

Dixon

**STATE OF VERMONT
WINDSOR COUNTY**

AVERY AUSTIN)	
)	
v.)	Windsor Superior Court
)	Docket No. 98-2-04 Wrev
)	
JONATHAN W. BYNORTH, SR.)	
and MYRA D. BYNORTH)	

DECISION ON PENDING MOTIONS

Plaintiff Avery Austin filed a complaint in 2004 alleging that defendants Jonathan and Myra Bynorth had interfered with a right-of-way providing emergency and fuel-delivery access to his property. After an evidentiary hearing, this court issued written findings and an order in September 2004 requiring the Bynorths to (1) pay \$4,007.49 to Mr. Austin and (2) "remove all junk or other vehicles or trailers or obstructions, including but not limited to, trees, brush, chicken wire, dirt mounds, debris, gates, fences or posts, and to permit unmolested and free travel across the right-of-way from Plaintiff's residence and boundary line to Spencer Hollow Road." The order was accompanied by a final judgment for the payment of money and for injunctive relief.

There have been at least four contempt proceedings in this court since the issuance of the September 2004 order, and Mr. Bynorth has been found to be in contempt on two prior occasions. In February 2005, this court found that Mr. Bynorth had willfully failed to remove debris from the right of way, and accordingly ordered him to remove the debris or pay money to Mr. Austin to enable him to remove the debris and restore the right of way. In May 2005, this court again found Mr. Bynorth in contempt for failing to remove the existing debris pile, for adding additional debris to the right of way, and for parking a backhoe in the right of way, thus blocking access.

The present matters before the court are four individual motions filed by Mr. Austin in connection with a new claim for contempt. He seeks first to establish that Mr. Bynorth has engaged in contemptuous behavior by continuing to block the right of way and by damaging the road surface. He moves second to "reopen" the judgment so that the claim for contempt may be heard. He moves third to substitute Scott Darrell as the real plaintiff in interest for the reason that Mr. Darrell has taken assignment of Mr. Austin's interests in the property and right of way. Finally, Mr. Austin moves to "enforce the judgment awards" for the payment of money that have been issued by this court. Mr. Bynorth opposes all of the motions on procedural and substantive grounds.

The procedure for the initiation of contempt proceedings in the superior court is established by Vermont Civil Procedure Rule 70 and 12 V.S.A. § 122, as follows:

FILED

SEP 15 2009

When a party violates an order made against him in a cause brought to or pending before a superior judge or a superior court . . . after service of the order upon that party, contempt proceedings may be instituted against him before the court or any superior judge. When, in a cause no longer on the docket of the court, the proceedings are brought before a superior judge, that judge shall order forthwith the cause to be brought forward on the docket of the court and may issue concurrently with the order a summons or capias against the party. The issuing of the summons or capias and any further proceedings thereon shall be minuted on the docket.

In other words, § 122 requires contempt proceedings to be brought under the same docket as the original order. This makes sense because “a contempt proceeding based on the violation of a court order does not open to reconsideration the legal or actual basis of the order so as to result in a retrial of the original controversy.” *State v. Pownal Tanning Co.*, 142 Vt. 601, 605 (1983) (quoting *Socony Mobil Oil Co. v. Northern Oil Co.*, 126 Vt. 160, 164 (1966)). Instead, the court determines only whether the existing order has been violated, and if so, whether remedial consequences should be imposed in order to coerce the defendant to comply with the order. Contempt proceedings are therefore viewed as a continuation of the original action, rather than a new and independent action on the judgment. *MacDermid v. MacDermid*, 116 Vt. 237, 242–43 (1950); accord 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2960 (explaining that “civil contempt charges are a continuation of the original proceedings”).

It does not matter for purposes of contempt proceedings whether the judgment is “dormant.” See *Koerber v. Middlesex College*, 136 Vt. 4, 8 (1978) (explaining that dormant judgments are judgments for the payment of money on which no execution has been requested for more than a year and a day). Title 12, V.S.A. § 122 expressly contemplates that contempt proceedings may be initiated in cases that are no longer on the active docket of the court. There is accordingly no dormancy bar to the present contempt proceedings. This conclusion is consistent with the inherent power of the court to enforce its own orders. See 11A Federal Practice and Procedure, *supra*, at § 2960 (explaining historical roots of contempt power).

Neither is there any issue involving the statute of limitations or the procedure for the renewal of judgments. See *Nelson v. Russo*, 2008 VT 66 (explaining procedures for renewal of judgments). The plaintiff here seeks enforcement of the five-year-old injunction. The plaintiff does not seek to renew the judgment for purposes of the statute of limitations.

Finally, it also does not matter whether the injunction is recorded in the land records. Rule 70 requires the recording of judgments that divest title to real property, but the order in this case does not involve titles. The notice requirement applicable here is that the defendant have actual notice of the September 2004 order. See *Vermont*

FILED

Women's Health Center v. Operation Rescue, 159 Vt. 141, 144–45 (1992) (explaining that actual notice of the injunction is required as a procedural prerequisite to the institution of contempt proceedings).

In this case, Mr. Austin has filed a motion for contempt in the same docket as the court order allegedly violated. The motion is accompanied by an affidavit setting forth the alleged facts constituting the contempt, and there is a return of service showing that the motion and affidavit were personally served upon Mr. Bynorth. It also appears from the file that Mr. Bynorth has actual notice of the September 2004 order. Since this is the correct procedure under § 122, the court shall bring the cause forward on the docket and set the contempt motion for hearing.

The second matter before the court is the motion to “reopen.” It is not clear from the motion whether Mr. Austin seeks to reopen the docket or to reopen the judgment. If the former, no motion is necessary since the court will bring the cause forward on the docket on its own in response to the motion for contempt. 12 V.S.A. § 122. If the latter, Mr. Austin has not explained why it is necessary to reopen the judgment in order to enforce the judgment, and there is no other suggestion in the pleadings showing why relief from the judgment should be granted under V.R.C.P. 60(b).¹ The motion to reopen is accordingly denied.

The third matter before the court is the motion to add Scott Darrell as a plaintiff in this action. Mr. Austin asserts that he has transferred his interests in the property and the right of way to Mr. Darrell.

Vermont Civil Procedure Rule 25(c) provides that, in the event of transfers of interest occurring after the commencement of the action, the court may permit the action to be continued by the original party or may permit the joinder or substitution of the transferee. The rule is intended to be flexible and non-controversial; an order of joinder is “merely a discretionary determination by the trial court that the transferee’s presence would facilitate the conduct of the litigation.” 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1958. Rule 25(c) applies here because the contempt proceedings are a continuation of the original action. The court accordingly grants the motion for joinder since it appears that the addition of Mr. Darrell as a party will facilitate the contempt proceedings. Mr. Darrell must file the appropriate notice of appearance with the court prior to any scheduled hearing.

The final matter before the court is the “motion to enforce judgments.” The motion is clear that the plaintiffs seek to enforce the money judgment awards issued by this court, and specifically that plaintiffs seek “issuance of liens against the personal property [and] real estate” of the Bynorths.

¹ The court notes here that contempt proceedings are limited to determining whether the defendant has violated a prior court order. The contempt power reaches only violations of the existing injunction. If the plaintiff wishes to expand the scope of the injunction or to assert new claims for injunctive relief, the plaintiff must file a new action with the court. Rule 60(b) would not be an appropriate tool for expanding the scope of an existing injunction.

FILED

SEP 15 2009

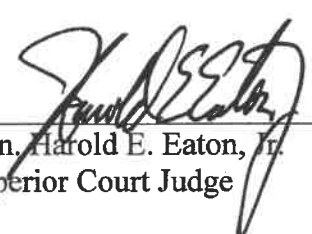
The motion is denied because the requested relief is the issuance of liens, but the procedure for the creation of judgment liens does not involve the court. See 12 V.S.A. §§ 2901–2905 (explaining procedures). The court therefore cannot grant the requested relief. Moreover, Rule 69 explains that the only court process to enforce a judgment for the payment of money “shall be a writ of execution, unless the court directs otherwise.” Since the motion does not seek a writ of execution, and since the motion does not explain why some other form of relief would be available and appropriate, the motion is denied.

ORDER

For the foregoing reasons, Plaintiff’s Motion for Contempt and for Injunctive Relief and Damages (MPR #17 and MPR #18) shall be *set for hearing*, and Plaintiff’s Motion to Add Necessary Party (MPR #15) is *granted*. Mr. Darrell must file a notice of appearance prior to the scheduled hearing.

Plaintiff’s Motion to Reopen (MPR #14) and Motion to Enforce Judgments (MPR #16) are both *denied* for the reasons stated above, but the denial of these motions does not affect the ability of the plaintiffs to pursue the motion for contempt.

Dated at Woodstock, Vermont, this 15 day of September, 2009.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

SEP 15 2009