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COMMONWEALTH OF MASSACHUSETTS

Essex, ss Supreme Judicial Court

In RE: Jane Daniel

PETITIONER JANE DANIEL'S MEMORANDUM OF LAW IN SUPPORT OF HER REQUEST FOR REVIEW PURSUANT TO M.G.L.c. 211 SECTION 3

I. Brief Factual Background Of Entire Case

This matter, at its core, arises out of a book entitled "Misha: A Memoir of the Holocaust Years." This was an autobiographical work, published by petitioner, Jane Daniel, (hereinafter "Daniel") and her publishing company, Mt Ivy Press Co., in April of 1997. The book was written by Misha Defonseca, (hereinafter "Defonseca") and ghostwritten by the plaintiff in the contempt action, Vera Lee (hereinafter "Lee"). The underlying premise of the story was that Defonseca was a Holocaust survivor, who, at the age of seven, after Nazi seizure of her parents, embarked on a three thousand mile journey across the European theatre of war. In so doing, she survived by stealing food, staved off starvation and exposure, was trapped in the Warsaw ghetto, killed a German soldier, and was aided and befriended by a pack of wolves. Disputes among Daniel, Lee and Defonseca led to a lawsuit filed in Middlesex Superior Court. After a trial, the jury entered a verdict in favor of Lee and Defonseca and against Daniel. The verdict was later trebled by the trial court under M.G.L.c. 93A. Subsequent to the verdict, Daniel learned that, in fact, the story in the book was a hoax, fabricated from whole cloth by Defonseca. Based upon this information, she filed a lawsuit seeking to have the judgments entered by the jury against her, and in favor of Lee and Defonseca vacated. The matter eventually reached the Court of Appeals which held that, based on extraordinary circumstances, Daniel had stated a cause of action with respect to vacating the judgment as to Defonseca, but not Lee, because there was no evidence that Lee

knew of the hoax. In short, the entire underlying judgment was based upon a book that turned out to be entirely false, a falsehood the Court of Appeals found to be "so emotionally inflammatory..." that it impeded the jury's "ability impartially to evaluate facts and adjudicate" the case. See Court of Appeals decision, (App. 0001-0018). Daniel has since filed, and argued a summary judgment motion in the Middlesex Superior Court, seeking that the Defonseca judgment be vacated in accordance with the directive of the Court of Appeals. A decision on that Motion is pending.

II. Procedural History of the Contempt Action.

In 2006, prior to the unraveling of the hoax, Lee began efforts to try to collect on the underlying judgment. A review of the docket, (App.0226-0228), suggests that on 11/3/05, the Gloucester District Court, the Hon. Richard Mori presiding, ordered that Daniel pay $2,000.00 a month to Lee. Subsequent nonpayment issues arose and, finally, on 8/16/ 07, the parties reached a settlement of their dispute, which was filed with the court and, according to Lee's counsel, Frank Frisoli, merged as an order of the court.[1] (App. 0020; 0228). This settlement agreement/order, relieved Daniel of the duty to pay $2,000.00 a month, per the previous order of the court, but committed her to other obligations under the settlement agreement (App 0026-0034). In essence, the agreement, in addition to a cash payment of $250,000.00 from Daniel to Lee, affords Lee a financial interest in a property owned by Daniel, located at 4 – 6 Hovey St., Gloucester, MA. Basically, upon sale of the property, the mortgagee would be paid in full, Daniel would receive $300,000.00, Daniel's ex-husband, Robert Nickse, $250,000.00, and the balance, if any, would inure to the benefit of Lee. Under paragraph 7 of the agreement, Daniel was obligated to "take such action to market and sell the Hovey House property as may be

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directed by counsel for Vera Lee and shall fully cooperate in all respects with said process." On 8/3/11, Attorney Frank Frisoli (hereinafter "Frisoli") and/or creditor Lee, executed a listing agreement with Coldwell Banker with respect to the subject property. The agreement is executed by Ginger Attaya, on behalf of Coldwell Banker, and by Frisoli/Lee as the "seller" of the property. (App. 0101-0106). Daniel was entirely unaware that the listing agreement had been signed, with Lee/Frisoli executing same, as the "seller." (App. 0112). Frisoli, both in court, and in an affidavit filed in connection with Plaintiff's Second Complaint for Contempt, acknowledged that Daniel was not provided with a copy of the subject agreement (App. 0056;160). Unaware of the existence of the listing agreement, and in an effort to comply with the terms of the settlement agreement[2], Daniel did cooperate with the Coldwell Banker broker, Ginger Attaya, with respect to efforts to sell said property. Daniel's efforts are outlined in her affidavit (App. 108-113). By contrast, Daniel encountered some odd behavior on the part of Attaya with respect to the sale of the property, including, but not limited to, seeking to have the property shown on Christmas Day 2011, and on the day Hurricane Irene hit in 2011. Concerned about such behavior, Daniel sent an e-mail to Attaya requesting the names of the persons who wished to view the property on these days. Attaya did not respond to this e-mail. (App. 108-113; 0247; 253). Daniel subsequently discovered the existence of the listing agreement. Daniel requested a copy of the listing agreement that had been signed by for Frisoli/Lee, as the "seller" of the property. On 1/10/12 Attaya, in response to Daniel's request to review the listing agreement, emailed Daniel that she would "bring copy of listing-contract which was left with you at the onset when you signed it." (App. 0254). It subsequently became clear that, in fact, Daniel had never signed any listing agreement and, of course, Attaya was unable to provide a copy of a

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listing agreement signed by Daniel. Once she received the listing agreement, which included warranties regarding the condition of the property, purportedly made by the "seller," Daniel became concerned about proceeding under the auspices of that listing agreement. Through her counsel, she requested that Coldwell Banker immediately cease and desist marketing the property under the listing agreement, which she viewed as fraudulent. Coldwell Banker immediately complied. Further, because she was aware that Coldwell Banker had, apparently intentionally, marketed the property using a fraudulent listing agreement, requested that Lee choose another broker, as she intended to sue Coldwell Banker regarding its conduct vis-à-vis the listing agreement. Indeed, she promptly filed a Declaratory Judgment action in Superior Court seeking an order of that court determining whether or not the settlement agreement conferred upon Frisoli/Lee, the right to execute sale documents in her stead. (App. 0136-0139).

In the meantime, Lee filed her (Second) Complaint for Contempt. Daniel, through her counsel, responded with Defendant's Motion to Dismiss Plaintiff's (Second) Complaint for Contempt (App. 0095-0120)). The plaintiff then opposed the defendant's motion to dismiss, and filed a motion requesting an evidentiary a hearing.(App. 0121-0133). Believing that Lee had failed to make out a prima facie case of contempt, the defendant initially opposed the motion for an evidentiary hearing (App. 0134-0152)). On 4/17/12, a hearing on the Plaintiff's (Second) motion for contempt was held in the Gloucester District Court, the Hon. Richard Mori presiding. The record of that hearing is attached hereto (App. 0153-0176).) Essentially, the defendant contended that the plaintiff had violated the settlement agreement by failing to keep the mortgage current, and by failing to cooperate with the broker in the sale of the property and, in particular, focusing upon Daniel's reluctance to work with Coldwell Banker, going forward, as a result of the listing agreement issues. At hearing, Daniel's counsel maintained that, while there had been

lapses in the mortgage payments, these had occurred, in each and every instance, as a result of financial hardship (App. 163-164). Daniel's affidavit, submitted in connection with the motion to dismiss, also verified as much (App. 0108). Defense counsel further represented to the court that, as of the date of the hearing, Daniel had successfully brought the mortgage payments up to date (App. 0164). In terms of noncooperation, Daniel's affidavit was submitted, again demonstrating full cooperation with the efforts to sell the house by Coldwell Banker. Daniel did represent to the Court, however, that she had great concerns about signing a second listing agreement with Coldwell Banker, given its prior track record of, in her view, marketing the property in the absence of a legal listing agreement (App. 0112-0113). The court, after argument of counsel, announced that Daniel was in contempt of court and ordered her to twenty days of incarceration (App. 170). Now understanding that the court had seemingly identified some conduct that would appear contemptuous, defense counsel argued vigorously that Daniel should not be sent to jail without: 1. clear and convincing evidence that her failure to keep the mortgage current had been occasioned by anything other than in an inability to pay; and 2. clear and convincing evidence of Daniel's non-cooperation in the efforts to sell the property.[3] (See, generally, App. 170-175).The court refused to hear, or consider, evidence on these topics, receiving only a package of incomplete, often self-serving, documents from Atty. Frisoli, all of which lack any evidentiary foundation whatsoever. (App. 177-209)). The court made no findings, oral or written, as to the conduct which it held as contemptuous, nor did the court indicate the nature of steps which Daniel could take to purge or cure the contempt. The Court would only state: "She has not been in compliance with the agreement over the years." (App. 0171). A request for an evidentiary hearing was flatly denied. (App. 175).Daniel was taken

[3] This necessarily would have required some analysis as to whether Daniel had a reasonable basis for challenging the listing agreement, and any related concerns arising therefrom.

from the courtroom in handcuffs, over objection of counsel, who appealed to the Court thusly: "I don't know what she's being taken away for here, Your Honor, I have no idea." (App. 0171).

Daniel promptly filed a motion for reconsideration, as well as a request for rulings of law and findings of fact. Daniel argued that the Court had, erroneously, (1) sent Daniel to jail without receiving any evidence, whatsoever[4]; (2) failed to make specific findings of misconduct on her part; and, (3) neglected to identify those steps which Daniel could take to purge the contempt. (App. 210-216). A second hearing occurred on 4/20/12. Once again, the defendant advanced these arguments, all of which went unheeded by the Court. As was the case in the first hearing, the court denied the defendant's right to an evidentiary hearing, instead making broad statements regarding Daniel's noncompliance, but identifying no specific conduct, vis-à-vis the settlement agreement, which it found contemptuous. The Court would only state its conclusion that Daniel "has not complied with the letter of the law and the spirit of the settlement agreement." (App. 0243). The Court denied the Motion for Reconsideration, but never issued findings of fact and rulings of law as sought by Daniel in her post-contempt hearing motions.

Moreover, the Court, throughout the course of both hearings demonstrated a decided lack of neutrality with respect to the parties. For example, when Daniel's counsel pointed out to the court that Frisoli was attempting to leverage the courts 4/17/12 contempt order, to garner funds neither he, nor his client, were owed, characterizing such efforts as "extortion," the court took personal offense . It stated: "it's far from extortion. I'm offended you're terming it that." (App. 0244). It is beyond argument that the sums demanded by Frisoli in the subject letter were not owed to him, under any construction of the orders issued by the court with respect to this matter. Defense counsel merely pointed out to the court that it is inappropriate for attorney to attempt to leverage

[4] Indeed the only reliable evidence that the Court had at its disposal was Daniel's Affidavit which, clearly, cut in her favor on these matters.

the incarceration of a person found in contempt to seek funds beyond that which were ordered by the court. The court's reaction to the statement is telling. For whatever reason, the court entered these proceedings with a sense of pre-determination. Nothing that defense counsel said, or submitted, would, or could, alter the result.

In terms of a purging of the contempt, the court stated only that she could "start with the $23,000.00." (App. 0243). In other words, the court held that Daniel was required to pay the $2,000.00 a month originally ordered on 11/3/05, even though that order had been rescinded and replaced with the obligations set forth under the settlement agreement. Further, the court's language that Daniel could "start with" this payment still left the defendant entirely unclear as to what steps, if any, she could take to purge the contempt. If she paid the $23,000.00, would she be released? It was anyone's guess.

As the contempt was entered pursuant to M. G. L. c. 224, Section 18, the court's determination was not reviewable by the Appellate Division of the District Court. Correspondingly, the plaintiff was compelled to bring the instant petition.

III. Statement of Jurisdiction for Appeal to a Single Justice

In civil cases, except for orders pursuant to G. L. c. 209A, the single justice has jurisdiction over interlocutory orders of the district court. The power of the single justice to review these orders is codified at Massachusetts General Law c. 211, § 3. The first paragraph of G.L. c. 211, § 3, gives the single justice *general superintendence power* (emphasis added) over "all courts of inferior jurisdiction to prevent and correct errors and abuses." The first paragraph provides for review on a case-by-case basis. Matters under the second paragraph typically

involve practices and procedures beyond a single case and may have an impact on courts and cases statewide.

Massachusetts General Law c. 211 §3, confers on the SJC the power of general superintendence of all courts of inferior jurisdiction to correct and prevent errors and *abuses therein* if no other remedy is expressly provided and will only be exercised in the most exceptional circumstances. To obtain a review under the aforementioned statute, a party must demonstrate that there has been (a) a substantial claim of violation of his or her substantive rights; *and* an error that cannot be remedied under the ordinary review process. Parties seeking relieve must demonstrate that they have no other legal remedy to pursue and that a petition under this law is their only alternative. The petitioner in this matter believes that these criteria are met by her case and as such, under the applicable Massachusetts statutes, she is not entitled to an appeal on her case and there has been a substantial violation of her procedural due process rights as promised by the Constitution of the Commonwealth of Massachusetts and the United States Constitution.

IV. The Petitioner Has No other Remedies or Appellate Procedures Available to Her as a Matter of Law.

When a case is brought on a petition to the SJC pursuant to c. 211 §3, the petitioner must show that she has no alternative relief or legal remedy under the ordinary review process. In the case at bar, the petitioner has no other alternative than to seek a review under the superintendence power of the SJC.

The petitioner in this matter was found to be in contempt of a civil order of the court pursuant to Massachusetts General Law c, 224 §18, which deals with orders of contempt and

states "There shall be no appeal from any judgment, order or sentence under the provisions of this chapter, except as provided in section nineteen." In *Marram v Fourth Dist. Court of E. Middlesex,* the court found "the phrase 'there shall be no appeal' surely bars any ordinary appeal from an order in a supplementary process proceeding. *Marram v. Fourth Dist. Court of E. Middlesex* 353 Mass. 770 (1968). It equally surely bars any attempt to seek review of the underlying judgment whose payment is at issue in the supplementary process proceeding. See *O'leary v Education Resources Inst., Inc.* 441 Mass. 1018,1019 (2004).

Massachusetts General Law c. 224 §19, states that one may appeal from a contempt finding in cases where a debtor is charged with fraudulently hiding money, hazarding money, or contracted with the intent to never pay the debt. Neither of these exceptions applies to the petitioner's case. As such, the petitioner is left with no appeal or remedy with which to challenge the order of contempt.

Additionally, an order of civil contempt is meant to be remedial in nature. Pursuant to public policy, the contempt hearing is a means by which to enforce a court order to pay monies owed or to ensure compliance with a court order for specific performance. If these orders are not complied with, a party to an action may be placed in jail for a willful violation of the order. However, in a civil/indirect contempt proceeding, the judge should make findings on the contempt to inform the debtor what they can do in order to remedy the contempt. That also did not happen in this case. The judge at the district court level made no findings as to how the petitioner could remove the contempt and as such the petitioner was sent to jail with absolutely no clear remedy with which to get herself out.

V. Argument

A. Petitioner has a substantial claim for violation of her substantive procedural due process rights where she received no evidentiary hearing.

"Due Process of law… requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses on his behalf, either by way of defense of explanation." *In re Oliver, 333 U.S. 257.* In essence, a person charged with contempt of court must have a reasonable opportunity to present evidence in defense of a claim for contempt of court.

The purpose of civil contempt is remedial: its aim is to coerce the performance of a required act by the disobedient party for the benefit of the aggrieved complainant. *Sodones v. Sodones* 366 Mass. 121, 129-130 (1974). Essentially, the purpose of a civil contempt finding is to induce the disobedient party to comply with the court order with the sought action to satisfy the requirements of the court. However, recent case law has determined that the burden of proof on the aggrieved party to prove contempt has shifted from a standard of preponderance of the evidence to the more rigorous clear and convincing evidence standard.

In 2009, the Supreme Judicial Court heard the Matter of Richard Birchall. Mr. Birchall, who had been held in jail for close to two years on a contempt order for his failure to pay a civil judgment for which there had been no identified asset to be liquidated or turned over to the judgment creditor and for which he had no income to pay, had filed a petition for a writ of habeas corpus. The Supreme Judicial Court agreed to hear the appeal pursuant to the superintendence power as previously mentioned in this memorandum. In this appeal, the Supreme Judicial Court found that the preponderance of the evidence standard adequately characterized the level of certainty appropriate to justify civil contempt sanctions, especially

when those sanctions may include incarceration. It found that the clear and convincing evidence standard better described the level of certainty that arises from a finding of a clear and undoubted disobedience of a clear and unequivocal command. The Supreme Judicial Court found that in all actions, a civil contempt finding must be supported by clear and convincing evidence of disobedience of a clear and unequivocal command. *In Re Birchall* 454 Mass. 837 (2009).

This clear and convincing evidence standard was not met in the case at bar. Additionally, based on the transcripts of the hearings, there is no way to even infer that the clear and convincing evidence standard may have been met. During both hearings, Judge Mori refused to hear evidence on the issue of contempt. Daniel's request for an evidentiary hearing was summarily denied. (App. 175)). Stating simply that Ms. Daniel was "in utter contempt of my orders, Utter Contempt." (App. 0242)). Attorney for the Petitioner was not allowed to present evidence that Ms. Daniel was not in contempt, and counsel for the moving party was not required to introduce any evidence that Ms. Daniel clearly and convincingly had engaged in an undoubted disobedience of a clear and unequivocal order of the court. Judge Mori accepted representations of counsel, for the moving party, as facts established by evidence, and found the petitioner to be in contempt. Representations of counsel are not considered to be evidence in any area of law. Judge Mori abused his judicial discretion by finding the Petitioner in contempt of court with no evidentiary support at all. Additionally, if he had accepted evidence, it is unclear as to whether the court would have found a clear and unequivocal violation of a court order to a clear and convincing standard.

B. Petitioner has a substantial claim for violation of her substantive procedural due process rights where if it is found that an evidentiary hearing occurred, it was insufficient under the current case law.

Before one may be found in civil contempt for conduct that did not occur in the presence of the judge, one is entitled as a matter of due process to be advised of the charges against him, to have a reasonable opportunity to respond to the charges, and to retain private counsel to represent the alleged contemnor at trial, to testify in his defense at trial, and to call witnesses on his behalf. *Sodones v. Sodones*, 366 Mass. 121, 127 (1974), quoting *In re Oliver*, 333 U.S. 257, 275 (1948). Pursuant to the United States Consitution and the Constitution of the Commonwealth of Massachusetts, no person may be denied life, liberty, or property without due process of the law. Massachusetts Rules of Civil Procedure 65.3 establishes the procedures for civil contempt hearings which states in section H that, "the complaint for contempt shall be tried upon the facts in accordance with Rule 52. The court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. This did not happen in the present case.

In *Mahoney v. Mahoney*, the Appeals Court of Massachusetts, Middlesex division was presented with an issue regarding evidentiary hearings in a judicial order for civil contempt. In *Mahoney*, the husband Christopher instituted a complaint against Shirley, the wife, in Middlesex Family and Probate Court, seeking to enforce a section of the separation agreement they signed as part of their divorce. The portion of the separation agreement at issue was splitting the proceeds of the sale of the marital home. In this case, the only evidence presented to the judge during the hearing for contempt was the deed to the house and a check appended to the wife's motion to dismiss the contempt complaint. The judge found the wife in contempt of court.

In *Mahoney*, the Appeals court stated that "to constitute a civil contempt there was be a clear and undoubted disobedience of a clear and unequivocal command and that contempt proceedings must satisfy the strictures of due process of law which requires. Contempt

proceedings must satisfy the strictures of due process; due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense of explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf by way of defense or explanation. *Mahoney v. Mahoney*, 65 Mass.App.Ct. 537 (2006). In *Mahoney*, the court reversed for a finding of whether or not the wife had waived her right to an evidentiary hearing on the issues of contempt. The court noted that waivers of evidentiary hearings generally occur in cases where the parties acquiesce to the waiver or where the representations by counsel are undisputed. The present case is similar to *Mahoney* in many ways.

In *Mahoney*, the court allowed two pieces of evidence to enter in the evidentiary hearing, a deed and a cancelled check. This is more than the petitioner in this case was allowed to offer. The petitioner was not allowed to offer any evidence in support of her defense against the contempt charge brought. As in *Mahoney*, this is not a case in which the parties agreed to the facts to be discussed through an evidentiary hearing so as to waive any rights to an evidentiary hearing. To the contrary, counsel for the Petitioner and counsel for the Complainant disagreed on nearly every factual element in the contempt complaint. The judge in the district court presiding over the contempt hearing simply listened to the attorney representing the complainant and found Ms. Daniel in contempt based on the attorney's representations of the facts only. After oral arguments alone, and in the absence of testimony or properly founded documentary evidence, the judge stated on the record " I've never had anyone who has been more in contempt of my orders than Ms. Daniel. In all the cases that I've had, unbelievable." (App. 0167). The petitioner in this case was effectively sent to jail without any due process of the law but based solely on the representations of counsel. This effectively sent the petitioner to jail for twenty (20)

days with no due process of law at all, let alone the minimum evidentiary hearing that is required on complaints for contempt.

C. **Petitioner has a substantial claim for violation of her substantive procedural due process rights where, even if the evidentiary requirement is found to have occurred and been adequate, as no factual findings were made and she received no instructions on how she could remove the contempt.**

As the petitioner has noted on multiple occasions in this brief, an order for civil contempt is meant to be remedial in nature. When a complaint for civil contempt is brought, the contemnor essentially holds the key to his or her own jail cell. The purpose of contempt is to encourage the contemnor to do some specific act or comply with a court order. During the course of a contempt hearing, a judge ***must*** make finds of fact and rulings of law so that the person found in contempt may have an opportunity to right the wrong. As a matter of public policy, at a bare minimum, the court should be required to state on the record the following: 1. What court order the contempt is based on; 2. What actions of the contemnor rose to the level of contempt of that court order; 3. What evidence offered in the contempt hearing proves that the contempt occurred; and 4; Clear and unequivocal instructions as to what the contemnor can due to comply with the court order and avoid going to jail. None of the four were done in the present case.

The starting point for this analysis is that the court must identify the specific unequivocal order or command of the court which Daniel violated. The trial Court never specified such order. Was it the order of 10/14/05, in which Daniel was ordered to pay $2,000.00 a month? The court, at various times during the two hearings, seemed to hint that, possibly, this is the order allegedly violated, albeit some five years earlier. But that order was dissolved when a settlement agreement was filed by the parties, and accepted by the Court on 8/16/07, restructuring the payment methodology. Was it, therefore, the failure to comply with the settlement agreement

that constituted an undoubted disobedience of a clear and unequivocal command of the court? The court makes several veiled references to the settlement and noncompliance therewith, but, at other times, bounces back to the $2,000.00 a month obligations set in the original 2005 order. No fair reading of the two hearing transcripts will reveal the nature of the clear and unequivocal order of the Court, Daniel is held to have violated. If the court does not identify, with specificity, such order, then, ipso facto, Daniel cannot be sent to jail for acting in contempt thereof.

Further insufficiencies in the court's handling of this matter flowed directly from its unwillingness to identify the specific court order it claims Daniel violated. Clearly, if the court cannot, or will not, identify the specific order, then it, similarly, cannot state, with specificity, the conduct undertaken by Daniel to violate such order. As Daniel was led away in handcuffs no one in the courtroom knew what specific actions she had taken that caused her to be in contempt. Daniel did not know if it was the failure to pay the $2,000.00 a month, originally ordered in 2005, but supplanted by the settlement agreement. Certainly, logic would dictate that this could not have been the order leading to her contempt, as her obligations to pay such $2,000.00 a month had been eliminated by virtue of the settlement agreement, filed, and accepted by the district court. Daniel did not know if it is because the court had found that that she had failed to keep the mortgage of the property current, notwithstanding sufficient financial wherewithal to do so. Daniel did not know if it was because the court had found that she had not cooperated with the broker or, by extension, whether her concerns, about the execution of the listing agreement by Frisoli//Lee as "sellers", were so wildly unfounded that they constituted obstructionist behavior. The hearing record speaks for itself. Daniel did not know, nor could she have known the nature of the conduct which led to her imprisonment.

COMMONWEALTH OF MASSACHUSETTS

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knew of the hoax. In short, the entire underlying judgment was based upon a book that turned out to be entirely false, a falsehood the Court of Appeals found to be "so emotionally inflammatory…" that it impeded the jury's "ability impartially to evaluate facts and adjudicate" the case. See Court of Appeals decision, (App. 0001-0018). Daniel has since filed, and argued a summary judgment motion in the Middlesex Superior Court, seeking that the Defonseca judgment be vacated in accordance with the directive of the Court of Appeals. A decision on that Motion is pending.

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[2] Even in advocating for his client at hearing, Attorney Frisoli characterized Daniel's cooperation as "limited." (App. 0169).

listing agreement signed by Daniel. Once she received the listing agreement, which included warranties regarding the condition of the property, purportedly made by the "seller," Daniel became concerned about proceeding under the auspices of that listing agreement. Through her counsel, she requested that Coldwell Banker immediately cease and desist marketing the property under the listing agreement, which she viewed as fraudulent. Coldwell Banker immediately complied. Further, because she was aware that Coldwell Banker had, apparently intentionally, marketed the property using a fraudulent listing agreement, requested that Lee choose another broker, as she intended to sue Coldwell Banker regarding its conduct vis-à-vis the listing agreement. Indeed, she promptly filed a Declaratory Judgment action in Superior Court seeking an order of that court determining whether or not the settlement agreement conferred upon Frisoli/Lee, the right to execute sale documents in her stead. (App. 0136-0139).

In the meantime, Lee filed her (Second) Complaint for Contempt. Daniel, through her counsel, responded with Defendant's Motion to Dismiss Plaintiff's (Second) Complaint for Contempt (App. 0095-0120)). The plaintiff then opposed the defendant's motion to dismiss, and filed a motion requesting an evidentiary a hearing.(App. 0121-0133). Believing that Lee had failed to make out a prima facie case of contempt, the defendant initially opposed the motion for an evidentiary hearing (App. 0134-0152)). On 4/17/12, a hearing on the Plaintiff's (Second) motion for contempt was held in the Gloucester District Court, the Hon. Richard Mori presiding. The record of that hearing is attached hereto (App. 0153-0176).) Essentially, the defendant contended that the plaintiff had violated the settlement agreement by failing to keep the mortgage current, and by failing to cooperate with the broker in the sale of the property and, in particular, focusing upon Daniel's reluctance to work with Coldwell Banker, going forward, as a result of the listing agreement issues. At hearing, Daniel's counsel maintained that, while there had been

lapses in the mortgage payments, these had occurred, in each and every instance, as a result of financial hardship (App. 163-164). Daniel's affidavit, submitted in connection with the motion to dismiss, also verified as much (App. 0108). Defense counsel further represented to the court that, as of the date of the hearing, Daniel had successfully brought the mortgage payments up to date (App. 0164). In terms of noncooperation, Daniel's affidavit was submitted, again demonstrating full cooperation with the efforts to sell the house by Coldwell Banker. Daniel did represent to the Court, however, that she had great concerns about signing a second listing agreement with Coldwell Banker, given its prior track record of, in her view, marketing the property in the absence of a legal listing agreement (App. 0112-0113). The court, after argument of counsel, announced that Daniel was in contempt of court and ordered her to twenty days of incarceration (App. 170). Now understanding that the court had seemingly identified some conduct that would appear contemptuous, defense counsel argued vigorously that Daniel should not be sent to jail without: 1. clear and convincing evidence that her failure to keep the mortgage current had been occasioned by anything other than in an inability to pay; and 2. clear and convincing evidence of Daniel's non-cooperation in the efforts to sell the property.[3] (See, generally, App. 170-175).The court refused to hear, or consider, evidence on these topics, receiving only a package of incomplete, often self-serving, documents from Atty. Frisoli, all of which lack any evidentiary foundation whatsoever. (App. 177-209)). The court made no findings, oral or written, as to the conduct which it held as contemptuous, nor did the court indicate the nature of steps which Daniel could take to purge or cure the contempt. The Court would only state: "She has not been in compliance with the agreement over the years." (App. 0171). A request for an evidentiary hearing was flatly denied. (App. 175).Daniel was taken

[3] This necessarily would have required some analysis as to whether Daniel had a reasonable basis for challenging the listing agreement, and any related concerns arising therefrom.

from the courtroom in handcuffs, over objection of counsel, who appealed to the Court thusly: "I don't know what she's being taken away for here, Your Honor, I have no idea." (App. 0171).

Daniel promptly filed a motion for reconsideration, as well as a request for rulings of law and findings of fact. Daniel argued that the Court had, erroneously, (1) sent Daniel to jail without receiving any evidence, whatsoever[4]; (2) failed to make specific findings of misconduct on her part; and, (3) neglected to identify those steps which Daniel could take to purge the contempt. (App. 210-216). A second hearing occurred on 4/20/12. Once again, the defendant advanced these arguments, all of which went unheeded by the Court. As was the case in the first hearing, the court denied the defendant's right to an evidentiary hearing, instead making broad statements regarding Daniel's noncompliance, but identifying no specific conduct, vis-à-vis the settlement agreement, which it found contemptuous. The Court would only state its conclusion that Daniel "has not complied with the letter of the law and the spirit of the settlement agreement." (App. 0243). The Court denied the Motion for Reconsideration, but never issued findings of fact and rulings of law as sought by Daniel in her post-contempt hearing motions.

Moreover, the Court, throughout the course of both hearings demonstrated a decided lack of neutrality with respect to the parties. For example, when Daniel's counsel pointed out to the court that Frisoli was attempting to leverage the courts 4/17/12 contempt order, to garner funds neither he, nor his client, were owed, characterizing such efforts as "extortion," the court took personal offense . It stated: "it's far from extortion. I'm offended you're terming it that." (App. 0244). It is beyond argument that the sums demanded by Frisoli in the subject letter were not owed to him, under any construction of the orders issued by the court with respect to this matter. Defense counsel merely pointed out to the court that it is inappropriate for attorney to attempt to leverage

[4] Indeed the only reliable evidence that the Court had at its disposal was Daniel's Affidavit which, clearly, cut in her favor on these matters.

the incarceration of a person found in contempt to seek funds beyond that which were ordered by the court. The court's reaction to the statement is telling. For whatever reason, the court entered these proceedings with a sense of pre-determination. Nothing that defense counsel said, or submitted, would, or could, alter the result.

In terms of a purging of the contempt, the court stated only that she could "start with the $23,000.00." (App. 0243). In other words, the court held that Daniel was required to pay the $2,000.00 a month originally ordered on 11/3/05, even though that order had been rescinded and replaced with the obligations set forth under the settlement agreement. Further, the court's language that Daniel could "start with" this payment still left the defendant entirely unclear as to what steps, if any, she could take to purge the contempt. If she paid the $23,000.00, would she be released? It was anyone's guess.

As the contempt was entered pursuant to M. G. L. c. 224, Section 18, the court's determination was not reviewable by the Appellate Division of the District Court. Correspondingly, the plaintiff was compelled to bring the instant petition.

III. Statement of Jurisdiction for Appeal to a Single Justice

In civil cases, except for orders pursuant to G. L. c. 209A, the single justice has jurisdiction over interlocutory orders of the district court. The power of the single justice to review these orders is codified at Massachusetts General Law c. 211, § 3. The first paragraph of G.L. c. 211, § 3, gives the single justice *general superintendence power* (emphasis added) over "all courts of inferior jurisdiction to prevent and correct errors and abuses." The first paragraph provides for review on a case-by-case basis. Matters under the second paragraph typically

involve practices and procedures beyond a single case and may have an impact on courts and cases statewide.

Massachusetts General Law c. 211 §3, confers on the SJC the power of general superintendence of all courts of inferior jurisdiction to correct and prevent errors and *abuses therein* if no other remedy is expressly provided and will only be exercised in the most exceptional circumstances. To obtain a review under the aforementioned statute, a party must demonstrate that there has been (a) a substantial claim of violation of his or her substantive rights; *and* an error that cannot be remedied under the ordinary review process. Parties seeking relieve must demonstrate that they have no other legal remedy to pursue and that a petition under this law is their only alternative. The petitioner in this matter believes that these criteria are met by her case and as such, under the applicable Massachusetts statutes, she is not entitled to an appeal on her case and there has been a substantial violation of her procedural due process rights as promised by the Constitution of the Commonwealth of Massachusetts and the United States Constitution.

IV. The Petitioner Has No other Remedies or Appellate Procedures Available to Her as a Matter of Law.

When a case is brought on a petition to the SJC pursuant to c. 211 §3, the petitioner must show that she has no alternative relief or legal remedy under the ordinary review process. In the case at bar, the petitioner has no other alternative than to seek a review under the superintendence power of the SJC.

The petitioner in this matter was found to be in contempt of a civil order of the court pursuant to Massachusetts General Law c, 224 §18, which deals with orders of contempt and

states "There shall be no appeal from any judgment, order or sentence under the provisions of this chapter, except as provided in section nineteen." In *Marram v Fourth Dist. Court of E. Middlesex,* the court found "the phrase 'there shall be no appeal' surely bars any ordinary appeal from an order in a supplementary process proceeding. *Marram v. Fourth Dist. Court of E. Middlesex* 353 Mass. 770 (1968). It equally surely bars any attempt to seek review of the underlying judgment whose payment is at issue in the supplementary process proceeding. See *O'leary v Education Resources Inst., Inc.* 441 Mass. 1018,1019 (2004).

Massachusetts General Law c. 224 §19, states that one may appeal from a contempt finding in cases where a debtor is charged with fraudulently hiding money, hazarding money, or contracted with the intent to never pay the debt. Neither of these exceptions applies to the petitioner's case. As such, the petitioner is left with no appeal or remedy with which to challenge the order of contempt.

Additionally, an order of civil contempt is meant to be remedial in nature. Pursuant to public policy, the contempt hearing is a means by which to enforce a court order to pay monies owed or to ensure compliance with a court order for specific performance. If these orders are not complied with, a party to an action may be placed in jail for a willful violation of the order. However, in a civil/indirect contempt proceeding, the judge should make findings on the contempt to inform the debtor what they can do in order to remedy the contempt. That also did not happen in this case. The judge at the district court level made no findings as to how the petitioner could remove the contempt and as such the petitioner was sent to jail with absolutely no clear remedy with which to get herself out.

V. Argument

A. Petitioner has a substantial claim for violation of her substantive procedural due process rights where she received no evidentiary hearing.

"Due Process of law… requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses on his behalf, either by way of defense of explanation." *In re Oliver, 333 U.S. 257.* In essence, a person charged with contempt of court must have a reasonable opportunity to present evidence in defense of a claim for contempt of court.

The purpose of civil contempt is remedial: its aim is to coerce the performance of a required act by the disobedient party for the benefit of the aggrieved complainant. *Sodones v. Sodones* 366 Mass. 121, 129-130 (1974). Essentially, the purpose of a civil contempt finding is to induce the disobedient party to comply with the court order with the sought action to satisfy the requirements of the court. However, recent case law has determined that the burden of proof on the aggrieved party to prove contempt has shifted from a standard of preponderance of the evidence to the more rigorous clear and convincing evidence standard.

In 2009, the Supreme Judicial Court heard the Matter of Richard Birchall. Mr. Birchall, who had been held in jail for close to two years on a contempt order for his failure to pay a civil judgment for which there had been no identified asset to be liquidated or turned over to the judgment creditor and for which he had no income to pay, had filed a petition for a writ of habeas corpus. The Supreme Judicial Court agreed to hear the appeal pursuant to the superintendence power as previously mentioned in this memorandum. In this appeal, the Supreme Judicial Court found that the preponderance of the evidence standard adequately characterized the level of certainty appropriate to justify civil contempt sanctions, especially

when those sanctions may include incarceration. It found that the clear and convincing evidence standard better described the level of certainty that arises from a finding of a clear and undoubted disobedience of a clear and unequivocal command. The Supreme Judicial Court found that in all actions, a civil contempt finding must be supported by clear and convincing evidence of disobedience of a clear and unequivocal command. *In Re Birchall* 454 Mass. 837 (2009).

This clear and convincing evidence standard was not met in the case at bar. Additionally, based on the transcripts of the hearings, there is no way to even infer that the clear and convincing evidence standard may have been met. During both hearings, Judge Mori refused to hear evidence on the issue of contempt. Daniel's request for an evidentiary hearing was summarily denied. (App. 175)). Stating simply that Ms. Daniel was "in utter contempt of my orders, Utter Contempt." (App. 0242)). Attorney for the Petitioner was not allowed to present evidence that Ms. Daniel was not in contempt, and counsel for the moving party was not required to introduce any evidence that Ms. Daniel clearly and convincingly had engaged in an undoubted disobedience of a clear and unequivocal order of the court. Judge Mori accepted representations of counsel, for the moving party, as facts established by evidence, and found the petitioner to be in contempt. Representations of counsel are not considered to be evidence in any area of law. Judge Mori abused his judicial discretion by finding the Petitioner in contempt of court with no evidentiary support at all. Additionally, if he had accepted evidence, it is unclear as to whether the court would have found a clear and unequivocal violation of a court order to a clear and convincing standard.

B. <u>Petitioner has a substantial claim for violation of her substantive procedural due process rights where if it is found that an evidentiary hearing occurred, it was insufficient under the current case law.</u>

Before one may be found in civil contempt for conduct that did not occur in the presence of the judge, one is entitled as a matter of due process to be advised of the charges against him, to have a reasonable opportunity to respond to the charges, and to retain private counsel to represent the alleged contemnor at trial, to testify in his defense at trial, and to call witnesses on his behalf. *Sodones v. Sodones*, 366 Mass. 121, 127 (1974), quoting *In re Oliver*, 333 U.S. 257, 275 (1948). Pursuant to the United States Consitution and the Constitution of the Commonwealth of Massachusetts, no person may be denied life, liberty, or property without due process of the law. Massachusetts Rules of Civil Procedure 65.3 establishes the procedures for civil contempt hearings which states in section H that, "the complaint for contempt shall be tried upon the facts in accordance with Rule 52. The court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. This did not happen in the present case.

In *Mahoney v. Mahoney*, the Appeals Court of Massachusetts, Middlesex division was presented with an issue regarding evidentiary hearings in a judicial order for civil contempt. In *Mahoney*, the husband Christopher instituted a complaint against Shirley, the wife, in Middlesex Family and Probate Court, seeking to enforce a section of the separation agreement they signed as part of their divorce. The portion of the separation agreement at issue was splitting the proceeds of the sale of the marital home. In this case, the only evidence presented to the judge during the hearing for contempt was the deed to the house and a check appended to the wife's motion to dismiss the contempt complaint. The judge found the wife in contempt of court.

In *Mahoney*, the Appeals court stated that "to constitute a civil contempt there was be a clear and undoubted disobedience of a clear and unequivocal command and that contempt proceedings must satisfy the strictures of due process of law which requires. Contempt

proceedings must satisfy the strictures of due process; due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense of explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf by way of defense or explanation. *Mahoney v. Mahoney*, 65 Mass.App.Ct. 537 (2006). In *Mahoney*, the court reversed for a finding of whether or not the wife had waived her right to an evidentiary hearing on the issues of contempt. The court noted that waivers of evidentiary hearings generally occur in cases where the parties acquiesce to the waiver or where the representations by counsel are undisputed. The present case is similar to *Mahoney* in many ways.

In *Mahoney*, the court allowed two pieces of evidence to enter in the evidentiary hearing, a deed and a cancelled check. This is more than the petitioner in this case was allowed to offer. The petitioner was not allowed to offer any evidence in support of her defense against the contempt charge brought. As in *Mahoney*, this is not a case in which the parties agreed to the facts to be discussed through an evidentiary hearing so as to waive any rights to an evidentiary hearing. To the contrary, counsel for the Petitioner and counsel for the Complainant disagreed on nearly every factual element in the contempt complaint. The judge in the district court presiding over the contempt hearing simply listened to the attorney representing the complainant and found Ms. Daniel in contempt based on the attorney's representations of the facts only. After oral arguments alone, and in the absence of testimony or properly founded documentary evidence, the judge stated on the record " I've never had anyone who has been more in contempt of my orders than Ms. Daniel. In all the cases that I've had, unbelievable." (App. 0167). The petitioner in this case was effectively sent to jail without any due process of the law but based solely on the representations of counsel. This effectively sent the petitioner to jail for twenty (20)

days with no due process of law at all, let alone the minimum evidentiary hearing that is required on complaints for contempt.

C. **Petitioner has a substantial claim for violation of her substantive procedural due process rights where, even if the evidentiary requirement is found to have occurred and been adequate, as no factual findings were made and she received no instructions on how she could remove the contempt.**

As the petitioner has noted on multiple occasions in this brief, an order for civil contempt is meant to be remedial in nature. When a complaint for civil contempt is brought, the contemnor essentially holds the key to his or her own jail cell. The purpose of contempt is to encourage the contemnor to do some specific act or comply with a court order. During the course of a contempt hearing, a judge ***must*** make finds of fact and rulings of law so that the person found in contempt may have an opportunity to right the wrong. As a matter of public policy, at a bare minimum, the court should be required to state on the record the following: 1. What court order the contempt is based on; 2. What actions of the contemnor rose to the level of contempt of that court order; 3. What evidence offered in the contempt hearing proves that the contempt occurred; and 4; Clear and unequivocal instructions as to what the contemnor can due to comply with the court order and avoid going to jail. None of the four were done in the present case.

The starting point for this analysis is that the court must identify the specific unequivocal order or command of the court which Daniel violated. The trial Court never specified such order. Was it the order of 10/14/05, in which Daniel was ordered to pay $2,000.00 a month? The court, at various times during the two hearings, seemed to hint that, possibly, this is the order allegedly violated, albeit some five years earlier. But that order was dissolved when a settlement agreement was filed by the parties, and accepted by the Court on 8/16/07, restructuring the payment methodology. Was it, therefore, the failure to comply with the settlement agreement

that constituted an undoubted disobedience of a clear and unequivocal command of the court? The court makes several veiled references to the settlement and noncompliance therewith, but, at other times, bounces back to the $2,000.00 a month obligations set in the original 2005 order. No fair reading of the two hearing transcripts will reveal the nature of the clear and unequivocal order of the Court, Daniel is held to have violated. If the court does not identify, with specificity, such order, then, ipso facto, Daniel cannot be sent to jail for acting in contempt thereof.

Further insufficiencies in the court's handling of this matter flowed directly from its unwillingness to identify the specific court order it claims Daniel violated. Clearly, if the court cannot, or will not, identify the specific order, then it, similarly, cannot state, with specificity, the conduct undertaken by Daniel to violate such order. As Daniel was led away in handcuffs no one in the courtroom knew what specific actions she had taken that caused her to be in contempt. Daniel did not know if it was the failure to pay the $2,000.00 a month, originally ordered in 2005, but supplanted by the settlement agreement. Certainly, logic would dictate that this could not have been the order leading to her contempt, as her obligations to pay such $2,000.00 a month had been eliminated by virtue of the settlement agreement, filed, and accepted by the district court. Daniel did not know if it is because the court had found that that she had failed to keep the mortgage of the property current, notwithstanding sufficient financial wherewithal to do so. Daniel did not know if it was because the court had found that she had not cooperated with the broker or, by extension, whether her concerns, about the execution of the listing agreement by Frisoli//Lee as "sellers", were so wildly unfounded that they constituted obstructionist behavior. The hearing record speaks for itself. Daniel did not know, nor could she have known the nature of the conduct which led to her imprisonment.

Additionally, as the court made no findings as to the contemptuous conduct by Daniel, it clearly could point to no evidence, in the record, to suggest that such contempt had occurred. Again, the court refused Daniel, outright, an evidentiary hearing. At the time that the court issued the contempt order, it had, in its possession, only a package of self-serving documents produced by Frisoli, during the hearing, all of which lacked an appropriate evidentiary foundation. Although not evident from the hearing record, at the time that the court seemed to imply that the evidence it needed could be found in such documents, the court had not taken the time to review, much less scrutinize, said documents (App. 0172).)[5]. At other times, the court indicated that it needed no evidence, because there had been an evidentiary hearing five years earlier (App. 0174-0175)). In either case, such evidence was woefully inadequate. An evidentiary hearing, five years earlier, after which time Daniel was, apparently, in compliance with the settlement agreement, as Lee had taken no action against her during that time frame, could not conceivably provide a basis for incarceration. Contempt review always contemplates changing circumstances. Daniel's circumstances in 2007 were very different than those in 2012. Further, a package of materials submitted to a judge in a motion hearing as exhibits cannot constitute a substitute for an appropriate and complete evidentiary hearing. Its mind made up from the beginning, the court was determined to receive no evidence on the relevant issues.

Lastly, the analysis comes back the final factor, which is that a person found in contempt must be afforded the key to his or her release. The court flagrantly refused to provide this answer. A statement, provided only in response to the pleas of defense counsel, that she could "start with the $23,000.00," does not meet this obligation (App. 0243). Again, under the agreement

[5] Notably, at the time that the Court affirmed the contempt sentence at the 4/20/12, it did so without review of countervailing documents, primarily Emails between Daniel and the broker, Attaya, related to the listing/marketing of the property.

between the parties, the $23,000.00 was not owed. Further, the order of the court left it in entirely open question whether, if paid, Daniel would be released. This vague and uncertain pronouncement by the Court defeats the purpose of contempt and ignores the principles which serve as its foundation.

Conclusion

Because it is not subject to review, the contempt power afforded Massachusetts courts, under M.G.L. 224 Section 18, requires vigilant scrutiny and superintendence by the higher courts. There is dramatic risk, associated with the statute, for the deprivation of property and liberty, without due process. It is because of these risks, that this court, as it did in the ***Birchall*** decision set rigid and elevated standards for the utilization of such extreme remedy. Unfortunately, the circumstances of this case are such that the trial court improperly and recklessly utilized its power. The Supreme Judicial Court has an obligation to the petitioner herein, as well as to the citizens of the Commonwealth to ensure that courts do not carelessly wield such power. As such, it is critical that this court come forth and strike down the impermissible conduct of the trial court in this case. By doing so, it will continue to guide the trial courts to understand that the power of contempt must be used sparingly, only in the most egregious of circumstances, and, most importantly, exclusively in situations where the evidence clearly, and convincingly demonstrates that the party to be incarcerated willfully evaded an order of the court By the time that the court reviews this matter, Daniel will be out of jail. A 70-year-old woman will have lost twenty days of her life that she can never regain. But that does not render this issue moot. The

duty and obligation of the Supreme Judicial Court to oversee the conduct of the lower courts is pervasive and extends far beyond the scope of the underlying issues attendant to this dispute.

Petitioner,
By her attorney,

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