Matter of Norton v Town of Islip
2020 NY Slip Op 30531(U)
February 25, 2020
Supreme Court, Suffolk County
Docket Number: 19018-2003
Judge: David T. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 19018-2003

---x

Application of

HOWARD NORTON,

Petitioner,

For a Judgment Pursuant to Article 78 of The Civil Practice Law and Rules,

-against-

TOWN OF ISLIP, PATRICIA PASCUITTI, in her capacity as PRESS INFORMATION OFFICER, MICHELLE REMSEN, in her capacity as DIRECTOR OF THE OFFICE OF PUBLIC INFORMATION and RICHARD HOFFMAN in his capacity as DEPUTY TOWN ATTORNEY and as FOIL APPELLATE OFFICER ,

Respondents.

---x

Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP
Attorneys for Petitioner
33 West Second Street
P.O. Box 9398
Riverhead, NY 11901

Lewis Johs Avallone Aviles, LLP
Attorney for Respondents Town of Islip, Patricia Pascuitti, Pierce Fox Cohalan, Esq. and Erin A. Sidaris, Esq.
One CA Plaza
Islandia, NY 11749

By decision and Order of the Appellate Division, Second Department dated February 9, 2010 the trial court's denial of petitioner Howard Norton's application for contempt against respondents Town of Islip, et al. was reversed and the matter remitted to this Court for a hearing to determine whether respondents violated the judgment entered on January 31, 2006. The Appellate Court ordered that the matter be remitted to the Supreme Court:

> ... for a hearing to determine whether the Town of Islip, Patricia Pasciutti, Pierce Fox Cohalan, and Erin A Sidaras violated the judgment entered January 31, 2006 and a new determination thereafter on the motion and cross motion...

(***Matter of Norton v Town of Islip***, 70 AD3d 833, 897 NYS2d 122 [2d Dept 2010]). Pursuant to the decision and Order of the Appellate Division a hearing was conducted by this Court on May 6, 7, 8 and 9, 2019.

PROCEDURAL HISTORY

In an earlier decision by the Appellate Division concerning this matter the procedural setting and history of this matter was concisely stated:

> Following the petitioner's success in his action against, among others, the Town of Islip, brought pursuant to 42 USC §1983, his attorney made applications under the Freedom of Information Law (hereinafter FOIL). These applications requested a record of payments made to attorneys or law firms for legal services in connection with the petitioner's federal action, all retainer agreements with these attorneys or law firms, and all billing invoices from them. Well beyond the five-day deadline for complying with these requests, the Town furnished a dollar figure and otherwise claimed that the attorney-client privilege barred compliance with the remainder of the requests. The petitioner's attorney took an administrative appeal to the appellant Richard Hoffman as Deputy Town Attorney and FOIL Appellate Officer. During the course of the appeal, the petitioner's attorney expressly stated that he was acting on behalf of the petitioner. Mr. Hoffman upheld the Town's claim of privilege (***Norton v Town of Islip***, 17 AD3d 468, 793 NYS2d 133 [2d Dept 2005])(Internal citations omitted).

Thereafter, on or about July 24, 2003, petitioner filed a special proceeding pursuant to Article 78 of the Civil Practice Laws and Rules to annul the determination by the Town of Islip which denied petitioner's FOIL request. Respondent Town of Islip served its verified answer on October 23, 2003 after its motion to dismiss was denied by this Court [Mullen, J. (Ret.)].

After a hearing on November 5, 2003 Judge Michael Mullen (Ret.) issued a decision and Order dated December 15, 2003 which granted the petition in its entirety, including petitioner's request for attorney fees, and scheduled a hearing to determine the reasonable amount attorney fees to be awarded. Respondents appealed and the Appellate Division, Second Department, in its decision dated April 11, 2005, held that respondents' contention that petitioner lacked standing was without merit, but modified the judgment and denied petitioner attorney fees.[1] The Appellate Court determined, "Although ultimately unsuccessful, the Town had a reasonable basis in law for withholding the requested materials" (*see* ***Id.***)(Internal citations omitted).

On January 31, 2006 a judgment was entered which:

---

[1]The Appellate Division referred to Justice Mullen's December 15, 2003 determination as a judgment. This Court notes that in an appellate record it is referred to as a judgment and there is nothing else in the court's own determination which describe it otherwise. However, on January 13, 2006 a judgment on this Court's December 15, 2003 determination was signed and entered on January 31, 2006 which is the foundation upon which this subsequent litigation has ensued.

> ORDERED, ADJUDGED AND DECREED, that the respondent Town of Islip, its officers, agents and employees are directed to promptly produce to petitioner unredacted copies of (1) all retainer agreements with, (2) all billing statements from, and (3) records of all payments by the Town of Islip to, outside counsel hired by the Town of Islip to defend it in the federal civil rights action filed in the United States District Court, Eastern District of New York entitled Norton v. Town of Islip et al. (Index No. CV-98-6745); ...

That judgment was served on the Islip Town Attorney on February 3, 2006. On February 10, 2006 the respondent Town moved by order to show cause to vacate, modify or resettle the judgment entered on January 31, 2006. Included in its application was a stay of enforcement of the judgment. The Town's order to show cause was denied by the Court on April 4, 2006. At or about the same time the Town appealed the judgment entered on January 31, 2006, but later withdrew that appeal in August 2006. During the appeal respondents asserted a stay which petitioner claims did not exist. However, this issue was never considered by the courts in all the prior proceedings.

PETITIONER'S MOTION FOR CONTEMPT

Petitioner moved for contempt and sanctions against the respondents on or about May 16, 2007 for failing to comply with the mandates of the January 13, 2006 judgment. Respondents cross moved for sanctions against petitioner and his attorney. The Court, in its decision dated July 26, 2007, denied petitioner and respondents' applications and identified its December 15, 2003 determination as a judgment. It also referenced an extensive *in camera* review of all the items the Town had turned over to the petitioner and specifically noted items which the Court found missing from the document production submitted by the Town. The Court explained that a conference and *in camera* inspection:

> ...would help the Court confirm that everything in the Town's possession had, in fact, been turned over to petitioner, and also help determine whether the Town's attempt to "redact" some of the materials violated the orders of the Appellate Division and this Court.

The *in camera* inspection apparently revealed deficiencies in the Town's prior document productions.

The Court's determination denying petitioner's motion for contempt and respondents' cross-motion were the subject of the appeal which resulted in the Appellate Division's decision dated February 9, 2010 directing a hearing to determine: "... *whether by virtue of its nonproduction of certain documents, the* Town *violated the judgment, and for a new determination thereafter on the motion and cross-motion*" (***Matter of Norton v Town of Islip***, supra) [*Emphasis added*].

According to that holding this Court must accept that there was a non-production of certain documents responsive to the judgment. These documents must, at the very least, be those identified as missing by the Court in its July 26, 2007 decision, to wit:

> ...vouchers for the years 1999, 2000 and 2001, as well as checks for the period between August 27, 2001 and November 20, 2002.

It is clear that these documents were not produced prior to petitioner's motion for contempt or in any earlier production of documents.

RE-HEARING

Petitioner contends that he demonstrated at the hearing that the respondents, Town of Islip, Ms. Pascuitti and nonparties, Pierce Fox Cohalan and Erin A. Sidaras, did violate the judgment by virtue of their non-production of documents. Petitioner maintains that in the underlying motion for contempt the four elements for civil contempt were established by clear and convincing evidence. The Court notes, however, that there has yet to be a full determination of petitioner's motion for contempt because the Court [Mullen, J. (Ret.)] dismissed that motion and the respondent's cross-motion. The Appellate Division has directed that this Court consider the motion and cross-motion anew only after first determining if the respondents violated this Court's judgment.

Petitioner's witness, Bryan Van Cott, Esq., testified to the Town's failure to produce the requested documents. The respondents' witness, former assistant town attorney Erin A. Sidaras, testified to her efforts to procure documents responsive to the judgment.[2] In addition, she asserted claims of harassing conduct by the petitioner and his attorney. Her testimony leaves this Court in doubt if the Town had any recognizable system to place any employee in a position of authority to collect the documents or data from the various Town Departments that could be responsive to the judgment.

The failure to timely and accurately produce the requested information appears to arise from abject institutional indifference, rather than individual or joint connivance to withhold information. It also appears from the testimony that the Town was constrained from offering a detailed affidavit or statement that there were no more responsive documents to the judgment because there was no one who could aver this to be fact.

Both the Court's prior findings of the Town's non-production of documents and this Court's consideration of the additional evidence adduced at a hearing as directed by the Appellate Division, Second Department necessitates a finding that the Town of Islip did violate this Court's January 31, 2006 judgment. The petitioner has failed to show proper service of the motion for contempt on the individually named respondents and, therefore, the Court makes no determination as to their individual culpability, but will consider their conduct as it relates to the Town's failure to abide by the judgment. Now, after making said determination, it is necessary for the Court to reconsider the motion and cross-motion.

---

[2]The Court acknowledges that the respondent also called Edward Ross as a witness.

MOTION FOR CONTEMPT

It is well settled that a movant must prove by clear and convincing evidence the following four elements to establish civil contempt pursuant to Judiciary Law 753(A)(3):

1. A lawful order or judgment of the court was in effect, clearly expressing an unequivocal mandate;

2. That the order or judgment was disobeyed;

3. That the party to be held in contempt had knowledge of the court's order or judgment; and

4. Prejudice to the right of a party to the litigation.

(*see* ***El-Dehdan v. El-Dehdan***, 26 NY3d 19, 19 NYS3d 475 [2015]). After the hearing this Court finds that the petitioner has established by clear and convincing evidence that the judgment dated January 13, 2006 was violated by the respondent Town, thereby demonstrating the second element.

LAWFUL ORDER OF THE COURT

In order to prevail on a motion for civil contempt the movant must demonstrate that the party charged violated a clear and unequivocal court order (***Goldsmith v Goldsmith***, 261 AD2d 576, 690 NYS2d 696 [2d Dept 1999]). An order is not clear and unequivocal when it fails to mandate a specific deadline for performance (*see* ***Chambers v. Old Stone Hill Road Associates***, 66 AD3d 944, 889 NYS2d 598 [2d Dept 2009]). At first it would seem respondents' claim that the January 13, 2006 judgment was not clear and explicit is without merit. However, upon further reflection, by employing the term "promptly" in its judgment, rather than a specific date or period of time, the Court created uncertainty as to the timely measure of performance or the point from which a violation would be deemed certain.

The judgement required un-redacted documents related to the federal Norton litigation to be "promptly" produced by the Town. While no specific time period for production was set forth in the judgment, it is clear the Court intended the respondents to act with some immediacy. The initial decision of the Court in favor of the petitioner was dated December 15, 2003. It took approximately eight months (August 2006) for the Town to produce documents responsive to the judgment.[3] Thereafter, in November 2006, petitioner informed the Town of deficiencies in its August responses and again respondents failed to timely supplement their prior production. In fact, the Town only supplemented its document production in its opposition papers to petitioner's contempt motion and again upon request of the Court after the *in camera* inspection. Petitioner continues to claim that the Town still has not produced all responsive documents.

---

[3]Respondents reference an earlier 2003 response with redactions. However, it is clear that this production was insufficient and was not made with all reasonable efforts.

Given the appeals and purported stays (until August 10, 2006), the initial production by respondents on August 22, 2006 was relatively timely, but clearly deficient.[4] The Town was then notified of these problems some three months later and, despite further prompting by the petitioner, the Town's additional responses were tardy and incomplete. Without a definitive time frame for production stated in the judgment, however, it is difficult under these facts to consider the Court's directive to be a clear and unequivocal mandate. Before there can be a finding of contempt the order or judgment must set forth an ascertainable time for performance – a clear reference point to measure the parties' adherence to the Court's directives. At best, respondents worked within the outer fringes of prompt production, but in all candor the Court finds the Town acted without a time reference. Each of respondent's individual deficient document productions, when taken cumulatively, still lack best efforts in reasonably responding to this Court's judgment. The Court does not criticize the Town for its continued effort to locate records, but rather its failure to conduct a reasonable investigation and detail these undertakings. The continuous effort by the Town to locate responsive documents could be applauded if the Court could discern any sincerity to the purpose for which the searches presumably were undertaken and the scope of documents provided.

Under the facts before it, and petitioners heightened burden of proof, this Court concludes that its mandate was not clear and unequivocal because it failed to designate a specific time for production. The implementation of the word "promptly" fails to adequately clarify the mandate and properly alert respondents to a time frame for performance. Since the petitioner has failed to sustain its burden on this issue, his motion for contempt is denied. However, this determination does not exonerate the Town from its failures to fairly and properly respond to a judgment of this Court.

Given the tremendous effort made by all parties on these motions and the related appellate practice, this Court will continue to consider the remaining elements of petitioner's motion for contempt and thereafter consider both parties' applications for sanctions.

RESPONDENTS HAD KNOWLEDGE OF THE COURT'S JUDGMENT

For a party to be held in contempt it must have knowledge of the Court's order, although it is not necessary that the order actually have been served upon the party (*see* ***Shakun v Shakun***, 11 AD2d 724, 204 NYS2d 694 [2d Dept 1960]). There appears to be no dispute that the respondent Town and its agents had knowledge of this judgment. Based on the record and facts obtained at the hearing, the Court finds that petitioner has established by clear and convincing evidence respondents' knowledge of the judgment dated January 13, 2006.

---

[4]The parties seemingly honored the Town's assertion of a stay on appeal although CPLR 5701(a)(1) would suggest no stay existed. In the interim, petitioner failed to take any action to enforce his rights under the judgment until after the "stay" ended in August 2006.

PREJUDICE TO THE RIGHTS OR REMEDIES OF THE PETITIONER

Respondents argue that regardless of petitioner's claim that the Town failed to provide records as required by the court's judgment, their conduct did not impair a right or remedy of the petitioner. Furthermore, respondents urge that since the records were requested under FOIL the Town's failure to produce them does not impact on any right or remedy. If this was the case a successful petitioner would have no remedy in an Article 78 proceeding to compel the production of documents under FOIL.

Petitioner argues that his rights emanate from the judgment and the Town's failure to comply with the terms of the judgment, thereby defeating his rights. It is the Court's understanding that the Freedom of Information Law (FOIL) requests were initiated by the petitioner to aide in his application for attorney fees in his successful federal action against the Town. The nature and origin of the request has little to do with the contempt charge arising from a violation of this Court's judgment.

The Court granted the petitioner the right to obtain certain documents from the Town. Clearly, the Town has impaired Mr. Norton's rights arising from that judgment. Although this Court is unable to discern the degree to which the Town has impaired petitioner's claim for attorney fees or any damages arising therefrom, it does find that respondent's failure to produce the documents set forth in the judgment impaired and prejudiced petitioner's remedy in the federal action and this special proceeding.

Petitioner has sustained his burden of proof on three of the four elements that would establish the Town's contempt. Lacking a finding that the judgment was clear and unequivocal this Court must deny petitioner's motion for contempt. Although, this Court need not consider respondents' other defenses to this application, in an effort to give finality to the parties further attention is given to these arguments.

RESPONDENTS DEFENSES TO PETITIONER'S MOTION FOR CONTEMPT

Respondents contend that, considered cumulatively, they have substantially complied with this Court's order and therefore cannot be held in contempt (*see* ***Miller v. Miller***, 61 AD3d 651, 877 NYS2d 148 [2d Dept 2009]). In support of this contention the Town references the findings of this Court in its July 26, 2007 decision which stated, "...the fact is petitioner now has these items in his possession." By Order dated February 9, 2010 the Appellate Division, Second Department reversed this Court's prior decision and directed that a new determination be made. Therefore, this Court is not bound by its earlier decision and finds after the hearing that the Town failed to produce all the necessary documents because it failed to conduct a proper and complete search of its records.

Petitioner argues that even substantial compliance with an order or judgment is not a defense to civil contempt (*see* ***McCain v. Dinkins***, 84 NY2d 216, 616NYS2d 335 [1994]). Respondent is required to make in good faith all reasonable efforts to produce the documents. At

the hearing it was established that there was little order or discipline in the search effort made by the Town. It is clear to the Court that there was no process followed or in existence to ensure that a reasonable search was conducted. In addition, the Court finds that respondents evaded certification of the search because of the very real problem it faced – it could never determine if all documents were produced. At the hearing it was also demonstrated that timely searches of various departments were not conducted, although individual efforts were taken to locate the records.

Petitioner correctly notes that the Town is required to retain records in accordance with the "Local Governments Records Law" (*see* McKinney's Laws of New York, Arts and Cultural Affairs Law, Article 57-A; *see also* 8 NYCRR § 185.11 [Appendix H]). It is this Court's understanding that part of the Town's record retention requirements is to store this material for a definite period of time during which it may be retrieved for and reviewed by the general public.

At the hearing, and after review of the papers submitted, the Court finds the Town has failed to establish any general methodology for its record retention and storage as it relates to the documents ordered to be produced. Nor has the Town established to this Court's satisfaction that a methodical search for these records was ever conducted. It should be noted that the Court is not guided by petitioner's claim that there were admissions made as to the existence of certain documents, such as retainers. It is not that the Town found documents and refused to turn them over, but rather it has failed in good faith to employ all reasonable efforts to locate these documents. At this point the Town should not be guided by any standard of production under FOIL, but rather, should recognize the gravity of its position and its utter failure to promptly produce to date all the documents responsive to the judgment.

If the documents were produced, the Court under these facts and circumstance would expect a very detailed affidavit by someone with actual knowledge of the Town's record retention system and the searches conducted and a sworn statement that no other documents can be located after employing all reasonable efforts. There is nothing in the record before this Court from which the Court can conclude that a proper reasonable search was ever conducted.

There are numerous instances in the records before this Court which reveal that the petitioner has informed the Town with specificity about the deficiencies in its document productions. This information has been presented to the Town in a logical and pragmatic manner. In response, the Town claims that the petitioner has failed to prove that any documents are missing. Based on the Town's repeated failure to use all reasonable efforts to promptly produce the documents set forth in the judgment, its failure to delineate any reasonable search it ever has undertaken to locate the documents and its repeatedly tardy supplementation of its initial response, this Court finds this claim by the Town devoid of any substance or merit and indicative of its obstinate, obfuscation of its responsibility to its citizens under FOIL and its unwillingness or incapacity to honor this Court's judgment.

While this Court has not found respondent in contempt, it does find that the Town failed to promptly produce documents as directed in the judgment as measured against the standard of reasonableness. By its inaction the Town has prevented Mr. Norton from obtaining information to assist him in pursuing his claim for attorney fees in Federal Court.

SANCTIONS

Each of the parties to this special proceeding seek to sanction the other pursuant to 22 NYCRR § 130-1.1. Petitioner maintains that the Town has sought to hinder the prompt production of documents by implementing a litigation strategy of delay. Respondents' claim is centered on allegations of harassing conduct by the petitioner and his attorneys against the Town and, more particularly, one of the assistant town attorneys.

When there is litigation before this Court that was commenced some seventeen years ago, one can only imagine the level of frustration shared by the parties. Such litigation can become a yoke around the proverbial necks of the attorneys involved. One would hope that none of the parties expected such time to pass and expense to be incurred in this litigation and one would hope that the officers of the court would not endeavor to prolong ultimate resolution.

The Court has reviewed respondents' claims against petitioner and his attorneys and finds that they have failed to substantiate any action by them to harass any respondent to this proceeding whether or not they are a party. At the same time this Court does not endorse every word written or said by the parties or their attorneys. The Court calls upon the parties and their attorneys to retrospectively review their conduct towards each other and take the opportunity to improve upon themselves. As to the conduct alleged in the federal action, this Court restrains itself from further comment and leaves to that august judiciary the necessary and just determinations.

Petitioner's claims for sanctions against the Town can be maintained upon a finding that it engaged in frivolous conduct. 22NYCRR § 130-1.1(c) defines conduct as frivolous if:

> (1) it is completely without merit in law and cannot be supported by reasonable argument for an extension or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statement that are false.

Here, since January 31, 2006, the respondent Town has had an unfettered opportunity to produce the documents set forth in the judgment. There is little confusion on the issue of redaction and no confusion after respondent withdrew their appeal in August of 2006. The Town's failure to produce the documents to date or to satisfy this Court that there are no other documents in its possession has delayed and prolonged the resolution of this special proceeding. The one stark difference between the litigants in this case is that the municipality has the benefit of time on its side and the petitioner does not. It is clear that respondent Town has used time to its advantage and to the detriment of the petitioner. The Court finds that respondent Town's failure to conduct a search for documents using all reasonable efforts sanctionable because it has primarily delayed and prolonged this litigation and grants petitioner attorney's fees. The parties are directed to confer within thirty (30) days of this decision and Order and either agree to an amount to be paid which the Court would "so order" or contact the Court to conduct a further hearing on attorney fees.

Based on the sum of the foregoing, it is hereby

ORDERED, that respondent Town of Islip shall, within ninety (90) days of the date hereof, produce such other documents as may be located which are responsive to the judgment entered on January 31, 2006; and its is further

ORDERED, that the Town of Islip shall submit a copy of the documents to the Court together with sworn affidavit(s) setting forth the places the relevant documents are stored, the manner of search for documents, whether the search is complete and upon what facts the respondents certify that the search and production is complete.

Any other applications not specifically determined herein are denied.

This constitutes the decision and Order of the Court.

Dated: February 25, 2020
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION