

CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

CITY OF CLEVELAND

Plaintiff

-vs-

CELESTIA TERRACE, LTD.,

Defendant

Date: April 15, 2010

**JUDGMENT ENTRY RECEIVED
FOR JUDICIALIZATION**

APR 16 2010

Case No.: 2009 CRB 13214

EARLE B. TURNER, Clerk

JUDGMENT ENTRY

This case is before the Court on defendant's motion to purge civil contempt sanctions or in the alternative to vacate such sanctions. Plaintiff has not filed a written response to the motion. For the following reasons, defendant's motion is granted in part and denied in part.

The complaint for violation of C.C.O. § 3101.10(E) initiating this action was filed with the Clerk of Court on or about May 7, 2009. The case was called for hearing on May 20, 2009, but the file was not in Court. The case was passed for service to June 17, 2009; the Clerk was ordered to reissue summons by Bailiff. Bailiff service was made on May 26, 2009. The Bailiff service delivered to 6406 Edgerton Road, North Royalton, OH 44133 – the address provided by the Patrolman who swore out the complaint - was returned "RS with Jessica @ 10:45 (Daughter)." Defendant failed to appear at the hearing on June 17, 2009.

Defendant having failed to appear, the case was set on the Court's corporation docket on September 21, 2009, at which a representative of the defendant was ordered to appear. Notice of the hearing was sent to the defendant on August 7, 2009; notice was sent to the corporation at the address of record, as well as to Mario Malizia personally at the same address. Defendant failed to appear at that hearing; the Court ordered the defendant to appear on October 19, 2009 to show cause why it should not be held in contempt of the Court's order to appear. Notice of the October 19, 2009 hearing was sent to defendant on September 29, 2009. Notice was sent to the corporation at the address of record, as well as to Mario Malizia personally at the same address.

Defendant failed to appear at the October 19, 2009 show cause hearing. The Court found defendant to be in civil contempt of the Court's order to appear, and determined \$1,000 to be an appropriate per diem financial sanction to compel defendant's presence. The case was continued until December 14, 2009 for status hearing. Notice of the December 14, 2009 hearing was sent to the defendant on October 23, 2009. Notice was sent to the corporation at the address of record, as well as to Mario Malizia personally at the same address.

The case was called for status hearing on December 14, 2009. Defendant did not appear. Pursuant to notice given, the Court converted the per diem sanctions from October 19, 2009 through December 14, 2009 – 56 days in civil contempt – in the amount of \$56,000 to civil judgment for collection.

On or about February 9, 2010, some 57 days later, defendant submitted to the Court a written plea of not guilty. The matter was set for a Court-supervised pretrial on March 3, 2010; defendant appeared at that hearing. The underlying case ultimately was resolved by the Prosecutor amending the complaint to Mario Malizia personally, and allowing him to pay the waiver amount of \$75, which was paid on April 2, 2010.

In the motion pending with the Court, defendant argues that is entitled to purge the civil contempt sanctions as a result of its subsequent compliance with all orders of this Court.

As announced in the Judgment Entry of October 20, 2009, defendant was found in civil contempt of the Court's order to appear. The Court determined \$1,000 to be appropriate per diem sanction to coerce defendant to appear.

The Court, in light of the conflicting Eighth District Court of Appeals decisions in *City v. Washington Mutual*, 179 Ohio App.3d 692, 2008-Ohio-6956, and *City v. Destiny Ventures*, No. 91018, 2008-Ohio-4587, and awaiting decision from the Supreme Court of Ohio in those matters, faces a legal conundrum with regard to corporations that fail to appear, thereby avoiding prosecution and disrespecting the authority and validity of this Court, and the legal system as a whole. If the City declines to separately name a corporate officer, as it typically does, there are no arrest powers over the corporation in order to compel its presence. Therefore, the Court is left to utilize its inherent powers of contempt to attempt to secure the presence of the corporate defendant.

Corporations 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 the 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. There are no special rules given to corporations that would allow the corporation to avoid prosecution, or appearing in Court, simply because it is not a natural person, and cannot be arrested and brought in front of the Judge.

Defendant is correct in its assertion that, in civil contempt, the contemnor holds the keys to its prison in its own pocket. But, instead of those keys being to a physical jail cell with four walls, the "prison" was the imposition of the per diem financial sanctions. The defendant, all along, could have purged itself of contempt and ceased the accrual of those sanctions by simply appearing and entering a plea. However, just like a Court cannot return the days to a natural person found to be in contempt of a court's order and was jailed, the Court cannot simply return – or vacate – the fines accumulated until the defendant appeared and purged itself of contempt when it appeared to file its written plea of not guilty.

As defendant points out, there is no statutory scheme that allows for a set amount of per diem sanctions when a defendant violates an order of this Court. However, a trial court has inherent authority to enforce its prior orders through contempt. *Webb v. Webb*, 3rd Dist. Nos. 9-06-70, 9-07-04, 2007-Ohio-5625.

The Court holds that, even when the 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. The defendant must file a separate motion to mitigate if it wishes to reduce those fines, demonstrating to the Court good cause why they should be lessened. Factors the Court may weigh in reviewing such a motion include, but are not limited to reasons why the defendant failed to appear initially, and what remedial measures, if any, the defendant has taken to ensure that it will appear on any subsequent cases before the Court.

Defendant argues that it first learned of the outstanding ticket from a bailiff at an eviction hearing, and entered a plea on that same date. The argument is not well-taken; a review of the service return indicates that bailiff service already had been made upon the defendant. The Ohio Rules of Criminal Procedure defer to Civil Rules 4 through 4.2 and 4.6(A) and (B) regarding service upon a corporation. Crim. R. 4(D)(3).

To ensure that notification is properly made to corporate defendants, and that every opportunity is given to defendants to appear in Court, routine investigation by the Court's warrant-capias unit pulled statutory agent information for the defendant, resulting in Mr. Malizia's name and address as listed in the complaint. Defendant argues that its member, Mario Malizia, had been experiencing communication difficulties with his wife and daughter (who accepted service on behalf of the corporation). If Mr. Malizia had reason to believe he might not receive mail sent to the Edgerton Road address, it was incumbent upon him to notify the Secretary of State of a different mailing address. There is no indication that Mr. Malizia did so.

In *Cuyahoga River Associates Ltd. Partnership v. MJK Corp.*, (8th Dist. Jan. 18, 1996), No. 68673, 1996 WL 17292, 3, MJK argued that its statutory agent was estranged from the corporation and failed to notify the company of the service until February 8, 1995. In an affidavit filed with the motion for continuance, a representative of the corporation stated that the statutory agent withdrew as an "interested party in the defendant corporation" and brought criminal charges against the company and its officers in December 1994. MJK, however, made no attempt to remove the statutory agent or appoint a new one prior to the litigation. The Eighth District held that the corporation could not claim that it did not receive proper notice where its own statutory agent was properly served pursuant to the civil rules. Applying the principles of *Cuyahoga River*, even assuming defendant did not have actual knowledge of the ticket, it had constructive knowledge.

Defendant also argues that the civil contempt sanctions should be vacated due to procedural or substantive error.

Defendant cites *Hansen v. Hansen* (1st Dist. 1999), 132 Ohio App.3d, 795 for the proposition that service pursuant to Ohio Rule of Civil Procedure 5(B) was not proper for due process requirements of notification of contempt proceedings. In reviewing *Hansen*, the Court notes that the First District found improper the fact that the notice for the contempt proceedings were served only upon the counsel for the contemnor, and not the contemnor himself. Here, copies of the notice were sent both to the corporation and its statutory agent, as described in the Ohio Rules of Court¹.

Further, a review of the Court's docket in the eviction proceedings filed by Malizia reveal that he used the very address at which he was served with notice for both the underlying criminal case, as well as the contempt proceedings: 6406 Edgerton Road, North Royalton, OH 44133. See 2010 CVG 01115, and 2010 CVG 01116². Due process requires that notice be reasonably calculated to reach an alleged contemnor. *Hansen*, supra. The Court finds that due process requirements were met in sending notice to both the corporation, and Malizia personally, at that address. The case was called for contempt hearing on October 19, 2009; however, in light of defendant's failure to appear, a brief hearing was conducted finding defendant's absence constituted civil contempt of the Court's order.

Finally, defendant argues, the fact that there was less than 30 days notice for the show cause hearing; defendant references *Poptic v. Poptic*, 2006-Ohio-2713. In *Poptic*, the contemnor had approximately 6 days actual notice to prepare for the proceedings. The contemnor appeared, and sought a continuance, which was denied. Here, however, defendant failed to appear completely – either through a member or by counsel; defendant did not seek a continuance, either in person or in writing, prior to the contempt hearing. As the Court in *Poptic* noted, there is no “bright line” rule regarding time required for notice of a contempt hearing; notice simply must be “reasonable”. The Court finds that the notice to defendant, approximately 22 days before the hearing, was reasonable under the circumstances. The defendant had the right to be present at the contempt proceedings; it simply chose not to be.

Defendant's motion, as styled, is denied. While the Court, in all future cases, will require a separate motion to mitigate the sanctions, as this case is one of first impression on this issue, for the purpose of this case only, the Court will construe defendant's motion also as a motion to mitigate the sanctions imposed.

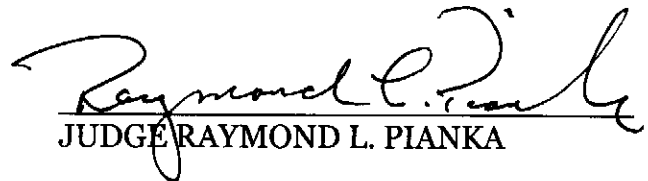
¹ Criminal Rule 49(A) states, “Written notices...and similar papers, shall be served upon each of the parties.” Section (B) of that Rule states, in relevant part, “Service upon the attorney or upon the party shall be made in the manner provided in Civil Rule 5(B).” Civil Rule 5(B) states, in pertinent part: “Service upon the * * * party shall be made by * * * mailing it to the last known address of the person to be served... * * * Service by mail is complete upon mailing.”

² Going back even farther, to just after the contempt hearing was held, a review of the docket reveals that Malizia personally had three civil eviction cases pending in this Court – 2009 CVG 23280 and 2009 CVG 23281 (both filed October 21, 2009; Court date November 12, 2009), and 2009 CVG 24850 (filed November 12, 2009; Court date on December 3, 2009). Each of the complaints filed listed Edgerton Road as Malizia's address of record.

In reviewing motions to mitigate with respect to the imposition of per diem sanctions ordered after a show cause hearing, the Court will consider factors including, but not limited to: the defendant's record of appearance in other criminal cases; whether the defendant's failure to appear was deliberate; whether defendant has demonstrated a willingness to resolve the underlying charges; whether the alleged violation is of an on-going nature; and the seriousness of the alleged violation.

Defendant did recently appear and participate in another case in this Court (2009 CRB 45814). There are no other cases upon which defendant has been cited that indicate a repetition of defendant failing to appear. Perhaps defendant, through Malizia, did not become aware of this criminal case until February 2, 2010; much of the responsibility for that lies with Malizia himself, who continued to use an address – even on civil cases filed with this Court – at which he could reasonably have anticipated having difficulties receiving notice. Defendant did take action to address its non-appearance after becoming aware of the pending action; that does not go unnoticed. The Court finds that, in taking action to purge itself of contempt immediately upon learning of the instant case, and retaining counsel to participate in the proceedings, defendant has shown good cause to mitigate a portion of the per diem sanctions. However, the Court notes that, as a corporation organized under the statutes of the State of Ohio, defendant receives many benefits. Among these benefits is shielded personal liability for Malizia³. As the Statutory Agent, if service to the address listed with the Secretary of State was not the proper address at which to serve him, Malizia had a statutory responsibility to change the address to one at which he *would* receive service of process. As such, the Court would be remiss if it were to mitigate all of the per diem sanctions. Defendant's motion to mitigate the financial sanctions is granted, in part. The Court shall suspend all but \$1000 of the per diem sanctions previously ordered. The Court cautions the defendant, however, that the alleged address problem, brought to the attention of the defendant, shall not excuse defendant's non-appearance in future cases.

Defendant is to pay the \$1000 owed on this case no later than April 30, 2010. Case closed; file to judgment.


JUDGE RAYMOND L. PIANKA

³ The Court notes that the underlying charges ultimately were resolved by a plea agreement by which the prosecution amended the complaint to Malizia personally, and Malizia paying the waiver amount for a natural person, as opposed to a corporation. The Court cautions the defendant corporation, and Malizia personally, that such action may be perceived at a future point in time to be a piercing of the corporate veil, see, e.g., *Belvedere Condominium Unit Owners' Assoc. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274.

SERVICE

A copy of this Judgment Entry was mailed to the following on 4/16/10. har

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