

**Bean v Bean**

2007 NY Slip Op 34382(U)

October 20, 2007

Supreme Court, Albany County

Docket Number: 7678-04

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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KAREN BEAN,

*Plaintiff,*

**DECISION and ORDER**

**RJI NO.: 0104080406**

**INDEX NO.: 7678-04**

-against-

DAVID BEAN,

*Defendant.*

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Albany County Supreme County All Purpose Term, October 9, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Carol Stiglmeier, Esq.  
Bixby, Crable & Stiglmeier, PLLC  
*Attorneys for the Plaintiff*  
19 Dove Street, Suite 301  
Albany, NY 12210

Kevin O'Brien, Esq.  
O'Brien & Associates  
*Attorneys for Defendant*  
18 Corporate Woods Blvd  
Albany, NY 12211

**TERESI, J.:**

“Throughout the course of the litigation, defendant continually disobeyed court mandates and failed to appear on multiple occasions.... defendant's contumacious pattern of obfuscation and delay, including his history of failing to appear in court and refusing to comply with court mandates, such as support orders and disclosure requirements” are background to plaintiff’s current motion, seeking this Court to hold defendant in contempt. (Bean v. Bean, 53 AD3d 718, 719, 721 [3d Dept. 2008]).

Defendant, by an affidavit verified by his attorney and his attorney's affirmation, opposes plaintiff's motion. Defendant's verified affidavit, unsigned and unsworn by defendant personally, is unauthorized by the CPLR. Verifications are authorized only for pleadings (CPLR §3020), which defendant's affidavit in opposition clearly is not (CPLR §3011). As such, any factual representations made by defendant's counsel are hearsay, without foundation and can be given no weight. Further, in view of the fact that the defendant himself has submitted no affidavit, the Court infers adversely against him as to any information or facts within his control concerning the issues of this motion which he himself has not provided. (Bronson v. Algonquin Lodge Association, 295 AD2d 681 [3d Dept. 2002]).

While plaintiff specifically states that she seeks this Court to hold defendant in contempt for defendant's "willful non-compliance with this Court's Temporary Order", her motion is properly analyzed under DRL §245. DRL §245 provides, in pertinent part, states that:

"Where a spouse, in an action for divorce... makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced pursuant to [DRL §§243 or 244 or CPLR §§5241 or 5242] the aggrieved spouse may make application pursuant to the provisions of [Judiciary Law §756] to punish the defaulting spouse for contempt..."

Moreover, "[t]o sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and that the person alleged to have violated that order had actual knowledge of its terms". Labanowski v. Labanowski, 4 AD3d 690, 694 [3d Dept. 2004][citing Graham v. Graham, 152 AD2d 653 [3d Dept. 1989)]. "[P]rejudice to the rights of a party to the litigation must [also] be demonstrated" (McCain v. Dinkins, 84 NY2d 216, 226 [1994]); and a finding of contempt

requires the Court to find that there are no “less drastic” means of enforcement available.

(Kayemba v. Kayemba, 309 AD2d 1045 [3d Dept. 2003]; MacKinnon v. MacKinnon, 277 AD2d 636, 638 [3d Dept. 2000]; and DRL §245). In order to prevail on a motion to hold another in contempt “[t]he contempt must be proven by clear and convincing evidence”. (Rienzi v. Rienzi, 23 AD3d 447, 449 [2d Dept 2005]).

Relative to that portion of plaintiff’s motion seeking contempt for defendant’s non-payment of this Court’s distributive award, child support and maintenance payments, plaintiff has failed to demonstrate that she has exhausted her use of all remedies under DRL §§243 and 244 or CPLR §§5241 and 5242. The record demonstrates that the only enforcement procedures she has employed to collect on the judgments against defendant are her issuing two restraining notices and three information subpoenas. Although not an enforcement provision itself, her attorney also informed the “Support Collection Unit” of this court’s judgments and the Appellate Division-Third Department’s decision herein. The Support Collection Unit’s attempts at collection are not set forth in this record. Such proof falls far short of demonstrating that plaintiff has availed herself of all available remedies under DRL §§243 or 244 or CPLR §§5241 or 5242, or that there are no “less drastic” means of enforcement available to collect her distributive award, child support and maintenance payments. (Kayemba, supra).

Relative to that portion of plaintiff’s motion seeking contempt for defendant’s failure to comply with her information subpoena, dated July 31, 2008, directed to the defendant, again defendant is not held in contempt because plaintiff failed to demonstrate “less drastic” means. By affidavit of service, plaintiff demonstrated full compliance with the service provisions of CPLR §5224 (a)(3). Moreover, defendant’s attorney acknowledges defendant’s receipt and

characterizes such information subpoena as “harassing”. Far from harassing, such subpoena is precisely the efforts plaintiff must engage in to satisfy the judgment herein. While defendant is not held in contempt of court for his prior non-compliance with the information subpoena, defendant is hereby directed to answer plaintiff’s information subpoena, dated July 31, 2008, within twenty days of service of this decision and order upon defendant’s attorney. Defendant shall serve the answers to the information subpoena upon plaintiff’s attorney, and forward a copy thereof to the Court.

Similarly, relative to that portion of plaintiff’s motion seeking contempt for defendant’s failure to comply with this Court’s directives in its July 12, 2007 Decision and Order, again defendant is not held in contempt because plaintiff failed to demonstrate, by clear and convincing evidence, defendant did not so comply. Accordingly, defendant is hereby Ordered to submit an affidavit demonstrating compliance with this Court’s July 12, 2007 Decision and Order within twenty days of service of this decision and order upon defendant’s attorney.

Plaintiff also moves for a modification of this Court’s prior Order, dated October 18, 2007, which appointed Peter Coffey, Esq. as referee to “sell the real estate as set forth in Paragraph 39-b. of the Conclusions of Law of this Court as dated April 26, 2007”. Plaintiff seeks to modify such Order by allowing the referee to “transfer” specifically enumerated real estate parcels to herself, instead of selling them. Upon the transfer defendant would then be entitled to a credit of one half of the property’s value, as determined in this Court’s Conclusions of Law dated April 26, 2007, toward the distributive award defendant is obligated to pay plaintiff.

The lots plaintiff seeks to “transfer” are entitled: Presidential Lots 27, 26 and 25, Kinderhook, New York. Each lot was valued in this Court’s Conclusions of Law, dated April 26,

2007, paragraphs 23(8, 9 and 10) for \$90,000.00, \$95,000.00 and \$173,000.00 respectively. The parcels' total value is \$358,000.00 and defendant's one half share is \$179,000.00.

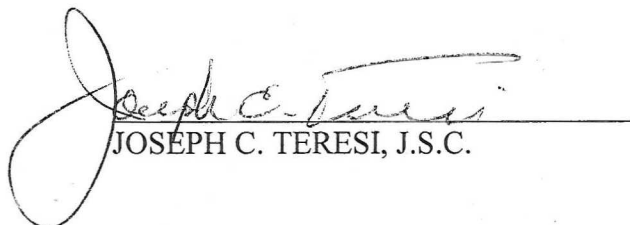
The modification plaintiff seeks is wholly in accord with this Court Conclusions of Law, dated April 26, 2007. The Conclusions of Law paragraph 40(a) specifically authorizes defendant's one half share of the proceeds of a sale of each parcel of real estate to be transferred to plaintiff, and such amount to be credited against the amount defendant owes plaintiff under the distributive award. Moreover, defendant does not specifically object to the proposed modification and the modification is in accord with this Court's powers under DRL §243. Accordingly, this Court's prior Order, dated October 18, 2007, is hereby amended to allow referee Peter Coffey, Esq. to "transfer" lots entitled Presidential Lots 27, 26 and 25, Kinderhook, New York to plaintiff and that upon such transfer defendant shall be credited \$179,000.00 toward the balance defendant owes to plaintiff for a distributive award.

Finally, plaintiff moves for attorney's fees, which demand is denied. The Court has assessed the Plaintiff's supporting papers for content, thoroughness, cogent legal arguments, and the results obtained, in determining that attorney's fees should not be granted on these motions.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 20 2007  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated September 22, 2008, Affidavit of Karen Bean, dated September 4, 2008, Affirmation of Carol Stiglmeier, dated September 4, 2008, Affirmation of Paige Crable, dated September 18, 2008, with attached Exhibits A-N.
2. Affidavit in Opposition of David Bean (unsworn), dated 10/6/08, Affirmation in Opposition of Kevin O'Brien, dated October 6, 2008, with attached Exhibits A-C.
3. Supplemental Affirmation of Carol Stiglmeier, dated October 8, 2008 with attached Exhibit A.
4. Supplemental Affidavit of Karen Bean, dated October 8, 2008 with attached Exhibits A-C.