Contemptible: Enforcing Money Judgments In Surrogate's Court

By: Gary E. Bashian*

"*JUDGE*: Are you trying to show contempt for this court?
MAE WEST: I was doin' my best to hide it."
— Mae West.

It seems to be undeniable that litigation in New York is on the rise. Market volatility, unemployment, ever increasing medical, healthcare, and living costs, the reasons for this explosion in litigated matters of all kinds are innumerable. The confluence of political, economic, and social turmoil that has made headlines across the globe over the past several years, and which has been felt especially hard here in New York, have prompted a downward pressure that has undeniably fueled this litigation boom.

These same underlying factors that have led to this surge in litigation generally, have also directly impacted a growth in Estate litigation. The noticeable increase in contested accounting proceedings, and even discovery/turnover proceedings, are forcing many Trusts and Estates practitioners to cope with a problem more regularly encountered by civil litigators in other areas of practice: Judgment Enforcement.

Ordinarily, a favorable Order, or final Judgment, on an issue that directs an opposing party to pay money is considered to be a victory by counsel and client alike. However, one can find themselves "clutching defeat from the jaws of victory" where they are forced to deal with an opposing party who simply refuses to remit the funds, documents, goods etc. as which they have been directed to do by the Court. Increasingly, if not unsurprisingly, this is the case many of us are finding ourselves in.

The problem here is obvious: how do you force a party who has no compunction about flouting the authority of the Court, to comply with what amounts to be little more a piece of paper telling them what to do with a raised seal and signature.

Enforcement of Judgments are governed by New York Civil Practice Law and Rules ("CPLR") article 51 and 52. Consisting of over 40 subsections, almost all are characterized by a deeply technical tone even for the CPLR, the denseness of the language itself serving almost as a warning about the practical difficulties of utilizing their provisions.

Generally speaking, enforcement falls into one of two categories: Execution or Contempt. Overwhelmingly, executing a judgment is a complex, costly, and time consuming endeavor that may ultimately fail in compelling payment if the judgment debtor has effectively hidden their assets and/or income.

However, enforcement by way of Contempt, though rarely granting immediate relief, in my experience remains the most practical and effective enforcement mechanism to compel payment.

By no means can it be implied that moving for, and actually having a party held in Contempt, is an easy task. On the contrary, it is a highly technical and formalized application to the Court whose procedural requirements must be followed to the letter if due process is to be satisfied, and the application will be granted.

Though CPLR articles 51 and 52, working in conjunction with Judiciary Law article 19, authorize the Courts generally to exercise Contempt powers, article 6 of the Surrogate's Court Procedure Act ("SCPA") governs Contempt proceedings in the Surrogate's Courts; specifically SCPA § 606 and § 607 in conjunction with Judiciary Law article 19.

With the dual powers of fine and imprisonment, enforcement by Contempt is very much a coercive tool for compelling payment, but as indicated above, one that is very technical, if not arcane.

It is important to note that only the violation of an Order or a Judgment are can lead the finding of Contempt, meaning one must first Settle and later Enter a Decision with the Court where compliance has not occurred.[1]

Initially, the Petitioner must, via in hand personal service, serve a certified copy of the Order or Judgment upon the Contemnor.[2] Substituted service is not sufficient, a requirement that invites obvious practical problems as a party who refuses to comply with the directive of the Courts will undoubtedly have no issues about evading service at every opportunity.

Subsequent to service of the Certified Order or Judgment, if the judgment debtor still has not complied with the Order or Judgment, which they probably haven't, the application to hold the individual in Contempt must be brought before the Court by an Order to Show Cause. Notably, the Order to Show Cause must include, in at least an 8 point bold font, the language: "WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT" in order to even be considered by the Court.[3] Additionally, the face of the Order must also include the language: "The purpose of this hearing is to punish you for a Contempt of Court. Such punishment may consist of fine or imprisonment, or both, according to law."

In many cases, Petitioner is forced to seek enforcement by Execution before moving for Contempt. However, where the Contemnor is a fiduciary of an Estate, and the violation relates to an Order or Judgment germane to the Estate, the requirement for Petitioner to first attempt Execution can be waived by the Surrogate.[4] Be sure to request this waiver in the underlying Affirmation and/or Affidavit in support of the application itself. Although the Court may grant such a waiver *sua sponte*, showing that Execution will prove futile, ineffective, and be an overall waste of judicial resources is an important point to draw to the Court's attention at this juncture.

The Petition itself must be made by a person interested, and the Order or Judgment at issue must direct the payment of a sum of money, or the performance of any act. The Petition itself must establish:

1. A lawful Order or Judgment of the Court has been issued, is in effect, and contains an unequivocal mandate to pay monies;

2. One of the grounds prescribed in the SCPA § 606;

3. That the actions of the contemnor have been calculated to, or actually defeated, impaired, impeded, or prejudiced the rights or remedies of the other side;[5]

4. That a certified copy of the has been personally served on the contemnor;

5. That the contemnor has refused or willfully neglected to obey such order or decree;[6] and

6. Praying that the contemnor be directed to show cause why he should not be punished for contempt.[7]

Most of these elements can be proven with relative ease assuming that compliance with the Order of Judgment has not been met, and harm has been suffered as a result.

As you can imagine, the third element of Petitioner's burden can be the hardest to establish. Though a bare refusal to comply with the Court's directive can be easily shown, often the Court will require a showing of willful neglect before granting a final Order of Contempt - which will in turn lead to fine and/or imprisonment. Presumably, the application of this higher burden on Petitioner is used in order to ensure that all constitutional considerations are met. After all, deprivation of liberty and/or property is not something to be taken lightly by either the Court, or by the Contemnor. By requiring a showing, and making a finding, of willfulness, the Court inoculates itself against claims of error and abuse of discretion which would undoubtedly be raised on appeal. Commonly, in the absence of direct evidence otherwise, a hearing will be scheduled by the Court to determine if the Contemnor's violation of the Order or Judgment has been willful.

To my knowledge, a definition of willfulness, or a bright line test to determine that the Contemnor acted willfully in their refusal to comply with the Order of Judgment at issue, has not been articulated completely by case law. It does not appear that a jstrict definition, circumstantial presumption, or allowable inference exists on that can guide a Petitioner in the task of establishing Contemnor's willfulness.

However, proof indicating that no serious effort to comply with the Order or Judgment of the Court until long after the proceeding to punish for Contempt was instituted[8] will of course go a long way in supporting the argument that Contemnor acted

willfully, and is often easy to establish. Moreover, the operative case law describing what specifically constitutes the willful refusal/neglect to pay monies can be distilled to the basic rule that: Knowledge of the Order or Judgment (established by in hand service) + the failure to comply with the directives of the Order of Judgment = willfulness.[9] Although this test may not be the most elegant of interpretations, it concisely summarizes the Court's approach to determining the level of willfulness a Contemnor is culpable of.

The level of willfulness in a Contemnor's refusal to comply with a directive of the Court is also an important point in and of itself, as it determines whether Contemnor is to be held in either Civil or Criminal Contempt for their violation. Civil or Criminal Contempt can be found from the same violation of the Court's directive, willfulness having to be found with reasonable certainty to find Civil Contempt, and beyond a reasonable doubt for Criminal Contempt.[10] The distinction between the Civil and Criminal Contempt is important not only because it determines the burden of proof on Petitioner for establishing willfulness, but because each is utilized for a different purpose. Civil Contempt is used as a coercive tool to force a contemnor into compliance with the directive of the Court, designed to compensate the injured party for the loss caused.[11] Alternatively, Criminal Contempt is a punitive measure taken against a contemnor to punish and deter disobedience of Judicial mandates.[12] This distinction is important not only on academic grounds, but because one can move for concurrent penalties for both Civil and Criminal Contempt. Furthermore, a finding of Civil vs. Criminal Contempt will determine the length of time that the Contemnor can be incarcerated. Oddly, the period of confinement for Criminal Contempt is less than that for Civil Contempt. Criminal Contempt ordinarily carries with it a maximum confinement of thirty days.[13] Alternatively, a Contemnor found to be in Civil Contempt for the omission to perform a duty or act can be confined indefinitely, as their release if conditioned on their compliance; a Civil Contempt based on a failure to pay a fine of $500 or less carrying with it a maximum sentence of three months, and for a fine above $500 a maximum sentence of six months.[14]

The second, and sometimes overlooked, power of the Court when finding a party in contempt, is that of a fine.[15] The power of the fine should not be discounted as an economic levy, either coupled with or separate from confinement, can prove very

effective. The power of the fine is most notable where the Court allows for a penalty in the amount of the uncollected money judgment itself.[16] In lieu of the proving actual losses, the statutory fine imposed is set at $250.[17]

Given that the potential periods of incarceration are significant, the Judiciary law provides several defenses that can be argued to avoid imprisonment.[18] The most common defenses made being 1) an inability to pay, and 2) the inability to endure confinement – usually based upon medical grounds. Predictably, the burden is on the Contemnor to prove either a financial inability, or any defense of sickness. Conclusory statements, allegations, and claims of insolvency unsupported by documentary an independent and verifiable sworn proof will not be sufficient to establish these defenses; i.e. financial records, tax records, sworn doctor Affidavits, etc. are need to meet this burden.[19] Importantly, the contemnor's inability to pay cannot be caused by their own misconduct[20], such as a series of fraudulent transfers[21], or as is often the case involving an errant Executor, where the funds of the Estate have been misapplied and their misappropriation forms the substance of the Judgment itself.[22] Clearly, the Court is cognizant of the lengths that judgment debtors will go to avoid paying their creditors, and the fact that they have little hesitation perpetrating a fraud upon the Court.

If and when the Order to Show Cause is Ordered by the Court, the initial return date will usually be uneventful. However, the Order itself must be served upon the Contemnor no less than ten days prior to the initial hearing, and no more than thirty days prior to the initial hearing.[23]

Thereafter, the Court will issue a Decision regarding the application. Usually, but dependent on the circumstances and level of culpability of the Contemnor, a second hearing will be scheduled on the Court calendar. At this second hearing, the Court will resolve any issues not determined in the Decision, address any questions it may have regarding Contemnor's willfulness, and prepare to issue a Final Order of Contempt if warranted. Again, depending on the circumstances of the case, the Court will offer the Contemnor one final time period to cure the Contempt by providing a final limited window for compliance to be made. If the Contemnor fails to comply by the end of the period laid

out in the Final Order of Contempt, depending on the terms of the Order itself, the fine will be levied, and a warrant of commitment will be issued.

To enforce the warrant, it must be delivered to sheriff or local law enforcement so that they can then arrest the contemnor. Each county has its own procedure and fee schedule for this process. The NYC.gov website[24] has a description of this process for the boroughs in New York City, other counties in the metropolitan area should be contact directly to ensure compliance with their own unique requirements.

If the Court agrees with the Petitioner, the facts support a finding of Contempt, a warrant of commitment is issued, and if the Contemnor is incarcerated, monies that were previously claimed to be unavailable, tend to suddenly appear and be remitted in order to avoid further incarceration, especially in the cases where the Contemnor's release is entirely predicated in compliance with the Court's directives.

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Mr. Bashian would like to thank Andrew Frisenda, an associate attorney at Bashian & Farber, LLP concentrating in estate, guardianship, trust, and corporate litigation, for his contribution to this article.

[1] CPLR § 5101.
[2] CPLR § 5104; SCPA § 606 (1).
[3] Judiciary Law § 756.
[4] SCPA § 606(1)(d).
[5] Farkas v Farkas, 202 AD2d 316 (App. Div. 1st Dept. 1994).
[6] Matter of Kahr, 85 Misc. 2d 363,366 (Albany County Surrogate's Court 1976).
[7] Matter of Kahr, ibid.
[8] Matter of Cinquemani, 96 Misc.2d 531 (Bronx County Surrogate's Court 1978).
[9] See generally: Kahr, ibid.; Matter of Storm, 28 AD2d 290 (App. Div. 1st Dept. 1967); McCormick v Axelrod, 59 NY2d 574 (1983); McCain v Dinkins, 84 NY2d 216 (1994).

[10] N.A. Development Co. Ltd v Jones, 99 AD2d 238 (App. Div. 1st Dept. 1984).
[11] N.A. Development, ibid, 240.
[12] N.A. Development, ibid, 240.
[13] Judiciary Law § 751.
[14] Judiciary Law § 774.
[15] Judiciary Law § 753
[16] Corpuel v Galasso, 240 AD2d 531(App. Div. 2nd Dept. 1997); Distinguish with Matter of Barclays Bank v Huges, 306 AD2d 406 (App. Div. 2nd Dept. 2003).
[17] Judiciary Law § 773.
[18] Judiciary Law § 775.
[19] Farkas v. Farkas, 209 AD2d 316 (App. Div. 1st Dept. 1994)
[20] Matter of Garrity, 149 Misc. 180 (King's County Surrogate's Court 1933); James Talcott Factors, Inc. v Larfred, Inc., 115 AD2d 397 (App. Div. 1st Dept. 1985).
[21] Matter of Collins, 39 Misc. 753 (King's County Surrogate's Court 1903)
[22] Matter of Gallagher v Keating, 29 NYCiv.Proc.R. 178 (App. Div. 2nd Dept. 1899)
[23] Judiciary Law § 756.
[24] http://www.nyc.gov/html/dof/html/services/services_enforcement_arrests.shtml