THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case No. 2014-CP-42-01622

Appellate Case No. 2015-000366

Spartanburg Buddhist Center of South Carolina, Inc., Respondent,

v.

Ron Ork and Luke Dong, Appellants.

Ron Ork and Luke Dong, Third Party Plaintiffs,

v.

Chivin Sun, Robert Pek, Sakhan Sok, Sambo Khieav, Sophay Pres, and Tommy Ong, Third Party Defendants.

RETURN TO PETITION FOR WRIT OF SUPERSEDEAS WITH REQUEST FOR EXPEDITED DECISION

Respondent hereby files this Return to Appellant's Petition for Writ of Supersedeas with Request for Expedited Decision ("Petition"). Appellant's Petition should be denied, for the following reasons.

1. Appellant has not timely appealed the Order Granting Temporary Injunction dated May 16, 2014, the Order dated July 25, 2014 denying Appellants' SCRCP Rules 59 and 60 Motion, or the Order Granting Temporary Injunction dated April 21, 2014. Appellant did not file a Notice of Appeal as to these Motions within thirty days as required

by Rule 203, such that these issues are not properly before the Court and thus, the Court lacks jurisdiction to hear those issues. *See* South Carolina Rule of Appellate Procedure 203(b).

2. Thus, Respondent will limit its reply to those Orders timely before the Court, the January 7, 2015 Contempt Order holding Ron Ork in contempt and the February 20, 2015 Order denying Appellants' SCRCP Rules 59 and 60 Motion and Rule 62 Motion.

3. Respondent is a Buddhist Temple in Spartanburg, South Carolina, and a nonprofit corporation under South Carolina law. Appellant Ork is the Head Monk and a Board member at the Temple, and Appellant Dong is a member at the Temple. Respondent has been represented in this action by the rest of the Board members and officers prior to any alleged April 2014 election, several of whom have been named as Third Party Defendants.

4. To give this Court context for Appellant Ork's appeal of his contempt order, it is important to understand that the underlying litigation in this matter is at its core a dispute among Respondent's Board members as to the construction of a new building and related expenditures of Respondent's funds (which are donations by Temple members). In fact, from the Temple's inception in 2009-10 until that dispute began in late 2013 through early 2014, neither Appellant voiced any concerns or disputed the individuals or terms of the Board of Directors or Officers of Respondent. In fact, Appellant Ork signed documents containing such designations up until that point and never argued he himself was not an authorized Board member.

5. Although Respondent and Ork agreed in 2013 to construct a new building, raise funds for that purpose, and attend a groundbreaking ceremony, they did not come to

an agreement on the exact plans and costs of construction. Ork then secretly entered into an agreement for the construction of a building without Respondent's knowledge, permission or authorization. In fact, Board of Directors members and/or Officers' names were crossed off the contract. Appellants Ork and Luke Dong (a member of the Temple but not a Board member or Officer), along with another Temple member, signed the construction agreement on behalf of Respondent. Respondent did not see this agreement until discovery began.

6. Appellant Ork was a signatory on Respondent's bank account and had been since 2009-10, along with at least four others, and was responsible for paying certain Temple expenses. Respondent trusted Ork to do so until Respondent began to feel Ork was mismanaging those funds in early 2014.

7. Ork would not tell his plans to or gain approval from Respondent for the money he was spending on the new building. When Ork's actions began causing tension among the Board and Officers, Ork and Dong organized an election to replace all the other Board members and Officers. Dong sent a notice to of the election to some members, naming himself Chief Election Officer (which position does not exist). Respondent did not believe 2014 was the proper year for an election, and this was just Ork's way of avoiding resistance in having the new building of his choice constructed. Notice of the election was not given to all members, as required by the bylaws, and Respondent and those members in agreement with the other Board members and Officers did not attend the alleged election.

8. Upon information and belief, Appellants' counsel Shealy and Gregg assisted at the election, and armed guards were present as alleged members voted in a new

Board (not including any of Respondent's former Board members except Ork). Further, the Board then called a special meeting without giving the required notice to the current Officers, and elected all new Officers.

9. Just prior to the election, Respondent used funds from its account to retain legal counsel in this matter. In return, Ork withdrew the balance of the account, approximately $61,400, and began a petition among the members regarding what he claimed was Respondent's theft of members' donations.

10. Respondent felt the election(s) were improper, and brought this lawsuit to stop Ork's and Dong's actions until order could be properly restored at the Temple.

11. In the April 21, 2014 Temporary Injunction, the Court ordered Ork to return the withdrawn funds to Respondent's bank account and that the Board and Officers were the same as since the Temple's inception in 2009-10.

12. Prior to the Temporary Injunction Hearing on April 25, 2014, Judge Keith Kelly met with Appellants' attorneys Shealy and Gregg and Respondent's attorneys Talley and Phillips. Judge Kelly asked the attorneys if there was anything that could be done to resolve the matter among the parties, and even if not, what could be done to safeguard the Temple's money during litigation, and discussed a potential trust account with counsel. It was clear to Respondent's counsel at this meeting that the parties and Judge considered the $61,000 a significant sum of money to be protected from either party pending an outcome of the election and other issues.

13. As there was no agreement between the parties, there was hearing held on April 25, 2015, and arguments and affidavits were presented to the court. Judge Kelly took the matters under advisement, and days later asked for a conference call with the parties'

counsel to further discuss the issues. After the conference call, Judge Kelly issued an e-mail directive on May 2, 2014 to the parties' counsel that the parties were to set up a trust account for the Temple's funds, with a lawyer from each side as signatory.

14. The parties discussed the terms of the potential order, and an Order was filed May 16, 2014.

15. When attorneys Phillips and Gregg met in June 2014 to set up the ordered trust account, Gregg brought a cashier's check from Respondent's old account for approximately $1,600. Quite obviously, Respondent was shocked and dismayed to learn that approximately $60,000 was missing.

16. In Appellants' discovery responses, bank records showed that Ork had deposited the funds back into Respondent's account in accordance with the April 21, 2014 Order. However, Respondent learned from a bank teller that Ork removed the other four signatories to the account such that Respondent could not access the account after April 21, 2014. Thus, Ork deposited the funds back into the account but changed the nature of the account so that it was his account and not Respondent's.

17. Ork then proceeded to write three large checks to the construction company before the May 16, 2014 Order was issued. On April 29, 2014, Ork wrote a check for $20,000 to the construction company. On May 7 and 9, 2014, after Judge Kelly's May 2, 2015 email was sent to the parties, Ork wrote two checks, totaling $48,400 out of the account. This Rule to Show Cause followed.

18. Ork does not claim Respondent knew Ork was writing or authorized Ork to write these checks, and in fact admits, "Respondent *was unaware* that the Head Monk had issued the three checks for construction costs." *See* Petition, para. 36.

19. Appellants now argue that Ork should not be held in contempt because he technically complied with the April 21, 2014 Order by depositing the funds into Respondent's account. *See* Petition, paras. 32, 48. Respondent finds this argument disingenuous and arguing form over substance, as Ork changed the signatories on the account to make it his account alone and then proceeded to spend all of the money out of the account towards exactly what he knew Respondent opposed (i.e. construction of Ork's chosen building despite Respondent's lack of approval for that construction), without the approval or even knowledge of Respondent or the court. Ork did so after he had knowledge of the Court's concerns about safeguarding the $61,000, and he knew the Court's Orders that the money should be returned to a joint (with signatories from both sides) account and then a trust account to prevent this type of loss prior to a resolution of other issues.

20. It is clear to Respondent that Ork violated the Orders that the funds in dispute should be deposited into Respondent's account, and then a trust account when Ork changed Respondent's bank account signatories and drafted three large checks, effectively spending all of Respondent's money on a construction contract Ork knew Respondent opposed. *See* April 21, 2014 Order and May 2, 2014 E-mail.

21. In general, a trial court has discretion in determining whether a party is in contempt of court. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607, 567 S.E.2d 514, 519 (Ct. App. 2002). A contempt order "will not be disturbed on appeal unless it is without evidentiary support" or an abuse of discretion. *See Haselwood v. Sullivan*, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984) (citation omitted); *Smith v. Smith*, 359 S.C. 393, 597 S.E.2d 188 (Ct. App. 2004); *State ex rel. McLeod v. Hite*, 272 S.C. 303, 306, 251 S.E.2d 746, 748 (1979) (a court has the inherent authority to punish "offenses

calculated to obstruct, degrade, and undermine the administration of justice"); *Browning v. Browning*, 366 S.C. 255, 262, 621 S.E.2d 389, 392 (Ct.App.2005) ("The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings."); *In re Terry*, 128 U.S. 289, 303, 9 S.Ct. 77, 32 L.Ed. 405 (1888) (citations omitted) (court's contempt power "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts; and consequently to the due administration of justice").

22. A party may be held in contempt where he or she acts " 'voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.' " *Miller v. Miller*, 652 S.E.2d 754, 759-60 (S.C. Ct. App. 2007) (finding trial court was within its discretion in holding party in contempt because such finding was supported by evidence) (quoting *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001)).

23. If a court did not have the power to hold individuals in contempt, "the administration of the law would be in continual danger of being thwarted by the lawless." *Miller*, 375 S.C. at 453-54, 652 S.E.2d at 759 (citing *Terry*, 128 U.S. at 303, 9 S. Ct. 77).

24. It is clear that Appellant Ork violated the April 21, 2014 Temporary Injunction, which he has not timely appealed, by depositing the funds at issue back into Respondent's bank account but then fundamentally changing the nature of that account so that it was his account only and spending the money without authorization from Respondent or the Court.

25. Ork knew at the April 25, 2014 hearing that protecting the funds during litigation was of utmost concern to the Court and parties, and Ork had written notice that the funds were to be placed in a joint trust account on May 2, 2014.

26. Appellants now argue that "the 'directive by electronic communication dated May 2, 2014' was not an order such that Appellants could have been in contempt of it." *See* Petition, paras. 57 and 64.

27. Appellant Ork's argument that a party can violate a court's clear directive to the parties any time before a written order is signed would set too dangerous a precedent in our judicial system. It is common practice for a judge to rule from the bench or otherwise communicate a resolution to parties in a letter or e-mail, and then have attorneys draft and discuss specific language. It is absurd to think that while parties are hashing out specific terms of the order, either party can wholly violate a court's clear directive without reprisal until the final order is signed. This would surely encourage the lawless to thwart justice. *See Miller*, 375 S.C. at 453-54, 652 S.E.2d at 759.

28. Appellant's argument that the May 2, 2014 e-mail is not an order such that Ork could not be held in contempt for violating it may have been more understandable if the e-mail had not spoken directly to Ork's subsequent actions, or if the e-mail had been unclear whether Ork could spend all the funds at issue. Rather, Ork was on notice of the Court's intentions and ruling and therefore could be held in contempt for his actions in direct violation of that ruling. *See Watson v. Citizens' Sav. Bank*, 5 S. C. 159, 166-67 (S.C. 1874) (quoting 2 Abbott's N. Y. Dig. 5) (finding, "defendants in a cause are guilty of a contempt in violating an order which the Court had pronounced, and of which they knew, although the order was not entered or the process served.").

29. It is not as if Ork waited to see what the exact language of the written order would be; rather, he quickly spent almost all of the money within days of the court's e-mail, and there is no evidence he had to do so to avoid any mechanic's lien as argued by his counsel. He certainly did not tell Respondent or the court or get permission to spend the money.

30. Appellants further claim that Ork, "has no income, survives on the donations of others, owns no property..." and thus, "does not have the ability to purge himself of contempt." *See* Petition, paras. 44-45.

31. In support of their argument that a party should not be held in contempt when the party cannot purge the contempt, Appellants cite the *Phillips* case. *See Phillips v. Phillips*, 341 S.E.2d 132, 288 S.C. 185 (S.C. 1986). In the *Phillips* case, a grandmother was held in contempt for failing to bring a child to court hearings when the child's father had taken the child out of state. *See id.* Because the grandmother did not physically have the child in her custody, it was impossible for her to comply with the court's order. *See id.* This is not like the *Phillips* case, because it is possible for Ork to pay back the funds he spent.

32. Contrary to his allegation, Ork does have personal funds, as he is given personal donations by the members of the temple and others. During and immediately prior to this litigation, he has taken cross-country trips, hired Appellants' counsel to facilitate the election prior to the underlying litigation, and likely has been paying his attorneys during this litigation. These funds seemingly do not come from Respondent's building temple fund, as Ork feels using those for anything beyond building construction is a "misuse" of donations. *See* Petition, para. 12.

33. After Ork argues that he has no money and cannot purge himself of contempt, he then admits to this Court that he has already received enough donations to purge himself of contempt. *See* Petition for Writ of Supersedeas with Request for Expedited Decision, para. 60 ("Some of the Head Monk's supporters donated cashier's checks for the entire amount the Contempt Order requires the Head Monk to pay."). Again, it seems it is possible for Ork to purge his contempt, and to have already done so.

34. Further, it seems a ludicrous argument to Respondent that a party ordered to deposit money into an account during pending litigation could spend said money, and then avoid a contempt order because he does not have the means to repay the money. What kind of incentive would this give parties ordered to safeguard money in litigation?

35. The Contempt Order should not be stayed. An appeal does not automatically stay an order of civil contempt. *Decker, Matter of*, 471 S.E.2d 459, 322 S.C. 212 (S.C. 1995). Thus, a party must request supersedeas to stay proceedings in the lower court.

36. Supersedeas, however, should be requested from the trial court before sought on appeal in all but extreme cases, and Appellant has not requested supersedeas from the trial court. *See* South Carolina Rule of Appellate Procedure 241 (d)("Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision"). Appellant has not shown extraordinary circumstances justifying its failure to request supersedeas from the lower court.

37. Although it is within the Court's discretion to grant supersedeas, this case is not one in which supersedeas is appropriate. *Compare Decker, Matter of*, 471 S.E.2d 459 (granting supersedeas to prevent party's incarceration while appellate court considered novel constitutional questions) with *City Of Spartanburg v. Belk's Dep't Store Of Clinton*, 199 S.C. 458, 20 S.E.2d 157 (S.C. 1942) (stating, "nor do we see any reason why a supersedeas should have been granted" in a case where property had been condemned, and the only issue remaining was to determine how much the owner was owed for the property).

38. As for Appellants' untimely arguments that the Temporary Injunction(s) are not valid without bond, Judge Kelly effectively waived the required bond by requiring the funds at issue be placed into an account with both parties' signatories and then a joint trust account. In the May 16, 2014 Temporary Injunction, which superseded the April 21, 2014 Temporary Injunction, Judge Kelly expressly waived the bond requirement.

39. Even this Court finds a bond is required, this does not reverse the injunction but rather, proceedings should be remanded for determination of an appropriate bond. *See AJG Holdings, LLC, et al., v. Dunn, et al.*, 674 S.E.2d 505, 509 (S.C. Ct. App. 2009) (remanding for determination of proper bond).

40. As to Appellant's argument that attorney's fees were improperly awarded because Respondent's counsel did not submit an attorney fee affidavit, Respondent states that it did in fact submit an affidavit for attorney's fees showing time spent preparing the issues and attending a hearing which justified the amount awarded. Granting a reasonable amount of attorney's fees was well within the trial court's discretion. *See Cheap-O's Truck Stop, Inc.*, 567 S.E.2d 514 (finding attorney's fees proper award in contempt action).

41. Appellants have cited no authority supporting their allegation that supersedeas should be granted or that an expedited appeal is necessary in this matter.

Accordingly, Respondent respectfully requests the Appellants' Petition for Supersedeas be denied.

Dated this the 6th day of March, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Return to Petition for Supersedeas in this action was served upon Defendants, by and through their attorneys, Thomas Belenchia and Camden Shealy, by first class mail sending copies of the same with sufficient postage affixed thereto, and addressed as follows:

Thomas Belenchia
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TALLEY LAW FIRM, P.A.

Shannon M. Phillips

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March 6, 2015