Kadosh v Kadosh
2018 NY Slip Op 31976(U)
August 14, 2018
Supreme Court, New York County
Docket Number: 651834/2010
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MICHEL KADOSH, on behalf of himself and as a Member and in the right of 213 West 85th Street LLC,

Index No.: 651834/2010

DECISION & ORDER

Plaintiff,

-against-

DAVID KADOSH, 114 WEST 71ST STREET, LLC, 30 LEXINGTON AVENUE, LLC, and 3D IMAGING CENTER CORP.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Robert Lewis, who served as receiver in this action, moves and Davidoff Hutcher & Citron LLP (DHC) cross-moves for an order holding defendant David Kadosh (David) in contempt for violating this court's August 5, 2016 Order (August 2016 Order). The motions are granted.

Background

On July 21, 2016, while David was testifying on direct, the parties settled this action. At the time, the receiver was holding over $7,000,000. It was stipulated on the record, in David's presence, that "with the exception of $700,000" plaintiff Michel Kadosh was entitled to receive half of the amount being held and David would receive the other half but only after the receiver received a written letter from DHC, signed off on by both DHC's managing partner and David, authorizing the release of funds (Dkt. 540 at

4-5).[1] The parties agreed in court that the receiver was to retain David's money until he received a proper letter permitting release of the funds based on a May 2015 letter agreement signed by David (May 2015 Letter), which set forth that David irrevocably consented to the receiver "paying DHC directly from the Escrow any fees due to [DHC] for work rendered in connection with the Actions and/or for any other fees" that David then owed (Dkt. 537).

On August 5, 2016, after ascertaining the actual amount that the receiver was holding in escrow, the parties once again personally appeared in court and modified the arrangement. They stipulated that the receiver would retain approximately $1.64 million and that each would be entitled to release of $2.7 million to be distributed consistent with the procedure previously set forth. David was present when the court explained in no uncertain terms that an order would be issued that very day "ordering the release of the $2.7 million to each of the parties" as directed on the record a few weeks earlier in July (Dkt. 524 at 12). The August 2016 Order (Dkt. 460), which was e-filed later that day, provided that pursuant to the hearing on the record of July 21, 2016, it was "ORDERED that Mr. Lewis . . . [was] to immediately release all but $1,634,442.02 from escrow—50% to Michel Kadosh ($2.7 million) and 50% to David Kadosh ($2.7 million) upon receipt of a letter from each party (David Kadosh's letter to be signed both by his counsel

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Capitalized terms not defined herein have the same meaning as in the May 2018 Order.

. . . and David), with instructions as to how and where the money is to be paid" (Dkt. 538).

It is undisputed that, approximately three months later, in October 2016, without informing DHC, David surreptitiously called and emailed the receiver, requesting release of $2.7 million of the escrowed funds directly to him. In response, the receiver, who failed to consult the August 2016 Order, issued David a check for $2.7 million. It was not until over a year later, when the receiver moved to be discharged, that DHC and this court for the first time learned that the August 2016 Order had been violated.

In May 2018, this court held that the receiver did not have immunity in connection with his violation of the August 2016 Order (*see* Dkt. 525 [May 2018 Order]). But the court explained that "the real wrongdoer [was] David, who apparently sought to evade the requirements of the August 2016 Order and the May 2015 Letter" (*id.* at 8).

The receiver and DHC now move to hold David in contempt for violating the August 2016 Order (Dkts. 531, 543). David, represented by new counsel, opposes the motions. He maintains that he did not fraudulently induce the receiver to transfer the funds to him (Dkt. 544 at 2, ¶ 4). He emphasizes that he just made one telephone call followed by one email asking the receiver whether he could release to him the $2.7 million--money to which he claims to be "wholly entitled" (¶ 11). David insists that he did not mislead or coerce the receiver; but rather was "simply looking for the money that [he] was entitled to, funds [he] badly needed to pay enormous debts following a disastrous business endeavor with [his] brother" (¶ 12). He claims that he sincerely

believed (and still does today) that he had the right to the $2.7 million from the escrow account from which his brother had already been paid and, incredibly, that he "knew nothing of any Court Order" (¶ 16).

Because the proof establishes that David knew of the August 2016 Order and violated it, the motion and cross-motion are granted. David is held in contempt and will be subject to imprisonment and payment of legal fees related to these motions unless, within 2 weeks of entry of this order, he purges his contempt and restores the status quo.

Analysis

"A litigant who knowingly causes a court order to be violated may be held in contempt" (*Tishman Constr. Corp. v United Hispanic Constr. Workers, Inc.*, 158 AD3d 436, 437 [1st Dept 2018] ["court properly found that appellants disobeyed the (order), which was negotiated by the parties and … expressed an unequivocal mandate of which appellants were well aware"], citing *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *see 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co.*, 57 AD3d 340, 341 [1st Dept 2008] [holding party in contempt where it "defies credulity that [the contemnor] himself was unaware of the orders"]).

David himself was present when the court announced that an order was being issued memorializing the terms of withdrawal of money that the receiver was holding in escrow. To be sure, he was also in court when those terms were agreed upon and initially set forth on the record. There can be no doubt that he was aware of the court order and its provisions. His knowledge, moreover, is confirmed by his behavior. He waited

several months and then stealthily personally contacted the receiver without asking or informing DHC. David's assertion that he "knew nothing of any court order" (Dkt. 544 at 4, ¶ 16) "defies credulity" (*see 1319 Third Ave.*, 57 AD3d at 341).

The evidence also conclusively establishes that David caused the August 2016 Order to be violated by asking the receiver to send him money in contravention of the order and in violation of DHC's rights thereunder (Dkt. 544 at 3, ¶ 11; *see* Dkt. 548 [10/30/16 email]). David's justification for his misconduct--that he did not lie to or defraud the receiver and that he was "wholly entitled" to the money despite the order to the contrary--compels a finding of contempt under the circumstances (*see* Dkt. 544 at 3, ¶¶ 11-12).

Allowing David to escape the consequences of his defiance of the August 2016 Order would make a mockery of adherence to judicial mandates. Whether he intended to mislead or coerce the receiver is irrelevant. David's contention that he did not intend to "undermine anyone's interests or responsibilities" and that he was "entitled to" the escrowed funds is both astonishing and belied by the record. He knew about the August 2016 Order, the reasons for it and that his fee dispute with DHC affected his rights to the escrowed money. The only reason for him to have sought the funds from the receiver was to undermine DHC's secured claim in contravention of the court's order.

Though David's actions do not excuse the receiver's gross negligence, that the receiver foolishly succumbed to David's request does not cleanse the wrongful nature of David's conduct. David knew a court order barred him from touching the money, yet

asked an officer of the court to give it to him anyway. He intentionally caused this court's order to be violated. That is contempt. David, therefore, is liable for "all losses caused by his [contempt] under Judiciary Law § 773," which include the movants' attorneys' fees in connection with these motions (*Gottlieb v Gottlieb*, 137 AD3d 614 [1st Dept 2016]).

Because the purpose of civil contempt is to induce compliance with court mandates, David may purge his contempt by paying the $2.7 million that he improperly obtained into court.[2] After all, that is what would be required to restore the parties' status to what it was before the August 2016 Order was violated. If David does so, he may avoid having to pay the attorneys' fees. If he does not, the court will not hesitate to issue an arrest warrant to induce compliance (*see* Judiciary Law § 753; *see People v Sweat*, 24 NY3d 348, 357 [2014] [a defendant may be held in contempt "for the remedial purpose of compelling compliance"]; *GEM Holdco, LLC v Changing World Techs., L.P.*, 159 AD3d 483 [1st Dept 2018] [affirming court's issuance of arrest warrant after finding defendant in contempt due to failure to comply with order to remit stolen funds into escrow]). While David finds no shortage of blame on the part of everyone else in this action,[3] he is entirely devoid of contrition or recognition of the seriousness of his offense.

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[2] The money will remain in court pending further order allowing for release of funds after a determination has been made related to attorneys' fees David owes DHC or the parties resolve the matter (*see Davidoff Hutcher & Citron LLP v Kadosh*, Index No. 657292/2017).

[3] Amazingly, David, who himself flouted the August 2016 Order, seeks to hold the receiver in contempt (*see* Dkt. 558). Although the receiver was grossly negligent, David lacks a basis to do so. The receiver does not have the $2.7 million dollars that David took; therefore, contempt is wholly unwarranted to induce compliance with the order. Since David is not aggrieved by the

He induced an officer of the court to wrongfully give him $2.7 million. Such conduct must be treated with the severity it deserves. Accordingly, it is

ORDERED that the motion and cross-motion to hold David Kadosh in civil contempt for knowingly violating the court's order dated August 5, 2016 (Dkt. 460) are granted because David's actions were calculated to and actually did defeat, impair, impede, and prejudice the rights or remedies of DHC to recover its attorneys' fees from the receiver's escrow account prior to any funds being disbursed to David as ordered and agreed upon by the parties in court; and it is further

ORDERED that David may purge his contempt if he pays $2.7 million into court within two weeks of the entry of this order on NYSCEF and files an affidavit of compliance with accompanying proof that the money was paid into court; and it is further

ORDERED that after the two-week purge period has passed, DHC shall e-file an affidavit informing the court of whether David purged his contempt, and in the event David has not purged, shall attach a proposed arrest warrant and order for a reference to a Special Referee to hear and report on the reasonable attorneys' fees incurred by the receiver and DHC in connection with this motion, and David will be responsible for payment of such fees after a motion is made to confirm the referee's report.

Dated: August 14, 2018 ENTER:

Jennifer G. Schecter, J.S.C.

receiver's conduct and since he is, at best, *in pari delicto*, the court declines to sign David's order to show cause.