

Getty Prop. Corp. v Getty Petroleum Mkt. Inc.

2013 NY Slip Op 33138(U)

December 9, 2013

Sup Ct, New York County

Docket Number: 651762/12

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER

PART 45

Justice

GETTY PROPERTIES CORP. et al

INDEX NO. 651762/12

- v -

GETTY PETROLEUM MARKETING, et al

MOTION DATE _____

MOTION SEQ. NO. 018

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to hold defendants in criminal and civil contempt is GRANTED to the extent of finding defendants guilty of a civil contempt and DENIED as to criminal contempt per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 9, 2013

Melvin L. Schweitzer
MELVIN SCHWEITZER, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 45

-----X		
GETTY PROPERTIES CORP. et ano.,	:	
	:	
Plaintiffs,	:	Index No. 651762/12
	:	
-against-	:	DECISION AND ORDER
	:	
GETTY PETROLEUM MARKETING INC., et al.,	:	Motion Sequence Nos.
	:	18 and 19
	:	
Defendants.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

Plaintiffs move, by two Orders to Show Cause, to hold defendants in Criminal and Civil Contempt and additional sanctions for violating the court's July 23, 2013 Injunction against bringing any more actions or motions relating to the subject matter of this action without first obtaining the court's approval; and failing to produce certain bank statements as required by the court. Motion Sequence Nos. 18, 19. Defendants oppose. The motions are joined for disposition.

Background

As the parties are familiar with the facts, the court will provide only a summary of facts material to the contempt motions. The motions are directed against all defendants, but they concern the actions of defendant Robert G. Del Gadio (Del Gadio), an attorney who has been serving as defendants' counsel.

After defendant LLC were adjudged liable to plaintiffs for Use and Occupancy (U&O) damages in the amount of \$434,233.80, Del Gadio failed to comply with multiple court orders (a TRO and a preliminary injunction) directing defendants to pay the full amount of U&O monies into court. Initially, when asked by the court what happened to the money he ostensibly collected

from the sub-subtenant gas station operators of the LLCs Del Gadio's response to the court was that he did not know. Then, later, at a hearing before the court, Del Gadio was asked again by the court whether it wasn't the case that he was the one with knowledge of all the numbers (referring to the U&O monies collected). He responded:

The numbers are the bank statements that show how much the LLC, got from a tenant [gas station operator], and the amount that was put into court. That requires looking at the bank statement and looking at the amount that was deposited.

But thereafter, at a subsequent status conference, when the court ordered that defendants "shall provide plaintiffs with bank statements re: monies collected from operators of the sites," Del Gadio's written response to this court directive was that his LLCs have "no bank statements responsive to the [court's] direction in the status conference order. . . ." And, to date, he has failed to produce any.

Not content with his efforts to obfuscate defendants' failure to observe the court's orders for the deposit of U&O monies, Del Gadio then began a campaign to seek offsets, for certain improvements at the LLC leased gas station sites, to which he claimed the LLCs were entitled. The fact of the matter is, however, as Del Gadio has admitted, these claimed improvements to the sites were not made by the LLCs. ¶ 31, Kingsley Aff., Cross-Motion (Seq. No. 15).

Notwithstanding Del Gadio's failure to account for missing U&O monies and LLC bank statements, as well as his grasping for offsets to which defendants are not entitled, he has inundated the court with a plethora of motions, claims and arguments with no legitimate basis in fact or law which simply has served to clog the court's calendar. Del Gadio's actions culminated

in the court's issuance of a July 23, 2013 Order and Judgment assessing monetary sanctions against defendants (except for 60 BK Street LLC), and including the following injunction:

Defendants, and any attorney acting on their behalf, are hereby enjoined from making any motions or commencing any action in this or any other court relating to the subject matter of this action without prior approval of this court.¹

Also in that Order, the court referred, to a Special Referee, the issues of costs and fees, and a set-off amount for improvements Del Gadio claimed had been made by defendant 49-25 Van Dam LLC. Del Gadio was precluded from reducing the U&O Judgment because of claimed improvements to any of the other properties. In an Interim Order dated August 8, 2013 (amended September 6th), the court ordered limited discovery for the Special Referee Hearing, directing plaintiffs to make one witness available to testify as to U&O at a deposition, and defendants to produce documents relating to U&O and alleged improvements.

Del Gadio filed Notices of Appeal from the July 23rd and August 8th orders. He has also appealed an October 30, 2013 order of the court in his favor which mooted out *plaintiffs'* earlier motion to disqualify him as defendants' counsel which plaintiffs had not pursued and which remained undecided. The Appellate Division, First Department denied defendants' motion for a stay of the July 23rd and August 8th orders, except as to the sanctions awarded against defendants, on condition that defendants timely perfect their appeal.

¹Del Gadio argues that since the Supreme Court is a court of record and thus a record needs to be made for all parties' right to appeal, the court's order requiring its permission before a motion may be made denies defendants due process. But the fact is Del Gadio has shown that he knows very well how to preserve his appellate rights in seeking advance permission to make a motion by letter or email application as he did on October 3, 2013 in a succinct email to the court's Law Clerk, Tracy Young, in which Del Gadio spelled out his arguments to consolidate four actions for joint trial involving the same parties and common questions of law or fact. Although Ms. Young turned down Del Gadio's request because the main action is nearly completed, Del Gadio's email made an ample record to preserve his clients' appellate rights without burdening the court with a mountain of unnecessary paper.

Current Contempt Motions

The two pending contempt motions concern filings made and actions taken by Del Gadio since the court issued its July 23rd Order and Judgment.

October 2nd Motion (OSC, Seq. No. 018)

Plaintiffs claim that defendants violated the July 23rd Injunction by filing motions for summary judgment in two matters transferred to this court from Nassau County pursuant to the court's July 30, 2013 order granting plaintiffs' motion for transfer. The cases were filed by some of the defendants against plaintiffs and seek compensation for improvements.² Del Gadio did not first obtain the court's approval to file these motions. Del Gadio argues that he was merely renewing summary judgment motions which he had filed originally in Nassau County.

The court granted a temporary restraining order staying these unauthorized motions until the contempt motion pertaining to them was resolved. The court noted on the body of the order to show cause for the contempt motion that no oral argument and no personal appearance would be necessary with regard to this contempt motion.

Earlier, by e-mail on October 3, 2013, Del Gadio asked the court's Law Clerk Tracy W. Young for permission to move to consolidate the Nassau County actions with this action. Ms. Young, speaking for the court, responded that same day, "The first action is nearly completed, so Del Gadio's request is denied." Notwithstanding the court's denial of Del Gadio's request, Del Gadio proceeded to move *twice* for this identical relief.

²These cases have been assigned New York County Supreme Court Index Nos. 401313/13 and 401438/13. Only one defendant in this case, 49-25 Van Dam Street LLC, is permitted to seek a set-off for improvements.

October 17th Contempt Motion (OSC, Seq. No. 019)

Plaintiffs claim that Del Gadio violated the July 23rd Injunction by filing a cross-motion in response to the October 2nd Order to Show Cause without first obtaining the court's approval. As referenced above, the cross-motion seeks leave to file a motion to consolidate this action with the transferred Nassau County actions, together with *twelve* additional forms of relief, including, *inter alia*, this court's recusal for being biased, sanctions, declaring the July 23rd Judgment for money damages to be nothing more than *pendente lite* relief, and directing the Clerk to enter satisfaction of judgments as to four of the defendants. Del Gadio submitted documents and arguments in support of the cross-motion that addressed the merits of the requests for relief. Plaintiffs contempt motion also was based on defendants' failure to produce bank statements as directed by a Status Conference Order dated September 10, 2013, and an October 4, 2013 e-mail in which Ms. Young ordered the parties to produce the previously ordered documents by October 11, 2013.

Plaintiffs' October 17 contempt motion contained the following warning in all caps and in bold on the front page of the order to show cause: "**YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.**" Unlike the Order to Show Cause for plaintiffs' October 2 contempt motion (on which the court wrote that no appearance was necessary), the court scheduled oral argument for November 20, 2013 on this one. Del Gadio countered with a motion for a stay of both contempt motions, which was denied by the Appellate Division, and then Del Gadio followed this denial with a motion to this court, seeking the same stay, which also was denied.

The November 20, 2013 Hearing

Del Gadio failed to appear at the hearing. An associate of plaintiffs' counsel telephoned his office and spoke with a secretary, who stated that Del Gadio would not be appearing and that "he didn't feel it was necessary to appear." Transcript (T):2. The hearing then proceeded without the presence of Del Gadio. Plaintiffs' counsel made the following arguments, *inter alia*, in support of contempt:

- 1) The motions for summary judgment filed in the transferred Nassau County cases violated the court's July 23rd Injunction because those actions involve the same parties and concern the same "subject matter" as this action, whether defendants are entitled to monies for improvements on the properties;
- 2) The court has already decided that defendants, except for 49-25 Van Dam LLC, have no right of offset (7/23/13 Order and Judgment), so the transferred actions and the summary judgment motions related thereto are frivolous;
- 3) Del Gadio violated discovery orders by not producing bank statements that he represented would reflect the amounts collected by the defendant LLCs, and that he agreed to produce, then falsely denying that the bank statements existed;
- 4) Del Gadio has a history of abuse and violating orders, and has brought a multiplicity of obfuscatory actions and motions;
- 5) The July 26 and August 2, 2012 orders of the court granting judgment for money damages were affirmed on appeal, yet Del Gadio has now asked this court to declare the orders as constituting only *pendente* relief;

6) Del Gadio's filing of the cross-motion seeking leave to file a frivolous motion for thirteen forms of relief, some of which the court had previously denied, violated the court's July 23rd Injunction because Del Gadio had not first obtained the court's approval; and

7) Del Gadio had also filed a separate motion (Seq. No. 020) seeking permission to file a motion for the *same* thirteen forms of relief as that requested in the cross-motion.³ Plaintiffs' counsel submitted as exhibits the various motion papers, proofs of service, e-mails and correspondence, court orders and judgments. Thereafter the court took the matter under submission.

Discussion

A court has the power to punish for civil contempt pursuant to Section 753(A)(3) of the Judiciary Law, which provides, in relevant part:

A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: * * * 3. A party to the action or special proceeding * * * for any other disobedience to a lawful mandate of the court.

Civil contempt "has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right." *See McCormick v Axelrod*, 59 NY2d 574, 582-583 (1983).

³The court stated that plaintiffs would need to file a separate motion for contempt based on the second, separate motion filed by Del Gadio. Plaintiffs' counsel had submitted a letter to the court requesting that the contempt motions be applied to this second, separate motion, but the court received the letter too late to grant the request and provide Del Gadio with sufficient notice. T:4.

A court has power to punish the violation of its lawful mandates as a criminal contempt pursuant to Judiciary Law 750. 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, supra*. (Citations omitted.) The level of willfulness with which the conduct is carried out is the element which serves to elevate a contempt from civil to criminal. *Id.*; see also *Emanuel v Sheridan Transp. Corp.*, 58 AD3d 583 (1st Dept), *lv dismissed* 13 NY3d 758 (2009) (finding of contempt and subsequent punishment and seizure order warranted by repeated violation of court orders); *Sentry Armored Courier Corp. v New York City Off-Trade Betting Corp.*, 75 AD2d 344 (1st Dept 1980). Criminal contempt must be proved by clear and convincing evidence. *Matter of Powers v Powers*, 6 NY2d 63, 68 (1995).

The court here finds that plaintiffs have proven, by clear and convincing evidence, that defendants have committed criminal contempt. Defendants, through counsel Del Gadio, have willfully and repeatedly violated the court’s orders. Defendants violated the July 23, 2013 Order and Judgment enjoining them from filing any further motions or actions related to the subject matter of this action without first obtaining the court’s approval by filing the cross-motion for leave to file the motion seeking thirteen forms of relief, when leave and much of the requested relief had already been denied by the court. Del Gadio also violated the court’s orders to produce the LLCs’ bank statements and other records reflecting Use and Occupancy fees collected from the gas stations. Del Gadio then committed a separate criminal contempt by failing to appear at the contempt hearing on November 20, 2013.

Del Gadio’s willfulness is manifest in his dogged refusal to comply with the court’s rulings, and his repeated attempts to obtain relief that the court has already denied. The court

may consider its own records reflecting Del Gadio's repeated violations of court orders, and the resulting sanctions orders. The separately filed motion, for leave to file a motion identical to the cross-motion, is additional proof of defendants' willfulness.

That Del Gadio labeled the cross-motion, and the separate motion, as requests for leave to file substantive motions is not a defense, but rather a transparent attempt to circumvent the court's Injunction. The motions "for leave" are fully briefed substantive motions, and the court had already denied defendants' requests for recusal and to consolidate, as well as Del Gadio's request for leave to file a motion to consolidate. Del Gadio's available remedy was to appeal.

These violations, especially considering Del Gadio's past contumacious conduct, overwhelmingly prove criminal contempt. They also prove civil contempt. Del Gadio has substantially interfered with plaintiffs' right to pursue the litigation and their judgment without obstruction and unnecessary delay.

With respect to the first contempt motion, Del Gadio did not ask the court for permission to file the partial summary judgment motions in the transferred Nassau County actions.

Del Gadio's claim that he was merely renewing the motions is, at best, questionable. If true, then Del Gadio would have mentioned that fact in his Notices of Motion. Nevertheless, the procedural posture of these actions having been transferred to New York County provides Del Gadio with some semblance of an explanation such that it militates against the court finding criminal willfulness with respect to that motion.

Accordingly, based on the foregoing record which the court finds to include defense counsel Del Gadio's disobedience of the lawful mandates of the court (civil contempt) and

Del Gadio's multiple offenses against public justice and the dignity of the judicial system by willfully disrespecting the court and its lawful mandates (criminal contempt), it is hereby

ORDERED and ADJUDGED that plaintiffs' motion (Seq. No. 18) to hold defendants in criminal and civil contempt is granted to the extent of finding defendants guilty of a civil contempt, and denied as to criminal contempt; and it is further

ORDERED and ADJUDGED that plaintiffs' motion (Seq. No. 19) to hold defendants in criminal and civil contempt is granted in its entirety; and it is further

ORDERED and ADJUDGED that defendants are guilty of an additional criminal contempt for his knowing and willful failure to appear at the contempt hearing on November 20, 2013; and it is further

ORDERED and ADJUDGED that Robert G. Del Gadio shall be imprisoned for three (3) consecutive days as punishment for said criminal contempts, and a bench warrant to arrest and take custody of Robert G. Del Gadio shall issue upon execution by the court of an Order of Contempt and Arrest ten business days after this Decision and Order appears on the court's electronic docket, provided that no stay of this Decision and Order by the Appellate Division has been obtained by the defendants; and it is further

ORDERED that defendants shall pay a maximum fine of \$1,000.00 as further punishment for each of the two criminal contempts, for a total amount of \$2,000.00; and it is further

ORDERED that defendants shall pay to plaintiffs their attorney's fees and costs incurred in pursuing the contempt motions; and it further

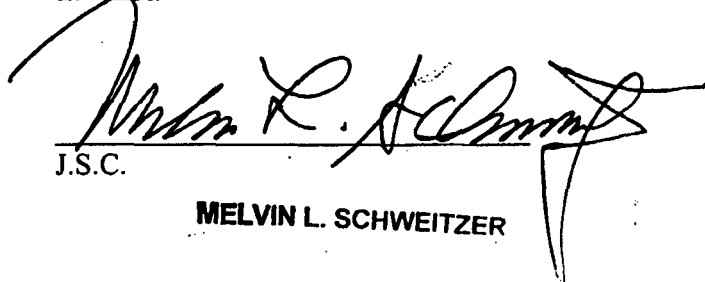
ORDERED that within five days of the date this Decision and Order appears on the electronic docket, plaintiffs shall file and serve invoices establishing attorney's fees and costs, and a proposed Order of Contempt and Arrest; and it is further

ORDERED that the Order of Contempt and Arrest may be purged by the following conduct of Del Gadio within seven business days of this Decision and Order's appearing on the court's electronic docket:

- 1) A sincere apology directed to the court, delivered in person by Del Gadio before the court;
- 2) A sincere written apology to be directed to plaintiffs' counsel and efiled with the court;
- 3) Presentation of a certified check payable to New York County, County Clerk for \$2,000.00 for the two criminal contempts;
- 4) Presentation of a certified check payable to plaintiffs' counsel in the amount of \$10,000.00, representing an amount to be applied towards the full amount of their attorney's fees and costs, to be held in escrow, to satisfy the ultimate amount of attorney's fees and costs set forth in the judgment; and
- 5) Production to plaintiffs of: a list of accounts, including account numbers and names of banks or other institutions, that the defendant LLCs currently maintain, and have maintained from the period of the filing of the complaint in this action to the present; and written authorizations (notarized) for plaintiffs' counsel to obtain the statements for these accounts.

Dated: December 9, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER