

Only Props., LLC v Sylvia Wald & Po Kim Art Gallery
2019 NY Slip Op 33679(U)
December 19, 2019
Supreme Court, New York County
Docket Number: 150805/2019
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 150805/2019

ONLY PROPERTIES, LLC,

MOTION DATE 12/18/19

Petitioner,

MOTION SEQ. NO. 004, 005

- v -

THE SYLVIA WALD & PO KIM ART GALLERY and CGM-LLNR, LLC,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for PUNISH FOR CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for CONTEMPT.

Motion (Seq. 004) by Petitioner Only Properties, LLC (“Only”) to hold Respondent The Sylvia Wald & Po Kim Art Gallery (“Wald”) in criminal and civil contempt, pursuant to Judiciary Law §§ 750 and 753, and motion (Seq. 005) by Respondent CGM-LLNR, LLC (“CGM”) to hold Wald in in criminal and civil contempt, pursuant to Judiciary Law §§ 750 and 753, are denied for the reasons stated herein.

BACKGROUND

Only is the owner of a five-story building located at 415 Lafayette Street in Manhattan. Wald is the owner of an eight-story building located at 417 Lafayette Street that abuts Only’s building. CGM is a commercial tenant of Only, occupying premises on the ground floor and basement.

Only brought this special proceeding, pursuant RPAPL § 881, seeking an order of this Court granting Wald a license to make a limited use of Only’s property so that Wald could complete repairs to Wald’s façade which was designated “unsafe” around July 2014, pursuant to Local Law 11.¹ In sum and substance, Only and CGM assert that Wald’s failure to make timely

¹ CGM has also brought a related action for damages, under a theory of nuisance, *CGM-LLNR LLC v The Sylvia Wald and Po Kim Art Gallery*, No. 153910/2017, which is also pending before this Court. CGM was made a respondent to this special proceeding on the grounds that it has a “property interest” at stake in this proceeding.

repairs has interfered with their respective uses of their property, most notably caused by a sidewalk shed that encroached onto Only's property since roughly April 2015 and protections placed on Only's roof this year.

On March 27, 2019, Only, Wald, and CGM entered into a stipulation of partial settlement ("the Stipulation") that was so-ordered by the Court. Pursuant to the Stipulation, Wald was granted a license to make limited use of Only's building for the purpose of completing its Local Law 11 repairs, with the license to commence on April 1, 2019 and end on June 30, 2019. The Stipulation further stated:

"From April 1, 2019 to June 30, 2019, Wald shall complete the work designated in the amendment and license attached hereto as Exhibit A in the manner required by the amendment and license attached hereto as Exhibit A ...

Wald shall remove the protection on Only's roof at 415 Lafayette Street, and the sidewalk shed in front of 415 Lafayette Street, New York, New York no later than June 30, 2019 in compliance with Local Law 11."

(Affirm in Supp., Ex. C [The Stipulation] at 2.) Furthermore, pursuant to an Amended License Agreement annexed to the Stipulation, Wald was to pay Only \$100 for each calendar day that "any element" of either the roof protection or the sidewalk shed remained in place after June 30, 2019. (Id. [License Amendment] ¶ 6.)

According to the parties, the sidewalk shed was not removed until August 8, 2019 and the roof protections remain in place to this day. Wald asserts that the sidewalk shed was removed following an inspection declaring that the façade facing the sidewalk was safe and that the roof protections remain in place pursuant to Department of Buildings' regulations because the façade facing Only's roof remains in an unsafe condition.

As such, Only and CGM each move to hold Wald in criminal and civil contempt, arguing that Wald has failed to complete its repair work and remove the protections pursuant to the above paragraphs of the Stipulation. In sum and substance, Only and CGM assert that the continued presence of the roof protections prevent them from undertaking renovations to portions of the roof—such as the skylights and the air conditioning system—in preparation for CGM reopening its restaurant. Further complicating matters, CGM and Only assert that their roof has begun to leak and that the roof protections prevent them from repairing the leak.

DISCUSSION

With regard to criminal contempt, under NY Judiciary Law § 750 (A) (3), "[a] court of record has power to punish for a criminal contempt, a person guilty of . . . [w]ilful disobedience to its lawful mandate."

With regard to civil contempt, under NY Judiciary Law § 753 (A):

“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.”

There are four elements for civil contempt:

- (1) “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect”;
- (2) “it must appear, with reasonable certainty, that the order has been disobeyed”;
- (3) “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”; and
- (4) “prejudice to the right of a party to the litigation must be demonstrated”

(*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].) In addition, the movant must establish civil contempt by clear and convincing evidence. (Id.) “A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court.” (*Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 [2d Dept 2009].)

The purpose of an order of civil contempt is “vindication for individuals who have been injured or harmed by a contemnor's failure to obey a court order.” (*Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 630 [2d Dept 2012].) As such, “[c]ivil contempt fines must be remedial in nature and effect and awards should be formulated not to punish an offender, but solely to compensate or indemnify private complainants.” (Id. [internal quotation marks omitted]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994] [“Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate.”].) Civil contempt is “designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both.” (*Dept. of Env'tl. Protection of City of New York v Dept. of Env'tl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987]; see also *People v Sweat*, 24 NY3d 348, 357-58 [2014] [stating that for civil contempt, imprisonment serves “the remedial purpose of compelling compliance” whereas imprisonment for criminal contempt is “designed to inflict a sanction for past conduct”].)

It is important to note difference between civil contempt and criminal contempt. “While the same act may be punishable as both a civil and criminal contempt, the two types of contempt serve separate and distinct purposes.” (*Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 630 [2d Dept 2012] [internal quotation marks omitted].) “A criminal contempt . . . involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates.” (*Dept. of Env'tl. Protection of City of New York v Dept.*

of Envtl. Conservation of State of N.Y., 70 NY2d 233, 239 [1987].) “Unlike civil contempt, the aim in a criminal contempt proceeding is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory.” (Id.)

As such, the movant need not show that its rights have been prejudiced to establish criminal contempt, “since the right of the private parties to the litigation is not the controlling factor.” (*Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 [2d Dept 2012].) However, to establish criminal contempt, “the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding.” (Id.) “Moreover, criminal contempt must be proven beyond a reasonable doubt.” (Id.)

Here, there is no dispute that Wald has failed complete all of the Local Law 11 façade work in the time set forth in the Stipulation and that the roof protections remain in place. Nonetheless, Wald has completed the façade work on its exterior wall facing the sidewalk and this has allowed them to remove the sidewalk shed, which has been the crux of CGM and Only’s complaint. Further, there was testimony presented to this Court concerning the limited number of days that Wald’s contractor was working during the license period. Wald has introduced evidence that in the course of making repairs it became apparent to its contractor that a parapet wall facing Only’s building also needed to be repaired before the remainder of the Local Law 11 façade work could be completed. In addition, there was testimony presented by Wald’s president Hyong Cho that Wald’s contractor abandoned the project and that this contractor has since lost its license. Mr. Cho testified that he believes he has found a new contractor who will complete the repairs.

The Court is mindful that Wald has been on notice of its Local Law 11 violations since July 2014 and now, approximately five years later, Wald has still not fully completed its repair work.

The Court is also mindful that CGM claims that Wald’s failures to repair its façade, pursuant to Local Law 11, have prevented it from reopening its restaurant on the ground floor.

On the issue of contempt presented by these motions, the Court however credits the testimony of Mr. Cho that Wald – a non-profit organization – is actively working toward completing the Local Law 11 façade work, and that Wald has experienced several unforeseen setbacks in fully completing that Local Law 11 façade work—most notably, its contractor losing its license. In addition, the Court notes that the sidewalk shed—which again was the crux of CGM and Only’s complaint—has now been removed (albeit 39 days after the June 30, 2019 deadline set by the Stipulation). Furthermore, as Only and CGM now focus on being able to renovate and repair Only’s roof—particularly the skylight—in advance of CGM reopening its restaurant, Wald has put forward a plan to adjust the roof protections and thereby allow Only and CGM to renovate and repair their roof.

As such, this Court finds that—on these motions—there has not been the requisite showing of disobedience of an order of this Court to hold Wald in civil or criminal contempt.

That the Court denies the instant motions for contempt should in no way be viewed as this Court approving of the time it has taken Wald to comply with its Local Law 11 obligations. It is only to say that on these motions there is not sufficient evidence to hold Wald in civil or criminal contempt.

This however does not mean that Only and CGM are without any remedy. Pursuant to the Stipulation, Wald agreed to pay Only \$100 for every calendar day that the protections remain in place after June 30, 2019—and Wald does not contest Only's entitlement to these payments. Further, pursuant to CPLR § 881, Only is entitled to a license fee for Wald's use of its property and said license fee will take into account the length of time it has taken Wald to complete the subject work.² Finally, CGM has its own action against Wald for money damages arising from Wald's failure to timely complete its repairs.

The reality is that there are many competing interests at play in this special proceeding and CGM's related action for money damages. This Court's paramount interest is to ensure the public's safety during the course of any work performed on either of the buildings. The parties' property and business interests are also of strong importance.

The Court believes that the parties have been earnestly working together to establish a plan that will allow Only and CGM to fix the leaking roof and thereby allow CGM to open its restaurant. The Court encourages the parties to continue working towards a new license agreement that allows CGM and Only to undertake their repairs and renovations as soon as possible.

The Court is directing that the parties appear before it on January 8, 2020 at 3:00 PM to report on the status of adjusting the roof protections. To the extent that the parties cannot agree as to the method and manner of the roof protections and a new license agreement, a motion, pursuant to RPAPL § 881, can of course be made for the Court to fashion an order addressing these issues.

² The issue of the amount of the appropriate and reasonable license fee to be awarded to Only for Wald's use of its property from April 1 to June 30, 2019 was referred to the Special Referee Clerk to hear and report, pursuant to CPLR 4212, and that reference is currently pending.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (Seq. 004) by Petitioner Only Properties, LLC ("Only") to hold Respondent The Sylvia Wald & Po Kim Art Gallery ("Wald") in criminal and civil contempt, pursuant to Judiciary Law §§ 750 and 753, and the motion (Seq. 005) by Respondent CGM-LLNR, LLC ("CGM") to hold Wald in in criminal and civil contempt, pursuant to Judiciary Law §§ 750 and 753, are denied; and it is further

ORDERED that Only is to purchase a copy of the minutes of the hearing of December 18, 2019 before this Court, file a copy of said minutes on NYCEF within thirty (30) days, and CGM is to reimburse Only for half of the cost of said minutes; and it is further

ORDERED that the parties are appear before this Court (71 Thomas, Room 104) on January 8, 2020 at 3:00 PM to report on the status of adjusting the roof protections.

The foregoing constitutes the decision and order of this Court.

12/19/2019
DATE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE