

ORIGINAL

IN THE SUPREME COURT OF OHIO

DOCKS VENTURE, LLC,

Appellant,

-vs-

DASHING PACIFIC GROUP,  
LTD.,

Appellee.

) Case No.: 13-0473

) C.A. Case No.: :L-12-1312

) C.P. Case No.: CI-12-1340

)  
) APPEAL FROM THE LUCAS  
) COUNTY COURT OF APPEALS,  
) SIXTH APPELLATE DISTRICT  
)

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MERIT BRIEF OF APPELLANT, DOCKS VENTURE, LLC

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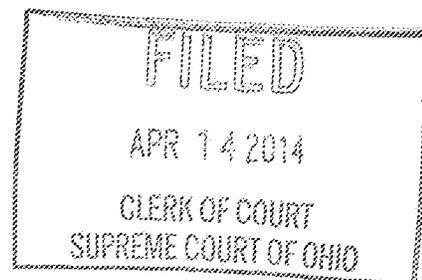


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## STATEMENT OF FACTS

This is an appeal on a certified conflict. The issue certified for review and final determination is: "In a contempt of court action, is the trial court's judgment finding a party in contempt and imposing a sentence final and appealable when the sentence is imposed, albeit with purge conditions, or when the defendant has failed to purge his contempt and sentence is executed?"

On January 24, 2012, Plaintiff-Appellant, Docks Venture, LLC, filed a Complaint in the Lucas County Court of Common Pleas against Defendant-Appellee, Dashing Pacific Group, Ltd. The Complaint sought monetary damages and specific performance of lease provisions. Dashing Pacific Group, Ltd., filed an Answer and Counterclaim, and Docks Venture, LLC, filed a Motion for Preliminary Injunction. The pertinent facts are succinctly summarized in the trial court's Order of April 19, 2012, granting the Preliminary Injunction (Appendix at 13-14):

### Facts Presented

1. The parties entered into two (2) separate leases on the 18<sup>th</sup> March, 2011. Plaintiff's Exhibit A refers to a restaurant formerly known as the Navy Bistro and Exhibit B refers to a restaurant formerly known as Tango's. Exhibit A now refers to Admiral's American Grill and Exhibit B refers to El Vaquero's.
2. What is at issue in this matter is the question of utilities. Both leases are identical on this issue. Item 13 of each lease provides as follows:

**Utilities. Lessee will pay before delinquency all charges for water, sewer, electricity, gas, heating, cooling, and telephone used by Lessee on the Leased Premises. Lessee shall be responsible for contracting directly with all utility providers for such services to be provided under separate metering and direct billing arrangements. Lessor shall provide,**

**repair and maintain the necessary distribution systems and other required equipment, fixtures or facilities necessary to furnish such services to the Leased Premises.**

Item 15 provides for responsibilities of Lessor and item 15.6 states as follows:

**Installing separate meters for all utilities inside the Leased Premises.**

3. The Plaintiff's evidence indicates that the present utilities (gas, water and electricity) are not separately metered and the utilities are not separately divided between the two leased premises (See Exh C). The separate meters violates the leases and must be corrected.

In its April 19, 2012 Order, the trial court issued a preliminary injunction requiring Dashing Pacific Group, Ltd, to provide separately metered gas, electric, and water utilities for each of the leased premises within thirty (30) days (Appendix at 14-15). No appeal was taken from this injunction.

On May 25, 2012, Docks Venture, LLC, filed a Motion to Show Cause requesting that Dashing Pacific Group, Ltd., be held in contempt of court for having failed to provide separately metered utilities as ordered. Hearings were held on the Motion to Show Cause, and on October 2, 2012, the trial court found Dashing Pacific Group, Ltd., in contempt and made the following Order (Appendix at 18-19):

It is therefore ORDERED, ADJUDGED and DECREED that the defendant, Dashing Pacific Group, LTD, an Ohio Limited Company, correct the distribution lines within the leased premises within thirty (30) days to provide separate lines for each tenant for billing purposes.

It is further ORDERED, ADJUDGED and DECREED that the work to be done shall not interfere with the normal business hours of operation of either of the leased premises.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff shall continue to escrow rent with the Clerk of Courts and held by the Clerk until released by the court.

It is further ORDERED, ADJUDGED and DECREED that if the defendant, Dashing Pacific Group, LTD, an Ohio Limited Company fails to comply with this Order within the thirty (30) day time period that the defendant, Dashing Pacific Group, LTD, an Ohio Limited Company shall find [sic] the sum \$1,000 per day until the Order has been complied with in full.

Subsequently on October 26, 2012, Dashing Pacific Group, Ltd., was granted an extension of time to comply with the purge conditions (Appendix at 20).

On October 31, 2012, Dashing Pacific Group, Ltd., filed a Notice of Appeal to the Sixth District Court of Appeals from the October 2, 2012 Order.

On November 16, 2012, Docks Venture, LLC, filed a Motion to Dismiss the appeal on the grounds that the October 2, 2012 Order from which the appeal had been taken was not a final appealable order because a contempt finding imposing a conditional punishment coupled with an opportunity to purge did not constitute a final determination of the contempt action.

On February 25, 2013, in a four (4) page Decision and Judgment Entry, the Sixth District Court of Appeals denied the Motion to Dismiss and *sua sponte* certified its decision to this Honorable Court for review and final determination pursuant to Article IV, Section 3 (B)(4) of the Ohio Constitution. Since the denial of the Motion to Dismiss and certification of conflict occurred before the merits of the appeal were reached by the Court of Appeals, there has been no decision on the merits by the Court of Appeals. This case is before this Honorable Court solely on the procedural question of whether the order appealed from constitutes a final appealable order. That is the question as to which the certified conflict has been accepted.

## PROPOSITION OF LAW

In a civil contempt of court proceeding, a judgment finding a party to be in contempt of court and imposing a sentence conditioned on an opportunity to purge that contempt is not a final appealable order unless and until the party found to be in contempt fails to purge and the sentence is ordered executed.

The issue presented for review and final determination is whether a civil contempt judgment finding a party in contempt of court and imposing a sentence conditioned on an opportunity to purge constitutes a final appealable order when entered, or when the party found to be in contempt fails to purge and the sentence is ordered executed. The appellate courts in Ohio are divided on this issue as noted in *Gauthier vs. Gauthier*, 137 O.St.3d 562, 2 N.E.3d 239, 2013-Ohio-5479 (Kennedy, J., dissenting), reviewing cases.

R.C. 2505.02 defines what constitutes a final appealable order. That statute provides, in pertinent part, as follows:

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy and to which both of the following apply:
  - (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
  - (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

\* \* \*

At the outset, it is clear that a contempt action is not a "special proceeding" as defined in R.C. 2505.02(A)(2). The contempt power is an inherent power of the courts which is not dependent upon any statutory authority, and was in existence prior to 1853. Hale vs. State, 55 Ohio St.210 at 213-215, 45 N.E. 199 at 200 (1896); State vs. Nixon, Wright 763 (1834); State vs. Coulter, Wright 421 (1833), syllabus #3.

The contempt action in this case was brought to remedy a violation of a preliminary injunction that had been issued in a pending and ongoing civil action for injunctive relief and monetary damages. Accordingly, in the case *sub judice*, the contempt action would be a "provisional remedy" within the meaning of R.C. 2505.02 (A)(3). The requisites of a final appealable order in this context are established under R.C. 2505.02 (B)(4).

There is no substantial right to disobey a court order. In the instant case, the

Preliminary Injunction that the contempt action was brought to enforce was never appealed. So the propriety of the Preliminary Injunction is not subject to challenge. When Dashing Pacific Group, Ltd., failed to obey the Injunction, it committed a contempt of court. However, the finding of contempt coupled with the existence of purge conditions rendered the imposed contempt sanction conditional in nature which did not operate to determine the action with respect to the provisional remedy of contempt. A contempt order that announces a conditional punishment coupled with an opportunity to purge does not operate to determine the action. The contempt action is only determined after a purge hearing is held and when the announced sanction or sentence is carried into execution. Until that point, the punishment is conditional in nature and the party found to be in contempt always has the option to purge through compliance or establish a defense of impossibility. "For an order to determine the action it must dispose of the merits of the case or some separable and distant branch thereof and leave nothing for the determination of the court." VIL Laser Sys., L.L.C. vs. Shiloh Industries, Inc., 119 Ohio St.3d 354, 894 N.E.2d 303, 2008-Ohio-3920 at ¶8.

Announcement of a contempt sanction conditioned on an opportunity to purge does not meet this standard.

Whether the contemnor completely fails to purge, or takes action to fulfill the purge conditions, a purge hearing is required and the court still must make a determination of non-compliance or the adequacy of purported compliance or any alleged impossibility of compliance<sup>1</sup> before the contempt action is determined. Liming vs. Damus, 133 Ohio St.3d 509, 979 N.E.2d 297, 2012-Ohio-4783 at ¶ 16: "A purge

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<sup>1</sup> Impossibility of compliance is a defense to civil contempt. Liming vs. Damus, supra, at ¶20.

hearing is not a new contempt proceeding, but the conclusion of the originating contempt hearing, because its purpose is to determine whether the contemnor has satisfied the purge conditions." Accordingly, a civil contempt action is not determined until the purge hearing has been completed.

It is not suggested that the party found to be in contempt must wait until "final judgment as to all proceedings, issues, claims, and parties in the action" in order to take an appeal. However, sound policy reasons dictate that a civil contempt action is not determined until a purge hearing has been held, any defenses have been litigated, and the announced punishment is actually ordered executed. A contrary rule would invite gamesmanship and piecemeal appeals for purposes of delay.

As observed in Gauthier vs. Gauthier, *supra*, at ¶13, "Domestic and juvenile actions are particularly rife with contempt rulings." Emotions not uncommonly run high in such cases. A disgruntled contemnor has little incentive not to appeal a contempt judgment that imposes a sentence subject to purge conditions since an unsuccessful appeal would still leave the contemnor with the same opportunity to purge after postponing the inevitable with an unsuccessful appeal. If the contemnor would be confronting a sentence to be carried into execution if an appeal turned out to be unsuccessful, it is likely that he or she would be more circumspect about taking an appeal unless there were good grounds to support it.

Since inability to pay is a defense to a contempt action to enforce payment of alimony or child support, treating a contempt finding imposing a conditional sentence subject to purge conditions as a final appealable order would also invite piecemeal appeals. For example, in such a situation, a contemnor who is a delinquent alimony or child support obligor could appeal imposition of a conditional sentence that is subject to

purge conditions and, if unsuccessful on appeal, could then assert an impossibility defense in the trial court and appeal again if the impossibility defense is rejected. This sort of piece meal appellate litigation is not consistent with the requirement that an "order in effect determines the action" before it can be appealed pursuant to R.C. 2505.02 (B)(4)(a).

In this regard, requiring that the purge conditions expire and the contempt sanction/sentence be ordered into execution before an appeal can be taken would not deprive the contemnor of a meaningful or effective remedy by appeal. As observed in Davis vs. Davis, 11<sup>th</sup> District case no. 2004-G-2572, 2004-Ohio-4390 at ¶5, "Once her sentence is ordered to be imposed, she [the contemnor] may then seek a stay [pending appeal] from the trial court. If that is unsuccessful, she can seek a stay from this Court." This is essentially no different from the situation presented where a contempt finding is made and a sentence/sanction is imposed subject to purge conditions. If such an order is considered final and appealable, time for compliance with the purge conditions would need to be stayed pending appeal in the same manner as a punishment ordered into execution would need to be stayed pending appeal. In either situation, a stay is necessary for the right of appeal to provide a meaningful and effective remedy. It is not as if the appealing party would be subject to irreparable disadvantage in either scenario.

There is another practical policy consideration militating in favor of requiring that the contempt sanction be ordered executed before a contempt judgment is considered final and appealable. If a judgment of contempt announcing a sentence subject to purge conditions is considered final and appealable, the purge conditions cannot be modified, except pursuant to Civ.R.60 (B). In re RTA, 8<sup>th</sup> District case no. 98498, 2012-

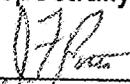
Ohio-5080. See, also, Gauthier vs. Gauthier, 12<sup>th</sup> District case no. CA 2011-05-048, 2012-Ohio 3046 at ¶23. It is sometimes desirable for a trial court to be able to modify purge conditions in light of logistical considerations that may arise as a contemnor makes a good faith effort to purge.

Allowing an appeal to be taken from a contempt order announcing a conditional punishment subject to purge will in all likelihood increase the number of such appeals regardless of whether they have potential merit, and would also invite piecemeal appeals in contempt cases that involve an arguable impossibility defense thereby needlessly burdening appellate dockets. Such a rule would also deprive trial courts of practical flexibility in addressing unforeseen logistical problems that may be confronted by a contemnor in the process of making a good faith attempt to comply with purge conditions. A contempt order that announces a prospective punishment subject to purge conditions is not an order that "in effect determines the action with respect to the provisional remedy" of contempt as required by R.C. 2505.02 (B)(4)(a). Accordingly, in a contempt of court action, there is no final appealable order when a party is found in contempt and sentenced subject to purge conditions. It is only when a purge hearing has been completed, and the conditional sentence is carried into execution that there is a final appealable order under R.C. 2505.02 (B)(4).

**CONCLUSION**

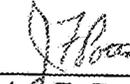
For these reasons, the Decision of the Sixth District Court of Appeals denying the Docks Venture, LLC, Motion to Dismiss the appeal of Dashing Pacific Group, Ltd., must be reversed.

Respectfully submitted,

  
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**CERTIFICATION**

This is to certify that a copy of the foregoing was served by ordinary U.S. Mail this 14<sup>th</sup> day of April, 2014, upon: Byron S. Choka, *Spengler Nathanson, P.L.L.*, Four Seagate, Suite 400, Toledo, OH 43604.

  
\_\_\_\_\_  
John F. Potts (0033846)

# APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0473

DOCKS VENTURE, LLC, )  
Appellant, )  
-vs- )  
DASHING PACIFIC GROUP, )  
LTD., )  
Appellant. )

Case No.:  
C.A. Case No.: :L-12-1312  
C.P. Case No.: CR12-1340

APPEAL FROM THE LUCAS  
COUNTY COURT OF APPEALS

NOTICE OF CERTIFIED CONFLICT

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*On Behalf of Appellee*

*On Behalf of Appellant*

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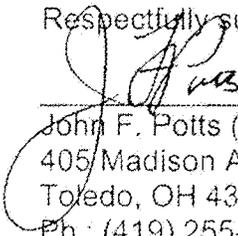
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SUPREME COURT OF OHIO

**NOTICE OF CERTIFIED CONFLICT**

Appellant, Docks Venture, LLC, hereby gives notice that on February 25, 2013, the Lucas County Court of Appeals, Sixth Appellate District, issued a Decision and Judgment Entry in Docks Venture LLC vs. Dashing Pacific, Ltd., 6<sup>th</sup> Dist. No. L-12-1213, finding said decision to be in conflict with the decision of the Eleventh District Court of Appeals in Davis vs. Davis, 11<sup>th</sup> Dist. No. 2004-G-2572, 2004-Ohio-2572, and certifying the matter to the Ohio Supreme Court for review and final determination pursuant to Section 3(B)(4), Article IV of the Ohio Constitution.

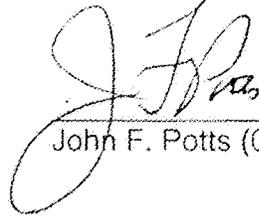
The Decision and Judgment Entry of the Sixth District Court of Appeals dated February 25, 2013, certifying the conflict and constituting the certifying Court's opinion is attached hereto as EXHIBIT A. The Memorandum Opinion of the Eleventh District Court of Appeals in Davis vs. Davis, 11<sup>th</sup> Dist. No. 2004-G-2572, 2004-Ohio-2572 is attached hereto as EXHIBIT B.

Respectfully submitted,

  
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CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. Mail this 21<sup>st</sup> day of March, 2013, upon: Byron S. Choka, *Spengler Nathanson, P.L.L.*, Four Seagate, Suite 400, Toledo, OH 43604.



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John F. Potts (0033846)

# EXHIBIT A

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COMMON PLEAS COURT  
SERVIC QUILTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Docks Venture LLC

Court of Appeals No. L-12-1312

Appellee

Trial Court No. CI0201201340

v.

Dashing Pacific Group LTD

DECISION AND JUDGMENT ENTRY

Appellant

Decided: FEB 25 2013

\* \* \* \* \*

This case is before the court on the motion of appellee, Docks Venture, LLC ("Docks"), to dismiss the appeal. Appellant, Dashing Pacific Group, Ltd. ("Dashing"), has filed a motion in opposition to appellee's motion to dismiss.

On October 31, 2012, Dashing appealed a judgment of the Lucas County Court of Common Pleas which granted Docks' motion to show cause. The trial court found Dashing to be in contempt of a prior order dated April 19, 2012, and ordered Dashing to correct the distribution lines within the premises leased by Docks. The trial court ordered

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the work to be completed within 30 days from the date of the order, or Dashing would be fined \$1000 per day until the work is complete.

In Docks' motion to dismiss the appeal, it argues that Dashing's appeal is not taken from a final and appealable order. Specifically, Docks cites decisions of the Seventh and Eleventh District Courts of Appeals and argues that a contempt citation is not a final and appealable order if it imposes a conditional punishment coupled with an opportunity to purge. *See Davis v. Davis*, 11th Dist. No. 2004-G-2572, 2004-Ohio-4390, ¶ 6. *See also Bd. of Trustees of Chester Twp. v. Baumgardner*, 11th Dist. No. 2002-G-2430, 2003-Ohio-4361, ¶ 12. However, this court has previously determined that a contempt citation is final and appealable if it includes both a finding of contempt and pronouncement of a penalty or sanction, even though the order contains purge conditions. *See In re J.Z.*, 6th Dist. No. H-11-003, 2012-Ohio-1105, ¶ 7; *Strong v. Strong*, 6th Dist. No. L-01-1464, 2002-Ohio-2693. Accordingly, Docks' motion to dismiss is found not well-taken and is denied.

We have previously certified this conflict to the Supreme Court of Ohio. *In re J.Z.* at ¶ 16-18. The Ohio Constitution, Article IV, Section 3(B)(4) states:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of this state, the judges shall

certify the record of the case to the supreme court for review and final determination.

In order to qualify for certification to the Supreme Court of Ohio pursuant to the Ohio Constitution, Article IV, Section 3(B)(4), a case must meet the following three conditions:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

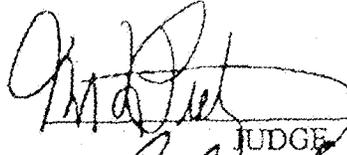
We find that our holding today is again in conflict with the Eleventh District Court of Appeals' decision in *Davis v. Davis*, 11th Dist. No.2004-G-2572, 2004-Ohio-4390. Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: In a contempt of court action, is the trial court's judgment finding a party in contempt and imposing a sentence final and appealable when the sentence is imposed, albeit with purge conditions, or when the defendant has failed to purge his contempt and the sentence is executed?

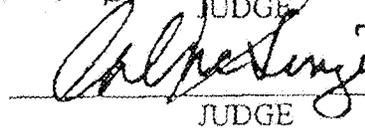
Appellee's motion to dismiss is denied. It is so ordered.

Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

# **EXHIBIT B**

{Cite as *Davis v. Davis*, 2004-Ohio-4390.}

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA, OHIO

LINETTE DAVIS,	:	MEMORANDUM OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2004-G-2572
GARY DAVIS,	:	
Defendant-Appellee.	:	

Civil appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 87 D 854.

Judgment: Appeal dismissed.

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*Donald Navatsyk*, Thrasher, Dinsmore & Dolan, 100 Seventh Avenue, #150, Chardon, OH, 44024 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶} On May 4, 2004, appellant, Linnette Davis, filed a notice of appeal from an April 5, 2004 judgment of the Geauga County Court of Common Pleas. In that judgment, the trial court found appellant in contempt and ordered her to serve five days

in the Geauga County Safety Center unless she purged herself of the contempt by paying appellee, Gary Davis, \$2,818.26 by July 1, 2004.

{¶2} On July 6, 2004, this court issued a judgment entry ordering appellant to show cause why this case should not be dismissed. Relying on *In re Smeed* (May 24, 1996), 11th Dist. No. 96-L-059 and *Eggett v. Eggett* (Feb. 3, 1995), 11th Dist. No. 94-L-090, this court stated that a contempt judgment is not a final appealable order when the contemnor still has an opportunity to purge by performing the required act.

{¶3} On July 22, 2004, one day past the deadline for filing a response, appellant filed a memorandum in support of jurisdiction. Thus, this appeal could be dismissed for failure to prosecute as outlined in this court's July 6, 2004 judgment. However, appellant's memorandum will be considered on its merits. No response has been filed by appellee.

{¶4} Appellant argues that she is caught between two impossible choices. If she purges herself of contempt, an appeal would then be moot. That is correct.

{¶5} In the alternative, if she refuses to purge herself of contempt, the trial court will likely refuse to stay its judgment because appellant has no funds to post a supersedeas bond and, therefore, she would end up serving her jail time before an appeal could be heard. That is pure speculation on appellant's part. Once her sentence is ordered to be imposed, she may then seek a stay from the trial court. If that is unsuccessful, she can seek a stay from this court.

{¶6} The law is clear: a contempt citation is not a final appealable order if it only imposes a conditional punishment coupled with an opportunity to purge the contempt. *Board of Trustees of Concord Twp. V. Baumgardner*, 11th Dist. No. 2002-G-

2430, 2003-Ohio-4361, ¶ 12. Until the opportunity to purge has been removed, there is no final appealable order.

{¶7} Accordingly, this appeal is sua sponte dismissed for lack of a final appealable order.

Appeal dismissed.

DONALD R. FORD, P.J.,

JUDITH A. CHRISTLEY, J.,

concur.



Item 15 provides for responsibilities of Lessor and item 15.6 states as follows:

**Installing separate meters for all utilities inside the Leased Premises.**

3. The Plaintiff's evidence indicates that the present utilities (gas, water and electricity) are not separately metered and the utilities are not separately divided between the two leased premises (See Exh C). The separate meters violates the leases and must be corrected.

**II. Legal Issues**

4. For an injunction to be granted pursuant to Civil Rule 65, the moving party must establish that the evidence is strong and there is a great likelihood of success on the merits and that the harm is immediate and irreparable. The Plaintiff has established the criteria to be granted an injunction.

5. The real issue is, where is the water, gas or electrical lines crossed? The landlord has the responsibility to get the utilities to the leased premises with separate meters (Lease 13 & 15.6). However, the tenant has the responsibility of the distribution of those utilities within the leased premises.

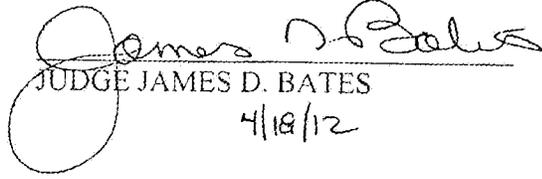
**Judgement Entry**

It is therefore ORDERED, ADJUDGED and DECREED that the preliminary injunction shall issue in favor of the Plaintiff, Docks Venture, LLC, and the Defendant, Dashing Pacific Group, LTD is hereby ORDERED:

- 1) The Defendant shall provide a separate metered utilities (gas, electric and water) for each of the leased premises (Exh A & B) within thirty (30) days;
- 2) The Plaintiff shall escrow rent until further order of this Court to the Lucas County Clerk of Court and be held by the Clerk until released by this Court;
- 3) The parties to appear before this Court on **May 14, 2012 at 1:00 p.m.** to report on the status of this Order.

4) The work to be done by the Defendant shall not interfere with the normal business hours of operation at either of the leased premises.

April 18, 2012

  
JUDGE JAMES D. BATES  
4/18/12

cc: JOSEPH B CLARKE  
RICHARD G. FARRAR

2012 OCT 2

FILED  
LUCAS COUNTY

2012 OCT -2 A 9:01

COMMON PLEAS COURT  
JAMES D. BATES

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

DOCKS VENTURE LLC  
Plaintiff,

vs.

DASHING PACIFIC GROUP LTD, AN  
OHIO LIMITED LIABILITY COMPANY  
Defendant.

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\*  
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Case No. G-4801-CI-0201201340-000

ORDER

JUDGE JAMES D. BATES

This matter came on to be heard upon the the Motion to Show Cause filed by the Plaintiff on May 25, 2012. The Court previously granted the Plaintiff's Motion for a Preliminary Injunction on April 19, 2012. The Plaintiff filed their closing argument in writing on September 13, 2012 and the Defendant filed their closing argument on September 19, 2012.

**I. Facts Presented**

1. The parties entered into two (2) separate leases on the 18th day of March, 2011. One lease was for a restaurant formerly known as the Navy Bistro, n/k/a Admirals Grill and another lease for a restaurant formerly known as Tango's, n/k/a El Vaquero.

2. The Court previously Ordered the Defendants to comply with Item 13 of the lease which provides as follow:

**Utilities. Lessee will pay before delinquency all charges for water, sewer, electricity, gas, heating, cooling and telephone used by Lessee on the Leased Premises. Lessee shall be responsible for contracting directly with all utility providers for such services to be provided under separate metering and direct billing arrangements. Lessor shall provide,**

**E-JOURNALIZED**

SCANNED

repair and maintain the necessary distribution systems and other required equipment, fixtures or facilities necessary to furnish such services to the Leased Premises.

The Court further Ordered the Defendant to comply with Item 15.6 which provides as follows:

**Installing separate meters for all utilities inside the Leased Premises.**

- 3. The Court finds that the Defendant has complied with the provisions of Item 15.6.
- 4. It appears from the testimony that while separate meters provided to each tenant, the lines are crossed inside the leased premises causing a disproportionate billing for various utilities provided.

**II. Legal Issue**

5. The remaining issue is whether Item 13 requires the landlord to remedy the problem within the leased premises. Item 13 requires the lessee to contract with the utility providers for separate metering. The first sentence in Item 13 places the burden on the lessee to pay all utilities (water, sewer, electricity, gas, heating, cooling and telephone). The second sentence mandates that the lessee contact the utility providers for such services "to be provided under separate metering and direct billing arrangements." The third sentence requires the "lessor shall provide, repair and maintain the necessary distribution systems...necessary to furnish such services to the Leased Premises." This sentence obligates the lessor to provide..."the necessary distribution systems...necessary to furnish such services to the leased premises." This is clear and unambiguous. It places the responsibility on the Lessor to correct or to provide the necessary distribution system. This has neither been done pursuant to the provisions of the lease nor the Court Order dated April 19, 2012. The Lessor is in violation of the lease as well as a court order. Therefore, the defendant Dashing Pacific Group, LTD, an Ohio Limited Company, is hereby found in Contempt.

It is therefore ORDERED, ADJUDGED and DECREED that the defendant, Dashing Pacific Group, LTD, an Ohio Limited Company, correct the distribution lines within the leased premises within thirty (30) days to provide separate lines for each tenant for billing purposes.

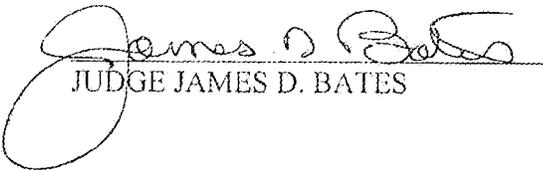
It is further ORDERED, ADJUDGED and DECREED that the work to be done shall not interfere with the normal business hours of operation of either of the leased premises.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff shall continue to escrow rent with the Clerk of Courts and held by the Clerk until released by the Court.

It is further ORDERED, ADJUDGED and DECREED that if the defendant, Dashing

Pacific Group, LTD, an Ohio Limited Company fails to comply with this Order within the thirty (30) day time period that the defendant, Dashing Pacific Group, LTD, an Ohio Limited Company shall find the sum of \$1,000 per day until the Order has been complied with in full.

September 27, 2012

  
JUDGE JAMES D. BATES

cc: JOSEPH B CLARKE  
RICHARD G. FARRAR

FILED  
LUCAS COUNTY

CLERK OF COURTS

2012 OCT 26 A 9:41

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS  
LUCAS COUNTY, OHIO**

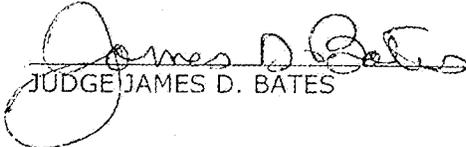
Docks Venture, LLC,	)	Case No. G-4801-CI-0201201340-000
Plaintiff,	)	Judge James D. Bates
v.	)	<b><u>ORDER</u></b>
Dashing Pacific Group, Ltd.,	)	
Defendant.	)	

\*\*\*\*\*

This cause came to be heard on Defendant's Motion for Extension of Time to Comply with Court Order of October 2, 2012. For good cause appearing, it is

**ORDERED** that Defendant Dashing Pacific Group is granted an extension of 60 days, to and through December 28, 2012, in which to comply with the Court Order of October 2, 2012.

10/22/12  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
JUDGE JAMES D. BATES

This Order prepared by:  
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OCT 26 2012