At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 6th day of October 2017.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

STATE OF NEW YORK and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiffs,

vs.

JAMES C. STEVENS, III and LAWRENCE G. HILL,

Defendants.

DECISION AND ORDER

Index No. EF14-553
RJI No. 2014-0356-M

APPEARANCES:

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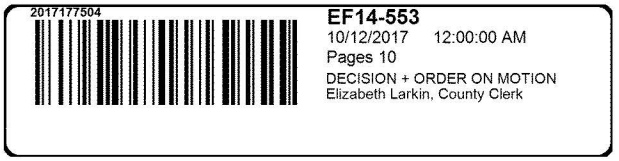

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion brought by Order to Show Cause by the defendant James C. Stevens, III seeking an order vacating the Decision and Order in this matter dated April 25, 2016. That Decision and Order found Mr. Stevens guilty of criminal and civil contempt. The Attorney General opposes the motion on behalf of the plaintiffs.

The matter was heard on October 6, 2017 at the Cortland County Courthouse, Cortland, NY. Ronald R. Benjamin, Esq. appeared on behalf of Mr. Stevens in support of the motion and Joseph M. Kowalczyk, Esq. appeared on behalf of the plaintiffs in opposition thereto.

Background

This action arises out of changes to the topography of and water flow on land owned by Mr. Stevens which resulted in erosion on both adjoining and non-adjoining properties. At one point, the adjoining property – a cemetery – suffered erosion from the water run off which disinterred several graves.

The plaintiffs State of New York and Department of Environmental Conservation (DEC) commenced this action on November 18, 2014. Numerous hearings have been held and numerous motions have been made and heard over the nearly three years that this case has been pending. Mr. Stevens was found to have violated certain provisions of New York State Environmental Conservation Law and to have created a public nuisance.

After Mr. Stevens failed to comply with various court orders, he was found in civil and criminal contempt. The penalty was stayed to provide Mr. Stevens with the opportunity to

purge the contempt. When he failed to do so, he was incarcerated in the Cortland County Jail in February 2017.[1] The Justice then handling this matter was thereafter appointed to the Appellate Division, Third Department.[2] As a result, this case was reassigned to the undersigned. Since that reassignment and prior to hearing the present motion, three appearances have occurred. Each time, Mr. Stevens was present, having been brought to Court in the custody of the Cortland County Sheriff's Department.

The present motion

Mr. Stevens seeks an order vacating the April 25, 2016 Decision and Order which found him in criminal and civil contempt. As a civil contempt penalty, Mr. Stevens was directed to design, engineer, and construct a comprehensive storm water management control system. On the criminal contempt finding, Mr. Stevens was sentenced to 10 days in the Cortland County Jail, which was to be suspended provided he complete 20 hours of community service by July 29, 2016.

In support of the motion, Mr. Stevens submits the affirmation of his attorney, Mr. Benjamin. The affirmation asserts the Decision and Order should be vacated based on ineffective assistance of counsel, lack of a knowing, voluntary, and intelligent allocution and plea, and the conduct of others creating the increased water flow which caused the erosion. The motion includes a transcript of a portion of the proceeding held on April 12, 2016, which was scheduled as an evidentiary hearing but was resolved by the plea.

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1 At the time this motion was heard he was still incarcerated.

2 His appointment was effective May 26, 2017.

The State and DEC oppose the motion in an affirmation of their attorney, Mr. Kowalczyk. His affirmation asserts that Mr. Benjamin's affirmation in support of the motion contains false material factual statements and misrepresents the law of the case and points out that Mr. Benjamin lacks personal knowledge of the facts cited in his affirmation. It also asserts the motion should be before Justice Rumsey, the judge who issued the Decision and Order, is not supported by any reliable evidence, and violates Part 1200 of the Rules of Professional Conduct.

The State and DEC assert that I should not or cannot hear the present motion, as it seeks to vacate a Decision and Order of the previously assigned judge. They correctly point out that New York Civil Practice Law and Rules 2221 provides that a motion to vacate an order shall be made "to the judge who signed the order, unless he or she is for any reason unable to hear it." As noted previously, the judge who issued the April 2016 Decision and Order is now assigned to the Appellate Division.

The State and DEC do acknowledge that Section 202.3(b) of the Uniform Rules for the Supreme Court and the County Court provides the "assigned judge" shall conduct all further proceedings in a matter. By Order of the Administrative Judge of the Sixth Judicial District, this matter was assigned to me on June 16, 2017. Therefore, I am now the "assigned judge" within the meaning of 22 NYCRR § 202.3(b).

The Court is unaware of any authority, and none has been provided, that would require an appellate court judge to hear an application to modify or vacate a prior decision and order

issued when that judge was a trial court judge.[3] When the individual assignment system was implemented, the Third Department recognized that it is the then-assigned judge who determines any motions that are made.

> At issue is whether the second Justice's failure to transfer the motion, as CPLR 2221 seemingly mandates, was an improvident exercise of discretion. We think not. To the extent pertinent, CPLR 2221(a) provides that "[a] motion for leave to renew or to reargue a prior motion * * * shall be made, on notice, to the judge who signed the order, *unless he is for any reason unable to hear it*" (emphasis supplied). Here, the motion was before the second Justice because of the implementation of the individual assignment system which contemplates that all motions are to be made returnable before the Justice charged with overseeing the case (*see* 22 NYCRR 202.8[a]). That carrying out the purpose of the individual assignment system satisfies the underscored excepting clause has been confirmed by an amendment to the rule (CPLR 2221[b], as amended by L.1986, ch. 355, § 5, eff July 17, 1986; 22 NYCRR 202.8[a]; *see Ministry of Christ Church v. Mallia*, 129 AD2d 922 [3d Dept 1987]).

(*Billings v. Berkshire Mut. Ins. Co.*, 133 AD2d 919, 919-920 [3d Dept 1987]).

Logic, practicality, and a reasonable interpretation of the law and rules provide that the "assigned judge" in any case is authorized to modify or take such other action as is required with respect to decisions and orders of the previously "assigned judge." The simple reality is that whomever is the assigned judge has the authority and obligation to make rulings and issue orders on the merits of the applications in cases to which he or she is assigned.

Mr. Stevens submits the affirmation of his attorney in support of the motion. The State and DEC assert the affirmation is hearsay and provides insufficient support for such a motion, which must be supported by a party or person with knowledge of the facts. This argument is

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3 One can only imagine the difficulty this would create if it were required. For example, given how frequently applications to modify orders in matrimonial actions are filed, judges assigned to appellate courts could become embroiled in matrimonial actions for months or years after their appointment.

consistent with the Third Department's holding in *Lifset v. Ehrlich* (61 AD2d 1063 [3d Dept 1978] [attorney's affidavit is hearsay and thus insufficient, as affidavit of merit must be made by a party or person with personal knowledge of the facts]; *see also Sturtevant v. Home Town Bakery,* 192 AD2d 904 [3d Dept 1993] [affidavit of attorney with no personal knowledge of the facts insufficient to support motion]; *Bronson v. Algonquin Lodge Assn.*, 295 AD2d 681, 682 [3d Dept 2002] [affidavit from one who has no personal knowledge of the operative facts is without probative value and insufficient to defeat the motion]).

While the motion is also supported by the transcript of the April 12, 2016 court proceeding, the transcript does not provide sufficient information for this Court to vacate the April 25, 2016 Decision and Order.

Incarceration

This Court had three prior opportunities to observe and have a dialogue with Mr. Stevens. Each of those times, he was not represented by counsel and the Court inquired whether he intended to obtain counsel and if he could afford it. At times in this proceeding, he has been represented by retained counsel. He was represented by counsel in making the present motion and at the return date on October 6, 2017.

In the prior dialogues with Mr. Stevens it appeared he understood the proceedings and was aware of the issues, as he appropriately addressed questions and discussed the issues. However, at times he made statements which seemed to indicate that he was not fully grasping all of the details or issues. It was not and still is not clear to the Court whether this is due to a typical layperson's lack of knowledge of the legal issues and considerations present here or a lack of mental competence.

Mr. Stevens has been incarcerated based on a civil contempt determination since February 2017. That confinement is nearing its eighth month. The prior colloquies with Mr. Stevens strongly indicated to this Court that further incarceration was not going to achieve the goals and purposes of the incarceration.

Judiciary Law § 774 provides for a review of the proceedings every 90 days to "determine whether such offender shall be discharged from imprisonment." Given the statutory language, it seems implicit that a court has an obligation to consider whether the continued imprisonment is having or will lead to its intended purpose and effect. "A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both" (*Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.,* 70 NY2d 233, 239 [1987] [internal citations omitted]).

The Court could find no precedent from New York State courts regarding the standard or inquiry with respect to the type of "review" that should be conducted at the 90 day intervals.[4] However, some guidance can be found in federal court precedent for the Second Circuit. In *Simkin v. U.S.* (715 F2d 34, 37 [2d Cir 1983]), the Court stated that ". . . due process considerations oblige a court to release a contemnor from civil contempt if the contemnor has then shown that there is no substantial likelihood that continued confinement will accomplish

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Perhaps this is due either to individuals who ignore court orders being willing to do so only until incarceration is the consequence or to those who will accept incarceration only bearing that consequence for less than 90 days.

its coercive purpose" (*id.* [citations omitted]). In *Matter of Parrish* (782 F2d 325, 328 [2d Cir 1986]), the Court affirmed a District Court judge's release of an incarcerated contemnor on the basis that where "after several months in custody not even a realistic possibility remains that the continued confinement might cause the contemnor to [comply], then his [or her] release is warranted because further confinement in such circumstances would be punitive" (*id.*).

This Court believes that point has been reached in this case. Mr. Stevens was first incarcerated in February 2017 and he has been in the continued custody of the Cortland County Sheriff since that time. Over the course of those approximately eight months, he has steadfastly maintained that he will not comply with the Court's Order that resulted in his confinement despite being given numerous opportunities to do so. It appears he views this situation as a matter of principle and – unlike so many who cite principle as the basis for taking or not taking an action – he was and no doubt still is willing to sacrifice his freedom for it. Based on this, the Court signed an Order at the October 6, 2017 court appearance releasing Mr. Stevens from custody.

Criminal contempt

The April 2016 Decision and Order found Mr. Stevens guilty of criminal contempt and imposed a sentence of 10 days of incarceration "suspended upon [the] condition that by July 29, 2016 [he] completes 20 hours [of] community service." There appears to be no dispute that he timely completed the community service required by that Decision and Order.[5]

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5 A May 18, 2016 letter to the Court from his former counsel provided a statement from Cortland Loaves and Fishes showing that Mr. Stevens had performed 23 hours of community service there as of May 2, 2016.

The December 2016 Decision and Order found Mr. Stevens guilty of criminal contempt and imposed a sentence of 20 days of incarceration "suspended upon [the] condition that by August 1, 2017 [he] completes 200 hours of community service." Later, on February 7, 2017, he was committed to the custody of the Cortland County Sheriff for civil contempt where he has remained until very recently.

The State and DEC contend that Mr. Stevens has not met the conditions of the 20-day suspended sentence for criminal contempt, as he did not complete the 200 hours of community service, and assert he has not yet served the 20-day sentence.

Mr. Stevens clearly did not complete the 200 hours of community service by August 1, 2017, as he was incarcerated for the six months prior to and on that date. Given the fact that he was already incarcerated at that time, did service of the criminal sentence automatically begin at that point (i.e., on August 1, 2017)? Or does the 20-day sentence not begin until there is some additional Court action?

Because the status of the 20-day criminal contempt sentence is not clear to the Court, the Court declined to continue his incarceration on that basis. Either party may make an application regarding the status of the 20-day criminal contempt sentence. The Court will make a determination on that issue once all parties have had an opportunity to state and provide support for their position in that regard.

Conclusion

The motion to vacate the April 25, 2016 Decision and Order is denied. Mr. Stevens is released from incarceration based on the civil contempt. The status of the sentence on the

December 2016 criminal contempt is held in abeyance pending a determination upon application by either party upon notice and an opportunity for the other party to be heard.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Jeffrey A. Tait
Digitally signed by Jeffrey A. Tait
DN: CN=Jeffrey A. Tait, C=US, OU=Supreme Court Justice, O=Broome County Supreme Court, E=taitjsc@nycourts.gov
Date: 2017-10-12 10:35:01

Dated: October 12, 2017
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice