Crisson v Crisson
2015 NY Slip Op 32349(U)
December 7, 2015
Supreme Court, New York County
Docket Number: 160950/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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CHRISTINE H. CRISSON and M.C. by his next friend and mother CHRISTINE H. CRISSON,

Index No. 160950/2015

Plaintiffs

- against -

DECISION AND ORDER

ANDREW L. CRISSON,

Defendant

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LUCY BILLINGS, J.S.C.:

I. PROCEDURAL HISTORY

In a decision dated October 30, 2015, partially granting plaintiffs' motion for a preliminary injunction, the court ordered defendant to pay $7,000.00 forthwith to the Aaron School, LLC, in New York County, on behalf of his son, a third party beneficiary of a Re-Enrollment Contract executed by defendant to pay his son's school tuition for the 2015-2016 school year. State of California Pub. Employees' Retirement Sys. v. Shearman & Sterling, 95 N.Y.2d 427, 434-35 (2000); Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d 209, 211-12 (1st Dep't 2006); Internationale Nederlanden (U.S.) Capital Corp. v. Bankers Trust Co., 261 A.D.2d 117, 123 (1st Dep't 1999). The order was effective upon personal service of the order with notice of entry, as well as personal service of plaintiffs' summons with notice, on defendant pursuant to one of the methods prescribed by C.P.L.R. § 308. The order's continued effect was conditioned on plaintiffs filing an

undertaking of $7,000.00 with the court by November 9, 2015. C.P.L.R. §§ 6312(b), 6313(c); 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44 (1st Dep't 2014); Witham v. vFinance Invs., Inc., 52 A.D.3d 403, 404 (1st Dep't 2008).

Plaintiffs personally served the summons with notice November 4, 2015, and the order with notice of entry November 6, 2015, on defendant and filed the undertaking November 9, 2015, but defendant, still having made no payment to the Aaron School, continues to disobey the order. Therefore plaintiffs have moved to hold him in contempt of the order dated October 30, 2015. N.Y. Jud. Law § 753(A)(3).

That order adjourned plaintiffs' motion for a preliminary injunction to November 12, 2015, expressly to provide defendant a further opportunity to appear and defend against the relief sought, and warned him that, if he failed to appear or to pay the amount ordered after service of the summons with notice and the order as required, he would be subject to contempt penalties. N.Y. Jud. Law §§ 750(A)(3), 751(1), 753(A), 773. Defendant has failed to appear or respond to either plaintiffs' motion for a preliminary injunction or their motion for contempt, except by correspondence to plaintiffs' attorney.

II. DEFENDANT'S CORRESPONDENCE

First, defendant forwarded an unsworn note from a specialist in sports medicine that, as of November 6, 2015, defendant was scheduled for a medical procedure November 12, 2015. Despite the inadequacy of this hearsay communication, plaintiffs and the

court accorded defendant an adjournment to Monday, November 23, 2015.

Defendant similarly responded to this scheduled court appearance. On Friday, November 20, 2015, he forwarded, again to plaintiffs' attorney, another unsworn note from the same physician that defendant would be unfit to travel to New York until the end of the month. Plaintiffs and the court again accommodated defendant with an adjournment of the motion for a preliminary injunction to December 1, 2015. In the meantime plaintiffs, on November 18, 2015, had filed, and on November 20, 2015, had served, their motion to hold defendant in contempt, which the court scheduled for December 7, 2015, to provide defendant more than the statutory time to respond. N.Y. Jud. Law § 756.

Although defendant has attempted to explain his failure to appear in person at least through November 2015, he has not excused his nonappearance through an attorney or through a responsive affidavit or sworn affirmation, C.P.L.R. § 2106(b), electronically filed in the court or mailed to the court. Most astonishingly, defendant's communications express no concern for his son Matthew Crisson's well-being, but only for defendant's own physical and financial condition. Defendant does not explain why he may not draw on the same trust, of which both he and his son are beneficiaries and which paid his son's tuition at the Aaron School in the past, to pay the tuition now. Defendant explains that his employer, a jewelry business, has not generated

enough profit to pay him a bonus, and he has not rented all his real estate holdings. He does not show, however, that his salary and his income from real estate he has rented have not generated even $7,000.00 for his son's tuition or why he has not sold any of his holdings to generate the funds. Nor does he indicate that any economic downturn he may have experienced only has developed, unexpectedly and dramatically, since he obligated himself on his son's behalf to the Re-Enrollment Contract he executed in March 2015. His own portrayal of his financial condition disqualifies him under C.P.L.R. § 1102(a) or New York Judiciary Law § 770 from the appointment of an attorney that he indirectly requests though his correspondence to plaintiffs' attorney.

Finally, defendant indirectly requests that the court postpone any further determination of his son's educational, developmental, and social future to February 2016. Matthew Crisson's educational, developmental, and social future will not wait that long.

III. THE PREJUDICE TO PLAINTIFF CHILD'S RIGHTS UNDER DEFENDANT'S CONTRACT

Plaintiffs, defendant's minor son and the child's mother, have shown the Aaron School's notice to them and to defendant that, after October 30, 2015, the school refuses to re-enroll the child Matthew Crisson or to release his school records to enable him to enroll in an alternative school, until the balance of tuition owed by defendant under his contract with the school is paid. Aff. of Christine H. Crisson ¶ 19 and Ex. G, at 1 (Nov. 16, 2015). Thus defendant's contemptuous nonpayment has severely

disrupted the education, academic progress, and social adjustment and development of his son who is in need of the special educational services that the Aaron School offers and has provided to him for several years. As of now, defendant has prevented his son from attending school for five weeks.

IV. CONTEMPT

Plaintiffs have sustained their burden for the court to hold defendant in contempt of the order dated October 30, 2015, and personally served on him November 6, 2015. N.Y. Jud. Law § 753(A)(3); McCain v. Dinkins, 84 N.Y.2d 216, 225 (1994). The order is unequivocal that defendant was to pay the $7,000.00 forthwith to the Aaron School on his son's behalf and in partial satisfaction of his contractual obligation. McCain v. Dinkins, 84 N.Y.2d at 226; Burn v. Burn, 101 A.D.3d 488, 490 (1st Dep't 2012); 450 W. 14th St. Corp. v. 40-56 Tenth Ave., LLC, 15 A.D.3d 166, 166-67 (1st Dep't 2005). See Cashman v. Rosenthal, 261 A.D.2d 287, 287 (1st Dep't 1999). Defendant's correspondence demonstrates that he is aware of and understands the order and does not dispute that he has disobeyed it. McCain v. Dinkins, 84 N.Y.2d at 226; Burn v. Burn, 101 A.D.3d at 490; Cashman v. Rosenthal, 261 A.D.2d at 287. "Forthwith," means "immediately," yet more than 30 days has elapsed since the order was served on defendant. McCain v. Dinkins, 84 N.Y.2d at 227; Burn v. Burn, 101 A.D.3d at 490.

Under these circumstances, there also is no dispute that defendant has prejudiced, impeded, impaired, and defeated his

son's rights under defendant's contract with his son's school. N.Y. Jud. Law § 753(A); McCain v. Dinkins, 84 N.Y.2d at 226; Burn v. Burn, 101 A.D.3d at 490; Cashman v. Rosenthal, 261 A.D.2d at 287. Even if defendant's physical or financial condition amounted to noncompliance with the order in good faith, or defendant believed that disenrolling his son from the Aaron School were in his son's best interests, such protestations would not be a defense to his contempt. McCain v. Dinkins, 84 N.Y.2d at 227. See 450 W. 14th St. Corp. v. 40-56 Tenth Ave., LLC, 15 A.D.3d at 166.

The minimum means to vindicate Matthew Crisson's rights and compensate him for his father's disobedience of the court's order is entry of a judgment that plaintiffs may collect from defendant's income and assets. McCain v. Dinkins, 84 N.Y.2d at 226, 229. See N.Y. Jud. Law § 753(A)(3). Therefore the Clerk shall enter a judgment in favor of plaintiffs and against defendant for $7,000.00, with interest from December 7, 2015. Plaintiffs shall serve the judgment with notice of entry on defendant by personal service pursuant to one of the methods prescribed by C.P.L.R. § 308.

Although plaintiffs complain that personal service is a hardship, the difficulties plaintiff mother describes are with personal delivery to defendant. Personal service pursuant to the methods prescribed by C.P.L.R. § 308 includes delivery to a suitable adult at defendant's place of business or dwelling followed by a mailing. C.P.L.R. § 308(2) and (4).

Finally, plaintiffs request their attorneys' fees and expenses in this action. Neither their motion for a preliminary injunction nor their motion for contempt, however, seeks this relief. Nor do plaintiffs cite any contractual, statutory, or regulatory authority supporting recovery of fees or expenses for this action. Mount Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 88 (2002). Attorneys' fees and expenses may be awarded for actual losses incurred due to defendant's contempt, N.Y. Jud. Law § 773, but plaintiffs do not show what amount of fees or expenses are specifically attributable to the motion for contempt.

V. FURTHER PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs' motion for a preliminary injunction also seeks that defendant be enjoined to pay to the Aaron School the balance of tuition owed under his contract with the school on behalf of his son. Defendant's continued delinquency has raised the stakes. Plaintiffs now show the Aaron School's notice to them that, as of November 23, 2015, the school refuses to re-enroll the child Matthew Crisson until the balance of $45,020.00 in tuition owed under the contract is paid. Supp. Aff. of Christine Helen Crisson ¶ 8 (Nov. 23, 2015). For all the same reasons that the court on October 30, 2015, ordered defendant to pay $7,000.00 forthwith, the court now orders him to pay the balance of $38,020.00 forthwith.

Although given multiple opportunities, defendant has failed to dispel the irreparable harm his son is suffering due to

defendant's nonpayment or the lesser hardship that payment of this amount will impose on defendant. C.P.L.R. §§ 6301, 6312(a); 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d at 643; Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 272-273 (1st Dep't 2009); Concourse Rehabilitation & Nursing Ctr., Inc., 64 A.D.3d 405, 405 (1st Dep't 2009); Witham v. vFinance Invs., Inc., 52 A.D.3d at 403-404. Having now been given ample opportunity, he also has failed to show any conceivable basis on which this relief ultimately will be determined unwarranted, such that plaintiffs' original undertaking is now insufficient.

Consequently, the court grants plaintiffs' motion for a preliminary injunction to the further extent of ordering defendant to pay $38,020.00 forthwith to the Aaron School, LLC, 44 East 30th Street, 6th floor, New York, New York, in compliance with the Re-Enrollment Contract executed by defendant to pay his son's school tuition for the 2015-2016 school year. If defendant disobeys this order after personal service of the order with notice of entry, he may expect further penalties for continued contempt. N.Y. Jud. Law §§ 750(A)(3), 751(1), 753(A), 773.

VI. CONCLUSION

In sum, the court grants plaintiffs' motion for a preliminary injunction and their motion to hold defendant in contempt of the order dated October 30, 2015, to the extent set forth above and otherwise denies the motions. C.P.L.R. §§ 6301, 6312(a); N.Y. Jud. Law § 753(A)(3). The Clerk shall enter a judgment in favor of plaintiffs and against defendant for

$7,000.00, with interest from December 7, 2015. Defendant may purge his contempt by paying the $7,000.00 to the Aaron School, LLC, 44 East 30th Street, 6th floor, New York, New York, and the accrued interest to plaintiffs. Defendant shall pay an additional $38,020.00 forthwith to the Aaron School, LLC.

DATED: December 7, 2015

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.