

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS PART: IDV

July 12, 2005

SHERRIL R. D.

Index No. : 21827/04

Plaintiff,

-against-

DECISION AND ORDER

HON. ESTHER M.MORGENSTERN

ALFRED B. D.

Defendant,

QUESTIONS PRESENTED:

Should the Defendant be held in Contempt without a hearing of this Court's Order of December 23, 2004 and the prior Court Order of November 5, 2004? Whether upon the finding of Contempt, should the Defendant be incarcerated with bail set at no less than the amount of the arrears due as of the date of said finding. Finally, should the said bail, if posted, be released to the Plaintiff, Sherril D. Further, the Court must determine if the Plaintiff should receive counsel fees from the Defendant. The question of relocation has been settled by stipulation. Additionally, if the case proceeds to trial, is the Defendant precluded from submitting evidence at trial since he has failed to produce specific court-ordered documents, failed to answer interrogatories, appear for deposition or answer satisfactorily where he works and how much he earns.

The Plaintiff, moves by Order to Show Cause to adjudge the Defendant, Alfred D., to be held in contempt of this Court's Order dated December 23, 2004 and a prior *pendente lite* Order dated November 4, 2004. Plaintiff also seeks to have the Defendant incarcerated for his contempt and to pay counsel fees in the sum of \$6,000. Further, Plaintiff moves for an Order to be allowed to relocate with the parties' child to

Florida. Finally, Plaintiff moves to preclude the Defendant from offering evidence at trial for his failure to produce documents and for the Court to resolve all financial issues in favor of the Plaintiff.

The Defendant was ordered to pay child support commencing November 5, 2004 in the amount of \$200.00 per week by the Order of the Hon. Jeffrey D. Lebowitz. Plaintiff maintains that the checks made payable to Plaintiff from Defendant for support arrears were dishonored and no further payments have been made. Defendant was, also, ordered to pay carrying charges on the marital residence on December 23, 2004 and again on March 2, 2005 which has not been paid to date.

Plaintiff is requesting permission to relocate to Florida with the parties' child where her family has assured her that she could reside rent-free with her sister who would also help with child care. Plaintiff is currently unemployed and requests permission to relocate claiming that she has found employment in Florida.

The Court ordered the Defendant on two occasions to produce a Net Worth Statement, provide additional discovery and appear for a deposition by March 23, 2005. There has been no compliance to date. Defendant was further ordered to present verification of employment and income which he has also failed to produce. Defendant has been repeatedly ordered to retain counsel and submit a retainer agreement, but the Defendant has failed to comply.

Defendant, with assigned 18B counsel on December 23, 2004, signed a Preliminary Conference Order with a discovery schedule. There has been no compliance with that Preliminary Conference Order. Plaintiff filed a Note of Issue on May 13, 2005. On May 19, 2005 the Defendant, with the advice of counsel, consented to a divorce based upon the grounds of constructive abandonment. The Inquest was held and the parties agreed that the Plaintiff would be awarded a Final Order of Sole Custody and be allowed to relocate with the parties' daughter to Florida. The Defendant would be awarded a Final Order of Visitation with the subject child and be allowed visitation in Florida. The remaining issues of child support, equitable distribution, maintenance, and counsel fees were to be determined by the Court. Defendant was again

advised, at this point, to retain his own counsel for the Equitable Distribution portion of the action as well as the matters raised by the instant motion. The Court marked the file “final for the Defendant to retain counsel”. On the next adjournment June 16, 2005 the Defendant appeared without counsel, without a Net Worth Statement and without ordered discovery. Plaintiff now moves to hold Defendant in Contempt for his failure to comply, preclusion and payment by Defendant of \$6,000.00 for counsel fees. Plaintiff states that the Defendant’s non-compliance and dilatory action caused her to incur unnecessary legal fees. Plaintiff has paid a retainer fee in the amount of \$7,500.00 dollars which has been exhausted and since her job here has been terminated she has no financial means of support.

A finding of contempt is justified by a defendant’s disobedience of a *pendente lite* order with which the defendant was required to comply. See Gucci v. Gucci, 213 A.D.2d 356 (1st Dept. 1995). Furthermore, the Defendant’s failure to obey the Order of this Court regarding child support has been ongoing for many months indicating not mere disobedience but a willful disobedience. “The element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out.” McCormick v. Axelrod, 59 N.Y.2d 574 (1983). In this case, the record shows, the Defendant has made expenditures on himself, has failed to be honest with this Court about his employment, and has shown a willful disobedience of this Court’s Preliminary Conference Order dated December 23, 2004. A willful failure to comply with an order of support may result in a sentence of incarceration under Family Court Act §454. “A father’s concession that he did not fully comply with order of support constituted prima facie evidence of willful violation”. The burden then shifts to the violator to rebut the prima facie evidence with competent and credible evidence of an inability to comply. A failure to present evidence of prioritizing the payment of certain expenses before payment of child support mandated by court order is a failure to rebut the evidence that the violation was willful. Powers v. Horner, 12 A.D. 3rd 609 (2nd Dept., 2004); See also Family Ct Act §454[3][a]. This Defendant has wilfully failed to comply with this Court’s Orders of support.

C.P.L.R. § 3126 and existing case law hold that a party should be precluded from offering documents at trial that he failed to produce during discovery pursuant to a Court Order. In addition, an inference favorable to the Plaintiff shall be drawn with respect to all financial issues if a party has failed to produce the requisite documents in a timely manner. The sanctions for nondisclosure by a party to an action are provided for in the statute. C.P.L.R. § 3126 provides in pertinent part:

“If any party, or a person who at the time a deposition is taken or an examination or inspection is made ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just , among them:

1. An order that the issues to which the information is relevant shall be deemed resolved for the purposes of the action in accordance with the claims of the party obtaining the order; or
2. An order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, ... or from using certain witnesses: or
3. An order striking out pleadings or parts thereof, ...or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The sanctions of CPLR §3126 may be invoked for failure to attend a deposition or for failure to answer questions propounded at the deposition. (Siegel, New York Practice, 3rd Edition §367)

Also, the Court must determine whether an award of counsel fees to the Plaintiff would be appropriate. DRL §§ 237 and 238 state that the court may do so in the event that the Defendant has wilfully failed to obey a court order to pay child support. The DRL also specifies that it is at the discretion of the court to decide whether such an award is appropriate. The Defendant has been non-compliant with the Court’s Orders regarding child support and discovery throughout this proceeding. The Defendant has increased litigation costs to the Plaintiff by both failing to obey court orders to pay child support, carrying charges for the marital residence and by being non-compliant with discovery as well as his change of attorney three times. The Defendant is the cause of the Plaintiff’s increased litigation costs and should compensate the Plaintiff for her increased legal fees due to his actions.

Contempt

The Court ordered Defendant to pay \$200.00 per week for child support based on Plaintiff's application filed on September 23, 2004. The record shows that Plaintiff has only received a total of \$1,000.00 to date. On February 4, 2005 two checks presented by Defendant for support were dishonored by the bank. Plaintiff prepared a Reply Affidavit although Defendant never filed any opposition papers with the Court. The Defendant's former attorney delivered opposition papers to Plaintiff's attorney but never filed them with the Court. The Plaintiff's Reply Affidavit quoted the Defendant admitting to the Court that it is more important for him to pay his rent than to pay support for his child. Defendant also admitted in open Court that he was taking a vacation during this action which necessitated a rescheduling of visitation. The Defendant subsequently unilaterally ended the Court ordered supervised visitation with his child. The Defendant appears to have priorities more important than his child or complying with the Orders of this Court. "[S]ince the father failed to present any credible evidence demonstrating the necessity for prioritizing the payment of certain expenses ahead of his child support obligation, he failed to rebut the prima facie evidence of a willful violation." The burden of going forward shifts to the Defendant to offer competent and credible evidence of his intent to comply with the order. *See, Powers v. Horner, supra.*

There are three requirements in order to find that contempt of a court order has occurred in a given case. It must be determined that a lawful order of the court was in effect and then found, with reasonable certainty, that it was disobeyed. The party to be held in contempt must have had knowledge of the court's order. Finally, a prejudice to the right of the other party to the litigation must be demonstrated. *See, Judiciary Law, §753 [A].* All of the requirements are present in the instant case. The Court ordered Defendant to pay child support to Plaintiff in the amount of \$200.00 per week commencing November 4, 2004. Defendant has not complied with this Order and has argued that other financial obligations prevent him from doing so. This Court has ordered the Defendant to pay the carrying costs for the marital residence on numerous occasions. The Defendant has failed to do so and has placed this marital asset in danger of foreclosure. In addition, Defendant has not been forthcoming about his present employment which resulted

in unnecessary delay and additional cost to the Plaintiff. Despite the Defendant's unsupported assertions of financial distress he has an obligation to support his child. "A parent's child support obligation is not necessarily determined by his or her current financial condition, but rather by his or her ability to provide support." Davis v. Davis, 13 A.D. 3d 623,(2nd Dept., 2004). Defendant is a 41 year old skilled tradesman who prior to the matrimonial action was able to provide income sufficient to maintain the marital residence. He has the financial ability to lease a new car and pay for automobile insurance. The Defendant has made donations to charity. The Defendant has chosen to pay for numerous items before complying with his court ordered obligations.

Once it is established that there has been a willful default of a court order, FCA §454 permits a court to commit a Defendant to jail, although other enforcement methods may be available. *See* FCA §454; *See also* DRL §245. "Where, as here, the record demonstrates that the alternative remedies would be ineffectual, the party need not exhaust those remedies." Rosenblitt v. Rosenblitt, 121A.D. 2d 375, (2nd Dept. 1986). The record of the Defendant's disregard of his financial support of his child as well as his refusal to comply with almost all of this Court's directions indicate that drastic intervention is necessary. It is not likely that enforcement methods, other than incarceration, would be an effective remedy for this Defendant.

The actions of this Defendant have impaired, impeded and prejudiced the Plaintiff. The Defendant's behavior exhibits a willful and unbroken disregard for this Court's Orders. The allegations contained in the Plaintiff's Affidavit and her attorney's Affirmation are uncontroverted. Defendant has failed to use the numerous opportunities afforded him to comply or explain his default. Defendant has failed to timely file an Affidavit in Opposition to the instant contempt or the *pendente lite* motion. Therefore, it is unnecessary for the Court to hold a hearing in this case. "Supreme Court properly held defendant in civil contempt without a hearing, since it was clear from the papers submitted to the court that there was no issue of fact to be resolved (*see*, Coronet Capital Co v Spodek, 202 AD 2d 20, 29-30 [1st Dept. 1994]) and, in any event, defendant never requested a hearing ...[.]" Cashman v. Rosenthal, 261 AD 2d 287 (1st Dept. 1999). The Defendant's

former attorney, who was relieved on April 12, 2005, delivered opposition papers to the Plaintiff's attorney but those papers were never filed with the Court. The Defendant has never properly submitted any papers to the Court and has failed to submit a satisfactory explanation of his failure to pay child support and carrying charges for the marital residence as ordered.

Relocation

The Court in Tropea v. Tropea, 87 N.Y.2d 727, (1996) stated: "the Court must determine, based on all proof whether it has been established by a preponderance of the evidence that the custodial parent's proposed relocation would serve the child's best interest." The Second Department, in a matrimonial action, allowed the custodial parent to relocate with the parties' child to another state after considering that the mother and child would have a significant support network of friends and family in the new location, the lower cost of living would allow the child to live an improved lifestyle, and the lack of interest and involvement by the non-custodial father. Aziz v. Aziz, 8 A.D.3d 596 (2nd Dept. 2004).

In the case at bar, the Plaintiff has already consented to the relocation of the subject child. That branch of the Plaintiff's motion is moot.

Preclusion

The Defendant should be precluded from offering at trial any documents he failed to produce pursuant to the Court Orders for discovery. An inference favorable to the Plaintiff shall be drawn with respect to all the financial issues remaining in this action. Generally, a court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands. Pearl v. Pearl, 266 A.D.2d 366, (2nd Dept. 1999). C.P.L.R. §3126 provides that when a party refuses to obey an order for disclosure, the court may make an order "prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony." CPLR. § 3126 (McKinney 2005). To invoke the remedy of preclusion, the "court must determine whether the offending party's lack of cooperation with disclosure was willful, deliberate, and

contumacious.” Robustelli v. Robustelli, 262 A.D.2d 390, (2nd Dept. 1999), *citing* Maillard v. Maillard, 243 A.D.2d 448, (2nd Dept. 1997); Brady v. County of Nassau, 234 A.D.2d 408, (2nd Dept. 1996). The absence of any excuse for a party’s delay in responding to discovery demands and his failure to object to the demands, supports the inference that the party’s conduct was willful. *See* Robustelli at 390; *See also* Brady at 408.

Compliance with an order to disclose requires both a timely response and a good faith effort to address the request meaningfully. Kihl v. Pfeffer, 94 N.Y.2d 118, (1999). In Pearl, the record established to the Court’s satisfaction that a party’s repeated failure to comply with prior orders for discovery was willful and contumacious. The Defendant was precluded from submitting evidence relating to his finances and financial issues of fact were resolved in favor of the Plaintiff. *See*, Pearl at 366. A court precluded a party’s counsel from participating at an inquest because the party willfully disobeyed a multitude of court orders which frustrated disclosure and the party falsified financial documents for more than a year. Settembrini v. Settembrini, 270 A.D.2d 408, (2nd Dept. 2000). Here, the Defendant was ordered to provide the Plaintiff with a Net Worth Statement, tax returns and three pay stubs from all his current employment by January 13, 2005. This Court gave the Defendant the opportunity to comply with a second order, on or before March 23, 2005. The Defendant was ordered by the Conference Order, dated December 23, 2004, to produce a Net Worth Statement, pay stubs, tax returns, answers to interrogatories, and other discovery documents by March 23, 2005 or the Defendant “waives as to those issues.” The Defendant failed to file any timely, appropriate response with the Court. The Defendant has failed to provide a reasonable excuse for his failure to respond to the Court’s orders. Also, the Defendant’s apparent disregard of the Court’s repeated orders supports a finding of a willful and deliberate lack of cooperation with disclosure. Public policy mandates full financial disclosure for the issue of equitable distribution in a matrimonial action. “[M]inimal efforts expended by the defendant in attempting to provide further documentation of his finances, clearly displays a lack of good faith. Accordingly, having failed to disclose information critical to the assessment of his net worth, the defendant is now in no position to complain that the court erred in drawing inferences favorable to the

plaintiff with respect to the disputed financial issues involved.” Richter v Richter, 131 A.D. 2d 453,455 (2nd Dept. 1987). Since the Defendant did not provide these documents, he has waived any right to defend or address any financial issues in this action and should be precluded from using these documents in the future.

The Court may make an inference favorable to a party, upon a motion, with respect to any disputed factual issue affected by the party’s failure to provide a requisite statement of Net Worth when determining *pendente lite* relief in a divorce action. NYCRR §202.16 (k). A party was held to have displayed bad faith when a section of his net worth statement pertaining to the value of his assets was left blank even though the asset value was easily ascertainable. A failure to disclose information, by the defendant, critical to the assessment of his net worth put that party in no position to complain about the favorable inferences the court found for the Plaintiff with respect to disputed financial issues. *See, Richter, supra*. In the case at bar, this Court shall make an inference favorable to the Plaintiff since the Defendant did not provide the requisite Net Worth Statement or any additional documents. Thus, the Defendant will be precluded with regard to the information he did not supply and an inference favorable to the Plaintiff shall be drawn with respect to all financial issues.

Counsel Fees

Counsel for the Plaintiff requests reasonable counsel fees and costs in the sum of \$6,000.00 and for necessary expenses to maintain this proceeding. Pursuant to DRL §237 [c], the court may order the respondent to pay counsel fees to the petitioner’s attorney as long as it finds that the respondent willfully failed to obey some lawful order compelling payment of support or maintenance. The Plaintiff asserts that the Defendant has failed to pay the court-ordered child support and Plaintiff has insisted that this failure was, indeed, willful. The Defendant has filed no timely response to these allegations.

DRL §238 states that it is at the court’s discretion to require either party to pay the expenses of the other in bringing, carrying on, or defending any action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to DRL §§ 243, 244, 245, or 246.

In Sapir v. Sapir, 288 A.D.2d 25(1st Dept. 2001) the court awarded Plaintiff counsel fees after considering 1) the circumstances of the case, including that the Plaintiff had no income, 2) the Defendant's admitted vast wealth, and 3) the Defendant's avoidance of service and requests for adjournments increasing the Plaintiff's litigation costs. The court also ordered an award to cover the cost of the Plaintiff's contempt motion because the Defendant had necessitated the motion by violating the restraining order.

In the case at bar, the Defendant has failed to disclose his income but admitted to the Court he has sufficient funds to provide himself with a new car and a vacation during the pendency of this action. The Defendant alleges that he has no present income but has repeatedly refused to provide any documentation to the Court. Like the defendant in Sapir, the Defendant in the present case has violated court orders by refusing to pay child support and expenses for the marital home, and, thus, has necessitated the Plaintiff's filing of this Order to Show Cause.

A defendant non-compliant with discovery can be liable for the plaintiff's attorney fees. An award of attorney fees to compensate the Plaintiff and to penalize the Defendant for failure to comply with the discovery request is appropriate. Kramer v. Kramer, N.Y.L.J. 9/10/91 p.27 ,col. 6. In the case at bar, the Defendant has been non-compliant with all discovery. Defendant has failed to provide responses to interrogatories and discovery demands, pay stubs, tax returns and a Net Worth Statement on numerous occasions. Defendant has not produced any of these documents. Consequently, he has caused the Plaintiff to incur attorney fees and delayed the court proceedings.

The Defendant's recalcitrance includes a wilfull violation of this Court's repeated direct Orders for support and discovery without excuse or defense. The Defendant has willfully disregarded this Court's Orders and the Defendant's actions have impaired, impeded and prejudiced the Plaintiff. The record contains voluminous evidence to establish wilful violations of the Court's Orders. The Plaintiff's application for adjudging the Defendant to be held in contempt of the Orders of this Court is granted without a hearing. The

court holds that the Defendant is not entitled to a hearing considering the Defendant's failure to timely rebut the prima facie evidence of his wilful failure to comply with this Court's Orders.

Wherefore, it is

ORDERED AND ADJUDGED that the Defendant Alfred D. is guilty of civil contempt of this Court's Orders for his wilful violation of the *pendente lite* order dated December 23, 2004 and November 4, 2004 by failing to pay \$200.00 weekly child support and the carrying charges of the marital home from December 23, 2004. This contempt was calculated to and did actually defeat, impair, impede, and prejudice the rights of the Plaintiff; and it is further

ORDERED AND ADJUDGED that as a result of said civil contempt the Plaintiff has been damaged in the amount of \$11,800.00 plus the unpaid carrying charges on the marital residence. The sum represents the unpaid child support of \$5,800 and counsel fees of \$6,000. Counsel fees are for numerous unproductive conferences, the instant Order to Show Cause, and for the extensive service costs due to Defendant's evasiveness. The Court grants that part of the motion for counsel fees; and it is further;

ORDERED that pursuant to DRL §244 the Plaintiff is awarded a money judgement in the amount of \$5,800 representing unpaid child support together with statutory interest; and it is further

ORDERED that the Defendant shall be committed to the custody of the New York City Department of Corrections for a period of 3 months unless defendant purges himself of his contempt by paying the money judgment of \$5,800 to the Plaintiff and paying Plaintiff's counsel the attorney fees incurred in the amount of \$6,000. Execution is stayed for 15 days from this day to enable the Defendant to purge himself of contempt by complying with the Court's prior Orders by satisfying the money judgment and paying the counsel fees by July 27, 2005; and it is further

ORDERED that the Defendant appear before this Court on July 28,2005 at 9:30 a.m. in order to submit proof that said purge conditions have been satisfied or a bench warrant shall be issued for his arrest; and it is further

ORDERED that the Defendant is hereby precluded from submitting evidence, at trial, pertaining to any document previously requested by the Plaintiff and an inference shall be drawn in favor of the Plaintiff on all remaining financial issues.

This constitutes the Decision and Order of this Court.

ENTER,

Hon. Esther M. Morgenstern, J.S.C.