

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

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|---|---|-------------------------|
| Berne Corp. and B & B Corp., Twenty-one Queens |) | |
| Quarter, Inc., Miller Properties, Inc., Equivest St. |) | |
| Thomas, Inc., Robert Schmidt, Kim Holdsworth, |) | CIVIL No. 2000-141 |
| Robert Schmidt Development Corp., and Dori P. |) | (Consolidated Case No.) |
| Derr, The Cyril V. Francois Associates, LLC, Shell |) | |
| Seekers, Inc., Charles W. Consolvo, Linda B. |) | |
| Consolvo, Snegle Gade Associates LP, Charles W. |) | |
| Consolvo as Trustee of the Yvette B. Lederberg Trust, |) | Consolidated with: |
| Arthur B. Choate, Stewart Loveland, and Stacy |) | |
| Loveland, Elizabeth Sharp, Lindon Corp., Gordon L. |) | CIVIL No. 2000-167 |
| Coffelt, Soraya Diase Coffelt, and One Stop, Inc., |) | CIVIL No. 2001-151 |
| |) | CIVIL No. 2001-155 |
| Plaintiffs, |) | CIVIL No. 2001-181 |
| |) | CIVIL No. 2001-196 |
| vs. |) | CIVIL No. 2001-197 |
| |) | CIVIL No. 2001-228 |
| GOVERNMENT OF THE VIRGIN ISLANDS, ROY |) | CIVIL No. 2001-057 |
| MARTIN, in his official capacity as Tax Assessor, |) | |
| and the Board of Tax Review, |) | |
| |) | |
| Defendants. |) | |
| |) | |

**PLAINTIFFS' SECOND MOTION FOR ORDER
TO SHOW CAUSE RE CONTEMPT**

COME NOW Plaintiffs, by and through their undersigned counsel of record, and move the Court for an Order requiring the Government to appear and show cause why it should not be held in contempt for violating this Court's Order of May 12, 2003, as modified by the Order of August 13, 2003. As set out in more detail below, the Government has again simply decided for itself that it is going to ignore this Court's lawful orders and send out 2006 property tax bills. The following is a relevant chronology of events.

On September 11, 2008, this Court entered an Order finding the Government in contempt of the Order of May 12, 2003r , and setting certain conditions for the Government to purge the

contempt (Docket No. 439 in Civil 00-141). On September 18, 2008, this Court entered a further Order denying the Government's Motion to Stay the Contempt Order pending appeal (Docket No. 445). Subsequently, on October 10, 2008, in a short Order the Third Circuit stayed this Court's Contempt Order pending appeal. (See Exhibit A hereto). Plaintiffs believed this Order to be ambiguous in that part of the relief requested in their Motion for Stay was an Order allowing the Government to send out new tax bills during the pendency of the appeal. Therefore, Plaintiffs promptly filed a Motion for Clarification seeking direction from the Third Circuit as to whether tax bills could be sent out. On October 28, 2008, the Third Circuit entered a very brief Order which provided in pertinent part:

“The Court sees no need to ‘clarify’ its clear and ambiguous (sic, unambiguous) order of October 10, 2008 which stayed only the District Court's Contempt Order of September 11, 2008 and did not refer to, much less purport to lift, an injunction issued on May 12, 2003.” (Exhibit B hereto).

Surprisingly, the Government chose to interpret this Order clearly stating that the injunction remains in place as a green light to send out tax bills. Exhibit C hereto is a copy of a Daily News article reporting certain statements made by the Attorney General. According to that article Attorney General Frazer said that the Third Circuit's Order does not prohibit issuing property tax bills using new values, and he said that new tax bills for all property owners are forthcoming. According to the article the Attorney General asserted that “the bills are still valid.” Attorney General Frazer admitted that “These are very fine lines we are walking.” He then continued with the highly questionable assertion that “the government's position is very well thought out, and it is backed up with the law.”

The Government has carried through on its threat and has now sent out tax bills based on the 2006 tax assessments. (See Exhibits D, and E). It should also be noted that one of the attached bills

is for a property that is involved in the instant action and, therefore, unquestionably subject to the terms of the injunction. This blatant disregard of the May 12, 2008, Order is simply another example of the Government placing itself above the law and ignoring the lawful Orders of this Court.

**THIS COURT RETAINS JURISDICTION TO ENFORCE
ITS CONTEMPT ORDERS**

“In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.” *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985). However, this Court retains jurisdiction to impose contempt sanctions for disobedience of an order currently on appeal. The filing of a notice of appeal “only divest[s] the district court of jurisdiction respecting the questions raised and decided in the order appealed from.” *New York State National Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989), *citing Compania Espanola de Petroleos. S. A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 972-73 (2d Cir. 1975) (*overruled on other grounds by Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993)). In a contempt proceeding, the questions relate solely to the directives in the order and the refusal of the party to comply with issues that are entirely distinct from the issues decided in the order itself. In *Bray v. United States*, 423 U.S. 73, 75-76, 46 L. Ed. 2d 215, 96 S. Ct. 307 (1975), the Supreme Court held that a contempt charge based on a party’s refusal to obey a lawful order of the District Court initiated “a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court” and was “not a part of the original cause.” *quoting Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 and in *United States v. United Mine Workers*, 330 U.S. 258, 294, 91 L. Ed. 884, 67[**10]S. Ct. 677 (1947), the Supreme Court stated: "Violations of an order are

punishable as criminal contempt even though the order is set aside on appeal, or though the basic action has become moot." (citations omitted)¹

Thus, a district court remains vested with the ability to enforce an order, even while the order is *sub judice* before the reviewing court. See *Peterson v. Vallenzano*, 1996 WL 252376, *4 (S.D.N.Y. May 13, 1996). Long ago, the Supreme Court ruled that “an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.” *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947) (note omitted). Such orders are “to be obeyed until they expire or are set aside by appropriate proceedings, appellate or otherwise.” The Second Circuit has aptly noted that “it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.” *Alemite Mfg. Corp v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930).

This Court has clearly stated that it views the original May 12, 2003 injunction and August 13, 2003 modification to be currently in effect. This posture has also been firmly stated by the Third Circuit, which stated that its Stay Order did not affect the underlying injunction. Yet, the Government, “walking a fine line,” has made its own independent determination that it does not have to obey the Court and that it is free to issue tax bills using assessed values that have never been authorized by this, or any other court, and for which it was sanctioned previously.

¹ Plaintiffs emphasize that at this point they are only seeking civil contempt sanctions. Plaintiffs leave to the Court’s discretion the appropriateness of criminal sanctions for this second violation.

CONCLUSION

For the foregoing reasons, and each of them, Plaintiffs respectfully request that the Court enter an Order setting a time for the Government to appear and show cause why it should not be held in contempt for violating this Court's Order of May 12, 2003.

DATED: November 14, 2008

Respectfully Submitted,

/s/ James M. Derr
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DATED: November 14, 2008

Respectfully Submitted,

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DATED: November 14, 2008

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CERTIFICATE OF SERVICE

I certify that on this 14th day of November, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

Carol Thomas-Jacobs, Esq.

Chad Messier, Esq.

David Bornn, Esq.