SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MILTON BRESLAW,

Plaintiff,

Index No. 22587/86

-against-

EVELYN BRESLAW,

Defendant.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This Memorandum is respectfully submitted in support of a motion to dismiss the Order To Show Cause signed by Mr. Justice Fredman on June 22, 1989, initiating a contempt proceeding in the above-entitled action against Doris L. Sassower, P.C., and Doris L. Sassower, Esq., for alleged non-compliance with orders of this Court relative to a file turnover and a fee refund.

THE FACTS

The pertinent irrefutable facts are here set forth only as they relate to the instant motion to dismiss:

1. As the title of the above underlying action, which was one for divorce, unmistakeably shows, the aforesaid Order to Show Cause was signed in an action to which neither Doris L. Sassower, P.C., nor Doris L. Sassower, Esq., individually, were a named party.

2. At the time the aforesaid Order to Show Cause was signed, it is equally indisputable that neither Doris L. Sassower, P.C. nor Doris L. Sassower, Esq., individually, were

Exhibit "A"

acting as counsel for Evelyn Breslaw and that the relationship between them then and for the preceding 16 months was an adversarial one.

3. The Order to Show Cause was signed by Justice Fredman at the instance of Mrs. Breslaw's then lawyers, Bender & Bodnar, Esqs., who had been representing her at that point since February 1988, after Doris L. Sassower, P.C., was discharged as her counsel.

4. Doris L. Sassower, Esq., individually, was never representing Mrs. Breslaw.

5. The aforesaid Order to Show Cause was not served personally on Doris L. Sassower, Esq., individually or on Doris L. Sassower, Esq., on behalf of Doris L. Sassower, P.C.

6. The underlying order sought to be enforced was not served personally on the alleged contemnors, nor was any demand for compliance therefor.

7. None of the Orders allegedly served were certified copies.

8. Neither the aforesaid Order to Show Cause nor the Supporting Affidavit of her attorney, Harvey Landau, Esq., contained the requisite allegation that the conduct complained of had impaired, impeded and prejudiced Mrs. Breslaw's rights, nor did they set forth with specificity the material factual allegations or documentary proof establishing any impairment, impediment or prejudice.

9. No affidavit by Mrs. Breslaw herself was annexed

to support the application.

10. The supporting affidavit by Mr. Landau failed to include the requisite allegation of compliance by Mrs. Breslaw with the very same order she was seeking to enforce by contempt.

11. At the time the said Order to Show Cause was signed, Mrs. Breslaw herself was in violation of the very order she was seeking to enforce, which fact her counsel, Bender & Bodner, wholly failed to disclose, as required by law and the Code of Professional Responsibility.

THE ARGUMENT

A. GENERAL PRINCIPLES:

It was early established that contempt proceedings are to be construed stricti juris, and every condition precedent to the exercise of the power must show a literal compliance with the law. Flor v. Flor, 73 AD 262; McComb v. Weaver, 11 HUN 271. Thus it has become hornbook law that:

> "The remedy by way of contempt proceedings is a harsh one, the enforcement of which may deprive the party of his liberty, applicant will be held to a full compliance with the technical requirements of the law to entitle him to what he asks." 10 Carmody-Wait, Sec. 66.11.

B. THE ORDER TO SHOW CAUSE SIGNED JUNE 22, 1989 IS JURISDICTIONALLY DEFECTIVE AND MUST BE DISMISSED.

1. This contempt proceeding was improperly commenced and service of the Order to Show Cause signed June 22, 1989 failed to confer jurisdiction on this Court.

The law is clear that a contempt motion against a non-party to an underlying action in which the contempt was allegedly committed must be initiated by an independent special proceeding

pursuant to CPLR 403, Long Island Trust Co. v. Rosenberg, 82 A.D. 2d 591; 442 N.Y.S.2d 563 (2nd Dept., 1981). Service of such motion must be effected personally or the resultant contempt order will be vacated on appeal, John Sexton & Co. v. Law Foods, Inc. 108 A.D.2d 785; 485 N.Y.S 2d 115 (2nd Dept. 1985), citing Long Island Trust Co. v. Rosenberg, supra. Federal Deposit v. Richmond 98 AD2d 790, also citing Long Island Trust Co. v. Rosenberg, supra.

The contemnor's right to have the contempt allegations raised in a formal petition by way of a separate, plenary proceeding takes on added importance, when considering the subsidiary rights afforded under the ensuing CPLR sections 404 through 411. These include the right of disclosure, as well as the most crucial and fundamental right of trial by jury, a right intended to curb the excesses of the judiciary. That right is protected not only by the U.S. Constitution, Seventh Amendment, Art.III, Sec.2, cl.1, but by the New York State Constitution, Art.1, Sec.2; and statutory provision CPLR 4101(1),(3).
That the Seventh Amendment right to a jury trial extends to actions unknown at common law, see Tull v. U.S. 107 S.Ct. 1831, 481 U.S. 412.

In the case at bar, the subject Order to Show Cause not accompanied by a Petition naming the alleged contemnor as a party in a wholly separate proceeding should never have been signed by Justice Fredman, and must be treated as void ab initio.

Justice Fredman further erred in failing to require

that the Order to Show Cause include a provision requiring personal service on the alleged contemnor, Doris L. Sassower, Esq., rendering the Order also void on that ground as well, under the reasoning of the above-cited cases. Moreover, no personal service of said order, having been effected on her, as revealed by the affidavit of service, the matter was not properly before the Court, and should have been dismissed on the Court's own motion, under applicable law. In the absence of proof of personal service of said Order on Doris L. Sassower, Esq., she had no obligation to show cause on July 10, 1989 in the within action to which she was not a party, and her non-appearance on that date could not be held against her. An adjudication of contempt will be vacated where the order allegedly violated did not bind the alleged contemnor in any way. Allison v. Delinko 85 AD2d 564, cited in Dept. of Housing v Manarelli N,Y.L.J. 10/11/89, p. , Col.1F.

2. This contempt proceeding was initiated by an Order to Show Cause and Supporting Affidavit, both of which failed to include requisite factual allegations to confer jurisdiction on the Court.

Nowhere are the essential allegations set forth that the conduct of the alleged contemnors was calculated to defeat, impair, impede or prejudice Mrs. Breslaw's rights or that it actually, in fact, did so. Judiciary Law, sec. 770, Leerburger v. Watson, 169 AD 48; Fischer v. Raab, 81 N.Y. 235

The supporting affidavit of Harvey Landau, Esq. alleges personal service by Susan Birnbaum, Esq. of various Orders as to which non-compliance is asserted, including her affidavit dated

June 12, 1989, which reveals on its face that the service was effected by mail. Such defect is jurisdictional.

Moreover, "in order to render contempt proceedings available as a remedy for the enforcement of a judgment, a certified copy of the judgment must be served upon the party or other person required thereby or by law to obey it." (emphasis added) 10 Carmody Wait Sec. 66.11. Nonetheless, Mr. Landau's supporting affidavit fails to allege that any of the allegedly served copies of orders sought to be enforced were certified, as required under CPLR sec. 5104. Where no certified copies of orders were purported to be served on the defendant, the motion for contempt would be denied, Present v. Aranyi, 38 AD2d 801. The papers annexed to the subject Order to Show Cause reveal that there not only is no claim that certified copies of the relevant orders were served, but uncertified copies were, in fact, served, rendering the Order dismissable as a matter of law.

Moreover, there is no allegation or showing of any demand for compliance served personally or otherwise after June 12th on the alleged contemnors, Delanoy v. Delanoy 19 AD 295. Cases hold that until the alleged contemnors, by a demand for performance, have been placed in a position by which they "refuse" or "willfully" neglect to obey, they are not guilty of contempt for which they can be punished, General Electric Co. v. Sire, 88 AD 498.

3. The Order to Show Cause signed on June 22, 1989 was jurisdictionally defective in that it failed to allege compliance by the complaining party with conditions on her part to be performed in the very order she was seeking to enforce.

Under the Order Mrs. Breslaw was seeking to enforce, which was annexed to her papers, Mrs. Breslaw was required to pay expert witness fees in the amount of $3,650. At the time the Order to Show Cause was presented, the time for her to do so had expired, yet no allegation was contained in her supporting papers showing her compliance, making the Order to Show Cause vulnerable to a motion to dismiss.

The Appellate Division, 2nd Department, in White v. White, 265 App. Div. 942 (1942), stated:

> "it appears without contradiction that the plaintiff failed to comply with the conditions imposed by an order ... in that circumstance there should be no adjudication of contempt for the failure of the defendant to comply with other conditions in said order."

In view of that determination, the Court reversed the lower court on the law and the facts, and denied the motion to punish for contempt. From this case, it is apparent that the doctrine of "clean hands" is recognized to preclude a party from gaining enforcement by contempt of a judgment or order which the party herself has violated.

CONCLUSION

THE ORDER TO SHOW CAUSE SIGNED BY JUSTICE FREDMAN ON JUNE 22, 1989 WAS JURISDICTIONALLY DEFECTIVE AND A LEGAL NULLITY, RENDERING IT DISMISSABLE AS A MATTER OF LAW.

Respectfully Submitted,

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Dated: White Plains, N.Y.
May 18, 1990