

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

REPLY BRIEF OF APPELLANT, DOCKS VENTURE, LLC

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STATEMENT OF FACTS

In its Merit Brief at 3, Appellee, Dashing Pacific Group, Ltd., states as follows:

After filing its Notice of Appeal, Dashing Pacific complied with the trial court's October 2, 2012, Order by providing separately metered utilities inside the premises. Dashing Pacific has appealed the October 2, 2012, Order to dispute the trial court's finding that Dashing Pacific's failure to separate the utilities on the inside of the premises constituted a breach of terms of the lease agreement. Any issues pertaining to Dashing Pacific's actual compliance with the contempt Order and purge conditions are now moot, as Dashing Pacific has separated the utilities as instructed by the Court.

The foregoing allegation of fact regarding compliance with the trial court's order does not appear in the record of this case. If, indeed, Dashing Pacific has complied with the purge conditions, any appeal by Dashing Pacific will have been rendered moot in its entirety. *Bank One Trust Company, N.A. vs. Scherer*, 10th Dist. 2006-Ohio-5097 at ¶¶12-13; *Huffer vs. Huffer, II*, 12th Dist. 2010-Ohio-1223 at ¶17. *cf.*, *State vs. Wilson*, 41 O.St.2d 236, 325 N.E.2d 236 (1975). Be that as it may, Appellant, Docks Venture, LLC, does not agree that the work performed by Appellee, Dashing Pacific after October 2, 2012 constitutes full compliance with the purge conditions. However, there is nothing in the record to support the contentions of either party regarding the status of Dashing Pacific's compliance with the purge conditions set forth in the October 2, 2012 Order.

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.

In support of its position that a judgment finding a party to be in contempt of court and imposing a sentence subject to purge conditions is a final appealable order, Dashing

Pacific asserts that if it were not, a contemnor would be placed "in the impossible position of choosing between failing to satisfy the purge conditions, and risking execution of the sentence, or satisfying the purge conditions and forfeiting the right to any meaningful appeal." (Merit Brief of Appellee at 8). "Furthermore, if this court would find that contempt orders with purge conditions are not final and appealable until a purge hearing is held and the sentence is executed, contemnors including Dashing Pacific would be forced to choose between defying the purge order and risking a penalty or incarceration, or complying with the purge order and forfeiting any meaningful appeal. . . . Under this rationale, contemnors would have no access to effective judicial review to protect their substantial rights implicated by a finding of contempt" (Merit Brief of Appellee at 10; citation omitted).

This argument is specious. The assertion that requiring the purge hearing be completed before a contempt order is final and appealable would deprive the contemnor of meaningful appellate review is unfounded. When an appeal is taken from a contempt finding that imposes sentence subject to purge conditions the contemnor has to seek a stay of the purging deadline pending appeal or risk execution of sentence. Likewise, if such an appeal is taken after the purge hearing at which the sentence is ordered into execution, the contemnor would have to seek a stay of execution pending appeal. In either situation, a stay is required to preserve the contemnor's ability to obtain meaningful appellate review, and in either situation the issuance of a stay will, in fact, protect the aggrieved contemnor's right to meaningful appellate review. It is not as if a stay is available in one situation but not the other. A stay must be sought in either situation. Dashing Pacific offers no explanation of why a stay of the deadline to comply with purge conditions pending appeal affords a contemnor an opportunity for meaningful appellate review but a stay of execution of sentence for failure to comply with purge conditions pending appeal does not.

The procedure for obtaining meaningful appellate review in a contempt proceeding is the same whether the appeal can be taken from the order making a contempt finding and imposing sentence subject to purge conditions, or whether the appeal must be taken after the purge hearing when the sentence is ordered into execution. In either situation, if there is an appeal, a stay of the trial court's order needs to be sought and in either situation issuance of such a stay pending appeal will adequately protect the aggrieved contemnor's ability to obtain meaningful appellate review. Appellee's lament that if a contempt order were not final and appealable until a purge hearing is held and the sentence ordered into execution "contemnors would have no access to effective judicial review to protect their substantial rights implicated by a finding of contempt" is unfounded because of the available procedure for obtaining a stay pending appellate review. It is no more or less burdensome to obtain a stay of compliance with purge conditions than it is to obtain a stay of execution of sentence for not having complied with purge conditions.

It is clear that meaningful appellate review remains available to a contemnor after a purge hearing. What, then, is the justification for allowing the contempt finding to be appealed prior to that final stage of the contempt proceedings? Appellee offers none, nor do the decisions of the various Court of Appeals articulate any comprehensive explanation in that regard.

This particular issue was not before the Court for decision in Liming vs. Damos, 133 O.St.3d 509, 979 N.E.2d 297, 2012-Ohio-4783. Accordingly, it was *dictum* when this court stated at ¶20 that "the [contemnor] parent will have had the opportunity to defend against the contempt charges and otherwise object to or appeal from a finding of contempt and purge conditions" prior to the purge hearing.

It may be that the purge hearing is viewed as a sort of ministerial proceeding.

However, determining compliance with purge conditions (or impossibility of compliance) is not always a simple task. Certainly, when the purge condition only involves the payment of money, the factual issue for determination at a purge hearing is particularly well defined. But compliance with purge conditions in other cases may not be as clearly ascertainable.

In the instant case, a Preliminary Injunction was issued ordering Dashing Pacific to provide separate and separately metered utilities to each of two (2) leased premises. (No appeal was taken from the Preliminary Injunction.) Dashing Pacific did certain work on the leased premises that it considered to be in compliance with the Preliminary Injunction. However, the work performed was found not to be in full compliance and on October 2, 2012, Dashing Pacific was held in contempt and sentenced to pay a per diem fine with a purge condition that the required work be completed. Dashing Pacific performed additional work which it contends fulfills the purge condition. Docks Venture contends that the work performed does not constitute full compliance with the purge condition, making it likely that a purge hearing will be conducted at which the issue of compliance with the purge condition will presumably be heard and determined. What is the justification for permitting what constitutes an interlocutory appeal by Dashing Pacific in the middle of the ongoing dispute prior to final determination of the contempt proceedings by the trial court?

In a situation such as is presented in the case at bar, the determinations to be made at a purge hearing are not simple or ministerial in nature. Docks Venture respectfully contends that there is no justification for allowing Dashing Pacific to take an appeal now and then be able to take another appeal after the purge hearing if the issue of compliance with purge conditions is resolved adversely to Dashing Pacific. To allow such piecemeal appellate litigation is not in the interests of justice nor does it further the efficient administration of justice. The better rule is to require the contempt proceedings to proceed

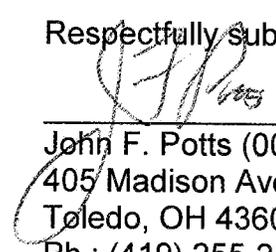
to final conclusion through a purge hearing before a judgment of civil contempt is considered to be a final appealable order.

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

CONCLUSION

For these reasons, and the reasons set forth in Appellant's previously filed Merit Brief, 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.

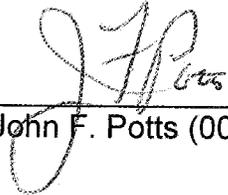
Respectfully submitted,



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CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. Mail this 29th day of May, 2014, upon: Byron S. Choka, *Spengler Nathanson, P.L.L.*, Four Seagate, Suite 400, Toledo, OH 43604.



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