

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

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STEPHEN CHU,

Plaintiff,

Index No. 306949/2018

-against-

**DECISION AND ORDER
MOT. SEQ. NOS. 7 & 8¹**

YO-YO LIN,

Defendant.
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Matthew F. Cooper, J.S.C.

When in the future people speak of the New York State court system, they may very well say that this — the horrific COVID-19 pandemic of 2020, with New York City and its environs sadly at its epicenter — was its finest hour. While the true heroes of this medical emergency are undoubtedly health care workers, first responders, and other front-line workers who have put their health, and even their lives, on the line caring for others and supplying vital goods and services, an immense amount of credit must also be given to those who have managed to keep our courts open and running under the most difficult of circumstances imaginable. An independent, operational court system may not be an absolute necessity for sustaining life itself, but it is nevertheless an essential component of life as we know it in this country, as it is of any full-fledged constitutional democracy.

This is not to say that our courts have continued to operate as before. Far from it. It is now a full two months since we have gone “virtual,” with judges performing their duties

¹ Motion Sequences 7 and 8 are consolidated for purposes of this decision and order.

“remotely” from their kitchens and living rooms instead of from their courtrooms.² Through the efforts of dedicated and skilled court clerks, court officers, technology specialists, and administrators — many of whom continue to do their work from the courthouse — judges have been able to conference cases, hear oral argument, maintain calendars, and issue orders, all remotely from their homes and all via an impressive and growing array of videoconferencing and other telecommunication platforms, applications, services and devices.³ Remarkably, full-scale bench trials and evidentiary hearings are now being conducted with the judge, the attorneys, the litigants, and the court reporter all in different locations.

Still, no matter how advanced the technology, helpful the support services, and surprisingly fast and successful the transitions implementing the technology, I believe most judges, and most attorneys as well, find virtual proceedings to be a poor, if necessary, substitute for “actual” ones. I know I do. In the high-conflict matrimonial cases I handle, having both parties present in the courtroom for protracted, intensive conferencing is almost always required if any progress is to be made towards resolving the matter. Thus, in order to reasonably replicate the in-court experience while remotely conferencing a case, I would need a videoconferencing platform with the kind of enhanced features that would allow me to shuttle the parties and their lawyers back and forth to meet with me or my court attorneys in a virtual robing room, direct the

² By an Administrative Order (AO) dated March 15, 2020, notice was given that as of the close of business the next day, judges were to stay home and not to go to the courthouse unless their assignments were deemed essential. Although New York City judges were subsequently given different instructions, a further AO issued the morning of March 17 made it clear that the “stay-at-home” directive applied to judges throughout the state.

³ Those of us who grew up watching the cartoon show “The Jetsons” -- where the funny, futuristic fantasies included George seeing his wife Jane on a videophone as he flew home in his car from a hard day’s work at Spacely Space Sprockets -- may still find Skype, Zoom, and the other videoconferencing platforms rather amazing (and from my perspective, rather daunting). All that’s left now is for there to be cars that fly.

attorneys to go out and speak to their clients privately in a virtual hallway, and announce to all sides that they should be prepared to spend the remainder of the day together in a virtual courthouse until there is a resolution.⁴

Special challenges are being posed during this period of remote judging when the conflict, as it so often does in divorce cases, centers on the parties' children. In determining questions of child custody and parental access, judges are frequently called upon to assess each parent's "credibility, character, temperament and sincerity" (*Matter of Tori v Tori*, 103 AD3d 654, 655 [2d Dept. 2013]). This is difficult enough even in a physical courtroom setting. But, at least there the judge can closely view the parties both on and off the witness stand, scrutinize their body language, note how they react to what happens in the courtroom, and observe how they otherwise comport themselves throughout the proceedings. It becomes that much harder in a virtual courtroom setting, such as the one presently operating out of my kitchen, where the view is limited to what can be shown in fragmentary form on the screen of a laptop computer.

This is a long-running divorce case where COVID-19 has exacerbated an already existing problem with parental access. Having been unable to see his children since the advent of the crisis, the plaintiff-father brought a motion to compel the defendant-mother to comply with the parenting order that I had previously put into effect. Shortly thereafter, he brought a second motion, this time to hold defendant in contempt of court. In both motions, plaintiff also seeks relief regarding another serious issue, this one financial: the need for defendant to vacate the

⁴ I imagine that my colleagues who handle non-matrimonial cases are also finding it frustrating in the virtual court world to be unable to do much of what they would normally do when trying to settle a case in the physical court world. For instance, it must be hard for a judge who is remotely conferencing a personal injury or other tort case not to be able resort to the tried and true technique of telling the lawyers, sternly and emphatically, that unless they are ready to settle, then they better be ready in, say, 15 or 20 minutes to be sent out to go pick a jury.

former marital residence so that the closing on its sale can proceed. As will be discussed later, addressing that issue within the limitations imposed by the pandemic has surprisingly proven even more complicated than dealing with the parenting problems.

What is not surprising is that COVID-19 has offered the parties yet another opportunity to battle over their children. Throughout the pendency of this case, all efforts to reach any kind of lasting resolution on custody and parental access have been stymied by a toxic mix of dysfunctional parenting (on the part of both parties), allegations of domestic violence (made by each against the other), the existence of a Family Court Order of Protection (which plaintiff contends he ill-advisedly consented to), and an inability to abide by court orders (primarily on the part of defendant). Putting COVID-19 into the equation has only added a new element of conflict, as it has in innumerable other matrimonial cases where it has impacted the ability of divorced and divorcing parents to see their children.⁵

Fortunately, I found that I was able to address plaintiff's inability to see his children without having to hold a virtual evidentiary hearing and contend with the operational demands such a hearing would entail. Nor did I have to resort to the extreme remedy of contempt, with the additional difficulties that would entail. Because the case has now been before me for almost two years, I am intimately familiar with the parties and, seemingly, every facet of their unhappy situation. I also have had the benefit of excellent attorneys representing the parties and a skilled and caring Attorney for the Children. Consequently, the motion papers themselves, as augmented by oral argument and coupled with a follow-up report from the Attorney for the Children,

⁵ For a thoughtful analysis of how the health crisis has impacted these matters and the difficulties imposed on courts in ensuring parental access, see the article by the Hon. Jeffrey Sunshine, the Statewide Coordinating Judge for Matrimonial Cases, *COVID-19 and Future Custody Determinations*, New York Law Journal, March 27, 2020.

provided an ample basis on which to determine what further directives were needed to ensure that plaintiff was no longer deprived of access to his children. I set forth these directives in an interim order dated April 30, 2020.

It is heartening to see that the services needed to implement the directives can be provided despite the immense hurdles presented by the COVID-19 emergency. A key component of the order is to have social workers from Comprehensive Family Services, an independent family support agency, physically present to supervise the mandated transfers of the children from one parent to the other.⁶ This will serve to facilitate the transfer process, help allay any concerns that either child might have about going to plaintiff's home — especially any COVID-19-related fears that defendant may have stoked — and allow the issuance of first-hand objective reports that will assist me in making further determinations. Additionally, arrangements have been made, despite the significant logistical difficulties, to finally change the children's therapy from one where defendant was the only parent involved to a more whole-family focused modality where both parents are included.

As it turns out, the situation is far different when it has come to resolving the branch of each of plaintiff's motions that seeks to hold defendant accountable — including holding her in contempt of court and in turn sentencing her to a term of imprisonment — for her failure to comply with court orders requiring her to vacate the former marital residence. Here, not only does the virtual court format make it difficult, if not impossible, to conduct a contempt

⁶ Recognition needs to be given to the people at Comprehensive Family Services, and all those other dedicated individuals, both in government and out, who have been willing to leave the safety of their homes to provide vital services to children and families in crisis. They, too, are unsung heroes helping to keep the social fabric from fraying while we are in these fraught and frightening times.

proceeding, but other restrictions engendered by the pandemic foreclose the implementation of much of the relief that plaintiff seeks.

The residence, a condominium in the financial district of Manhattan, represents the parties' only marital asset. It is presently occupied by defendant. Because they lacked the financial means to continue to pay the mortgage and common charges, and as a result were faced with the prospect of the unit being foreclosed, the parties entered into a "so-ordered" stipulation in which they agreed to sell the apartment. Unfortunately, defendant soon after discharged her retained attorney (defendant now has court assigned counsel to represent her only on the child custody and parental access matters) and then embarked on an extended course of conduct designed to thwart a sale. This necessitated a series of motions in order to compel defendant to comply with the stipulation so that sale process could go forward. Ultimately, the unit was listed, a buyer found, and a contract of sale entered.

The pressing problem now is that the contract of sale requires the premises to be vacant at the time of closing, and defendant refuses to leave the apartment. As a result, the closing, which was repeatedly adjourned to give defendant more than ample time to vacate, has not been able to occur. Defendant's continued refusal to vacate is in direct defiance of a string of orders. These include a temporary restraining order I granted plaintiff on April 14, 2020, in a fruitless attempt to permit the "time of the essence" closing demanded by the buyer to proceed on April 20, 2020. Moreover, defendant's actions have not only jeopardized the sale, but have left the buyer threatening to sue for damages.

In terms of whether defendant's refusal to vacate the marital apartment constitutes contempt, there is little question that she has violated lawful court orders and that her actions have impaired and prejudiced the rights of the plaintiff (*see* New York State Judiciary Law §

753). Nevertheless, it strikes me as highly problematic, and perhaps even impermissible, to conduct a virtual hearing in a proceeding that could result in defendant being sentenced to jail.⁷

Even if I could find that a virtual contempt proceeding is permissible, I would still be hard pressed to find that it could prove workable. In addition to the general misgivings I voiced earlier about conducting virtual hearings in certain instances, I have concerns specific to this case. One is the fact that defendant has frequently been prone to disruptive outbursts in the courtroom, often necessitating the intervention of a court officer. I am skeptical as to whether the mute feature on the court system's Skype for Business platform will afford me the same level of control in my virtual courtroom. Another concern is one of more general applicability: how to utilize a Mandarin interpreter remotely. Although defendant seems to be sufficiently fluent in English, she states that when on the record she is more comfortable having an interpreter. While in the courtroom setting, she is given a court interpreter, who sits next to her and simultaneously translates everything said during the proceeding. In the virtual court setting, the interpreter, who of course will have no physical proximity to defendant, will be unable to speak to defendant whenever anybody else is speaking. Absent enhancements to Skype, the translation process, instead of being simultaneous and flowing, will be delayed and fragmented. A contempt hearing is far too serious a proceeding to operate under these less than optimum conditions.

In any event, a contempt proceeding, whether conducted remotely or not, would be of no avail to plaintiff in the end. What plaintiff is seeking is to have defendant jailed until she relents and agrees to vacate the apartment. The problem with this, of course, is that no matter how

⁷ Although contempt under New York State Judiciary Law § 753 is a civil proceeding, it is questionable whether a virtual hearing can ever be proper where, as here, the imprisonment of the person being charged with contempt is being sought, and thus, a person's liberty is at stake (*see e.g.*, for instance, Criminal Procedure Law § 182.20 [1], prohibiting a court in a criminal trial from permitting a defendant's "electronic appearance" in lieu of a "personal appearance").

blatant defendant's failure to comply with court orders or how extensive the resultant financial damage to plaintiff may be, it would be unthinkable to incarcerate anybody for an offense like this during the COVID-19 outbreak, with the serious threat of infection rendered even more acute by the inevitable conditions of incarceration. After all, this is a time when every effort is being made, as it should, to decrease the jail population, not increase it. Nothing more need be said.

A similar problem exists with the one of the major items of relief that plaintiff is seeking in his motion to compel: an order removing defendant from the premises. Frankly, I would be reluctant to do anything that might result in defendant ending up on the street in the middle of the pandemic, as she claims she will, especially considering that the children continue to reside primarily with her. As it so happens, though, I need not wrestle with the question. The power to evict defendant, whether by a Sheriff's Writ of Assistance or any other means, cannot be exercised at this time. By Executive Order 202.8, issued March 20, 2020, the Governor directed there can be "no enforcement of ... an eviction of any tenant residential or commercial ... for a period of ninety days."

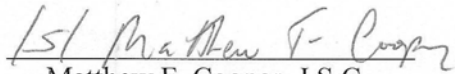
It might appear then that the COVID-19 emergency has, in effect, enabled defendant to avoid being held accountable for her conduct. And that may very well be true to the extent that she can neither be held in contempt nor removed from the apartment as things now stand. Fortunately, there are other remedies sought by plaintiff that are available to him, albeit ones that will not afford him any kind of immediate relief. Because the apartment is marital property, the proceeds from any eventual sale, whether to the present buyer or a future one (or if there is a foreclosure, then a sale by the bank) will be distributed *equitably*, not *equally*, in accordance with Domestic Relations Law § 236 B. As requested in his motion, and considering, as I am required

to do, the 14 factors set forth under DRL § 236 B (5)(d), I find that plaintiff's share of the proceeds shall be increased and defendant's share decreased in accordance with whatever loss in the selling price is attributable to defendant having prevented the sale from closing on April 20, 2020. As further requested, and again considering the factors, I find that defendant shall be held fully liable for all damages sought by the buyer or any other aggrieved third-party resulting from the inability to close insofar as that inability was caused by defendant's failure to vacate.

Although there have been instances where warring parents, viewing the death, pain, and hardship inflicted on so many by COVID-19, have been able to take stock of their own situation and diligently work in good faith to resolve their differences, that seems highly unlikely here. The best that might be hoped for is that now that upstate courts are beginning to emerge from the lockdown, New York County Supreme Court will be able to reopen shortly, and safely, so that this case can at last be fully tried, if that is what is necessary for a final resolution. Whatever the virtues of virtual justice, I remain convinced that a case such as this is better suited for disposition in an old-fashioned, brick and mortar courthouse. And it goes without saying, that I very much look forward to leaving my kitchen and returning to that grand and glorious building at 60 Centre Street, New York, New York.

In accordance with the foregoing, plaintiff's motion to compel (Motion Sequence 007) is granted to the extent set forth herein and as provided in the interim order dated April 30, 2020, as referenced herein, and plaintiff's motion to hold defendant in contempt of court (Motion Sequence 008) is denied without prejudice. This constitutes the decision and order of the court.

Dated: May 18, 2020

Enter: 
Matthew F. Cooper, J.S.C.