

**Home Ct. Dev. Corp. v K&C Beauty Supply Inc.**

2006 NY Slip Op 30705(U)

December 11, 2006

Supreme Court, New York County

Docket Number: 101014/2006

Judge: Walter B. Tolub

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4

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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HOME COURT DEVELOPMENT CORPORATION

Plaintiff,

Index No.101014/2006  
Mtn Seq.002

-against-

K&C BEAUTY SUPPLY INC d/b/a  
SOLOMON'S BEAUTY SUPPLY

Defendant.

**FILED**  
DEC 12 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

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**WALTER B. TOLUB, J.:**

By this motion Defendant seeks an order of contempt pursuant to New York Judiciary Law §756 and CPLR §5104 against the Plaintiff for its failure to comply with and carry out the provisions of the order dated May 22,2006. Defendant also seeks the attorney's fees, costs and disbursements.

Facts

This action was commenced on or about January 25, 2006 by order to show cause with a temporary restraining order because the building in which Defendant's business was (premises), was in a "dangerously precarious" condition and in danger of collapsing. Plaintiff stated that it wanted to gain access to the premises in order to make it safe, and committed to accomplish the emergency repairs in approximately eight weeks.

On January 31, 2006, the parties entered into an in court stipulation wherein the Plaintiff agreed to box and remove Defendant's inventory, store it, return it to the store and then

set up the display. Everything that was going to be done, from removing the inventory to setting up the display, was to be done at the Plaintiff's expense.

Plaintiff's original motion was decided on May 22, 2006. That decision granted Plaintiff's motion to the extent that the Plaintiff was to put the Defendant back in possession of the premises on or before June 19, 2006, again, at its own expense. Plaintiff appealed and Judge Sullivan, by order dated June 22, 2006, denied the Plaintiff's application for an stay.

Defendant then filed this motion for contempt arguing that the Plaintiff has failed to comply with and carry out the provisions and requirements of this court's May 22, 2006 order and that Plaintiff refuses to carry out said order wilfully. Defendant argued that such refusal has led to the damage of inventory and has destroyed Defendant's ability to conduct business and earn income. On September 21, 2006, this court held a contempt hearing. Defendant's motion for contempt is denied.

#### Discussion

In order to find that contempt has occurred in a given case, it must be determined that a lawful order of court, clearly expressing an unequivocal mandate, was in effect. (McCormick v. Axelrod, 59 NY2d 574 [1983] citations omitted) It must appear, with reasonable certainty, that the condemnor has either (1) violated a court order with the intention to cause prejudice to

another party or (ii) violated a court order which actually did result in prejudice to the movant's rights or remedies.

(McCormick v. Axelrod, 59 NY2d 574 [1983] citations omitted; Oppenheimer v. Oscar Shoes, Inc., 111 AD2d 28 [1<sup>st</sup> Dept 1985]; Clinton Corner HDFC v. Lavergne, 270 AD2d 339 [1<sup>st</sup> Dept 2001]).

Here, Defendant failed to show by a "reasonable certainty" that Plaintiff's actions were calculated and done wilfully so that Defendant's rights would be impeded.

Plaintiff demonstrated that it sought access to Defendant's space in order to address and repair safety concerns. At the contempt hearing Mr. Biagas and Mr. Rutherford testified that there had not been plans to repair and renovate the premises until it was clear that the premises contained structural damage which had to be corrected for the safety of the occupants. (Tr. 78:5-24; 135:5-136-12).

Furthermore, there is nothing indicating that the Plaintiff acted intentionally with respect to the delay of restoring Defendant to the premises beyond the period it initially sought and beyond the period ordered by the court. Mr. Biagas testified that he took steps to ensure that the work would be completed in the time required. (Tr. 86:19-87:25). Defendant was unable to show by a reasonable certainty that Plaintiff acted wilfully especially in light of the testimony by Plaintiff's witnesses setting forth the delays that prevented it from complying with

the court's order. (Tr. 86:19-92:19, 155:12-23).

Finally, Defendant was unable to show that it suffered actual prejudice in connection with the violation of this court's order. While Mr. Chung testified that his business was seriously impacted by the cessation of business, Defendant failed to provide any evidence that the harm it suffered was caused by the delay in being restored to the Premises rather than being displaced because of safety reasons.

Although this court is sympathetic to Defendant's situation, it does not change the fact that Defendant has failed to show by a reasonable certainty that Plaintiff acted intentionally or that any prejudice suffered was caused by the failure to restore Defendant to the premises and not to being displaced in the first instance.

Accordingly it is

ORDERED that Defendant's motion is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/12/06

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HON. WALTER B. TOLUB, J.S.C.