

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
RAYMOND L. PIANKA, JUDGE

CITY OF CLEVELAND

Date: April 16, 2012

JUDGMENT ENTRY RECEIVED
FOR JOURNALIZATION

-VS-

2010 CRB 033918 APR 16 2012

BANK OF NEW YORK TRUST COMPANY
Defendant (s)

EARLE B. TURNER, CLERK
JUDGMENT ENTRY

This case is before the Court on Defendant's *Motion to Mitigate Civil Contempt Sanctions*. Plaintiff has not filed a written response to Defendant's *Motion*. For the following reasons, Defendant's *Motion* is granted in part and denied in part.

The City of Cleveland filed the complaint in this case on or about September 1, 2010, alleging violation of the City's Housing Code. Defendant was served by certified mail and scheduled to attend a hearing on September 23, 2010; however, Defendant failed to appear at that hearing.

As a result of Defendant's failure to appear, the Court placed this case on the Corporation Docket, and ordered a representative of Defendant to appear on November 15, 2010. The Court sent notice of the November 15, 2010 hearing to Defendant at its address of record on October 1, 2010. The Court also sent courtesy notice to: Christine Schaub, 525 Vine Street, #900, Cincinnati, OH 45202, CT Corporation System, 1300 E. 9th #1010, Cleveland, OH 44114; Robert P. Kelly, Chairman & CEO, One Wall Street, New York, NY 10286; Skylight Tower, 1550 W. 2nd Street, 8th Floor, Cleveland, OH 44113; and Cheryl Santucci, One Wall Street, Legal Department-29th Floor, New York, NY 10286, organizations or individuals whom the Bailiffs' Department, through investigation, determined are officers or representatives of Defendant¹. After Defendant again failed to appear at the November 15, 2010 hearing; the Court ordered Defendant to appear on December 13, 2010 to show cause why it should not be held in contempt of the Court's order to appear. The Court sent notice of the show cause hearing to Defendant on November 17, 2010.

Defendant failed to appear at the December 13, 2010 show cause hearing. The Court found Defendant to be in civil contempt of the Court's order to appear, determined \$1,000 to be an appropriate per diem financial sanction to compel Defendant's presence, and continued the case until February 7, 2011 for status hearing. The Court sent notice of the status hearing to Defendant on December 16, 2010. The matter was continued for three additional status hearings—April 13, 2011, June 13, 2011, and August 8, 2011.

¹ Each subsequent notice was sent to the service address provided by the City, as well as to each of these addresses.

Prior to the August 8, 2011 status hearing, Defendant appeared through counsel on July 11, 2011, entered a plea of not guilty, waived its right to speedy trial and sought a continuance for trial. The matter was continued to August 23, 2011, at which Defendant withdrew its plea of not guilty, entered a plea of no contest, was found guilty and fined \$5,000. It was given time to pay the fine and costs until November 1, 2011. A review of the docket indicates the fine and costs were paid timely and in full on October 27, 2011.

A corporation, having been properly summoned and notified, must appear before this tribunal to enter a plea and conclude its case, *just like any other defendant*. The distinction between a case filed against a corporation and one filed against a natural person is that, if Defendant here had been a natural person, an arrest warrant could have been issued and a Bureau of Motor Vehicles block placed against the person. The inability to be arrested and brought before a Judge does not render corporations and other organizational entities immune from prosecution or exempt from having to appear in Court.

The imposition of the per diem sanction is coercive in nature. The Court imposed such sanctions to inspire Defendant to appear to face the charges against it. Sometime after the per diem fines took effect, Defendant appeared. If the Court does not enforce such sanctions, the coercive effect is lost.

Defendant remains responsible for the per diem sanctions that accrued between the period of December 14, 2010 and July 10, 2011. Defendant's 209 days in civil contempt, multiplied at the per diem rate, resulted in \$209,000 in civil sanctions. Of this amount, \$119,000 has been ordered to civil judgment for collection. Defendant, in its *Motion*, asks the Court for an order mitigating the civil contempt sanctions.

This Court has previously held that, even when a defendant ultimately appears and enters a plea, thereby purging itself of the contempt, any financial sanctions that have accrued until that point remain in place. In reviewing motions to mitigate with respect to the imposition of per diem sanctions ordered after a show cause hearing, the Court considers factors including, but not limited to: 1.) Defendant's record of appearance in other criminal cases; 2.) whether Defendant's failure to appear was deliberate; 3.) whether Defendant has demonstrated a willingness to resolve the underlying charges; 4.) whether the alleged violation is of an on-going nature; and 5.) the seriousness of the alleged violation.

1.) Defendant's record of appearance in other criminal cases.

There has been a lengthy history of Defendant's failure to appear in numerous other cases before the Housing Court. Generally, since appearing in the within matter, Defendant has been consistently appearing at Housing Court hearings². However, The Court notes that Defendant recently failed to appear at an initial appearance, which has resulted in Defendant being placed back onto the Corporation Docket³. Despite this, the

² In case number 2011 CRB 30624, Defendant failed to appear at hearing scheduled for January 12, 2012. The matter was referred to the Corporation Docket at which local counsel appeared on behalf of Defendant.

³ 2012 CRB 03045, set for May 7, 2012 at 1:00 p.m. in Courtroom 13-B.

Court finds that Defendant's record of appearance in other criminal cases, on the balance, side in favor of mitigation.

2.) Whether Defendant's non-appearance was deliberate.

In its *Motion*, Defendant argues that its failure to appear was not deliberate. It further argues that the reason for its non-appearance was due to a technical glitch in its computer system when the relevant loans and properties were purged from the active loan system. This explanation of Defendant's non-appearance actually indicates that it was deliberate. Defendant received noticed to appear, and it chose not to do so because it did not believe it was culpable. The only way for the Court to determine whether a criminal defendant is responsible for the crimes alleged by the City is for that defendant to appear.

In any event, Defendant's servicer has examined this problem and has taken subsequent remedial measures to ensure that it does not miss further Housing Court appearances.

3.) Whether Defendant has demonstrated a willingness to resolve the underlying charges.

The Court finds Defendant has demonstrated a willingness to resolve the underlying charges in the instant case by retaining an attorney, concluding the case in an expeditious manner—even making payment of the fine and costs before they were due.

4.) Whether the underlying violation is of an on-going nature; and, 5.) the seriousness of the underlying violation.

The underlying violations were not alleged to be on-going; Defendant was cited with first degree misdemeanor of the City's Housing Code for failure to file a Disclosure Statement.

The Court notes that, as a business entity, Defendant receives many benefits. Among these benefits is shielded personal liability for its principals. A mere appearance by a representative of Defendant would have avoided the finding of contempt; however, Defendant failed to appear as ordered.

Defendant ultimately took appropriate action to address its non-appearance. The Court finds that, in taking action to purge itself of contempt, and retaining counsel to participate in the proceedings, Defendant has shown good cause to mitigate a portion of the per diem sanctions.

In weighing Defendant's failure to appear for 209 days, with the fact that the complaint did not allege on-going violations, that Defendant promptly paid its underlying fine and court costs in full, and Defendant's overall record of appearance in subsequently filed cases, Defendant's *Motion to Mitigate* is granted, in part. The Court shall suspend all but \$20,900 of the per diem sanctions previously ordered.

As a result of its 209 days in contempt, Defendant is ordered to pay the civil contempt sanction of \$20,900, no later than May 31, 2012. Failure to pay the full amount due by this date may result in the Court vacating this order and re-imposing the full financial sanctions and ordering same to civil judgment for collection. Case is set for status hearing on June 4, 2012 to verify payment has been made.



Judge Raymond L. Pianka
Housing Division

A copy of this judgment entry was sent by regular U.S. mail to parties/counsel on 4/18/12, by MS.