

Dreher v Martinez

2016 NY Slip Op 32825(U)

May 23, 2016

Supreme Court, Nassau County

Docket Number: 6554/12

Judge: Jeffrey S. Brown

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This opinion is uncorrected and not selected for official publication.

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easement line between the property line and 28 East Avenue, Lawrence, New York. The plaintiff will retain the surveyor at his election. The parties will split the cost of the staking of that line. Once the line is staked, the defendants at their sole cost and expense will remove the fence where it stands now and move it to the easement line or off of the easement line towards their home, but no further towards the plaintiff's property than the easement line. That will be at their sole cost and expense. That will be done within two weeks of the actual staking of the easement line.

In the event the defendant elects to raise his driveway, the plaintiff will cooperate with that, and will agree to raise to a point no higher than the highest point on their common property line. . . .

Just to make it clearer, that when the defendant removes the fence, he will restore that area in order for the easement area to be continued to be used as a driveway. . . .

The driveway will be a regular driveway.”

CPLR Section 5104 Enforcement of judgment or order by contempt provides:

“Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court.”

This court's review of all of the papers submitted for its consideration of the instant motion does not find that “a certified copy of the . . . order” was served by the defendants upon the plaintiff.

Therefore, the defendants' prayer for an adjudication of civil contempt, pursuant to CPLR Section 5104, is denied.

Judiciary Law Section 750A provides:

“Power of courts to punish for criminal contempts

A. A court of record has the power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

- [* 3]
1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
 2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.
 3. Wilful disobedience to its lawful mandate.
 4. Resistance wilfully offered to its lawful mandate.
 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.
 6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.
 7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury or subpoenaed witness service in violation of this chapter or section 215.11 of the penal law. Application to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session.

The only causes for which a person may be punished for a criminal contempt are the ones enumerated in this section (*see Briddon v Briddon*, 229 NY 452 [1920]). The failure of the movants to particularize the plaintiff's actions which meet the above set forth statutory requirements mandates the denial of relief pursuant to Judiciary Law 750 (*see In re Application of the Law Firm of Daniel P. Foster, P.C.*, 115 AD2d 375 [1st Dept 1985]).

Judiciary Law Section 753A provides:

Power of courts to punish for civil contempt

- 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

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in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: . . .

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy or a party to an action or special proceeding in that court, or to protect the right of a party.

The elements of civil contempt were unequivocally set forth by the New York Court of Appeals.

First, “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect” [*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 (1983)]. Second, “[i]t must appear, with reasonable certainty, that the order has been disobeyed” (*id.*). Third, “the party to be held in contempt must have had knowledge of the court’s order, although it is not necessary that the order actually have been served upon the party” (*id.*). Fourth, “prejudice to the right of a party to the litigation must be demonstrated” (*id.*; see *Karg v Kern*, 125 AD3d 527, 528-529 [1st Dept 2015] [contempt requires a showing of a violation of a clear and unequivocal court mandate and that the movant was thereby prejudiced]; *Matter of Vernon D. [Tarah F.]*, 119 AD3d 784, 784 [2d Dept 2014] [civil contempt was properly found where the contemnor did not obey a clear and unequivocal order]; *Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012] [order violated must be an unequivocal mandate]; *Connors v Pallozzi*, 241 AD2d 719, 719 [3d Dept 1997] [evidence proving with a reasonable certainty that a prior court order has been violated will support a finding of civil contempt]; *N.A. Dev. Co. v Jones*, 99 AD2d 238, 242 [1st Dept 1984] [movant must establish a reasonable certainty]; *Power Auth. of State of N.Y. v Moeller*, 57 AD2d 380, 382 [3d Dept 1977] [personal service is not necessary if the party has actual knowledge of the order], *lv denied* 42 NY2d 806 [1977]).
El-Dehdan v El-Dehdan, 26 NY3d 19, 29 (2015), quoting *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 (1983).

The movants bear the burden of establishing civil contempt with clear and convincing evidence (see *Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628 [2d Dept 2012]).

In support of the instant motion, the defendant, Frances Martinez in her “Affirmation in Support” states under oath:

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“1. I am one of the named defendants in the above-entitled action. As such, I am fully familiar with and have personal knowledge of the facts and circumstances surrounding this matter. Julio Martinez is my husband.

2. Plaintiff is the owner in fee simple of the property known as 30 East Avenue, Lawrence, New York which is located in Nassau County, State of New York. Julio and myself are the owners in fee simple of the property known as 28 East Avenue, Lawrence, New York which is located in Nassau County, State of New York. These properties are located next to each other making both plaintiff and ourselves neighbors. We have lived in this house for over fifteen (15) years. . . .

7. On December 13, 2015 plaintiff knocked on my door. My husband answered and was approached by plaintiff who demanded to know what was going on with the fence. Julio told him that we were waiting for the survey to be done and that he should have his attorney contact our attorney. Plaintiff stated that the “fucking fence is coming down” and then got into his truck and sped away.

8. On December 14, 2015 when I returned home from work I saw that our white PVC fence, post and cinder blocks and phone box had all been pulled out of the ground and destroyed. Additionally, the electrical wiring running from our house to the backyard was damaged and now we have no electricity in our shed. . . .

9. On December 15, 2015 at approximately 2:00 in the afternoon, I received a phone call from a neighbor telling me that plaintiff was in the process of removing our wooden fence from the back of our property.¹

In opposition to the instant motion, the plaintiff, Anton Dreher, in his Affidavit in Opposition states under oath:

1. I am the plaintiff in the above matter and as such I make this affidavit based upon my own personal knowledge of the facts and circumstances of this matter. Further, I submit this Affidavit in Opposition to the defendants’ application to hold me in contempt.

¹The wooden fence runs along the property line and comes up to the rear of our house. The PVC fence runs between the properties from the rear of the house all the way to the front. The wooden fence makes up about 20% of the total fence area and is necessary to enclose our above-ground pool.

2. At the outset, I readily admit that I removed the fence that is at issue in this case. I did it without advising the defendants and without their permission. However, I have a valid reason for acting in the manner in which I did. It involved the safety of my tenants, the general public, and the preservation of my home and the defendants' home.

Based upon all the papers submitted for this court's consideration, there is no dispute that the movants have established by clear and convincing evidence the plaintiff's requisite knowledge of the subject order and non-compliance with same. However, the court is unable to determine whether the plaintiff, Anton Dreher, disobeyed the terms of the August 31, 2015 stipulation of settlement which was so-ordered by this court on October 6, 2015.

Therefore, pursuant to Judiciary Law 753 A.8, it is the order of this court that a framed issue hearing be held before this court to determine whether the plaintiff disobeyed the subject so-ordered stipulation of settlement and whether any such disobedience defeated, impaired, impeded or prejudiced the rights of the defendants thereto (*see Town of Huntington v Reuschenberg*, 70 AD3d 814 [2d Dept 2010]).

Subject to the approval of the justice there presiding and provided a note of issue has been filed at least 10 days prior thereto, the herewith ordered framed issue hearing shall appear on the calendar of **CCP on July 12, 2016, at 9:30 a.m.**

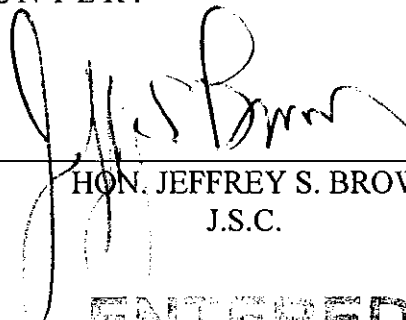
A copy of this order shall be served on the calendar clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the justice presiding in CCP to refer the matter to a justice, judicial hearing officer or a court attorney/referee as he or she deems appropriate.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 23, 2016

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

ENTERED

MAY 23 2016