STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

TOWN OF NASSAU, NEW YORK,

Plaintiff,

-against-

STEPHEN O. NALLEY d/b/a IMPACT AUTO,

Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0290-03 Index No. 208220

Appearances: Greenberg & Greenberg
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(Peter A. Lynch, Esq., of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff has moved for an order holding defendant in civil contempt of court pursuant to Judiciary Law § 753 for violating a temporary restraining order contained in an order to show cause executed by this Court on June 19, 2006. The order to show cause provided:

> "it is further ORDERED that pending the hearing and determination of this application and until further order of this court, the defendant and/or his agents, servants, employees, as well as all persons acting on his behalf are restrained, enjoined, and stayed from operating a

> "junk yard" as same is defined by Town of Nassau Local Law Number One of the Year 1989 at the property located at U.S. Route 20 in the Town of Nassau, either now or formerly owned by defendant and used for such purpose."

Defendant has cross-moved for an order vacating the prior orders of this Court and dismissing the instant action on the ground that Local Law Number 1 for the Year 1989 entitled "The Junk Yard Ordinance" was not filed with the Secretary of State as required and as such never became effective pursuant to Municipal Home Rule Law § 27 (3). Defendant also seeks a n award of damages arising out of the temporary restraining order as well as an award of attorneys fees.

CPLR 2215 requires that a notice of cross-motion be served at least three days prior to the return date of the primary motion. Defendant's papers are dated only two days before the return date. While defendant has not submitted an affidavit of service of the cross-motion, it is obvious that it was not timely served. Moreover, the Court finds that it is without merit.

While the enactment entitled "The Junk Yard Ordinance" was typed on a form for a Local Law, and states that it is Local Law Number 1 of the year 1989, the body of the enactment consistently refers to itself as an ordinance. In the title section, it states "[t]his ordinance shall be known and quoted as the Junk Yard Ordinance." The articles on definitions, general purpose, penalties, separability and conflict, and effective date all refer to "this ordinance." Nothing in the body of the enactment refers to it as a local law. Moreover, the Town did enact and file a Local Law Number 1 for the Year 1989 involving sold waste management. The Town has also established that it followed all of the proper procedures for passage of an ordinance, which is not required to be filed with the Secretary of State (see Town Law § 133).

The Court finds that, contrary to defendant's contentions, the Town is authorized to regulate an automobile junk yard by enactment of either an ordinance or a local law. Town Law § 130 (6)

authorizes a town to regulate "dumping grounds" by ordinance. Town Law § 130 (15) authorizes the use of an ordinance to promote the health, safety and general welfare of the community, which certainly encompasses regulation of an automobile junk yard. Town Law § 136 (1) expressly authorizes the licensing and regulation of junk dealers and dealers in second hand articles by ordinance. Such provisions clearly provide ample authority to regulate an automobile junk yard by ordinance (see e.g. People v Scott, 26 NY2d 286, 288 [1970]). Moreover, General Municipal Law § 136 imposes statewide requirements for the operation of an automobile junk yard. Section 12 thereof specifically contemplates and defers to local ordinances regulating junk yards.

The Court further finds that the clerical error of designating the ordinance as Local Law Number 1 of 1989 is *de minimis* and did not cause any prejudice to defendant or the public. Such error is insufficient to invalidate the ordinance (see e.g. Matter of Friends of Hammondsport v Village of Hammondsport Planning Bd., 11 AD3d 1021, 1023 [4th Dept 2004]; Preble Aggregate v Town of Preble, 247 AD2d 697, 699 [3d Dept 1998]; cf. Matter of Cerro v Town of Kingsbury, 250 AD2d 978, 980 [3d Dept 1998]).

It is therefore determined that the Junk Yard Ordinance of the Town of Nassau is valid and enforceable. Defendant's cross-motion to dismiss shall be denied.

With respect to the motion for contempt, plaintiff must establish that

> "a lawful judicial order expressing an unequivocal mandate [was] in effect and disobeyed (see, e.g., Pereira v Pereira, 35 NY2d 301, 308; Matter of Spector v Allen, 281 NY 251, 259; Ketchum v Edwards, 153 NY 534, 539; Coan v Coan, 86 AD2d 640, 641, appeal dismissed 57 NY2d 608). Moreover, the party to be held in contempt must have had knowledge of the order, although it is not necessary that the order actually have been served upon the party (e.g. People ex rel. Stearns v Marr, 181 NY 463, 470, supra). In addition, prejudice to the rights of a party to the litigation must be demonstrated (see, Judiciary Law § 753[A]; Matter of McCormick v Axelrod, 59 NY2d 574, supra)." (McCain v Dinkins, 84 NY2d 216, 225 [1994]).

The order to show cause dated June 19, 2006 unequivocally prohibited the operation of a junk yard on the premises. While it incorrectly referenced Local Law Number 1 of 1989, there is no indication whatsoever that defendant was confused as to the meaning of the term "junk yard" or what conduct was prohibited. Plaintiff has also shown that the order to show cause was served by delivery to defendant's former attorney, by service at defendant's place of business and by mailing to defendant at the subject property. Defendant filed a cross-motion to vacate the temporary restraining order, establishing that defendant had actual knowledge of the order. It is also clear that plaintiff's rights to enjoin the improper and unlawful operation of the junk yard have been prejudiced by a violation of the temporary restraining order.

Plaintiff has also submitted affidavits from persons who purchased used auto parts from the junk yard and witnessed ongoing operations during the period of the temporary restraining order. Plaintiff has thus made a prima facie showing that defendant is in contempt of court.

Defendant's opposition on the merits consists of his affidavit in which he acknowledges that he owns the subject junk yard. He states in entirely conclusory fashion that he has not engaged in the operation of the junk yard and has instructed the operators of the junk yard to stop operating it. He further avers that the junk yard is operated by his son and his son's mother and that he has no personal knowledge of the particular sales of used auto parts established by plaintiff. However, he has not denied that the junk yard has continued to operate despite the temporary restraining order. He has also failed to offer any proof that he has leased the premises to the current operators or that the terms of the lease prohibit him from exercising any control over the continued operation of the junk yard (see Moran v Village of Philmont, 147 AD2d 230, 234-235 [3d Dept 1989]; cf. People v Scott, 26 NY2d at 289-290). Defendant has therefore failed to show the existence of any triable

issue of fact with respect to a defense to contempt. As such no hearing is warranted (see Bowie v Bowie, 182 AD2d 1049, 1050-1051, [3d Dept 1992]; see also Snyder v Snyder, __ AD3d ___, 2007 NY Slip Op 03531 [4th Dept 2007]; Ginther v Ginther, 13 AD3d 1128 [4th Dept 2004]). Accordingly, defendant shall be held in contempt of court.

Plaintiff has not shown that the violation of the order has resulted in any actual loss or injury. As such, defendant shall be fined the sum of $250.00 and shall be required to pay all of plaintiff's expenses and attorneys fees incurred in the instant application (Judiciary Law § 773). Plaintiff's counsel shall serve and file an Affirmation of Legal Services detailing the fees and expenses to which plaintiff claims entitlement within 20 days of the date hereof. Should defendant seek to challenge the reasonableness of these fees, his counsel shall notify the Court and plaintiff's counsel in writing within five (5) days of receipt of such affirmation.

The Court notes that after the initial version of the instant decision and order was drafted, but before its issuance, defendant submitted an affidavit from his son alleging that the parts referenced in the affidavits submitted by plaintiff were acquired from third parties and were not related to the junk yard. Defendant has not offered any excuse for the delay in submitting the affidavit, and the facts alleged therein were certainly known to defendant's son at the time the motion was made. As such, the affidavit is not properly before the Court. Moreover, the definition of junk yard incorporated in the temporary restraining order includes "any place where the storage, collection or sale of any second-hand material of any kind or substance for salvage purposes is handled ***." Even if the salvaged auto parts did not originate in the subject junk yard, the affidavits indicate that they were collected, handled and sold at the subject premises, in violation of the temporary restraining order. Furthermore, defendant's son does not address those portions

of the affidavits alleging that normal business operations were occurring at the junk yard. In addition, this Court, by decision and order dated August 24, 2006, has already determined that the injunctions associated with this action are applicable to defendant's other businesses which are operated from the same site. Defendant's son's claim that S&S Auto sold the parts is therefore irrelevant. As such, the affidavit, even if properly submitted, fails to raise an issue of fact.

Accordingly, it is

ORDERED that plaintiff's application for an order of contempt is hereby granted, and it is further

ORDERED that defendant shall be fined the sum of $250.00 together with plaintiff's expenses and counsel fees, and it is further

ORDERED that defendant shall pay such sum within seven days of receipt of an Affirmation of Legal Services, unless defendant challenges the amount of attorneys fees in writing within five days of such receipt; and it is further

ORDERED that a warrant of commitment shall issue if defendant fails either to pay the fine with expenses or challenge the amount of attorneys fees in a timely manner.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for plaintiff, who is directed to enter this Decision and Order without notice and to serve all attorneys of record with a copy of this Decision and Order with notice of entry.

Dated: May 11, 2007
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers considered:

Notice of Motion dated March 12, 2007; Affirmation of Mark D. Greenberg, Esq. dated March 12, 2007 with Exhibit A annexed; Affidavit of Stephen Apisa, Sr. sworn to March 7, 2007 with Exhibit A annexed; Affidavit of Antonia Fiscarelli sworn to March 6, 2007 with Exhibit A annexed; Affidavit of Rudolph Jahn sworn to March 8, 2007;

Notice of Cross-Motion dated April 3, 2007; Affirmation of Peter A. Lynch, Esq. dated April 3, 2007; Affidavit of Stephen O. Nalley sworn to April 3, 2007 with Exhibit 4 annexed; Affidavit of Joshua L. Farrell sworn to April 2, 2007 with Exhibits 1-3 annexed;

Affirmation of Mark D. Greenberg, Esq. dated April 4, 2007 with Exhibits A-B annexed;

Supplemental Affirmation of Peter A. Lynch, Esq. dated April 5, 2007 with Exhibit A annexed;

Affidavit of Stephen B. Nalley sworn to May 2, 2007 with Exhibits 1-4 annexed;

Reply Affirmation of Mark D. Greenberg, Esq. dated May 3, 2007.