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14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF ALAMEDA**
17

18 RENTAL HOUSING OWNERS)
19 ASSOCIATION OF SOUTHERN)
ALAMEDA COUNTY, INC.,)
20)
Petitioner,)
21)
v.)
22)
CITY OF HAYWARD,)
23)
Respondent.)
24 _____)

CASE NO: HG 09 433908
CITY OF HAYWARD'S OPPOSITION
TO EX PARTE APPLICATION FOR
HEARING OF OSC RE CONTEMPT
Date: January 14, 2010
Time: 11:00 a.m.
Dept: 31
Judge: Hon. Frank Roesch
Action Filed: February 2, 2009
Trial Date: None Set

Introduction

1
2 The Respondent City of Hayward ("the City") opposes the application of the Petitioner Rental
3 Housing Owners Association of Southern Alameda County, Inc. ("the Petitioner") for a hearing on the
4 City's alleged contempt of court. This application should be denied because the Petitioner has not met
5 its burden of showing that a hearing on the issue of contempt is warranted. The Petitioner has failed to
6 make the required threshold showing that there has been "willful disobedience" of the Court's order by
7 the City, and therefore this allegation should not proceed to a hearing.

8 The City also opposes the Petitioner's application for an order shortening time. There is no
9 urgency that necessitates an order shortening time, other than perhaps the Petitioner's own delay. The
10 City filed its intermediate return to the writ of mandate on November 2, 2009 and its final return to the
11 writ of mandate on December 8, 2009. These returns explained how the City was complying with the
12 writ. The letters that Petitioner introduces as evidence of the City's contempt are dated December 15,
13 2009. The Petitioner, however, did not file its application for almost a month, on January 12, 2010. An
14 order shortening time is therefore unnecessary.

15 If, despite the City's objections, the Court decides to proceed with the order to show cause, the
16 trial on the issue of contempt will need to be scheduled before a different judge. The City requests that
17 the trial be scheduled with sufficient time for the City to prepare its defense and asks that the Petitioner
18 be required to provide the City with a list of the witnesses who will testify and the documents that will
19 be introduced by the Petitioner to prove the claim of contempt against the City.

Argument

20
21 **A. The Petitioner has failed to make the required threshold showing that there has been**
22 **"willful disobedience" of the Court's order by the City, and therefore a hearing on the**
issue of contempt is not warranted.

23 "It is well established in this state that the affidavit by which a contempt proceeding is instituted,
24 in order to sufficiently support an adjudication of contempt, must state facts constituting the offense.
25 Otherwise, the court is without jurisdiction." (*Application of Ny* (1962) 201 Cal.App.2d 728, 731.)

26 "The facts essential to establish jurisdiction in the contempt proceeding, and thus to enable the
27 trial court to punish the accused, are: (1) the making of the order; (2) the accused's knowledge of the
28 order; (3) the accused's ability to render compliance, and (4) the accused's willful disobedience of the

1 order." (*Cowsey v. Superior Court* (1987) 194 Cal.App.3d 147, 154.) "A finding that one accused of
2 contempt is in violation of an order of court states only a conclusion of law." (*Application of Ny, supra*,
3 201 Cal.App.2d at p. 731.)

4 The Petitioner's declaration in support of its application does not establish facts sufficient to
5 allege that the City has willfully disobeyed the Court's order in this case. The Writ of Mandate issued by
6 the Court directed the City not to enforce sections 9-5.306 and 9-5.401 of the Hayward Municipal Code
7 and to repeal or cure the constitutional and statutory defects in these provisions. (Peremptory Writ of
8 Mandate, issued August 4, 2009.) The Judgment Granting Writ of Mandate, filed July 30, 2009,
9 explained that:

10 "Sections 9-5.306 and 9-5.401 of the Hayward Municipal Code contravene the 4th
11 Amendment to the United States Constitution and California Civil Code §1954 insofar as
12 they require landlords to provide or otherwise facilitate entry by city inspectors into
occupied dwelling units without the consent of a person who is in actual possession of the
dwelling unit."

13 In response to this directive, and as reported in the City's Final Return to Writ of Mandate, filed
14 December 8, 2009, the City Council of the City of Hayward amended the provisions of its municipal
15 code regarding residential rental unit inspections. As amended, section 9-5.306 of the Municipal Code
16 requires that consent must first be obtained from the tenant before a dwelling unit can be inspected.
17 Although the owner of a rental unit is required to make a good faith effort to obtain the consent of the
18 tenant, there is no penalty to the owner if the consent cannot be obtained. "If consent to enter on to any
19 rental housing property or any rental housing unit is refused or otherwise cannot be obtained, the
20 Enforcement Official is authorized to seek an inspection warrant from a court of competent jurisdiction."
21 This amended ordinance was adopted on December 1, 2009 by the Hayward City Council, and it cures
22 the constitutional and statutory defects with the ordinance identified by the Court in its judgment on the
23 writ. (See Respondent's Final Return to Writ of Mandate, Exhibit 2, p. 1.)

24 In support of its request for a contempt hearing, the Petitioner alleges that the City violated the
25 Court's order by mailing out notices on December 15, 2009 that informed property owners of
26 inspections to occur in January of 2010 and by issuing invoices for fees for the City's residential rental
27 inspection program. These allegations do not establish a willful violation of the Court's order. When
28 these letters were sent out, the City Council had already amended the Municipal Code to clarify that

1 landlords are not required to facilitate the entrance of the City inspectors into occupied dwelling units
2 without the consent of the person living in the dwelling unit, and that if consent was not given by the
3 inhabitant that the City inspectors must obtain a court warrant for an inspection. The allegations
4 therefore do not establish a willful disobedience of the Court's order, and the Petitioner's application for
5 a contempt hearing should be denied.

6 **B. The Petitioner's application for an order shortening time should be denied.**

7 The Petitioner's request for an order shortening time for a contempt hearing should be denied
8 because the Petitioner has not shown that there is good cause for such an order. There is no emergency,
9 other than any delay caused by the Petitioner sitting on its hands. It was made clear to the Petitioner
10 through the Respondent's Intermediate Return to Writ of Mandate, filed November 2, 2009, and the
11 Respondent's Final Return to Writ of Mandate, filed December 8, 2009, how the City was responding to
12 the writ. The City Council first held a hearing on the ordinance on October 6, 2009. (Respondent's
13 Intermediate Return to Writ of Mandate, 2:7-8.) The City Council was scheduled to adopt the ordinance
14 on October 20, 2009, but Petitioner's counsel appeared and objected. (*Id.* at 2:19-23.) The ordinance
15 was deferred to November 17, 2009 and published in the Hayward Daily Review on November 21, 2009.
16 (Respondent's Final Return to Writ of Mandate, 1:19-24.) It was finally passed by the City Council on
17 December 1, 2009. (*Id.* 1:23-25.) The letters that Petitioner points to as evidence of contempt are dated
18 December 15, 2009. Despite this, the Petitioner did not file this ex parte application until January 12,
19 2010. If there is indeed an urgent need for an order shortening time, the Petitioner has not explained
20 why it did not act urgently itself.

21 **C. If the Court decides to proceed with a contempt trial, the trial will need to be before a
22 different judge; the City should be given sufficient time to prepare for trial; and the
23 Petitioner should disclose the witnesses who will testify at the trial and the documents that
24 will be introduced.**

25 If the Court decides to proceed with the Petitioner's contempt allegation, the trial on contempt
26 must be before a different judge. "In the case of an indirect contempt (conduct outside the court's
27 presence), absent some emergency, the trial must be held before a judge other than the one whose order
28 was allegedly violated." (Weil & Brown, *Civil Procedure Before Trial*, § 9:719 [a copy of this provision
is attached to this brief]; *Gates v. Municipal Court* (1992) 9 Cal.App.4th 45, 52.) Moreover, because

1 "[I]ive testimony, rather than declarations, is required from witnesses against the alleged contemner, to
2 ensure his or her right to cross-examine," (Weil & Brown, *Civil Procedure Before Trial*, § 9:718.2) the
3 City should be given sufficient time to prepare for the trial and a list of the witnesses who will testify
4 against the City.

5 **Conclusion**

6 For the reasons stated above, the City requests that the Petitioner's application for a contempt
7 hearing be denied because the Petitioner has failed to meet its basic burden of showing that a contempt
8 hearing is warranted. To the extent the Petitioner wants to argue that the City's ordinance has not
9 satisfied the writ, a hearing on the Petitioner's objections to the City's return on the writ is already
10 scheduled before this Court on February 19, 2010. A contempt proceeding is therefore unwarranted and
11 unnecessary.

12
13 JARVIS, FAY, DOPORTO & GIBSON, LLP

14
15 Dated: January 14, 2010

16 By: 

Benjamin P. Fay

Attorneys for Respondent CITY OF HAYWARD

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19 J:\Clients\187 [City of Hayward]\003 - RHO v. City\Pleading\Ex parte re OSC - Opposition.wpd

**California
Practice
Guide**

**CIVIL PROCEDURE
BEFORE TRIAL**

Chapters 8-9

ORIGINAL AUTHORS

JUDGE ROBERT I. WEIL (Ret.)
Los Angeles Superior Court

JUDGE IRA A. BROWN, JR. (Ret.)
San Francisco Superior Court

AND

JUSTICE WILLIAM F. RYLAARSDAM
Calif. Court of Appeal, 4th Dist.

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less of whether the prohibition is addressed to the parties or to the federal court itself. [*Donovan v. City of Dallas* (1964) 377 US 408, 412-413, 84 S.Ct. 1579, 1582; *Biosense Webster, Inc. v. Sup.Ct. (Dowell)* (2006) 135 CA4th 827, 839, 37 CR3d 759, 767-768]

12. Enforcement of Injunctions by Contempt Proceedings

- a. [9:711] **Indirect contempt:** Most violations of injunctions involve conduct outside the presence of the court, i.e., an "indirect contempt" (distinguished from a "direct contempt" which is committed in the court's presence—e.g., as where counsel is held in contempt for rearguing a position after court rules on a motion). Accordingly, the contempt charge must be presented to the court for adjudication.

Cross-refer: For discussion of direct vs. indirect contempt, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 12.

- b. [9:712] **Issues involved:** The substantive issues involved in an indirect contempt proceeding are four-fold:

- The rendition of a *valid order*;
- Respondent's *actual knowledge* of the order;
- Respondent's *ability to comply* with the order; and
- Respondent's *willful disobedience* of the order. [*Conn v. Sup.Ct. (Farmers Group)* (1987) 196 CA3d 774, 784, 242 CR 148, 154 (citing text)]

- (1) [9:712.1] **Agents, servants and employees:** An injunction may be directed to "agents, servants and employees" of named parties (*see* 19:656.1). In such cases, a charge of contempt may be sustained against a person for violating the injunction upon a showing that he or she was acting as the "agent or servant of or in concert or combination with" named parties, and had actual notice of the injunction. [*Ross v. Sup.Ct. (Woods)* (1977) 19 C3d 899, 905, 141 CR 133, 137]

Compare: An injunction seeking to control "all persons with actual knowledge of it," is too broad to be enforced: "The order must be directed against a person either by naming the person as an individual or by designating a class of persons to which that person belongs." [*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 CA4th 345, 352, 132 CR2d 46, 52 (emphasis added)]

c. Commencing a contempt proceeding

- (1) [9:713] **Charging affidavit:** A contempt proceeding is commenced by the filing of an affidavit showing the facts set forth in 19:712, above (the "charging allega-

tions"). [CCP §1211, 2nd para.] The affidavit frames the issues to be tried. [*Reliable Enterprises, Inc. v. Sup.Ct. (People)* (1984) 158 CA3d 604, 616, 204 CR 786, 793]

- (a) [9:714] Each allegation (valid order, knowledge, ability to comply and willful disobedience) must be pleaded by *factual statements*; however the affidavit may be amended to correct technical insufficiencies if the respondent would not be prejudiced thereby. [CCP §1211.5(b)]
- (b) [9:714.1] To establish willful disobedience, the affidavit should show that the alleged contemnor had *personal notice* of the contents of the order.
- (2) [9:714.2] **Notice to opposing counsel of application:** As with *ex parte* proceedings generally, parties requesting an OSC re Contempt must notify opposing counsel before presenting the application to the court. [CRC 3.1203; *see* 19:352]
- (3) [9:715] **Order to Show Cause:** If the court is satisfied that the affidavit alleges sufficient grounds for contempt, it signs an "OSC re Contempt," setting the date and time for a hearing. [CCP §1212]
- (4) [9:716] **Service of OSC and affidavit:** The citee-respondent must be formally notified of the contempt charge and of the time and place of the hearing; otherwise, the court lacks jurisdiction to proceed. For this purpose, both the OSC and affidavit ordinarily must be served on respondent *in a manner authorized for service of summons*. [*Cedars-Sinai Imaging Med. Group v. Sup.Ct. (Moore)* (2000) 83 CA4th 1281, 1286, 100 CR2d 320, 324 (citing text); *Kroneberger v. Sup.Ct.* (1961) 196 CA2d 206, 209-210, 16 CR 339, 341-342; but *see Shibley v. Sup.Ct.* (1927) 202 C 738, 741, 262 P 332, 333—court can authorize service on attorney where party conceals self to avoid service]

FORM: Application for Order to Show Cause re Contempt; Declaration of Notice and Proposed Order, *see Form 9B:12* in Rivera, *Cal. Prac. Guide; Civ. Pro. Before Trial FORMS* (TRG).

d. Trial of the contempt proceeding

- (1) [9:717] **Quasi-criminal proceedings:** Because of the potential for imprisonment (below), a contempt proceeding in the court that made the order allegedly violated is considered quasi-criminal. [*People v. Gonzalez* (1996) 12 C4th 804, 816, 50 CR2d 74, 82]

(a) [9:718] **Constitutional protections:** Because the proceedings are quasi-criminal, defendant possesses "some of the rights of a criminal defendant." [*People v. Gonzalez*, supra, 12 C4th at 816, 50 CR2d at 82]

As will be seen, most of the rights of a criminal defendant are extended to a person cited for contempt and the court must inform him or her of such rights. [See *In re Kreltman* (1995) 40 CA4th 750, 753, 47 CR2d 595, 597—because court failed to advise citee of right to jury trial, sentence could not exceed 180 days; see 19:721.2]

Included are the following constitutional protections:

- 1) [9:718.1] **Presumption of innocence; burden of proof:** A person cited for contempt is presumed innocent until proven guilty "beyond a reasonable doubt."
- 2) [9:718.2] **Evidence:** Live testimony, rather than declarations, is required from witnesses against the alleged contemner, to ensure his or her right to cross-examine. [See CCP §1217—judge "must hear any answer" which the contempt citee may make and "may examine witnesses for or against him"]

Testimonial and self-incrimination privileges apply (including the right *not* to testify *at all* and not to incriminate self).

- 3) [9:718.3] **Presence at hearing:** The hearing may not be held in the absence of the alleged contemner or counsel unless there is a finding (supported by evidence) that the alleged contemner is *voluntarily absent*. [*Farace v. Sup.Ct. (Hale)* (1983) 148 CA3d 915, 918, 196 CR 297, 299]
- 4) [9:718.4] **Assistance of counsel:** The alleged contemner is entitled to the assistance of counsel and such counsel must be appointed if the alleged contemner cannot afford counsel.
- 5) [9:718.5] **Arraignment:** The alleged contemner must be arraigned (advised of the charges) at the beginning of the contempt hearing. This includes admonition and inquiry regarding defense counsel. A continuance is likely if the alleged contemner is indigent and unrepresented by counsel at the hearing.

- 6) [9:719] **Trial judge:** In the case of an indirect contempt (conduct outside the court's presence), absent some emergency, the trial must be held *before a judge other than the one whose order was allegedly violated*. [*Gates v. Mun.Ct.* (1992) 9 CA4th 45, 52, 11 CR2d 439, 443]

[9:720] *Reserved.*

- (b) [9:721] **Right to jury trial depends on sentence:** Unlike other criminal proceedings, there is no constitutional right to a jury trial in civil contempt proceedings in which the sentence imposed *does not exceed 6 months' imprisonment*. Crimes carrying a sentence of 6 months or less are deemed "petty" offenses not subject to the constitutional right to jury trial. [*Codispoti v. Pennsylvania* (1974) 418 US 506, 512, 94 S.Ct. 2687, 2691; *Mitchell v. Sup.Ct. (People)* (1989) 49 C3d 1230, 1244, 265 CR 144, 152]

- 1) [9:721.1] **Aggregate punishment for separate contempts:** Where separate violations of the same order are charged (e.g., failing to pay support obligations), the *aggregate* penalty imposed, not the penalty for each contemptuous act, determines the right to jury trial. I.e., a contemner sentenced to an aggregate of *more than 180 days* in jail has a federal constitutional right to be tried by a jury. Absent an express waiver of that right, the sentence must be reduced to no more than 180 days. [*In re Kreitman* (1995) 40 CA4th 750, 753, 47 CR2d 595, 597]

- 2) [9:721.2] **Compare—criminal contempts:** Willful disobedience of a court order is also a misdemeanor (see Pen.C. §166(a)(4)). If prosecuted as a criminal contempt, a right to jury trial exists regardless of the sentence imposed. [See *Mitchell v. Sup.Ct. (People)*, *supra*, 49 C3d at 1240, 265 CR at 150]

(2) Particular issues at trial

- (a) [9:722] **Valid order:** Rendition of the order on which the contempt charge is based usually is not in doubt. However, by way of defense, the respondent may challenge the *validity* of the order.

- 1) [9:722.1] **Void orders:** Violation of a *void* order is *not* punishable as a contempt. An order