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: Edward Fassett, Jr., Esq.
Attorney For the Plaintiff
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(Peter A. Lynch, Esq., of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

For a number of years the defendant has operated a junk yard on property located on U.S. Route 20, Town of Nassau in Rensselaer County. Over the years there have been disagreements between the Town and the petitioner with regard to the petitioner's operation of the junk yard and the Town's efforts to regulate it. In August 2002 the Town commenced an action against the petitioner in an attempt to enforce Town of Nassau Local Law No. 1 [1989] with regard to the licensing and regulation of junk yards. That action was ultimately resolved when the parties entered into a stipulation which was so-ordered by the

undersigned on September 9, 2002. In May 2003 the Town of Nassau commenced the instant action against the defendant. The action was temporarily halted when the parties, on November 8, 2004, entered into a Stipulation of Settlement which was so-ordered by the Court. That agreement, arrived at after much litigation and negotiation, memorialized a number of commitments on defendant's part regarding the manner in which he would operate and maintain the junk yard. By reason of defendant's violations of the November 8, 2004 Stipulation of Settlement the plaintiff, in June 2006, commenced an enforcement proceeding seeking to permanently enjoin the operation of the junk yard and for liquidated damages. On June 8, 2007 the Court, after a hearing, issued a permanent injunction prohibiting the defendant from further operation of the junk yard and awarding plaintiff liquidated damages[1]. The Court found that the defendant failed to erect and maintain a twelve foot high perimeter fence as agreed to in the Stipulation of Settlement; that he used junk vehicles as "gates" for the fence; that he failed to remove motor vehicles from outside the perimeter fence; and that he failed to remedy violations within 48 hours of receiving notice thereof from the plaintiff. On June 26, 2008 the defendant entered into a contract with JB Car Services, Inc. ("JB Car Services") to clean up of the property. A copy of the contract was forwarded to the attorney for the plaintiff. Under the contract, JB Car Services was to remove all cars, trucks, trailers, tires, equipment and miscellaneous metals by October 1, 2008. By letter dated September 18, 2008, plaintiff's counsel imposed a deadline of October 2, 2008 to complete the clean up. In furtherance of counsel's letter, on October

[1]The judgment was modified on appeal by reducing the award of liquidated damages (see Town of Nassau v Nalley, 52 AD3d 1013 [3d Dept., 2008], mot for lv to app dismissed 11 NY3d 771 [2008]).

1, 2008 plaintiff caused its Building Inspector, Rudolph Jahn, to visit the junk yard for purposes of conducting an inspection. Mr. Jahn observed numerous motor vehicles, auto parts, tires, buses, commercial trucks and truck part on the site. He observed vehicles stored within twenty-five feet of the property line. He noted that outdoor storage of vehicles violated a Town regulation requiring an approved site plan for such storage. As promised, by order to show cause dated October 3, 2008 plaintiff commenced the instant proceeding to hold the defendant in contempt of court by reason of defendant's continued operation of the junkyard in violation of the permanent injunction. The defendant submitted opposition to the application, and a hearing thereon was held on July 30, 2009.

The party seeking to hold another in contempt of court has the burden of proof (see, Beverina v West, 257 AD2d 957, 975 [3d Dept., 1999], citing Matter of Powers v Powers, 86 NY2d 63, 70). In order to support 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 party alleged to have violated that order had actual knowledge of its terms (see, Matter of McCormick v Axelrod, 59 NY2d 574, 583 [1983], amended 60 NY2d 652; Matter of Aurelia v Aurelia, 56 AD3d 563 [3rd Dept., 2008]; Matter of Gonzalez v Hunter, 50 AD3d 1262 [3rd Dept., 2008]). Contempt should not be granted unless the order violated is clear and explicit and unless the act complained of is clearly proscribed (see Alson v Hudson River Black River Regulating District, 54 AD3d 457,457 [3rd Dept., 2008]; Matter of Cloey Y, 51 AD3d 1078, 1079 [3rd Dept., 2008]). "The mandate alleged to be violated should be clearly expressed, and when applied to the act complained of it should appear, with reasonable certainty, that it had been violated"

(Pereira v Pereira, 35 NY2d 301, 308 [1974], quoting Ketchum v Edwards, 153 NY 534, 539; Bell v White, 55 AD3d 1211, [3rd Dept., 2008]; Chase v Chase, 45 AD3d 1206, 1207-1208 [3rd Dept., 2007]; Matter of Council 82, AFSCME v Campbell, 268 AD2d 859, 861 [3d Dept., 2000]; 10 Weinstein-Korn-Miller, NY Civ Prac ¶ 5104.15); Quick v ABS Realty Corporation,13 AD3d 1021,1022[3d Dept., 2004]; Matter of Wood v Wood, 8 AD3d 767, 768 [3d Dept., 2004]). Finally, it must be demonstrated that the offending conduct defeated, impaired, impeded, or prejudiced a right or remedy of the complaining party (see Judiciary Law § 753 [A]; Altbach v Kulon, 302 AD2d 655, 659 [3d Dept., 2003] Town of Lloyd v Moreno, 297 AD2d 403, 405 [3d Dept., 2002]; Matter of Wade v Pataki, 288 AD2d 788, 789 [3d Dept., 2001]).

Plaintiff called Rudolph Jahn as its only witness. Mr. Jahn testified that when he visited the junk yard on July 28, 2009 he observed junk vehicles parked in front of the fence of the premises, and within the interior. He observed automobile parts within two of the vehicles: a trailer and a step van. He also observed trucks, trailer bodies and small piles of automobile parts at various locations within the site. Five photographs taken by Mr. Jahn during his July 28, 2009 visit to defendant's property were received into evidence. Mr. Jahn testified that one of the photographs depicted at least six junk vehicles within the enclosure; and that another photograph depicted approximately thirty such vehicles.

The defendant testified that on June 26, 2008 he entered into a contract with JP Car Services, Inc. to remove all vehicles, tires, equipment and scrap from the site. Under the contract, the defendant was to be paid a certain amount of money per ton of scrap metal removed. In his words JP Car Services was to "clear the entire property". According to the

defendant, JB Car Services commenced performance of the contract within a week of its signing and stayed on the job for approximately four months. The defendant testified that during this time some 1,400 tons of vehicles were removed from the site. He further testified that he released JB Car Services from the contract when the prices for scrap metal decreased so much that the defendant was placed in a position where he would have to pay JB Car Services to remove any more vehicles. The defendant indicated that soon after JB Car Services left the job, he made arrangements with an individual by the name of Donald Slovak to continue the removal of junk vehicles from his property.[2] The defendant testified that he, together with the help of his son, his daughter and Mr. Slovak, removed vehicles from his property and transported them to a storage yard in the Town of Schodack. The defendant estimates that approximately one thousand cars were moved to the Schodack storage yard; and that approximately 3,000 vehicles have been removed from his junk yard site altogether. He testified that there are some 75 to 100 vehicles remaining on the site.

As relevant here, the June 8, 2007 court order recites as follows:

> "ORDERED that defendant is permanently enjoined from operating a junkyard in the Town of Nassau. . ."

As pointed out by the plaintiff the Town of Nassau Junk Yard Ordinance contains the following definitions:

> "Junk Yard. Any place where the storage, collection or sale of any second-hand material of any kind or substance for salvage is handled, including motor vehicles or parts thereof as defined in Section 136 of the General Municipal Law, but not including antique furniture." (Junk Yard Ordinance fo the Town of

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[2]Mr. Slovak was called as a witness, and testified that he removed approximately 600 tons of scrap metal from the site.

Nassau, Local Law No. 1 of the year 1989, Article 2)

"Junk Yard Operator. The owner, owners or lessee of any junk yard."

The defendant maintains that he ceased selling motor vehicle parts to members of the public upon issuance of the injunction on June 8, 2007, and that therefore he no longer operates a junk yard within the meaning of the injunction. This argument ignores the above definition of a junk yard, which includes a location within the Town where material for salvage is stored, and in so doing disregards the entire context from which all of plaintiff's enforcement efforts under the Town of Nassau Junk Yard Ordinance arose. Webster's II New College Dictionary includes the following definition for the term "salvage": "1. To save from loss or destruction. 2. To save (damaged or discarded material) for further use." It appears that the only reason vehicles were collected and stored on the defendant's property (at any time) was for purposes of salvage: that is, to sell the motor vehicle parts, the vehicles themselves, and scrap metal to a willing buyer, for some other and further use. The intrinsic nature of the vehicles, vehicle parts, and scrap as salvage did not undergo a change merely by reason that the defendant discontinued his sales of motor vehicle parts to members of the public. In the Court's view the defendant, by continuing to store salvage materials upon his property, continued to operate a junk yard within the meaning of the June 8, 2007 court order.

Turning to the issue concerning defendant's current non-ownership of the subject real property, as noted, during the pendency of the instant proceeding, on December 22, 2008, the defendant transferred the property to Barbara S. Secor, the mother of his children. The defendant testified on direct examination that the conveyance, made without consideration,

was done so that his son could have the property. Notably, the defendant agreed on cross-examination that the purpose of the conveyance was to "get away from" the Town's then-pending enforcement proceeding. It is well settled that the inability of a party to comply with a court mandate will not excuse compliance where the party's own acts rendered compliance impossible (see People ex rel. McGoldrick v Douglas, 286 App Div 807 [1st Dept., 1955], Held: Defendants' transfer of real property, thereby disabling them from compliance with a court mandate, was no defense to an application to hold them in contempt of court; see also IBE Trade Corp. v Litvinenko, 288 AD2d 125 [1st Dept., 2001], Held: "[the defendant] will not be heard to invoke a disability created by his own contumacious conduct as an excuse for failing to comply with the purge provisions of the order holding him in contempt"). Separate and apart from the foregoing, there is no evidentiary showing that vehicles and scrap remaining on the subject premises were included as a part of the conveyance to Barbara S. Secor (and therefore now owned by her), and/or that they are now beyond defendant's possession or control. In sum, the Court finds no merit to the defendant's argument that he is unable to comply with the June 8, 2007 court order.

With regard to defendant's alleged violation of the June 8, 2007 court order, it has been held that where a party has made a good faith effort to comply with a judgment or order that the imposition of contempt sanctions is improper (Matter of Benson Realty Corp. v Walsh, 54 AD2d 881, 882-883 [1st Dept., 1976], citing 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 5104.15). In this instance, as noted, the defendant hired JB Car Systems to clean up the premises in late June 2008. Said contractor removed roughly 1,400 tons of scrap from the site. When the price of scrap metal declined, the defendant did not cease his clean-up

efforts, but rather made an arrangement with Donald Slovak to continue the work. In addition, the defendant, together with members of his family, made a significant personal effort to remove vehicles and debris from the site. Defendant estimated that a total of 3,000 vehicles were removed from his property, with 75 to 100 vehicles currently remaining. Thus, by the time the plaintiff commenced the instant proceeding, the defendant had removed well over 95% of the vehicles from the site. Additionally, there is no evidence that the defendant said or did anything to suggest that he would discontinue his efforts to clean up the site after October 1, 2008. The Court finds, under principles of fairness and equity, that the defendant made a good faith effort to comply with the June 8, 2007 court order, and that he had substantially complied with the order as of October 1, 2008.

One final point should be made. In theory, the defendant was in violation of the June 8, 2007 order as soon as it was issued. Notwithstanding this fact, he could not be held in contempt of court until a reasonable time had transpired after issuance of the permanent injunction to enable him to comply. While it is evident that the defendant's efforts at cleaning up the property were indeed belated, the Court (without in any manner condoning the delay) cannot ignore the fact that the defendant embarked upon the clean up operation in earnest within two weeks after the June 12, 2008 order of the Appellate Division; and that up to the date of commencement of the instant proceeding he had made significant progress. Under such circumstances, and mindful that no specific deadline was mentioned in the June 8, 2007 order, it would be improper to hold the defendant in contempt (see Matter of Bryant v D'Elia, 82 AD2d 902 [2d Dept., 1981], Held: Contempt denied where no deadline was specified in the court order, and where the respondent had commenced to comply with the

court order, albeit belatedly).

The Court concludes that the application to hold defendant in contempt must be denied. This does not mean, however, that the defendant has fully complied with the June 8, 2007 order. To the contrary, it is evident from the record that he has not. The Court finds that a deadline should be imposed in order to bring this matter to conclusion. The Court will direct that all vehicles, trailers, tires, scrap metal and other debris be removed from the site on or before December 1, 2009 (see Matter of Bryant v D'Elia, supra).

Accordingly, it is

ORDERED, that the motion to hold the defendant in contempt of court is denied; and it is

ORDERED, that the defendant is directed to complete removal of all vehicles, trailers, tires, scrap metal and other debris from the subject real property on or before December 1, 2009.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the defendant. All other papers (other than the hearing transcript and exhibits) are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. Exhibits are being returned directly to the respective parties. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: September 3, 2009
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated October 3, 2008, Supporting Papers and Exhibits
2. Affidavit of Stephan O. Nalley, sworn to October 22, 2008
3. Affirmation of Peter A. Lynch, Esq., dated October 22, 2008 and Exhibits
4. Reply Affirmation of Edward Fassett, Jr., Esq. dated October 26, 2008
5. Hearing Transcript and Exhibits