[Cite as *Coventry Group, Inc. v. J.L. Gottlieb Agency, Inc.*, 2010-Ohio-4135.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94185

COVENTRY GROUP, INC.

PLAINTIFF-APPELLEE

vs.

J.L. GOTTLIEB AGENCY, INC.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-603412

BEFORE: Dyke, J., McMonagle, P.J., and Jones, J.

RELEASED AND JOURNALIZED: September 2, 2010

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ANN DYKE, J.:

{¶ 1} Appellants Joshua L. Gottlieb ("Gottlieb"), principal of defendant J.L. Gottlieb Agency, Inc. ("JLGA"), and Charles M. Hall ("Hall"), records custodian of defendant JLGA, appeal from the order of the trial court that found them in contempt of court and awarded sanctions to plaintiff-appellee Coventry Group, Inc. ("Coventry"), in connection with their failure to respond to discovery requests propounded to JLGA. Gottlieb and Hall additionally challenge the trial court's denial of their motion for relief from judgment. For the reasons set forth below, the order of contempt is reversed, the award of sanctions is vacated, and the matter is remanded to the trial court for further proceedings. The order denying their motion for relief from judgment, which was initially challenged in a separate appeal, App. No. 94058, was dismissed for lack of a final order, and is now moot.

{¶ 2} On October 4, 2006, Coventry filed a complaint against JLGA. In relevant part, it alleged that JLGA is the successor to Capital Creation Co. ("CCC"), and that Coventry and CCC entered into an agreement to procure corporate owned life insurance policies for the Charming Shoppes, and to share the revenue generated from such policies. Coventry asserted that in a judgment entered in the United States District Court for the Northern District of Ohio on October 7, 2003, CCC was ordered to pay Coventry $713,789. Coventry further alleged as follows:

{¶ 3} "7. On March 4, 2004, CCC filed a voluntary bankruptcy petition pursuant to 11 U.S.C. §301 in the Bankruptcy Court for the Northern District of Ohio, Eastern Division.

{¶ 4} "8. To date, Plaintiff has not received any distributions from the bankruptcy estate of CCC. As a result, the aforementioned judgment remains unsatisfied.

{¶ 5} "9. JLGA, through its agents, has asserted that JLGA is a successor and mere continuation of CCC.

{¶ 6} "10. JLGA, in fact and law, is a mere continuation of CCC."

{¶ 7} The record further reflects that on April 19, 2007, Coventry served JLGA its First Set of Interrogatories and Request for Production of Documents. On April 23, 2007, Coventry served Gottlieb with a subpoena duces tecum, requesting 18 categories of documents. Coventry also served Hall with a subpoena duces tecum, requesting four categories of "records of communications." JLGA filed a motion to quash and a motion for a protective order. The discovery deadline was then extended to August 5, 2007.

{¶ 8} On August 3, 2007, Coventry filed a motion for sanctions and to compel discovery. Coventry also commanded Gottlieb and Hall to appear for depositions on November 21, 2007. JLGA again filed a motion for a protective order to bar production of the documents requested in April 2007. In relevant part, JLGA asserted that "all of [the] documents, which were requested by Plaintiff, had already been produced to them and were in their possession." On November 19, 2007, JLGA filed a notice of service of "Defendant's Answers to Plaintiff's Discovery."

{¶ 9} Following a pretrial on April 22, 2009, the trial court issued an order which provided in pertinent part as follows:

{¶ 10} "By agreement of counsel, responses to requests for production and interrogatories are due by 6/12/2009. General discovery cut-off is 11/18/09."

{¶ 11} On May 8, 2009, the trial court granted Coventry's motion for sanctions or to compel discovery and ordered JLGA to respond by June 12, 2009. On this same date, the trial court denied JLGA's motions for protective orders and to quash. On this date, Gottlieb filed a motion for an extension of time within which to respond. Coventry filed a brief in opposition to this motion and also filed a motion for sanctions and a contempt finding, arguing that JLGA, its owner, officers, and related entities had "made a mockery of this Court's Orders and their own promises to the Court."

{¶ 12} The trial court scheduled a show cause hearing and hearing on the motion for sanctions for August 13, 2009. It is undisputed that defendant JLGA, its owner Gottlieb, and its agent Hall did not appear. At this time, the court stated on the record that "there is purportedly a bankruptcy in regard to J.L. Gottlieb Agency, Inc." In response, the following transpired:

{¶ 13} "Mr. Douthett: [T]he notice of bankruptcy that I have seen references a different company name, its something like JLGA Services, Inc., and when I spoke to counsel for the respondent yesterday, when he told me he wasn't coming, he told me that J.L. Gottlieb Agency, Inc. had changed its name. So the bankrupt entity, probably to keep the name out of the legal papers, J.L. Gottlieb Agency, Inc.

had changed its name to some other entity, and it's somewhere in my notes, but the notice we have does not say J.L. Gottlieb Agency, Inc., the bankruptcy documents.

{¶ 14} "The Court: All right. And I think we have a copy. You got a copy yesterday, right?

{¶ 15} "Mr. Douthett: I believe so, Your Honor, yes.

{¶ 16} "The Court: Okay. All right. The Court will deem that a hearing was held on the Plaintiff's motion for sanctions and contempt, and will wait for a proposed journal entry. And I presume with that journal entry will be your documentation of fees, or is that going to be a separate —

{¶ 17} "Mr. Douthett: In my experience, Your Honor, and that's something I would like to talk to you about, in my experience the Court grants the motion and then orders a separate submission on fees.

{¶ 18} "The Court: Okay. And that's fine. I'll wait for your proposed journal entry, and then rule on the motion and then we'll go to step two."

{¶ 19} The trial court subsequently concluded that Gottlieb and Hall intentionally disregarded an order of the court. The court granted Coventry's motion for sanctions and contempt.

{¶ 20} Thereafter, on September 9, 2009, the trial court issued the following order:

{¶ 21} "Defendant has notified the court of defendant's JL Gottlieb Agency, Inc. now known as JLGA Services, Inc. filing of bankruptcy. Bankruptcy Case # 09-17508-AIH. The case is hereby stayed as to that defendant only. To be reinstated by motion only."

{¶ 22} On September 8, 2009, Gottlieb and Hall filed a motion for relief from judgment. The trial court denied this motion on September 23, 2009.

{¶ 23} On October 7, 2009, after Coventry submitted an itemized fee bill under seal, the trial court awarded Coventry attorney's fees and expenses in the amount of $30,364, less than the amount requested.[1] Gottlieb and Hall now appeal.

{¶ 24} In their first, third, and fourth assignments of error, Gottlieb and Hall maintain that the trial court erred in failing to stay this matter pursuant to the automatic stay provision of the Federal Bankruptcy Code, 11 U.S.C. Section 362, upon defendant J.L. Gottlieb Agency, Inc.'s filing of bankruptcy. In opposition, plaintiff-appellee asserts that this provision is only applicable to the debtor, and not others, that this provision does not bar a court from finding a party in contempt of court, and that Gottlieb and Hall did not object to the trial court's proceedings, thus waiving any error.

{¶ 25} Turning to the issue of whether the automatic stay arising from JLGA's bankruptcy petition is applicable Gottlieb and Hall, we begin by noting that,

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[1] The record does not indicate that the trial court held a hearing on the issue of attorney fees.

in general, pursuant to 11 U.S.C. Section 362(a)(1), the filing of a petition for bankruptcy operates as a stay of various actions. Section 362(b) sets forth exceptions to this rule.

{¶ 26} Generally, Section 362(a)(1) operates as a stay to the commencement or continuation of any action brought against a debtor, where the action: (1) was or could have been commenced prior to the commencement of the bankruptcy action; or (2) was brought to recover a claim against a debtor that arose prior to the commencement of the bankruptcy action. *Curtis v. Payton* (Feb. 5, 1999), Greene App. No. 98-CA-49. Actions taken in violation of the stay are void. Id.; *Hershberger v. Morgan* (1996), 112 Ohio App.3d 105, 677 N.E.2d 1261.

{¶ 27} In *State ex rel. Krihwan v. Falkowski*, Lake App. No. 2009-L-2286, 2010-Ohio-2286, the court observed that Congress generally intended for the stay provision to apply only to the debtor, not other persons. The court explained, however, as follows:

{¶ 28} "The only type of situation in which the automatic stay can be enforced against a non-bankrupt party is when 'such an identity of interest exists between the debtor and third party non-debtor that a judgment against the third party will directly affect the debtor.' *Gucci America, Inc. v. Duty Free Apparel, Ltd.* (S.D.N.Y., 2004), 328 F.Supp. 439, 441."

{¶ 29} In this matter, there is clearly an identity of interests between JLGA and Gottlieb, its principal, and Hall, its agent. Thus, we conclude that the stay, if applicable herein, is applicable to Gottlieb and Hall.

{¶ 30} As to the claim of waiver, we note that in *Curtis v. Payton,* the court concluded that it is generally inappropriate to apply the waiver doctrine to instances involving the automatic bankruptcy stay because the stay serves to protect not just the debtor, but also his creditors. Id., citing *Commerzanstalt v. Telewide Systems, Inc*. (C.A.2, 1986), 790 F.2d 206, 207.

{¶ 31} As to whether the automatic stay provisions bar a trial court from invoking its inherent powers to punish contempt, we note that numerous cases have determined that a trial court is barred from punishing for civil, as opposed to criminal, contempt. See *In re Atkins* (Bankr.D.Minn. 1994), 176 B.R. 998; *In re Rook* (Bankr.E.D.Va. 1989), 102 B.R. 490. Accord *Atwater v. Delaine*, 155 Ohio App.3d 93, 2003-Ohio-5501, 799 N.E.2d 216 ("We question the authority of the trial court to issue the April 10, 2001 [contempt] order because of the automatic stay provision contained in Section 362, Title 11, U.S.Code").

{¶ 32} We note, however, that the Ohio Supreme Court has reached a contrary view. In *Barnett v. Barnett* (1984), 9 Ohio St.3d 47, 458 N.E.2d 834, the court stated:

{¶ 33} "[i]t is rather universally acknowledged that a judicial power of the highest order of a state court is that of the inherent power of holding in contempt perpetrators of contumacious acts that affront the court. Where the state court is

exercising its contempt powers in order to so maintain the dignity of the court and its process, rather than being a step to collect on a judgment, the cases have rather uniformly held that the automatic stay of the Bankruptcy Code is not applicable."

{¶ 34} In this matter, the action was, in our view, filed in order to link JLGA to CCC, and was initiated as a step to collect the $713,789 judgment rendered in federal court. However, the trial court concluded that Gottlieb and Hall engaged in contumacious acts, so we conclude that the automatic stay is inapplicable to bar the court from punishing for contempt.

{¶ 35} The first, third, and fourth assignments of error are without merit.

{¶ 36} In their second, fifth, and eighth assignments of error, Gottlieb and Hall assert that the trial court erred in granting Coventry's motion for sanctions and contempt and erred by determining they committed "an act or omission substantially disrupting the judicial process."

{¶ 37} Among the inherent powers of a court necessary for the orderly and efficient exercise of justice are the powers to punish the disobedience of the court's orders with contempt proceedings. *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 459 N.E.2d 870. Accord *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 520 N.E.2d 1362. The trial court's finding with respect to appellant is properly characterized as a finding of indirect civil contempt. Indirect contempt of court is an act committed outside the presence of the court but

that also tends to obstruct the due and orderly administration of justice. *In re Purola* (1991), 73 Ohio App.3d 306, 596 N.E.2d 1140.

{¶ 38} Generally, contempt consists of two elements, the finding of contempt and the imposition of a penalty or sanctions; until both elements of contempt have been met, the finding of contempt does not constitute a final appealable order. *Chain Bike v. Spoke 'N Wheel, Inc*. (1979), 64 Ohio App.2d 62, 410 N.E.2d 802.

{¶ 39} With regard to the first element, "[c]ontempt of court consists of an act or omission substantially disrupting the judicial process in a particular case. It is disobedience of an order of the court or conduct which brings the administration of justice into disrespect or which tends to embarrass, impede or obstruct a court in the performance of its functions." *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479, 674 N.E.2d 761, citing *Dozer v. Dozer* (1993), 88 Ohio App.3d 296, 623 N.E.2d 1272; *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 294, 588 N.E.2d 233.

{¶ 40} A trial court's finding of contempt will not be reversed absent an abuse of discretion. Id. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 41} The record reflects that Gottlieb and Hall's conduct included repeated delays in providing discovery, including breaches of their agreement before the court to provide discovery by certain dates. The trial court acted within its

discretion in finding that their conduct substantially disrupted the judicial process for purposes of contempt. Accordingly, the eighth assignment of error is without merit and is overruled.

{¶ 42} However, a sanction for civil contempt must allow the contemnor to purge himself of the contempt. *Tucker v. Tucker* (1983), 10 Ohio App.3d 251, 461 N.E.2d 1337. In this matter, the trial court did not provide Gottlieb and Hall with an opportunity to purge the contempt order. We therefore find that the trial court abused its discretion for that reason. With regard to the contention that Gottlieb and Hall waived any objection by failing to appear or properly challenge the court's order, we note that the opportunity to purge the contempt is required, *In re Purola,* and, in any event, this issue may be raised for the first time on appeal. *Tucker v. Tucker*. Accordingly, the judgment of contempt is reversed and the sanctions are vacated.

{¶ 43} The second and fifth assignments of error are well-taken.

{¶ 44} The remaining assignments of error, including the challenge to the attorney fee award and the trial court's denial of the motion to vacate the contempt order, are moot. App.R. 12(A)(1).

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

LARRY A. JONES, J., CONCURS;
CHRISTINE T. MCMONAGLE, P.J., CONCURS. (SEE SEPARATE CONCURRING OPINION).

CHRISTINE T. McMONAGLE, J., CONCURRING WITH SEPARATE OPINION:

{¶ 45} I disagree with the majority's analysis under the fifth assignment of error, which involves a review of the trial court's finding of contempt against three non-parties to the underlying lawsuit for failing to respond to subpoenas issued during discovery.

{¶ 46} Plaintiff moved under Civ.R. 45(E) for contempt and/or sanctions for avoidance of discovery. Civ.R. 45(E) provides that the failure to respond to a subpoena may be punished by "contempt of the court from which the subpoena is issued" against any person, and "that person may be required by

the court to pay the reasonable expenses, including reasonable attorney fees, of the party seeking discovery." The majority concludes that the trial court erred in the contempt sentence by not providing for a purge, because an indirect civil contempt requires a purge. I disagree with the majority that this case involved civil indirect contempt. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E. 2d 610.

{¶ 47} When determining whether a contempt citation is civil or criminal, we look to the court's resolution of the matter. If it is unconditional and constitutes a punishment for a completed act of disobedience (e.g., payment of attorney fees incurred by the opposing party for failure to respond to a subpoena, as in this case), it is **punitive,** which would render this a criminal contempt. Criminal contempt "is punishment for the completed acts of disobedience. Its purpose is to vindicate the authority of the court and the law." *Brown* at 254. As proof that this was criminal contempt, the trial court stated in the entry appealed from: "[e]ach of the respondents have committed 'an act or omission *substantially disrupting the judicial process* (citation omitted). As such, this court may exercise broad discretion in deciding what actions rise to a level of contempt, *to secure the dignity of the courts* and the uninterrupted and unimpeded administration of justice." The trial court's punitive intent and purpose to vindicate the authority of the court

is clear on the face of this entry. This is criminal contempt, not civil contempt.

{¶ 48} If the trial court had ordered payment of attorney fees that might be purged upon compliance with all subsequently-issued subpoenas, this contempt would be civil in nature because the trial court's purpose would be to coerce compliance in the future. The fact that no purge was ordered does not invalidate the contempt (as suggested by the majority); it is merely an indicator that the contempt is criminal, and that all criminal due process rights must be accorded the contemnor in the contempt proceedings. I would find in this case that no criminal due process rights were afforded the alleged contemnors.

{¶ 49} While both parties and the majority discuss at great length whether there was a bankrupcy stay, etc., these arguments are moot in light of the fact that under either the analysis of the majority, or the analysis in this separate opinion, the contempt citations against the three non-parties must be vacated.[2] I note first that in the trial court's findings of fact and conclusions of law, no mention is made of the burden of proof applied in deciding this

[2]The trial court stated that the hearing on August 12, 2009 would proceed only against Joshua Gottlieb, Charles Hall, and J. Gottlieb Companies, Inc., as there was a valid bankrupcy stay regarding J.L. Gottlieb Agency, Inc. (JLGA is the only party to the underlying lawsuit). "Acknowledging that notice [the bankrupcy of JLGA], plaintiff disclaimed any attempt to impose sanctions or pursue any claim against the defendant or its property, and the hearing proceeded accordingly." (Court order that is the subject of this appeal.)

matter. In a criminal contempt, the burden of proof is beyond a reasonable doubt. Of most import is the fact that this trial proceeded in the absence of all three respondents. Section 10, Art. I of the Ohio Constitution guarantees defendants the right to be present at all stages of a trial. See *State v. Grisafulli* (1939), 135 Ohio St. 87. As the court in *Adams v. Epperly* (1985), 27 Ohio App.3d 51, 52, 499 N.E.2d 374, stated, "[a]mong the rights afforded to both civil and criminal contemnors are notice and an opportunity of a hearing on the matter. " The *Adams* court concluded that in a criminal contempt, unlike in a civil contempt, the alleged contemnor must not only have the opportunity to be present, he must also *actually be present* at the criminal contempt hearing. See, also, *Bierce v. Howell*, 5th Dist. No. 06 CAF 050032, 2007-Ohio- 3050. In the instant case, none of the alleged contemnors were present.

{¶ 50} I also note that due process requires notice of the proceedings. In this case, we have a motion filed and served upon Peter Turner and Eric Zagrans, attorneys for J.L. Gottlieb Agency (dismissed from the show cause hearing due to the bankrupcy stay). J. Gottlieb Companies Inc., Joshua Gottlieb, and Charles Hall were not even named in the service portion of the motion, they are not parties to the underlying lawsuit, and the docket reflects no representation on their behalf.

{¶ 51} Further, the docket does not indicate that the court sent any sort of notice to these non-parties; the only mention of the notice issue at all is a docket notation on July 1, 2009 that "counsel for defendant [JLGA] to advise non-party representatives of hearing date." This is hardly adequate notice for criminal proceedings. Finally, nothing on the docket, and nothing in the court's entry, prepared by plaintiff, indicates whether counsel for defendant in fact advised any non-party representatives, or the non-parties themselves, of the hearing date, or of the charges being levied against them. Clearly, the non-parties were never served with the show cause motion. This would be a failure of service and notice in a civil matter, let alone a constitutional deprivation in a criminal matter.

{¶ 52} Accordingly, I would reverse and remand the order of contempt to the trial court with orders to vacate the finding of contempt and the sanction.