

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY**

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**

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THE SEAVIEW at AMAGANSETT, LTD., DUNES
at NAPEAGUE PROPERTY OWNERS
ASSOCIATION, INC., THE TIDES
HOMEOWNERS ASSOCIATION INC., WHALERS
LANE HOMEOWNERS ASSOCIATION INC.,
THE OCEAN ESTATES PROPERTY OWNERS
ASSOCIATION, INC., ROBERT HIGGINS, MARC
HELIE, ROBERT CRISTOFARO and ROBERT
COOPERMAN,

Plaintiffs,

-against-

TRUSTEES of the FREEHOLDERS and
COMMONALTY of the TOWN OF EAST
HAMPTON, THE TOWN OF ESTATE HAMPTON,
JAY H. BAKER and PAT GOOD BAKER JOINT
TRUST, DAVID STUART TYSON, STEPHANIE
BITTERMAN, JUNE MERTON, NAPEAGUE
ASSOCIATES, DAVID ROSS, GRACE ROSS,
IRVING C. MARCUS and HARRIET MARCUS,

Defendants.

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PLAINTIFFS' ATTORNEYS:

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INDEX NO.: 34714/2009E

MOTION DATE: 2/10/22

MOTION SEQ. NO.: 011 MG

MOTION SEQ. NO.: 013 MD

MOTION SEQ. NO.: 014 MD

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ORDERED that plaintiffs' motion (sequence no. 011) served by order to show cause (BAISLEY, J.) to hold the defendants in civil contempt for violating the injunction of the Appellate Division, Second Department's decision of February 3, 2021 and this court's modified judgment entered April 12, 2021, and plaintiffs' motion (sequence no. 013) served by order to show cause (BAISLEY, J.) to remove fourteen actions relating to trespassing summonses issued by the Town of East Hampton Marine Patrol on October 17, 2021 and being prosecuted in the East Hampton Justice Court and consolidate them with this action, and defendant Town of East Hampton's cross-motion (sequence no. 014) to vacate the Temporary Restraining Order ("TRO") issued by the court (BAISLEY, J.) on June 4, 2021, or in the alternative, modify the TRO to render it consistent with the Appellate Division's decision and modified judgment of this court entered on April 14, 2021, are consolidated for the purposes of this determination, and upon consolidation, it is further

ORDERED that the court hereby finds the defendants guilty of civil and criminal contempt of the Appellate Division, Second Department's decision of February 3, 2021 and this court's modified judgment entered April 12, 2021; and it is further

ORDERED that the defendants are fined in the maximum amount allowed in criminal contempt of \$1,000.00 per day from February 3, 2021 to September 30, 2021, totaling \$239,000.00, payable to the plaintiffs; and it is further

ORDERED that the defendants are directed to pay plaintiffs' costs, expenses, and attorneys' fees associated with the motion for contempt and the hearing conducted in this matter; and it is further

ORDERED that the Town Clerk is directed to revoke all permits issued by the Town that have been issued since February 3, 2021, that are not in compliance with the decision of the Appellate Division, Second Department and to inform the prior permit holders within 45 days of service of the within Order with notice of entry, by certified mail, return receipt requested, that driving on Truck Beach is prohibited; and it is further

ORDERED that plaintiffs' motion to remove the fourteen actions relating to trespass summonses from East Hampton Justice Court and consolidate them with this matter is denied; and it is further

ORDERED that defendant's motion to vacate the Temporary Restraining Order, or alternatively, modify the TRO, is denied.

The dispute in this litigation arises out of the ownership and use of land located in the Town of East Hampton which spans approximately 4,000 feet of oceanfront property. On

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February 3, 2021, the Appellate Division, Second Department, issued a decision which held in part that “the reservation [in the Benson Deed] is in the nature of an easement allowing the public to use the homeowners associations’ portion of the beach only for fishing and fishing-related purposes.” The Decision further held that, “the reservation does not confer upon the Town and Trustees lawful governmental or regulatory power to issue permits allowing members of the public to operate and park vehicles on any portion of the beach owned by the homeowners associations.” On April 12, 2021, this court (BAISLEY, J.) signed a judgment in accordance with the Appellate Division Decision. Plaintiffs now move for an order holding the defendants in civil contempt for violating the injunction of the Appellate Division, as well as this Court’s modified judgment which enjoined the defendants from issuing “permits purporting to authorize their holders to operate and park vehicles” on any portion of the beach owned by the Homeowners Associations; and directing the defendants to purge their contempt by complying with the injunction by revoking any and all permits issued by the Town for the 2021 season that do not expressly prohibit driving or parking on the beach. By order dated December 20, 2021, this court (BAISLEY, J.) set the matter down for a contempt hearing. A hearing was conducted on January 26, January 27, and February 10, 2022.

Peter Van Scoyoc (“Van Scoyoc”), East Hampton Town Supervisor, testified that he is the chief executive of the Town and that he presides over legislative and executive matters. In February 2021 he became aware that the Appellate Division, Second Department had issued a decision holding, *inter alia*, that the reservation in the subject deed “does not confer upon the Town and Trustees lawful governmental or regulatory power to issue permits allowing members of the public to operate and park vehicles on any portion of the beach owned by the homeowners’ association.” Van Scoyoc testified that following this decision he understood that the Town could not let people drive on what is referred to as “Truck Beach.” He doesn’t recall if he did anything between February and April 2021 to comply with the Appellate Division’s decision. Van Scoyoc did not ask the Town Board to amend the Town Code to reflect the Second Department decision, thereby categorizing Truck Beach as a restricted beach. He doesn’t recall if he instructed any law enforcement in the Town to deny cars access to the beach between February and April. Van Scoyoc identified the modified judgment from this court (BAISLEY, J.) dated April 12, 2021, but he didn’t recall if he took any steps to comply with the judgment between April and June. He is aware that the Town sought a stay of the enforcement of the judgment, but was unsuccessful. Thereafter, Van Scoyoc testified that the Town erected some string fencing on the beach and posted signage.

Van Scoyoc was aware that an order to show cause seeking to hold the Town in contempt was served on June 4, 2021 that contained a temporary restraining order (“TRO”) prohibiting and preventing any and all driving and/or parking on the beaches owned by the plaintiff homeowners’ association. In response to the TRO the Town barricaded a road entrance, and put up string fencing and signage, although he admitted that the signs did not comport with the TRO. Van Scoyoc testified that he had a conversation with Carole Brennan, Town Clerk, that the Town

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would advise people when they were issued permits that Truck Beach was off limits. He didn't recall if he contacted the Town Clerk to advise that the Town shouldn't be issuing permits that allowed people to drive on Truck Beach. Van Scoyoc did not have notices sent by the Town Clerk to permit holders advising that they could not drive on Truck Beach. He doesn't recall instructing Code Enforcement or Marine Patrol on how to comply with the TRO, but he did tell Ed Michels, Chief of Marine Patrol, that he needed to keep cars off that stretch of beach. Van Scoyoc was aware that there would be two protests at Truck Beach and that preventing vehicles from driving on the beach was law enforcement's responsibility. The first protest occurred on June 27, 2021 and the second occurred on October 17, 2021.

Van Scoyoc testified that a dirt berm consisting of approximately 30 cubic yards of sand was placed at the foot of Marine Boulevard and that berms are routinely put in place in advance of hurricane season because of flooding. He identified a photograph depicting a Town bucket loader removing sand at the end of Marine Boulevard, but he testified he was unaware of who ordered the removal of the berm two days prior to the second protest. Upon further questioning, Van Scoyoc testified that either he or someone else at the Town ordered that the berm be removed after Hurricane Henri in August, and that it was merely a coincidence that the berm was removed two days prior to the second protest. He testified that he had a concern about potential violence between property owners and protesters as well as violence between protesters and police. Van Scoyoc is unaware if the Town did anything to prevent the protesters from driving onto the beach at either Marine Boulevard or Napeague Lane. He testified that nothing in the Appellate Division decision tells the Town to close off access to any portion of any beach. In his opinion, the scope of the TRO is broader than the scope of the injunction under the Appellate Division decision and the modified judgment. In June 2021, the Town posted signs stating, "[p]er court order, no vehicles beyond this point until further notice." There were notices distributed by the Clerk's office with new beach driving permits alerting the public that driving or parking on Truck Beach was no longer permitted until further notice. Van Scoyoc admitted that the notices were issued in response to the TRO.

David Lys ("Lys") testified that he has been a town board member of the Town of East Hampton for just over four years. He became aware of the litigation involving Truck Beach some time in 2009. Lys knew shortly after the Appellate Division, Second Department issued the February 3, 2021 decision that the Town was enjoined from issuing permits which allowed driving on Truck Beach, however, he didn't recall what steps the Town Board took between February and April to comply with the decision. He was aware of the judgment the court issued on April 12, 2021 and testified that the Town put up signs, barricades, fencing, and put out social media posts. Lys was aware of the TRO issued in this matter and understood that it obligated the Town to stop individuals from driving and parking on Truck Beach. He believes he discussed it with Ed Michels, but doesn't recall what was discussed. Lys also discussed the TRO with Chief Sarlo, chief of East Hampton Town Police Department. Specifically, Lys inquired about how the property boundaries were marked, but he did not ask Chief Sarlo to block off either access point

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to the beach. Lys did ask Anthony Littman, the person in charge of Buildings and Grounds to erect a string fence on Napeague Lane and put barricades at Marine Boulevard; the Town Board made the decision to put up the barricade. He did not speak to the Town Clerk after the judgment was served on the Town nor did he speak to her after the TRO was entered. Lys believes that he discussed the protests with Ed Michels, but doesn't recall what was specifically discussed. Lys testified that in August 2021, just before the onset of Hurricane Henri, a berm was put up at the east end of Marine Boulevard. The berm was removed in October, and it was a mere coincidence that it was removed two days before the second protest. Lys became aware of the October 17, 2021 protest shortly before it occurred when he was told by his wife. It was his understanding that baymen were organizing the protest to show their rights to fish. Lys testified that marine patrol attempted to prevent trucks from driving on the beach at the protest, but doesn't know specifically what they did. Lys knew that after the Second Department decision was issued on February 2, 2021 that the Town had no authority to issue permits to allow driving on Truck Beach.

Carole Brennan ("Brennan") has been employed as the Town Clerk for East Hampton for eight years. The Town maintains addresses for every person who is issued a permit. A beach driving map is provided when the permits are issued and since June 2021, a separate document is issued with the pamphlet. The document was not sent to any permit holders who obtained their permit before June 2021 because she was not directed to do so. The beach driving guide was updated in July 2021, but it did not reflect that driving on Truck Beach was prohibited. Brennan testified that between February and September 2021, 4,016 resident beach driving permits were issued and 111 nonresident beach driving permits were issued, but no one told Brennan that she wasn't allowed to issue the permits allowing for permit holders to drive on Truck Beach. Brennan testified that a notice is posted in her office reflecting the restriction prohibiting driving on Truck Beach.

Ed Michels ("Michels") was previously employed as Chief Harbormaster for the Town for over twenty years. Michels testified that as Chief he was in charge of the Marine Patrol Division, which is technically the Marine Enforcement Division of the police department, and handles all waterways, beaches, fishing, and hunting. Chief Sarlo was Michels' immediate supervisor. On June 3, 2021, Michels became aware that he was named in the contempt proceeding, but nobody informed him that the Town had lost the Truck Beach case nor did anyone inform him that the Town should not issue beach driving permits for Truck Beach. After conferring with the Town Attorney on June 3rd, Michels brought in his patrol officers to review the procedures for a private property trespass. He testified that they put a police barricade up until the Parks Department could put in something more permanent.

Michels advised the dispatch center to notify him immediately of any complaints at Napeague Lane. He did not instruct his personnel to prevent people from entering the beach. Michels testified that the best he could do to comply with the TRO was to block the access at the

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end of Marine Boulevard and advise people that they were not supposed to be there. Sarlo advised Michels that they were going to follow the standard procedures that they operate under all the time with private property. Michels advised the Chief of Staff that it wasn't physically possible for Marine Patrol to prohibit access to Truck Beach, but no one got back to Michels regarding his concerns. Marine Patrol has four full-time officers and twelve part-time officers.

Michels identified a photograph depicting a string fence erected at the end of the east side of Napeague Lane, but testified that the string fence was not adequate to comply with the court's order. Michels became aware of the first protest several weeks before it happened when he received a phone call from the organizer, Daniel Lester ("Lester"). Lester advised that they didn't want to cause any problems and that they would drive down the beach, turn around, and come back. Michels responded, "[a]bsolutely, go ahead, just as long as you stay below the mean high watermark." Michels did not anticipate any physical problems with the protesters because he knew them. Van Scoyoc did not tell Michels that he anticipated that the protest would become violent. Prior to the second protest, Lester advised Michels that the participants wanted to get a summons for driving down onto the beach. Michels testified that he didn't know how to prevent fifteen trucks from trespassing, but admitted that it is the police department and the Marine Patrol's responsibility for enforcing the TRO.

Stephen Lynch ("Lynch") has been employed as the Superintendent of Highways for East Hampton for ten years. Lynch identified a photograph taken on October 15, 2021 which depicts a Highway Department payloador moving sand out of the roadway at the end of Marine Boulevard. The sand berm had been placed in the area in August or early September, as is customary prior to the hurricane season. Lynch received a call from Lys in possibly October advising him to remove the berm. Once the berm was graded, a snow fence was erected at that location.

Kenneth Silverman ("Silverman") resides at 24 Marine Boulevard, East Hampton from May through October. He is president of the Napeague Property Owners Association. Silverman testified that following the Appellate Division decision on February 3, 2021, the Town posted signs on the beach indicating that vehicular access to the beach area was limited to fishing and fishing-related purposes. Thereafter, the signs were replaced with different signs stating that "per court order, no vehicles would be permitted beyond this point until further notice." The first signs were posted on May 28, 2021 and the second signs were posted on June 11, 2021. Silverman is aware of the TRO issued by this court on June 4, 2021. Silverman had several conversations with Michels where Silverman indicated that the Town needs to put up a fence of a more permanent nature on Napeague Lane. He testified that he told Michels that "you've lied to the people for thirty years, telling them the Town trustees own the beach and you've issued over 60,000 permits to people telling them that it's okay to drive and park on the beach." Silverman also asked Tony Littman, head of Parks and Recreation, to put up a snow fence on Napeague Lane, but that never happened. Silverman testified that Michels informed him that he was told not to do anything unless he got other instructions.

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Diane Elam (“Elam”) resides at 12 Whalers Lane, Amagansett, which is located with the Whalers Lane Homeowners Association. Elam testified that Michels acknowledged the court orders, but stated that in the absence of any written direction from the Town, Marine Patrol would not be able to enforce the Second Department’s order or the Supreme Court’s judgment.

A finding of civil contempt requires: (1) a lawful court order clearly expressing an unequivocal mandate; (2) the contemnor’s knowledge of the order; (3) a reasonable certainty that the order was disobeyed; and (4) prejudice to a party of the litigation. (*See Madigan v. Berkeley Capita, LLC*, - - - NYS3d - - -, WL 1560981, 2022 NY Slip Op. 03237; *Matter of McCormack v. Axelrod*, 59 NY2d 574, 453 NE2d 508, 466 NYS2d 279[1983]; *McCain v. Dinkins*, 84 NY2d 216, 639 NE2d 1132, 616 NYS2d 335[1994]). “Civil contempt has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right...[a]lthough the line between [civil and criminal] contempt may be difficult to draw in a given case, the element which serves to elevate a contempt from a civil to criminal is the level of willfulness with which the conduct is carried out” (*Matter of McCormack v. Axelrod*, *supra*, at 582-583). To establish civil contempt, “it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party” (*Philie v. Singer*, 79 AD3d 1041, 1042, 913 NYS2d 745 [2nd Dept. 2010]). The same act may be punishable as both a civil and criminal contempt, depending on the “level of wilfulness associated with the conduct” (*McCain v. Dinkins*, *supra*, at 225). Both civil and criminal contempt require a determination that a lawful order expressing an unequivocal mandate was in effect; that there is a reasonable certainty that the order was disobeyed; and that the alleged contemnor had knowledge of the order (*McCormack*, *supra* at 574). Moreover, “[s]anctions may be appropriate where: (1) a party willfully disobeys a court order, or (2) a losing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons” (*Kinney v. Gallagher*, 524 B.R. 455 [2015]).

Defendants contend that the court should deny plaintiffs’ contempt motion because plaintiffs cannot prove that the Town disobeyed an unequivocal mandate and/or that plaintiffs suffered prejudice. This contention is without merit. Upon the testimony adduced at the hearing and a review of the parties’ extensive submissions, and the applicable law, the court finds that the defendants are guilty of civil and criminal contempt.

The testimony adduced at the hearing indicates that the Town Code still permits vehicles on plaintiffs’ properties and that the Town has continued to issue permits allowing permit holders to drive on Truck Beach, in derogation of the Appellate Division decision, this court’s modified judgment, and the TRO. Van Scoyoc testified that he knew vehicles were not allowed on the beach, but he didn’t recall if any steps were taken to prevent vehicles from entering the beach nor did he recall whether he ever told law enforcement to bar vehicles from the beach. Brennan testified that between February and June 4, 2021 the Town issued 2,031 permits which

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allowed the holders to drive on Truck Beach. Moreover, the Town has not informed any of the thousands of prior permit holders that driving on Truck Beach is prohibited. Ultimately, the Town did install signs on May 28, 2021 permitting vehicle access but limiting it to “fishing and fishing-related purposes,” which is clearly inconsistent with the plain language in the Appellate Division decision. With respect to the alleged prejudice, the court can infer that the barrage of vehicles on Truck Beach is prejudicial to the plaintiffs’ quiet enjoyment of their property. The defendants have clearly demonstrated an appallingly studied indifference and deliberate disobedience to the lawful and unequivocal orders of this court and the Appellate Division.

In addition to continuing to flout the directives of the Appellate Division decision, this court’s modified judgment, and the TRO, the testimony adduced at the hearing demonstrates that the Town failed to comply with the so-ordered subpoenas issued in conjunction with the contempt motion. The subpoenas required the Town to produce communications, including text messages and emails from personal or government-owned devices, and documents concerning the TRO and driving on Truck Beach. Yet Van Skoyoc testified that he didn’t recall turning over any text messages to his attorney, Lys testified that he did a “cursory search” and that the Town attorney searched the documents, and Brennan testified that she was not asked to search her cell phone in connection with the subpoena. Michels testified that he never saw the subpoena, but turned over his texts to his attorneys. Lynch testified that he was never asked to search either his personal cell phone or Town cell phone in connection with this matter.

CPLR § 602 provides that, “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” The within matter arises out of a dispute regarding the ownership and use of oceanfront property in the Town of East Hampton. The fourteen matters pending in East Hampton Justice Court involve criminal trespass summonses. While both matters arise out of the same property, the court does not find the consolidation of this civil matter and the fourteen criminal matters appropriate, and therefore, the motion to consolidate is denied (*RCN Construction Corp. v. Fleet Bank, N.A.*, 34 AD3d 776, 825 NYS2d 140 [2nd Dept. 2006]; *Flaherty v. RCP Associates*, 208 AD2d 496, 616 NYS2d 801 [2nd Dept. 1994]).

The court finds defendants remaining contentions without merit.

Plaintiffs’ counsel are directed to submit a bill of costs and affirmation of services within thirty (30) days of service of the within order with notice of entry.

The foregoing constitutes the order of the court.

Dated: June 30, 2022


J.S.C.