

State of New York v Cotoia
2012 NY Slip Op 31476(U)
May 16, 2012
Sup Ct, Queens County
Docket Number: 23500/00
Judge: Martin J. Schulman
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Short Form Order**NEW YORK SUPREME COURT - QUEENS COUNTY**

Present: Honorable Martin J. Schulman
Justice

T S P

STATE OF NEW YORK,

Index No.: 23500/00**Plaintiff,****Motion Date: 2/7/12****-against-****Motion Seq. No.: 7**

**MARCANGELO F. COTOIA,
 MARCANGELO O. COTOIA,
 AVALANCHE CONTRACTING, INC.
 and FMC REALTY, LLC.,**

Defendants.

The following papers numbered 1 to 29 read on this motion by plaintiff State of New York for an order pursuant to Judiciary Law §753 finding defendants Marcangelo F. Cotoia and Marcangelo O. Cotoia in civil contempt of the permanent injunction and judgment dated September 17, 2008 and entered on September 19, 2008, and upon the cross-motion by defendants Marcangelo O. Cotoia Jr., Avalanche Contracting, Inc., and FMC Realty LLC for an order pursuant to CPLR §§1003 and 3025(c) amending the caption and removing it from the caption, and vacating and striking the Notice of Pendency filed against the real property known as 149-35 Powells Cove Boulevard, Whitestone, New York

	<u>PAPERS NUMBERED</u>
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Upon the foregoing papers, the motion and cross-motion are decided as follows:
 The motion by the plaintiff for an order holding defendants Marangelo F. Cotoia

(Cotoia Sr.,”) and Marangelo O. Cotoia (“Cotoia, Jr.”)in civil contempt of the permanent injunction and judgment dated September 17, 2008 and entered on September 19, 2008 is denied, and the cross-motion by defendants Cotoia, Jr., Avalanche Contracting, Inc., (“Avalanche”), and FMC Realty LLC (“FMC”) is granted solely with respect to the request to delete FMC as a defendant, and to amend the caption.

The history of this case as pertinent to this motion is as follows: This action was commenced by the State of New York and John Cahill, as Commissioner of the New York State Department of Environmental Conservation(DEC), on October 6, 2000 against defendants Cotoia Sr, Cotoia Jr., Angelica Cotoia, and Avalanche, alleging that the defendants placed fill materials, including soil, and engaged in construction activities in the navigable waters and tidal wetlands of New York State at or near 149-35 Powells Cove Boulevard, Whitestone, New York, without a permit from the DEC, and in violation of the Tidal Wetlands Act, the Navigation Law, and an administrative consent order entered into by Cotoia, Sr. and the DEC.

In an order dated July 6, 2006, the action against Angelica Cotoia was dismissed, and plaintiff was granted leave to add FMC Realty LLC,(FMC) as a defendant. Said order directed that the caption be amended to name State of New York as the only plaintiff, although the DEC remains the agency charged with protecting and preserving the state’s tidal wetlands.

Following the completion of discovery, an evidentiary hearing was held before JHO Sidney Levis on June 23, 2006 and July 17, 2006. The parties submitted their proposed findings of fact and conclusions of law on March 27, 2007, and the JHO issued his report on April 11, 2007. The court awarded plaintiff \$145,000.00 in civil penalties against Cotoia Sr., Cotoia Jr., and Avalanche, and directed both of the Cotoia defendants to restore the tidal wetland and adjacent area to their conditions prior to the violations. Thereafter, this court, in an order dated May 1, 2008, granted a motion submitted by plaintiff to confirm the JHO’s factual findings, and to adopt and supplement his legal conclusions. The court denied that branch of plaintiff’s motion which sought an award of civil penalties against FMC, finding that FMC had failed to demonstrate that it was properly served with the supplemental summons and amended complaint, or that it had appeared in the action. On June 5, 2008, a money judgment was entered against Cotoia Sr., Cotoia Jr., and Avalanche in the sum of \$145,000.00, plus interest in the amount of \$13,904.11, totaling \$158,904.11.

A separate judgment for injunctive relief dated September 17, 2008, directed the Cotoia defendants “to restore the affected tidal wetland seaward of Block 4487, Lot 17 in Queens County and the tidal wetland adjacent area on Block 4487, Lot 17 in Queens County to the condition that existed before the violation occurred, insofar as that is possible, within

a reasonable time and under the supervision of the Commissioner of the New York State Department of Environmental Conservation”. Said judgment was entered against Cotoia Sr., and Cotoia Jr. on September 19, 2008, and was served on these defendants on January 5, 2009.

Although defendants filed a notice of appeal on January 20, 2009, they failed to ever perfect it. Sometime in 2009, defendants retained new counsel, Garfunkel, Wild, PC, who continued to represent them until sometime in the summer of 2011.

Thereafter, defendants attempted to comply with the judgment. In January 2010, Susan Maresca, a DEC marine biologist, Udo Drescher, the DEC’s Assistant Regional Attorney, and Assistant Attorney General Lisa Feiner met with the Cotoia defendants’ new counsel and their consultant, Nicholas Mann, the principal of Quay Environmental and Marine Consulting (Quay), to discuss a mitigation plan. Quay agreed to engage a licensed surveyor, who prepared a survey for the property. On May 6, 2010, Quay sent the survey, along with plotted elevations, to Ms. Maresca. On June 10, 2010, Ms. Maresca met with Mr. Mann at the property to discuss the required restoration. Ms. Maresca stated that she informed Mr. Mann that the seawall, all of the fill in the tidal wetland seaward of the seawall, and all of the fill placed on the former sloping adjacent area landward of the seawall must be removed, and that the slope down to the shore must be restored. She further states that Mr. Mann agreed to create a restoration plan within those parameters.

On January 6, 2011, Mr. Mann submitted his proposed restoration plan to the DEC. Phase I of the plan proposed removal of the wooden deck and stairs at the property, and the removal of dirt below the deck. Phase II of the proposed plan included the removal of blocks and the re-grading of the upper portions of the shoreline slope to a 3:1 repose. The DEC found this plan to be unacceptable, and in response, created its own restoration plan.

In a letter dated March 25, 2011, Ms. Feiner sent a copy of the DEC’s remediation plan to the Cotoias’ counsel, stating that the DEC’s plan would restore the affected tidal wetland and adjacent area to the conditions before the violations occurred, as required by the judgment. She explained that the plan submitted by the Cotoias’ consultant “does not restore the wetland and adjacent area to their pre-violation condition and therefore does not comply with the Court’s judgment. Specifically, the Quay plan leaves substantial amount of fill in the tidal wetland itself and in the adjacent area and does not restore the slope as it existed before the violations.”

Ms. Avena responded by email on April 14, 2011 that she had discussed the DEC’s plan with Mr. Mann, who had raised concerns regarding the DEC’s depictions, and that Mr. Mann and Ms. Maresca should discuss the matter. The DEC declined to meet with Mr.

Mann. Ms. Feiner, in a letter dated June 13, 2011, advised Ms. Avena that she would move to hold the defendants in contempt of the permanent injunction if she did not receive a commitment by June 17, 2011 to implement the DEC's plan. Ms. Feiner states that on June 17, 2011 she received an email from Ms. Avena stating that she was unable to respond, as her client had not yet approved the DEC plan and had left the City due to a family emergency and could not be reached. Neither defendants nor their counsel provided any further response to Ms. Feiner's letter dated June 13, 2011.

Thereafter, Quay prepared a modified plan which it provided to the DEC on August 15, 2011. The modified plan proposed removing concrete blocks, removing the wooden deck and stairs, returning the slope to a certain repose, and providing for a "tidal wetlands planting slope stabilization". Counsel for Cotoia Jr., in her sur-reply, submits copies of the third and fourth modifications to the proposed remediation plans, which were also submitted to the DEC during the pendency of this motion.

In support of the motion for contempt, plaintiff asserts that pursuant to the September 17, 2008 judgment, the Cotoias are required to remove the illegal fill from the tidal wetland and adjacent area and to restore these areas to their pre-violation condition; that prior to the violations, there was no fill in the tidal wetland, there was no fill in the adjacent area, and defendants had not yet constructed a patio, path and deck in the adjacent area; and that the Cotoias were served with the judgment containing the permanent injunction and related relief on January 5, 2009, and failed to undertake any action to comply with the judgment, other than engaging Quay who submitted an inadequate restoration proposal.

Plaintiff asserts further that the defendants' proposed restoration plan would do nothing to restore the wetlands that were buried under the illegal fill, and would permanently allow the defendants to convert the wetlands and adjacent area to an enhanced and elevated back yard, in violation of this court's permanent injunction; that the official tidal wetland line, as depicted in Quay's restoration proposals, cuts across the deck that the defendants illegally constructed atop the concrete wall; that defendants' proposal would leave almost all of the illegal fill in the tidal wetland adjacent area, thus violating the judgment directing the defendants to restore the adjacent area to its pre-violation condition insofar as possible; and that the DEC's restoration plan complies with the court's judgment, as it requires the removal of the seawall, all of the illegal fill, the deck and path, and the restoration of the slope of the adjacent area down to the shoreline, and that the defendants' failure to implement this plan violates the court's judgment.

In further support, plaintiff has submitted an affidavit from Susan Maresca, the Marine Resources Program Manager at Region 2 of the DEC. After the commencement of this action, a DEC environmental engineer Thomas E. Lincoln, inspected the site on

December 12, 2011. Mr. Lincoln has also submitted an affidavit attesting to the feasibility of performing the restoration from the landside of the property.

In opposition, Cotoia Jr. asserts that the September 17, 2008 judgment only requires the defendants to restore the property to a certain condition, “insofar as possible, within a reasonable time, and under the supervision of the State”, and does not require the defendants to take any particular action. Defendant asserts that there is no requirement that the State have sole discretion and control over the restoration work; that the defendants have submitted multiple plans for restoration, and that the State has rejected them without explanation or justification; and that the State’s counter proposal is highly impracticable and not reasonably possible to construct. Further, since the judgment does not set forth a specific time in which the work must be completed, and since defendants have diligently attempted to design a restoration plan in conformity with the court’s judgment, the State’s motion is premature. Defendant Cotoia Jr. and Mr. Mann have submitted affidavits in opposition.

Cotoia Sr., asserts that plaintiff is improperly proceeding under an incorrect caption, and is required to correct the caption prior to making this motion. Cotoia Sr. further asserts that he cannot be held in contempt, as he is not a fee owner of the real property, and therefore has no control or authority over the property, and that he lacks the financial resources to perform the restoration.

Initially, the court rejects Cotoia Sr.’s assertion that plaintiff is required to amend the caption before moving for contempt. This court, in its order of July 6, 2000, amended the caption to reflect the dismissal of the action as to defendant Angelica Cotoia, and inadvertently omitted co-plaintiff DEC from the caption. Thereafter, the parties, in conformity with the court’s order, used the new caption in subsequent motions, and the judgments entered correctly reflect the amended caption. The State of New York has remained a plaintiff in the action, and as the Commissioner of the DEC is an agent of the State, and judgments have been entered in this action, this omission by the court may be disregarded (CPLR §§ 2001, 5019).

Cotoia Sr.’s assertion that he does not have the authority, power, or financial means to restore the premises, and thus cannot be held in contempt, is also rejected. The September 17, 2008 judgment expressly included Cotoia Sr., in its directives, and he is required to comply with said judgment regardless of his present lack of ownership interest in the property. His claim that he lacks the financial resources to effectuate the work is wholly unsubstantiated.

"To sustain a finding of either civil or criminal contempt based on an alleged

violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect," that "the order has been disobeyed," and that the charged party "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 of State of N.Y.*, 70 NY2d 233, 240 [1987]; see, *Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 [2012]). Civil contempt must be proven by clear and convincing evidence, and requires a showing that the rights of a party have been prejudiced. See, *McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *Incorporated Vil. of Plandome Manor v Ioannou*, 54 AD3d 365, 366 [2008]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1073, 1074 [2008]; *Judiciary Law § 753 [A] [3]*. The court has the power to punish for civil contempt, by fine and imprisonment, or either, in an instance where a party disobeys a lawful court order. (*Dept. of Environmental Protection of City of New York v. D.E.C. of State of New York*, *supra*; *Judiciary Law §753[A][3]*).

Here, the May 1, 2008 order directed the Cotoia defendants and Avalanche to “restore the affected tidal wetland seaward of Block 4487, Lot 17 in Queens County and the tidal wetland adjacent area on Block 4487, Lot 17 in Queens County to the condition which existed before the violations occurred”, and the judgment dated September 17, 2008, directed the Cotoia defendants to “restore the affected tidal wetland seaward of Block 4487, Lot 17 in Queens County and the tidal wetland adjacent area on Block 4487, Lot 17 in Queens County to the condition which existed before the violations occurred insofar as that is possible, within a reasonable time and under the supervision of the Commissioner of the New York State Department of Environmental Conservation”.

It is undisputed that the order and judgment constitute a lawful order and judgment, and that defendants were aware of said order and judgment. Plaintiff, however, has failed to demonstrate that the defendants have disobeyed an unequivocal mandate of the court, inasmuch as the prior order and judgment do not require the defendants to act within any specific time frame. The defendants were directed to restore the affected areas within a “reasonable time”; although more than four years have now elapsed, it appears that both the defendants and the DEC have been slow to act. Defendants, pursuant to the judgment, are required to act under the DEC’s supervision.

Further, although this court required the defendants to restore the affected areas to their pre-violation condition, insofar as this is possible, the prior order and judgment did not specify the scope of the remediation or the manner in which it was to be performed. Contrary to defendants’ assertions, plaintiff’s counsel in her letter of March 25, 2011

explained the reasons for the rejection of the Quay/Mann restoration proposal. The DEC's proposed plan sets forth certain mapped boundaries for the areas of restoration, as well as the grade of the slope, and requires the Cotoia defendants to remove the seawall, to remove the fill placed in front of the seawall, to remove the fill placed behind the seawall, and to remove the patio, path and deck in the adjacent area. The defendants' objections to DEC's plan that it is prohibitively expensive, impossible to perform, and may cause harm to either the property or neighboring properties, are speculative at best.

This court, however, makes no determination as to the feasibility of the DEC's proposed plan, and declines to act as an arbiter of the parties' plan. The parties and their counsel are clearly capable of determining the scope and manner of the work that needs to be performed, and the court will not review the particulars of the DEC's proposal in the context of a motion for civil contempt. Therefore, defendants' failure to adopt and implement the DEC's plan does not warrant the granting of the motion for civil contempt.

With respect to the cross-motion by defendants Cotoia Jr., Avalanche, and FMC, said cross-motion was not made in conformity with the notice provisions set forth in CPLR § 2215. However, plaintiff has not been prejudiced, and has responded on the merits. That branch of the cross-motion which seeks to vacate the notice of pendency is denied as moot. Contrary to defendants' assertions, plaintiff did not file a notice of pendency with respect to the real property following the entry of the judgments in this action. Rather, plaintiff filed a Notice of Judgment with the City Register on May 15, 2009. The Notice of Judgment is not a Notice of Pendency. The Notice of Pendency filed in this action expired in 2003 by operation of law (CPLR § 6513).

The order dated May 1, 2008 denied the plaintiff's request to impose a civil penalty against FMC, as it had failed to establish that the court had jurisdiction over this defendant. No judgment has been entered against FMC, and plaintiff does not oppose that branch of the cross-motion which seeks to remove this defendant from the caption. Therefore, that branch of the cross-motion which seeks to amend the caption and to remove FMC from the caption is granted (CPLR § 3025). Defendants' request for costs and disbursements in connection with the cross motion is denied.

The caption is hereby amended to read as follows:

STATE OF NEW YORK,

Plaintiff,

Index No. 23500/00

- against-

**MARCANGELO F. COTOIA, MARCANGELO O.
COTOIA, and AVALANCHE CONTRACTING, INC.
Defendants.**

For the foregoing reasons, plaintiff's motion for an order holding defendants in civil contempt of the September 17, 2008 judgment is denied. Defendants' cross-motion is granted solely with respect to the request to delete FMC as a defendant, and to amend the caption, and is denied in all other respects.

Dated: May 16, 2012

J.S.C.