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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Attorneys For Defendant
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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 numerous disagreements between the plaintiff and defendant with regard to the defendant's operation of the junk yard, and the Town's efforts to regulate it. In August 2002 the Town commenced an action against the defendant in an attempt to enforce Town of Nassau Local Law No. 1 [1989] with regard to the licensing and regulation of defendant's junk yard. That action was ultimately resolved when the parties entered into a written stipulation which was

so-ordered by the undersigned on September 9, 2002. In May 2003 the Town of Nassau commenced the above-captioned 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 to be performed by the defendant regarding the manner in which he would operate and maintain the junk yard. By reason of defendant's alleged violations of the November 8, 2004 stipulation of settlement the plaintiff, in June 2006, commenced an enforcement proceeding seeking to permanently enjoin operation of the junk yard. On June 8, 2007 the Court, after a hearing, issued a permanent injunction prohibiting the defendant from further operation of the junk yard and awarded the plaintiff liquidated damages[1]. In its decision and order, the Court found that the defendant violated the November 8, 2004 stipulation of settlement in the following manner: in failing to erect and maintain a twelve foot high perimeter fence; in using junk vehicles as "gates" for the fence; in failing to remove motor vehicles from outside the perimeter fence; and in failing to remedy such violations within 48 hours of receiving notice thereof from the plaintiff. After issuance of the decision of the Appellate Division (see footnote one, infra) the defendant, on June 26, 2008, entered into a contract with a salvaging company named JB Car Services, Inc. ("JB Car Services") to clean up the property. A copy of the salvage 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

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

metals by October 1, 2008. On October 3, 2008 plaintiff commenced a proceeding to hold the defendant in contempt of court by reason of defendant's failure to clean up the site ("first contempt proceeding"). In an order dated September 3, 2009 the Court denied the contempt application, but directed the defendant to complete removal of all vehicles, trailers, tires, scrap metal and other debris from the subject real property on or before December 1, 2009. Upon the defendant's failure to meet the court-ordered deadline the plaintiff, by notice of motion dated February 9, 2010, made the instant application to hold the defendant in contempt (second contempt proceeding). The grounds for the application were defendant's failure to comply with the December 1, 2009 deadline imposed by the Court in its order dated September 3, 2009. The defendant submitted opposition to the instant application and, in addition, made a motion to vacate all previous orders issued in this matter. In a decision-order dated May 17, 2010, the Court denied the defendant's motion to vacate all previous orders, and found the defendant to be in contempt of court by reason of his failure to comply with the Court's orders dated June 8, 2007 and September 3, 2009. In its decision-order dated May 17, 2010 the Court directed that there be a hearing with regard to plaintiff's actual loss or injury within the meaning of Judiciary Law § 773. The hearing was held on July 15, 2010.

In the meantime, the defendant made a motion to vacate the Court's order dated May 17, 2010, pursuant to CPLR 5015. The defendant has not relied upon any specific statutory ground set forth in CPLR 5015 (a). Rather, the primary argument advanced in the motion is that the defendant was not afforded a hearing with respect to the issue of whether the defendant should be held in contempt of court. The Court recognizes that where there are

contested issues in a contempt proceeding a hearing must be conducted. Notably, "due process does not mandate a hearing in every instance where contempt is sought; it need only be conducted if a factual dispute exists which cannot be resolved on the papers alone" (Ovsanikow v Ovsanikow (224 AD2d 786 [3d Dept.,1996]), at 787). Stated differently, "a hearing is required only where the alleged contemnor raises a question of material fact by submitting evidence directly contradicting the allegations of the contempt application" (People of the State of New York v Hooks, 64 AD3d 1075, at 1076 [3rd Dept., 2009]).

A review of the affidavit of the defendant submitted in opposition to the instant application reveals that his primary contention was that he was not able to clean up the property by reason that he had been prevented by third parties from doing so. By way of explanation, he indicates that in December 2008 (during the pendency of the first contempt proceeding) he had deeded a certain portion of the junk yard property (hereinafter, the "Secor Property") to an individual named Barbara Secor[2]. Defendant indicates that an incident occurred at the Secor property on November 27, 2009, during which Ms. Secor called the New York State Police and had the defendant removed from the premises. According to the defendant, Ms. Secor subsequently prohibited the defendant from entering upon her property to complete the clean-up operation. In one portion of his opposing affidavit the defendant acknowledged that the September 3, 2009 court order required him to remove all vehicles, trailers, scrap metal and other debris from the premises by December 1, 2009. He indicated that between September 3, 2009 and December 1, 2009 he made "substantial" efforts to clear that portion of the premises which he had retained. He further

[2]Barbara Secor is the mother of defendant's son, Stephen B. Nalley.

indicated that his son, Stephen B. Nalley, who was aware of the court order, initially took steps to clean up the Secor property; but that he (the son) discontinued those efforts. At that point, the defendant attempted to clean up the Secor parcel himself. The defendant indicated that on November 27, 2009, his son and Ms. Secor engaged in an altercation with the defendant concerning the items of personal property that he was attempting to remove from the premises. He asserted that his son and Ms. Secor claimed that the items were their property, not his.[3] He maintained that his intention in visiting the Secor property that day was only to remove property from the premises "that was causing the premises to allegedly be in violation of the Court's [September 3, 2009] order." The defendant further stated, "as a result, I was and still am unable to personally assure that Ms. Secor's portion of the property is in compliance with the Court's order." To support his contention that Barbara Secor continued to deny him access to her property, the defendant submitted an affidavit signed by Barbara Secor in which she confirms that she will not allow him on her parcel to remove any items of personal property. He also submitted various photographs of the Secor property which appear to depict various vehicles and debris upon the premises (and which, accordingly, appear to corroborate the contentions of the plaintiff).

None of the affidavits submitted by the defendant ever identified a single item of personal property which was owned by either Ms. Secor or their son Stephen B. Nalley. Nor did they controvert any of the plaintiff's contention's concerning the existence of junk

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[3]Notably the defendant himself, in his opposing affidavit, never took the position that any personal property on the Secor parcel belonged either to his son or Barbara Secor. Nor did he claim that his son was responsible for continuously depositing additional vehicles onto the Secor property. These claims were advanced for the first time during the course of the hearing held on July 15, 2010 with regard to the issue concerning the penalty to be imposed.

vehicles, trailers, tires, scrap metal and other debris on the premises. Not only did the defendant fail to refute the plaintiff's contentions concerning these matters, but rather his argument, as noted, narrowly focused on his claim that the he had been prevented by Ms. Secor from completing the clean-up process. In this respect the defendant failed to controvert any factual issue sufficient to warrant the conduct of a hearing with regard to the question of whether or not prohibited junk material remained on the junk yard site..

Among the arguments advanced by the defendant, the defendant maintains that the permanent injunction issued by the court in its June 8, 2007 court order, while preventing the defendant from operating a junk yard, did not direct closure of the junk yard. This issue was addressed in the Court's decision-order dated September 3, 2009 (included in defendant's moving papers) which relied upon the plaintiff's definition of a junk yard, as set forth in its Junk Yard Ordinance, which defined a Junk Yard as

> "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 as defined in Section 136 of the General Municipal Law, but not including antique furniture." (Junk Yard Ordinance of the Town of Nassau, Local law No. 1 of the year, Article 2)

A junk yard operator was defined as "the owner, owners or lessee of any junk yard." (id.). As noted, the same decision-order directed the defendant to complete the removal of all vehicles, trailers, tires, scrap metal and other debris by December 1, 2009. All of the foregoing constitutes the law of the case.

In its decision-order dated September 3, 2009 the Court rejected defendant's argument that he was unable to comply with the June 8, 2007 permanent injunction. The Court specifically found that inasmuch as his inability to comply with the permanent

injunction was self-created (through conveyance of a portion of the junk yard property to Barbara Secor prior to clean-up of the junk yard site), this would not operate as an excuse for noncompliance. The Court cited People ex rel. McGoldrick v Douglas (286 App Div 807 [1st Dept., 1955]) and IBE Trade Corp. v Litvinenko (288 AD2d 125 [1st Dept., 2001]) in support of this finding. The Court made the same finding in its decision-order dated May 17, 2010 with respect to defendant's failure to comply with the December 1, 2009 deadline imposed in the September 3, 2009 order.

Under all of the circumstances, the Court finds that the motion to vacate the May 17, 2010 decision-order must be denied.

Under Judiciary Law § 773, a fine imposed in a contempt proceeding may include the amount of any actual loss or injury suffered by the aggrieved party "by reason of the misconduct proved against the offender" (Judiciary Law § 773; see also State v Unique Ideas, Inc., 44 NY2d 345 [1978]; Riverside Capital Advisers, Inc. v First Secured Capital Corporation, 57 A.D.3d 870 [2d Dept., 2008]). In a decision-order dated June 22, 2010, the Court found that the actual loss or injuries at issue in this proceeding would be those items of damage suffered by the plaintiff as a consequence of defendant's misconduct, specifically, the defendant's failure to comply with the September 3, 2009 order, which established a December 1, 2009 deadline to complete cleanup of the junk yard. The Court determined that only those losses or injuries which arose after December 1, 2009 would have any relevancy to the instant proceeding, inasmuch as prior to December 1, 2009 the defendant could not be found to have disobeyed the September 3, 2009 court order.

At the hearing conducted on July 15, 2010 Kevin Condon, Code Enforcement Officer

of the plaintiff, testified that he expended twenty-one and one half hours in inspections and inventory of the defendant's property. He indicated that he was paid $25.00 per hour, for a total cost to the plaintiff of $537.50. Plaintiff's attorney, Edward Fassett, Jr., Esq. presented evidence that the plaintiff has incurred attorneys fees of $1,955.00 on this matter since December 1, 2009. The Court will award the plaintiff the sum of $2,492.50 to be paid by the defendant.

The Court observes that as a part of its claim, the plaintiff asserts that it is entitled to liquidated damages as set forth in the so-ordered stipulation dated November 8, 2004. Without determining whether liquidated damages might otherwise be recoverable, the Court finds that because the remedy under Judiciary Law § 773 is purely statutory, limited to plaintiff's "actual loss or injury", it may not award liquidated damages in the instant proceeding.

Lastly, the Court observes that Barbara Secor and Stephen B. Nalley are not subject to any pre-existing court orders, and are not currently subject to the jurisdiction of the Court. The Court is unaware of any Code enforcement proceedings which have been brought against them by the plaintiff. In a similar vein, it does not appear that the defendant has undertaken any legal action against them to gain access to the Secor Parcel to remove his personal property.[4] Limited relief can be granted under such circumstances. Phrased differently, complete relief may not be capable of being granted in future proceedings unless all parties have properly been brought before the Court.

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[4]There has been no evidentiary showing, nor claim made, that in December 2008, when the defendant transferred ownership of the Secor Parcel to Ms. Secor, that he also transferred to her ownership of the vehicles, junk and debris which remained thereon.

The Court has reviewed and considered the remaining contentions of the parties and finds them to be without merit.

Accordingly, it is

ORDERED, that defendant's motion to vacate the decision-order of the Court dated May 17, 2010 is denied; and it is further

ORDERED, that the defendant Stephen O. Nalley, is guilty of contempt of court in having willfully disobeyed the September 3, 2009 court order in that he failed to complete removal of all vehicles, trailers, tires, scrap metal and other debris from the subject real property on or before December 1, 2009; and it is further

ORDERED, that the said misconduct of the defendant Stephen O. Nalley and the offense committed by him as aforesaid was calculated to and actually did defeat, impair and prejudice the rights and remedies of the plaintiff, and it appearing that the misconduct of said defendant consisted of an omission to perform an act or duty which it was in his power to perform, and it is further

ORDERED, that a fine of $2,492.50 be and the same hereby is imposed upon the defendant, Stephen O. Nalley for the misconduct and contempt of court of which he was found guilty, as aforesaid, said fine consisting of disbursements of $537.50 and counsel fees of $1,955.00, said fine to be payable to the Town of Nassau.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the plaintiff. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. 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: January 13, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated February 9, 2010, Supporting Papers and Exhibits
2. Notice of Motion dated March 10, 2010
3. Affidavit of Kevin C. Murphy, Esq., sworn to March 10, 2010
4. Affidavit of Stephen O. Nalley, sworn to March 8, 2010
5. Affidavit of Heather M. Cole, Esq., sworn to March 10, 2010 and Exhibits
6. Affidavit of Barbara Secor, sworn to March 8, 2010
7. Affirmation of Edward Fassett, Jr., Esq. dated March 16, 2010
8. Affirmation of Edward Fassett, Jr., Esq., dated June 3, 2010
9. Affirmation in Opposition of Peter A. Lynch, Esq., dated June 18, 2010
10. Letter of Edward Fassett, Jr. dated June 21, 2010
11. Notice of Motion dated September 9, 2010, Supporting Papers and Exhibits
12. Affirmation of Edward Fassett, Jr., Esq. dated September 20, 2010
13. Transcript of Hearing Held on July 15, 2010 and Exhibits