

PURSUANT TO CIV. R. 53(D)(3) THE CLERK OF COURTS SHALL SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR OR COUNSEL OF RECORD NOTICE OF THIS MAGISTRATE'S DECISION AND ITS DATE OF ENTRY UPON THE JOURNAL

IN THE COURT OF COMMON PLEAS
WILLIAM H. MORRIGAN

COUNTY OF SUMMIT
2010 DEC 16 AM 10:46

STATE OF OHIO EX REL
ATTORNEY GENERAL OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

CASE NO. CV 2007-07-5117

Plaintiff

MAGISTRATE DICKINSON
JUDGE ROWLANDS

vs

LARRY E. HARDESTY, et al.

MAGISTRATE'S DECISION

Defendant

To the Honorable Mary Margaret Rowlands, Judge of the Court of Common Pleas,
Summit County, Ohio:

Pursuant to Civil Rule of Practice 53, Local Rule of Practice 18, and the Order of Reference made in this case, the Magistrate hereby reports his Decision to the Court, based upon the arguments made in the hearing heard by the Magistrate on December 6, 2010.

This matter came before the Court for a Show Cause Hearing on Plaintiff's Motion for Contempt filed on August 27, 2010. Plaintiff's Motion alleges Defendants have violated the consent order filed in this case on September 21, 2009 regarding the property 1830 Firestone Parkway Extension in Akron, Summit County, Ohio. Defendants did not file any briefs in this matter. The matter was originally set for a Hearing on November 15, 2009. At this time Defendant Hardesty claimed he had no notice of the hearing. The matter was continued to December 6, 2010, when it was heard by Acting Magistrate Matthew Dickinson. Present for the Plaintiff were attorneys Nicholas Bryan and John Cayton. Defendant Hardesty was present pro

se representing himself. Defendants Summit Transfer and Recycling, Inc. and Law, Ltd. were unrepresented at the hearing due to the fact that Ohio law does not allow corporations to be represented pro se. *Remlinger-Oldsmobile Cadillac v Performance West Group*, 2000 Ohio App. LEXIS 6240.

The magistrate denied Defendants' motion to appoint counsel. The Ninth District Court of Appeals has ruled that, "There is no right to counsel furnished at state cost to one who is indigent in a civil contempt proceeding." *Thomas v Thomas*, 1990 Ohio App. LEXIS 4407.

FINDINGS OF FACT

- 1) In brief history, the State of Ohio filed its original complaint in this matter on July 20, 2007 seeking injunction and penalties against Defendants for alleged violations of Ohio laws concerning construction and demolition debris, solid waste disposal and water pollution. Defendant Summit Transfer & Recycling, Inc. is registered as the owner of the site in question. Defendant Law, Ltd. holds the title to the property. Defendant Hardesty is the president and/or principle officer of Summit Transfer & Recycling, Inc. and Law, Ltd.
- 2) This matter was referred to the court's mediation program and a consent entry was filed on September 21, 2009. The consent entry was signed by counsel for Plaintiff and Defendants, as well as Judge Rowlands, and outlined clean up procedures to be followed by Defendants and the agreed upon penalties for failure to comply.
- 3) Since this order was filed, Plaintiffs claim that Defendants has constantly failed to fulfill his obligations under it.

- 4) A hearing was held on the matter and testimony was taken from two environmental specialists from the Ohio Environmental Protection Agency, David Dysle and Barry Chapman. Pro se Defendant also testified. Exhibits were also received from both sides.
- 5) Page five, paragraph 22, of the September 21, 2009 order reads,

Beginning on the last day of the first calendar month after entry of this consent Order, and continuing every calendar month thereafter until removal is complete, Defendant shall have removed, by the last day of each calendar month, a cumulative amount of materials, debris and/or waste equal to or greater than 2000 cubic yards times the number of calendar months since the date of entry of this Consent Order (for example a total of 2000 cubic yards removed after the first month, 4000 cubic yards removed after the second month, etc.). By the fifteenth day of each month, Defendant shall provide a report of proof of the removal, for the previous calendar month, to Ohio EPA and City of Akron Department of Health, including, but not limited to, removal and/or disposal receipts from the removal/disposal site(s).

The order reads on page 8, at paragraph 30,

In the event that Defendants fail to comply with the requirements of paragraph 22 of this Consent Order, Defendants shall immediately and automatically be liable for and shall pay a stipulated penalty in accordance with the following schedule:

- a. If Defendants fail to provide a(ny) monthly reports as referenced above in paragraph 22 herein, Defendants shall automatically be liable for and shall within (10) days of the failure to pay a civil penalty of one thousand dollars (\$1,000).
- b. If, as of the end of any calendar month, Defendants have failed to remove the cumulative total of the amount of materials, debris, and waste required to have been removed as of the end of that calendar month as set out in Paragraph 22 herein, Defendants shall automatically be liable for and shall within ten (10) days of the failure pay a civil penalty of ten dollars (\$10) per every cubic yard of the cumulative total of the amount of materials, debris, and waste required to have been removed and which Defendants have failed to remove.

- 6) Defendant Hardesty does not dispute that the property has not been cleaned up as required by the consent order, nor that any of the required reports have been sent to the Ohio EPA or the City of Akron. Defendants have also not paid any of the fines as stated in paragraph 30 of the consent order.

CONCLUSIONS OF LAW

1) In Ohio,

Contempt is a disregard of, or disobedience to, an order or command of judicial authority. Contempt may be classified as civil or criminal. These two types may be distinguished by the character and purpose of the punishment imposed. The punishment for civil contempt is remedial or coercive in nature and for the benefit of the complainant, i.e., conditional fines and prison sentences. The purpose of the punishment for criminal contempt is punitive and not coercive, i.e., usually unconditional fines or prison terms. The burden of proof in a civil contempt action is clear and convincing evidence and in a criminal contempt action it is beyond a reasonable doubt. Proof of purposeful, willing, or intentional violation of a trial court's prior order is not required in civil contempt. *Carroll v Detty* (1990), 113 Ohio App. 3d 708.

2) Contempt is further classified as direct or indirect contempt. Direct contempt occurs in the presence of the court in its judicial function. Ohio Revised Code § 2705.01. Indirect contempt occurs outside the presence of the court and shows a lack of respect for the court or its lawful orders. Ohio Revised Code § 2705.02. The matter presently before the court is one of indirect civil contempt.

3) Pro se litigants are to be granted reasonable leeway such that their motions and pleadings should be liberally construed so as to decide the issues on the merits, as opposed to technicalities, while at the same time they are to remain subject to the same rules and procedures as a represented litigant. *Sherlock v Meyers*, 9th Dist. No. 04CV336,

2004-Ohio-5178 citing, *Martin v Wayne Cty. Natl. Bank*, 9th Dist. No. 03CA0079, 2004-Ohio-4194; *Kilroy v B.H. Lakeshore Co.* (1996), 111 Ohio App. 3d 357, 363.

4) After a thorough review of the motions, testimony and exhibits in this matter, the Magistrate concludes, from evidence clearly and convincingly establishing the matter, that Defendants Larry Hardesty, Summit Transfer and Recycling, Inc. and Law, Ltd. are in willful and knowing contempt of the consent order filed on September 21, 2009.

5) The actions of the Defendants in this matter are concluded to be willful, intentional and in knowing violation of the Court's September 21, 2009 Order. Such Contumacious conduct is willful disobedience to a court order to which the parties all agreed. Courts in Ohio have the inherent power to punish parties for contempt of court. *Hale v State* (1896), 55 Ohio St. 210.

6) In the hearing, Defendant Hardesty made three arguments in his defense. First, Defendant argues that the attorney who signed the consent agreement and order, as his representative, was not authorized to do so. The magistrate acknowledges the confidentiality of the attorney client relationship and the mediation proceedings, however the magistrate concludes that Defendant's position on this matter is not credible. The consent entry was signed in September of 2009. However, Defendant's testimony is that he waited until a hearing in December of 2010 to mention this argument for the first time. His testimony on this matter is not credible.

7) Defendant Hardesty also argued that he is financially unable to perform the clean up tasks detailed in the consent order. In support of this argument he has submitted Defendant's Exhibits B, Defendant Hardesty's personal tax documents, C, Defendant Hardesty's notice of bankruptcy, and D, an order from another case involving the same

property estimating the cost of clean up to be between one and two million dollars. This issue is not relevant to whether or not the terms of consent agreement have been violated. Defendant Hardesty was aware of his financial situation when he entered the consent agreement. The magistrate also notes that while Defendant Hardesty has credibly shown that he, in his personal capacity, is undergoing financial hardship, there is no evidence before the court to say the same for Defendants Summit Transfer and Recycling, Inc. and Law, Ltd.

8) Defendant Hardesty also argued that the overarching plan of the consent agreement was that the property be cleaned up in four years, and that time has not expired. This testimony is inconsistent with the consent order itself which details a month by month plan to clean up the area.

9) The clear and convincing evidence in this matter leads the magistrate to conclude, that Defendants have not taken any substantial steps towards cleaning up the property since November of 2008, some months before the consent order was entered into, as shown by receipts submitted as Defendant's Exhibit A. More specifically Defendants are concluded to be in knowing violation of the Court's order of September 21, 2009.

10) Plaintiff has submitted two versions of their calculations of the fines, Plaintiff's Exhibit 7, which details fines through October of 2010, and Exhibit 8 which details fines through November of 2010. Since the hearing on this matter was on December 6, 2010 and the report for the preceding month, November, is not due from Defendants until December 15, 2010, the magistrate concludes that Plaintiff's Exhibit 7 is an accurate reflection of the fines due under the consent agreement. After a review, the magistrate

also concludes that Plaintiff's calculations are accurate and \$1,820,000 is the amount due at this time according to the September 21, 2009 order.

11) Defendants are hereby ordered to pay, jointly and severally, the amount of \$1,820,000 within ninety days of the adoption of this order, should the trial court do so.

Pursuant to paragraph 31 of the consent order this amount shall be paid by check or money order, payable to Treasurer, State of Ohio and mailed to Karen Pierson or her successor, paralegal, at the office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400.

12) The above financial penalty may be held in abeyance upon a motion of Defendants, filed within the next ninety days, demonstrating that they have made substantial steps towards bringing the property into compliance with the consent order, proof that they have filed the required reports, and a showing of a feasible plan to continue to clean up the property. Unless the court orders otherwise, the above fine is due ninety days after the adoption of this decision, should the trial court adopt it.

13) Further, upon failure to pay the above stated penalty in the specified time, Plaintiff shall be given judgment in that amount against Defendants jointly and severally. Plaintiff shall be permitted to file the court's final order adopting this decision, should the court do so, as a judgment lien against the real estate and against the land owner of the subject real estate located at 1830 Firestone Parkway Extension in Akron, Summit County, Ohio.

14) Plaintiff has also requested that a prison sentence of thirty days be imposed on Defendant Hardesty. At this time, the magistrate declines to do so. The consent order in this matter is still in place and Defendants incur further penalties for every month they do not bring the property into compliance with the order. To impose a prison term at this

time would prevent Defendant Hardesty from performing under the consent agreement. Defendant Hardesty should be aware that nothing prevents the court from imposing a prison term should future contempt of court, through noncompliance with the consent order or the fines imposed in this order, warrant it.

- 15) The parties and/or their counsel are specifically warned and noticed hereby that a party may not assign as error on appeal the adoption by the trial court of any findings of fact or conclusions of law as set forth herein unless a timely and specific objection is first made to the trial court pursuant to Ohio Civil Rule 53 (D)(3)(a)(iii).
- 16) Pursuant to Civil Rule 53 (D)(3)(a)(iii), the Clerk of Courts shall serve upon all parties not in default for failure to appear or counsel of record notice of this Magistrate's Decision and its date of entry upon the journal.

It is so decided.



ACTING MAGISTRATE
MATTHEW DICKINSON

**NOTICE
COURT OF COMMON PLEAS
CIVIL DIVISION
COUNTY OF SUMMIT
STATE OF OHIO**

Case No: CV-2007-07-5117 5

THE STATE OF OHIO
SUMMIT COUNTY, SS.

STATE OF OHIO
EX REL.
ATTORNEY GENERAL OF OHIO

VS

HARDESTY, LARRY E.
284 E. BAIRD AVE.
BARBERTON, OH 442033218

To the following:

ATTORNEY NICHOLAS J. BRYAN
30 E. BROAD ST., 25TH FL.
COLUMBUS, OH 432153400

You are hereby notified that the following copy(s) have been filed with the SUMMIT COUNTY CLERK OF COURTS OFFICE:

CIV.R.53(D)(3)

Given under my hand and seal of the said Court, this December 16, 2010 date.

Daniel M. Horrigan, CLERK OF COMMON PLEAS COURT, CIVIL DIVISION.

By: s/ M. Randles Deputy Clerk