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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division.

Mikael SALOVAARA, Plaintiff,

v.

Alfred C. ECKERT III, SSP Advisors, L.P., a Delaware Limited Partnership, and  
SSP Partners, L.P., a Delaware Limited Partnership, Defendants.

No. MRS-C-126-96, MRS-L-539-99.

Jan. 13, 2003.

Sills Cummis Radin Tischman, Epstein & Gross, P.A., Newark, New Jersey, for  
Plaintiff Mikael Salovaara.

ORDER

MACKENZIE, J.

\*1 This matter, having come before the Court on the motion of plaintiff Mikael Salovaara for an Order pursuant to R. 1:10-3 compelling defendant Alfred C. Eckert III to comply with this Court's Orders of October 9, 2002 and December 2, 2002, and on cross-motion of Alfred C. Eckert III to establish a procedure to determine the amount of indemnification Mr. Eckert is entitled to receive for legal fees and costs incurred in *Salovaara v. Eckert*, MRS-C-29-94 ("*Salovaara I*") I, and Mr. Eckert having represented to this Court that he returned the \$2,015,000 paid by the SSP Partnerships to satisfy the judgment in *Salovaara I*, and the Court, having reviewed the papers submitted in support of and in opposition of the application and having heard oral argument, and for good cause shown and for the reasons set forth on the record;

IT IS, therefore, on this 13th day of January, 2003,

ORDERED THAT

1. Plaintiff Mikael Salovaara's Motion to compel Mr. Eckert to comply with the Court's October 9, 2002 and December 2, 2002 Orders, or be held in contempt pursuant to R. 1:10-3 shall be and is hereby GRANTED;

2. Defendant Alfred C. Eckert III shall either, within twenty-one (21) days, (a) return the "\$2,000,000 plus" advanced by the SSP Partnerships as indemnification for his legal fees and expenses in *Salovaara I*, or (b) post a supersedeas bond in favor of the SSP Partnerships in the amount of \$3,000,000, or (c) place \$3,000,000 in an escrow account with either New Jersey counsel of record in this matter, said monies to be held and disbursed in accordance with the Court's Orders of October 9, 2002 and December 2, 2002;

3. Defendant Alfred C. Eckert III shall personally reimburse plaintiff Mikael Salovaara for the costs of seeking enforcement of the Court's October 9, 2002 and December 2, 2002 Orders, including reasonable attorneys' fees and costs, and Mr.

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Eckert is barred from seeking indemnification for such fees and costs from the SSP Entities and/or any parent, affiliate or subsidiary thereof. Counsel for Mr. Salovaara shall submit a certification of reasonable attorneys' fees and costs within ten (10) days of the date of this Order;

4. If it appears, upon certification of plaintiff's counsel, that defendant Alfred C. Eckert III has not complied with paragraph two above within the allotted time, defendant Alfred C. Eckert III, shall, following an additional five day grace period to comply or certify why he is unable to do so, be arrested and held at the Morris County jail until such time as defendant complies with the Court's Orders or demonstrates that compliance is impossible;

5. Defendant Alfred C. Eckert III's cross-motion to establish a procedure for determining the amount of indemnification he is entitled to receive from the SSP Partnerships for fees and expenses incurred in *Salovaara I* be and is hereby GRANTED on consent, except that a Special Master shall not be appointed at this time;

6. Within 15 days of receipt of this Order, Mr. Eckert shall submit papers to this Court setting forth the specific amount of indemnification he believes he is entitled to receive for legal fees and expenses incurred in *Salovaara I*, with supporting documentation;

\*2 7. To the extent Mr. Salovaara disagrees with Mr. Eckert's application, within 15 days of receipt of Mr. Eckert papers, Mr. Salovaara shall submit responding papers setting forth the specific amount of indemnification he believes Mr. Eckert is entitled to receive for legal fees and expenses incurred in *Salovaara I*, with supporting documentation;

8. If necessary, Mr. Eckert shall file any reply papers within 7 days of receipt of Mr. Salovaara's submission.

9. A copy of this Order shall be served on all counsel of record within seven days.

FACTS: The Court incorporates by reference all of the facts stated in the Court's previous written opinions regarding this long fought litigation. Plaintiff Mikael Salovaara claims that Defendant Alfred Eckert refuses to comply with the Court's Orders in this matter dated October 9, 2002 and December 2, 2002 ("the Orders"). Plaintiff now moves to have those Orders enforced, or have Defendant held in contempt. According to Plaintiff, Defendant refuses to comply with that portion of the Court's Order requiring him to pay over \$4,000,000 to SSP Partners, LP and SSP Advisors, LP ("the SSP Partnerships"). Plaintiff states that Defendant's sole excuse for turning over the money is that the Court's Orders are not final. Plaintiff contends that neither New Jersey law nor basic legal principles allow Defendant to treat the Court's Orders as mere advisory opinions that can be ignored until a case is completely over.

The Court's October 9, 2002 Order stated that "Defendant Eckert be, and hereby is, ordered to return the \$2,000,000 plus advanced by the SSP entities for his legal expenses, as well as the \$2,000,000 paid into deposit with the Clerk of the Court in connection with satisfying the Judgment in *Salovaara I*." On November 8 and 15, 2002, counsel for Plaintiff wrote to Defendant's counsel to ascertain whether Eckert had complied with the Court's Orders. On November 19, 2002, counsel for Eckert advised that the \$4,000,000 plus had not been returned "to either SSP Advisors, LP or SSP Partners, LP." Defendant's counsel further wrote that it "would be premature to take any action until there is a final order."

Subsequently, on December 2, 2002, the Court entered an Order clarifying the October 9, 2002 Order "so that Mr. Eckert shall not receive any monies for indemnification relating to the matters set forth in the October 9 Order" until the parties presented their positions regarding the methodology and amounts to which Defendant was entitled to receive indemnification; as well as until the Court entered an Order regarding the amount that Eckert was to receive. On December 5, Plaintiff's counsel again inquired regarding Eckert's compliance, but was not given any assurances that he would do so. Plaintiff now maintains that Eckert should be

made to comply with the Orders immediately, and pay for Plaintiff's reasonable attorneys fees, because 1) Eckert has already been found to have engaged in bad faith and willful misconduct, 2) was Ordered by the Court to return the money in question, and 3) has offered no explanation for failing to pay the amounts in question other than the argument that the Court's Order was not final. Also, Plaintiff argues that the Court's Order stating Eckert not receive any money for indemnification until a determination by the Court makes no sense unless Eckert returns the amounts in question to the SSP Partnerships in the first instance, pending the determination of the indemnification amount.

**\*3** Defendant counter-argues that the "lack of finality" of the Orders provides a valid basis for not requiring Eckert to make payments at this time. While neither party disputes the Orders are not final, they are so because they require a determination as to how much Eckert will actually owe on his defense costs. Additionally, Salovaara II has been consolidated with Salovaara III, and Plaintiff has only moved for partial summary judgment in that matter; which is opposed. There is also an outstanding motion by Eckert to enforce the Final Judgment in Salovaara I, and obtain a release and distribution of the recovery made in Advisory Fee litigation.

According to Defendant, he has already returned the \$2,015,000 relating to the Salovaara I judgment to the SPP Partnerships. Eckert claims he made this payment because the amount was fixed, and required no further determination by the Court. However, since that is not the case at hand regarding Eckert's defense costs, Eckert does not believe he should now turn over the money in question. In addition, Eckert contends that R. 1:10-3 is inapplicable to the case at hand because the claims underlying the Orders do not contain requests for equitable relief. Eckert also argues that R. 1:10-3 is inapplicable because Salovaara is not a judgment creditor pursuant to R. 4:59-1. Even if so, Defendant argues that Salovaara has not demonstrated that Eckert "has assets that have been secreted or otherwise placed beyond the reach of execution." R. 1:10-3. Moreover, relying on the comment notes under R. 1:10-3, Defendant maintains that R. 1:10-3 was enacted to prevent the very issue at hand: Plaintiff's attempt to have Eckert incarcerated for failure to pay.

Further, Eckert has submitted recommendations to the Court regarding his indemnification for the "claims he prevailed upon in Salovaara I." By Salovaara's own calculation, Eckert will be entitled to 38.6% of the total attorneys' fees incurred in defending Salovaara I. However, while Eckert contends that Salovaara's calculations are flawed in certain respects, he argues that this evidences he will be entitled to indemnification for a substantial portion of his attorneys' fees; and the anticipated difference between the two figures. Further, because Eckert, Salovara, and their respective IRAs each have equal interests in the SSP Partnerships, Defendants argues that Salovaara will ultimately be entitled to only half of whatever funds are paid into the Partnership. Therefore, Defendants argue that Salovaara's fears that the funds will dissipate in the future are meritless; and that only a small fraction of the \$2 million plus in legal fees will fully go to Salovaara.

Therefore, Eckert argues there are at least two main reasons why he should not have to pay the defense costs into the SSP Partnerships. One reason is that it is not clear much in attorneys' fees Eckert will be indemnified for. The second reason is that the payment of the full amount of Eckert's legal fees into the SSP Partnerships would create an immediate taxable event to the Partnerships; by essentially being a reversal of previously deductible expenses.

**\*4** Eckert also proposes the following procedure to establish the amount he will be indemnified for. His first recommendation is for the Court to establish a briefing schedule to determine the issue of the amount of Eckert's entitlement to indemnification in the issues which he prevailed. Another option along these same lines is to appoint a Special Master to hear and recommend to the Court, pursuant to an established briefing schedule, the amount the Eckert is entitled to. Eckert does not anticipate that this process would last very long. Thereafter, Eckert states he should pay to the SSP Partnerships the net amount he is determined to owe, which would be the difference between the total fees previously advanced to him and the

amount the Court determines he is entitled to. Eckert believes this can be a relatively expeditious process since Salovaara's counsel have long had Eckert's billing statements in *Salovaara I*, and also have had access to the knowledge of briefs, transcripts, and exhibits in the case. Further, Eckert and his attorneys are prepared to make full submissions, complete with all relevant billing statements and other documents that may be required by the Court or a Special Master, within fifteen (15) days of the entry of an Order. Finally, Defendant argues that Salovaara's only possible excuse for not wanting to go along with this proposed plan is because he wants to inflict financial harm on Eckert; even though the actual net amount owed by Eckert will ultimately be significantly less than the money Salovaara is asking Eckert to return to the SSP Partnerships.

Plaintiff replies to Eckert's position by arguing that Eckert has lost his current argument twice already before the Court, with the most recent loss courtesy of the telephonic oral argument on November 22, 2002. Following that date, the Court ordered Eckert, for the second time, to return the \$4,000,000 plus to the SSP Partnerships pending further determination by the Court. Therefore, Plaintiff argues there is no justification for Eckert still refusing to comply with the Court's Orders. Further, Plaintiff contends that Eckert's arguments are misplaced because Salovaara is seeking to have Eckert return the subject amounts to the SSP Partnerships, pursuant to the Court's Order; and is not seeking to collect a monetary judgment. Moreover, Plaintiff argues that even if commitment is not an option, the proper remedy is to grant his application without such commitment as an enforcement mechanism.

Additionally, Plaintiff agrees with Eckert that a procedure should be established to brief and resolve the issues relating to the amount of indemnification Eckert may receive. Of the options offered by Eckert, Plaintiff believes the briefing schedule with oral argument is the best method of the two because it will avoid the time and expense of a Special Master.

#### ANALYSIS

"The orderly processes of administration of justice are necessarily dependent on full compliance with all lawful orders of the courts." *In re: the Application of Tiene*, 17 N.J. 170, 181 (1954). "If [a] person to whom a court order is directed wishes to test its validity before complying with it, the appellate courts are open to him [ ... ] [o]therwise, he must obey it." *Roselle v. Mayor and Council or Borough of Monnachie*, 48 N.J.Super. 17, 25 (App.Div.1957). "No other rule is compatible either with the dignity of the courts or the effective prosecution of their business ." *Id.* A failure to comply with an Order subjects the recalcitrant party to commitment under R.1:10-3, and potentially criminal contempt proceedings as well. See *Essex County Bd. Of Taxation v. City of Newark*, 340 N.J.Super. 432, 437 (App.Div.), certif. denied, 170 N.J. 387 (2001); *Marshall v. Matthei*, 327 N.J.Super. 512, 527-28 (App.Div.2000).

\*5 Additionally, R. 1:10-3 states that "no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based on a claim for equitable relief [ ... ] and except if a judgment creditor demonstrates to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution ." The comments following R. 1:10-3 state that "[t]he evident purpose" of the rule "is to make clear that enforcement by incarceration was never intended to create a so-called debtor's prison." Sylvia B. Pressler, *New Jersey Court Rules*.

Accordingly, the Court will grant Plaintiff's motion. To begin, nothing in the Court Rules, or R. 1:10-3, limits the right of this Court to compel compliance with its Order until the subsequent date when it becomes fully final. To accept Defendant's position that he need not comply with the Court's Orders until they are final is completely at odds with long established law and legal doctrines. Such a position also yields the preposterous conclusion that the Court is powerless to compel a litigant to perform as the Court directs until all litigation is over. In essence, an acceptance of Defendant's position would make a mockery of our judicial system's credibility and effectiveness. Further, the Court only instructed Eckert to

return the subject amount to the SSP Partnerships, and not to Salovaara personally. Therefore, Eckert's arguments revolving around the fact that Salovaara will only receive a significantly lesser portion of these amounts must fail. The subject amounts rightfully belong to the SSP Partnerships, and will not be distributed for indemnification purposes until the Court has finished wrestling with that issue. Therefore, Plaintiff's motion is granted.

As for the procedure to be established regarding a methodology for ascertaining the amount Eckert is to be indemnified for, the Court will choose the procedure both sides agree on, which is a briefing schedule with oral argument to be heard before the Court. The Court also feels this is the preferred method since the appointment of a Special Master would cause the case to move less expeditiously.

#### CONCLUSION

- 1) Grant Salovaara's Motion
- 2) Set a Briefing Schedule and Oral Argument Date to Ascertain Eckert's Indemnification Amounts.

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