

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIDGEPORT AND PORT JEFFERSON
STEAMBOAT COMPANY, ET AL.,

CASE NO. 3:03 CV 599 (CFD)

Plaintiffs,

- against -

BRIDGEPORT PORT AUTHORITY,

July 13, 2010

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF THE
FERRY COMPANY'S MOTION FOR ORDER OF
CONTEMPT AND RELATED RELIEF**

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Plaintiff Bridgeport and Port Jefferson Steamboat Company (the “Ferry Company”) submits this memorandum of law in support of its motion for an order of civil contempt and related relief against defendant, Bridgeport Port Authority (“Port Authority”).

Preliminary Statement¹

By this motion, the Ferry Company seeks various items of substantive and procedural relief, all stemming from the Port Authority’s failure to comply with the permanent injunction contained in the Decision and Judgment issued by the Court in July 2008, which limited and required the Port Authority to reduce the Passenger Fee.

The Court is familiar with the factual and procedural background of this case. The background relevant to this motion, the relief requested, and the grounds for such relief, are set forth in the accompanying declarations of Martin Domb and Frederick A. Hall. To avoid needless repetition, we briefly summarize these matters below, and we respectfully refer the Court to those declarations for a fuller statement thereof. In the legal argument section below, we address the Court’s power to hold a party in civil contempt, and to impose sanctions and award damages and attorneys’ fees in connection therewith.

Two years after the Court enjoined the Port Authority to *reduce* the Passenger Fee, in July 2008, the Port Authority has yet to do so (Hall Decl. ¶ 3; Domb Decl. ¶¶ 9-16).

The Port Authority avoided the effect of the injunction – so that it could continue collecting an illegally excessive Passenger Fee – for as long as it could. First, it successfully obtained from this Court a stay of the Judgment pending its appeal to the Court of Appeals. It then tried to needlessly prolong the appeal (and therefore the stay), by repeatedly opposing the

¹ Capitalized terms herein have the same meaning as in the accompanying declarations of Martin Domb and Frederick A. Hall (“Domb Decl.” and “Hall Decl.” respectively).

Ferry Company's motion to expedite the appeal. But the Court of Appeals did expedite the appeal. Following briefing and oral argument, the Second Circuit affirmed the Judgment in all respects by opinion dated May 29, 2009 (reported at 567 F.3d 79). The Port Authority extended the stay by petitioning for rehearing *en banc*, and when that petition was denied, it sought to continue avoiding the Judgment by asking the Court of Appeals to stay the Judgment pending filing of and a decision on the Port Authority's petition for certiorari. The Court of Appeals denied that motion, and issued its mandate, on August 27, 2009. On January 11, 2010, the Supreme Court denied the Port Authority's petition for certiorari. (Domb Decl. ¶¶ 23-24.)

During the 13 months from July 2008 to August 2009, while its appeal, petition for rehearing, and motion for a stay were pending before the Second Circuit – and as this Court anticipated at the July 29, 2008, hearing should the Court of Appeals affirm – the Port Authority “collected an awful lot of money that it [wasn't] entitled to under [the Court's] decision.” (Tr. of July 29, 2008 hearing [Domb Decl. Ex. A], pp. 5-6.)

Once the Court of Appeals issued its mandate on August 27, 2009, the stay ended and the Judgment went into effect. But the Port Authority still, almost a year later, has not reduced the Passenger Fee. Following issuance of the mandate, however, the Ferry Company resorted to “self-help” in order to effectuate the Judgment and prevent further collections of amounts to which the Port Authority was not entitled. Mindful that the Judgment bars the Port Authority from either imposing *or collecting* an excessive Passenger Fee, the Ferry Company has withheld from its monthly remittances to the Port Authority – since August 27, 2009 – 57% of the as-yet unreduced Passenger Fee amount (Hall Decl. ¶ 6). That is the percentage by which the Court found the Passenger Fee to be excessive as of 2003 and through trial in 2006, for purposes of

computing the damages of passenger plaintiff D & D Wholesale Flowers Inc. (Decision, pp. 23-24).

The Port Authority performs far fewer ferry-related activities today than it did at the time of trial, while it continues to perform non-ferry activities (such as the high speed ferry and port development generally), which it still funds from the Passenger Fee (Hall Decl. ¶ 14; Domb Decl. ¶ 34). The Ferry Company therefore believes that an appropriate Passenger Fee currently should be considerably lower than 43% of the fee that has been in effect since before July 2008.

As the Court is aware, the parties and their counsel spent the last six months trying to reach a global settlement of all issues in this litigation and their relationship generally, but were unable to do so. The Court has scheduled oral argument on “all pending motion(s)” for July 27, 2010. The Ferry Company’s motion for attorneys’ fees has been fully briefed and awaiting oral argument since December 2009 (that argument was deferred pending the settlement efforts). The issues concerning the Passenger Fee also remain to be determined, and accordingly, by this motion the Ferry Company brings those issues to the Court’s attention and seeks a prompt and orderly procedure for their determination by the Court.

As described more fully in the accompanying motion and Domb Decl. (at ¶¶ 32-39), the Ferry Company seeks a short period of discovery followed by an evidentiary hearing at which the facts relevant to the Passenger Fee issues can be presented. The argument section that follows addresses the Court’s power to hold the Port Authority in civil contempt, to impose appropriate sanctions to ensure future compliance, and to award the ferry company damages and attorneys’ fees in connection therewith.

ARGUMENT

I. THE PORT AUTHORITY SHOULD BE HELD IN CIVIL CONTEMPT FOR FAILING TO COMPLY WITH THE COURT'S DECISION AND JUDGMENT

The Court has inherent power to hold a party in civil contempt for failing to abide by the Court's orders or judgments. Such power may only be exercised when "(1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply." New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989).

In the present case, the exercise of the Court's contempt power against Port Authority is appropriate. First, the language of the Decision and Judgment is clear and unambiguous. The Court enjoined the Port Authority as follows:

The Port Authority is enjoined from the further use of revenues from the Passenger Fee to fund its activities that are unrelated to and do not benefit the ferry passengers or approximate their use of the port, and the Passenger Fee shall be reduced accordingly. The Port Authority shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port.

(Judgment [Docket # 187], emphasis added.) The Decision includes language that is nearly identical to the Judgment (Decision [Docket # 186], at 44-45). This language is not subject to multiple interpretations.

As required by Federal Rule of Civil Procedure 65(d), the Decision and Judgment "describe in reasonable detail . . . the act or acts to be restrained." Fed. R. Civ. P. 65(d). The injunction entered by the Court clearly requires the Port Authority to *reduce* the Passenger Fee to an amount that is necessary to cover only those expenses that benefit ferry passengers and fairly approximate their use of the Port. However, since entry of the Judgment on July 8, 2008, over two years ago, the Port Authority has failed to reduce the Passenger Fee as required by the

Decision and Judgment, and has continued to fund non-ferry activities from the Passenger Fee (Hall Decl. ¶ 14).

Second, the Port Authority's failure to comply with the Decision and Judgment is supported by clear and convincing evidence. The indisputable fact is that the Port Authority has never reduced the Passenger Fee (Hall Decl. ¶ 3).

Third, the Port Authority has not diligently attempted in *any manner* – let alone in a reasonable manner – to comply with the Decision and Judgment (*id.*; *see also* Domb Decl. ¶¶ 16-28).

The record already is clear, even before an evidentiary hearing, that the prerequisites for the Court to exercise its inherent contempt power have been satisfied. Accordingly, the Court should issue an order holding the Port Authority in civil contempt for failure to comply with the clear and unambiguous language of the Decision and Judgment.

II. THE COURT SHOULD IMPOSE APPROPRIATE CONTEMPT SANCTIONS AND AWARD DAMAGES AGAINST THE PORT AUTHORITY

Upon finding the Port Authority in civil contempt, and following the evidentiary hearing, the Court should impose appropriate contempt sanctions against it. Imposing sanctions for civil contempt serves two purposes: (1) to coerce future compliance and (2) to remedy past non-compliance. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979). Sitting in equity, the Court has wide discretion in determining a remedy to coerce future compliance. *Id.* For example, the Court may impose a fine as a coercive device. *See Terry*, 886 F.2d at 1353 (holding that a coercive sanction of \$25,000 for each successive act of contempt was appropriate). Past non-compliance, by contrast, may be remedied by awarding the Ferry Company any proven damages caused by the Port Authority's violation of the terms of the injunction. *See Vuitton et Fils S.A.*, 592 F.2d at 130 (“once the plaintiff has proved that he has

suffered harm because of a violation of the terms of an injunction, compensatory damages are appropriate.”).

Based on the Port Authority’s blatant failure to comply with the Decision and Judgment for over two years, the Court should exercise its informed discretion by imposing a fine on the Port Authority for each additional day of future non-compliance, as a coercive device. When imposing coercive sanctions, the Court should consider “(1) the character and magnitude of the harm threatened by the continued contumacy, (2) the probable effectiveness of the sanction in bringing about compliance, and (3) the contemnor’s financial resources and consequent seriousness of the sanction’s burden.” Terry, 886 F.2d at 1353. However, “[t]he ultimate consideration is whether the coercive sanction . . . is reasonable in relation to the facts.” *Id.*

Here, imposing a fine on Port Authority for each day of future non-compliance is reasonable under the circumstances. For 13 months, while it pursued its appeal and engaged in dilatory tactics before the Court of Appeals, the Port Authority continued to collect an excessive Passenger Fee. To use the Court’s own anticipatory words, it “collected an awful lot of money that it’s not entitled to under my decision.” Even after its appellate remedies were exhausted, on August 27, 2009, the Port Authority did not reduce its Passenger Fee, forcing the Ferry Company to take the initiative to effectuate the injunction at least in part (Hall Decl. ¶ 6; Domb Decl. ¶ 25). The Port Authority thus has caused harm to both the passengers and the Ferry Company, (a) during the 13-month period of its appeal, by collecting an excessive amount for which it must account, and (b) for the period since August 27, 2009, by failing to reduce the Passenger Fee and causing the Ferry Company to withhold and reserve excessive amounts instead of taking them in as revenue. The passengers have been harmed to the extent the 43% that the Port Authority has collected was excessive, and the Ferry Company has been damaged to the extent it has been

unable to realize its own revenue and profit from the 53% that it has withheld but that it has been forced to maintain in a separate account.

This constitutional harm will continue until the Port Authority complies with the Court's Decision and Judgment. The imposition of a fine for future non-compliance, if high enough, will likely cause the Port Authority to comply with the Decision and Judgment. Further, in view of the fact that the Port Authority has been using the funds derived from the Passenger Fee for purposes that do not provide a benefit to the ferry passengers – which is impermissible under the Court's Decision and Judgment – the imposition of a fine should not cause a serious burden on the Port Authority's finances.

Accordingly, following the evidentiary hearing requested hereby, the Court should impose a fine on the Port Authority for each future day of non-compliance in such appropriate amount as the Court determines will coerce the Port Authority to comply with the Decision and Judgment. In addition, the Court should award the Ferry Company damages, to be proved at the hearing, in the amount of all or a portion of the 57% that it has withheld and retained in a separate account since August 27, 2009, and the Court also should determine the proper distribution – to passengers and/or the Ferry Company – of the excessive portion of the Passenger Fee that the Port Authority has collected since July 2008.

III. THE COURT SHOULD AWARD THE FERRY COMPANY ITS REASONABLE ATTORNEYS' FEES AND COSTS IN CONNECTION WITH THIS MOTION

Regardless of the purpose served by the contempt sanctions imposed, the Court “may award appropriate attorney fees and costs to a victim of contempt.” Wietzman v. Stein, 98 F.3d 717, 719 (2d Cir. 1996). In addition, because the Ferry Company should be made whole for the

harm it has sustained, it is appropriate for the Court to award it the reasonable attorneys' fees and costs it has incurred in litigating the contempt. Vuitton et Fils S.A., 592 F.2d at 130.

When deciding whether to award attorneys' fees and costs to a victim of contempt, the Court may consider the willfulness of the contemnor's misconduct. Wietzman, 98 F.3d at 719. (“[W]hile willfulness may not necessarily be a prerequisite to an award of fees and costs, a finding of willfulness strongly supports granting them.”). In this instance, the facts evidencing the Port Authority's blatant non-compliance with the Court's Decision and Judgment support a finding of willfulness by the Port Authority.

Because the Port Authority's contempt for this Court's injunction was willful, an award of attorneys' fees and costs to the Ferry Company is proper. *See* Wietzman, 98 F.3d at 719 (“to survive review in [the Second Circuit Court of Appeals], the district court, having found willful contempt, would need to articulate persuasive grounds for any denial of compensation for the reasonable legal costs of the victim of contempt.”).

Accordingly, following the evidentiary hearing, and submission of appropriate proof of such fees and costs, the Court award the Ferry Company its attorneys' fees and costs incurred in connection with this motion.

(Remainder of this page intentionally left blank.)

Conclusion

For the foregoing reasons, the Court should hold Port Authority in civil contempt for failing to comply with the Court's Decision and Judgment and, following an evidentiary hearing, impose an appropriate sanction on the Port Authority to ensure future compliance, determine the proper disposition of excessive amounts collected by the Port Authority, and award the Ferry Company its damages caused by the contempt as well as its reasonable attorneys' fees and costs incurred in litigating the issue of Port Authority's contempt.

Dated: July 13, 2010

BRIDGEPORT AND PORT JEFFERSON
STEAMBOAT COMPANY, D & D Wholesale
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CERTIFICATE OF E-SERVICE

I hereby certify that on **July 13, 2010**, a copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF THE FERRY COMPANY'S MOTION FOR AN ORDER OF CONTEMPT AND RELATED RELIEF** was filed electronically and served by mail on anyone unable to accept electronic filing (all counsel were served electronically). Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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