

Rubin v Salters

2011 NY Slip Op 32057(U)

July 20, 2011

Supreme Court, Nassau County

Docket Number: 011687/07

Judge: Ira B. Warshawsky

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Scan

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/PART 7.

MARK RUBIN individually and derivatively on behalf and in the right of PRODIGY HOMES, LLC, MJM REALTY CO., LLC, MJM SOUTH CAROLINA, INC., MJM NORTH CAROLINA, INC, MJM LOUISIANA CORPORATION AND MJM CAPITAL PARTNERS INC.,

Plaintiffs,

- against -

INDEX NO.: 011687/07
MOTION DATE: 6/27/11
MOTION SEQUENCE: 31

JAMES SALTERS, DANISMINE CORP., CATALYST DEVELOPMENT CORP., SALTERS & SALTERS, INC., MARTIN J. BUSH and RICHARD BUCKHOLZ, and, as nominal derivative Defendants, PRODIGY HOMES, LLC. MJM REALTY CO., LLC, MJM SOUTH CAROLINA, INC., MJM LOUISIANA CORPORATION AND MJM CAPITAL PARTNERS INC.,

Defendants.

Papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Affirmation in Further Support of Kenneth E. Aneser.....	2
Affidavit in Opposition to Order to Show Cause for Contempt of James Salters..	3
Reply Affirmation of Erik Zaratina.....	4

PRELIMINARY STATEMENT

Plaintiff, Mark Rubin, along with a supporting affidavit from Richard Buckholz, moves by Order to Show Cause for a finding of civil contempt against James Salters and

[* 2]

Martin J. Bush, “defendants”, for failing to comply with an existing contempt order from this Court dated February 23, 2011 and criminal contempt against the same for failing to comply with the this Court’s prior mandates dated (1) March 27, 2009, (2) June 23, 2009, (3) June 21, 2010 and subsequently the contempt order dated February 23, 2011 (“2011 Order”). Plaintiff encourages confinement until compliance with the prior contempt order, for civil contempt, and an additional \$1,000 fine and (30) days imprisonment without opportunity to purge, for criminal contempt, against defendants.

BACKGROUND

The instant case is the result of over three years of ongoing litigation. Therefore, only the relevant facts will be set forth herein. By Order dated March 27, 2009, the Court appointed Howard M. Fielstein (“Fielstein”) as an independent forensic accountant. At Salters’ suggestion, the cost of these services was to be split equally among Rubin, Buckholz, Bush & Salters. Salters paid an initial \$1,500, but failed to pay his \$16,296.12 share as invoiced by Fielstein or his overdue balance of \$2,250.00, for a total of \$19,176.12. Even worse, Bush had not paid any of the \$20,676.12, representing his 25% share of the fee for the independent accountant, that he owed.

Salters never denied that he is in default for the amounts due. The Court ordered Salters and Bush to pay the monies owed on March 27, 2009 and again on June 21, 2010. On February 23, 2011, this Court found Salters and Bush in civil contempt and ordered each of them to pay their monies owed to the accountant plus an additional \$10,338.06 to both Rubin and Buckholz, representing 50% of each person’s share, as reimbursement for expenditure for the forensic accounting services of Fielstein.¹ At the time the Court cautiously refrained from finding criminal contempt, however reserved the right to re-open the matter on notice to defendants, Bush and Salters, in the event of their failure to comply with that Order of the Court.

They failed to comply with such order. Naturally, plaintiff filed the instant action, by Order to Show Cause, requesting that the Court find defendants in civil and criminal contempt of the prior contempt order. Plaintiff requested that the Court adopt several remedial and punitive measures if it found the defendants in contempt. Plaintiff asked the

¹ See Court Order dated Feb. 23, 2011.

[* 3]
Court to preclude the defendants from cross-examining witnesses at an inquest substantially unrelated to the forensic accountant's fees. Additionally, the plaintiff asked the Court to imprison the defendants until they comply with the 2011 Order as a remedy for civil contempt. For criminal contempt, the plaintiff asked the Court to impose the maximum penalty of 30 days imprisonment plus a \$1,000 fine.

The Court will address each of the plaintiff's requests *infra*.

DISCUSSION

Civil Contempt:

Where "a party seeks an adjudication of civil contempt based upon a violation of a court order, he or she must establish a willful and deliberate violation of a lawful court order expressing a clear and unequivocal mandate"² When the moving party has proved his burden with reasonable certainty, pursuant to Judiciary Law § 753, a court may punish a party for contempt by imposing a fine or imprisonment, or both.³ Civil contempt fines and/or imprisonment are meant to coerce future obedience and may involve confining a contemnor indefinitely until he complies with an affirmative command.⁴ However, if the contemnor lacks the power to complete the affirmative command, "the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid."⁵

Here, the plaintiff has proved his burden with reasonable certainty, and in fact beyond a reasonable doubt, that defendants failed and presently refuse to comply with the 2011 Order. To be sure, Salters, in his papers, never denies that he did not pay the monies owed or that he lacks the ability to pay. Rather, Salters requests a liability hearing before he will comply with the prior Orders of this Court and Bush asserts, without corroboration, that he lacks the ability to pay.

Contrary to Salters' position, the lack of a liability hearing, to which he feels entitled, does not give him free reign to disregard Orders of the Court. Accordingly,

² *Collins v. Telcoa Int'l Corp.*, 2010-08639, 2011 WL 2714218 [2d Dept July 12, 2011].

³ *Vider v. Vider*, 925 NYS2d 189, 192 [2d Dept 2011].

⁴ *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 US 821, 828 [1994]

⁵ N.Y. Judiciary Law § 774 [McKinney].

[* 4]
Salters is now held in contempt of a contempt order. His utter disregard for the Court's authority is apparent and has reached wit's end.

Criminal Contempt:

Unlike civil contempt, criminal contempt is intended to punish, since it involves an offense against judicial integrity, and is designed to protect the process rather than reimburse another for their loss.⁶ Although the line between the civil and criminal contempt may be difficult to draw in a given case and the same act may be punishable as both a civil and criminal contempt, the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct.⁷ If the contempt is characterized as criminal, then greater procedural protections apply, such as, among other things, the right to have the contempt proved beyond a reasonable doubt, and the right to the assistance of counsel.⁸ However, a right to a jury trial is only triggered for "serious" rather than "petty" criminal contempt.⁹ Therefore, where the sentence is six months or less or where the fine is relatively small, the contemnor does not have a right to a jury trial.¹⁰

The Court ordered Salters and Bush to pay their share of the forensic accountant's fees on March 27, 2009 and again on June 21, 2010. Finally, just several months ago, the Court held defendants in contempt for failing to abide by the prior Orders and directed defendants to pay their share of the accountant's fees and shifted liability so that the plaintiff and Buckholz could be reimbursed for their timely payment. Today, the parties are before the Court once again for failing to abide by a previous Contempt Order, which the plaintiff proves beyond a reasonable doubt and stands uncontroverted by defendants. The endless motion papers and court appearances must cease. Defendants have offended the judicial integrity of this Court and continuously challenge its legitimacy. Therefore, the Court finds that the defendants, Salters and Bush, are in criminal contempt for failing to abide by any of the plethora of Orders established and proffered by this Court.

⁶ *King v. Barnes*, 113 NY 476 [1889].

⁷ *McCain v. Dinkens*, 84 NY2d 216, 226 [1994] [citing *Matter of McCormick v. Axelrod*]

⁸ *New York City Transit Auth. v. Transp. Workers Union of Am., AFL-CIO*, 35 AD3d 73, 86 [2d Dept 2006]

⁹ *Id.*

¹⁰ *Id.*

Sentencing for Contempt:

The creative mind is limited when crafting a remedy upon contempt. In fact, The Supreme Court exceeds its authority when it fashions a remedy not contemplated by the Judiciary Law.¹¹ Therefore, the Court denies the plaintiff's request to preclude defendants from cross-examining witnesses at a substantially unrelated inquest hearing.

However, it is hereby ORDERED that the plaintiff's motion for an order of contempt against defendant is granted. Accordingly, Salters and Bush must comply with the 2011 Order, which requires Bush to pay \$20,676.12 to Fielstein and \$10,338.06 to both Rubin and Buckholz and Salters to pay \$19,176.12 to Fielstein and \$10,338.06 to both Rubin and Buckholz, in order to purge this contempt; and further

It is hereby ORDERED that, pursuant to Judiciary Law §774, should Salters and Bush fail to comply with the 2011 Order within **30 days** of entry of this judgment, a warrant shall automatically issue to the Nassau County Sheriff's Department for their arrest and imprisonment until they purge themselves of civil contempt by complying with the 2011 Order. In the event that such occurs, pursuant to §774, defendants are to be brought, by the sheriff, or other officer, as a matter of course personally before this Court and a review of the proceedings shall then be held to determine whether the defendants shall be discharged from imprisonment; and further

It is hereby ORDERED that Salters and Bush are held in criminal contempt and thereby are each directed to pay \$1,000 to the Court, pursuant to Judiciary Law §751.

Nothing in this decision shall preclude Bush from, through proper application to the Court, presenting evidence of inability to pay the amounts due. A proper showing of inability to pay would entitle Bush to all safeguards set forth in the Judiciary Law §774.

This constitutes the Decision and Order of the Court.

Dated July 20, 2011


J.S.C

¹¹ *Vider*, 925 NYS2d at 192.

ENTERED

JUL 21 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE