

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

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|-------------------------------------|----------|--------------------------------|
| CHAMBERS FUNERAL HOMES, INC. |) | CASE NO: CV 09 688265 |
| |) | |
| Plaintiff |) | JUDGE JOHN P. O'DONNELL |
| |) | |
| vs |) | |
| |) | |
| MARK L. KACIREK, et al. |) | <u>JOURNAL ENTRY</u> |
| |) | |
| Defendants |) | |

John P. O'Donnell, J.:

Having considered the plaintiff's motion to show cause why defendants should not be held in contempt and the evidence produced at the July 28, 2009, hearing on that motion, the court finds as follows:

FACTS

On March 24, 2009, an order was entered granting the plaintiff's motion for pre-judgment attachment. The order is of record and it need not be reproduced in its entirety here. Relevant for this motion, the order required as follows:

1. Defendants are to immediately provide Plaintiff with a complete accounting of all funeral services provided by Defendants pursuant to the license granted by Plaintiff, for the time period beginning November 21, 2006, with respect to all of Defendants':
 - a. billings to customers;
 - b. fees collected;
 - c. payments made by Defendants to third parties with respect to such funeral services provided and/or billed; and

- d. payments made to (*sic*) Defendant Kacirek Funeral Home, Inc. to Defendant Mark L. Kacirek;
2. Defendants shall immediately provide a complete accounting to Plaintiff of all Pre-Need funeral service payments made to Defendants . . .
3. Defendants shall immediately turn over to Plaintiff all collected funds in the possession of Kacirek Funeral Home, Inc., from customers with respect to licensed funeral services, and Defendants shall not spend, convey, or otherwise utilize any of such funds beforehand. Any such expenditure or conveyance shall be in direct violation of this Court's order.
4. Defendants shall immediately provide a complete accounting to Plaintiff of all of their accounts receivable . . . and Defendants shall undertake no effort to collect any of such accounts receivable beforehand. Any such effort to so collect will be in direct violation of this Court's order.
5. Defendants will endorse to Plaintiff immediately upon receipt any payments received by Defendant hereafter . . . Any disposition or use of such funds other than an endorsement to Plaintiff shall be in direct violation of this Court's order.

Discovery began after the order went into effect. The discovery deposition of defendant Mark Kacirek was taken on June 16. During that testimony, the defendant acknowledged having received the order of pre-judgment attachment and admitted that he had collected funds from customers and not turned them over, in direct violation of paragraph 5 of the order.

The defendants did produce some of the accounting information but did not include any information for 2009.

At the motion hearing, the president of the plaintiff corporation, Daniel B. Chambers, Jr., testified that he has not received any billing or fee information from the defendants for the period of December 31, 2008, through April 1, 2009. Chambers also testified that he cannot determine whether the defendants have provided an accounting of all of the pre-need funeral services payments made to the defendants because the defendants appear to have improperly mingled pre-need funeral payments with the general business bank account of the corporation and perhaps the

personal bank accounts of the individual defendant. Chambers also testified that the defendants have not given the plaintiff information pertaining to the defendants' accounts receivable.

CONCLUSION

Ohio Revised Code Section 2705.02(A) provides that disobedience of a lawful order of a court is a contempt that subjects a person to the possibility of punishment. Although Chapter 2705 of the Revised Code addresses the subject of contempt of court, courts also have an inherent power to punish contempt.¹ Pursuant to its inherent powers, a court may punish a contemptuous refusal to comply with its orders without regard to the statutory penalties.² A trial court may within its discretion include attorney's fees as part of a contempt sanction.³

There is no doubt that the defendants have refused to comply with this court's lawful order. The testimony at the hearing was credible and uncontradicted. The individual defendant also conceded in his deposition that he has not disobeyed the order in several respects.

The defendants are, therefore, found to be in contempt of the court's March 24, 2009, order.

The plaintiff has requested relief including: reimbursement for the bond posted in for the order of pre-judgment attachment; attorney's fees and expenses in connection with prosecuting the motion to show cause; a new order that the defendants immediately comply with the original order; and an order that the defendants produce all records of any Huntington Bank accounts.

A bond would have been necessary even if the defendants had complied with the order from the start. While it may be argued that the expense of the bond should be assessed to the defendants as a punishment for the contempt, that purpose is accomplished by ordering the

¹ See, e.g., *State v. Baumgartner*, 2008-Ohio-971, 6th Dist. App. No. OT-06-046.

² *McDaniel v. McDaniel* (1991), 74 Ohio App. 3d 577, 579.

³ Id.

defendants to reimburse the plaintiff for its attorney's fees and expenses incurred on the motion to show cause. The defendants are ordered to pay the plaintiff for those fees and expenses. Evidence of the amount of attorney's fees and expenses incurred by the plaintiff for the motion to show cause was not introduced at the hearing. Upon request by the plaintiff, a separate evidentiary hearing will be scheduled to receive evidence of the appropriate award in that regard.⁴

As for a new order that the defendants immediately turn over all of the information they were already ordered to produce, the court is not inclined to grant that relief. Entering such a separate order is akin to supplicating the defendants to follow an order already made. Such a "pretty please" may have the effect of communicating to the defendants that the court does not expect them to follow an order the first time it is made. The fact is that the March 24, 2009, order remains in effect and each day that passes without all of the information being produced is another day when the defendants are in disobedience of the order and subject to sanctions, including jail, for that disobedience.

As for the final aspect of the requested relief, the court finds based upon the evidence produced that the records of all Huntington Bank accounts, whether in the name of the corporate defendant, the individual defendant, or the individual defendant and his wife, may contain information required to be produced under the March 24 order. Therefore, the defendants are

⁴ In the meantime, the parties are free to exchange evidence of attorney's fees and expenses with the purpose of possibly stipulating to the appropriate amount.

ordered to forthwith provide to the plaintiff an authorization to allow the plaintiff complete access to all Huntington Bank account information still in the possession of the bank, and that the defendants produce forthwith to the plaintiff all Huntington Bank account information in their possession.

IT IS SO ORDERED:

Date: _____

Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of August, 2009, to the following:

Aaron H. Bulloff, Esq.
Janeane R. Cappara, Esq.
Kadish, Hinkel & Weibel
1717 East Ninth Street, Suite 2112
Cleveland, OH 44114
Attorneys for Plaintiff

John J. Lasko, Jr., Esq.
1150 Rockefeller Building
614 Superior Avenue
Cleveland, OH 44113-1306
Attorney for Defendants

Thomas C. Pavlik, Esq.
Novak, Robenalt & Pavlik, LLP
950 Skylight Office Tower
1660 West Second Street
Cleveland, OH 44113
Attorney for Defendants

Judge John P. O'Donnell