Supreme Court of the County of Suffolk
State of New York - Part XL
Memorandum Decision

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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In the Matter of the Application of NATALE CARDINO, as Holder of More Than Twenty percent of ALL OUTSTANDING SHARES of PEEK-A-BOO, INC.,

Petitioner,

For the Dissolution of PEEK-A-BOO, INC., a Domestic Corporation,

Respondent.

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DECISION AFTER HEARING

INDEX NO.:37021/2007

DAVIS & FERBER, LLP
Attorneys for Peek-A-Boo, Inc.
1345 Motor Parkway
Islandia, NY 11749

STEVEN M. BURTON, ESQ.
Receiver
PO Box 697
Central Islip, NY 11722

JOSEPH A. SOLOW, ESQ.
Attorney for Petitioner
330 Motor Pkwy - Suite 400
Hauppauge, NY 11788

DARRELL J. CONWAY, P.C.
Attorney for Defendant Lombardo
179 Little East Neck Road
Babylon, NY 11702

The case at bar involves the dissolution of a business in which the Court (Spinner J.) had appointed Steven Burton, Esq. as Receiver to oversee the assets of the company during the pendency of the proceeding. The merchandise of the store disappeared while in the custody of the Respondents Mr. Vincent Lombardo Sr. and Mr. Vincent Lombardo Jr. The Petitioner then moved to have them held in contempt of the Court's Order appointing the receiver. The motion was granted to the extent that the Court held a hearing to determine this question.

Prior to analyzing the evidence submitted, the Court would be remiss if it did not commend Messrs. Solow and Conway for the excellence with which they represented their respective clients.

The Court received the following evidence:

The Petitioner, Mr. Cardino, testified, *inter alia*, that he went to the business location on Route 110 in the Town of Huntington. The store was closed so he looked in the front windows and observed the stock, just as it was in 2007 when he was involved in running the store. In December 2011, the store appeared to be in full operation. On his return in January of 2012, however, it was empty. All the stock was gone. The Respondents never contacted him during 2011 and never informed him that the Town was taking action to close down the operation.

The Petitioner then called the Respondent Mr. Lombardo Sr. to the stand. Notwithstanding his position as a part owner of the corporation, Mr. Lombardo claimed that he did not know what a shareholder was. He stated that he did not remember if the business was in operation during December of 2011. Mr. Lombardo claimed a lack of recollection concerning critical details of the operation of the business in the latter part of 2011 as well as the moving of the inventory. He claimed that the inventory was moved into a 15' by 15' shed on his property in Massapequa. It was at that location on October 29, 2012 when Super Storm Sandy struck and the inventory was lost to the rising waters of the Great South Bay.

Mr. Lombardo Sr. stated that he filed a claim with an insurance company (whose name he couldn't recall), but the request for payment of the items in the shed was disallowed. He admitted that he did not inform Mr. Cardino of the storage arrangements for the ostensible reason that attorneys and the receiver were involved at that stage.

Ms. Hiotis (Mr. Lombardo Sr.'s daughter) also testified. She stated that she had worked for her father for a short time in 2009 and 2010 through 2011 when-in her words: "...the Town shut us down." She helped her father with the running of the business but did not recall discussing the tax returns with him or seeing same. Ms Hiotis had testified in a prior District Court proceeding that she had helped empty out the store and that it took about a week to move the inventory (Plaintiff's Exhibit11).

Upon observing the demeanor of Mr. Lombardo on the witness stand, we found him to be less than credible as compared to the testimony of Mr. Cardino. Ms. Hiotis's statements were of limited utility and she presented before the Court as someone who, quite understandably, had allowed her testimony to be colored by the natural affection any child would feel for their father.

The Court appointed Receiver, Steven Burton Esq., also testified. The Court's Final Order of Dissolution (Plaintiff's Exhibit 1) clearly stated that he was appointed "...permanent receiver of all of the assets and property of PEEK-A-BOO, INC." The Court's Order

contains a further decretal paragraph which states that "...said permanent receiver shall proceed to collect and receive the debts, demands and other property of PEEK-A-BOO, INC....". Contrary to the Order's command, Mr. Burton did not receive the inventory or an accounting for same. Moreover, when he visited the premises the inventory was gone.

The Respondents called Mr. John Farrell to the stand. Mr. Farrell is the Director of The Quality of Life Task force in the Town of Huntington and is in charge of Code Enforcement for the Town. He stated that the Town did not give the subject property a Certificate of Occupancy for an Adult Business and that the business was ultimately closed because of this.

The Court finds that both Mr. Burton and Mr. Farrell testified truthfully and accurately.

The Plaintiff also introduced copies (Exhibits 5, 6, and 7) of the Corporate Tax returns for the years 2008-2010 of the business operation indicating an inventory value of approximately $100,000. In the final year of operation, the inventory's value declined to $84,000.00.

After reviewing the Petitioner's and Respondents' proof, it is readily apparent that the Respondents seized the assets of the company and took them into their keeping. This created a bailment even in the absence of a contractual agreement (***Foulke v. N.Y. Consol. R. Co.***, 228 N.Y. 269, 275, 127 N.E. 237, 239 [1920]; *see* ***Phelps v. People***, 72 N. Y. 334, 557; ***Burns v. State***, 145 Wis. 373, 128 N. W. 987, 140 Am. St. Rep. 1081]). The existence of a bailment imposed a burden on the Respondents, as bailee, to not only safeguard the inventory, but also to account for it (***Pivar v. Graduate Sch. of Figurative Art of the N.Y. Acad. of Art***, 290 A.D.2d 212, 213, 735 N.Y.S.2d 522, 524 [1st Dept. 2002]).

The Respondents' status as a bailee, however, merely imposes a burden in addition to another, more severe, obligation. The Court is referring to the duty of a litigant to obey the lawful order of a tribunal. The failure to do so may constitute contempt.

As discussed in our prior Decision, the remedy of civil contempt serves as a vindication for parties who have been "harmed by [a] contemnor's failure to obey a court order" (***Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.***, 208 A.D.2d 37, 42, 620 N.Y.S.2d 837 [2nd Dept.1995]); **Judiciary Law § 753**). While criminal contempt (**Judiciary Law § 750**) is used to punish those who wrongfully rebel against judicial authority and is employed "to protect the integrity and dignity of the judicial process and to compel respect for its mandates," civil contempt penalties are invoked "not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate" (***Department of Housing Preservation and Development of City of New York v. Deka Realty Corp.***, *supra* at 42; ***Matter of Department of Envtl. Protection of City***

of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 N.Y.2d 233, 239, 519 N.Y.S.2d 539 [1987]).

The movant seeking to have a respondent adjudicated as being in criminal contempt must prove the willful and contumacious conduct by clear and convincing evidence (***Rolon v. Torres***, 121 A.D.3d 684, 993 N.Y.S.2d 348 [2nd Dept.2014]; ***Bemis v. Town of Crown Point***, 121 A.D.3d 1448,1452, 995 N.Y.S.2d 794 [3rd Dept.2014]).

Civil contempt has a different standard from its criminal counterpart. This was pointed out by the Court in the case of ***El-Dehdan v. El-Dehdan***, 26 N.Y.3d 19, 19 N.Y.S.3d 475 (2015). Wilfulness, the Court noted, is not an element of civil contempt. Instead, the elements are as follows:

> "First, 'it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect.' Second, '[i]t must appear, with reasonable certainty, that the order has been disobeyed.' Third, 'the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party.' Fourth, prejudice to the right of a party to the litigation must be demonstrated.'"

(***Id.*** at 29 quoting ***McCormick v. Axelrod***, 59 N.Y.2d 574, 466 N.Y.S.2d 279, amended, 60 N.Y.2d 652, 467 N.Y.S.2d 571 [1983], Lawrence Cooke CJ in a *per curiam* opinion]).

Mr. Lombardo Sr.'s statement that he was unable to account for the stored goods due to the destruction caused by Super Storm Sandy is quite revealing. By describing the impossibility of compliance, the Respondent admits that he has not complied with the plainly worded Order.

In answering a motion for contempt, the party alleged to have disobeyed the Court's Order may assert factual impossibility as a defense (***Badgley v. Santacroce***, 800 F.2d 33, 36 [2d Cir. 1986]). This must not only be alleged, it must be proven by the offending party (***Id.*** at 36, citing ***Natural Resources Defense Council, Inc. v. Train***, 510 F.2d 692, 713 [D.C.Cir.1975]; ***Aspira of New York, Inc. v. Board of Education***, 423 F.Supp. 647, 654 [S.D.N.Y.1976]). This is a heavy burden and will not be satisfied by showing that the respondents "...were attempting to comply or acting in good faith" (***McCain v. Dinkins***, 192 A.D.2d 217, 219, 601 N.Y.S.2d 271, 273 [1993], aff'd as modified, 84 N.Y.2d 216, 616 N.Y.S.2d 335 [1994]).

Mr. Lombardo's admitted conduct demonstrates that he was presented with a clearly worded Order and instead of turning over possession of the goods to Mr. Burton as directed, he attempted "...to fashion [his] own remedy" (***N.Y. City Hous. Auth. v. Porter***, 40 Misc. 3d 41, 42, 970 N.Y.S.2d 655, 657 [App. Term 2012] quoting ***Peters v. Sage Group Assoc.***, 238 A.D.2d 123, 123, 655 N.Y.S.2d 500 [1997]). We find that these facts have been proven by clear and convincing evidence. The Court further finds, by application of this standard of proof, that the actions of the Respondents in disobeying the Court's Order were "calculated to.." [and] "..actually did, defeat, impair, impede or prejudice the rights..." of Mr. Cardino, specifically, his right to the value of one third of the inventory of Peek-a-Boo, Inc. (**Judiciary Law** § 753; ***Julius Fed. Deposit Ins. Corp. v. Richman***, 98 A.D.2d 790, 470 N.Y.S.2d 19, 20 [2nd Dept.1983]).

The forgoing mandates a finding of civil contempt as against both Respondents since we credit Mr. Cardino's testimony in full and the Court's Order applied equally to both Mr. Lombardo Sr. and Mr. Lombardo Jr.

The Court having adjudicated the Respondents as being in civil contempt, the final question is what penalty, if any, is to be imposed? Judiciary Law § 773 states in relevant part that:

> "If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court."

As noted heretofore, the tax returns submitted by the Petitioner indicate that the yearly value of the Corporation's inventory ranged from $84,000.00 to approximately $100,000.00. It has also been clearly established that the benefit of the inventory was completely lost to Mr. Cardino due to the Respondents' actions. The last specific figure that has been proven concerning the inventory's value is found in Petitioner's "Exhibit 5" which lists a cash value of $84,000.00 for same as of 1/29/2011.

Therefore, this finding of civil contempt may be purged by paying a fine in the amount of $28,000.00 to the Petitioner, representing the loss of Mr. Cardino's share of the inventory. This sum is to be paid within 30 (thirty) days from service of a copy of this Decision.

The foregoing memorandum is also the Order of the Court.

DATED: JULY 28, 2017
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.