STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

In The Matter of the Application of VALERIE SMITH,

Petitioner/Plaintiff,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE TOWN OF PLATTEKILL, THE PLANNING BOARD OF THE TOWN OF PLATTEKILL, THE ZONING BOARD OF APPEALS OF THE TOWN OF PLATTEKILL, ROBERT SMITH, JR., AS THE ZONING ENFORCEMENT OFFICER OF THE TOWN OF PLATTEKILL, MICHAEL LEMBO, JR., MARY LEMBO, MARY LEMBO FAMILY TRUST, MIKE LEMBO ENTERPRISES and MICHAEL LEMBO, III,

Respondents/Defendants.

Supreme Court Ulster County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #55-97-00889 Index No. 97-1460

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DECISION AND ORDER

George B. Ceresia, Jr., Justice

This is an application brought by respondent Town of Plattekill (the Town) seeking a contempt adjudication and imposition of sanctions against co-respondents Michael Lembo, Jr., Mary Lembo, Mary Lembo Family Trust, Mike Lembo Enterprises and Michael Lembo III (the Lembo's). The Town alleges that the Lembo's have willfully violated the terms of a Decision and Order of this Court (Bradley, J.) dated June 29, 2006. That Order permanently enjoined the Lembo's "from conducting commercial off-road and ATV motor vehicle uses, including but not limited to the racing and riding of motorcycles, the operation of ATV's and /or motorcycles anywhere on the Lembo property [located in the Town of Plattekill]."[1] According to the Town, despite the clear and unambiguous terms of the injunction, the Lembo's are nonetheless regularly allowing invitees – for a fee – to enter upon their property and operate ATV's. Apparently, even though the Town has also issued appearance tickets and filed accusatory instruments in the local criminal court seeking to punish the Lembo's for violating zoning laws by this continued unlawful use of their land, the activity continues.

While a complete recitation of the factual and procedural history of this litigation, currently in its twelfth year, is unnecessary, some background facts are required for the adjudication of the

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[1] As detailed more fully *infra*, only Michael Lembo III was personally served with a certified copy of this Order (*see* CPLR 5104).

present application.[2] Petitioner Valerie Smith commenced a CPLR Article 78 proceeding naming the Town and the Lembo's as co-respondents. The petition sought annulment of a determination by the Zoning Board of Appeals that allowed the Lembo's to operate an off-road motorcycle racing track on their property. The ultimate result of that and another related CPLR Article 78 proceeding between the same parties was the permanent injunction of June 29, 2006.

Insofar as the Town was not the successful party against the Lembo's in the underlying litigation, (indeed, they were united in interest in the CPLR Article 78 proceedings), a civil contempt motion brought under the Judiciary Law would not be available to the Town to enforce the permanent injunction (*see generally, McCormick v Axelrod*, 59 NY2d 574 [1983] [Judiciary Law contempt exists as vehicle to enforce the rights of the prevailing parties to litigation]). Counsel for the Town correctly recognized (at para 4 of his Reply Affirmation) that CPLR 5104 is the one provision that would allow for contempt enforcement on an application brought by a party other than the successful party to the underlying litigation. The Town's failure to comply with the notice requirements of that statute, however, is fatal to this application.

CPLR 5104 provides, in pertinent part, that an "order 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 . . . ." Here, the only party personally served with a certified copy of the June 29, 2006 Order was Michael Lembo III. Personal service was attempted on Michael Lembo, Jr., but only service upon his adult daughter was effected, and followup mailing of a copy of the certified order was never accomplished (*see* CPLR 308 [2]). No attempt at service was made upon the remaining Lembo

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[2] For a fuller insight into the underlying litigation, *see Smith v Town of Plattekill*, (13 AD3d 695 [3d Dept 2004]); *see also, Smith v Town of Plattekill,* (274 AD2d 900 [3d Dept 2000]).

respondents. Meanwhile, the allegations of the Town's supporting affidavits suggest that Michael Lembo, Jr. is the one individual respondent personally responsible for the alleged violations of the injunction. Moreover, Michael Lembo III, the only respondent actually served with a certified copy of the June 29, 2006 Order, is nowhere alleged to have participated in (or even known about) any violations of the injunction. Thus, the critical prerequisite to CPLR 5104 contempt, service of a certified copy of the order upon the person against whom enforcement is sought, has not occurred here. The instant application must therefore be denied.

The Town also seeks the imposition of sanctions for frivolous conduct under 22 NYCRR Article 130 against the Lembo's. This specific relief exists "to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics" (*Kernisan v Taylor*, 171 AD2d 869 [2d Dept 1991] [citations omitted]). It is not available as a remedy for contumaceous conduct which is otherwise punishable by the contempt power of the court (*Grier v Grier*, 266 AD2d 345 [2d Dept 1999]). The conduct alleged here, the deliberate flouting of a clear mandate of the court by a party to litigation, does not fall within the definition of frivolous conduct (*see,* 22 NYCRR § 130-1.1 [c]). Rather, the conduct alleged here can only be defined as contempt of court. Had the prerequisites of CPLR 5104 been met, it would have been punished as such; those requirements not having been satisfied, it cannot be addressed as though it were something that it is not.

That portion of the June 29, 2006 Decision and Order that held petitioner's cross-motion for contempt in abeyance for thirty days must also be addressed at this time. The preliminary injunction under which the cross-motion was brought enjoined the Lembo's "from operating a motorcycle track on their premises." Implicit in the late Justice Bradley's determination to hold the contempt motion

in abeyance was a decision to exercise discretion and give the Lembo's the opportunity to demonstrate future compliance with the Court's orders. While the record suggests that the Lembo's have not been acting in accordance with the terms of the permanent injunction, there is no indication that they have resumed the operation of the motorcycle track constructed on their premises under the mistaken belief that it complied with the applicable zoning requirements. As a result, petitioner's cross-motion, held in abeyance by Justice Bradley, is now denied.

Nonetheless, this Court is concerned lest its mandate continue to be ignored. From the papers submitted on this motion, in particular from the affidavit of the Code Enforcement Officer for the Town, it appears uncontested that the mandate of the permanent injunction has been violated repeatedly. While, for the reasons already stated, contempt will not be available to address past violations, the situation would be different if the Town effectuates proper service of the June 29, 2006 Decision and Order, and a subsequent violation occurs. Respondents are therefore cautioned that upon application by the Town, this Court will not hesitate to avail itself of the full panoply of options available to punish any subsequent conduct in violation of the permanent injunction. Accordingly, it is

ORDERED that the motion by respondent Town of Plattekill for an adjudication of contempt is, in all respects, denied; and it is further

ORDERED that the motion by respondent Town of Plattekill for an award of sanctions is, in all respects, denied; and it is further

ORDERED that the cross-motion by plaintiff/petitioner for an adjudication of contempt, previously held in abeyance, is denied in all respects.

This constitutes the Decision and Order of this Court. The original papers, including this Decision and Order, are being returned to counsel for the municipal respondents. The signing of this

Decision and Order shall not constitute entry of filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notices of entry.

ENTER

Dated: Troy, New York
April 30, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated August 21, 2006, Morgan supporting Affirmation dated August 14, 2006 and annexed Exhibits A to N (including Exhibits 1 and 2 annexed to Exhibit E).
2. McGuire undated opposing Affirmation.
3. Carroll reply Affirmation dated September 7, 2006.
4. Carroll reply Affirmation dated September 12, 2006 and annexed Exhibit A.
5. Morgan reply Affirmation dated September 12, 2006 and annexed Exhibit.
6. Order to Show Cause labeled as "CROSS MOTION" dated February 9, 2006, Carroll Affirmation dated February 8, 2006, annexed Exhibits A to D, Smith Affirmation dated February 8, 2006 and annexed Exhibits 1 and 2.
7. McGuire undated opposing Affirmation.
8. Morgan Affirmation in Response dated March 2, 2006 and annexed Exhibits A to D.
8. Carroll reply Affidavit dated March 1, 2006.