

**Matter of Condon v Inter-regilious Found. for  
Community Org., Inc.**

2009 NY Slip Op 32518(U)

October 21, 2009

Supreme Court, New York County

Docket Number: 406703-2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 406703/2007  
**CONDON, RICHARD J.**  
 vs.  
**INTER-RELIGIOUS FOUNDATION**  
 SEQUENCE NUMBER : 008  
 PUNISH FOR CONTEMPT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
 OCT 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 10/21/09

*Judith J. Gische*  
**JUDITH J. GISCHE, J.S.C., J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 10**

-----x  
 In the Matter of  
**Richard J. Condon**, in his official capacity as  
 Special Commissioner of Investigation for  
 The City of New York School District,

**DECISION/ORDER**  
 Index No.: 406703-2007  
 Seq. No.: 008

Petitioner,  
 -against-

**PRESENT:**  
Hon. Judith J. Gische  
 J.S.C.

The Inter-religious Foundation for  
 Community Organization, Inc.,

Respondent.

-----x  
 Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
 (these) motion(s):

**Papers**

**Numbered**

<u>Index No. 406704-2007- Seq 007</u>	
Resp LW n/m (RR) w/AP, ANE (2) affirms, exh .....	1,2,3
Pet RJC opp w/AER affirm, exh .....	4
Resp LW reply w/ANE affirm, exh .....	5
<u>Index No. 406703-2007- Seq 008</u>	
Pet RJC n/m (contempt) w/AER affirm, proof of service .....	1,2,3
Resp IFCO opp w/ACP affirm, exhs .....	4
Pet RJC reply w/AER affirm, exh .....	5

**FILED**  
 OCT 29 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

*Upon the foregoing papers, the decision and order of the court is as follows:*

There are two separate special proceedings before the court, both involve the petitioner's ("SCI") investigation into a school trip by New York City public school students to Cuba in April 2007. The court has before it a motion in each of the proceedings. In the proceeding against respondent Lucius Walker, Jr. ("Reverend Walker") (I/M/O Condon v. Lucius Walker, Jr., Index No. 406704-2007), Reverend

Walker seeks an order vacating this court's June 4, 2009 decision/order ("vacate motion"). In the proceeding against the Inter-religious Foundation for Community Organization, Inc. ("IFCO") (I/M/O Condon v. The Inter-religious Foundation for Community Organization, Inc., Index No. 406703-2007), SCI seeks an order holding IFCO in civil contempt ("contempt motion").

Although the two proceedings are separate, the issues presented and arguments raised by all the parties are related and inextricably intertwined. Therefore, both motions will be considered and decided together in this single decision/order.

### **Motion to Reargue**

Despite having been styled as a motion to "vacate" this court's June 4, 2009 decision/order, the vacate motion is actually one to reargue that decision, in which the court declined to sign an order to show cause seeking a protective order (sequence no. 7) ("declination order") CPLR § 2221. The respondents argue that because the court's decision was made in connection with an ex parte motion, as opposed to a motion on notice, there is no right of appeal, and therefore, the court should at least let them have an appellate opportunity.

A motion for leave to reargue is addressed to the court's discretion. Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept. 1979). It may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1<sup>st</sup> Dept 1992). The court will permit reargument only because the Court's declination of the order to show cause was never intended to deprive respondents of a right of appeal. Upon reargument, however, the court adheres to its

[\* 4]

prior decision and order, because respondent Reverend Walker is not entitled to the relief sought in the vacate motion.

Since there has been extensive litigation in both proceedings, here and in the Appellate Division, the details of this case will not be repeated here and this decision/order will focus on the May 7, 2009 (corrected May 11, 2009) decision/order ("May 2009 order to compel") and the June 4, 2009 declination order ("declination order").

The declined order to show cause was for a protective order to prevent SCI from sharing with any other investigative or prosecutorial agency of the federal, state or local government certain documents that respondents were ordered to produce in this proceeding. In its declination order, the court decided that there was no basis for the relief requested and that the respondents had not provided to the court any legal authority that would allow this court to otherwise restrict how the SCI could use materials produced by IFCO pursuant to an investigative subpoena.

The respondents now argue that the court's declination of a protective order is inconsistent with the court's May 2009 order which recognized that Reverend Walker had an act of production privilege deriving from the 5<sup>th</sup> Amendment to the United States Constitution. Respondents claim that without the requested protections, two documents belonging to IFCO which were previously identified by Reverend Walker, could possibly incriminate him personally if they are otherwise produced. The documents, which are currently with respondents' attorney, have not yet been produced to SCI.

[\* 5]

While the court held in the May 2009 order that Reverend Walker could not be compelled to produce his personal documents, or documents belonging to IFCO, if the act of production would tend to incriminate him, the court also found that IFCO is still responsible for the production of such documents. Thus, the documents demanded by the subpoena did not have to be turned over by Reverend Walker himself if they were self-incriminating, but they nevertheless had to be produced to SCI, if they belonged to IFCO, even if they incriminated the Reverend.

In a letter dated May 20, 2009 (subsequent to the May 2009 court order), respondents' lawyer informed SCI that Reverend Walker had discovered two documents "in his capacity as IFCO's records custodian and are not personal documents." Prior to the court's May 2009 order Reverend Walker (and IFCO) had identified the same two documents in a combined privilege log dated February 5, 2008. The log did not distinguish between the respondents or who was asserting the privilege. When Reverend Walker appeared to testify on February 7, 2008, he voluntarily stated that he had found the two documents that were then turned over to respondents' attorneys.

Although Reverend Walker now argues that the court's prior orders are inconsistent, they are, in fact, completely consistent with one another. The court found that Reverend Walker need not serve as custodian, because of the act of production privilege that he was asserting, and directed IFCO to appoint a new custodian to conduct a search for all responsive documents and produce same. Respondents' attorneys, in fact, agreed that such a remedy was appropriate in light of Reverend

[\*6]  
Walker's asserted privilege.

Respondents contend that since Reverend Walker "has already been identified as the party who searched for, located and identified the documents [which are the subject matter of the February 5, 2008 privilege log], IFCO's production of these documents would be "in derogation" of Reverend Walker's Fifth Amendment privilege. The court rejects this argument. IFCO may not conceal these documents on the basis of Reverend Walker's privilege. IFCO's production of these documents vis-a-vis a new custodian would not "implicitly authenticate" the same, since Reverend Walker is not required to search for, locate or identify these documents in response to the subject subpoena. Whatever prior statements Reverend Walker has made with respect to these documents were made voluntarily and not court compelled, since the Court in its original decision (Order dated 1/17/08) and in subsequent orders thereafter always acknowledged and protected Reverend Walker's rights to assert his 5<sup>th</sup> Amendment privileges.

It is of no moment that Reverend Walker turned these documents over to respondents' attorneys. Reverend Walker's privilege exists only within the context of his own act of producing the documents and/or what he did to locate such documents. Directing a new custodian to produce the documents was the court's remedy in the May 2009 order, a remedy endorsed by the respondents themselves, to circumvent the conflict between Reverend Walker and IFCO's inability to comply with the subpoena. This order is easily complied with by the new custodian for IFCO because it has been repeatedly represented to the court that the documents are now with IFCO's own

attorneys. Thus the new custodian has ready access to such documents without needing any information from Reverend Walker.

Respondents still seek a broad restriction on SCI's use of the documents when IFCO turns them over. The original declination order addressed a request for broader restrictions. Now respondents present a narrower protective order than they had previously sought from the court. The proposed restriction is that SCI not divulge the information IFCO provides to the Office of Foreign Assets Control of the U.S. Treasury without first notifying Reverend Walker so he can challenge SCI's decision to turn those documents over. There is, however, no legal authority to support their argument that the court can impose any restriction on how the materials produced to SCI can be used by it. The court's orders concern compliance with investigatory subpoenas. They are not discovery materials produced in the context of a civil litigation and no analogy can be made to the court's right to protect further use of documents under Article 31 of the CPLR. The court, therefore, denies Reverend Walker's motion for a protective order.

### **Motion for Contempt**

The court ordered that IFCO designate someone (other than Reverend Walker) to search IFCO records for documents that are responsive to SCI's subpoena. IFCO designated Donald Reasoner as its custodian of records and on June 11, 2009 he appeared before SCI to answer questions about his search and to produce records ("examination"). At his examination, Mr. Reasoner described his search which included conventional and computerized files, drawers, boxes, etc. He did not find the two documents in dispute, but stated that respondents' lawyer had them. When SCI's

attorney asked Mr. Reasoner to instruct respondents' lawyer (Linda Backiel, Esq.) to give him the documents, Ms. Backiel interjected and stated the following on the record:

"I just need to object. I mean we know what the situation is with those documents. We've filed a motion for a protective order, it was denied, [and] we've moved to vacate and that really doesn't involve this witness. That's all. We haven't discussed it with him, we haven't given him the documents."

SCI contends that IFCO's refusal to produce those documents is a contemptuous act that impeded, impaired, prejudiced and defeated SCI's rights because IFCO withheld evidence relevant to the underlying investigations, and both documents were within the control of IFCO because its lawyer has them.

Respondents argue that they did not intend to disregard the court's May 2009 order to compel, but acted in good faith by first bringing the order show to cause that was declined by the court on June 4, 2008 and then bringing the motion on notice to reargue the court's declination order. The motion to reargue was served on June 10, 2009 and later amended on June 30, 2009, after the clerk rejected the original motion because the caption was improperly styled.

Respondents contend their good faith compliance is demonstrated by Mr. Reasoner's examination and production of several other responsive documents. Respondents also argue that since they were in the process of seeking relief from the court's June 4, 2009 declination order which was made in connection with their motion for a protective order, discovery was stayed pursuant to CPLR § 3103.

On a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to

the parties. DRL §245; Judiciary Law § 753[A][3]; see also: McCormick v. Axelrod, 59 NY2d 574, 583 *amended* 69 NY2d 652 (1983); Puro v. Puro, 39 AD2d 873 (1st Dept. 1990). Furthermore, the actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. Farkas v. Farkas, 209 AD2d 316 (1st Dept. 1994). A party seeking contempt must show that there are no alternative effective remedies available. Id.

SCI has established that respondents were served with the court's order requiring IFCO to produce documents pursuant to SCI's subpoena. Respondents have also established that there was no stay of the court's order and that respondents did not produce the documents at the examination on June 11, 2009. They have also established that the documents in dispute are relevant to the underlying investigation. The documents were turned over to IFCO's lawyers and the lawyers should have given them to the designated custodian so he could comply with the court's production order. The failure to produce the documents, as had been ordered, was clearly a disobedience of the court's order.

SCI has not, however, proved why an order compelling IFCO to comply with the subpoena would be ineffective at this point. However misguided they may have been, respondents apparently believed that their motion to "vacate" the court's decision, which included a more narrowly tailored proposed protective order, stayed the production of the subject documents in dispute. IFCO has not indicated that if it loses this motion to reargue the court's declination order, it will not produce the two documents to SCI.

Since contempt is a harsh remedy to be used only when other means of enforcement cannot be relied upon, the court will deny SCI's motion for contempt at this time and without prejudice. However, IFCO **MUST** produce the two documents and give testimony at SCI's offices on **November 10, 2009**, unless the parties mutually agree in writing to another date. If IFCO fails to comply with this order, the motion for contempt may be renewed. Nothing short of an appellate stay (or legal equivalent) should foreclose IFCO's compliance with this order.

**Conclusion**

Respondents' motion for an order by this court "vacating" its declination order of June 4, 2009 is granted only to the extent that the court deems it a motion for leave to reargue and grants reargument. Upon reargument, the court adheres to its June 4, 2009 order in its entirety and it is neither vacated nor otherwise modified.


Petitioner's motion to hold IFCO in contempt is denied at this time. However, IFCO **MUST** produce the two documents and give testimony at SCI's offices on **November 10, 2009**, unless the parties mutually agree in writing to another date.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 21, 2009

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
OCT 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK