

**Rochester Drug Coop., Inc. v Tremont Pharm. Servs.
Corp.**

2010 NY Slip Op 32395(U)

July 29, 2010

Supreme Court, Nassau County

Docket Number: 017025/2008

Judge: Ira B. Warshawsky

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MEMORANDUM**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,****Justice.****TRIAL/IAS PART 8**

ROCHESTER DRUG COOPERATIVE, INC.,**Plaintiff,****INDEX NO.: 017025/2008****-against-****TREMONT PHARMACEUTICAL SERVICES CORP.,
d/b/a TREMONT PRESCRIPTION CENTER f/k/a
F & N TREMONT CORP., TREMONT PAYMENT
CENTER CORP., 623 TREMONT AVE. DRUG
CORP., MICHAEL DRIVE MANAGEMENT CORP.,
VICTOR M. LaPERLA and ROSEMARIE LaPERLA****Defendants.**

DECISION AFTER HEARING ON CONTEMPT

Pursuant to the decision of this Court dated March 16, 2010, the Court ordered a hearing on the issue of contempt which took place on April 26, 2010.

Plaintiff requested an Order be entered to hold defendants in civil and criminal contempt of Court for wilfully disobeying a Temporary Restraining Order, dated February 2, 2009. That Order enjoined defendants from "selling, transferring, pledging, hypothecating, assigning, negotiating or in any way disposing of any assets of Tremont Pharmacy outside the ordinary course of business."¹ The Order also directed defendants immediately "to account for and remit all accounts receivables collected by Tremont Pharmacy and Z-Stop Drugs for prescriptions filled by patients that are currently or were previously serviced by Tremont Pharmacy to Zimmet

¹ Contempt Hearing Exhibit "1".

Bieber LLC (“Zimmet Bieber”),” attorneys for the plaintiff, Rochester Drug Cooperative, Inc. (“Rochester Drug”).² Plaintiff also seeks reimbursement of the costs, attorneys’ fees and incarceration of LaPerla pending full compliance of the request or his delivery of wrongfully seized monies in the amount of 199,609.66. Rochester Drug contends that such sum represents the accounts receivables and deposits into Tremont Pharmacy and Tremont Payment Center Corp. (“Tremont Payment Center”) accounts that were not tendered to Zimmet Bieber.

Plaintiff based his request on the following contentions:

- defendants received the sum of \$116, 841.24 in Medicaid reimbursements and instead of distributing it to the plaintiff, wrongfully converted the Tremont Pharmacy assets through the payment of personal expenses and fraudulent transfer to another pharmacy, Z-Stop Drugs, Inc. (“Z-Stop”), as well as Dale Pharmacy & Surgical Inc. (“Dale”), non-party, and Tremont Payment Center;
- defendants and their counsel had a notice of the Temporary Restraining Order as they were properly served with it;
- defendants wilfully violated the Temporary Restraining Order by not directing accounts receivable to the plaintiff’s counsel, using such monies outside of “ordinary course of business”, and prejudicing plaintiff’s rights.

Defendants seek dismissal of the plaintiff’s application for contempt on the grounds that:

- Temporary Restraining Order failed to include an “unequivocal mandate” barring the use of accounts receivables;
- assets of Tremont Pharmacy were used in the “ordinary course of business” while Tremont Pharmacy was continuing to be active and not dissolved;
- plaintiff failed to establish by clear and convincing evidence that defendant LaPerla wilfully violated the Order of this Court;
- \$82,768.42 investment to Tremont Pharmacy came from the Victor La Perla’s personal savings and is not a subject to the Temporary Restraining Order.³

² Contempt Hearing Exhibit “1”.

³ Defendant’s Brief, p.1.

BACKGROUND

Plaintiff and defendant have been involved in the purchase and sale of pharmaceutical products with one another for a number of years. Defendants did not deny that they are indebted to the plaintiff.⁴ The Court entered judgment against defendants on October 21, 2009 in the amount of \$5,062,015.04. According to the plaintiff, said judgment remains wholly unsatisfied. On February 2, 2010, the Court granted the relief sought by plaintiff in his Order to Show Cause and issued a Temporary Restraining Order to protect plaintiff's priority lien on the Tremont Pharmacy assets.⁵ Defendants did not deny that Tremont Pharmacy received \$116,841.24 in Medicaid reimbursements, and that they did not turn over any portion of said monies to Zimmet Bieber. Moreover, Victor LaPerla admitted that he transferred the Tremont Pharmacy's assets to Z-Stop that was servicing Tremont Pharmacy's accounts.⁶ On April 29, 2010, the Court upheld the Temporary Restraining Order.⁷ At the hearing, defendants acknowledged that Tremont Pharmacy ceased the direct sale of pharmaceuticals by no later than December 31, 2008 but remained an active New York corporation.⁸ Its employees remained employed continuing to supply nursing homes, clinics, and other facilities with pharmaceuticals. Victor LaPerla also did not deny that he deposited all accounts receivables of Tremont Pharmacy to the account of Tremont Payment Center. Additionally, defendant contends that between March and October 2009, he deposited \$82,768.42 of his own funds and not from the accounts receivables into the Tremont Pharmacy's accounts.

DISCUSSION

Civil contempt:

"To sustain a finding of civil contempt, a court must find that the alleged contemnor

⁴ Exh. "C" to Affirmation in Support of Order to Show Cause.

⁵ Contempt Hearing Exhibit "1", Doud Aff. At Exhibits "C" and "D".

⁶ Contempt Hearing Exhibit "1", Kenny Aff. at ¶¶ 4-5; Frost Aff. at ¶26).

⁷ Contempt Hearing Exhibit "1".

⁸ Contempt Hearing Exhibit "4".

violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced.” (*Casavecchia v. Mizrahi*, 57 A.D.3d 702, 703 [2d Dept. 2008]). The contempt must be proven by clear and convincing evidence. (*Vujovic v. Vujovic*, 16 A.D.3d 490, 491 [2d Dept. 2005]). “ [I]t is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party (citations omitted)’ “. (*Casavecchia v. Mizrahi*, 57 A.D.3d 702, 703 [2d Dept. 2008]; quoting *Hinkson v. Daughtry-Hinkson*, 31 A.D.3d 608, 608 [2d Dept. 2006]).

Judiciary Law §753 provides:

Power of courts to punish for civil contempts

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

. . . .

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.

Imposition of fine in the case of civil contempt is governed by Judiciary Law §773 (N.Y.

McKinney’s 2010):

§773. Amount of fine

If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

In the instant case, the Temporary Restraining Order did not fail to express an “unequivocal mandate” because defendant Victor La Perla admitted that he had a knowledge and understanding of such order. Defendant testified that he was aware that he could not transfer the assets of Tremont Pharmacy outside of the ordinary course of business and must remit accounts receivables to Rochester Drug Cooperative. Additionally, Victor La Perla contends that while the premises of the Tremont Pharmacy were closed, and its direct sale of pharmaceuticals was ceased, Tremont Pharmacy continued servicing its customers to maintain relationships with them through Z-Stop and Dale Pharmacies using account of Tremont Payment Center in order to pay Rochester Drug. Therefore, such contentions and testimony of Victor La Perla demonstrate his knowledge and understanding of sections (b) and (e) of the Temporary Restraining Order.

Further, defendant explained that all of the receivables of Tremont Pharmacy were used in the ordinary course of the business, and that he never intended to violate the Temporary Restraining Order. However, the motive for its violation is not determinative in finding a civil contempt. (*Casavecchia v. Mizrahi*, 57 A.D.3d 702, 703 [2d Dept. 2008]). Tremont Pharmacy received payments from Medicaid in the amount of \$116,841.24 that were deposited to Tremont Payment Center. Using both Tremont Pharmacy and Tremont Payment Center accounts “interchangeably” for many years, defendant did not remit any of these monies to Zimmet Bieber in order to comply with the Order. Therefore, such actions by the defendant represent a clear violation of section (e) of the Temporary Restraining Order and prejudice the rights of the plaintiff.

Victor La Perla explained that the reason for not remitting monies received from Medicaid to plaintiff was that business expenses of Tremont Pharmacy in the ordinary course of business exceeded \$116,841.24. However, not turning the accounts receivables to the plaintiffs’ counsel while having a knowledge of the Temporary Restraining Order shows defendant’s disobedience that is sufficient to find a civil contempt.

Pursuant to the compensatory nature of the punishment for a civil contempt, the statute requires an assessment that will “indemnify the aggrieved party”. In our case, such party is the plaintiff, who was prevented from collecting the accounts receivables of Tremont Pharmacy due to violation of the Temporary Restraining Order by defendants. The existence of such injury is not

disputed, and its extent could not be less than \$116,841.24, the amount collected from Medicaid reimbursements and deposited to Tremont Payment Center's account. Therefore, Victor La Perla is directed to deliver a payment to plaintiff's counsel in the amount of \$116,841.24, the accounts receivables of Tremont Pharmacy. An additional monetary relief in the amount of \$82,768.42 requested by the plaintiff is not a subject to the defendant's responsibility to the plaintiff. Such monies were deposited to Tremont Pharmacy's account from Victor La Perla's personal savings that were not accounts receivables of Tremont Pharmacy. Thus, such sum is not a subject to the section (e) of the Temporary Restraining Order. Finally, defendant is responsible for plaintiff's costs, disbursements, and reasonable attorney's fees incurred in filing and pursuing the within applications. The determination of said fees and costs shall be made at a hearing conducted by Court Attorney/Referee Frank Schellace (Special Term Part 2 Courtroom, Room 060, Lower Level) on September 15, 2010, at 9:30 A.M. Counsel for plaintiff shall serve defendants, and file with the Clerk of the Court, a Note of Issue and pay all appropriate fees for the filing thereof on or before September 1, 2010.

Criminal contempt:

"In order to sustain a finding of criminal contempt, there must be proof beyond reasonable doubt that the contemnor willfully failed to obey an order of the court." (*Rubackin v. Rubackin*, 62 A.D.3d 11, 15 [2d Dept. 2009]). The purpose of criminal contempt is punitive and to vindicate the authority of the court (*Dalessio v. Kressler*, 6 A.D.3d 57, 65 [2d Dept. 2005]). No showing of prejudice to the rights of a party to the litigation is needed "since the right of the private parties to the litigation is not the controlling factor." *Id.* Whether contempt is civil or criminal, it depends on purpose and character of it and "not the fact of punishment." (*Rubackin v. Rubackin*, 62 A.D.3d 11, 15-16 [2d Dept. 2009]; quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441-42 [1911]). The character of punishment can be determined by drawing a distinction of whether defendant refused to do an act commanded, and contempt has remedial purpose, or whether defendant did an act forbidden, and contempt has punishment purpose. *Id.* "If it is for civil contempt, the sentence is remedial, and for the benefit of complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court." *Id.* "An essential element of criminal contempt is willful disobedience. Knowingly failing to comply with a court

order gives rise to an inference of willfulness which may be rebutted with evidence of good cause for noncompliance.” (*Dalessio v. Kressler*, 6 A.D.3d 57, 66 [2d Dept. 2008]).

A “beyond reasonable doubt” standard of proof to establish that defendant wilfully violated the Temporary Restraining Order is not met here. Accordingly, the defendant will not be held in criminal contempt. Victor La Perla contends that he never intended to violate the Temporary Restraining Order and believed that his actions were permissible according to his interpretations and understanding of the Order. Although the defendant failed to comply with it by not remitting Medicaid payments to the plaintiff’s counsel, such inference of noncompliance does not establish its willfulness. Moreover, the usage of the said monies along with \$82,768.42 that were deposited from the Victor La Perla’s personal funds demonstrated defendant’s intention to “keep the company running” and continue business with the Tremont Pharmacy clients to repay Rochester Drug. Such facts represent evidence of good cause that rebuts the inference of willful disobedience. Additionally, the purpose of the contempt must be remedial and not punitive, “to vindicate the authority of the court” (*Dalessio v. Kressler*, 6 A.D.3d 57, 66 [2d Dept. 2008]).

By not directing the accounts receivables of the Tremont Pharmacy to the plaintiff’s counsel, Victor La Perla refused to perform an affirmative act but did not perform “an act forbidden” in accordance with the Temporary Restraining Order. (*Rubackin v. Rubackin*, 62 A.D.3d 11, 16 [2d Dept. 2009]). Therefore, defendants are not guilty of criminal contempt.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: July 29, 2010


J.S.C.

ENTERED
AUG 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE