SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

FELICE J. MURACA,

Plaintiff(s),

-against-

MARK MEYEROWITZ, KAREN MEYEROWITZ, HERBERT NEWMAN, RAYE NEWMAN and TOWN OF HEMPSTEAD,

Defendant(s).

ORIGINAL RETURN DATE:09/07/07
SUBMISSION DATE: 09/21/07
INDEX No.: 003241/05

MOTION SEQUENCE #12,13

The following papers read on this motion:

Order to Show Cause.....	12/13 A
Cross-Motion.....	12/13 B
Answering Papers.....	12/13 C, 12/13 D
Reply.....	12/13 F
Plaintiff's Brief.....	12/13 E

Order to Show Cause [sequence #12] by plaintiff Felice Muraca, for an order pursuant to CPLR Article 19 of the Judiciary Law, punishing defendants Mark and Karen Meyerowitz for civil and/or criminal contempt based upon the alleged failure to comply with a judgment dated October 4, 2006 is granted as to civil contempt and denied as to criminal contempt.

Cross-motion [sequence #13] by Karen and Mark Meyerowitz for an order directing the Town of Hempstead to approve their application for a permit to relocate their float out of a zone constituting plaintiff's riparian area, as delineated by the Court in its October 4, 2006 judgment is denied.

By memorandum decision after trial dated July 10, 2006, this Court adjudicated the competing riparian rights of plaintiff Felice Muraca, defendants Mark and Karen Meyerowitz [Meyerowitz] and defendants Herbert and Raye Newman [Newman] – each of whom own property bordering upon Merrick Bay in the Town of Hempstead (*see*, *Muraca v. Meyerowitz*, 13 Misc.3d 348 [Supreme Court, Nassau County 2006]).

In substance, and as memorialized in an underlying, "counter" judgment entered October 12, 2006, this Court fashioned a 10' x 30' "riparian corridor" for Meyerowitz' use, extending outshore from the upland boundary between Meyerowitz' lot and Newman's lot to the south (*see*, Counter-Judgment and annexed diagram [Pltff's Mot. Exh. A]).

The final decretal paragraph of the Court's judgment states, in relevant part, that the "non-municipal parties * * * are hereby mandated to promptly commence and diligently pursue the removal of all piles, piers, poles, floats ramps and the like as are or may be necessary to implement and to effect [the Meyerowitz' riparian corridor] *and to* promptly make and diligently pursue and complete any and all applications necessary to any governmental boards, agencies and/or officials having or asserting jurisdiction over Merrick Bay and the installation or relocation of any improvements thereof as may be required to lawfully relocate and reinstall any such pile, pier, pole ramp, float or the like" [emphasis added].

The Court further noted [in its underlying memorandum decision] that, "[w]hether the foregoing determination results in an inability of defendants Meyerowitz to dock their currently owned boat within their riparian rights is of little consequence to the outcome of this litigation. The corridor of access provided herein is sufficient to accommodate many reasonably sized watercraft commensurate with the very limited shorefront provided by [Meyerowitz' lot] * * *" (*Muraca v. Meyerowitz*, *supra*, at 358).

As a consequence of the court's memorandum and judgment, a dock/float and certain mooring pole owned by defendants Meyerowitz, were now located in whole or part outside their newly configured riparian corridor – and within plaintiff Muraca's judicially delineated riparian zone.

Defendants Meyerowitz claim that after the judgment was entered, they set about making a permit application first to the Department of Environmental Conservation ["DEC"]. The application sought permission to relocate their float and the mooring pole several feet to the south of its current location, so that it would be situated within their 10 x 30 foot riparian corridor (Meyerowitz Aff., ¶ 10a).

The DEC allegedly did not act with dispatch, even though Meyerowitz continually pressed that agency to do so in light of the directives contained in the Court's order requiring, *inter alia*, the removal of poles and the acquisition of relevant permits (Meyerowitz Aff., ¶ 10d).

In January of 2007, and while the DEC application process was pending, plaintiff Muraca moved by Order to Show Cause to hold defendants Meyerowitz in criminal contempt of the October 2006 judgment.

In February of 2007, this Court *sua sponte* adjourned the motion for reasons not relevant here, but reminded the parties in its ensuing order that the "final decretal paragraph of its judgment dated October 4, 2006 included two *distinct* directives – one dealing with removal of structures and the other dealing with their relocation or reinstallation" (Order of Phelan J., dated Feb. 9, 2007) [emphasis added]).

By order dated March 28, 2007, this Court denied plaintiff's contempt application, although it once again emphasized that the judgment included distinct and separate mandates: " removal" and "relocation or installation" (Order at p.2; Defs' Cross Mot., Exh. 14).

In June 18, 2007 the DEC issued the requested permit to defendants Meyerowitz and the mooring pole was removed on July 19, 2007 (Defs' Exh. 16; Meyerowitz Aff., ¶10[i]). According to Meyerowitz, while that application was pending, they made inquiries with the Town as to whether a permit was required and received an informal response to the effect that no permit would be needed to remove structures from a waterway (Defs' Exh. 17).

However, in July of 2007, Meyerowitz received a written correspondence from the Town which stated that a permit would be required to relocate the pole and float (Meyerowitz Aff., ¶ 10f; Defs' Exh. 17).

Defendants Meyerowitz thereafter submitted a permit application to the Town, but the Town later denied it, reasoning that although the relocated structures – including an 8 x 18 float – would be situated within the Court-approved riparian corridor, placing the float therein would then leave "no room to moor your boat" (Defs' Exh. 19).

The Town denial notice further explained that "we may only consider an application that maintains all proposed structures and moored * * * vessels within the 10 x 30 foot corridor" (Defs' Exh. 19).

According to Meyerowitz' construction of the Court's decision and judgment, this Court's delineation of riparian rights "never addressed any question as to the location or size and configuration of any boat to be moored at any structure either within the 10' by 30' zone or further out into Merrick Bay than that 10" x 30' corridor" (Meyerowitz Reply Aff., ¶ 5).

Plaintiff has taken a diametrically opposing view, asserting that "the Court's decision without question contemplated that any current or future boat moored by the Meyerowitz would be kept within the 10' by 30' foot corridor of access" (Bloom Aff. in Opp., ¶ 7).

By Order to Show Cause dated August 28, 2007, plaintiff now moves again to hold defendants Meyerowitz in criminal and/or civil contempt of this Court's October, 2006 judgment.

In support of the application, plaintiff contends, *inter alia*, that at this juncture almost a year has elapsed since the Court issued its judgment requiring the removal of encroaching structures; that the 8' x 18' float has not yet been removed; that the Town expressly advised Meyerowitz that the removal of structures from a waterway would not require a permit; and that despite this, the float has not yet been removed.

Plaintiff further contends that instead of simply removing the float now, defendants Meyerowitz have elected to delay the removal and await the issuance of a new permit, which relocates the dock in violation of the terms and parameters contained in this Court's judgment.

Defendants oppose the application and cross move for an order directing the Town to issue the permit, which they claim is mandated by the text and tenor of the October, 2006 judgment.

Plaintiff's motion for an order holding defendants in contempt is granted as to civil, but not criminal, contempt. Defendants' cross-motion is denied.

"In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing a right of another party to the litigation" (*Riverside Capital Advisers, Inc. v. First Secured Capital Corp.*, __AD3d___, 2007 WL 2729012 [2nd Dept. 2007]; Judiciary Law § 753[A][3] *see, McCain v. Dinkins*, 84 NY2d 216, 226 [1984]; *Giant v. Ioannou*, 41 AD3d 427; *Gloveman Realty Corp. v. Jefferys*, 29 AD3d 858, 859).

To satisfy the prejudice requirement, it is sufficient to allege and prove that the contemnor's actions were "calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of a party'" (*City of Poughkeepsie v. Hetey*, 121 AD2d 496, 497). "A hearing is not required unless there is a factual issue in dispute that needs to be resolved" (*Costanza v Costanza*, 213 AD2d 1043, 1044 *see also, Snyder v. Snyder,* 39 AD3d 1281, 1282; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 455, 456; *Goldsmith v. Goldsmith*, 261 AD2d 576, 577).

"The aim in imposing a penalty for civil contempt is not to punish, but rather, to compensate the injured party for the loss of or interference with the benefits of the court mandate" (*Thorsen v. Nassau County Civil Service Com'n*, 32 AD3d 1037, 1038 *see*, *McCain v. Dinkins*, *supra*). Indeed, "'[i]n order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party'" (*Hinkson v. Daughtry-Hinkson*, 31 AD3d 608, *quoting from, Jim Walter Doors v Greenberg*, 151 AD2d 550, 551 *see also, Goldsmith v. Goldsmith, supra; Consumers Sec. Group v. Benesowitz*, 14 Misc.3d 1214(A), 2007 WL 38672 [Supreme Court, Nassau County 2007]).

Movant bears the burden of proving the contempt by clear and convincing evidence (*Lutz v. Goldstone*, 42 AD3d 561, 563; *Riverside Capital Advisors, Inc. v. First Secured Capital Corp.*, *supra*, at 456).

By contrast, "[t]o be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding" (*Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]; *City of Poughkeepsie v. Hetey, supra, see,* Judiciary Law § 750[A][3]).

Specifically, criminal contempt requires, "[w]ilful disobedience to [a court's] lawful mandate" (Judiciary Law § 750[A][3]), which must be proven beyond a reasonable doubt (*New York City Coalition to End Lead Poisoning v. Giuliani*, 245 AD2d 49, 50). Criminal contempt, "involves vindication of an offense against public justice and is utilized to protect the dignity of the judicial

system and to compel respect for its mandates" (*McCormick v. Axelrod*, 59 NY2d 574, 583[1983]; *State v. Unique Ideas, Inc.*, 44 NY2d 345, 349 [1978]; *Dalessio v. Kressler*, 6 AD3d 57, 65-66).

It is settled that "[a]n application to punish a party for contempt is addressed to the sound discretion of the court" (*Educational Reading Aids Corp. v. Young*, 175 AD2d 152 *see, Fernandez v. Fernandez*, 278 AD2d 882; *Korn v. Gulotta*, 186 AD2d 195, 197).

Initially, the Court in its discretion concludes that plaintiff has failed to demonstrate the requisite level of wilfulness which would support a finding of criminal contempt as against defendants Meyerowitz (*see, McCormick v. Axelrod, supra*, at 513; *CBS Rubbish Removal, Inc. v. Town of Babylon Sanitation Com'n*, 249 AD2d 541). The Court agrees, however, that plaintiff has sustained his burden of establishing that defendants Meyerowitz have committed civil contempt (*e.g., Goldsmith v. Goldsmith, supra*).

It is undisputed that Meyerowitz' float structure has not yet been removed from its currently offending location.

Significantly, the October, 2006 judgment expressly and unequivocally obligated defendants Meyerowitz to "promptly commence and diligently pursue the removal of all piles, piers, poles, floats ramps and the like as are or may be necessary to implement and to effect" Meyerowitz' riparian corridor.

While the judgment language which follows mandates, *inter alia*, prompt application for any necessary permits or approvals, there is nothing in that language which would permit defendants to suspend or delay removal of an offending structure until after the "permit application" prong of the Court's directive has been completed. Indeed, in its February 9, 2007 and March 28, 2007 orders, this Court expressly warned that the judgment was to be read as containing "two *distinct* directives - one dealing with removal of structures and the other dealing with their relocation" [emphasis added].

The judgment language quoted and relied upon by defendants Meyerowitz, *i.e.* , the phrase, "installation *or* relocation," [emphasis by defendants] - is contained in the second portion of the final decretal paragraph and relates solely to the permit application process and the options which may be presented thereby. That language does not provide - nor was it intended to provide - that defendants would be free to delay compliance with the distinct removal directive until a reconfigured docking scheme of their choice was approved by relevant governmental entities. Nor is there any dispute that the Town expressly advised defendants Meyerowitz that no permit would be required to remove a structure from the subject waterway (Defs' Exh. 17).

These facts demonstrate, in the Court's view, that Meyerowitz' actions were calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of plaintiff under the judgment.

The Court agrees, however, that plaintiff has failed to demonstrate that he has sustained actual damage by virtue of Meyerowitz' contemptuous conduct (*Speirs v. Leffer*, 246 AD2d 590, 591; *Berkowitz v. Astro Moving and Storage, Co., Inc.*, 240 AD2d 450, 452 *see also, Barclays Bank v. Hughes*, 306 AD2d 406, 407).

Plaintiff's allegations with respect to the injury caused by the offending float - which apparently encroaches two to three feet into plaintiff's riparian zone (Meyerowitz Aff.,¶ 21[b]) - are inconclusive and do not quantify or adequately document the existence of any actual damage (*see*, Muraca Aff., ¶¶ 3-5; Pltff's Brief at 2). The Court further notes that plaintiff's opposition papers and memorandum of law do not address Meyerowitz' specific claims relative to the issue of actual injury (*see*, Meyerowitz Aff., ¶ 21[b]-[d]).

Nevertheless, "Judiciary Law § 773 permits a court, where no actual monetary damages have been caused by the contempt, to impose a fine 'not exceeding the amount of the complainant's costs and expenses, and [$250] in addition thereto'" (*Lembo v. Mayendia-Valdes*, 293 AD2d 789, 790 *see, State v. Unique Ideas, Inc., supra*; *Daniels v. Guntert*, 256 AD2d 940, 942; *Holskin v. 22 Prince Street Associates,* 178 AD2d 347, 348; *Costanza v. Costanza, supra*; *Glanzman v. Fischman*, 143 AD2d 880, 881).

In such a circumstance, complainants' costs and expenses are determined by the counsel fees and disbursement "incurred by plaintiff as a direct product of the contemptuous conduct" (*Lembo v Mayendia-Valdes*, supra; *see, also, Lamb v. Amigone*, 12 AD3d 1165; *Barclays Bank v. Hughes, supra* at 407; *Glanzman v. Fischman, supra*).

Where, as here, an award of counsel fees is requested and warranted, but proof in evidentiary form as to the amount of fees is lacking, a hearing is required (*Lamb v. Amigone, supra,* at 1166).

This matter is referred to the Calendar Control Part (CCP) for a hearing on the issue of attorney's fees and disbursements incurred by plaintiff as a direct product of Meyerowitz' contempt as found herein. Said hearing shall be scheduled to be held on November 29, 2007 at 9:30 A.M. Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer [JHO], or a Court Attorney/Referee, as he or she deems appropriate. A JHO or Court Attorney/Referee shall not be used however unless said JHO or Court Attorney/Referee has the power to hear and determine -- and not merely hear and report (see CPLR Article 43).

Lastly, defendants' cross-motion for an order compelling the Town to "forthwith" approve their previously rejected permit application, is denied.

The Court will not compel a municipal entity – here, the Town of Hempstead, which possesses jurisdiction over the conduct in question (*cf., Malloy v. Incorporated Village of Sag Harbor*, 12 AD3d 107, 109; *Melby v. Duffy*, 304 AD2d 33, 38) – to issue the disputed permit, especially since Meyerowitz' construction of the judgment is not in accord with the Court's holding. It bears noting that in its underlying trial decision, this Court expressly commented that, "[w]hether the foregoing determination results in an inability of defendants Meyerowitz to dock their currently owned boat *within their riparian rights* is of little consequence to the outcome of this litigation [since] [t]he corridor of access provided herein is sufficient to accommodate many reasonably sized watercraft commensurate with the very limited shorefront provided by [Meyerowitz' lot]" (*Muraca v. Meyerowitz*, *supra*, at 358) [emphasis added]).

In any event, the Court's judgment does not direct or order the affected municipal entities to grant permits filed by the parties, but instead merely authorizes the parties make such applications to the extent that permits are necessary and will facilitate the lawful installation or relocation of any improvements or structures. If defendants Meyerowitz are aggrieved by the Town's determination, they are free, if they be so advised, to challenge that decision by commencing an appropriate plenary action (see, e.g., CPLR Article 78).

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief beyond that granted above.

This decision constitutes the order of the court.

Dated: 10-23-07

HON THOMAS P. PHELAN

J.S.C.

ENTERED

OCT 26 2007

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