

Cumberland, ss.

In Re SIX CONSOLIDATED CASES
INVOLVING FLYNN, HOWANIEC, LILLEY
TUCKER and TROUBH HEISLER PARTIES

Docket Nos. BCD-CV-15-41 et seq.

ORDER ON MOTIONS FOR CONTEMPT
AND MOTION TO SEAL

Attorney John Flynn, III ["Flynn"] has filed a Motion for Contempt against two other parties, Daniel G. Lilley and Daniel G. Lilley, P.A. [hereafter collectively "the Lilley parties"] for violating discovery orders in this case. Attorney Flynn also filed a Motion to Compel which, to the extent it is directed against the Lilley parties is unnecessary because the Lilley parties have already been compelled to produce the material at issue.

The Lilley parties have also filed a Motion for Contempt against attorney Flynn, based on his acknowledged violation of the Confidentiality Order in this case. With their contempt motion, they filed a Motion to Immediately Seal attorney Flynn's summary judgment motion and exhibits.

Oral argument on the Motions was held January 5, 2017.

Attorney Flynn's Motion for Contempt

Attorney Flynn's Motion for Contempt is based on the Lilley parties' failure to comply with multiple court orders, beginning in August 2016. The materials at issue include the Lilley parties' tax returns; a case list of all cases in the Lilley law firm during attorney Flynn's time there, and a complete copy of the case files for those cases, as well as attorney Lilley's calendars for the years during which attorney Flynn was at the Lilley firm.

The tax returns were ordered produced because, during the jury trial in one of these consolidated cases, attorney Lilley testified that he decided not to pay attorney Flynn a bonus

based in part on the financial circumstances of the Lilley law firm, thereby putting the finances of the Lilley firm into legitimate issue for discovery purposes.

The case files, case list and calendars are discoverable because attorney Lilley and attorney Flynn disagree about how much time and effort each of them contributed to the cases that were handled by the Lilley law firm while attorney Flynn worked there.

Not until attorney Flynn filed his motion for contempt did the Lilley parties produce tax returns for the Lilley law firm. Attorney Lilley's personal tax returns have yet to be produced, because it turns out that they were filed jointly with his wife, Annette Lilley. However, redacted versions of portions of the returns have been filed in the context of Annette Lilley's motion for protective order, and after review, the court is in agreement with Annette Lilley's position that they need not be, and should not be, disclosed further.

There appears to be no dispute that the Lilley parties failed to obey the orders dated August 3, August 12 and November 9, 2016. Also, there appears to be no doubt that the disobedience was intentional for purposes of M.R. Civ. P. 66, which requires the moving party on a contempt motion to show by clear and convincing evidence that the court orders at issue were violated, and that the violator had the ability to comply.

Accordingly, the court concludes that attorney Flynn has proved that the Lilley parties were in contempt of the court's discovery orders.

This is a remedial contempt proceeding, so any contempt sanctions must be coercive or compensatory in nature, not punitive in nature. *See Land Use Regulation Commission v. Tuck*, 490 A.2d 649, 652 (Me. 1984). In his motion, attorney Flynn requests a variety of sanctions, including a finding of contempt, sanctions including default and dismissal of claims, attorney fees, and an extension of the dispositive motion deadline.

This order does include a contempt finding, but the court declines to award the other sanctions requested, other than a potential preclusion of evidence should the violation not be terminated and a coercive financial sanction.

First, on the present record, the court is not persuaded that a default or dismissal of claims is warranted.

Second, although the months of delay in producing documents could justify an award of attorney fees against the Lilley parties, attorney Flynn is proceeding pro se and presumably has not incurred any attorney fees payable to another attorney. Whether a pro se attorney is entitled to an award of attorney fees appears to be an open question in Maine, but the weight of authority elsewhere appears to be against such an award. *See, e.g., Kay v. Ehrler*, 900 F.2d 967, 970-72 (6th Cir. 1990); *McReady v. Department of Consumer & Regulatory Affairs*, 618 A.2d 609, 612-13 (D.C. App. 1992). The reason is that an attorney fee, by definition, implies a fee charged by an attorney to a client. There is a counterargument based on the lost opportunity costs to the pro se attorney, but this has not prevailed in most instances, according to the court's research. If attorney Flynn in fact incurred any attorney fees or any other expense as a result of the Lilley parties' violation of these orders, or if he can point to Maine authority for an award, he may request reconsideration.

The court has considered whether to impose a fine in lieu of attorney fees, but "[a] civil contempt fine must either compensate the party intended to be benefitted by the original court order for losses sustained or, by its conditional nature, work to coerce the contemnor to comply with the court's order." *See Land Use Regulation Commission v. Tuck, supra*, 490 A.2d at 652. Although attorney Flynn asserts that the Lilley parties' violation of discovery orders has deprived him of the opportunity to move for summary judgment, this does not translate into any dollar amount for purposes of compensation. Also, as noted at oral argument, the materials

at issue seem less relevant to any issue of law than to disputed factual issues for trial and to impeachment.

As to coercive sanctions, none would be necessary or appropriate if the Lilley parties were in full compliance with the discovery orders at issue. However, whether they are in full compliance, even now, is not clear. In their December 20, 2016 objection to attorney Flynn's contempt motion, the Lilley parties stated: "The documents requested by Flynn have now been provided with the only exception being the personal tax returns of Daniel G. Lilley which are the subject of a discovery dispute concerning Daniel G. Lilley's wife Annette." Objection ¶¶3 (Dec. 20, 2016). At the January 5 oral argument, it emerged that this representation was not entirely accurate. This troubling development leaves the court uncertain as to whether the Lilley parties have, in fact, even now, provided all of the discovery they have been ordered to provide. These cases are set for a two-week jury trial beginning in April 2017. As the trial dates approach, any continuing noncompliance with discovery becomes very problematic.

Accordingly, this order sets a deadline for the Lilley parties to certify full compliance and imposes coercive sanctions if the deadline is not met.

The Lilley Parties' Motion for Contempt

The Lilley Parties' Motion for Contempt against attorney Flynn is based on attorney Flynn's acknowledged violation of the Confidentiality Order in this case, by virtue of his including designated confidential material in a filing without following the procedure required by the Confidentiality Order. There appears to be no doubt that the violation was intentional, in the sense that attorney Flynn had the ability to avoid the violation for purposes of M.R. Civ. P. 66, which requires the moving party on a contempt motion to show by clear and convincing evidence that the court orders at issue were violated, and that the violator had the ability to comply.

Accordingly, the court concludes that the Lilley parties have proved that attorney Flynn violated in the confidentiality order. However, because the violation is not a continuing one, there is no need for any coercive sanction. Violation of any confidentiality order is a serious matter, so a finding of contempt is warranted, although the court finds and concludes that no other sanction, including any award of attorney fees, is necessary or justified.

The Lilley Parties' Motion to Seal

The court grants the Lilley parties' motion to seal to the following extent. Attorney Flynn's motion for summary judgment, statement of material facts and the exhibits thereto will be sealed. However, attorney Flynn will be required to file a redacted version of the motion and statement of material facts, redacting only specific dollar figures derived from the confidential documents. The redacted version will be public. This result reflects the court's effort to honor legitimate confidentiality concerns with its no less important duty of transparency as a public forum.

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Lilley parties' Motion for Contempt is granted. For the reasons stated above, John Flynn, III, Esq. is adjudicated to be in contempt of the court's Confidentiality Order.
2. The Lilley parties' Motion to Immediately Seal is granted. The motion for summary judgment and related materials filed by attorney Flynn shall be sealed forthwith. Within 14 days, attorney Flynn shall file a redacted copy of the motion and memorandum of law and statement of material facts, redacting only the dollar figures contained in designated confidential documents, and not making any other changes to what was previously filed. The redacted documents shall be available for public inspection.
3. Attorney Flynn's Motion for Contempt is granted. For the reasons stated above, Daniel G. Lilley, Esq. and Daniel G. Lilley, P.A. are hereby adjudicated to be in contempt of

the court's orders dated August 3, 2016, August 12, 2016, and November 9, 2016. To assure their full future compliance with said orders, it is hereby ORDERED:

- a) Within seven days of electronic notice of this order to their attorney, Daniel G. Lilley, Esq. and Daniel G. Lilley, P.A. jointly and severally shall produce to attorney Flynn any and all materials not previously produced that are within the scope of the court's order to produce dated November 9, 2016, except that any personal tax returns filed by attorney Lilley jointly with Annette Lilley need not be produced.
- b) Upon completing production of all such materials (other than joint personal tax returns) within the scope of the preceding subparagraph (a), the Lilley parties shall file with the court, subject to the provisions of M.R. Civ. P. 11, a certificate that they have fully complied with the preceding subparagraph (a).
- c) If the certificate of full compliance referred to in the preceding subparagraph (b) is not filed with the court by January 27, 2017, a coercive financial sanction of \$500 per day will be imposed on the Lilley parties for each day thereafter until the certificate of full compliance is filed. The coercive financial sanction shall terminate upon the filing of the certificate of full compliance, except that, should the court later determine that the certificate of full compliance was not accurate, the \$500/day sanction may be reinstated for the period between the filing of the certificate and the date on which full compliance in fact is determined to have occurred. The terms of payment of any financial sanction shall be determined by further order.
- d) If the Lilley parties are not in full compliance with this order by February 9, 2017, in addition to any financial sanction due, they will be precluded from presenting any evidence regarding the time spent and tasks performed by attorney Flynn on any case, including but not limited to the cases that generated the attorney fees at issue in these consolidated cases, and will be also precluded from presenting evidence in opposition to his claim for bonuses.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated January 17, 2017

/s _____

A. M. Horton, Justice

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BCD-CV-2015-41

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