

Yarrobino v Dolan

2007 NY Slip Op 30777(U)

April 4, 2007

Supreme Court, Suffolk County

Docket Number: 0012084/2002

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

THOMAS YARROBINO and CARRIE
YARROBINO,

Plaintiffs,

-against-

MICHAEL DOLAN and FRANCES DOLAN,

Defendants.

ORIG. RETURN DATE: December 22, 2006
FINAL SUBMISSION DATE: February 1, 2007
MTN. SEQ. #: 003
MOTION: MD

PLAINTIFFS' ATTORNEYS:
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Upon the following papers numbered 1 to 3 read on this unopposed motion
TO PUNISH FOR CONTEMPT

Notice of Motion and supporting papers 1-3; it is,

ORDERED that this motion by defendants, MICHAEL DOLAN and FRANCES DOLAN, for an Order, pursuant to CPLR 5104, punishing defendants' outgoing attorneys, MONAHAN & SKLAVOS, P.C. ("MONAHAN"), for contempt based upon their alleged failure to obey a lawful Order of the Court of which they had knowledge, in that they refused and failed to turn over the legal files of the

defendants to their incoming attorneys, is hereby **DENIED** for the reasons set forth herein. The Court notes that no opposition was interposed to the instant application.

Plaintiffs commenced this action against defendants for personal injuries allegedly sustained in an incident that occurred between the parties on May 16, 2001. By Order dated October 27, 2003 (Werner, J.), the instant action was consolidated with a Supreme Court, Nassau County action entitled *Dolan v Yarrobino*, for joint trial purposes, which is now pending in this Court under Index No. 26143/2004.

On or about April 22, 2005, defendants retained the firm of CERTILMAN BALIN ADLER & HYMAN LLP ("CERTILMAN") to represent them in the instant action as well as the above-referenced companion action, in the place and stead of the MONAHAN firm. A consent to change attorney was executed on or about May 13, 2005. CERTILMAN then sent MONAHAN a letter, dated May 18, 2005, requesting the turnover of defendants' legal files. CERTILMAN alleges that outgoing counsel had willfully refused to turn over defendants' legal files, despite numerous written requests. As a result, defendants filed a motion seeking an Order compelling MONAHAN to immediately relinquish defendants' legal files. That motion was granted, without opposition, by Order dated June 28, 2006 (Werner, J.). Within said Order, MONAHAN was directed to surrender the files to incoming counsel upon the payment of their disbursements, if any, within five days of service of a copy of the order with notice of entry. CERTILMAN submits that the aforementioned Order was served upon MONAHAN, with notice of entry, on July 19, 2006. Thereafter, CERTILMAN alleges that it made written demands for the files in June, July and August of 2005. A So-Ordered Stipulation of the parties dated September 15, 2005 reflects that as of that date, outgoing counsel had still not turned over defendants' files to CERTILMAN. In an attempt to resolve this matter without motion practice, CERTILMAN sent yet another letter to MONAHAN, dated September 15, 2006, requesting compliance with the Order. CERTILMAN alleges that to date, MONAHAN has failed to comply with the Order of June 28, 2006, thereby necessitating the instant application.

CPLR 5104 provides, in pertinent part, that "[a]ny interlocutory or final judgment or order not enforceable under either article fifty-two or section 5102 may be enforced by serving a *certified copy* of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court" (CPLR 5104 [emphasis supplied]). The statute explicitly requires that a certified copy of the order must be served on the party thereby required to obey it (CPLR 5104), and the failure to do so has resulted in the denial of a motion for contempt

(*S. Park Assocs. v 230 Park S. Apts., Inc.*, 3 Misc 3d 1111[A] [Sup Ct, NY County 2004], citing *Present v Aranyi*, 38 AD2d 801 [1972]). The Court notes that the Order need not be certified by the clerk, it may be certified by an attorney (see CPLR 2105). Notwithstanding the notice requirement of CPLR 5104, a person who has actual knowledge of the mandate of a court may be punished for contempt even though not personally served with a certified copy of the order allegedly disobeyed (*Village of Westhampton Beach v Suffolk Asphalt Supply*, 253 AD2d 425 [1998]; *Campanella v Campanella*, 152 AD2d 190 [1989]; *Puro v Puro*, 39 AD2d 873 [1972]).

In the instant application, CERTILMAN has not alleged that it served a certified copy of the Order dated June 28, 2006 upon MONAHAN, nor does the notice of entry served upon MONAHAN recite that a certified copy of the Order was annexed thereto. As discussed, this requirement may be waived if the Court finds that the alleged contemnor has actual knowledge of the Order (see *Village of Westhampton Beach v Suffolk Asphalt Supply*, 253 AD2d 425, *supra*; *Campanella v Campanella*, 152 AD2d 190, *supra*; *Puro v Puro*, 39 AD2d 873, *supra*). However, CERTILMAN has not alleged that they received any response or communication from MONAHAN since the initial correspondence sent in May of 2005. Accordingly, on this record, the Court cannot hold that MONAHAN has actual knowledge of the Order of June 28, 2006, a predicate for a finding of contempt.

In view of the foregoing, this motion to punish MONAHAN for contempt due to an alleged wilful violation of the Order dated June 28, 2006 (Werner, J.), in that they failed to turn over defendants' legal files to CERTILMAN, is denied without prejudice to renew upon proper papers.

The parties are reminded that a compliance conference in the instant matter, and a preliminary conference in the companion case entitled *Dolan v Yarrobino*, Index Number 26143/2004, are currently scheduled for **May 24, 2007 at 9:30 a.m., in Part 37, Arthur Cromarty Criminal Court Complex, 210 Center Drive, Riverhead.**

The foregoing constitutes the decision and Order of the Court.

Dated: April 4, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court