps, whatever they are,
17 never include willfulness.

18 So the inclusion of that phrase, in and of
19 itself, doesn't seem to me to be dispositive of the
20 issue.

21 MS. ALDEA: Well, actually, Your Honor, the
22 inclusion of the phrase is necessary to protect the
23 statute against a Constitutional infirmity.

24 JUDGE FAHEY: Well, that's your Fifth
25 Amendment argument. I don't know if I agree with

1 you, but go ahead.

2 MS. ALDEA: And the other part of it is
3 that actually what this court did, when you look at
4 the decisions carefully and your parse - - - you
5 actually walk through them, the court actually said
6 that for civil contempt, the element of willfulness -
7 - - the way that the court sort of defined it - - -
8 is actually included in the word "disobey", because
9 "disobey" implies that you're - - -

10 JUDGE FAHEY: So you could be more or less
11 willful than - - -

12 MS. ALDEA: Correct, Your Honor. And I
13 think in the criminal context, willfulness is - - -
14 and a lot of commentators have said, even the
15 Appellate Division in an actually very well-reasoned
16 opinion, although I don't agree with the ultimate
17 outcome - - - but the Appellate Division noted that
18 the part of the difference, or one way to interpret
19 it - - - and I think this is the way the court did it
20 - - - there is a mens rea requirement obviously for a
21 criminal contempt. There has to be. And that
22 element, willfulness, is - - - is akin to
23 intentional.

24 But to get back to Judge Pigott's question
25 - - -

1 CHIEF JUDGE LIPPMAN: Are you - - -

2 MS. ALDEA: - - - because - - -

3 CHIEF JUDGE LIPPMAN: Finish up, counsel.

4 Go ahead.

5 MS. ALDEA: Just this one - - -

6 CHIEF JUDGE LIPPMAN: Answer that quest - -

7 -

8 MS. ALDEA: - - - just this one answer.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MS. ALDEA: The key difference between the
11 civil and the criminal contempt with respect to the
12 timing is this. In the criminal con - - - in
13 contempt context, what it is being punished - - - and
14 it is a punishment - - - is the failure to obey with
15 the court - - - a court's order. That means that in
16 this context, when that order was initially issued,
17 even if it was a temporary order, the defendant had
18 an obligation to comply with it. A failure to comply
19 would make him guilty of a criminal contempt.

20 So at the hearing you would say, you had
21 the ability to comply with it then, you had a lawful
22 order then; you failed to do so, you're guilty of
23 criminal contempt. On a civil contempt - - - and
24 this is why the referee was absolutely spot-on - - -
25 on the civil contempt, the difference is that we are

1 not punishing the party who's unable to pay.
2 Instead, the purpose of civil contempt is to try to
3 get them, by putting them in prison, to actually pay
4 the debt.

5 JUDGE RIVERA: So the difference is the
6 nature of the sanction?

7 MS. ALDEA: Excuse me, Your Honor?

8 JUDGE RIVERA: You're saying the difference
9 is the nature of the sanction?

10 MS. ALDEA: Completely different. The best
11 way that it was worded is in civil contempt, you are
12 putting the contemtor in with the keys to the jail
13 cell in his own pocket. In order for that remedy to
14 be effectuated - - - in order for the purpose to be
15 effectuated - - - you have to prove that his pockets
16 are not empty. Because if you put him in jail with
17 empty pockets, if you haven't proven that element,
18 then what happens is, you're completely obliterating
19 the whole purpose of civil contempt in the first
20 place.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.
22 Thanks, counsel.

23 MS. ALDEA: Thank you.

24 CHIEF JUDGE LIPPMAN: You'll have your
25 rebuttal. Let's hear from your adversary.

1 MS. ALOMAR: May it please the court,
2 Karina Alomar on behalf of the respondent Jacqueline
3 El-Dehdan.

4 Your Honors, I respectfully request that
5 this court affirm the decision of the Second
6 Department. The Second Department was correct when
7 it found that by clear and convincing evidence it was
8 proved that the appellant in this case knew of a
9 lawful mandate, that the - - - a lawful mandate
10 existed.

11 JUDGE ABDUS-SALAAM: So are you suggesting
12 that willfulness is not a part of civil contempt?
13 You said by clear and convincing evidence, so are you
14 saying that his conduct did not have to be willful
15 for the civil contempt?

16 MS. ALOMAR: Yes, I am saying that. It's
17 my position that if there is an order of the court, a
18 litigant is required to obey that order of the court
19 when he had knowledge of that order, and that if it
20 prejudices the rights of the other litigants, then
21 there is civil contempt. And in this case - - -

22 JUDGE ABDUS-SALAAM: The order also has to
23 be a lawful mandate of the court.

24 MS. ALOMAR: And this was a lawful mandate
25 of the court.

1 JUDGE ABDUS-SALAAM: And how is that when
2 you have the underlying order was - - - obviously
3 there was no order permitting him or requiring him to
4 deposit funds. That was stricken from the order,
5 right?

6 MS. ALOMAR: Actually, Your Honor, that is
7 incorrect. Although there was - - - although we
8 later determined that there was no 2008 order in
9 existence which prohibited from him from sell - - -
10 from transferring any property, he was present in
11 court in January of 2009. And in January of 2009,
12 Justice Prus of the Supreme Court, on the record,
13 told him that he was not to transfer property. So
14 the fact that an order is not placed in writing, but
15 - - -

16 JUDGE ABDUS-SALAAM: But he had already
17 transferred the property by then, hadn't he?

18 MS. ALOMAR: No, he had not. He trans - -
19 - he transferred the property in March of 2009. When
20 we were in court in 2009, Justice Prus stated to him
21 that we should try and settle the case, but he said,
22 if you don't want to settle, you're entitled to a
23 hearing on your arguments that you were divorced in
24 Lebanon and that she is entitled to nothing of the
25 marital estate. And he goes, but I'm telling you, in

1 the meantime, do not transfer any property; do you
2 understand me? And Mr. Sam Reed said, I understand,
3 Your Honor; I cannot transfer any properties.

4 And then after that took place on the
5 record in January of 2009, he failed to appear in
6 February, and then he went ahead and transferred the
7 property.

8 So my position - - -

9 JUDGE FAHEY: So - - - so it's the transfer
10 of title in '09 and then it's the requirement to
11 deposit the proceeds from the transfer or the sale
12 that the contempt is based on in January 2010.

13 MS. ALOMAR: Correct.

14 JUDGE FAHEY: All right.

15 MS. ALOMAR: In January of 2010, I
16 incorrectly cited the 2008 order rather than citing
17 the 2009 directive on the record. However, the point
18 is, is that the court ordered him to deposit money
19 into my escrow account for the purpose of
20 safeguarding marital property, and he failed to
21 comply with that lawful mandate.

22 And the appellant comes to court and he
23 says to the court, I was ordered to divest myself of
24 my property, but the - - - but he forgets to - - - to
25 mention, it was not his property. This was property

1 of the marital estate and it was for the court to
2 determine how that marital estate was to be divided
3 and he went ahead and he prejudiced the rights of the
4 plaintiff by transferring - - - by transferring the
5 property and then failing to comply with the court's
6 directive, which was done in order to safeguard the
7 property.

8 And after he's been found in civil
9 contempt, and he's been given the keys to his jail,
10 because all he had to do to purge himself was to
11 deposit the money, he still failed to deposit the
12 money, resulting in the court issuing an order for
13 his arr - - - a warrant for his arrest, which warrant
14 is still outstanding, because he's - - - he's still -
15 - - he's a fugitive, in essence.

16 So he - - - now he comes to court and he
17 says, you know, Your Honors, please help me.
18 Meanwhile, he's continued to prejudice the rights of
19 this court. Justice Prus had all of the right in the
20 world to issue this order. The - - - the Supreme
21 Court stands as a court of equity, the domestic
22 relations - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but in terms of
24 equity, this is kind of a mixed issue, where in the
25 one sense, you have someone who could be viewed as

1 defying the orders of the court, and in another
2 sense, you have someone who served time incarcerated
3 on an order that didn't exist. And then the second
4 time, in 2010, there's no hearing that gives him any
5 kind of an ability to defend himself, so I - - - I
6 think the fairness issue cuts both ways.

7 Well, I understand that you're saying, gee,
8 you know, he ought to do; he doesn't do it. But, you
9 know, the - - - the tables are - - - are kind of
10 balanced here that - - -

11 MS. ALOMAR: Your Honor - - -

12 CHIEF JUDGE LIPPMAN: - - - I mean, is that
13 fair to - - - to this - - - to - - -

14 MS. ALOMAR: It is fair, and I'll explain
15 why. This defend - - -

16 CHIEF JUDGE LIPPMAN: Tell me - - - tell me
17 why.

18 MS. ALOMAR: This defendant - - -

19 CHIEF JUDGE LIPPMAN: For 2008, there's
20 nothing fair about that, right? Being incarcerated
21 on an order that doesn't exist?

22 MS. ALOMAR: Well, Your Honor, you're
23 right, it wasn't fair to - - - to incarcerate him
24 based on the 2008. But had I argued the 2009 court's
25 directive on the record, he should - - - he would

1 have been incarcerated, because he did exactly what
2 the court told him not to do. He sold property and
3 we don't know where it is.

4 CHIEF JUDGE LIPPMAN: In 2010, it wouldn't
5 it have been better to have a hearing?

6 MS. ALOMAR: He could have reques - - - he
7 could have requested a hearing. He could've - - -
8 this defendant could have made an application to the
9 court to set aside the 2010 order, but under the
10 Section 245 - - - 234 of the Domestic Relations Law,
11 courts are empowered to issue an order of restraint
12 to prohibit the - - - the secretion of marital
13 assets.

14 And I would note most importantly, Your
15 Honor, that in 2009, the New York State Legislature
16 saw the danger that families faced in a divorce
17 proceeding and how one spouse could dissipate assets.
18 As a result, the legislature enacted a new section to
19 236(b) of the - - - of the Domestic Relations Law
20 where a spouse is automatically restrained from
21 transferring assets other than in the ordinary course
22 of business - - -

23 JUDGE RIVERA: So - - -

24 MS. ALOMAR: - - - upon the commencement of
25 an action.

1 JUDGE RIVERA: So just to be clear. You're
2 arguing - - - I understand your point about the
3 court's authority and the legislative intent, but
4 you're arguing that despite what your adversary says,
5 her client did have opportunities to challenge this
6 order before it got to the point of contempt.

7 MS. ALOMAR: Absolutely. Ms. - - -

8 JUDGE RIVERA: Before he's found in
9 contempt. Let me put it that way.

10 MS. ALOMAR: Absolutely.

11 JUDGE RIVERA: Okay, so can you just one
12 again - - - I know it may sound repetitive, but
13 please be repetitive - - - lay out when those
14 opportunities existed.

15 MS. ALOMAR: Okay, the order to show cause
16 was filed in January of 2010. We appeared in court
17 on March 3rd of 2010. He was incarcerated for
18 fifteen days and he was released in March - - -

19 JUDGE RIVERA: He had already sold the
20 properties by then.

21 MS. ALOMAR: He had already sold the
22 property by then. However, from March until I filed
23 my order to show cause in August of 2010 to hold him
24 in contempt, we had appeared in court on several
25 occasions, and Mr. El-Dehdan had - - - had argued on

1 those numerous occasions that the - - - the divorce
2 should be set aside, that the decision of the referee
3 should be set aside, and he could have, at that
4 moment in time, made an application to set aside the
5 January 2010 order.

6 In addition, once I filed my motion for
7 contempt in Jan - - - in August of 2010, Mr. Reed
8 could have made a cross-motion to set aside the
9 decision of the - - - the order of the court. He did
10 not. Instead, he chose to flout the court's
11 decision. He was defiant. And he should not be
12 rewarded for being defiant. He had all of the ample
13 opportunity in the world to say, this order was
14 wrong, it should be - - - it should be vacated, but
15 he made a choice not do so.

16 And we would be setting very dangerous
17 precedent if we were to allow him to do what he is
18 trying to do what he is trying to do because what we
19 would be telling - - -

20 JUDGE RIVERA: I'm sorry. What happens
21 when he's sent to the referee? Is he allowed at that
22 point to raise the underlying issue?

23 MS. ALOMAR: No, he isn't, because at that
24 - - - he never made an application to set aside the
25 January 2010 order. So at that point in time, when

1 we go before the referee, he is not allowed to
2 collaterally attack the order of the court. And that
3 was - - -

4 JUDGE PIGOTT: When - - - when was that? I
5 - - - I - - -

6 MS. ALOMAR: That was in February of 2011,
7 Your Honor.

8 JUDGE PIGOTT: Okay.

9 MS. ALOMAR: And it - - - and my position
10 would be that the Supreme Court was very eloquent
11 when it stated in Madju v. Sykes (ph.) that orders of
12 the court are not to be argued at a contempt hearing,
13 because if we do that, we are fostering an
14 experimentation - - -

15 JUDGE STEIN: But he didn't get a cha - - -
16 well, you - - - you talked about his opportunities,
17 but once - - - once he gets a hearing, is there - - -
18 is there a problem with the fact that he doesn't know
19 whether he's going to be found in civil or criminal
20 contempt? And in deciding whether to assert his
21 Fifth Amendment rights, it could make a difference?

22 MS. ALOMAR: No, Your Honor. There - - -
23 he - - - there isn't. The court - - - the court in
24 the United - - - in the United States v. United Mine
25 Workers of America determined that issue. And in the

1 - - - in United States v. United Mine Workers of
2 America, the Supreme Court held that it was
3 appropriate to hold joint civil and criminal contempt
4 proceedings, as long as all of the - - - the
5 defendant was afforded all of the rights to a
6 criminal defendant. And this defendant, in this
7 situation, he could have made a request to bifurcate
8 and he didn't.

9 But more importantly, the courts of both
10 the State of New York and the Supreme Court have held
11 that there is - - - that the fact that a person
12 invokes the Fifth Amendment on a criminal proceeding
13 does not mean that they - - - that a civil proceeding
14 has to be stayed, or that the - - - the invocation of
15 the Fifth Amendment in the civil proceeding will not
16 result in an adverse inference, because you're not
17 supposed to use the Fifth Amendment as a way of - - -
18 of relieving yourself of your burden of providing
19 evidence, which is what Mr. Reed did in this case.

20 He could have come - - - he could have come
21 to court and he could have said to - - - in the court
22 proceeding that he did not have the money and provide
23 evidence that he did not have the money. Instead, he
24 made the choice of using a self-serving statement
25 saying I don't have any money, yet failing to show

1 that he really didn't have any money. He could have
2 answered the questions as to what he did with the
3 money, but he didn't.

4 So he should not now be rewarded when he's
5 found in civil contempt. He has the ability right
6 now to purge himself from contempt by depositing the
7 money, but he hasn't. And in fact, it's been five
8 years. He has deposited zero money. He took the
9 entire marital estate because we were - - - this - -
10 - this 750,000 that he was to deposit in my account
11 only constituted one of the properties. There was
12 another property that he transferred without
13 consideration, and there was a tran - - - a
14 drycleaner that he transferred to his sister. So we
15 standing five - - -

16 JUDGE RIVERA: He claims he doesn't have
17 the money.

18 MS. ALOMAR: He doesn't - - - he claims he
19 doesn't have the money, but I'm sure if at some - - -

20 JUDGE RIVERA: Did he do anything more than
21 claim he doesn't have the money?

22 MS. ALOMAR: No, he didn't. He - - - he
23 just claimed I don't have the money and that is it.

24 JUDGE RIVERA: And when I say that, I mean,
25 did he show that he didn't have the money?

1 MS. ALOMAR: No, he didn't.

2 JUDGE RIVERA: Forget about what he may
3 have done with the money.

4 MS. ALOMAR: No, Your Honor, he did not
5 provide any type of evidence to show that he did not
6 have the money. He did not provide his bank account
7 and show that it was used in any - - - in any which
8 way.

9 CHIEF JUDGE LIPPMAN: Okay, counselor,
10 thanks.

11 MS. ALOMAR: Thank you.

12 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

13 MS. ALDEA: Yes, Your Honor. There are a
14 few factual issues here. There's one very serious
15 legal issue. The first thing is that counsel has
16 argued that Judge - - - Judge Prus, that actually
17 even though there was a problem with the restraining
18 order, she should have moved instead to find him
19 guilty of contempt for failing to comply with a - - -
20 an oral order that Judge Prus - - - or directive that
21 Judge Prus made on the record in January of 2009.

22 First of all, Judge Prus rejected that.
23 Secondly - - -

24 JUDGE PIGOTT: Let's think about this - - -

25 MS. ALDEA: - - - this defendant was not

1 held in contempt on either of those things.

2 JUDGE PIGOTT: Let's think about this in
3 terms of mat - - - of matrimonial, because this
4 sounds so common, and it's very - - - as - - - as
5 your opponent points out under - - - under 236 now,
6 that there's an automatic freeze on all the assets
7 once - - -

8 MS. ALDEA: Correct.

9 JUDGE PIGOTT: - - - once one's contem - -
10 - there's a reason why that was imposed. And when he
11 said back in - - - in 2008 or whatever, you know,
12 that I - - - that I'm going to en - - - engage in
13 equitable distribution on this and don't sell this
14 property, I think your client understood what was
15 going on. And I think he then did exactly what he
16 should not have done.

17 And now we're fighting over dots - - - dots
18 and commas and things of that nature over whether or
19 not this guy, who has not help - - - helped in any
20 way in this matrimonial - - - I'm sorry he went to
21 jail and he shouldn't have; he's out - - - but what
22 are - - - but what are we supposed to do here? You
23 know - - -

24 MS. ALDEA: Well, Your Honor - - -

25 JUDGE PIGOTT: At some point, when he says,

1 yes, I got the order. Yes, I know I was - - - I - -
2 - and yes, I have not complied. I'm not telling you
3 about my money. What - - - what does a court then
4 do?

5 MS. ALDEA: But - - - but Your Honor,
6 before we - - -

7 JUDGE PIGOTT: No, what does a court then
8 do?

9 MS. ALDEA: The court has to comply because
10 it's not the - - -

11 JUDGE PIGOTT: What does the court then do?
12 He's standing there saying, I've got the order, I've
13 not complied with it, I'm taking a Fifth on where my
14 money is. What does a court then do?

15 MS. ALDEA: The court has to determine if
16 it's a lawful order. The court has to determine if
17 it was procured by fraud because there are unclean
18 hands here - - -

19 JUDGE PIGOTT: No, you're not - - - he's
20 not raising that. He's standing there saying I'm not
21 complying and I haven't.

22 MS. ALDEA: But - - - but Your Honor,
23 that's not what was ever said.

24 JUDGE PIGOTT: Wait, wait, wait. I know,
25 you're saying that, oh, well, she didn't do this, she

1 didn't say this, she did - - - she - - - on - - - you
2 know. I get all that.

3 It's a matrimonial. There's a fact here
4 that he did not comply. And they say, where is your
5 money? He says, I'm not telling you. Now, what is a
6 court supposed to do? Do you say, well, I'm sorry,
7 spouse, but he's not telling you; this case is
8 dismissed. Is that what we're supposed to do?

9 MS. ALDEA: No, Your Honor. But I think
10 there are other ways to collect - - -

11 JUDGE PIGOTT: What are we supposed to do?

12 MS. ALDEA: I think there are other ways -
13 - - first of all, there are other ways to collect
14 money.

15 JUDGE PIGOTT: Help me out.

16 MS. ALDEA: One thing that wasn't done here
17 is that counsel - - - and this was part of the
18 referee's decision - - - never moved actually to
19 finally settle the other judgment on the divorce,
20 which would then have entitled her to go and collect
21 the assets that were ordered.

22 But there's a more fundamental problem,
23 which is that the equitable distribution - - - when
24 we talk about where the unclean hands started, and I
25 think this is - - -

1 JUDGE STEIN: But how do you - - - how does
2 she collect the - - - the money if he says he doesn't
3 have it, but won't tell you - - - won't give any
4 proof as to that?

5 MS. ALDEA: Well, even for the purpose of
6 the contempt proceeding in this case, if she wanted
7 to try to do a contempt proceeding, I mean, the - - -
8 the requirement still has to be that there is a
9 lawful order. And that order - - - initially, what
10 she said is that even in the order on its face, it's
11 - - - it's a temporary provision at best, which would
12 have expired at the moment that a hearing was held
13 which he never got.

14 JUDGE STEIN: That's questionable.

15 MS. ALDEA: She never moved for a hearing
16 on that, and there's a factual misrepresentation in
17 this point - - - on this point about whether or not
18 there was an opportunity to hold this hearing. She
19 said that he came in and he never tried to have a
20 hearing on this. That's absolutely untrue. He came
21 in and he specifically said on March 3rd that he
22 wanted to vacate the entire order, which included
23 that provision.

24 The court threw him in jail and never
25 addressed the second claim, nor did it issue another

1 order saying you have to deposit this money or let's
2 have a hearing to find out if we have this money.
3 That's her burden if she wants to collect. There
4 could have been, potentially, a subpoena issued to
5 the bank to find out what his bank records were.
6 There could have been orders issued by the court to
7 make a determination as to whether he had the assets.

8 She didn't do any of that. Instead, she
9 wanted to throw him in jail. And that's problematic
10 here. More than that - - -

11 JUDGE RIVERA: It's her burden to prove he
12 doesn't have the money or he does have the money?

13 MS. ALDEA: Yes, it is, Your Honor.

14 JUDGE RIVERA: It's his? Okay.

15 MS. ALDEA: And that's exactly where
16 willfulness comes in.

17 JUDGE RIVERA: So let me just understand.
18 Is the - - - the one - - - the March 3rd, when he
19 comes I and says I want to challenge the order, is
20 the only time he's done that?

21 MS. ALDEA: No, Your Honor.

22 JUDGE RIVERA: You said there were several
23 opportunities.

24 MS. ALDEA: There were, and in fact - - -

25 JUDGE RIVERA: Okay.

1 MS. ALDEA: - - - he - - - he did it again.
2 So then what happens is that he comes back in.
3 Counsel said he made a decision not to challenge
4 this. In fact, he comes back in and - - -

5 JUDGE RIVERA: I'm sorry; what does that
6 mean, "he made a decision". What does that mean?

7 MS. ALDEA: Counsel has said that he made a
8 decision not to challenge - - -

9 JUDGE RIVERA: The "he" being?

10 MS. ALDEA: - - - that - - - I'm sorry, Mr.
11 Reed.

12 JUDGE RIVERA: Okay.

13 MS. ALDEA: Made a decision not to
14 challenge the order. In fact, after March, he came
15 back in on August 11th, 2010, when the oral
16 application was made to hold him in contempt, and at
17 that point on the record, there was an argument that
18 the order was procured by misrepresentation and had
19 been vacated. At that point, the court adjourns the
20 case to allow defendant to respond, but has
21 apparently already made up his mind, because he was
22 so upset, he had to let him out of jail the first
23 time - - -

24 JUDGE RIVERA: So you're saying - - - the
25 point that you're actually on the contempt motion - -

1 -

2 MS. ALDEA: On the contempt motion.

3 JUDGE RIVERA: Right. At that time, he
4 should have been able - - - the court should have
5 entertained - - -

6 MS. ALDEA: Well, it was - - -

7 JUDGE RIVERA: - - - his request.

8 MS. ALDEA: Yes, and it was prior to the
9 response on the contempt. Then the next time that it
10 happens is that on October 5th, 2010, Mr. Reed moved
11 to vacate the orders, including the provision that's
12 at issue here. On - - - when that's decided - - - on
13 December 6th, 2010, he - - - Justice Prus actually
14 said on the record, no, no, no, you have to hold - -
15 - you have to raise these claims that the order was
16 procured by fraud as a defense to the contempt. And
17 that's in the record on page 185 and 189.

18 And counsel at that point on the record - -
19 - this is a quote - - - says "Whoa, whoa, these are
20 not defenses; the order should have never issued",
21 which is exactly what we're saying here. And Justice
22 Prus basically tells him, no, no, you raise this as a
23 defense when you get to the contempt. Now he gets
24 before Judge - - - before Referee Henderson on the
25 contempt and she says - - -

1 JUDGE RIVERA: But did he - - - did he ever
2 submit - - - did he ever submit papers on this?

3 MS. ALDEA: Yes, he did, Your Honor.

4 JUDGE RIVERA: When did he do that?

5 MS. ALDEA: And in fact, counsel
6 specifically told him - - - told Justice Prus on the
7 record, read the papers, because that's what we're
8 arguing, and Justice Prus said, it sounds like a
9 defense to the contempt. But - - -

10 CHIEF JUDGE LIPPMAN: Okay, okay, counsel.
11 We're - - - we're finished. Thank you both.

12 MS. ALDEA: Okay.

13 CHIEF JUDGE LIPPMAN: Appreciate it.

14 MS. ALDEA: Thank you.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of El-Dehdan v. El-Dehdan, No. 90, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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