

SCI Funeral Servs. of N.Y., Inc. v McGinley
2022 NY Slip Op 33147(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 656388/2019
Judge: Andrew S. Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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SCI FUNERAL SERVICES OF NEW YORK, INC.,

INDEX NO. 656388/2019

Plaintiff,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 011

KENNETH T. MCGINLEY, TERRANCE P. MCGINLEY,
ARLENE MCGINLEY, RYAN MCGINLEY, BRIANNE
KELLY, JOSEPH FUMANDO, MCGINLEY FUNERAL
HOME AND CREMATION SERVICE, LLC, JOHN T.
MCNAMARA, MCNAMARA FUNERAL HOME, INC.,
BRONSON & GUTHLEIN FUNERAL HOME, INC., 747
FOREST LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 308, 309, 311, 312, 314, 315, 316

were read on this motion to/for CONTEMPT.

SCI Funeral Services of New York Inc.'s (**SCI**) motion to hold Kenneth McGinley and Terrance McGinley (the **McGinley Defendants**) in civil and criminal contempt for violating this court temporary restraining order dated March 5, 2020 (the **March 2020 TRO**; NYSCEF Doc. No. 73) must be granted. SCI has proven beyond a reasonable doubt that the McGinley Defendants willfully violated the March 2020 TRO. The record firmly established that that the McGinley Defendants directed business to John McNamara's funeral home, Bronson & Guthlein Funeral Home, Inc. (**Bronson & Guthlein**) and directed kick-backs to the McGinley Funeral Home and Cremation Services, LLC (**McGinley Funeral Home**) to try to avoid detection.

SCI previously moved to hold the McGinley Defendants in civil and criminal contempt for violation of the March 2020 TRO. The facts of this case are set forth extensively on the

transcript (NYSCEF Doc. Nos. 273-274) and the decision and order dated May 5, 2021 (the **Prior Decision**; NYSCEF Doc. No. 196). Familiarity with the facts is presumed.

In the Prior Decision, the Court granted the branch of SCI's motion for civil contempt and denied the branch of the motion seeking criminal contempt at that time but gave SCI leave to renew its application to hold the McGinley Defendants in criminal contempt if appropriate following discovery (NYSCEF Doc. No. 196, at 2).

In the Prior Decision, among other things, the Court ordered Mr. McNamara to comply with SCI's subpoenas (*id.*, at 3). SCI also served a subpoena on TD Bank, N.A. seeking Bronson & Guthlein's banking records because SCI believed that Mr. McNamara was helping the McGinley Defendants divert business from SCI to various other funeral homes (McCusker Aff., at 4 [NYSCEF Doc. No. 309]). The records plainly demonstrate payments made to the McGinley Funeral Homes for funerals that they directed to Mr. McNamara's funeral home (*id.*, at 5-6). Specifically, among others, in October 2020, Maureen Ryan's funeral was held at Bronson & Guthlein despite previous arrangements to have her funeral at Harmon (NYSCEF Doc. No. 309, ¶ 21). Mr. McNamara stated in his affidavit that he handled the services because he had known the family since he was 10 years old and that he suggested to the family that they keep the funeral at Harmon (*id.*, ¶ 22). However, after the funeral, Mr. McNamara wrote a check to "Johnson & McGinley" that listed "Ryan" on the memo line (*id.*, ¶ 23). The funeral for Elinor Walshe was also moved from Harmon to Bronson & Guthlein (*id.*, ¶ 24). Mr. McNamara also wrote a check after the funeral to "Johnson & McGinley" that listed "Walshe" on the memo line (*id.*, ¶ 26).

To make a finding of civil contempt, the Court must determine that (i) a lawful order of the court clearly expressing an unequivocal mandate was in effect, (ii) it appears with reasonable certainty that the order has been disobeyed, (iii) the party to be held in contempt had knowledge of the court's order, and (iv) the right of a party to the litigation is prejudiced (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Civil contempt must be demonstrated by clear and convincing evidence (*Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]). To make a finding of criminal contempt, the Court need not determine that the right of a party to the litigation has been prejudiced but must find that the party to be held in contempt willfully disobeyed the court's order (*Madigan v Berkeley Capital, LLC*, 205 AD3d 900, 905-906 [2d Dept 2022]). Criminal contempt requires a showing of a higher degree of willfulness than required for civil contempt (*Digital Warehouse USA Inc. v Hasan*, 2019 WL 6840407, at * 2 [Sup Ct, NY County 2019], citing *Dept. of Env'tl. Protection v Dept. of Env'tl. Conservation*, 70 NY2d 233, 240 [1987]). Criminal contempt must be proven beyond a reasonable doubt (*Simens v Darwish*, 100 AD3d 527, 527 [1st Dept 2012]). Upon a finding of civil contempt, the Court may levy a fine of \$250 where such contempt has not cause actual loss or injury (Judiciary Law § 773) and upon a finding of criminal contempt, \$1,000 (Judiciary Law § 751).

As discussed above, the March 2020 TRO both enjoined further construction of the funeral home literally a few blocks away from SCI's funeral home and in violation of the non-compete agreement and prohibited the McGinley Defendants from misdirecting funerals in violation of the covenant not to compete. It is now clear that the McGinley Defendants have willfully violated the March 2020 TRO by working with Mr. McNamara and Bronson & Guthlein to

divert business away from SCI in violation of the covenant not to compete. It does not matter that Bronson & Guthlein was not named in the March 2020 TRO or that business was not being conducted by the McGinley Funeral Home. This sleight of hand fails. The McGinley Defendants shall be required to pay the statutory maximum for civil contempt of \$250 and the statutory maximum for criminal contempt of \$1,000, in addition to SCI's costs in connection with bringing this motion. The Court shall not, however, order the McGinley Defendants to be imprisoned at this time.

It is hereby ORDERED that SCI's motion to hold the McGinley Defendants in civil and criminal contempt of court is granted; and it is further

ORDERED that the McGinley Defendants are ordered to pay SCI's reasonable costs and attorneys' fees in connection with this motion; and it is further

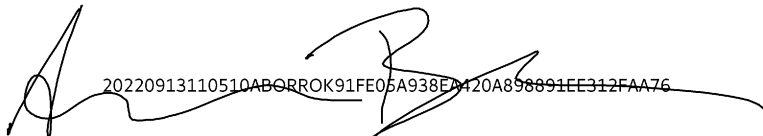
ORDERED that SCI will, within 14 days of the date of this order, provide the McGinley Defendants with an itemized invoice of its fees and costs in connection with this motion and if the parties cannot agree on the amount of such reasonable costs and fees within 30 days, the issue will be referred to a JHO or special referee to hear and determine; and it is further

ORDERED that the McGinley Defendants are hereby sanctioned by this Court in the amount of \$1,250 each and shall deposit said amount with the County Clerk, together with a copy of this order with notice of entry, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 53 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against the McGinley Defendants in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


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9/13/2022
DATE

ANDREW S. BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: