

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BROOME

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JUSTICE AND UNITY FOR THE SOUTHERN  
TIER

Plaintiff,

MEMORANDUM OF LAW

-against-

DAVID HARDER, Broome County Sheriff,

Defendant,

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**PRELIMINARY STATEMENT**

In March 2020, Defendant Harder cancelled all in-person visitation in response to the COVID-19 pandemic. For more than two and a half years there was no in-person visitation at the Broome County Jail (Jail). During that time-period the Broome County Sheriff's Office brought in an enormous amount of revenue because the only option people had to stay in contact with their loved ones was using the phones or video visitation.

After extensive litigation, in-person visitation at the Jail finally re-opened on September 29, 2022. However, without any notice to this Court Defendant Harder took it upon himself to contact the New York State Commission on Corrections (SCOC) and request approval for a significantly reduced visitation schedule. Defendant Harder is now offering less than half the visitation time the Court ordered him to offer. This intentional disobedience of the Court's clear and unequivocal mandate warrants the imposition of both criminal and civil contempt sanctions.

**Facts and Procedural History**

On May 25, 2022 Plaintiff filed a verified complaint and a motion for a preliminary injunction by order to show cause to end the visitation ban. (Dkt. No 4, 5.) On August 18, 2022

this Court issued a decision granting Plaintiff's motion for a preliminary injunction. *Just. & Unity for the S. Tier v. Harder*, No. EFCA2022000924, 2022 N.Y. Misc. LEXIS 4130, (Sup. Ct. Aug. 18, 2022). First, the Court held Plaintiff JUST had standing to challenge Defendant's policy. *Id.* at 4-7 On the merits the Court held JUST had shown a likelihood of success on the merits due to the readily available --and easily implementable -- protocols the Defendant could use to safely resume in-person visitation. *Id.* at 6-9 The Court found the entirety of Defendant's argument was based on generalized concerns about the transmission of COVID-19, and those concerns were not a sufficient justification for their ban. *Id.* at 8 (“[S]imply asserting that a risk of COVID-19 transmission exists, which appears to be the essence of defendant's defense, is insufficient to restrict the significant liberty interests guaranteed both pre-trial detainees and visitors.”).

In-person visitation was ordered to re-start no later than September 5, 2022 on the schedule set forth in Defendant's inmate handbook *Id.* Defendant Harder was allowed to put in any safety protocols he deemed necessary as long as they were consistent with government recommendations. (*Id.* at 9-10.)

In an effort to delay the start of in-person visitation, on August 30, 2022 Defendant Harder filed a notice of appeal which stayed the implementation of the preliminary injunction order. *See* C.P.L.R. §5519(a). JUST filed a motion to vacate the mandatory stay on September 6, 2022. In opposition to JUST's motion Defendant Harder again set forth conclusory arguments that a total ban on in-person visitation is necessary to protect inmates and staff. (Affirmation of Robert Behnke ¶ 9, September 14, 2022; Affidavit of Mark Smolinsky ¶¶ 11-14, September 14,

2022.<sup>1</sup>) On September 22, 2022 the Appellate Division vacated the mandatory stay with an effective date of September 29, 2022.

In response to the stay being lifted Sheriff Harder contacted the New York State Commission on Corrections (SCOC) and proposed a new limited visitation schedule. (*See* Cotter Affirmation ¶ 8.) According the Defendant’s counsel the schedule was approved by the SCOC. (*Id.*) Defendant Harder implemented this new visitation schedule—that does not comport with this Court’s preliminary injunction order--without notifying Plaintiff’s counsel or the Court. Plaintiff’s counsel only found out about Defendant’s intention to not comply with this Court’s order the day before visitation was set to resume. (Cotter Affirmation ¶ 7.) After discussing the issue with Defendant’s counsel, it was clear Harder had no intention to comply with the Court’s order and bringing this motion was necessary. (*Id.* ¶¶ 7-11.)

Defendant Harder’s new schedule offers visitation to the general housing pods only three days per week for a total of 12 hours (4 hours per day Monday-Wednesday). (Affidavit of William Martin, Exhibit A.) Under the court ordered visitation schedule there are 33 hours available for the visitation of general housing prisoners. (Dkt. No. 4 fn. 1) Under Defendant Harder’s new schedule prisoners in restricted housing units have access to only two hours of visitation per week. (Affidavit of William Martin, Exhibit A.) Under the Court ordered schedule there are 8 hours of available visitation time for prisoners housed in restricted housing units. (Dkt. No. 4 fn. 1)

### **Argument**

The Court should hold Defendant Harder in civil and criminal contempt due to his willful disregard of the August 18<sup>th</sup> preliminary injunction order. Civil and criminal contempt have

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<sup>1</sup> Both affidavits are attached as Exhibit 1 to the affirmation of Joshua Cotter.

separate and distinct purposes. *Matter of Dep't of Env'tl. Protection of City of N.Y. v. Dep't of Env'tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 (1987) The purpose of civil contempt is to compensate the injured party, coerce compliance with the Court's order, or both. *Id.* The purpose of criminal contempt is to punish the party disobeying the court order. *Id.*

"[T]he same act may be punishable as both a civil and criminal contempt." *McCormick v. Axelrod*, 59 N.Y.2d 574, 582-83, modified in part, 60 N.Y.2d 652 (1983). In this case --for both types of contempt-- the common sanctionable act is Defendant Harder's willful disregard of this Court's August 18, 2022 preliminary injunction order. *See* Judiciary Law § 750(A)(3) (A court "has power to punish for criminal contempt, a person guilty of . . . [w]illful disobedience to its lawful mandate."); Judiciary Law § 753(A)(3) (A court has the power to punish a party for any "disobedience to a lawful mandate of the court" where the rights of a party have been prejudiced.)

A party seeking a civil or criminal contempt order must show by clear and convincing evidence that: (1) there was an unequivocal and lawful mandate or order from the court in effect; (2) it is reasonably certain that the order has been disobeyed; (3) the party to be held in contempt had knowledge of the order even if it was not served upon him. *Matter of Dep't of Env'tl. Protection of City of N.Y.* 70 N.Y.2d at 240. Additionally, criminal contempt requires a degree of willfulness while civil contempt only requires a party show their rights were prejudiced by the disobedience of the court's order. *Id.*

Here, the facts establish both criminal and civil contempt by Defendant Harder. The Court should accordingly sanction him for the willful disobedience of this Court's order and redress the resulting prejudice to JUST.

**Defendant Harder Should be Found in Criminal Contempt and Sanctioned Pursuant to Judiciary Law § 750(A)(3) and 751(1)**

First, the August 18 preliminary injunction Order is a lawful order of the Court clearly expressing an unequivocal mandate. Pursuant to that order Defendant Harder is required to provide in-person visitation on the schedule outlined in the inmate handbook that was attached as an exhibit to JUST's verified complaint. *Just. & Unity for the S. Tier*, No. EFCA2022000924, 2022 N.Y. Misc. LEXIS 4130, at \*9.<sup>2</sup> The Court's ruling did not invite Defendant Harder to come up with his own schedule or change the ordered schedule in any way. To the contrary the Court required Defendant Harder to: "resume in-person visitation for pre-trial detainees and visitors at the Jail pursuant to the Jail's own inmate handbook namely the schedule set forth at pages 15-16 thereof." *Id.*

Second, there is an absolute certainty Defendant Harder disobeyed this Court's preliminary injunction order. (*See* Martin Aff. Exh. A)(Showing the new schedule implemented by Defendant Harder.) He made no efforts to comply with the order. Instead he immediately took steps to restrict visitation times after the stay was vacated by the Appellate Division. Defendant Harder's lack of good faith is further demonstrated by the total absence of safety protocols during in-person visitations. (Martin Aff. ¶ 7.) Before this Court and the Appellate Division Defendant Harder repeatedly argued that the total visitation ban was necessary for the safety of inmates and staff. (Affirmation of Robert Behnke ¶ 9; Affidavit of Mark Smolinsky ¶¶ 11-14.) Defendant Harder's subsequent actions have shown these arguments were not made in good faith.

Third, there is no dispute Defendant Harder had knowledge of the August 18 order. Plaintiff's Counsel filed a notice of entry which included this Court's decision and order. (Dkt.

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<sup>2</sup> The schedule ordered by the Court is available here: Broome County Jail Inmate Handbook, (Inmate Handbook) at 15-16, June 30, 2020, available at: <http://www.justicest.com/wp-content/uploads/2020/07/Handbook-foil-7-2-20.pdf>

No 21.) Nor can Defendant Harder argue he misunderstood this Court's order which is clear and unequivocal. Assuming *arguendo* he did misunderstand the order, he had ample opportunity to request clarification from the Court, but he made no effort to do so.

"Knowingly failing to comply with a court order gives rise to an inference of willfulness which may be rebutted with evidence of good cause for noncompliance." *Dalessio v Kressler*, 6 A.D.3d 57,66 (2d Dep't 2004). Defendant Harder's knowing and determined failure to comply with the Court's August 18 order rises to the level of criminal contempt. Defendant Harder has flouted the authority of the Court by deliberately refusing to make any effort to comply with the visitation schedule set forth in the preliminary injunction order. His conduct constitutes "an offense against judicial authority" and a finding of criminal contempt is therefore warranted to "protect the integrity of the judicial process and to compel respect for [the Court's] mandates." *Matter of Dep't of Env'tl. Protection of City of N.Y.*, 70 N.Y.2d at 239. The willfulness of Defendant Harder's actions is further demonstrated by his failure to take any of the legal options available to him such as: filing a motion for re-argument or clarification with this Court (CPLR 2221) or filing a motion to modify the preliminary injunction (CPLR 6314). *See Ulster Home Care, Inc. v. Vacco*, 255 A.D.2d 73, 78, (3d Dept. 1999) ("Until judicial relief to stay or vacate the order was successfully obtained, defendant was duty-bound to honor it.")

Most troubling is that Harder's illegal actions have likely led to dozens of people being unable to visit their loved ones at the Jail. (*See Martin Aff.* ¶¶ 10-11.) As a sanction for Defendant Harder's criminal contempt, Judiciary Law § 751(1) provides for a fine up to \$1,000. Therefore, this Court should order Defendant Harder to pay a \$1,000 fine. *Dep't of Hous. Pres. & Dev. v. Deka Realty Corp.*, 208 A.D.2d 37, 45, (2d Dept. 1995).

**Defendant Harder Should be Found in Civil Contempt and Fined for the Resulting Prejudice to JUST Pursuant to Judiciary Law §§ 753(a)(3), 756, and 776**

A civil contempt finding is also appropriate because Defendant Harder's disobedience of the Court's order has prejudiced JUST's ability to fully implement their visitation program. (Martin Aff. ¶¶ 8-11.) Without access to several different visitation times JUST is unable to visit all the prisoners they want to. *Id.* Family members have similarly been unable to take full advantage of in-person visitation due to the shortened schedule. *Id.* Defendant Harder's actions have further prejudiced JUST because their counsel has been forced to expend resources preparing these motion papers.

"Judiciary Law § 773 permits recovery of attorney's fees from the offending party aggrieved by the contemptuous conduct." *Children's Vill. v Greenburgh Eleven Teachers' Union Fed'n. of Teachers, Local 1532*, 249 A.D.2d 435,435 (2d Dep't 1998) (reversing denial of motion for attorneys' fees). The rationale is that "[t]he intent of [§ 773] is to indemnify the aggrieved party for costs and expenses incurred as a result of the contempt." *Id.* For an attorney with Mr. Cotter's level of experience \$250 per hour is an appropriate rate. *Disability Rights N.Y. v. N. Colonie Bd. of Educ.*, No. 1:14-CV-0744 (DNH/DJS), 2017 U.S. Dist. LEXIS 69593, at \*15 (N.D.N.Y. 2017) (Finding \$250 is an appropriate rate for an attorney with ten years' experience). Mr. Cotter has expended a total of 17.6 hours preparing this motion. (Cotter Affirmation ¶ 12.) Accordingly, the Court should impose a fine in the amount of \$4,400.00 in attorneys' fees, plus an additional \$250 pursuant to Judiciary Law § 753, for a total of \$4,650.00.

### CONCLUSION

For the reasons set forth herein and in the accompanying motion papers, the Court should hold Defendant Harder in civil and criminal contempt, impose a fine of \$1,000 to be paid to the Court for criminal contempt pursuant to Judiciary Law § 751(1), impose a fine of \$4,650.00 to be paid to JUST for civil contempt pursuant to Judiciary Law § 773, and grant

such other and further relief as the Court may deem just and proper.

Date: October 7, 2022

Respectfully submitted,

/s/ Joshua Cotter  
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