92-6832.rr3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

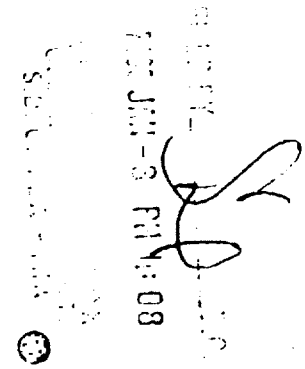
CASE NO. 92-6832-Civ-Ungaro-Benages
Magistrate Judge Brown

COMMODITIES FUTURES TRADING COMMISSION,

Plaintiff,

v.

TRINITY FINANCIAL GROUP, INC.,
CARRINGTON FINANCIAL CORP, INC.,
A. FRANCIS SIDOTI, and
MARC STEPHEN WUENSCH
Defendants.



REPORT AND RECOMMENDATION

This matter is before this Court on Motion of Plaintiff Commodity Futures Trading Commission's to Impose Coercive Sanctions..., filed September 25, 2001.[1] The Court has considered the motion, the response, the reply, and all pertinent materials in the file. In addition, a hearing was held and argument of counsel considered. While the motion is couched as a motion "for coercive sanctions," since it seeks, among other things, incarceration of the defendant it is, in reality, another motion for contempt related to the District Judge's prior order of disgorgement.

LEGAL STANDARD

A civil contempt proceeding is brought, as in this matter, to force a party to act in a defined manner. Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998). The burden on the party seeking

[1]Also referred to this Court is the Response and Objection of Plaintiff ... to Defendant ...'s Notice of Supplementary Compliance with March 28th Order. That issue is subsumed herein.

contempt is to show, by clear and convincing evidence, that the party allegedly in contempt violated the court's earlier order. U.S. v. Roberts, 858 F.2d 698, 700 (11th Cir. 1988); see also Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1529 (11th Cir. 1992); Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). This burden of proof is more exacting than the "preponderance of the evidence" standard but, unlike criminal contempt, does not require proof beyond a reasonable doubt. U.S. v. Rizzo, 539 F.2d 458, 465 (5th Cir. 1976)[2]. Once the petitioner makes a prima face showing of a violation, the burden of production shifts to the party alleged to be in contempt to produce detailed evidence specifically explaining why he cannot comply. Roberts, 858 F.2d at 701; see also Wellington 950 F.2d at 1529; U.S. v. Rylander, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552 (1983). The burden shifts back to the initiating party only upon sufficient showing by the alleged party in contempt of an inability to comply. At that point, the party seeking to show contempt then has the burden of proving ability to comply. Watkins, 943 F.2d 1297 at 1301; Wellington 950 F.2d at 1529. The focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged parties in contempt in complying with the order, but whether in fact their conduct complied with the order at issue. Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990.)

Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance. Id. at 1516 (citing Newman v. Graddick, 740 F.2d 1513, 1524-1525 (11th Cir. 1984)). In a "show cause" hearing, the party against

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[2]Decisions of the United States Court of Appeals for the Fifth Circuit, (the "former Fifth" or "the old Fifth") as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit for this court." Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

whom the contempt is sought must show that they did not violate the order or were excused from complying. See Chairs, 143 F.3d at 1436.

The remedy of disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws. SEC v. Friendly Power Co., 49 F.Supp.2d 1363, 1372 (S.D. Fla. 1999) (citing SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)). In disgorgement cases, the burden is on a defaulting fiduciary to demonstrate that application of the usual rule of complete disgorgement will produce a real injustice. McDonald v. O'Meara, 473 F.2d 799, 805-806 (5th Cir. 1973).

Once a prima facie showing of a violation has been made, the respondent can defend on the grounds that he was unable to comply. U.S. v. Hayes, 722 F.2d 723, 725 (11th Cir. 1984). The Eleventh Circuit has held that to succeed on this defense, however, the respondent must go beyond a mere assertion of inability and satisfy his burden of production on the point by introducing evidence in support of his claim. Id. at 725 (citing Rylander, 460 U.S. 752 (1983)). The trial court's finding of present ability to pay is a factual determination entrusted to the sound discretion of the court and subject to the clearly erroneous rule. Combs v. Ryan's Coal Co, Inc., 785 F.2d 970, 983 (11th Cir. 1986). It is further relevant to note that, "[i]t may be that [defendant] lack[s] the present ability to pay the obligation...But [his] failure to make all reasonable efforts to demonstrate that fact for the court means [he was] properly held in contempt." Id. at 984.

"Inability," as a defense to contempt does not mean that compliance must be totally impossible. Chairs, 143 F.3d at 1437. Instead, in this circuit, a party under court order to produce documents has "a duty to make in good faith all reasonable efforts to comply." Hayes, 722 F.2d at 725; see also Rizzo, 539 F.2d at 465 (quoting U.S. v. Ryan, 402 U.S. 530, 534 (1971)). Thus, unless

a respondent introduces some evidence to suggest that he has made all reasonable efforts to comply, his claimed inability to produce will not rebut the prima facie showing of non-compliance. Hayes, 7220 F.2d at 725. Further, where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings. Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1521 (11th Cir. 1986) (citing U.S. v. Asay, 614 F.2d 655, 660 (9th Cir. 1980)).

The Southern District of Florida has reiterated the three-pronged standard for establishing an inability to comply defense to contempt:

> Recently, the Eighth Circuit, citing to the Eleventh Circuit's decision in CFTC v. Wellington, 950 F.2d 1525 (11th Cir. 1992), also confirmed that a mere assertion of "present inability" is insufficient to avoid a civil contempt finding. Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 506 (8th Cir. 2000). Rather, the Eight Circuit states that "the alleged contemnors defending on the ground of inability to comply must establish: (1) that they were unable to comply, explaining why 'categorically and in detail,' Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1241 (9th Cir. 1999); (2) that their inability to comply was not 'self-imposed,' In re Power Recovery Sys., Inc., 950 F.2d 798, 803 (1st Cir. 1991); and (3) that they made 'in good faith all reasonable efforts to comply,' CFTC, 950 F.2d at 1529."

In re Lawrence, 251 B.R. 630, 652 (S.D. Fla. 2000).

In order to succeed on an inability defense, the alleged contemnor must establish that he has made "in good faith all reasonable efforts" to meet the terms of the court order he is seeking to avoid. Wellington, 950 F.2d at 1529; see also Combs 785 F.2d at 984 ("We construe this requirement strictly. 'Even if the efforts he did make were "substantial," "diligent" or "in good faith," ... the fact that he did not make "all reasonable efforts" establishes that [respondent] did not sufficiently rebut the ... prima facie showing of contempt.'" (quoting Hayes, 722 F.2d at 725)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issue of whether defendant is in violation of an order of the Court is easy to resolve. This Court has previously noted that defendant has stipulated to same. Clearly he has not paid in full the disgorgement to which he has been obligated by a prior order of the District Court dated December 7, 1999.

The next issue concerns defendant's alleged inability to pay. Previously, when this Court raised specific items of concern during the hearings regarding the efforts of defendant to properly document his purported inability, it was only afterwards that defendant made some efforts that resulted in the production of additional documentation.

This Court has reviewed the materials submitted, plaintiff's Response and Objection...to Defendant Marc Wuensch's Notice of Supplementary Compliance with March 28th Order (D.E.606) and the materials associated therewith. There is no question that, viewed in a light most favorable to defendant, there exists substantial unaccounted-for missing dollars, save for defendant's own, unsupported testimony (under oath) as to why it allegedly cannot be accounted for.

Notably, though defendant claims that substantial sums were spent on "personal entertainment," no sort of any documentation has ever been offered regarding same, nor has the attempt to obtain any documentation been shown. While this Court recognizes that this is a sensitive area of inquiry, there are millions of dollars unaccounted for.[3] Defendant simply brushes this matter off by saying something akin to "of course there are no records for this" without any further

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[3]This includes approximately $450,000 of the monies involved in the actual order of disgorgement, and some two million dollars of post-disgorgement dollars that remain unaccounted for. While these latter dollars are irrelevant to the amount owed under the order of disgorgement, they are relevant to defendant's ability to pay.

justification. While this Court recognizes the "sensitive" nature of this issue, it also recognizes defendant's obligation to numerous persons defrauded by his actions... to say nothing of his burden in this proceeding. If what is meant by "personal entertainment" is street walkers on Biscayne Boulevard, records are, understandably, non-existent. However, just brushing off the "of course there are no records" argument without more is not necessarily accurate. A recent indictment in this District suggests that in "higher levels" of "personal entertainment," records may indeed exist. It is worth noting, in addition, that spending $1,000 per week for a five year period for this "entertainment" would still only explain less than 20% of the unaccounted for dollars. It is worth noting that if this Court is to accept the showing in this area, anyone in the defendant's position could simply fall back on "the world's oldest profession" as an excuse for, and satisfaction of, defendant's substantial burden to demonstrate his inability to pay.

With regard to the gambling records, this Court substantially agrees with plaintiff. Those records, viewed in a light most favorable to defendant, document less than 10% of the missing dollars. On one hand, the records, to some extent, verify defendant's gambling. However, the records produced are far more significant for what they do not verify.[4] The pattern of gambling reflected therein strongly suggests that defendant's unverified gambling, unless radically different from the verified materials, cannot account for even another 10% of the missing funds. Coupled with the commodities and other accounts, fully 75%, if not more, of the missing dollars remain totally unaccounted for, considering the post-disgorgement missing funds which, as stated, supra, are relevant to the present alleged inability to pay.

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[4]Viewed in a light most favorable to defendant, this Court will not even address/consider the issue of whether the records are pertaining only to defendant, or to defendant and his wife.

This Court rejects defendant's argument that this is nothing more than a motion for reconsideration. In a sense it is, though based on a new and different set of circumstances.

Defendant originally claimed that much of the money he received in the earlier years was squandered gambling. He had no records from any casinos where he claimed to have gambled, and made no effort to obtain same until these hearings commenced. It was only when the evidence showed that he was "rated" at some casinos in Las Vegas and the Bahamas and this Court informed defendant that if he was rated, there must be records to show what he gambled and when, that he made efforts to obtain such records. While those records support his claim of gambling, they leave, as noted, large amounts of unexplained dollars. Notwithstanding that he claims to have bet at "sports books" at casinos (T-91)[5], there is no indication he sought, much less obtained, any records of same.

The uncontroverted evidence is that, notwithstanding the fact that the receiver has been seeking records from the defendant to substantiate his gambling losses since 1997, defendant did nothing to attempt to get any such records until after this hearing began. (T-120). This fact is even more egregious and relevant given that defendant's excuse for no records is, in part, that some of the casinos have changed ownership. (T-123). This is tantamount, in a manner of speaking, to the man who murdered his parents asking the Court to have mercy because he is an orphan. If those records had been promptly and properly sought at the outset, a clearer picture of defendant's gambling habits may have appeared which might have supported, but also may have refuted, defendant's allegations in this regard. This Court reiterates that the gambling records finally produced do not support the amount of gambling claimed by defendant.

It remains uncontroverted that defendant took monies that could have been used to partially

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[5]"T" refers to the transcript of the testimony before this Court.

pay the disgorgement, and gambled with it in the Bahamas, even recently. Though defendant claims that he only took up to $2000 on those trips (T-127), the records from The Casino at Bahamas suggest it may have been more than that - monies that could have been used towards disgorgement.

Defendant, in this contempt proceeding, remains subject to incarceration. Therefore, he is entitled to be represented by counsel. See Holt v. Commonwealth of Virginia, 85 S. Ct. 1375 (1965); Anonymous Nos. 6 and 7 v. Baker, 79 S. Ct 1157 (1959). A substantial issue arose over the payment of attorney's fees. This Court accepts defendant's rights to an attorney and to pay him or her using outside sources to do so. See, e.g., United States v. McAnlis, 721 F. 2d 334, 337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984). Substantial funds have been made available from outside sources (defendant's wife, family members, etc.), but this, again, raises the question of whether defendant has discharged his burden "to show that all reasonable avenues for raising funds have been explored and exhausted ...." Phoenix Marine Enterprises, Inc., supra.

A final and equally important factor must be addressed. Though not specifically a requirement, there is no question that substantial efforts were made by plaintiff and the receiver to locate other assets, without success. These efforts included retention of capable investigators who were unable to locate anything remotely supporting the obvious inference sought by plaintiff - that defendant has hidden assets somewhere in the world.

Courts have fashioned payments in lieu of incarceration. See, e.g., Wellington, supra. Defendant offered payment of the sum of $150,000 to "bring this matter to an end." The plaintiff appeared willing to consider payment, but requested the sum of $500,000. In light of the information missing, as discussed, supra, this Court finds merit, at least in part, to plaintiff's position. Courts fashioning payment in lieu of incarceration have discussed payment of 5% of the disgorgement order,

which in this case would amount to approximately $350,000.

RECOMMENDATION

As noted, supra, the motion for contempt should be **GRANTED,** in part. For the reasons stated herein, at the very least, serious sanctions should be imposed against the defendant. Considering and balancing both the non-accounted for dollars as well as the failure to locate anything resembling hidden assets, this Court again recommends a finding of civil contempt and incarceration. However, it further recommends that said order be purged by a payment, within 60 days, of the sum of $250,000, and an increase in the monthly payment to $1500.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Ursula Ungaro-Benages, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988).

DONE AND ORDERED this 3rd day of January, 2003 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Ursula Ungaro Benages
Peter M. Haas, Esq. [fax (202) 418-5538]
Joseph A. DeMaria, Esq. [fax (305) 536-1116]
Dominique Suite, Esq. [fax (954) 765-1477]