

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JAMES B. NICHOLSON,) CV. NO. 05-00030 DAE-KSC
SUCCESSOR TRUSTEE,)
)
Plaintiff,)
)
vs.)
)
BOBBY N. HARMON,)
)
Defendant.)
_____)

ORDER GRANTING PLAINTIFF'S MOTION FOR CONTEMPT AGAINST
DEFENDANT BOBBY N. HARMON OF FINAL JUDGMENT FILED AUGUST
22, 2006 AND COURT'S ORDER GRANTING PLAINTIFF'S MOTION FOR
ENTRY OF JUDGMENT ON THE ARBITRATION AWARD AGAINST
BOBBY N. HARMON FILED AUGUST 18, 2006

Pursuant to Local Rule 7.2(d), the Court finds this matter suitable for disposition without a hearing. After reviewing Plaintiff's motion and the supporting and opposing memoranda, the Court GRANTS Plaintiff's Motion for Contempt Against Defendant Bobby N. Harmon of Final Judgment Filed August 22, 2006 and Court's Order Granting Plaintiff's Motion for Entry of Judgment on the Arbitration Award Against Bobby N. Harmon Filed August 18, 2006.

Postmarked Jan 26, 2007
Rvd.
1/31/07
First class Mail
(Not certified)
BJ

BACKGROUND

This case arises out of an alleged breach of a Settlement Agreement reached between the parties on April 24, 2000. (Order Granting Pl. Mot. For Entry Of J. On The Arbitration Award Against Bobby N. Harmon, hereinafter “Entry of Judgment” at 1.) The Settlement Agreement terminated litigation between Harmon and his former Employer, Kamehameha Schools (“KS”). (Findings of Fact, Conclusions of Law, and Award, hereinafter “Arbitration Award”, at 7). Harmon was engaged in various litigation with KS; its captive insurer P&C Insurance Co., Inc. (“P&C” – of which Harmon had been President); and the various subsidiaries of each. The Settlement Agreement stated that it resolved all claims involved in the underlying litigation and also contained a confidentiality clause that prohibited either party from disclosing the terms of the Settlement Agreement. (Arbitration Award at 9-10.) Upon the alleged breach, the parties entered into arbitration.

On October 6, 2004, Arbitrator Judith Neustadter, Esq. (“the Arbitrator”) issued Findings of Fact, Conclusions of Law, and an Award in favor of Plaintiff against Harmon. (Entry of Judgment at 2.) The Arbitrator found that Harmon had violated the Settlement Agreement by writing and sending letters and by posting letters and other documents on his website (the-catbird-seat.net) that discussed the underlying litigation, new claims, and his employment with KS and

his relationship with P&C. (Arbitration Award at 15-16.). The Arbitrator listed “Protected Subject Matters” (“PSM”) that Harmon is prohibited from disclosing, discussing, disseminating or communicating by the terms of the Settlement Agreement, including: (1) “Any of the events and circumstances surrounding or occurring during Respondent’s employment at KS or in the performance of his duties at P&C”; (2) “Any fact or information discovered or learned by Respondent related in any way to KS or P&C as a result of his employment at KS or the performance of his duties at P&C”; (3) Harmon’s claims, issues, or allegations and/or the basis of the same (a) in the underlying litigation, (b) that were settled and released in the Settlement Agreement, (c) relating to the tax treatment of the settlement proceeds, (d) related to perceived conflicts of interests among attorneys or parties in the underlying litigation, (e) related to the Arbitration, and (f) related to indemnification for the costs, expenses, or damages related to the Arbitration. (Arbitration Award at 22-24.) The Arbitrator ordered that Harmon immediately remove all PSM from his website, www.the-catbird-seat.net. (*Id.* at 26).

On June 20, 2005, this Court confirmed the Arbitration Award and issued an Order Granting Plaintiff’s Motion for Summary Judgment on Plaintiff’s Application for Confirmation of Arbitration Award and for Entry of Judgment Against Bobby N. Harmon (“Order Granting Plaintiff’s Motion for Summary

Judgment”). (Entry of Judgment at 2.) On June 22, 2005, this Court entered judgment pursuant to the Order Granting Plaintiff’s Motion for Summary Judgment.

On July 15, 2005, Plaintiff filed a motion for assessment of damages against Harmon for violation of the Arbitration Award. (Entry of Judgment at 3.) The Court dismissed that motion without prejudice on October 17, 2005. (Id.) On April 11, 2006, Plaintiff filed a Motion for Summary Judgment on the Arbitration Award Against Bobby N. Harmon. (Id.)

On August 16, 2006, this Court entered judgment in favor of Plaintiff James B. Nicholson, Successor Trustee , affirming the Arbitration Award against Defendant Bobby N. Harmon. On August 22, 2006, this Court entered a Final Judgment against Harmon, in which the Court awarded to Nicholson damages in the amount of three hundred seventy-four thousand dollars (\$374,000.00), attorneys’ fees and costs in the amount of forty-eight thousand nine hundred seventy dollars and fifty-four cents (\$48,970.54); and interest payments at the legal rate of ten percent (10%) per annum, totaling four hundred twenty-two thousand nine hundred seventy dollars and fifty four cents (\$422,970.54). (Final Judgment at 2-3.) In addition, Harmon was required to “permanently and forever remove and/or delete from any web-site owned, managed or operated by . . . HARMON all

offensive materials which contains [sic] any reference to ‘Protected Subject Matters’, as that term is described and defined in the Arbitration Award dated October 6, 2004.” (Final Judgment at 3.)

The Court also ordered that Harmon provide written confirmation to the Court that the materials have been removed from the website. (Entry of Judgment at 14.) On September 2, 2006, Harmon sent a letter to the Court containing his confirmation of removal. (Mot. Contempt Ex. E.) The confirmation stated that Harmon “made a good faith effort to remove from public view, all ‘offensive materials’ – as he understands the meaning of the term and his rights under the First Amendment of the United States Constitution – from any website owned, managed, or operated by Defendant.” (Id.) A copy of the same was sent to Nicholson. (Id.) On September 11, 2006, Nicholson’s attorney (Guttman), wrote to Harmon, asking for clarification of exactly what modifications were made to the website. (Mot. Contempt Ex. J). Harmon did not respond to this letter. On September 25, 2006, Guttman again wrote to Harmon asking for a list of the specific modifications that Harmon had made to the website, or in the alternative, Guttman requested the password to access protected areas of Harmon’s site in order to verify that Harmon had indeed complied with the Court Order. (Mot. Contempt Ex. K.) Harmon responded to Guttman’s two letters on October 4, 2006.

(Mot. Contempt Ex. L at 1.) Harmon explained that he could not provide a detailed list of the changes he had made to the website because revisions were made daily and Harmon did not keep records of these revisions. (Id.) Harmon refused to provide Guttman with a password because (1) Harmon considers the materials privileged and confidential and (2) Harmon believes that he has a right to refuse Guttman access to all parts of his website under the Fifth Amendment of the Constitution. (Id. at 1-2.)

Plaintiff filed the instant Motion for Contempt on November 20, 2006. Plaintiff states that the following websites and attachments have not been removed, as required by the Court's Final Judgment and Entry of Judgment, but have instead been moved to password protected sites: (1) the-catbird-seat.net/RICO-BH/htm; (2) the-catbird-seat.net/Claims-By-Harmon.htm; (3) the-catbird-seat.net/Claims-Branch-P-C.htm and all the web-sites listed on this web-site, entitled "P&C Insurance Company, Inc.", "The Harmon Chronicles-1988-1996", "The Harmon Chronicles-1997-1999", "Harmon's Letters To The FBI", "Harmon's Letter To The IRS", "The Kamehameha Schools Pension Plan", and "RICO in Paradise"; and the-catbird-seat.net/HarmonArbitration.htm. The Plaintiff requests that the Court find Harmon in Contempt of the Final Judgment and Entry of Judgment, order Harmon to provide Plaintiff with complete access to Harmon's website such that

Plaintiff would be able to enter the site and remove any PSM, and issue a writ to Yahoo! Small Business Hosting (“Yahoo!”), which operates Harmon’s website, ordering Yahoo! to shut down Harmon’s site and forbidding him from creating another site with Yahoo!.¹

Harmon, pro se, filed an Answer to Supplemental Concise Statement of Facts by Plaintiff, And Supplemental Declaration of Steven Guttman Filed on Jan. 4, 2006; Request that Court Grant Defendant’s Motion For Abatement of Award And And [sic] His Motion For Damages (“Answer”) on January 17, 2007. In this document, Harmon claims that he filed an Answer to the instant motion on or around December 2, 2006. The Court has no record of Harmon’s December 2, 2006 Answer. In his January 17, 2007 Answer, Harmon argues that the Plaintiff’s supplemental concise statement of facts and supplement declaration were untimely because Harmon received them only seven days before the scheduled hearing, giving him inadequate time to respond to them. (Answer at 2.) Harmon also reasserts that he has “made a good faith effort to remove all Protected Subject

¹ In the Motion for Contempt, Plaintiff erroneously stated that Harmon operates his website through Voyager Info-Systems. (Mot. Contempt 3.) On January 4, 2007, Plaintiff filed a Supplemental Concise Statement of Facts In Support of Plaintiff’s Motion for Contempt (“Supplement”), which corrected that error, informing the Court that Yahoo! Small Business Hosting was Harmon’s actual web host. Supplement at 2.

Matters as he understands the meaning of the term and his rights to Free Speech under the First Amendment of the United States Constitution.” (Answer 3.)

Harmon further argues that Plaintiff failed to identify specifically which materials constituted PSM which needed to be removed, distinguishing those materials from materials that could be published under the First Amendment. Harmon also alleges that Plaintiff has not apologized for mistakenly identifying Voyager Info-Systems as Harmon’s web host in the initial Motion for Contempt, a mistake which was corrected by Plaintiff’s supplemental filings. (Id.) Harmon further argues that all the information on his website, including the PSM is protected under his First Amendment Rights, the Arbitration Award is invalid and unenforceable, and that Plaintiff’s suit against Harmon violates Hawaii’s Anti-SLAPP statute. Finally, Harmon responds to Plaintiff’s Motion for Contempt as follows: (1) Harmon is not in contempt because he has made a good faith effort to comply with the Court’s Entry of Judgment and Final Judgment; (2) providing Plaintiff with the ability to remove “offensive materials” from Harmon’s website would violate Harmon’s First and Fourth Amendment rights; and (3) a writ ordering the web-host to shut down Harmon’s website would violate Harmon’s First and Fourth Amendment Rights. Harmon raises additional issues, specifically, that Plaintiff has not responded to the specific issues raised in the Answer that Harmon purports to have

filed on or around December 2, 2006 as well as Defendant's Motions to abate the Arbitration Award and for Damages, that were purportedly filed with the Answer. Harmon provided a link to his website where he had apparently posted the Answer and Motions filed December 2, 2006, but the address is now inoperable.

STANDARD OF REVIEW

The “courts have inherent power to enforce compliance with their lawful orders through civil contempt.” Spallone v. United States, 493 U.S. 265, 276 (1990) (quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). A party who fails to take “all reasonable steps within the party’s power” to comply with a court order may be found in contempt. Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1130 (9th Cir. 2006) (citing In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993)) (footnote omitted). A party should not be held in contempt if his or her action “appears to be based on a good faith and reasonable interpretation of the court's order.” Id. (quoting In re Dual Deck, 10 F.3d at 695).

The party moving for a finding of contempt “has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.” In re Dyer, 322 F.3d 1178, 1191 (9th Cir. 2003) (citation omitted).

It is within a district court's discretion to issue a civil contempt order. See, F.T.C. v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir. 1999) (citing Hilao v. Estate of Marcos, 103 F.3d 762, 764 (9th Cir. 1996)).

DISCUSSION

Based upon the motions, the memoranda, and the record in this case, it is apparent to the Court that Harmon has engaged in an ongoing course of action to violate and evade the Settlement Agreement, Arbitration Award, and the various orders of this Court. Plaintiff has shown by clear and convincing evidence that Harmon has violated the Court's mandate that Harmon remove all PSM from his website and confirm to the Court that such action has been taken.

The actions required of Harmon have been clear from the outset. The Settlement Agreement was clear and unambiguous. (Arbitration Award 20.) In her Conclusions of Law 24(a) through (h), the Arbitrator set forth with great specificity what information Harmon was forbidden from communicating, identifying this information as PSM. (Arbitration Award 22-24.) This Court awarded damages against Harmon for continuing to incorporate PSM, as defined in the Arbitration Award. (Entry of Judgment 15.) This Court's Final Judgment also incorporated the Arbitrator's definition of PSM. (Final Judgment 3.) There can be

no question in Harmon's mind as to exactly what material he is no longer allowed to disseminate or communicate.

Harmon's creation of password protection for sites that previously contained PSM indicates that he is fully aware that these sites are covered by the various Agreements and Orders, which he has repeatedly disregarded. Harmon claims to have made a good faith effort to remove PSM from "public view." The Court's various orders, however, do not contemplate mere removal from public view. The Court ordered Harmon to remove all PSM from his website within ten days of the entry of judgment. (Entry of Judgment 14). The requirement was unambiguous. The creation of password protected areas on the website cannot reasonably be construed as a good faith effort to permanently remove the offending content. Rather, it demonstrates blatant disobedience to the Court. Thus, Plaintiff has proved that Harmon is in contempt of this Court's orders.

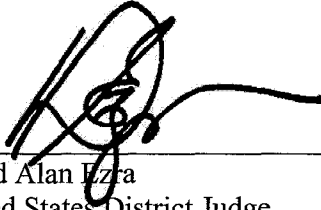
Therefore, this Court HEREBY FINDS Bobby N. Harmon in civil contempt of the Final Judgment and Entry of Judgment. Mr. Harmon must comply with this Court's orders. It is FURTHER ORDERED that within 10 days of the issuance of this Order, Mr. Harmon shall provide Plaintiff with complete access, including all passwords, to Harmon's website such that Plaintiff would be able to enter all areas of the site and remove any PSM (as defined above). If Mr. Harmon

fails to so comply with this Order, the Final Judgment and Entry of Judgment, within 10 days, then this Court will issue an order to Yahoo! Small Business Hosting directing it to shut down Mr. Harmon's website and forbid him from creating another website until such time as Mr. Harmon has verified to this Court that the new website will not contain any PSM. In addition, if Mr. Harmon fails to so comply with this Order, the Final Judgment, and Entry of Judgment, within 10 days, this Court will enter an order prohibiting Mr. Harmon from creating any new website, with any new host, until such time as Mr. Harmon has verified to this Court that the new website will not contain any of the PSM.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 26, 2007.





David Alan Ezra
United States District Judge

Nicholson v. Harmon, CV No. 05-00030 DAE-KSC; ORDER GRANTING PLAINTIFF'S MOTION FOR CONTEMPT AGAINST DEFENDANT BOBBY N. HARMON OF FINAL JUDGMENT FILED AUGUST 22, 2006 AND COURT'S ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT ON THE ARBITRATION AWARD AGAINST BOBBY N. HARMON FILED AUGUST 18, 2006