

Segismundo v Raynaud
2019 NY Slip Op 31465(U)
May 20, 2019
Supreme Court, Kings County
Docket Number: 516586/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of May, 2019.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

FRANCES KAYLA SEGISMUNDO,

Plaintiff,

- against -

HERBY RAYNAUD and BERNIER LEGAL,
LLC

Defendant(s).

Index No. 516586/2017

DECISION AND ORDER
On Default
(Contempt After Hearing)

Upon the foregoing papers and as indicated by this determination, the application to hold the Defendant Bernier Legal, LLC (hereinafter "BL") in civil contempt is granted.

The Court finds, as set forth herein, that the Defendant BL has failed to obey the Judgment and Order of this Court dated December 6, 2018 (entered on December 10, 2018) by failing to release the sum of \$27,000.00 (from its escrow account) to Counsel to Plaintiff, Frances Kayla Segismundo (the "Plaintiff"), for the sole benefit of Plaintiff and subject to her direction in relation to BL's role as escrowee in relation to a Contract of Sale concerning a cooperative apartment between Plaintiff (as Purchaser) and Defendant Raynaud (as Seller).

By Notice of Motion dated January 28, 2019, the Plaintiff moved (motion sequence # 2) for an Order providing for the following: (1) a Civil Contempt Order pursuant to Judiciary Law §753 as against the Defendant BL for allegedly failing to comply with the Court's Judgment and Order dated December 6, 2018; (2) a Criminal Contempt Order pursuant to Judiciary Law §750, as against the

Defendant BL for allegedly failing to comply with the Court's Judgment and Order dated December 6, 2018; and (3) a fine, costs and attorneys fees relating to thereto.

This Court conducted a hearing on April 25, 2019, at which time and appointed place both Defendants failed to appear, despite proper service upon them pursuant to this Court's Order dated March 20, 2019. Attempts were made by telephone to contact Defendant BL but no response was obtained and Defendants were accordingly found to be in default.

"In order to sustain a finding of civil contempt under Judiciary Law § 753 based on a violation of a court order, it is necessary to establish by clear and convincing evidence that a lawful court order clearly expressing an unequivocal mandate was in effect, that the person alleged to have violated the order had actual knowledge of its terms, and that the violation has defeated, impaired, impeded, or prejudiced the rights of a party (*see Schwartz v. Schwartz*, 79 A.D.3d 1006, 1009, 913 N.Y.S.2d 313; *Dankner v. Steefel*, 41 A.D.3d 526, 527–528, 838 N.Y.S.2d 601; *Hinkson v. Daughtry-Hinkson*, 31 A.D.3d 608, 819 N.Y.S.2d 535)." *Manning v. Manning*, 82 A.D.3d 1057, 1058, 920 N.Y.S.2d 126, 127 [2nd Dept, 2011]. Contempt may be warranted where the record demonstrates "that resort to other, less drastic enforcement mechanisms [has] been exhausted or would be ineffectual." *Keller v. Keller*, 126 A.D.3d 940, 941, 6 N.Y.S.3d 126, 127 [2nd Dept, 2015], quoting *Capurso v. Capurso*, 61 A.D.3d 913, 878 N.Y.S.2d 754 [2nd Dept, 2009].

Based upon the evidence submitted, this Court finds that Plaintiff has met her burden in support of her motion for civil contempt by clear and convincing evidence. See Judiciary Law §753(A); *see also El Dehdan v. El Dehdan*, 114 A.D.3d 4, 978 N.Y.S.2d 239 [2nd Dept, 2013], *aff'd*, 26 N.Y.3d 19, 41 N.E.3d 340 [2015]. As part of this Court's Judgment and Order, this Court

had granted the Plaintiffs' application for Summary Judgment and directed the release of escrow funds as referenced.

Further, the Court draws a negative inference regarding the Defendants' failure to appear. In drawing a negative inference in relation to a party failing to appear and testify, a Court may make "the strongest possible adverse inference as to any evidence which the missing party or witness 'would be in a position to controvert,' but the rule 'may not be used to draw any inferences beyond that.'" *Adam K. v. Iverson*, 110 A.D.3d 168, 179, 970 N.Y.S.2d 297, 306 [2nd Dept, 2013], quoting *Jane PP v. Paul QQ*, 65 N.Y.2d 994, 484 N.E.2d 122 [1985]; see *People ex rel. Sassower v. Sheriff of Suffolk Cty.*, 134 A.D.2d 641, 644, 521 N.Y.S.2d 536, 539 [2nd Dept, 1987]; see also *Dep't of Hous. Pres. & Dev. of City of New York v. Skydell*, 161 Misc. 2d 647, 650, 616 N.Y.S.2d 565, 567[1st Dept, 1994]. "This formulation of the broader principle is generally applied in cases where the missing witness is a party." "In these cases, which include jury trials, nonjury trials, and hearings, the negative inference is generally applied without reference to the prerequisites for the missing witness rule, since those factors would be either irrelevant (the party's control over himself or herself) or deemed satisfied (the party's availability and personal knowledge of noncumulative, material facts) (*but see Crowder v. Wells & Wells Equip., Inc.*, 11 A.D.3d at 361–362, 783 N.Y.S.2d 552 [analyzing, in a multiple defendant case, the availability and noncumulative, personal knowledge of the missing defendant]). *Adam K. v. Iverson*, 110 A.D.3d 168, 178, 970 N.Y.S.2d 297, 306 [2nd Dept, 2013]. The Defendants were given ample opportunity to appear at the hearing.

As a consequence of the Defendant BL's failure to release and/or transfer the subject escrow funds, in violation of the Court's Judgment and Order dated December 6, 2018, the Court finds that the Defendant BL's actions were contumacious and defeated, impaired, impeded and prejudiced the

Plaintiff's rights. Further, this Court finds that the allegations of Defendant BL's contempt were proven by clear and convincing evidence.

Plaintiff has shown entitlement to \$4,950.00 in attorneys fees, as supported by Affirmation of Counsel, in addition to \$250.00 in costs and fees.

Now, upon the Court's due deliberation, and upon all papers and proceedings it is hereby

ORDERED AND ADJUDGED that based upon the factors articulated herein as reflected in the record there clearly is no other adequate remedy at law in this matter. Sequestration, posting of a bond or entry of a judgment would be ineffectual; and it is further

ORDERED AND ADJUDGED, that the conduct of the defendant and the offense committed by it was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein, and it appearing that the misconduct of the defendant BL consisted of acts that it was Ordered to perform but did not perform notwithstanding; and it is further

ORDERED AND ADJUDGED that the Defendant BL is guilty of civil contempt in having disobeyed the Court's Judgment and Order dated December 6, 2018 by failing to release the subject escrow funds in the sum of \$27,000.00 in accordance with that Judgment and Order; and it is further

ORDERED AND ADJUDGED that a fine of \$32,200.00 (inclusive of costs and attorney's fees), less any credit upon the presentation of proof, subject to both Court approval and the right of examination of the Defendant by the Plaintiff, is imposed on Defendant BL for the misconduct and contempt of Court for which it was found guilty; and it is further

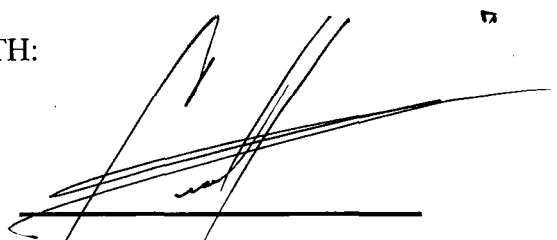
ORDERED AND ADJUDGED that this matter is adjourned to **June 10, 2019, at 10:00 a.m. in Courtroom 738** for Defendant BL to have an opportunity to purge its contempt, the imposition of fines and report as to the amount of any payments made with proof of payment, if any

ORDERED AND ADJUDGED that the remaining relief sought, *inter alia*, Criminal Contempt, is denied.

Plaintiff to serve a copy of this Decision and Order upon the Defendants by certified mail within 10 days hereof.

This constitutes the Decision and Order of this Court.

ENTER FORTHWITH:



Carl J. Landicino
J.S.C.

2019 MAY 22 AM 8:10
KINGS COUNTY CLERK
FILED