

Plaintiffs'. (Doc. No. 1). After a jury trial, on August 13, 2014, judgment was entered in favor of Plaintiffs for \$76,800.00. (Doc. No. 80). On October 3, 2014, Plaintiffs filed their first Motion to Compel Post-Judgment Discovery, which this Court granted. (Doc. Nos. 87 and 89). On May 19, 2015, judgment was entered in favor of Plaintiffs in the amount of \$460.00 for the district court costs taxed against Defendants. (Doc. Nos. 103 and 104). Defendants have not paid Plaintiffs for the judgment nor court costs.

Since the entry of judgment, Defendants have twice filed for bankruptcy; first on December 11, 2014, see In re Rosenblum, 545 B.R. 846 (Bankr. E.D. Pa. 2016), and again in 2016. In the latter bankruptcy action Judge Coleman ruled that the trademark judgment against Defendant Donaldson was a nondischargeable debt. See Doc. No. 146 at 5.

From 2015 through the present, Plaintiffs made additional motions to compel Defendant Donaldson to fully disclose his assets. See Doc. No. 87 at ¶4.¹ When Defendants failed to comply and failed to pay the judgment, this Court twice held Defendant Donaldson in contempt (Doc. Nos. 118 and 126) and ordered him to provide complete responses. (Doc. No. 140).

¹ Plaintiffs' Post-Judgment Request for Production of Documents asks Defendant to "[p]rovide a bank statement from each and every bank account owned by each defendant including both business and personal accounts for every month of the years 2011, 2012, 2013 and 2014."

Most recently, in seeking complete financial disclosure, Plaintiffs argue that Defendant Donaldson hides his assets. As a shield to paying the judgment from the trademark action, Plaintiffs' argument goes, Defendant deposits his income into his wife's, Tory Donaldson's, and son's, Taquiy Peurifoy's bank accounts. (¶7-¶8 Doc. No. 134).

On June 4, 2018, this Court again ordered (Doc. No. 135) Defendant Donaldson to respond to Plaintiffs' discovery requests (Doc. No. 134). On July 2, 2018, Defendant responded, including a disclosure that he deposited all of his income into the "Elite PT" account (ending in 5264). See ¶1, Doc. No. 138. Plaintiffs remained dissatisfied and moved this Court on three occasions to again find Defendant in contempt. (Doc. Nos. 136, 143, 146).

On January 31, 2019, this Court held a hearing to show cause as to why Defendant should not be held in contempt. (Doc. No. 145). Defendant's response after the hearing included a single bank statement from his wife's account ending in 3905; bank statements from his wife's account ending in 5127 (November, 2016 through June, 2018); and bank statements from his son's account ending in 6661 (July, 2017 to January, 2019).

Plaintiffs maintain that Defendant's responses are incomplete. They request this Court to hold Defendant in criminal contempt

for his failure to pay \$107,100.00², and for repeatedly ignoring this Court's orders to provide complete discovery responses.

II. LEGAL STANDARD

A. Contempt

"There are two types of contempt: criminal and civil." Walsh v. Free (In re Free), 466 B.R. 48, 57 (Bankr. W.D. Pa. 2012), quoting Walsh v. Bracken (In re Davitch), 336 B.R. 241, 251 (Bankr. W.D. Pa. 2006). It is within a federal court's power and discretion to hold a defendant in criminal contempt and punish by fine, imprisonment, or both, for disobedience or resistance to an order of the court. 18 U.S.C.S. § 401(3). "Any person who commits criminal contempt may be punished . . . after prosecution on notice." Fed. R. Crim. P. 42.

"The two types of contempt also have different burdens of proof and relations to the underlying proceeding. Civil contempt must be proved by 'clear and convincing' evidence, while criminal contempt must be proved beyond a reasonable doubt." United States v. Juror No. One, 866 F. Supp. 2d 442 (E.D. Pa. 2011) (citing United States v. Pozsgai, 999 F.2d 719, 735 (3d Cir. 1993)). Furthermore, while civil contempt proceedings are "ordinarily a part of the underlying action,"

² This figure represents the total sum due from Plaintiff's \$76,800.00 judgment against Defendant and the \$30,300.00 in civil contempt fines Defendant currently owes.

Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1343 (3d Cir. 1976), criminal contempt proceedings are separate; they "are between the public and the defendant, and are not a part of the original cause." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444-445 (1911).

B. Sanctions

The Supreme Court has distinguished between criminal and civil contempt by focusing on the purpose of each remedy: civil contempt is coercive, while criminal contempt is punitive. Gompers, 221 U.S. at 442. "The dichotomy between criminal and civil contempt lies in the function of the order." McDonald's Corp. v. Victory Inv., 727 F.2d 82, 86-87 (3d Cir. 1984) (citing United States v. United Mine Workers, 330 U.S. 258, 302 (1947); Gompers, 221 U.S. at 441; Latrobe Steel Co., 545 F.2d at 1343). "Civil contempt is remedial in nature, serving to coerce compliance with a court order or to compensate the other party for losses sustained due to noncompliance. By complying. . . a civil contemnor can purge the contempt." United States v. Pozsgai, 999 F.2d 719, 735 (3d Cir. 1993) (citing Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 632 (1988)).

On the other hand, criminal contempt is "retroactive . . . seeking to penalize previous violations. Second, it [is] punitive rather than remedial, because it. . . [seeks] to vindicate the authority of the Court to enjoin [a defendant]

from continuing [the offending activities]." Id. E.g., Chadwick v. Janecka, 312 F.3d 597, 608 (3d Cir. 2002) (quoting Gompers, 221 U.S. at 441, "[c]ivil confinement 'is remedial, and for the benefit of the complainant,' whereas criminal confinement 'is punitive.'").

III. DISCUSSION

It is well established that only "[t]he least possible power adequate to the end proposed' should be used in contempt cases." Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 895 (3d Cir. 1992) (citing Shillitani v. United States, 384 U.S. 364, 371 (internal citations omitted)). "The propriety of imposing criminal contempt sanctions depends upon whether punishment is necessary to vindicate the court's authority." Taberer v. Armstrong World Indus., Inc., 954 F.2d 888 (3d Cir. 1992). To convict for criminal contempt, 28 U.S.C. §401(3) the government must prove beyond a reasonable doubt that the alleged contemnor "willfully disobeyed" a court's order; "mere failure to comply. . .without more" will not sustain a conviction. United States v. Juror No. One, 866 F. Supp. 2d 442, 448 (E.D. Pa. 2011). See Waste Conversion, Inc. v. Rollins Env'tl. Servs., Inc., 893 F.2d 605, 610 (3d Cir. 1990) ("the crime of criminal contempt requires a specific intent to consciously disregard an order of the court."). The government must prove that the alleged contemnor did "a volitional act"

that he knew, or reasonably should have been aware, was wrong. United States v. Juror No. One, 866 F. Supp. 2d at 448 (quoting United States v. Greyhound Corp., 508 F.2d 529, 531-32 (7th Cir. 1974)).

In this case, we decline to exercise our discretion to institute criminal contempt proceedings where Plaintiffs seek a remedy for a civil wrong, the failure to fully comply with their post-judgment financial disclosure requests. After all, "it is well established that criminal penalties may not be imposed in civil contempt proceedings." In re Grand Jury Investigation, 600 F.2d 420, 424-5 (3d Cir. 1979).

In this instance, after Defendant Donaldson was twice held in civil contempt by this Court, and twice failed to provide complete discovery responses, Plaintiffs served Defendant with updated interrogatories. In their March 29, 2018 motion to compel, Plaintiffs requested "[a]n unredacted copy of any and all monthly bank statements from any bank account that you have deposited money into, withdrew money out of, or had in trust from the years 2013, 2014, 2015, 2016, 2017 and 2018. (This includes both personal and business accounts including any accounts in your wife's name)." (Doc. No. 134).

We find that Defendant Donaldson has made a good faith effort to respond to Plaintiffs' most recent requests for bank records. Defendant included bank statements for his personal

account, ending in 5264, from November, 2016 through June, 2018. Defendant stated that the 5264 account was opened on February 12, 2015, which would explain why he has not produced records from the account from 2012, 2013, and 2014, as Plaintiffs requested; although this does not explain his failure to provide records from 2015 or the second half of 2018 through 2019, as requested and ordered. (Doc. No. 142).

With regard to statements from accounts in Defendant's wife's name (Tory Donaldson), Defendant has provided a single monthly statement from the account ending in 3905, 19 months of statements from the account ending in 5127, and no statements from the 0172 account.³ See Doc. No. 147, Ex. A. Thus, he still has not provided statements from account-3905 from 2013, 2014, 2015, or most of 2016; nor has he provided statements from account-5127 from the second half of 2018 or 2019.

We acknowledge a contradiction in Defendant's representations to the Court. Defendant has stated, "I have not deposited or withdrew [sic] money into my wife's account. I only provided the account information to satisfy the court and plaintiff." See ¶1, Doc. No. 138. Yet, bank statements from Tory Donaldson's 5127-account show steady and continuous

³ Presumably, Defendant did not make deposits into or withdrawals from his wife's account ending in 0172, and therefore these records are not part of the order compelling production since the order compels compliance with Plaintiffs' request for financial records of accounts that Defendant made deposits into or withdrawals from.

deposits from Elite Pt. LLC, which is Defendant's personal bank account where he deposits his income.⁴

In the same vein, in his most recent response, Defendant stated the money in his wife's account (ending in 3905, then changed to 5127) comes from travel reimbursements, money earned from hair styling and cooking, and from selling her artwork.

See ¶A, Doc. No. 147.

He also stated that his wife's account number was changed from 3905 to 5127 due to "fraudulent activity by a merchant," See Doc. No. 147 at 8, which he attributes to "Square Inc."⁵

Plaintiffs aver that Defendant is lying. They argue that Square Inc., is Defendant Donaldson's personal training company and that to hide his assets he transfers his income from Square Inc. into his wife's account (5127). Defendant's and his wife's tax returns support this view, Plaintiffs assert. Ofa Donaldson's 2016 tax returns report \$22,293.00 in income, while his wife's 2016 tax returns report only \$105.00.

Indeed, the bank statements for account-5127 reveal deposits from the following sources: Mr. Donaldson's "Elite Pt

⁴ "All of his income was deposited into [sic] elite pt account from [February, 2015] until present." See ¶1, Doc. No. 138.

⁵ The lone bank statement Defendant provided from account 3905 shows one deposit by "Square Inc" on 10/24/18 of \$72.22. On the last page of the account statement, under "Items returned unpaid," three transactions by "Square Inc." appear: 11/8/18: \$3,129.00; 11/14/18: \$3,120.00; 11/15/18: \$195.00.

LLC" account ending in 5264, a tax refund from the IRS for \$5,826.84, Tory Donaldson's Venmo account (ending in 4211), and cash deposits. Plaintiffs again aver that the disparity between the total deposits into the 5127-account (\$34,469.71 during the 19 months documented in the records provided) and Tory Donaldson's reported income (\$105) reveals that Defendant uses the 5127-account to hide his assets.

Plaintiffs also requested bank records from the account ending in 6661. Defendant Donaldson explained that this account belongs to his teenage son, Taquiy Peurifoy. Mr. Donaldson states that the funds in the 6661-account come from money his son earns "for working, helping and doing odd jobs" and were contributed by family members. (Doc. No. 147). In opposition, Plaintiffs assert that Defendant moved \$550 in seizable assets from his personal account into his son's account, "instead of . . . making it payable to Plaintiff." See Doc. No. 146, at 5.

In light of Defendant's efforts to supply financial records, we decline to impose punitive sanctions in the form of criminal contempt. Here, Defendant has failed to [fully] "do the thing required by the order for the benefit of the complainant." Gompers v. Bucks Stove & Range Co., 221 U.S. at 442. Such an omission by Defendant does not qualify for criminal contempt. Criminal contempt is appropriate where a Defendant has done "an act forbidden." Id. at 443. The Gompers

Court explained that criminal contempt is an ineffective and inappropriate remedy for a civil wrong (such as failure to pay a judgment or failure to make full disclosure) because “[i]mprisonment [for a definite term] cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience.” Id. at 442.

Plainly, holding Defendant Donaldson in criminal contempt will not give Plaintiffs what they want – payment by Defendant. Although a complainant might derive some “incidental benefit” from a defendant’s definite imprisonment because it “tends to prevent a repetition of the disobedience,” the potential effect of such imprisonment “will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa.” Gompers, 221 U.S. at 498-499. “[C]riminal contempt sanctions [are] restricted to ‘those instances where the court must vindicate its authority.’” United States v. Juror No. One, 866 F. Supp. 2d 442, 446 (E.D. Pa. 2011) (quoting Waste Conversion, Inc., 893 F.2d 605, 612 (3d Cir. 1990)). This Court has twice applied the coercive remedy of civil contempt, (Doc. Nos. 118 and 126), and Defendant eventually provided financial records Plaintiffs requested. The fact that Defendant has not provided *all* of records does not require turning a civil contempt proceeding into a criminal one. Where Defendant has made efforts to comply with Plaintiffs’

post-judgment discovery requests, we DENY Plaintiffs' motion to hold Defendant in criminal contempt and we GRANT Plaintiffs a certificate of appealability to the Third Circuit.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

XTREME CAGED COMBAT, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 12-CV-3855
	:	
ECC FITNESS (AKA EXTREME CAGE COMBAT), ET AL.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 14th day of March, 2019, after a hearing, and upon consideration of Plaintiffs' 5th, 6th, and 7th Motions to Hold Defendant Ofa Donaldson in Contempt of Court (Doc. Nos. 136, 143, and 146), and Defendant's response to this Court's Order directing him to provide complete responses to Plaintiffs' discovery requests (Doc. Nos. 147 and 145), and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1) Plaintiffs' Motions to hold Defendant Donaldson in criminal contempt are DENIED.

2) Plaintiffs' request for a certificate of appealability to the Third Circuit is GRANTED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.