

Foster v 240 E. 55th Tenants Corp.

2015 NY Slip Op 30324(U)

March 5, 2015

Supreme Court, New York County

Docket Number: 153960/2013

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

-----X
PAUL FOSTER,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 153960/2013

240 EAST 55th TENANTS CORP.,

Defendants

-----X
NANCY M. BANNON, J.

In this action, inter alia, to recover damages for breach of a proprietary lease, the defendant moves for an order finding the plaintiff in civil contempt pursuant to Judiciary Law § 753(a) and imposing punishment therefor. For the reasons set forth below, the defendant's motion is granted only to the extent that an inquest is directed to address the issue of whether the plaintiff's disobedience of the court's orders defeated, impaired, impeded, or prejudiced the defendant's rights.

The plaintiff is the tenant and proprietary lessee of the subject premises located at 240 East 55th Street, Apt. 8E, New York, NY 10022 (the "apartment"). On March 21, 2013, the defendant, a cooperative corporation (the "co-op"), commenced a non-payment summary proceeding against the plaintiff in the Civil Court of the City of New York, entitled 240 East 55th Tenants Corp. v Paul Foster, under Index No. 61029/13, for non-payment of common charges due under the proprietary lease. The plaintiff commenced the instant action in the Supreme Court, New York County on April 30, 2013, asserting causes of action against the co-op for breach of proprietary lease and for a judgment declaring that the plaintiff retains the status of the holder of unsold shares in the co-op.

On May 1, 2013, the plaintiff moved by order to show cause to stay the summary non-payment proceeding pending in the Civil Court and to stay the defendant from preventing the plaintiff from subletting or assigning his interest in the shares appurtenant to the apartment.

Issue was joined by the defendant's answer, dated June 3, 2013. In its answer, the defendant asserted counterclaims for declaratory relief and for attorney fees and costs and disbursements. Specifically, the defendant seeks a declaration that the plaintiff never acquired the status of a holder of unsold shares or, alternatively, that even if he was a holder of unsold shares at one time, such status ceased when the plaintiff's daughter, the co-lessee, occupied the apartment.

On June 19, 2013, the parties entered into a stipulation, which was so-ordered by the court (Scarpulla, J.), resolving the plaintiff's motion. The June 19, 2013 order stayed the Civil Court proceeding. In exchange, the plaintiff was ordered to pay \$6,642.89 in outstanding maintenance charges and abatement fees within 45 days and \$958.24 per month for maintenance commencing July 5, 2013. The order further provided that the plaintiff was permitted to sublet the apartment as long as he provided the requisite disclosures to the defendant.

On February 26, 2014, the parties appeared for a status conference. In the corresponding order, the plaintiff was directed to pay \$8,624.16 to the defendant for maintenance through March 31, 2014, as well as \$6,642.89 to the County Clerk for maintenance due prior to the commencement of the action to the extent it had not already been paid. This court stated, "[t]he so ordered stipulation dated 6/19/2013 remains in full effect. Plaintiff shall continue to pay \$958.24 pursuant to said stip for maintenance." At the next status conference on April 10, 2014, counsel for the defendant represented that the plaintiff had not complied with the court's June 19, 2013 and February 26, 2014 orders. The April 10, 2014 order notes, "Plaintiff does not admit to any of these allegations."

On April 25, 2014, the defendant filed the instant motion seeking an order finding the plaintiff in civil contempt for failure to comply with this court's June 19, 2013 and February 26, 2014 orders. The defendant argues that the plaintiff should be held in civil contempt because he had knowledge of, yet failed to comply with two unequivocal orders of the court, which has prejudiced the defendant. The defendant submitted proof that on April 9, 2014, copies of the June 19, 2013 and February 26, 2014 orders were personally served upon the plaintiff's spouse at his home address in New Jersey. In further support, the defendant submitted the affidavit of William Marolda, president of Marolda Properties, Inc., the property manager of the defendant co-op. Marolda provided the Occupant Ledger for the apartment establishing that, after the June 19, 2013 order, the plaintiff made the first two required monthly payments in July and August, 2013 of \$958.24, but thereafter failed to

remit the monthly maintenance payments due. According to Marolda, the plaintiff's outstanding balance as of April 21, 2014 was \$20,161.03. Marolda alleges that, because of the plaintiff's failure to pay the monthly maintenance for the apartment, the other unit owners have had to make up the difference to keep the building's budget balanced, resulting in financial hardship for the defendant and the other unit owners.

The plaintiff did not submit opposition to the defendant's motion. On June 19, 2014, the day after any answering papers by the plaintiff on the instant motion were to be served on the defendant, counsel for the plaintiff moved by order to show cause to be relieved as attorneys for the plaintiff. On July 24, 2014, this court granted plaintiff's counsel's motion without opposition. This court ordered any new attorney to appear within 30 days of the date of the notice of entry, stayed all proceedings for a period of 60 days after service of the notice of entry on the plaintiff, and adjourned the instant motion to October 2, 2014. To date, no notice of appearance on the plaintiff's behalf has been filed.

Contempt is "a drastic remedy which should not be granted absent a clear right to the relief." Benson Park Assocs. LLC v Herman, 93 AD3d 609 (1st Dept 2012) citing Pinto v Pinto, 120 AD2d 337 (1st Dept 1986). In order to establish civil contempt, the movant must prove 1) the violation of a lawful court order expressing a clear, unequivocal mandate; 2) that the party to be held in contempt had actual knowledge of the existence and contents of the court's order; 3) that the order was disobeyed; and 4) that the disobedience of the order was calculated to or actually did defeat, impair, impede, and prejudice the rights or remedies of another party to the litigation. See McCain v Dinkins, 84 NY2d 216 (1994); Matter of McCormick v Axelrod, 59 NY2d 574 [1983], amended 60 NY2d 652 (1983); El-Dehdan v El-Dehdan, 114 AD3d 4, 16 (2nd Dept. 2013). The burden of proof is on the party making the motion for contempt, which must establish the contempt by clear and convincing evidence. See Massimi v Massimi, 56 AD3d 624 (1st Dept. 2008). A motion to punish a party for civil contempt is addressed to the sound discretion of the court. See Hughes v Kameneva, 96 AD2d 845 (2nd Dept. 2012); Bayamon Steel Processors, Inc. v Platt, 191 AD2d 249 (1st Dept. 1993).

Here, the defendant established that the plaintiff had actual knowledge of the existence and content of the June 19, 2013 and February 26, 2014 orders, both of which expressed a clear, unequivocal mandate, and that he disobeyed both orders. Through the affidavit of service, the defendant established that the plaintiff was properly served with copies of both the June 19, 2013 and February 26, 2014 orders at his home address in New

Jersey. In the order dated June 19, 2013, Judge Scarpulla issued an unequivocal mandate directing the plaintiff to pay \$6,642.89 in outstanding maintenance charges and abatement fees within 45 days and to pay \$958.24 per month for maintenance commencing July 5, 2013. In the February 26, 2014 order, the plaintiff was clearly directed to pay \$8,624.16 to the defendant for maintenance through March 31, 2014, and \$6,642.89 to the County Clerk for maintenance due prior to the commencement of the action to the extent it had not already been paid. The February 26, 2014 order reiterated that, pursuant to the June 19, 2013 order, the plaintiff was obligated to continue paying \$958.24 per month for maintenance. Additionally, Marolda's April 21, 2014 affidavit established that the plaintiff made two maintenance payments in July and August 2013 pursuant to the June 19, 2013 order, but thereafter failed to make any maintenance payments and failed to pay the \$6,642.89 in outstanding maintenance charges and abatement fees. The defendant, therefore, established by clear and convincing evidence the first three elements of civil contempt.

However, issues of fact exist as to the fourth element, whether the plaintiff's disobedience of the court's orders was calculated to or actually did defeat, impair, impede, or prejudice the defendant's rights, which preclude resolution of the motion on papers alone. See McCain v Dinkins, 84 NY2d 216; El-Dehdan v El-Dehdan, 114 AD3d at 17; Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., 50 AD3d 1073 (2nd Dept. 2008); Cashman v Rosenthal, 261 AD2d 287 (1st Dept. 1999). Marolda stated that the defendant has suffered financial hardship due to the plaintiff's non-compliance and that other unit owners in the building have had to make up the difference to avoid a budget shortfall. However, the defendant failed to submit evidence sufficient to make a determination on the papers alone as to whether the plaintiff's failure to pay maintenance as set forth in the June 19, 2013 and February 26, 2014 orders was calculated to or did prejudice the defendant's rights. Accordingly, an evidentiary hearing is necessary in this case. See Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., 50 AD3d 1073.

The parties are ordered to appear for an inquest on May 20, 2015 at 2:30pm. In the meantime, the plaintiff is reminded of his continuing obligation to comply with the court's June 19, 2013 and February 26, 2014 orders.

Upon the foregoing papers it is,


ORDERED that the defendant's motion to hold the plaintiff in civil contempt is granted without opposition only to the extent that an inquest is directed to address the issue of whether the plaintiff's disobedience of the court's orders defeated, impaired, impeded, or prejudiced the defendant's rights, and it is further,

ORDERED that the parties shall appear for an inquest on May 20, 2015 at 2:30pm, and it is further,

ORDERED that the defendant shall serve a copy of this order with notice of entry on the plaintiff within 10 days.

This constitutes the Decision and Order of the court.

Dated: March 5, 2015

 , JSC