

Town of Southold v Kelly

2021 NY Slip Op 33891(U)

October 12, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 015142/2015

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 015142/2015

CAL. No. _____

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY**

P R E S E N T:

MOTION SUBMIT DATE: 06/01/21

MOT. SEQ. # 005 - MG

HON. LINDA KEVINS
Justice of the Supreme Court

-----X

TOWN OF SOUTHOLD,
Plaintiff,

- against -

FRANK J. KELLY, ELIZABETH B. KELLY.
Defendants.

-----X

Upon the following papers e-filed and read on this motion to punish in contempt: Order to Show Cause and supporting papers by plaintiff, dated March 9, 2021; Answering Affidavits and supporting papers by defendants, dated April 5, 2021; Replying Affidavits and supporting papers by plaintiff, dated April 6, 2021; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that plaintiff's motion for an order adjudicating and punishing defendants for civil and criminal contempt based upon their failure to comply with the Court's March 21, 2018 Injunction Order (Luft, J.), is granted; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Frank Kelly and defendant Elizabeth Kelly are in civil contempt and criminal contempt of court for having willfully disobeyed the Court's March 21, 2018 Injunction Order (Luft, J.) in that defendants have willfully continued to use the premises located at 1900 Peconic Bay Boulevard, Laurel, New York as a tourist camp and recreational vehicle park without obtaining approval from the Town of Southold and without obtaining a certificate of occupancy or permit, and did so in contravention of the Court's March 21, 2018 Injunction Order (Luft, J.), and such acts did defeat, impair impede and prejudice plaintiff; and it is further

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ORDERED ADJUDGED AND DECREED that such misconduct of defendants constitutes civil contempt since they failed to obey a lawful judicial order, specifically, the Court's March 21, 2018 Injunction Order (Luft, J.), which was within their power to comply with and such disobedience was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of plaintiff; and it is further

ORDERED that with respect to both the criminal and civil contempt adjudications, defendants are ordered to comply with the Court's March 21, 2018 Injunction Order (Luft, J.), including that defendants shall, within 10 days from receipt of a copy of this Decision and Order, remove all property consistent with the Order and promptly file proof of same with the Court; and it is further

ORDERED that with respect to the civil contempt adjudication, upon the failure of defendants to remove the recreational vehicles, travel trailers, automobile trailers, house cars and tents used for living quarters and/or overnight sleeping purposes as delineated in the Court's March 21, 2018 Injunction Order (Luft, J.), within 10 days from receipt of a copy of this Decision and Order, then, at defendants' expense, and upon confirmation that such vehicles and other property are owned by defendants, the plaintiff, and any agents acting on its behalf, are authorized, with 24 hours-notice to defendants, to enter the property and remove same within 20 days of defendants' failure to remove same, and plaintiff will be entitled to recover all costs and expenses incurred for the removal which may constitute its actual loss recoverable pursuant to Judiciary Law § 773; and it is further

ORDERED that if the recreational vehicles, travel trailers, automobile trailers, house cars and tents used for living quarters and/or overnight sleeping purposes as delineated in the Court's March 21, 2018 Injunction Order (Luft, J.) are owned by third parties, then the plaintiff must provide such nonparty owners with 30 days-notice to either remove the vehicles themselves or plaintiff shall remove them and such costs for removal shall be paid by the defendants as set forth herein; and it is further

ORDERED that with respect to the civil contempt adjudication, plaintiffs shall file with the Court and provide defendants with a list itemizing all of the costs associated with removal of the items delineated in the Court's March 21, 2018 Injunction Order (Luft, J.), within 10 days of such removal, and such list shall be accompanied by an attorney's affirmation, representing that the costs stated were actually incurred in connection with such removal and defendants shall have 10 days from receipt of same to pay plaintiff such costs; and it is further

ORDERED that if such costs are not paid as ordered herein, upon proof of nonpayment, defendant Frank Kelly and defendant Elizabeth Kelly shall be imprisoned until the costs are paid, which duration may be up to six months pursuant to Judiciary Law § 774, and upon such nonpayment plaintiff shall make a prompt application to this Court for a warrant directing the sheriff of any county of the State of New York to seize and arrest defendant Frank Kelly and defendant Elizabeth Kelly forthwith and bring them before this Court to be committed or for such further disposition as the Court directs; and it is further

ORDERED that in the event that defendants remove such items themselves, then defendant Frank Kelly and defendant Elizabeth Kelly are each fined \$250.00 for civil contempt plus costs and expenses which shall be payable to plaintiff, pursuant to Judiciary Law § 773, within 10 days from receipt of a copy of this Decision and Order and defendants shall promptly file proof of such payment with the Court; and it is further

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ORDERED that if such fines are not paid as ordered herein, upon proof of nonpayment, defendant Frank Kelly and defendant Elizabeth Kelly shall be imprisoned until the fines are paid, which duration may be up to six months pursuant to Judiciary Law § 774 and upon such nonpayment plaintiff shall make a prompt application to this Court for a warrant directing the sheriff of any county of the State of New York to seize and arrest defendant Frank Kelly and defendant Elizabeth Kelly forthwith and bring them before this Court to be committed or for such further disposition as the Court directs; and it is further

ORDERED ADJUDGED AND DECREED that defendant Frank Kelly and defendant Elizabeth Kelly are adjudged to be in criminal contempt pursuant to Judiciary Law § 750 (3), for their willful disobedience of the Court's March 21, 2018 Injunction Order (Luft, J); and it is further

ORDERED ADJUDGED AND DECREED that, as this adjudication of guilt is imposed under the Judiciary Law and not the Penal Law, defendant Frank Kelly and defendant Elizabeth Kelly shall be permitted to purge themselves of the contempt by promptly complying with the Court's March 21, 2018 Injunction Order (Luft, J.); and it is further

ORDERED that defendant Frank Kelly and defendant Elizabeth Kelly shall appear with counsel before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, **on February 17, 2022 at 9:30 a.m.** to be sentenced upon their conviction and adjudication of criminal contempt as decided herein; and it is further

ORDERED that, upon failure of defendant Frank Kelly and/or defendant Elizabeth Kelly to appear as stated above, a warrant will be issued for the arrest of the non-appearing defendant(s); and it is further

ORDERED that plaintiff is directed to promptly serve upon the Suffolk County Clerk, notice pursuant to CPLR § 8019 [c] together with a copy of this Order and payment of any required fees; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon defendant Frank Kelly and defendant Elizabeth Kelly by personal service pursuant to CPLR § 308 and to promptly file the affidavits of service with the Clerk of the Court.

This action was commenced in August 2015 by plaintiff Town of Southold for an injunction directing defendants to comply with the Town Code of the Town of Southold by maintaining their property under the direction of the town ordinances, namely, by obtaining a certificate of occupancy and permits or other town approval before using the premises known as 1900 Peconic Bay Boulevard, Laurel, Town of Southold, County of Suffolk, New York, for parking and using recreational vehicles, travel trailers, and tents for living quarters, and for allowing and/or permitting the subject premises to be utilized as an operable marina. Subsequent to the commencement of this action, defendants use of the property as a marina was approved. Plaintiff alleges that defendants are in violation of various sections of Chapter 253 of the Town Code of the Town of Southold regarding prohibitions of use as a campground. By the undersigned's February 3, 2021 Decision and Order, plaintiff's previous motion for an order adjudicating and punishing defendant Frank Kelly and defendant Elizabeth Kelly in civil and criminal contempt was denied due to improper service.

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Plaintiff now renews its motion for an order adjudicating and punishing both defendants for civil and criminal contempts, among other things, based upon their alleged failure to comply with the Court's March 21, 2018 Injunction Order (Luft, J.). Such Decision and Order denied defendants' motion for summary judgment, and granted summary judgment to the Town of Southold awarding them "a permanent injunction. . . enjoining the defendants and their employees, agents, servants, representatives, tenants, lessees and all other persons acting on their behalf or in concert with them from operating a Tourist Camp and/or Recreational Vehicle Park, as those terms are defined and regulated in Chapter 253 of the Code of the Town of Southold, including but not limited to, parking, and/or using recreational vehicles, travel trailers automobile trailers, house cars and tents for living quarters and/or overnight sleeping purposes on the property located at 1900 Peconic Avenue ("Premises") unless and until such time as all necessary certificates of occupancy, permits and/or approvals from the Town for such use are obtained from the Town of Southold."

Plaintiff alleges that defendants were personally served with the Court's March 21, 2018 Injunction Order (Luft, J.), on April 3, 2018, that the defendants applied for a permit, but it was denied in June 2018, and that defendants continue to violate the Town Code and the Court's March 21, 2018 Injunction Order (Luft, J.). Proof of service of this motion is submitted and defendants have submitted papers in opposition.

An application to punish for both civil and criminal contempt is governed by Article 19 of the Judiciary Law. The same act may constitute both civil and criminal contempt (*Town of Copake v 13 Lackawanna Props., LLC*, 73 AD3d 1308, 900 NYS2d 508 [3d Dept 2010]).

With respect to civil contempt, pursuant to Judiciary Law § 756, the application is determined as with any other motion, and it may be initiated by notice of motion or order to show cause unless it is against a nonparty. To prevail on a motion for civil contempt, the movant must demonstrate by clear and convincing evidence (*Abizadeh v Abizadeh*, 190 AD3d 797, 136 NYS3d 772 [2d Dept 2021]; *Bennet v Liberty Lines Tr., Inc.*, 106 AD3d 1038, 967 NYS2d 390 [2d Dept 2013]; *Massimi v Massimi*, 56 AD3d 624, 869 NYS2d 558 [2d Dept 2008]) that the party to be held in contempt disobeyed "a lawful judicial order expressing an unequivocal mandate" (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29, 19 NYS3d 475 [2015]). Furthermore, the party disobeying the order must have had knowledge of the order and its terms, and the movant must be prejudiced by the offending conduct (*McCain v Dinkins*, 84 NY2d 216, 616 NYS2d 335 [1994]; *Weiss v Rosenthal*, 195 AD3d 730, 150 NYS3d 284 [2d Dept 2021]). It is not necessary that the disobedience be deliberate or willful, as the mere act of disobeying is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party (*Bais Yoel Ohel Feige v Congregation Yetev D'Satmar of Kiryas Joel, Inc.*, 78 AD3d 626, 910 NYS2d 174 [2d Dept 2010]).

Once a movant satisfies the burden, the burden shifts to the offender to offer evidence in defense such as the inability to comply with the order (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 19 NYS3d 475; *Matter of Weiss v Rosenthal*, 195 AD3d 730, 150 NYS3d 284; *Union Temple of Brooklyn v Seventeen Dev., LLC*, 162 AD3d 772, 79 NYS3d 194 [2d Dept 2018]). In the absence of factual evidence sufficient to refute the movant's demonstration of contempt, no hearing is required, and the matter may be summarily determined (Judiciary Law § 772; CPLR § 2218; *Gomes v Gomes*, 106 AD3d 868, 965 NYS2d 187 [2d Dept 2013]; *Town of Huntington v Reuschenberg*, 70 AD3d 814, 893 NYS2d 638 [2d Dept 2010]; *Kluge v Walter B. Cooke, Inc.*, 112 AD2d 230, 491 NYS3d 446 [2d Dept 1985]; *Quantum Heating Servs., Inc. v Austern*, 100 AD2d 843, 474 NYS2d 81 [2d Dept 1984]).

In support of its application, plaintiff submits the affidavits of Lester Baylinson and John Burke. In his affidavit, Baylinson states that he works as an ordinance inspector for the Town of Southold, and that prior to this position, he worked in the code enforcement department. He states that his responsibilities include responding to complaints, conducting investigations and issuing citations for violations of the Town Code. Baylinson states that he inspected the subject property on several occasions between May 2018 and May 2019, and that he observed the property being utilized as a campground by the housing of recreational vehicles and trailers. Baylinson avers that he issued several citations regarding same to defendant Frank Kelly between May 2018 and May 2019 for over 20 violations of the Town Code of which defendant Frank Kelly was ultimately convicted after trial in September 2019 by the Southold Town Justice Court (Hughes, J). Baylinson states that he inspected the property again in January 2020 and observed recreational vehicles, trailers and campers on the subject property. A copy of the Town of Southold's resolution adopted on June 6, 2018 is submitted indicating that defendants' application for a permit was denied, thus, given all of the above, establishes that defendants did not comply with the Court's March 21, 2018 Injunction Order (Luft, J.).

An affidavit by John Burke is submitted. Burke states that he is an assistant town attorney for the Town of Southold, and that he visited the subject premises on August 10, 2020. He states that he observed a residential structure at the subject premises that was being prepared for installation, and that he observed a number of other recreational vehicles and trailers used for living purposes which do not have certificates of occupancy or other permits. Burke states that Frank Kelly was on the subject premises supervising the installation, and that Frank Kelly indicated that he was aware of the prohibition against the installation of the structure and the presence of the other vehicles and trailers. Burke states that Frank Kelly told him he had no intention of complying with the Supreme Courts' Orders.

Here, the Town has demonstrated, by clear and convincing evidence, that defendants violated the Court's March 21, 2018 Injunction Order (Luft, J.) by failing to remove the items delineated in such Order and by failing to obtain the requisite permits, certificates of occupancy and/or approvals. The Order is clear and unequivocal, and defendants had knowledge of the Order. Furthermore, defendants' violation did defeat, impair, impede and prejudice plaintiffs' rights and remedies (*see Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 936 NYS2d 228 [2d Dept 2012]; *Town of Brookhaven v Mascia*, 38 AD3d 758, 833 NYS2d 519 [2d Dept 2007]).

It is worth noting that the defendants were previously held in civil contempt by the Court's October 26, 2016 Order (Tarantino, J.) based upon the defendants' failure to comply with the Court's September 10, 2015 Order (Tarantino, J.), which also prohibited defendants from using the premises as a trailer camp and/or a recreational vehicle park. Additionally, the Court notes that in a related action commenced in August 2020 under Index no. 611268/2020, this Court issued a similar injunction by its March 29, 2021 Order enjoining defendants from violating the same provisions of the Town Code of the Town of Southold by enjoining defendants from "keeping, storing, erecting, housing and/or placing structures, vehicles and trailers on the real property owned by them located at 1900 Peconic Bay Boulevard, Laurel, New York in the Town of Southold, County of Suffolk, which lack necessary permits, approvals and certificates of occupancy unless and until such time as defendants have obtained all necessary approvals from the Town of Southold." Defendants appealed such Order and the Appellate Division, by its June 4, 2021 Order, denied defendants' motion to stay enforcement of such injunction Order pending the appeal.

Significantly, here, defendants do not assert their inability to comply with the Court's March 21, 2018 Injunction Order (Luft, J.). The crux of defendants' arguments in opposition are impermissible collateral attacks upon the Judgment of Conviction from the Southold Town Justice Court (Hughes, J.) convicting defendant Frank Kelly of violating the Town Code and upon the Court's March 21, 2018 Injunction Order (Luft, J.) granting plaintiff a permanent injunction (*see Matter of Rubin Films LLC v Kaul*, 175 AD3d 419, 104 NYS3d 541 [1st Dept 2019]; *Board of Directors of Windsor Owners Corp. v Platt*, 148 AD3d 645, 49 NYS3d 293 [1st Dept 2017], *lv dismissed* 30 NY3d 986, 66 NYS3d 213 [2017]). However, although not demonstrated here, the only sufficient grounds to challenge an order underlying a contempt proceeding are that the court which entered it was without jurisdiction or the order has been stayed (*id.*).

Here, it is undisputed that the Court had jurisdiction to grant a permanent injunction. Furthermore, the Court's March 21, 2018 Injunction Order (Luft, J.) was not stayed, and it is still in effect. Although defendants have appealed the Judgment of Conviction from the Southold Town Justice Court (Hughes, J.), there is no stay of that matter. Consequently, there is nothing in defendants' opposition which warrants a hearing or denial of the instant motion (*see Matter of Vernon D. (Tarah F.)*, 119 AD3d 784, 989 NYS2d 334 [2d Dept 2014]; *Matter of People v Hooks*, 64 AD3d 1075, 883 NYS2d 378 [3d Dept 2009]; *Garbitelli v Broyles*, 257 AD2d 621, 684 NYS2d 292 [2d Dept 1999]).

Given all of the above, and defendants having failed to assert their inability to comply with the Court's March 21, 2018 Injunction Order (Luft, J.), or that the Court did not have jurisdiction to enter such Order, plaintiff's motion for an order adjudging and punishing defendant Frank Kelly and defendant Elizabeth Kelly for civil contempt is granted.

The penalty to be imposed for a civil contempt is remedial in nature and is designed to compensate the complainant, not to punish the offender (*Town Board of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 936 NYS2d 228 [2d Dept 2012]). Pursuant to Judiciary Law § 773, fines may be awarded in two situations: When actual damage results from the offender's acts, a fine may be imposed in an amount sufficient to indemnify the aggrieved party, and where the complainant's rights have been prejudiced but an actual loss cannot be established. In the latter situation, the fine is limited to \$250.00, plus the complainant's costs and expenses (Judiciary Law § 773; *Matter of Ferrante v Stanford*, 172 AD3d 31, 100 NYS3d 44 [2d Dept 2019]).

Pursuant to Judiciary Law § 774, where a fine has been imposed as a penalty for civil contempt either for actual loss or as indemnity, payment may be enforced by imprisonment (*Wides v Wides*, 96 AD2d 592, 465 NYS2d 285 [2d Dept 1983]; *Ditomasso v Loverro*, 242 AD 190, 273 NYS 76 [2d Dept 1934]). The statute provides, in pertinent part: "Where the misconduct proved consists of an omission to perform an act or duty which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine imposed." However, imprisonment cannot exceed six months.

With respect to criminal contempt, pursuant to Judiciary Law § 750 (3), the court has the power to punish for criminal contempt a person guilty of, among other acts, willful disobedience of its lawful mandate. The difference between civil contempt and criminal contempt is willfulness, and the standard of proof. With respect to criminal contempt, defendants must be found guilty beyond a reasonable doubt of willfully violating an order, and such willful disobedience is an essential element of criminal contempt. Willfulness may be inferred from knowingly failing to comply with a court order. However, such

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inference may be rebutted with evidence of good cause for noncompliance (*Matter of Figueroa-Rolon v Torres*, 121 AD3d 684, 993 NYS2d 348 [2d Dept 2014]).

A violation of an injunction constitutes criminal contempt where such violation is willful (*see Casavecchia v Mizrahi*, 57 AD3d 702, 869 NYS2d 864 [2d Dept 2008]). Where the application is to punish for a violation of an injunction, “the act complained of must be clearly embraced within the inhibited acts” (*Howard S. Tierney, Inc. v James*, 269 AD 348, 354, 56 NYS2d 8 [1st Dept 1945]; *see also Venables v Rovegno*, 195 AD3d 879, 135 NYS3d 834[2d Dept 2021]; *City Wide Sewer & Drain Serv. Corp. v Carusone*, 39 AD3d 687, 834 NYS2d 283 [2d Dept 2007]). Where a clear and unequivocal order issued by a court with jurisdiction is in effect and a contemnor has knowledge of it, a violation of such order must be interpreted to be willful (*Matter of Figueroa-Rolon v Torres*, 121 AD3d 684, 993 NYS2d 348).

Here, plaintiff has established that defendants committed criminal contempt beyond a reasonable doubt by willfully failing to comply with the Court’s March 21, 2018 Injunction Order (Luft, J.). The Order clearly defined the acts which defendants were obliged to perform, and defendants were well aware of the Order. Through the affidavit of the Town inspector and affirmation by the assistant town attorney who both visited the property and observed recreational vehicles during the relevant time period, plaintiff has submitted sufficient proof that defendants did not remove the recreational vehicles, and therefore, did not comply with the Court’s March 21, 2018 Injunction Order (Luft, J.). Additionally, defendant Frank Kelly was convicted after trial of utilizing the property as a campground during that same relevant period. Such issues were resolved under the most stringent standard of proof (beyond a reasonable doubt) and provide sufficient proof (*see People v Aguilera*, 82 NY2d 23, 603 NYS2d 392 [1993]) that defendant was using the recreational vehicles for living quarters or sleeping purposes in violation of the Court’s March 21, 2018 Injunction Order (Luft, J.). The doctrine of collateral estoppel may be invoked in a civil action when the prior proceeding is a criminal proceeding and the defendant was convicted based upon facts identical to those in the civil action (*Bazazian v Logatto*, 299 AD2d 433, 749 NYS2d 537 [2d Dept 2002]).

“Due process requires that an evidentiary hearing be held to resolve conflicting claims before one can be adjudged in contempt” (*Barreca v Barreca*, 77 AD2d 793, 430 NYS2d 739 [4th Dept 1980]). Where a defense is raised in an affidavit, a hearing is required as the requisite willfulness conduct of the contemnor cannot be ascertained without a hearing. Here, defendants have failed to refute plaintiff’s allegations or provide evidence of good cause for noncompliance, and therefore, no hearing is necessary and defendant Frank Kelly and defendant Elizabeth Kelly are adjudged to be in criminal contempt (*Matter of People v Hooks*, 64 AD3d 1075, 883 NYS2d 378; *Garbitelli v Broyles*, 257 AD2d 621, 684 NYS2d 292; *Guiliano v Carlisle*, 236 AD2d 364, 653 NYS2d 635 [2d Dept 1997]).

For criminal contempt, the penalties are punitive with the purpose of deterring the contemnor (*State v Unique Ideas, Inc.*, 44 NY2d 345, 405 NYS2d 656 [1978]). The maximum fine is \$1,000.00 and imprisonment of up to 30 days is authorized (Judiciary Law § 751). The continuing nature of the violation may be considered and a fine may be imposed for every day that the contempt persists (*Orchard Park Cent. Sch. Dist. v Orchard Park Teachers Assn.*, 50 AD2d 462, 378 NYS2d 511 [4th Dept 1976]).

Upon the adjudication of criminal contempt, defendant Frank Kelly and defendant Elizabeth Kelly shall appear for sentencing as ordered herein, and shall be permitted to purge themselves of the criminal contempt by promptly complying with the Court’s March 21, 2018 Injunction Order (Luft, J.) (*see Jones*

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v McKanic, 160 AD2d 870, 554 NYS2d 303[2d Dept 1990]; *Silverstein v Aldrich*, 76 AD2d 911,76 AD2d 911 [2d Dept 1980]; *Ferrara v Hynes*, 63 AD2d 675, 404 NYS2d 674 [2d Dept 1978]; *Trice v Ciuros*, 127 Misc2d 289, 485 NYS2d 689 [Sup Ct, Onondaga County 1985]; *Matter of Mayhew*, 33 Misc3d 1222(A), 943 NYS2d 792 [Westchester County Ct 2011]).

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.



LINDA KEVINS, JSC

Dated: 10/12/21

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION