

Casavecchia v Mizrahi
2007 NY Slip Op 32914(U)
September 11, 2007
Supreme Court, Nassau County
Docket Number: 8635-05/
Judge: Ira B. Warshawsky
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 12

JOSEPH CASAVECCHIA, SR.,

Plaintiff,

INDEX NO.: 008635/2005
MOTION DATE: 08/13/2007
MOTION SEQUENCE: 008

-against-

WILLIAM W. MIZRAHI, HILLS OF HEARTLAND LLC
and CASA MASON CORP.,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavit & Exhibits Annexed.....	1
Affidavit in Opposition of William W. Mizrahi & Exhibits Annexed.....	2

This motion by plaintiff for an order pursuant to Judiciary Law §§ 753, 773, 750 and 751 punishing defendant, Mizrahi, for civil and criminal contempt for his alleged failure to obey three orders of this court enjoining him from transferring any funds from the defendant corporation, Hills of Heartland, during the pendency of this action, and for an order directing defendants Mizrahi and Casa Mason Corp., to restore all monies distributed, transferred, received or loaned from Hills of Heartland, for a further order directing defendant Mizrahi to restore to Hills all funds loaned by Hills including those transferred from the Hills bank account, for an order enjoining defendant Casa Mason Corp., from using diverting, transferring or disposing of any funds received from Hills until further order of this court, and for an award of attorney fees incurred on this motion is determined as follows.

Plaintiff and defendant were in business together for many years constructing and marketing residential housing of which Hills of Heartland is just one. Allegedly, as a development was completed, the profits were used to finance the building of a new development. There came a time when plaintiff was no longer associated with the business. When Hills of Heartland made a \$100,000 distribution to, inter alia, plaintiff but turned it over to Casa Mason Corp., plaintiff commenced this action, in May 2005, to regain possession of his \$100,000 distribution. Seemingly, other funds in the Hills of Heartland account were not distributed as profits to the members.

As the action progressed, plaintiff sought to enjoin the transfer of profits of a business, with which he was no longer associated, to related business entities. It is such transfers that are this basis of the alleged contempt by Mizrahi.

The action was resolved on a motion for summary judgment in favor of Plaintiff. The court ruled that the unilateral distribution of what was plaintiff's money in the sum of \$100,000 deprived him of his right to the funds, and that Mizrahi's transfer of funds from Hills of Heartland LLC to other entities deprived plaintiff, as a member, of his right to control the disposition of those funds. The action was assigned to Court Attorney/Referee Thomas Dana to determine the amount of funds rightfully belonging to Hills of Heartland but which had been loaned or transferred to other entities. The finding of the Court Attorney/Referee was that the clear and convincing evidence showed that "monies improperly transferred by Hills to Casa Mason as per Judge Warshawsky's decision total \$3,939,541.30." There were three loans and one payment of Mizrahi's attorney fees involved.

"A party seeking to hold another in civil contempt bears the burden of proof (see *McCain v Dinkins*, 84 NYS2d 216, 225-227; *Rupp-Elmarsri v Elmarsi*, 305 AD2d 394, 395). 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 supra*; see also Judiciary Law § 753[A][3]; *Goldsmith v Goldsmith*, 261 A.D.2d 576, 577). The contempt must be proven by clear and convincing evidence (see *Raphael v Raphael*, 20 A.D.3d 463). 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 A.D.2d 541).” Riverside Capital Advisors v Winchester Global Trust, 28 A.D.3d 455, 456 (2d Dept 2006).

Plaintiff alleges that three orders of the court have allegedly been disregarded and disobeyed by defendant Mizrahi. Each forbids him from moving any monies out of Hills of Heartland LLC.

First, is a Preliminary Injunction issued June 14, 2005 in open court which enjoined defendant from transferring funds from Hills of Heartland to any other entity without plaintiff’s consent. Plaintiff states that defendant a) transferred the sum of \$1,225,000 from Hills to Casa Mason during the period July - October 2005; and b) transferred the sum of \$50,000 to an entity called Centennial Estates, Inc., in August of 2005.

Second, in an order to show cause to punish defendant for contempt the court granted a temporary restraining order, dated November 22, 2005, which ordered that “pending the hearing of this motion, and further order of this Court, and in accordance with defendant’s stipulation on-the-record in open court, defendants, their attorneys, servants, employees, directors, officers, representatives, agents, affiliates and all persons or entities acting on behalf of, or in concert with defendants ... are enjoined and restrained from distributing, transferring loaning or otherwise disposing of any monies from Hills without the prior written consent of plaintiff.” That motion brought by Show Cause order was referred to trial and has never been decided on the merits. Thus, the original TRO remains in full force and effect.

The third order issued on the record by Court Attorney Referee, on November 30, 2006 whereby defendant Mizrahi was instructed that “no money is to move whatsoever for any reasons from the Hills of Heartland account to any third party save the plaintiff.” Plaintiff states that defendant transferred two million dollars from the Hills of Heartland account after that date.

Defendant does not deny that he has transferred money from Hills of Heartland. His defense is that it is the way they always did business. He differentiates between his diversion to Casa Mason of the \$100,000 distribution to plaintiff and the funds that have

been transferred from Hills directly. He argues that there is no point in getting "fresh money" to complete Casa Mason when they have their own. He submits that Court Attorney Referee Dana could not have meant that he could not wisely place two million dollars in Treasury Bills when directing that there be no transfer of funds. Continuing in this vein he claims that he did not understand that Hills of Heartland funds could not be put to the use of Casa Mason, only that it could not be turned over to a third unrelated entity.

However, in a decision and order of this court dated August 23, 2006, whereby summary judgment was granted in favor of plaintiff on all six causes of action, the court ruled that Hills of Heartland was not formed to loan money and despite the fact that one construction project had historically financed the other between the parties it was not lawful for it to continue so without the members' consent. It was pointed out that since defendant was the only investor in Casa Mason an unsecured, unguaranteed, interest free loan from Hills of Heartland only benefitted defendant. To the extent that defendant claims that he did not understand the direction of the court stated thrice, he should have sought clarification. Riverside , 28 A.D.3d at 457.

In the present case, the record supports a determination of contempt. The proof shows that plaintiff Joseph Cassevecchia, Sr. has met his burden of proving to a reasonable degree of certainty that the defendant did transfer funds belonging to Hills of Heartland LLC to other entities or individuals or vendors in continuation of his financing the construction of one residential building project, here primarily Casa Mason Corp., with the assets and liquid funds and credit of a completed residential building project, in this case Hills of Heartland, has violated a lawful and unequivocal court mandate of which he had knowledge and by which the right of plaintiff to have control of such funds has been impaired. There were three explicit directives made on the record in open court and in two Show Cause Orders, which defendant Mizrahi, acting pro se and at times with counsel, heard and of which he had cognizance (see Judiciary Law §750 [A]) and he nonetheless willfully disobeyed those lawful mandates of this court. (See Judiciary Law § 750).

Plaintiff has sustained an actual loss by reason of the misconduct of defendant

as he has been deprived of the use and control of \$100,000. Plaintiff has sustained an additional actual loss as a result of the contempt committed by defendant since the funds belonging to Hills of Heartland LLC, of which he is a member, have not been available for distribution to plaintiff but have been invested against his wishes in another company.

Section 773 of the Judiciary Law provides that a fine sufficient to indemnify the aggrieved party is imposed to punish an offense where plaintiff has suffered an actual loss or injury. In this case the loss to plaintiff of \$100,000, diverted from him, is an actual loss resulting from defendant's using the funds of Hills of Heartland against the prohibition by the court. It is certain that that money is owed to him from Hills of Heartland. It is, therefore,

ORDERED that defendant William Mizrahi turn over to plaintiff \$100,000 together with interest within three (3) business days of the date of service upon him of a copy of this order. Failure to comply with the foregoing directive shall result in his incarceration until payment of the fine.

Section 773 further provides that where it is not shown that an actual loss or injury has been caused, a fine may be imposed, not exceeding complainant's costs and expenses and two hundred and fifty dollars. In this case plaintiff is entitled to the costs and expenses incurred by counsel representing him on this motion, plus \$250.00.

However, plaintiff's actual costs beyond \$100,000 resulting from defendant's violation of the court's orders is not readily discernable. The court cannot determine on this record that the return and distribution of the aggregate sum of three loans out of Hills is the true amount of profits Hills of Heartland LLC has earned. Yet, to the view of the court a fine of \$250.00 is insignificant to defendant and would serve to encourage wilful and flagrant disobedience of this court's orders. Moreover, plaintiff does not have another remedy for ascertaining the amount that should rightfully be distributed to him, and to effect its distribution, without initiating an action to account and pursuing successive motions to recover what is his due. It is for this reason that the court determines that defendant is guilty of criminal contempt in failing to obey three clear and unequivocal court orders and several admonitions that the funds of Hills of

Heartland should not be used without the consent of plaintiff.

Accordingly, the record submitted on this motion supports a finding that defendant's actions were calculated to and actually did defeat, impair and prejudice plaintiff's right in this civil proceeding. Seril v Belmord Tenants Ass'n., 139 A.D.2d 401 (1st Dept 1988). It is, therefore,

ORDERED that defendant is remanded to the custody of the Sheriff to be incarcerated until he turns over to Hills of Heartland the sum of \$2,000,000.00. He is ORDERED to establish to the satisfaction of the court the cash reserves that Hills of Heartland LLC now has or should have upon repayment of all loans, and for which it cannot be demonstrated that a legitimate corporate purpose would be served by not distributing them. He is ORDERED to turn over to plaintiff funds equal to the percentage of plaintiff's interest in the profits of Hills of Heartland LLC. A warrant for his arrest shall issue three (3) business days after the date of service of a copy by plaintiff upon defendant of this order upon the contemnor's failure to abide by the foregoing directive, upon affidavit by plaintiff giving notice of the contemnor's lack of compliance.

Dated: September 11, 2007

J. P. Wanshush

J.S.C.

ENTERED
SEP 14 2007
COUNTY CLERK OF
NASSAU COUNTY