

Elsayed v Sunset U.S. Corp.
2022 NY Slip Op 30953(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 158410/2021
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

INDEX NO. 158410/2021
MOTION DATE 11/16/2021
MOTION SEQ. NO. 002
LAMIA SALEM ELSAYED, NOUR MOHAMED ZAHER,
INDJI EL HENAWY, YASSIN EL SAYED,
Plaintiffs,

- v -

SUNSET U.S. CORPORATION, CARINI GROUP LLC,
Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 32

were read on this motion to/for CONTEMPT

Upon the foregoing documents, plaintiffs move for an order finding defendants in civil contempt for violating the interim relief and temporary restraining order (TRO) set forth in the signed order to show cause dated September 16, 2021 (NYSCEF Doc No. 16).

The TRO prohibited defendants from "engaging in any harassment, as defined by NYC Administrative Code Section 2[7]-2004 (48), and as barred by RPL Section 235-d" (id.).¹ The order to show cause was served with process upon defendants by overnight mail and e-mail on September 17, 2021 (see NYSCEF Doc No. 17) and by service upon the Secretary of State on September 20, 2021 (see NYSCEF Doc No. 18).

In seeking civil contempt against defendants, plaintiffs must demonstrate that (1) "a lawful order of the court clearly expressing an unequivocal mandate was in effect"; (2) "the order has been disobeyed"; (3) "the party charged must have had knowledge of the court's order" (Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation

¹ The first portion of the TRO, which prohibited defendants from "evicting or removing Plaintiffs without a proceeding or action, or otherwise locking Plaintiffs out of, or denying access to the Premises" does not appear to be at issue.

of State of N.Y., 70 NY2d 233, 240 [1987]); and (4) that a right of a party “may be defeated, impaired, impeded, or prejudiced” by the mere disobedience of the order (Hinkson v Daughtry-Hinkson, 31 AD3d 608 [2d Dept 2006]; see El-Dehdan v El-Dehdan, 114 AD3d 4, 11 [2d Dept 2013], affd 26 NY3d 19 [2015] [“The element of prejudice to a party’s rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation, but not criminal contempt, which aims to vindicate the authority of the court”]).

“[A]n application to adjudicate a party in contempt is treated in the same fashion as a motion and a hearing must be held if issues of fact are raised” (Quantum Heating Services Inc. v Austern, 100 AD2d 843, 844 [2d Dept 1984] [internal citations omitted]). “Conversely, a hearing is not necessary when there is no ‘factual dispute as to [the party’s] conduct unresolvable from the papers on the motion’” (id., quoting Siegel, NY Prac, § 484, p 649; see Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., 50 AD3d 1073 [2d Dept 2008]; Riverside Capital Advisors, Inc. v First Secured Capital Corp., 28 AD3d 455, 456 [2d Dept 2006]; El-Dehdan, 114 AD3d at 17 [noting that a “hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense”]).

In support of their motion, plaintiffs submit Zaher’s affidavit attesting that the defendants’ agents continued to contact her on September 16, 2021 and other occasions, presumably shortly thereafter, and she attaches screenshots from her phone (see NYSCEF Doc No. 21, Zaher affidavit at ¶¶ 3-6). However, other than the first allegation on September 16, 2021, there is no indication as to when some of the other alleged communications occurred (see id.; NYSCEF Doc No. 22). To the extent those communications occurred prior to service of the order to show cause, they cannot be considered in support of the contempt finding, as defendants had not yet been served with the TRO (see Dotzler v Buono, 144 AD3d 1512, 1513-14 [4th Dept 2016] [“Actual knowledge of a judgment or order is an indispensable element of a contempt

proceeding”], quoting Orchard Park Cent. School Dist. v Orchard Park Teachers Assn., 50 AD2d 462, 468 [4th Dept 1976] [internal quotations omitted]).

The text messages on September 23, 2021 are insufficient to demonstrate that the TRO was violated with reasonable certainty because it cannot be inferred that the complained of conduct was prohibited by the TRO. Thereafter, plaintiffs’ counsel advised defendants to communicate with counsel, and cease all communications with plaintiffs directly (see NYSCEF Doc No. 23).

The text message submitted as NYSCEF Doc No. 24 does not appear to have a date, but it was presumably from shortly before September 28, 2021 (see Zaher affidavit at ¶ 6, introducing exhibit C). In said text message, one of defendant’s representatives, Ilona, advised Zaher that a company was going to come to the apartment to remove the owner’s private artwork on September 28, 2021 between 11:00 am and 12:00 noon (see NYSCEF Doc No. 24). Ilona requested Zaher to confirm access to the apartment and Zaher responded advising that she was not giving access (see id.). Zaher also stated that the apartment was rented fully furnished pursuant to the lease, which includes the artwork and requested all communications to go through her counsel (see id.). Zaher’s affidavit then states that “at approximately 2:00 p.m., on September 28, 2021, I was at home studying in my pajamas, and suddenly, without announcement or any notice, THREE men entered the apartment! They stated that the Building Super, Carlos, let them in, and began walking through the apartment looking for paintings to remove” (Zaher affidavit at ¶ 8).

In opposition, defendants submit a single affidavit of Alex Carini, a real estate broker for defendant Carini Group LLC, wherein he denies receipt of the TRO until “after [they] had arranged to have professional art movers remove the artwork that had been inadvertently left within the unit” (NYSCEF Doc No. 32, Carini affidavit at ¶ 3 [emphasis in original]). However,

even if it is true that the movers were “arranged” or scheduled prior to receipt of the TRO, it does not explain why the arrangement would not have been canceled or rescheduled, especially when plaintiff Zaher expressly denied access.

Carini further states that he did not and would not deliberately disobey the Court’s order, or deliberately interfere with plaintiffs’ occupancy (*id.* at ¶¶ 4-5). However, “willful” or “intentional” disobedience is not a required element for civil contempt, as it is for criminal contempt (compare Jud L § 750 [A][3] and Jud L § 753 [A][3]; see generally El-Dehdan, 114 AD3d at 10-17; see also In re White, 478 BR 177, 183 [Bankr SDNY 2012]). As set forth above, civil contempt may be found where the mere disobedience of an order results in prejudice to a party (see Hinkson, 31 AD3d 608). Therefore, this contention is unavailing.

Carini further states, “[f]rankly, it never occurred to me that the retrieval of the artwork by professional art movers would become an issue. No disturbance or disruption was created and when access was denied the art movers just left” (Carini affidavit at ¶¶ 7-8). The Court presumes this to mean that retrieval of artwork (which appears to be an action that runs afoul of the lease [see NYSCEF Doc No. 4 at ¶ 34]), would not be considered as “harassment” and that plaintiffs were not prejudiced by the putative violation.

The TRO prohibited harassment as defined by NYC Administrative Code § 27-2004 (48) and as barred by RPL § 235-d. Subdivision 1 of RPL § 235-d states that it applies to landlords of buildings “which at any time was occupied for manufacturing or warehouse purposes” — it “does not apply . . . where a certificate of occupancy has issued for residential use” (Dan M. Blumenthal, Practice Commentaries, Book 49, RPL § 235-d). Here, the evidence is lacking with regard to whether such provision is applicable in order to find defendants liable for its violation.

It appears that the other provision does apply, as an owner of a multiple dwelling is statutorily required to “not harass any tenants or persons lawfully entitled to occupancy of such

dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter” (NYC

Admin Code § 27-2005 [d]). Section 27-2004 (48) provides that the term “harassment” shall


mean:

any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy . . .

While the first prong may be satisfied, proof of the second prong is absent from the plaintiffs’ submissions, which requires the conduct constitute one of the enumerated types of conduct set forth in the statute. Plaintiffs failed to identify the specific subdivision or conduct (see, e.g., § 27-2004 [48] [e] [removing possessions is one such act]). Therefore, the Court cannot find that a civil contempt has been committed as it does not appear with reasonable certainty that the prohibition set forth in the TRO had been violated.

Accordingly, it is ORDERED that the motion is denied without prejudice. This constitutes the decision and order of the Court.

3/18/2022
DATE


ALEXANDER TISCH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE