

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JAMES DIVERGILIS, ESQUIRE

Plaintiff

v.

GARY S. SILVER, ESQUIRE, individually
and General Partner, Silver & DiVergilis,

Defendant

: JULY TERM, 2001

:

: No. 1563

:

: COMMERCE PROGRAM

:

:

:

:

: Control No. 120590

OPINION

This Opinion is written in support of this Court's finding Defendant, Gary Silver, Esquire ("Silver") in contempt, pursuant to both Plaintiff, James DiVergilis, Esquire ("DiVergilis"),'s Amended Petition for Contempt of the Order, dated November 8, 2001, and pursuant to a Rule to Show Cause, issued *sua sponte* by this Court on March 26, 2002, for Silver's failure to appear without due cause at the scheduled hearing on that date. Following a hearing held on April 25, 2002, this Court determined that Silver's continued failure to respond to the Amended Petition for Contempt, despite Silver's own request for an extension to answer said petition, as well as his inappropriate and less than credible excuse for not attending the March 26th hearing and repeated "eleventh hour" request for an extension, warrants that Silver is held in contempt.

BACKGROUND

A recitation of the procedural history, or rather, procedural morass is necessary to gain a clear understanding of this case. This matter arose from a Petition for a Preliminary Injunction, filed by Plaintiff DiVergilis, seeking *inter alia* to compel Defendant Silver to complete various actions necessary to

complete the dissolution of the partnership of two lawyers, including providing DiVergilis with access to the partnership books, bank statements and business accounts, paying certain back due taxes and filing tax returns, closing certain bank accounts and paying certain bills of the partnership. See Petition for Preliminary Injunction - Proposed Order. This Petition was filed on July 13, 2001. Following an initial status conference with the parties on July 23, 2001¹ and a request from both parties to reschedule the initial Rule to Show Cause, a preliminary injunction hearing was scheduled for August 1, 2001.

At the August 1st hearing, the parties reached a partial settlement, pursuant to which, Silver agreed to many of the requests in the Petition. An Order of Stipulation of Agreement was entered on that date and was endorsed by Richard Q. Hark, Esq. on behalf of Plaintiff DiVergilis, Mr. Silver, who represented himself *pro se*, and this Court (“Stipulated Order”). The Stipulated Order incorporated the transcript of the hearing held on August 1, 2001. Specifically, Silver agreed to the following:

- (1) to sign the partnership dissolution document on August 1, 2001 and to deem the partnership of Silver & Divergilis dissolved as of December 31, 1999;
- (2) to provide DiVergilis within ten (10) days with all books and records of the partnership within Silver’s custody or control;
- (3) to provide DiVergilis with a cashier’s check in the amount of \$ 8,889, representing half of the previous payment of federal taxes of the partnership;
- (4) to refrain from issuing partnership checks without DiVergilis’s actual signature or express approval;
- (5) to have no open bank accounts in the partnership’s name or close any existing accounts;
- (6) to provide statements of the partnership bank accounts to determine if any funds are left from June, 1999 through June, 2001;
- (7) to investigate and contact the Registrar of Wills and assume responsibility of a notice sent July 24, 2001 to DiVergilis, to determine why DiVergilis was listed as administrator of an estate;

¹It appears that Defendant Silver attended this conference by telephone, but he was not physically present.

- (8) to provide proof within ten (10) days that the account number 6517866, relating to the City of Philadelphia business privilege tax account, for use and occupancy, had been closed;
- (9) with regard to exhibits ## 9-19, to contact the Disciplinary Board of the Supreme Court of Pennsylvania, stating that DiVergilis had nothing to do with the dishonoring of a settlement check out of an IOLTA account and to accept full responsibility of the Disciplinary Board's investigation;
- (10) with regard to item # 20, to provide proof that the multi-telephone number account under Winstar had been paid and DiVergilis's name had been taken off the account and that the account was closed;
- (11) with regard to items ## 21 and 22, to provide DiVergilis with a copy of a letter to the Minolta Corporation advising it that DiVergilis is not responsible for that account but that Silver is alone responsible;
- (12) with respect to item # 29, the Pitney-Bowes bill, to instruct Pitney-Bowes to remove DiVergilis's name and close the account and open a separate account in Silver's name only;
- (13) to file any and all outstanding local, state and federal tax returns dealing with the partnership that have yet to be filed by August 24, 2001 and agree to be 50% responsible for any tax liability but 100% responsible for any interest and penalties due on the taxes;
- (14) to bear the costs (i.e., accountant expenses) for any tax returns not yet completed; and
- (15) to pay any interest and penalties on taxes previously paid should the IRS not agree to an abatement.

See 8/1/01 N.T. 4-5, 7,-11, 13-14, 16, 21-25, 27, 29, 31. Certain other issues were monetary ones which would be resolved in a separate arbitration proceeding.

On August 14, 2001, Plaintiff filed a Petition for Sanctions, seeking to have the Court find Silver in Contempt of the Stipulated Order, asserting that Silver merely signed the dissolution agreement and provided a cashier's check in the amount of \$8889, but that Silver had not performed any of the other actions required by the Stipulated Order. Petition for Sanctions, ¶¶ 6-7. On September 21, 2001, this Court issued a Rule to Show Cause and scheduled a hearing on the Petition for Sanctions for October 29, 2001. Pursuant to a request of Mr. Hark, counsel for Plaintiff, dated September 26, 2001, the court

rescheduled the contempt hearing for November 5, 2001 at 9:30 am. On November 5, 2001, thirty minutes prior to the start of the hearing, Silver sent a handwritten facsimile, which was sent *ex parte*, requesting the Court to reschedule the hearing for November 13, 2002 because of a confusion in the dates on Silver's part. The Court denied the request as untimely and a violation of ethical rules, barring *ex parte* communication.

A hearing on the Petition for Sanctions was held on November 6 and 7, 2001, where both testimonial and documentary evidence were presented. On November 8, 2001, this Court entered an Interim Order, finding Silver in Contempt of the Stipulated Order, dated August 1, 2001, and ordering Silver to comply with all terms of the Stipulated Order and to pay attorney's fees in the amount of \$5,125 within thirty (30) days. This same Order directed both parties to simultaneously file proposed findings of fact and conclusions of law by December 7, 2001 and any reply brief by December 14, 2001. Silver never filed any filings but appealed to the Superior Court on December 10, 2001. On that same date, Plaintiff filed a second Petition for Contempt of this Court's November 8th Order, but the matter remained deferred while the appeal was pending.

Then, on December 18, 2001, this Court issued an Order, pursuant to Pa. R. App. P. 1925(b), directing Silver, as appellant, to file a Concise Statement of the Matters Complained of within fourteen (14) days. Silver never complied with the 1925(b) Order. On January, 4, 2002, Plaintiff DiVergilis filed a Motion to Quash the Appeal with the Superior Court. The appeal was dismissed on March 1, 2002. On February 25, 2002, a rule returnable on the Plaintiff's second Petition for Contempt was issued for a hearing to be held on March 21, 2002. On March 6, 2002, Plaintiff filed an Amended and Supplemental Petition for Contempt.

Upon a timely request by Plaintiff to reschedule the matter, the hearing was again rescheduled for March 26, 2002. Then, on March 25, 2002, at 4:30 pm, Silver sent a facsimile requesting that the Court again continue this matter as he would be out-of-state on March 26, 2002. By this same facsimile, Silver asserted that the amended Petition for Contempt had not been properly served and that he was requesting an extension of twenty (20) days to answer said Petition. As such, Silver did not appear for the March 26th hearing. This Court *sua sponte* issued a Rule to Show Cause for why Silver should not be held in contempt for his failure to appear at this hearing and as to the Plaintiff's Petition. The matter was then rescheduled for April 25, 2002.

Plaintiff, in his Amended Petition for Contempt, alleged *inter alia* that:

(1) Plaintiff has incurred additional attorney's fees in the amount of \$8050 since filing the second Motion for Sanctions with practical costs equaling \$883 for a total of \$8,933;

(2) that on December 7, 2001, Silver acted on behalf of the Silver & DiVergilis partnership in a manner inconsistent with the August 1st Stipulated Order with his letter to Roe Doyle;

(3) that DiVergilis received a recent cellular telephone bill in the partnership's name of which DiVergilis had no knowledge and which Silver had failed to change the joint account to a private one;

(4) that since November 8, 2001, DiVergilis has paid certain tax liabilities incurred during the partnership, of which he was only fifty percent 50% responsible, but that Silver has failed to cooperate in any manner consistent with the partnership dissolution agreement and is fifty percent (50%) responsible for the principal paid;

(5) that Silver, as managing partner, is responsible for all interest and penalties assessed by taxing authorities for taxes levied for which no return was filed and no taxes were timely paid;

and

(6) that Silver has failed to pay the balance of \$5,125 of previously-awarded attorney's fees.

Am. Petition for Contempt, ¶¶ 15-23.

At the April 25th hearing, this Court questioned Silver as to why he did not appear at the March 26th hearing. Silver's response to this inquiry was that he had to attend the anniversary of a relative's death in Connecticut on that date and that he was unable to cancel that familial commitment. This Court then found Silver in willful contempt of this Court and found that his conduct was outrageous in that Silver deliberately failed to apprise this Court with notice of his familial commitment until the eleventh hour, resulting in both inexcusable delay of the proceedings and a wasted court hearing. The Court thereupon ordered Silver to pay \$1000, directed to the Office of the Prothonotary, within ten (10) days of the hearing, unless Silver intended to appeal the matter. In such case, the Court would stay its Order of Contempt for a period of thirty (30) days for Silver to pay the \$1000. This Court also held that the averments in the Amended Petition for Contempt were deemed admitted by operation of law because there was no Answer to the original or Amended Petition for Contempt. Silver's response was that he was not properly served with the Amended Petition. However, Silver also did not file any motion or preliminary objections challenging the lack of service, and for these reasons the objections were deemed waived.

DISCUSSION

In ruling on the Amended Petition for Contempt, certain general principles must be noted. First, courts have always been empowered to enforce their orders by imposing penalties and/or sanctions for failure to obey or comply therewith. Brocker v. Brocker, 429 Pa. 513, 519, 241 A.2d 336, 338 (1968). "Each court is the exclusive judge of contempts against its process, and on appeal its action will be reversed

only when a plain abuse of discretion occurs.” Fatemi v. Fatemi, 371 Pa. Super. 101, 113, 537 A.2d 840, 846 (1988). As stated by the Pennsylvania Supreme Court,

Contempt of court is the obstruction of the court’s orderly process. It may be committed directly or indirectly. It is direct when committed in the court’s presence and indirect when committed beyond its presence. Contempt is a generic concept distinguished by two types, criminal and civil contempt. The difference is not of the essence, but of the purpose sought by their use. The gravamen of both is obstruction of orderly process, and each serves a different purpose for regulating obstruction.

Crozer-Chester Medical Center v. Moran, 522 Pa. 124, 130-31, 560 A.2d 133, 136 (1989).

Further, the distinction between civil and criminal contempt is determined by the dominant purpose of the judicial response to “contumacious behavior.” Id. at 131, 560 A.2d at 137. If the dominant purpose is to prospectively coerce the contemnor to comply with the court’s order, the adjudication of contempt is civil. Id. On the other hand, if the dominant purpose is to punish the contemnor for disobedience of the court’s order or some other contemptuous act, the adjudication of contempt is criminal. Id. Moreover, in civil contempt, one has “the key to the jail house” and may be “released of sanction whenever he signals that he will obey the order.” Id.

To succeed in a petition for civil contempt, the plaintiff has the burden of proving the defendant’s non-compliance by a preponderance of the evidence. C.R. by Dunn v. Travelers, 426 Pa. Super. 92, 100, 626 A.2d 588, 592 (1993).² To hold someone in civil contempt, the court must engage in the following 5-step process: (1) a rule to show cause why an attachment should not issue; (2) an answer and hearing;

²In criminal contempt cases, however, the burden of proof is “beyond a reasonable doubt.” Commonwealth v. Muttzabaugh, 699 A.2d 1289, 1292 (Pa. Super. Ct. 1997). In addition, the requisite elements for direct criminal contempt are: (1) misconduct; (2) in the presence of the court; (3) committed with the intent to obstruct the proceedings; (4) which obstructs the administration of justice. Id.

(3) rule absolute (arrest); (4) a hearing on contempt citation, and (5) an adjudication of contempt. McMahon v. McMahon, 706 A.2d 350, 356 (Pa. Super. Ct. 1998) (holding that procedures followed in trial court were in substance the equivalent of the required 5-step process). See also, Richland Twp. v. Prodex, Inc., 166 Pa. Commw. 313, 319 n.8, 646 A.2d 652, 654 n.8 (1994)(multi-step civil contempt procedure is not required if the contempt proceedings are predicated upon violation of an order entered after a full hearing

In addition, the court may, in a proceeding for civil contempt, impose an unconditional compensatory fine and/or a conditional fine and imprisonment, and such fine may be payable to the United States or to the Commonwealth or the county or to the individual who was injured. Brocker, 429 Pa. at 519-20, 241 A.2d at 339. A fine made payable to the complainant can act as compensation for the special damage he or she may have sustained by reason of the contumacious conduct of the offender. Id. at 521, 241 A.2d at 339. Such fine must be based upon evidence of complainant's actual loss, and his right to this compensatory fine is dependent upon the outcome of the basic controversy. Id. Further, this court may only award attorney's fees in addition to a compensatory fine if it specifically finds that the defendant(s) engaged in "dilatory, obdurate or vexatious conduct" beyond merely the contumacious conduct. Borough of Beaver v. Steckman, 728 A.2d 418, 420 (Pa. Commw. Ct. 1999)(citing Twp of South Strabane v. Piecknick, 546 Pa. 551, 686 A.2d 1297 (1996)). See also, 42 Pa.C.S.A. § 2503(7).

Here, the record sufficiently supports this Court's finding Defendant Silver in contempt of this court's November 8, 2001 Interim Order, as well as Silver's contempt of this Court for failure to appear at the hearing scheduled for March 26, 2002 and for failing to provide any credible excuse for his absence or for his repeated "eleventh hour" request for a continuance. Moreover, this Court specifically finds that

Silver engaged in dilatory and/or obdurate conduct beyond merely contumacious behavior which warrants the award of attorney's fees.

First, it was not necessary for this Court to delve into the merits of Plaintiff's Amended Petition for Contempt because the averments were deemed admitted by operation of law since Defendant Silver failed to file any answer whatsoever, nor did he file any motion or preliminary objections asserting improper service. Rule 206.7(a) of the Pennsylvania Rules of Civil Procedure {"Pa. R. Civ. P."}, which governs the procedure after issuance of a Rule to Show Cause, holds that "[i]f an answer is not filed, all averments of fact in the petition may be deemed admitted for the purposes of this subdivision and the court shall enter an appropriate order." See also, Pa. R. Civ. P. 1029(b)("Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication."). Here, Defendant Silver failed to file any answer to the Amended Petition despite the fact that the hearing on this Petition was repeatedly rescheduled and Silver had plenty of time to respond. Silver's assertion that he was improperly served has no bearing on this finding since he failed to file any motion challenging service and it is evident that he received the Amended Petition for Contempt at some point in light of his facsimile sent on March 25, 2002. Thus, under the Pennsylvania Rules of Civil Procedure, Plaintiff's averments may be deemed admitted.

Not that Defendant Silver's failure to respond in this instance is at all surprising since he never filed any response to any of the pleadings in this case from the initial Complaint in Equity and Petition for Preliminary Injunction to any of the subsequent Petitions for Contempt. Moreover, even when specifically directed by this Court to file proposed findings of fact, conclusions of law and memorandum, Silver did not comply. Nor did he respond in any manner to this Court's 1925(b) Order when he originally appealed this

Court's November 8th Order finding Silver in contempt, which otherwise could have been deemed a waiver of that Order under the Rules of Appellate Procedure. Pa. R. App. P. 1925(b). Silver's conduct warrants censure. Further, as an attorney representing himself *pro se*, it gives this Court much pause to note that Silver cannot even follow the most basic Pennsylvania Rules of Court or Rules of Civil Procedure.

Moreover, Defendant Silver's failure to appear at the hearing scheduled for March 26, 2002 is further evidence of his lack of respect for this Court's authority and the basic level of courtesy to this Court and to opposing counsel. His "eleventh hour" request for a continuance, which was received by this Court at 4:30 pm on the day before the March 26th hearing, was not the first indicia of Silver's irresponsibility. Indeed, his request for a continuance of the November 5, 2001 hearing on the first Petition for Contempt came a mere thirty minutes prior to the start of that hearing and it was sent *ex parte*, which was why that request was denied.³ Further, Silver's excuse for not attending the March 26th hearing was that he had to attend the anniversary of a relative's death in Connecticut. Common sense dictates that Silver must have had notice of such an anniversary well before the March 26th hearing, at least one year, such that his lateness in a request for a continuance is inexcusable. His "mei culpa" attitude and apology at the April 25th hearing did not sway this Court in its finding. Rather, his attitude during the hearing appeared insincere and manipulative.

In addition, while this Court finds that Silver engaged in dilatory conduct beyond merely contumacious behavior, this Court finds the request for attorney's fees in the amount of \$8,933, on top of the \$5,125 of previously awarded fees, is an excessive request and not indicative of the work performed

³Even though the request was denied, this Court did not conduct the hearing on November 5, 2001, but conducted it on November 6 and 7, 2001.

from November 8, 2001 until the present. In this Court's judgment, the value of the work performed by Plaintiff's counsel warrants no more than \$175 per hour based on the record and the pleadings filed in this matter, notwithstanding Plaintiff's counsel's assertion that his hourly rate is \$250 per hour. Therefore, applying this rate to the fees requested, this court holds that the proper amount of attorney's fees, on top of the \$5,125 of previously awarded fees, is \$6253.10. In addition, this court will award interest on the previous award at a rate of six percent (6%) per annum from December 8, 2001 until the present, equaling \$128.13 in interest. The total award of attorney's fees equals \$11,506.23.

This Court hopes that, in finding Defendant Silver in civil contempt of this court's November 8, 2001 Interim Order and ordering him to comply with that Order and the Proposed Order in Plaintiff's Amended Petition for Contempt, that Silver can find the key to release himself from the sanctions which have arisen from his behavior. Still, this Court must note that it is disturbing that the dissolution of a legal partnership, though not typically painful, has been more prolonged and protracted than pulling the most impacted of wisdom teeth since it has resulted in a series of Petitions for Contempt and Petitions for Preliminary Injunction.

CONCLUSION

For the reasons set forth above, this Court finds that Defendant Silver is in contempt of this Court's November 8, 2001 Interim Order and the Stipulated Order of August 1, 2001, and orders that he comply with the Order contemporaneously-filed with this Opinion.

BY THE COURT,

JOHN W. HERRON, J.

Dated: May 2, 2002

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

JAMES DIVERGILIS, ESQUIRE	---	:	JULY TERM, 2001
		:	
Plaintiff		:	No. 1563
		:	
v.		:	COMMERCE PROGRAM
		:	
GARY S. SILVER, ESQUIRE, individually		:	
and General Partner, Silver & DiVergilis,		:	
		:	
Defendant		:	Control No. 120590

ORDER

AND NOW, this 2nd day of May, 2002, upon consideration of Plaintiff's Amended Petition for Contempt, Defendant's lack of a Response thereto, having conducted a hearing on this Petition and orally found Defendant in contempt at that hearing, and in conjunction with the Opinion being issued contemporaneously with this Order, it is hereby **ORDERED** as follows:

- (1) Plaintiff's Amended Petition for Contempt is **Granted**;
- (2) Defendant, Gary S. Silver, Esquire, is found in contempt of this Court's November 8,

2001 Interim Order;

- (3) Defendant is held fifty percent (50%) responsible for all taxes paid by Plaintiff since the partnership dissolution for any tax period during which the partnership operated;
 - (4) Defendant is liable for one hundred percent (100%) of interest and penalties incurred, charged or otherwise assessed against the Silver & DiVergilis partnership by any federal, state, or local entity for taxes incurred during or on behalf of the partnership;
 - (5) Defendant shall reimburse Plaintiff in the amount of \$775.00 for the filing fee to the Registrar of Wills on the Catherine L. Fiolo file;
 - (6) Defendant is liable for additional IRS 940 and 941 taxes for the years, 1997 and 1998 in the amount of \$886.00;
 - (7) Defendant shall pay Richard Q. Hark, counsel for Plaintiff, attorney's fees and costs in the amount of \$11,506.23;
 - (8) Defendant shall satisfy the Comcast Cellular delinquent account, #07F96676549;
 - (9) Defendant shall pay \$1000 to the Office of the Prothonotary within thirty (30) days, since Defendant has indicated that he intends to appeal this finding;⁴
- and
- (10) Defendant shall pay all other sums required by this Order within thirty (30) days.

BY THE COURT,

⁴At the April 25th hearing, the Court ordered that Defendant pay this sum to the Prothonotary within ten (10) days unless Defendant intended to appeal the finding of contempt. For this reason, this Court changed the time period to thirty (30) days.

JOHN W. HERRON, J.