

**Riverside Capital Advisers, Inc. v First Secured  
Capital Corp.**

2007 NY Slip Op 32761(U)

August 30, 2007

Supreme Court, Nassau County

Docket Number: 0600-99/

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 12**

RIVERSIDE CAPITAL ADVISERS, INC., as investment advisor to Winchester Global Trust company Limited, and WINCHESTER GLOBAL TRUST COMPANY LIMITED, as trustee of The Factored Receivables Trust, as successor in interest to Highlands Financial Services, Inc.,

Plaintiffs,

INDEX NO.: 020600/1999  
MOTION DATE: 07/13/2007  
MOTION SEQUENCE: 060

-against-

FIRST SECURED CAPITAL CORPORATION, WET RESOURCES CORP., THE THOMAS B. DONOVAN FAMILY TRUST and THOMAS E. WYNNE,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.....	1
Affirmation of Kenneth A. Lapatine, Exhibit B, Deposition Transcripts.....	2
Affirmation of Kenneth A. Lapatine, Volume II.....	3
Plaintiff's Memorandum of Law in Support of Motion to Establish that the Contemnors did not Purge Their Contempt.....	4
Memorandum of Law in Opposition to Winchester's Motion for Contempt.....	5
Affirmation in Opposition of Kenneth E. Aneser & Exhibits Annexed.....	6
Plaintiff's Reply Memorandum of Law in Further Support of Motion to Establish that the Contemnors did not Purge Their Contempt.....	7
Affirmation of Kenneth A. Lapatine in Further Support of Winchester's Motion to Establish that the Contemnors did not Purge Their Contempt & Exhibits Annexed.....	8

This motion by plaintiff, Winchester Global Trust, for an order imposing a fine upon contemnors Thomas B. Donovan, Pamela Donovan and the Thomas B. Donovan Family Trust (The Contemnors) in an amount equal to the unsatisfied judgment entered in favor of plaintiff and against defendant, plus interest, and incarcerating the aforesaid contemnors until payment of such fine, by reason of the contemnors failure to purge their contempt is determined as follows.

This action has been the subject of several prior motions (59 in fact) and familiarity with the facts is presumed.

On March 8, 2006, the then "alleged" Contemnors were held in civil contempt. They were allowed to purge the contempt by paying a fine representing the actual costs to plaintiff's attorney, by responding to the Information Subpoena dated December 30, 2003 and by appearing to give testimony on oral deposition. The application sub judice requires the court to determine whether the Contemnors did purge their contempt by further responding to the aforesaid Information Subpoena (since March 8, 2006) and by answering questions on oral deposition relevant to the information sought in the Information Subpoena.

A farce is an empty show, a mockery. At the other end of the spectrum is serious business, testimony given in one's defense. The corner stone of Constitutional law is due process; Justice requires that no one be deprived of an opportunity to confront his or her accuser, of an opportunity to be heard in opposition to charges made, or to have a decision based on facts decided by a jury of one's peers. It has become a wearisome task in this case to keep due process from becoming a farce. Words of reason become laborious. Intolerance remains suppressed only by patience exerted with maniacal concentration.

"In Law, the best decisions are based on evidence." N.Y. Times, 8/22/07 at p A23, col5.

Thomas B. Donovan and Pamela Donovan were given an opportunity to purge

their contempt by presenting evidence. They had previously been held in contempt for their inaction in providing any loan histories. Riverside v First Secured Capital, 28 A.D.3d 455, 456-57 (2d Dept 2006). Starting in April 2006, for eleven days, they testified under oath that they do not have records beyond those that they have already produced concerning the mortgages, ultimately foreclosed upon or assigned, which they used Winchester's money to purchase. They have no other records of money proceeds from the disposition of Winchester's mortgages. Neither have they records of expenses incidental to a foreclosure sale, or resale of the real properties subject to the mortgages bought with Winchester's money. They testified that they couldn't produce any "records" and that they cannot testify to such circumstances. The record now before me shows there is neither information nor tax records (either sales tax, real property or income), neither information about or promissory notes, nor information about assignments of bid, or records thereof, no employment records or pertinent information, no records of professional fees nor information, no investment records or recalled information, no newly recorded mortgages or information regarding same, no receipts, no invoices, no record of closing attorneys, no recall about those things - nothing.

Since 2003, when the ironic statement, "7.6 million went out and nothing came back" was made, no "loan history" is visible. Three years of litigation, expense and time, devoted to due process. Wasteful to the individuals, but invaluable to society. Until it became a farce.

Mr. Donovan, his agents or assigns, wrote hundreds of checks, but he does not have records indicating the underlying obligation(s). The court should not be understood to take exception to that method of doing business, unless it is the money of another to which a fiduciary duty is owed, and unless it is not money which is the subject of a lawsuit beginning in July, 1999. And unless it is money that was secured by collateral. And unless the Appellate Division has affirmed the "existence of

numerous transfers to interlocking corporations controlled by the same principals... .”  
Riverside v Winchester, 28 A.D.3d 452, 53 (2d Dept 2006).

A party seeking to hold another in civil contempt bears the burden of proof. See McCain v Dinkins, 84 NY2d 216, 225-227 (1994); Rupp-Elmasri v Elmasri, 305 AD2d 394, 395 (2003). To prevail on a motion to hold another in civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court mandate, thereby prejudicing a right of another party to the litigation. See Rupp-Elmasri v Elmasri, supra; see also Judiciary Law § 753 [A] [3]; Goldsmith v Goldsmith, 261 AD2d 576, 577 (1999). The contempt must be proven by clear and convincing evidence. See Raphael v Raphael, 20 AD3d 463 (2005). An application to adjudicate a party in contempt is treated in the same fashion as a motion, and a hearing need not be held if an issue of fact is not raised. See Mulder v Mulder, 191 AD2d 541 (1993). This hurdle was passed on March 8, 2006, but the Contemnors were given another chance.

Defendants argue that reviewing their purge is subjective. In an exercise of abundant fairness this court will apply the aforesaid standard to the contemnors attempt to purge their contempt. It should be noted that application of that standard has now two times caused the Donovans to be held in contempt. 28 A.D.2d 456.

Moreover, case law holds that it is the contemnors burden to prove that they have purged their contempt. Bansal v Bansal, 281 A.D.2d 503 (2d Dept 2001). Their purge, be it compliance with the order or demonstration of inability to do so, must also be by clear and convincing evidence. Nestler v Nestler, 125 A.D.2d 836, 837 (3d Dept 1986). The Contemnors do not propose that they are objectively unable to comply with the lawful order of this court. Their position is that they just don't remember the details of these many transactions, occurring so long ago, and don't know about any documents.

In the present case, the record supports a determination of failure to purge. It

[\* 5 ]

shows that the plaintiff Winchester Global Trust Company Limited, as Trustee of the Factored Receivables Trust (hereinafter Winchester), has again met its burden of proving to a reasonable degree of certainty that the inaction of Thomas B. Donovan, Pamela Donovan and the Donovan Family Trust, violates a lawful and unequivocal court mandate to reveal the history of each loan from Winchester to First Secured Capital Corp., turned over for the purpose of buying distressed mortgages which were to be secured by the mortgaged property, of which they had knowledge and, in doing so, continue to prejudice Winchester's rights. See Judiciary Law § 753 [A]. See Allan Dampf, P.C. v Bloom, 122 AD2d 185, 186 (1986). Defendants have said nothing, done nothing, produced nothing to explain the history of the loans which they must repay with interest to plaintiff.

Moreover, it now appears that Thomas B. Donovan misrepresented certain facts in his deposition. In response to the question: "Mr. Donovan, could you state the names and last know address of all corporations or entities in which you have a legal interest since 1997" he omitted the names of Private Capital Management LLC and Private Capital Management Corp. Yet, he has commenced a shareholder's derivative suit for those entities which is pending in New York County.

Thomas B. Donovan and Pamela Donovan contemptuous conduct has been calculated and has actually impaired the right of the plaintiff, judgment creditor, Winchester Global Trust Co., to recover any amount of the judgment entered in its favor. Their failure to disclose the transfers of the liquidated mortgages has kept their assets out of the reach of the plaintiff judgment-creditor. Corpuel v Galasso, 659 N.Y.S.2d 65, 66 (2d Dept 1997). Accordingly, it is

ORDERED and ADJUDGED that plaintiff, Winchester Global Trust Company, have judgment against the Contemnors, Thomas B. Donovan and Pamela Donovan, and the Donovan Family Trust in the full amount of the uncollected judgment, \$21,471,650.29 plus interest. It is further

ORDERED that failure to pay said fine within three (3) weeks of the date of service upon the Contemnors of a copy of this decision shall result in a warrant issuing for their arrest and their incarceration until the fine is paid.

Dated: August 30, 2007

*J.B. Warshawsky*  
J.S.C.

**ENTERED**  
SEP 04 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE