

**Meyer v 148 S. Emerson Assoc., LLC**

2017 NY Slip Op 31186(U)

May 9, 2017

Supreme Court, Suffolk County

Docket Number: 068379/2014

Judge: Jerry Garguilo

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# E-FILE

SHORT FORM ORDER

INDEX NO. 068379/2014

## SUPREME COURT - STATE OF NEW YORK COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

**HON. JERRY GARGUILO**  
**SUPREME COURT JUSTICE**

MICHAEL J. MEYER, individually and derivatively on behalf  
of 148 SOUTH EMERSON ASSOCIATES, LLC.,

Plaintiff,

and

MICHAEL MEAGHER & STEPHEN SMITH,

Nominal Plaintiffs,

-against-

148 SOUTH EMERSON ASSOCIATES, LLC and DREW  
DOSCHER,

Defendants.

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DREW DOSCHER, individually; DREW DOSCHER,  
derivatively, on behalf of 148 SOUTH EMERSON  
ASSOCIATES, LLC; and DREW DOSCHER, derivatively, on  
behalf of 148 SOUTH EMERSON PARTNERS, LLC,

Third-Party Plaintiffs,

-against-

MICHAEL MEAGHER; STEPHEN SMITH; 148 SOUTH  
EMERSON PARTNERS LLC; THE SEAPORT GROUP LLC,  
and ALLAN POVOL, CPA; POVOL & FELDMAN, CPR, PC;

Third-Party Defendants.

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**SUPPLEMENTAL ORDER**

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**MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER**  
**INDEX NO.: 068379/2014**  
**PAGE 2**

The "Sloppy Tuna" is "the" resort hot-spot on the east end of Long Island. It is a bar-restaurant that conducts a proverbial land office business during the summer months. As such, the weekends of Memorial Day, the Fourth of July and Labor Day are large revenue events.

On November 16, 2016, this Court issued a Short Form Order. In that action, the Petitioner-Plaintiff, Michael J. Meyer sought, by way of Order to Show Cause, relief pursuant to Article 51 of the New York Civil Practice Law and Rules and Judiciary Law § 753, holding Defendant-Respondent, Drew Doscher, in contempt of court for willful violation of the March 16, March 29, April 22, and May 20, 2016 orders of this Court.

This Court noted as follows:

The genesis of the current petition occurred on May 31, 2016 when it is alleged the Defendant commenced an action against 148 South Emerson Associates, LLC ("Associates"), asserting claims for trademark infringement, and false designation of origin and unfair competition, in violation of sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), respectively; trademark dilution in violation of the Federal Trademark Dilution Act ("FTDA") under section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c); and cybersquatting in violation of the Anticybersquatting Consumer Protection Act ("ACPA") under section 43(d) of the Lanham Act, 15 U.S.C. § 1225(d). In that action the relief sought was a preliminary injunction enjoining Associates (The Sloppy Tuna) from (a) using certain trademarks ("The Sloppy Tuna Marks") registered to an entity known as Montauk USA "in any manner, including, but not limited to, using or employing The Sloppy Tuna Marks in connection with any goods, services, signage, decor, menus, employee clothing, marketing, advertising, merchandise, domain name, and/or social media, and (b) from making or employing any derivation or colorable imitation of the Sloppy Tuna Marks, or any mark confusingly similar thereto or likely to dilute the Sloppy Tuna Marks.

The November 16, 2016 Short Form Order describes the various lawsuits begun in

**MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER**  
**INDEX NO.: 068379/2014**  
**PAGE 3**

New York and Georgia (all clearly calculated to interfere with the operation of "The Sloppy Tuna"). Why is this relevant? On March 16, 2016 this Court issued an order (1) granting a duly appointed Receiver authority to take immediate control over the management of and authority over the daily operations and financial management of The Sloppy Tuna until further order; (2) directing Mr. Doscher to surrender control over and access to the daily operations and financial management of The Sloppy Tuna to the Receiver; and (3) restraining Mr. Doscher from participating in the daily operations and financial management of, entering into contracts on behalf of, or entering the premises of The Sloppy Tuna, and **from interfering in any way with the Court-appointed Temporary Receiver in its operations and management of the company, pending further order** (*emphasis added*).

Nevertheless, subsequent to the March 16, 2016 order, counsel for Montauk, A. Todd Merolla, issued correspondence to the duly Court-Appointed Receiver<sup>1</sup> in the nature of a notice of termination of a purported license agreement. Despite the Court's order, the letter indicated that the termination was effective immediately. That correspondence made extensive demands on Associates to accomplish the de-identification procedures. In addition, Mr. Merolla on behalf of his client, demanded payment to Montauk stemming from a purported licensing agreement of \$727,623.96. Additionally, despite this Court's order, Mr. Merolla, chose to by-pass Appellate practice and instead had the unmitigated audacity to suggest the duly appointed Receiver had "usurped" control:

In light of your appointment and usurpation of control of Associates, be advised that Associates may no longer use that domain name. Same for the Facebook page, Twitter account, and Instagram account - Associates is no longer permitted to use any of these social media accounts for THE SLOPPY TUNA (*emphasis added*).

On that same date, Montauk commenced an action against Associates in the Superior Court of Fulton County, State of Georgia seeking damages for Associates alleged breach of the license agreement or, in the alternative, under the theories of *quantum meruit* and unjust enrichment, as well as injunctive relief compelling Associates comply with post-termination obligations under the purported license agreement.

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FN1. It merits mention that Mr. Charles Russo was appointed Receiver upon consent of counsel for all parties.

**MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER**  
**INDEX NO.: 068379/2014**  
**PAGE 4**

By letter dated March 25, 2016, Mr. Russo, the Receiver, responded to Montauk's termination letter in relevant part as follows:

Unless I am specifically directed to do so by [the New York State Court], I will not turn over any items, nor will I comply with any of the demands and requests in your letter without the express authority of that Court. It is the position of Associates that the License Agreement is invalid, *void ab initio*, and of no force or effect. Additionally, the question of the validity of the license agreement is the subject of a declaratory judgment action now pending before Judge Garguilo. Therefore I will take no action related to the license agreement without the express authority of Judge Garguilo.

This, despite this Court's Order prohibiting Mr. Merolla's client, Drew Doscher, from interfering in any way with the Receiver in his operation and management of the company.

It is noteworthy that subsequent to this Court's order "not to interfere in any way," Mr. Doscher, with the counsel of Mr. Merolla commenced an action in a Georgia State Court. The Georgia Court rebuffed Mr. Doscher's wholly owned Montauk USA's attempt to prosecute any alleged license claims. Mr. Merolla's audacity shines through on the record:

**The Court:** What did he (Justice Jerry Garguilo) say about interfering with the operation of the restaurants?

**Mr. Merolla:** He said he can't interfere with the operations.<sup>2</sup>

**The Court:** In addition, the point they make about the signage and the expense associated with unwinding all that, you know, I didn't hear your client say we'll pay all that. We'll pay all that.

You need to talk to the judge up there (presumptively Mr. Justice Garguilo) and you also need to consider that issue as well. Would you do that?

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FN2. It is evident to this Court that Mr. Merolla was aware of this Court's ORDER NOT TO INTERFERE.

*MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER*  
*INDEX NO.: 068379/2014*  
*PAGE 5*

**Mr. Merolla:** Your honor, I respectfully disagree.

**The Court:** I know you do. And I really appreciate the way you said respectfully. It was nice of you to say that. I can't wait to hear what you tell your client when you walk out the door. But, in any event, I am denying the motion.

The Court again refers to its order of November 16, 2016 whereby a historical account of another action interfering with the operation of the Sloppy Tuna is described as brought before Judge Feuerstein in the Federal District Court.

The Short Form Order of November 16, 2016 ordered the appearance of A. Todd Merolla, Esq., with counsel. Mr. Merolla has appeared before this Court presenting himself as a duly licensed attorney at law in the state of New York on behalf of a litigant native to "The Sloppy Tuna" litigation.

Rather than appear, Mr. Merolla, on January 5, 2017 sent a communication to the to the Court as follows:

I write to inform you that I will not be appearing before you next week. I did receive a copy of your November 16, 2106 [sic] Short Form Order (the "contempt SFO") regarding the above-styled case by personal delivery outside my office located at 75 14th St., Atlanta, GA 30309 on November 22, 2016. I have significant concerns regarding the procedural and jurisdictional posture of the scheduled contempt hearing for January 9-10th, 2017 to the extent directed at me.

It is compelling that Mr. Merolla notes in his letter the following:

**I never appeared as counsel in this case for any party.** It is my understanding that any contempt action against a non-party-as I am-must be brought as a separate special proceeding independent of the underlying action under CPLR 401....(emphasis added)

**MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER**  
**INDEX NO.: 068379/2014**  
**PAGE 6**

The Court does not agree. Although Mr. Merolla is not a named Respondent he, as an officer of the Court, can be punished for his disobedience of this Court's Order. It is undisputed that he was aware of the "non-interference" Order when he appeared before the State Court in Georgia. A non-party may be held in contempt under these circumstances. *Third Avenue Realty Corp. V. Chateaubriant Restaurant Development Co., LLC*, 57 A.D.3d 340. Furthermore, since there are no issues of fact to be resolved at a hearing it is proper for the Court to make a finding of contempt without a hearing. *Cashman v. Rosenthal*, 261 A.D.2d 287 (1999). Additionally, even though Mr. Merolla is a "non-party" he may be bound by the injunction [DO NOT INTERFERE] if he had knowledge of it, provided he was a servant or agent of Montauk, U.S.A. and/or Mr. Doscher, or acted in collusion or in combination with them. *Rigas v. Livingston*, 178 N.Y. 20, 70 N.E. 107, see *Power Authority of the State of N.Y. v. Moeller*, 57 A.D.2d 380 which held the Supreme Court was presented with sufficient evidence that the Defendants and the Appellants were acting in combination.

The Court is in possession of the minutes of a proceeding before this Court on June 20, 2016. The transcript of that, on the record, conference found at index number 600830/2015, reads as follows commencing on page 4 lines 11-15:

**The Court:** Mr. Merolla, are you co-counsel, lead attorney or attorney of record for the defendants?

**Mr. Merolla:** As of right now I believe I'm co-counsel and lead attorney.

**The Court:** Okay.

**"Ut Poene Ad Paucos, Metus Ad Omnes Perveniat."**  
That the punishment may reach a few, but the fear of it affect all.

This Court cannot stand idly by and simply accept the utter disrespect for this Court's directives. First: the order not to interfere. Second: the order to appear. Additionally, Mr. Merolla has the unmitigated gall to suggest the appointment of a receiver in this most contentious litigation, represented a "usurpation" of power.

Mr. Merolla, an attorney, admitted in New York, with knowledge of this Court's Order prohibiting interference and admitting the same in a Georgia Court of record chose nonetheless to interfere. Afterwards he treated the Court's directive to "appear" as if it

**MEYER, MICHAEL V. 148 SOUTH EMERSON ASSOCIATES AND DREW DOSCHER**  
**INDEX NO.: 068379/2014**  
**PAGE 7**

contained a self addressed and stamped **RSVP**.

For this Court to turn a blind eye on such disrespect would amount to a dereliction of duty.

Accordingly, the Court *Sua Sponte*

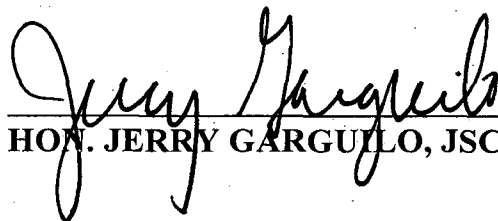
**ORDERS ADJUDGES AND DECREES** that Mr. Merolla is in Civil Contempt of this Court. The Court hereby appoints Garrett W. Swenson, Jr., Esq., 76 Bay Road, Brookhaven, NY 11719 516-380-2808, Referee for a determination of damages to the Plaintiffs. Said damages to be limited to the recovery of costs and fees related to his disobedience of the Order and Judgment relevant to this Contempt ruling as it concerns damages sustained by the Plaintiffs in defending the Georgia State Proceeding; and it is further,

**ORDERS ADJUDGES AND DECREES** that the Referee shall be compensated by the Receiver at an hourly rate of \$425/hour, in increments of 1/4 hour, and shall be reimbursed for all associated expenses, and the Receiver shall pay the Referee upon submission of itemized hourly bills; and it is further,

**ORDERS ADJUDGES AND DECREES** that the Plaintiffs shall be reimbursed for the aforesaid fees and expenses by the contemnor, to be added to the award to be determined by the Referee.

The foregoing constitutes the decision and **ORDER** of this Court.

**Dated: May 9, 2017**

  
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HON. JERRY GARGUILO, JSC