

Columbia Capital v Cuervo
2012 NY Slip Op 31912(U)
June 28, 2012
Sup Ct, Suffolk County
Docket Number: 15487-2005
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-6-12
ADJ. DATE _____
Mot. Seq. # 007 - MG

-----X		Christopher J. Panny, Esq.
COLUMBIA CAPITAL,	:	Attorneys for Plaintiff
	:	76 Court Street
	:	Brooklyn, New York 11201
	:	
Plaintiff(s),	:	
	:	
- against -	:	Lester & Associates, P.C.
	:	Attorney for Defendant Cuervo
	:	600 Old Country Road
	:	Garden City, New York 11530
DIEGO CUERVO, NEW YORK STATE	:	
COMMISSIONER OF TAXATION & FINANCE,	:	
LAURA CRUZ,	:	Frank M. Maffei, Jr., Esq.
	:	Jakubowski, Robertson, Maffei,
	:	Goldsmith & Tartaglia, LLP
Defendant(s).	:	Receiver
-----X		969 Jericho Turnpike
		St. James, New York 10118

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause by counsel for the receiver, signed February 21, 2012 (Mayer, J.), and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED AND ADJUDGED that Diego Cuervo is guilty of a contempt of court, by his refusal to comply with the provisions of this Court's Order dated June 22, 2011; and it is further

ORDERED AND ADJUDGED that said Diego Cuervo pay a fine of \$26,400.00 dollars on or before July 25, 2012 or be imprisoned in the Suffolk County Correctional Facility until the fine is paid or until a period of forty-five (45) days after the commitment of defendant to jail shall have expired; and it is further

ORDERED that the fine is to be paid to the order of the Receiver; and it is further

ORDERED that the defendant is directed to be present at 9:30 am on July 25, 2012 in Part 17 of

the Supreme Court, Suffolk County, Riverhead, New York for purposes of execution of sentence; and it is further

ORDERED that failure to be present at said time, date and place will result in the issuance of a warrant of arrest for the defendant.

The action underlying this proceeding was brought to foreclose a mortgage on a parcel of real estate known as 1224 Suffolk Ave. Brentwood, New York. By Order of the Court dated June 22, 2011, Mr. Frank Maffei, Esq. Was appointed Receiver for the benefit of the Plaintiff.

The plaintiff is owner and holder of a certain mortgage on the real estate.

The defendant, Diego Cuervo, is the owner, mortgagor and landlord of the said property.

This proceeding was brought by the court appointed receiver of real property which is the subject of this litigation to hold the defendant, Diego Cuervo in Civil Contempt pursuant to Section 753 through 756 of the Judiciary Law. The receiver seeks an order imposing a fine, imprisonment or both for the alleged failure of the defendant to comply with the provisions of this Court's Order dated June 22, 2011.

Among other things the order " directed that the defendant and their agents, officers, employees, and contractors deliver and attorn to the receiver all rents lists, shareholder lists, unexpired and expired leases, proprietary leases, agreements, contracts, recognition agreements, corporate by-laws, correspondence, notice registration statements, tenants securities, shareholders, escrows, and lists of current rent or other monies, arrear, relating to space in the mortgaged premises;... and further enjoining and restraining the defendant and their agents, officers, employees and attorneys from (I) collecting the rents of said mortgaged premises;(ii) interfering in any manner with the mortgaged premises or its possession, or with the Receiver's management thereof".

On September 6, 2011 the Receiver caused a "Notice to Attorn to Receiver" to be served upon the defendant through his attorney.

On December 2, 2011 and December 20, 2011 the Receiver caused Notices to attorn to Receiver to be served upon the tenants.

The Court heard oral argument from the parties on March 12, 2012 and as a result thereof set the matter for hearing on April 5, 2012. Evidence on the hearing was taken on April 5, 2012 and May 14, 2012.

Pursuant to the Court's order of March 12 , the defendant was ordered to appear on April 5, 2012 with " for the period from September 6, 2011 to present, all documents related to the premises located at 1224 Suffolk Avenue Brentwood, New York, including but not limited to the following: written and oral rent and lease agreements; names of all occupants; income and expenses; bank records; rent receipts and expenses."

The defendant appeared on April 5 and testified. He did not bring any of the ordered materials to court. The tenants of the subject parcel testified on May 14, 2012.

The essence of the Receiver's claim was that the tenants continued to pay rent to the landlord during and after both the defendant and the tenants received the notice to attorn served by the Receiver. Moreover, neither the defendant nor his agents or employees ever delivered any rent lists, unexpired or expired leases, corporate by-laws etc. There was no factual dispute by the defendant concerning his awareness of the Notice To Attorn or this Court's order of June 22, 2011.

In his testimony the defendant denied receiving any rents from any of the tenants after service of the Notice to Attorn. He claimed he did take rents from the tenants before the Notice to Attorn was served but never after. He further claimed he had no records of any past rental receipts, no leases, and no bank records relating to any of the tenants. When he did take rents he took it in cash. If he gave a receipt, he didn't keep copies of any. He maintained that he himself still engages in the business of the buying and selling of cars at the same address but has no business bank account from which to operate this business. He stated he had one at one time but his present recollection was that it was closed. He has no bank records relating to this account. All of his business was done in cash.

On May 14 three tenants testified that they were indeed tenants at 1224 Suffolk Avenue and paid rent for the space. All three claimed they paid their rent each month, particularly after the Notice to Attorn was served, to the defendant's father, Luis Cuervo. The only exception to this testimony came from Mr. Jovel Mayan who stated that he gave rent to Diego Cuervo at various times. Specifically, he stated that either at the end of March or April of 2012 he paid his rent at the office with both Luis and Diego Cuervo present. He remembers complaining to Diego Cuervo about the hot water as he had not had any for about two years and that the defendant responded that he would do what he could to get it fixed.

The evidence also disclosed the existence of a purported lease that appears to be entered into between one of the tenants, Ms. Sandra Ruiz and Diego Cuervo, the defendant, on or about November, 2011. Diego Cuervo, when confronted with this lease, denied that the signature was his and denied entering the lease. This testimony contrasted with Ms. Sandra Ruiz who said that she felt this was the lease she was operating under but she did not see Diego sign it as it was brought to her by the defendant's father Luis Cuervo. Notably, when seeing Diego's name on the signature line she asked why his name was there. Luis responded that the property was in Diego's name but he, Luis, was in charge of everything.

All three tenants testified that they paid rent in cash and that they rarely, if ever, got a receipt. Specifically, Mr. Alandro Buruca testified that he paid nine hundred dollars a month in 2011 to the defendant's father and one thousand dollars a month in January and February of 2012 to the defendant's father before paying the Receiver in March. Sandra Ruiz testified that her original lease agreement called for one thousand eight hundred dollars in security with the same amount due each and every month as rent. She complained of hot water problems as well and thought her lease of November 2011 reduced her rent to one thousand dollars a month. Notwithstanding the lease, she paid one thousand eight hundred dollars for the balance of 2011 and one thousand seven hundred from January to May of 2012, the excess over one thousand dollars allegedly being used to help with repairs to the demised premises, including the hot water. Ms. Ruiz stated that this arrangement continued after she began paying the receiver one thousand dollars a month in March and continued to pay the defendant's father seven hundred dollars on through May "for repairs". The defendant also never tendered the original security for the Ruiz lease despite the order mandating same.

Section 753 of the Judiciary Law reads, in pertinent part:

“A Court of record has the 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, counselor, or other person, for the non-payment of a sum of money...or for any other disobedience to a lawful mandate of the court.”

To sustain a finding of civil contempt, a court must find that the alleged contemnor 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. It is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience regardless of motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights of a party. (*Incorporated Village of Plandome Manor v. John Ioannou* 54 AD3d 365; 862 NYS2d 592 [2nd Dept. 2008]).

The order enjoined the defendant and his agent’s, employees, and contractors from collecting the rents or interfering with the mortgaged premises in any way.

An agent is a party who acts on behalf of the principal with the latter’s express, implied, or apparent authority in the transaction of some business or the management of some affairs on the principal’s account. The agent is a substitute or deputy appointed by the principal with power to do things which the principal may or can do and primarily to bring about business relations between the principal and third persons. (*Time Warner City Cable v. Adelphi University*, 27 AD3d 551, 813 NYS2d 114[2nd Dept. 2006]).

It is also well settled that an agent’s authority may be actual or apparent. Actual authority exists when an agent has the power “to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal’s manifestation to him.” (*Forest Park Cooperative, Inc. V. Commonwealth Land Title Insurance Comp.*, 2011 N.Y. Misc. LEXIS 2422, May 19, 2011 citing *Minskoff v. American Exp. Travel Related Services Co.* 98 F3d 703 [1996] quoting Restatement (Second) of Agency, Sec. 7 comment a [1958]). Actual agency may be express or implied. Express authority is the authority distinctly, plainly expressed, orally or in writing while implied authority exists when verbal or other acts by a principal reasonably give the appearance of authority to the agent. (See *99 Commercial St., Inc. V. Goldberg*, 811 F Supp 900 [1993]).

Apparent authority arises when a principal places an agent in a position where it appears that the agent has certain powers that the agent may or may not possess. If a third person holds the reasonable belief that the agent was acting within the scope of the agent’s authority and changes position in reliance on the agent’s act, the principal is estopped to deny that the agent’s act was authorized. (2A NY Jurisprudence, Second Edition, Agency and Independent Contractors, *Cohen v. Utica First Ins. Comp.*, 436 F. Supp 2nd, 517 [E.D.N.Y. 2006] applying New York Law). Further, all acts of the agent that are within the apparent scope of the authority conferred on the agent while no actual authority to do these acts has been conferred are binding on the principal. (2A NY Jurisprudence, Second Edition, Agency and Independent Contractors, *supra*.)

In this case, Mr. Buruca, one of the tenants testified that he used to pay his rent to the defendant,

Diego Cuervo pursuant to his lease agreement but then changed to paying the defendant's father, Luis. He stated that Luis told him to pay him and to stop paying Diego.

Ms. Ruiz testified that, as of November 2011, she thought she was operating under the new lease that had Diego Cuervo's signature on it, but paid Luis because Luis told her the building was in Diego's name but that he was in charge.

Mr. Jovel Mayan testified that although he pays cash rent to the defendant's father, he sees the defendant every time he pays the rent which nearly always takes place in the car dealership that the defendant runs. Further, he stated that, at times, he hands the rent directly to Diego Cuervo, the defendant. He also stated that he complained directly to the defendant about the lack of hot water at the car dealership which is the defendant's business. The defendant replied that he knew that the boiler was out of order and he would see if he could get it fixed. On the Court's questions, he stated that he paid the rent to one of both individuals, either Luis or Diego while he was complaining to Diego about the hot water. Both Mr. Cuervo and the defendant were standing together during this conversation.

The totality of the evidence shows that, based on the actions of the defendant, Luis Cuervo had the implied and/or apparent authority to act on behalf of his son in collecting the rents relevant to this property. The evidence also shows clear defiance of this Court's June 22 order and the notices to attorn served by the receiver. Moreover, the March or April rent tendered by Mr. Mayan was tendered to both the defendant and his father under circumstances where Mr. Mayan relied enough on the defendant's status with respect to this property to complain to him about the hot water and the defendant's knowledge of the boiler sufficient to show a level of dominion and control over the property, while at the very same moment, tendering his rent. This is direct evidence of the defendant's defiance of the June order and the Notice to Attorn.

The Court also concludes that the defendant's testimony given in open Court on April 5, 2012 is totally lacking in credibility. He is in the car dealership business, located at the same address, but has no business checking account. He didn't bring any records either to the receiver pursuant to this Court's order of June 22, 2011 or the court pursuant to the subsequent order setting the matter down for a contempt hearing. Notably, his testimony was that the tenants didn't pay him any rent for more than a year, conveniently coinciding with this Court's Order. Just as importantly, however, the defendant never mentioned anything about his father's involvement with these properties.

The Court also notes the reluctance of the tenant's to testify. Although they denied coercion by the defendant or his father, their demeanor and insistence that all rent payments were in cash with no receipts given clearly show they are, to some degree, under the control of the defendant who, the Court concludes, concocted a methodology to get around this Court's order and continue to prejudice the plaintiff by not remitting rent proceeds to the receiver as mandated by the order. Rather, the defendant simply circumvented this Court's order by employing an agent, or alter ego, to collect the rent.

The Receiver was employed to, among other things, collect the rent so it could be used to pay the mortgage, the holder of which is the plaintiff. To the extent that rents were paid to the defendant, through his father or otherwise, after the notice to attorn was received by the defendant, the plaintiff has been prejudiced. Thus, the Court finds, the element of prejudice to the plaintiff has been shown. Specifically, tenant Buruca paid nine hundred dollars a month from the service of the notice to attorn on the defendant on September 6, 2011 and one thousand dollars a month for January and February of 2012. Since these rents

were paid after the notice to attorn was served, the Court finds the plaintiff has been prejudiced to the extent these funds were not tendered to the receiver for his benefit.

Ms. Ruiz paid a total of twelve thousand seven hundred dollars from September of 2011 through and including May of 2012. The receiver was deprived of the use of these funds for the benefit of plaintiff thus prejudicing the plaintiff's rights in this amount. The defendant also never tendered the original security of one thousand eight hundred dollars given by Ms. Ruiz. The prejudice to the plaintiff from Ms. Ruiz totals fourteen thousand five hundred dollars.

Finally, Mr. Mayan paid nine hundred dollars a month from September 2011 through March 2012 for a total of six thousand seven hundred dollars thus prejudicing the plaintiff in this amount.

Thus, the plaintiff has been deprived of the benefit of twenty six thousand four hundred dollars in rental proceeds that, had they been tendered to the receiver pursuant to this Court's order of June 22, 2011 and the Notice to attorn served on September 6, 2011 on the defendant would have been available to plaintiff for purposes of paying down the balance on the mortgage as well as taxes and other expenses required to maintain the property.

The Court finds, by clear and convincing evidence, that the defendant's actions were calculated to, and actually did defeat, impair, impede and prejudice the rights of the plaintiff herein and, therefore, finds the defendant in contempt of this Court's Order of June 22, 2011.

The Court directs that the defendant pay a fine of twenty six thousand four hundred dollars on or before July 25, 2012 or be imprisoned in the Suffolk County Correctional Facility until the fine is paid or the expiration of 45 days, whichever occurs earlier.

The fine is to be paid to the order of the Receiver.

The defendant is directed to be present at 9:30 am on July 25, 2012 in Part 17 for purposes of execution of sentence.

Failure to be present at the above ordered time, date and place will result in the issuance of a warrant of arrest for the defendant.

This constitutes the Order of the Court.

Dated: June 28, 2012


PETER H. MAYER, J.S.C.

☐ FINAL DISPOSITION

☒ NON FINAL DISPOSITION