

STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

TOWN OF COPAKE, COLUMBIA COUNTY
NEW YORK,

Plaintiff,

-against-

13 LACKAWANNA PROPERTIES, LLC.,
SALVATORE CASCINO and COPAKE
VALLEY FARM, LLC.,

Defendants.

DECISION & ORDER

Index No. 0864-06

Appearances:

Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP.
Victor M. Meyers, Esq.
436 Union Street
Hudson, New York 12534
Attorneys for Plaintiff

Dennis B. Schlenker, Esq.
174 Washington Avenue
Albany, New York 12210
Attorneys for Defendants

NICHOLS, A.J.S.C.

By Orders to Show Cause dated August 3, 2007 and September 18, 2008, the Plaintiff moves for an Order finding the Defendants in contempt, both criminal (*see*, Judiciary Law § 750) and civil (*see*, Judiciary Law § 753) for allegedly violating a temporary restraining order (TRO) issued by the Court via an Order dated November 27, 2006.

The TRO was issued by the Court relative to an long-standing dispute between the Plaintiff and the Defendants involving activities related to some 310 acres owned by

the Defendants and located within the Town of Copake. Without belaboring the instant Decision and Order with the entire litany of the events that have characterized much of the acrimonious relationship between the Plaintiff and the Defendants, it is accurate to portray that the parties as having been engaged in an ongoing dispute regarding whether the Defendants' activities relative to the subject property are such so as to violate the Copake Town Code. Although the instant matter had its genesis in the context of that ongoing dispute, the actual points at issue in the instant matter and this Decision and Order are narrower in scope, i.e., whether the Defendants violated the TRO and are therefore in contempt.

In relevant part the TRO states that pending the further Order of the Court

“...defendants are hereby enjoined and prohibited from all further construction and/or excavation on the premises; and it is further ordered that pending further Order of the Court, defendants are hereby enjoined and restrained from depositing any material of any type upon the premises.”

Thereafter, the Defendants sought to modify the TRO by virtue of an Order to Show Cause dated December 16, 2006. By Decision and Order dated December 22, 2006, the Court responded by modifying the TRO to the extent that the Defendants were

“...granted the ability to plow disc, pick rocks, harrow and spread manure on both the 11-acre field located on the corner (of) Route 22 and Lackawanna Road and the 30-acre field located in the corner of Weedmine and Lackawanna roads...and only utilize equipment specifically designed to accomplish said limited tasks.”

In addition, the Court made such activities

“...contingent upon the Defendants contacting the Town of Copake Zoning Enforcement Officer at least seventy-two (72) hours before the commencement of such activity...”

Finally, the Court denied the remainder of the Defendants’ application and amplified that denial by starting

“(i)n particular...the Court denies the remainder of the Defendant(s’) application to...bulldoze, install tile drains, or otherwise excavate the subject property.”

In the Order to Show Cause dated August 3, 2007, the Plaintiff alleges that the Defendants violated the TRO by engaging in prohibited activity subsequent to the issuance of the TRO. Specifically, the Plaintiff alleges that the Defendants poured concrete at the site of a proposed farm stand located on the subject property, performed lattice-work on the farm stand, engaged in excavation work with a bulldozer and constructed a stone wall and a concrete foundation on the property.

By Order to Show Cause dated September 18, 2008, the Plaintiff alleged that the Defendants violated the TRO by allowing, on two separate occasions, trucks to dump materials on the subject premises and a bulldozer to spread the materials thereupon, and further violated the TRO on two other separate occasions, by allowing trucks and heavy machinery to deposit more dirt on the subject premises.

On November 13-14, 2008, a full evidentiary hearing was held relative to the Plaintiff’s accusations. At the conclusion of the hearing, the Court reserved decision and

afforded the Plaintiff and the Defendants the opportunity to submit post-hearing memorandums of law. The parties have filed memoranda with the Court and this matter has been fully submitted

NOW, upon all the pleadings, the evidence adduced in the course of the hearing held relative to this matter and after giving due consideration to the memoranda of law submitted by the parties, the Court makes the following findings and issues the following orders.

ALLEGATIONS OF CRIMINAL CONTEMPT

In order to prove that criminal contempt has occurred, the moving party bears the burden of demonstrating, beyond a reasonable doubt that a party has wilfully and knowingly disobeyed a known, lawful court order clearly expressive of an unequivocal mandate. *See, Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583; *see, also, McCain v. Dinkins*, 84 N.Y.2d 216, 226;

Upon review it is apparent that the Defendants engaged in criminal contempt relative to the TRO issued by the Court on November 27, 2006.

Initially, it is apparent that the TRO was a lawful order. In this regard, the Court possessed jurisdiction over the matter and in no manner is the TRO void on its face. *See, Dalessio v. Kressler*, 6 A.D.3d 57, 65. Indeed the Defendants have not seen fit to contest the legality and/or propriety of the Order. Furthermore, a review of the TRO demonstrates that its terms were entirely clear and unequivocal. In that regard, the TRO

prohibited all construction, excavation and the depositing of material on the subject premises. Thus, it is apparent that the Defendants were not faced with an ambiguous order; rather they were presented with an order that absolutely prohibited them from engaging in certain specific activities and that expressed that prohibition in clear and explicit language.

Turning to evidentiary considerations, it is apparent that the evidence presented by the Plaintiff demonstrated, beyond a reasonable doubt, that the Defendants, subsequent to the issuance of the TRO, engaged in activities specifically forbidden by the express terms of the TRO. In particular, the testimony of the witnesses presented by the Plaintiff (which the Court finds entirely credible) and the evidence presented by the Plaintiff (in particular the photographic exhibits), demonstrated beyond a reasonable doubt that the Defendants engaged in, or caused, the erection of a stone wall and construction relative to the farm stand (including, but not limited to lattice work and the pouring of concrete), and, further, allowed materials to be deposited and thereafter spread (by bulldozer and other heavy equipment) upon the subject property.

That such activity was in disobedience of the terms of the TRO is demonstrated, beyond a reasonable doubt, by the unequivocal language of the TRO.

In determining whether the Defendants' conduct constituted criminal contempt, the primary consideration involves "...the level of wilfulness with which the conduct is carried out." Matter of McCormick v. Axelrod, *supra* at 583. In determining whether the

requisite level of wilfulness to support a finding a criminal contempt "...the conduct...must be examined in light of the express terms of the order..." ENVTL. Protection v. D.E.C., 70 N.Y.2d 233, 241. In particular, if the order's terms are unclear or "...capable of a construction consistent with the innocence of the party," (*id*) a finding of contempt is inappropriate,

The express terms of the TRO in this case clearly prohibited the conduct the Defendants engaged in. In the face of an Order prohibiting construction the Defendants continued to pursue work relative to the farm stand buildings and constructed a stone wall anew. In the face of an Order prohibiting the deposit of any material on the subject premises, the Defendant caused materials to be deposited on the premises on several occasions. *Cf*, Matter of McCormick v. Axelrod, *supra* at 584.

With the evidence submitted by the Plaintiffs demonstrating that the Defendants did not comply with the TRO, the Plaintiff clearly established a prima facie case of criminal contempt, making it incumbent of the Defendants to establish good cause for that noncompliance. *See*, Dalessio v. Kressler, *supra* at 66; Ferraro v. Ferraro, 272 A.D.2d 510, 512.

Thus, Defendant Cascino testified that construction on the stone wall was commenced prior to the issuance of the TRO, that the work on the farm stand was necessitated by certain exigent circumstances and that the deposit of materials was necessitated by the Defendants' obligation to adhere to the terms of a consent decree

entered into the with Department of Environmental Conservation.

After considering the Defendant Cascino's testimony, observing his demeanor and assessing his credibility, the Court finds that his testimony, as set forth supra, is lacking in veracity and is not credible. In this regard, the Court finds that the testimony by Defendant Cascino that his actions were prompted by exigent circumstances and the need to conform to the terms of the consent degree represents an ex post facto attempt to justify the acts that occurred, as opposed to an accurate recital of why the acts were necessary. Furthermore, after considering the testimony of witnesses called by the Defendant regarding, *inter alia*, the alleged exigency and observing their demeanor and assessing their credibility, the Court similarly finds that testimony lacking in credibility.

Therefore, the Court finds that the Defendants' conduct relative to the construction work on the farm stand, the erection of the stone wall and the depositing of material on the subject premises was not due to a misapprehension of the terms of the Order or necessitated by exigent circumstances. Moreover, in view of the unequivocal language of the TRO and the implicit evidence that the Defendants, who made several attempts to modify the terms same, were well aware of the restrictions the order imposed, it is apparent that the Defendants wilfully flouted the TRO.

Based on the aforesaid, the Court finds the Defendant in criminal contempt relative to the Court's Order dated November 27, 2006.

CIVIL CONTEMPT

At the outset, the Court reiterates the factual findings made *supra*.

The elements that constitute an act of Civil Contempt are similar to those constituting criminal contempt. Indeed, as the Court of Appeals observed “...the line between civil and criminal contempt may be difficult to draw in a given case and the same act may be punished as both a civil and criminal contempt.” McCain v. Dinkins, *supra*. However, notwithstanding their similarity, civil and criminal contempt are distinguishable in that a finding of civil contempt need only be demonstrated by clear and convincing evidence, rather than beyond a reasonable doubt. *See*, Wheels America New York Ltd. v. Montalvo, 50 A.D.3d 1130, 1130. Furthermore, the conduct constituting civil contempt need not be of the same degree of willfulness as that required for a finding of criminal contempt. *See*, Matter of McCormick v. Axelrod, *supra*; McCain v. Dinkins, *supra*; ENVTL. Protection v. D.E.C., *supra* at 240. Moreover, in civil contempt, the moving party must suffer actual prejudice as civil, as opposed to criminal, contempt is designed to redress the rights of a party appurtenant to legal proceedings, rather than safeguard the integrity of a given court. *See*, Matter of McCormick v. Axelrod, *supra*; ENVTL. Protection v. D.E.C., *supra* at 239; Moran v. Village of Philmont, 147 A.D.2d 230, 235

Therefore, with the Court having reiterated its factual findings relative to criminal contempt, the only issue remaining relative to whether the Defendants are in civil

contempt is that involving the questions of whether the Plaintiff rights have been prejudiced by the Defendants' conduct. Indeed, without a demonstration that a party has suffered prejudice to his or her rights resulting in actual loss or injury due to a violation (*see*, Matter of Augat v. Hart, 244 A.D.2d 800, 802), a finding of civil contempt cannot be justified. *See*, ENVTL. Protection v. D.E.C., *supra* at 240. That is due to the fact that civil contempt is a compensatory remedy, as opposed to one punitive in nature. *See*, Matter of Thorsen v. Nassau County Civil Serv. Comm., 32 A.D.3d 1037, 1038.

In the case *sub judice* the Plaintiff has not asserted any actual injury or loss as the results of the Defendants' conduct. Indeed, it appears that no such injury or loss occurred. Rather, the prejudice the Plaintiff claims is that to its right to enforce the Copake Town Code. Decisional authority supports the proposition that the infringement of such a right is prejudicial, as that term is understood, in the context of a contempt proceeding. *See*, Moran v. Village of Philmont, *supra*; State of New York v. Stallings, 183 A.D.2d 574, 575.

Upon review, the Court finds that clear and convincing evidence was presented by the Plaintiff demonstrating that the Plaintiff's rights were indeed prejudiced by the Defendants' disobedience of a known, lawful court order clearly expressive of an unequivocal mandate.

In this regard, the Defendants' erection of the stone wall, the continuation of construction work relative to the farm store and the depositing of materials on the land in

question, not only violated the express terms of the TRO, they also prevented the Plaintiff from attempting to enforce the Copake Town Code against the Defendants with regard to the very activities the Defendants engaged in subsequent to the issuance of the TRO. Without deciding here whether the Plaintiff's reading of the Copake Town Code was correct or enforceable, it remains that the Plaintiff's ability to present those matters before this Court was stripped of any real or actual meaning by the Defendants' conduct. Indeed, the Defendants essentially presented the Plaintiff with a *fait accompli* relative to the very matters that caused the Plaintiff to seek judicial intervention by the Court. As such, the Court finds that the Plaintiff suffered prejudice and that the Defendants' are properly held in civil contempt. *See, Moran v. Village of Philmont, supra; State of New York v. Stallings, supra.*

DISPOSITION AS TO CRIMINAL CONTEMPT

Based on the findings relative to criminal contempt as set forth *supra*, the Defendants are fined \$250.00 and are sentenced to thirty (30) days in Columbia County Jail, with said sentence of incarceration suspended.

DISPOSITION AS TO CIVIL CONTEMPT

Based on the findings relative to civil contempt as set forth *supra*, the Defendants are hereby directed to perform the following acts:

1. Remove, forthwith, the materials deposited on the subject property in contravention of the TRO (*see, Moran v. Village of Philmont, supra*); and
2. Remove, forthwith, the stone wall constructed on the subject property in

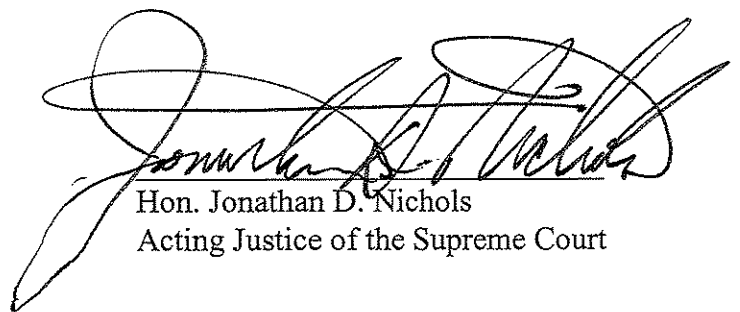
- contravention of the TRO (*see, Moran v. Village of Philmont, supra*); and
3. Immediately cease and desist from all construction work relative to the farm stand and perform no such work until the further Order of the Court; and
 4. Pay the Plaintiff reasonable costs and attorneys' fees expended by the Plaintiff in the course of prosecuting the Defendants' contempt. *See, Jamie v. Jamie*, 19 A.D.3d 330, 330.

CONCLUSION

The Plaintiff is given twenty (20) days from the date of the instant Decision and Order to submit an itemized claim for attorneys' fees and expenses to the Court, on notice to the Defendants. The Defendants are provided twenty (20) days to submit opposition to the Plaintiff's claim. Unless the parties stipulate to the issue of attorneys' fees and costs the Court will schedule an evidentiary hearing relative to that issue.

This constitutes the Decision and Order of the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provision of that section relating to, *inter alia*, filing entry and notice of entry.

Dated: June 9, 2009
Hudson, New York



Hon. Jonathan D. Nichols
Acting Justice of the Supreme Court