

**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF QUEENS: PART IDV \_\_\_\_\_x**

In the Matter of a Family Offense Proceeding,

**MIN,**

Petitioner,

-against-

**IM,**

Respondent.

Present

Hon. ESTHER M. MORGENSTERN  
J.S.C.

**DECISION\ORDER**

Docket O-00197-04/A

Dated: March 17, 2005

**What remedies are available to a Respondent when a provision of a Final Order of Protection in favor of Petitioner is violated by the Petitioner?**

A fact-finding hearing having been held on November 9, 2004, the Court makes the following findings of fact. Petitioner, Im, filed a Family Offense Petition in Queens County Family Court under Docket O-00197-04 on April 16, 2004. On May 5, 2004, this Court entered a Temporary Order of Protection ordering the Respondent Min, to stay away from Im's home at all times and her place of employment at 420 Broadway, New York, N.Y. on alternating days. Min was permitted to go to the location on alternating days.

On May 21, 2004 this Court amended the Temporary Order of Protection and ordered both parties to stay away from the business located at 420 Broadway, New York, since it was reported to the Court that allowing the parties to be present at the business on alternating days was resulting in the parties filing complaints with the Police Department.

On July 8, 2004, on consent, without a finding of fault, and prior to the commencement of a

fact finding hearing, a Final Order of Protection was issued in favor of Im, under Docket O-00197-04 ordering Min to stay away from Im. The Order directed both parties to stay away from the business located at 420 Broadway, New York. The Order of Protection was to be in effect until July 7, 2006.

Additionally a Short Form Order was entered on July 8, 2004, which ordered both parties to stay away from the business located at 420 Broadway, New York. A provision was added that allowed the parties to be together with counsel for the purpose of settling the matrimonial action.

Min filed a Supplemental Petition under Docket O-00197-04/A on October 1, 2004 and moved by Order to Show Cause to have Im, held in contempt for a violation of this Court's Final Order of Protection dated July 8, 2004. Min moved to enforce the Short Form Order and Final Order of Protection claiming Im failed to stay away from the business as directed. Min maintained that Im, in fact, transferred the business operating at 420 Broadway, New York to a third party in contravention of the Short Form Order and a provision of the Final Order of Protection. The Final Order of Protection prohibited both parties from going to the business location.

Im testified and the Court found her to be less than credible and her testimony to be evasive and self serving. Min testified and the Court found him to be a credible witness. Min testified that he went to the business premises on September 5, 2004, and observed that the business was operating. Further he testified that when he returned to the location he observed Im and took photographs of Im at the location. Min maintained he and his wife were the only persons with access to the location. They would be the ones to open and close the business. Min, on behalf of Suzy, Inc., and as the sole shareholder of 420 Apple Corporation, signed the original sublease for the premises 420 Broadway, New York where the business operated.

Im testified that she was around the location of the store every day on or about September 7, 2004. She testified further that she transferred the sublease for the business premises that had been

signed for by Min, alone, on behalf of Suzy Inc., and sold the assets of the corporation to a third party. Im maintained she conducted the transfer without ever entering into the business premises. She testified that she would go to the location for 2-3 hours at a time in order to confer with the new owner. Additionally, she said that she would stay outside of the store for several hours at a time in order to answer questions. Im maintained she never entered the store after the Orders of July 8, 2004. She testified that even if she needed to use a restroom she used one other than the one at the business premises.

Im conceded that the business she operated at 420 Broadway, New York was under a New York State Tax Certificate which authorized collection of sales tax by the corporation, 420 Apple Corp., whose sole shareholder was Min. A Tax Certificate was submitted and it showed that 420 Apple Corp. was authorized to collect sales tax for the business. Im testified that Min was the sole shareholder of 420 Apple Corp. which operated their business at 420 Broadway. On cross examination, Im conceded that the original sublease for the business premises was in the corporate name of Suzy, Inc which was signed by her husband only. Additionally, the only names appearing on the initial sublease are those of Suzy, Inc. and Min.

However, Im testified that she sold the business with all stock and inventory for \$ 10,000 to a third party and assigned the sublease for the location, after the Court ordered her to stay away from the business. Im testified that she believed she sold the business in the beginning of September 2004. Im acknowledged that she knew Suzy, Inc. could not conduct business in New York State. Im also testified that she did not sign the original sublease for 420 Broadway. Im maintained that there were no corporate books, accounts or ledgers for the business that operated at 420 Broadway, New York.

Im also testified about her marriage to Min and stated that the marriage was invalid because at the time of the marriage she was still married to someone else. She claimed that no judgement of

divorce had been entered for her first marriage at the time of her marriage to Min. That marriage to D. Lee in Chicago, Illinois was still valid when she married Min. She stated that her marriage to Min was a convenience or “pretend” marriage in order to help him in to obtain a permanent visa to remain in the United States.

Im called G. Tenpa to testify on her behalf. According to the witness he worked at the location 420 Broadway in September of 2004. He testified that he saw Im on the sidewalk in front of the location during August, September and October of 2004. Until September 2004 he paid rent to Min and Im and now pays rent to another person. He never observed who was opening and closing the store during the time in question.

J. Yoo testified on behalf of Im and identified himself as the manger for the new owner of the business at 420 Broadway. He said that his brother-in-law, Y. Kim, the new owner, purchased the business from Im. He further stated that \$75,000 was paid for the business sublease and \$20,400 for the inventory. He saw Im around the business on various occasions but would speak to her on the sidewalk or near the entrance to the store. Yoo testified that he did not take inventory of the stock of the business before the purchase.

Yoo further testified that he met Im and the landlord sometime in September of 2004 at the management office of the building at 420 Broadway. Yoo was unclear as to what transpired on that day. Inexplicably the second sublease submitted in evidence transferring the leasehold in the business premises to Y. Kim is dated the same date as the original sublease signed by Min: August of 2003. Even though Yoo testified he attended this meeting with the landlord and the Respondent in August of 2004 the new sublease is dated August 2003.

## DISCUSSION

The Family Court possesses the contempt powers accorded to all courts of record by the Judiciary Law. Section 113 of the Family Court Act states in pertinent part “the family court is established in each county of the state as part of the unified court system for the state.” The Family Court is a court of record”(N.Y.S. Const., Art 6, §1[b] 1997). “The provisions of the judiciary law relating to civil and criminal contempt shall apply to the family court in any proceeding in which it has jurisdiction ... a violation of an order of the family court in any proceeding which directs a person to do an act or refrain from doing an act shall be punishable under ... the judiciary law, unless a specific provision is provided in this act or any other law” (Family Court Act §156). A willful or intentional act is not generally required for civil contempt. *See Matter of Terry*, 151 Misc. 2d 48 (Fam. Ct., N.Y. Co., 1991).

Min’s supplemental petition provides the Court a framework in which to hold Im accountable for violating the Court’s orders. His supplemental petition alleges that Im violated this Court’s orders of July 8, 2004 that barred Im from going to the business location. Section 846-a of the Family Court Act defines this Court’s powers to punish a failure to obey a lawful court order. On its face, §846 appears to authorize action only against a “respondent” for failure to obey a lawful order of the court within the context of an Article 8 proceeding. However, once the respondent has filed a petition or counterclaim, as provided for in Family Court Act §841, then the respondent can move the Court to hold the violator accountable even when the movant is not the original petitioner.

There must be a lawful order still in effect at the time of the alleged violation (*Anderson v Anderson*, 25 AD2d 512 [1st Dept. 1966]). The violation of the Court order must have been willful. The performance of an action clearly proscribed by an “explicit” order of the court would be sufficient to find that a violation occurred. (*Kuenen v Kuenen*, 122 AD 4th 616 [4th Dept.1986]). The Court must be “satisfied by competent proof” that the respondent violated the order ( *Ryan v*

*Ryan*, 42 A.D. 2d 733, [2d Dept. 1973], Fam. Ct. Act §454 [1998]) “Competent proof” invokes a fair preponderance of the evidence standard to be used in a fact-finding hearing. See *Halleck v Hayden*, 47 AD2d 855, (2d Dept. 1975).[Family Court Act §832]

The sanctions for violations of a Court order issued under Article 8 of the FCA are found under FCA §846-a ; imprisonment for up to six months, modification of the original order, referring the case for criminal prosecution, and/or awarding the petitioner reasonable attorney fees incurred in the violation proceeding (*Linda D v Peter D.*, 152 Misc 2d 564, [Fam Ct., Westchester Co.1991] ).

However, §841(Fam. Ct. Act §841 [1994]) of the Family Court Act additional remedies:

“At the conclusion of a dispositional hearing under this article, the court may enter an order:

- ( a) dismissing the petition, if the allegations of the petition are not established ;or
- ( b) suspending judgment for a period not in excess of six months;
- ( c) placing the respondent on probation for a period not exceeding one year, and requiring respondent to participate in a batterer’education program ... ;or
- ( d) making an order of protection in accord with section eight hundred forty-two of this part; or
- ( e) directing payment of restitution in an amount not to exceed ten thousand dollars. An order of restitution may be made in conjunction with any order of disposition authorized under subdivisions ( b), ( c), or ( d) of this section ... ”

The provisions of §846-a alone would not adequately redress a violation of this Court’s Order of Protection. Invoking §841 allows the Court greater latitude in hearing evidence as well as the ability to fashion an appropriate remedy. “A broader standard of admissibility of evidence is available on the dispositional hearing than at the fact-finding hearing, and evidence may be admitted ... including hearsay and other evidence otherwise incompetent ( *V.C. v H.C. Sr.*, 257 AD2d 27, 32) see Besharov, Practice Commentaries, McKinney’s Cons Laws of NY, Book 29A, Family Ct Act §834, at 240). An order of protection may set forth “reasonable conditions of behavior to be

observed ... by the petitioner or respondent” (Family Ct Act §842 [a]). [emphasis added] This Court may enter an Order of Restitution after a dispositional hearing (see *V.C. v H. C. Sr.*, supra).

The Court’s assessment of witness credibility is given great weight in a hearing to determine if there was a violation (*Eisele v Eisele*, 307 AD2d 412 [3d Dept. 2003]). In the case at bar , Im provided testimony that was not credible. She admitted that although Min was the sole shareholder of the business entity empowered to collect sales tax at the business premises 420 Broadway and Min signed the original sublease that she alone signed the second sublease agreement that transferred the rights to the business premises and sold the assets to a third party. She testified that she entered into her marriage to Min for a fraudulent purpose and before her prior marriage was dissolved. The Court finds that Im did return to the business she shared with Min on more that one occasion in violation of this Court’s order. She returned to the business in order to negotiate the sale of the assets, transfer the sublease and assist the new owner which was a clear violation of this Court’s Orders.

### **CONCLUSION**

This Court finds that Min has submitted sufficient factual evidence to support the allegation in his petition. The facts as presented by Min were credible. The testimony and documentation provided clear evidence that Im returned to the business location in clear violation of this Court’s Orders. Im sold the assets of the business and assigned the sublease for the business premises while the Court’s Orders of July 8, 2004 were still in effect. The Final Order of Protection stated that “Both parties are to stay away from the Business located at 420 Broadway, NYC 10013.” A separate Short Form Order entered the same day reiterated more explicitly that “It is ordered that both parties are to stay away from the business they share.” Im’s testimony was filled with contradictions and her explanation that she obeyed the letter of the order was undermined by her testimony. It is clear

by a fair preponderance of the evidence that Im willfully violated the Order of Protection issued by this Court on July 8, 2004.

A dispositional hearing will be held forthwith on March 17,2005.

This constitutes the DECISION and ORDER of this Court.

---

ESTHER M.MORGENSTERN, JSC