

Great Wall Med. P.C. v Levine
2018 NY Slip Op 31842(U)
August 2, 2018
Supreme Court, New York County
Docket Number: 157517/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK - IAS PART 47

GREAT WALL MEDICAL P.C. d/b/a NEW
YORK ROBOTIC GYNECOLOGY &
WOMEN'S HEALTH and JOON SONG,

Index No.: 157517/2017

Mot. Seq. No.: 004

Plaintiffs,

DECISION & ORDER

-against-

MICHELLE LEVINE,

Defendant.

PAUL A. GOETZ, J.

BACKGROUND

In this defamation action Plaintiffs, Great Wall Medical P. C. d/b/a New York Robotic Gynecology & Women's Health ("NY Robotic GYN") and Joon Song (collectively "plaintiffs"), move by order to show cause to hold defendant Michelle Levine in civil and criminal contempt of court. The crux of this case centers on defendant's one visit to NY Robotic GYN where she was seen by plaintiff Dr. Joon Song and the negative Yelp.com review defendant wrote about her experience. On February 7, 2018, the parties, through counsel, entered into a stipulation and consent order for a preliminary injunction to resolve plaintiffs' order to show cause seeking a preliminary injunction (Mot. Seq. No. 003), and on February 13, 2018, the stipulation was "so-ordered" by the court ("Order"). The Order provides in relevant part that:

1. Defendant agrees to immediately take down and/or delete any statements she has made in any blog, website, social media account, online bulletin board, or bulk email, whether owned by Defendant or any third party, concerning Plaintiffs and/or Plaintiffs' counsel during the pendency of this action.
2. The parties agree not to make, publish, disseminate or communicate any oral or written statement referring to the other party - whether in their own name or a fictitious name- which is intended to or reasonably likely to disparage the other party or otherwise degrade the reputation of the other party in their relevant business or professional community, and/or which concerns the subject matter of this proceeding during the pendency of this action.

In support of their order to show cause to hold defendant in contempt, Plaintiffs annex to their order to show cause a May 28, 2018, New York Post ("Post") article entitled "I wrote a negative Yelp review - and it made my life a nightmare". The article includes direct quotes from defendant on her experience with plaintiffs and quotes from her reviews on her visit to NY Robotic GYN as well as a discussion about this court case. Plaintiffs also annex subsequent media coverage from four other news organizations; each story includes direct quotes from defendant discussing her dispute with plaintiffs, the reviews she authored about her experience and this court case. In further support of their order to show cause, plaintiffs include an affidavit from Hyejung Kim, NY Robotic GYN's office manager, who states they have been receiving phone calls and voicemails expressing disappointment and anger about plaintiffs' business practices. Ms. Kim alleges that before the Post article Dr. Song only had five Yelp reviews and four of them were positive and after the article Dr. Song received over fifty reviews all one-star (out of five) reacting to the news coverage. Plaintiffs also attach to their order to show cause a May 30, 2018, Yelp post from defendant describing herself as the one being sued for the review and referencing a GoFundMe.com page wherein she requests money to hire a lawyer to defend herself because she is being sued by Dr. Song for writing a review online about him.

Plaintiffs seek a directive that defendant immediately comply with the Order by contacting any news organizations she spoke with regarding this case and retract her statements and request an immediate removal of any related articles; and that defendant immediately remove and be restrained from publishing and republishing the content at certain URL addresses. Plaintiffs further seek a indemnification from defendant for their losses by reason of defendant's failure to abide by the Order and an award of costs, expenses, and attorney's fees in connection with the order to show cause.

In her affidavit (misidentified as an affirmation) in opposition¹, defendant states she took down or deleted "certain" statements she posted online about this matter but does not specify the deleted statements. Defendant admits that she spoke to a reporter from the Post in April and May, 2018, about her experience with Dr. Song and this case as well as with reporters from other media outlets. Defendant avers that everything she told the reporters was truthful. Defendant also admits to setting up the GoFundMe page to raise money for her legal expenses in this case and again avers that everything she posted on the GoFundMe page is truthful. Defendant alleges that on May 30, 2018, a Korean-language media outlet published an article about this case with quotes from Dr. Song. Defendant also states that Ms. Kim posted a lengthy statement on defendant's GoFundMe page defending Dr. Song. Defendant argues that plaintiffs repudiated the Order by rejecting her settlement offer and declaring that they would no longer negotiate a settlement and by accusing her of violating the order and making derogatory statements about her. In support of her repudiation argument, defendant apparently relies on the third "WHEREAS" clause of the Order which provides that "the Parties intend to enter into settlement

¹Counsel for defendant is advised that the letter from counsel dated July 23, 2018, accompanying defendant's affidavit was not considered because letter briefs are not an acceptable format for argument (*Accord* 22 NYCRR 202.8[c]).

discussions which may eliminate the need for further litigation.”

ANALYSIS

Criminal Contempt

Under Judiciary Law § 750(A)(3) the court has the authority to punish a person for criminal contempt for willfully disobeying a lawful mandate. “As with any other criminal charge, each element of criminal contempt must be proven beyond a reasonable doubt” (*Gouiran Holdings, Inc. v McCormick*, 163 AD2d 44 [1st Dept 1990]; see also *Usina Costa Pinto, S.A. v. Sanco Sav Co.*, 174 AD2d 487 [1st Dept 1991]; *Rush v Save My Home Corp.*, 145 AD3d 930 [2nd Dept 2016]). “A proceeding to punish for criminal contempt arising out of a civil action is considered separate from the civil action and must be properly commenced by personal service upon the alleged contemnor” (*Lu v Betancourt*, 116 AD2d 492, 494 [1st Dept 1986]). “[F]ailure to personally serve the alleged contemnor constitutes a jurisdictional defect requiring dismissal” (*Id.*). Here, the order to show cause authorized service on counsel for defendant and on the return date, counsel for plaintiffs did not submit an affidavit of personal service upon the defendant nor was one e-filed. Therefore, because defendant was not personally served with the order to show cause, plaintiffs’ application to hold her criminal contempt must be denied. (*In the Matter of Grand Jury Subpoena Duces Tecum Served Upon Morano’s of Fifth Ave., Inc.*, 144 AD2d 252 [1st Dept 1998] [finding that “the order to show cause on the contempt application authorized service on counsel for Morano’s, which is only sufficient for civil contempt.”]).

Civil Contempt

Under Judiciary Law § 753(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 in the court may be defeated, impaired, impeded, or prejudiced. . .” The necessary elements to support a finding of civil contempt are:

[f]irst, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. 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. Fourth, prejudice to the right of a party to the litigation must be demonstrated.

(*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015][citations and internal quotation marks omitted]). The moving party must establish civil contempt by clear and convincing evidence (*Id.*) and a “so-ordered” stipulation qualifies as a lawful order of the court (*Tishman Constr. Corp. V United Hispanic Constr. Workers, Inc.*, 158 AD3d 436 [1st Dept Feb. 6, 2018] [finding that violation of stipulation and order negotiated by the parties justified a finding of contempt];

Matter of Halioris, 126 AD3d 973 [2nd Dept 2015] [holding violation of “so-ordered” stipulation supported a finding of contempt]; *Town Bd. Of Town of Southampton v R.K.B. Rlty., LLC*, 91 AD3d 628 [2nd Dept 2012] [same]).

Here, the Order was in effect when defendant spoke to the press and posted her GoFundMe page about her dispute with plaintiffs and this court case. Defendant’s argument that plaintiffs repudiated the Order is without merit because a court order, even a negotiated consent order, cannot later be disregarded by the parties.² If defendant no longer wished to be bound by the Order based on her theory that the order was conditional and plaintiffs were no longer complying then her remedy was to move pursuant to CPLR § 2221(a) to vacate the Order, not ignore it. The Order explicitly and unequivocally prohibits the parties from communicating, publishing or otherwise disseminating statements to third parties concerning the subject matter of this case during its pendency. As to the disobedience of the Order, defendant admits that she spoke to reporters about this case. Defendant also admits that she posted on GoFundMe seeking funds to help pay her legal bills; the post gives a detailed description of defendant’s opinions on the issues being litigated. Moreover, defendant acknowledges she was aware of the Order. Regarding prejudice to plaintiffs for defendant’s failure to abide by the order, Ms. Kim expressed concern that the media stories and online postings are damaging to plaintiffs’ reputation and patient base. The potential harm expressed by Ms. Kim resulting from defendant’s violations of the Order is sufficient to satisfy the prejudice requirement for a finding of civil contempt (*Accord Bd. Of Directors of Windsor Owners Corp. v Platt*, 148 AD3d 645 [1st Dept 2017] [holding motion court correctly determined that movant showed that it suffered a potential harm from the violation of a permanent injunction order] *cf Bingham v Struve*, 184 AD2d 85, 90 [1st Dept 1992] [granting preliminary injunction where the potential harm caused by defendant’s conduct is

² Notwithstanding the proscription against incorporating legal principles and argument in a non-lawyer, party affidavit (*see* 22 NYCRR § 202.8[c]), defendant’s repudiation argument will be addressed. A repudiation “may take the form either of a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach” (*Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 AD2d 70,77 [1st Dept 2002] [citations and internal quotation marks omitted]). Indeed, it is unclear that even if the Order were merely a stipulation without the court “so-ordering” it that defendant would prevail on a repudiation theory. Apparently defendant interprets the “WHEREAS” clause concerning settlement discussions as a condition for the preliminary injunction provisions. However, the language is permissive in that settlement discussions “may” eliminate the necessity to litigate the case; it is not mandatory the parties reach a settlement or even continue settlement discussions. Regarding defendant’s argument that plaintiffs also failed to abide by the Order by discussing the case with a Korean language publication, even if true (whether it is true or not cannot be determined based on a Google translation [*see* CPLR 2101]), that does not release defendant from her obligation to abide by the Order. If defendant believes Dr. Song also violated the Order, then her remedy is to bring her own contempt motion, not disregard the injunctive relief afforded the parties under the Order.

irreparable and capable of injuring plaintiff's standing and reputation]). Consequently, plaintiffs have established by clear and convincing evidence the requisite elements for a finding of civil contempt against defendant.

In light of the civil contempt determination, the court is required to impose a penalty that is remedial in nature and effect and that is the least possible exercise of the court's power to achieve the proposed end, compliance with its orders (*McCain v Dinkins*, 84 NY2d 216, 229 [1994]). For this reason, plaintiffs' request that the court direct defendant to retract her statements to the press must be denied. While defendant's statements, as shown above, were in violation of the Order, defendant steadfastly contends that they are true. The truth of defendant's statements regarding plaintiffs is an issue that must be resolved on a dispositive motion or by the finder of fact at trial; directing defendant to retract them would not remediate the harm done by violating the Order. A more appropriate penalty under the circumstances is for defendant to turn over to plaintiffs all the proceeds from her GoFundMe page (and delete the page) as well as pay plaintiffs costs, expenses and attorneys' fees incurred in connection with bringing their contempt order to show case. Defendant should not be permitted to profit from her disobedience of the Order (*cf Id.* [directing the "City to pay fines to families not properly sheltered as required by the court orders" is an appropriate sanction]), nor should plaintiffs incur additional expenses in order to obtain her compliance (*Accord Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339 [1st Dept 2001] [holding attorneys fees awarded as sanction for civil contempt limited to those incurred as result of the contemptuous conduct]).

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that plaintiffs' motion to hold defendant in criminal contempt of court is DENIED; and it is further

ORDERED that plaintiffs' motion to hold defendant in civil contempt of court is GRANTED; and it is further

ORDERED that defendant is directed to remove all on-line postings created by defendant or at her direction that discuss the subject matter of this action, including, but not limited to, postings on Yelp.com, GoFundMe.com within five days of the date of this order; and it is further

ORDERED that the February 13, 2018, Order remains in full force and effect; and it is further

ORDERED that defendant is directed to pay plaintiffs their costs, expenses and attorneys' fees incurred in connection with their contempt order to show cause; plaintiffs shall file and submit to Part 47 papers in support of the costs, expenses and fees sought within twenty

days of the date of this order, defendant's response to plaintiffs' submission due fifteen days thereafter; and it is further

ORDERED that defendant is directed to pay plaintiffs all the funds defendant collected in connection with her GoFundMe.com page requesting assistance with her legal fees in this case along with an accounting of funds received within twenty days of the date of this order; and it is further

ORDERED that plaintiffs' application for an order directing defendant to retract her statements to the press is DENIED.

This constitutes the Decision and Judgment of the Court.

Dated: New York, New York
August 2, 2018

ENTER:

A handwritten signature in black ink, appearing to read "Paul A. Goetz", is written over a horizontal line.

Hon. Paul A. Goetz, JSC