

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

BAY COMMUNICATIONS III LLC, Plaintiff,)	
)	
)	Civil Action
)	Docket No. 2:20-cv-00100-LEW
v.)	
)	
CITY OF ROCKLAND and CITY OF ROCKLAND PLANNING BOARD, Defendants.)	
)	

**PLAINTIFF’S MOTION FOR CONTEMPT
AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Fed. R. Civ. P. 70(a) and (e), plaintiff Bay Communications III LLC (“Bay”) hereby moves that the defendants City of Rockland (the “City”) and City of Rockland Planning Board (the “Board”) (collectively, the “Defendants”) each be held in contempt for their repeated and continuing failures to comply with this Court’s Judgment dated November 12, 2020 (Docket No. 22). In short, the Judgment¹ unambiguously commands:

the Board and the City . . . *to grant all necessary special exceptions, special use classes, site plan review approvals, variances, waivers, permits and any and all other required approvals (collectively, the “Zoning Relief”) necessary pursuant to the Zoning and Planning and Site Plan Ordinances of the City of Rockland, Maine for Bay to construct and operate the Facility at the Site²* in accordance with the Site Plan package dated 6/21/19, last revision 1/6/20, entitled “ME0041B Rockland 120-Foot Tower, 182 Camden Street, Rockland ME 04841 Knox County” prepared for Bay Communications by Wood Environmental & Infrastructure Solutions, Inc., 511 Congress St., Suite 200, Portland ME 04101, Project No: 3618198681, Sheets Number: T-101, C-101, C-102, C-103, C-104, D-101, D-102, and G-101 (together, the “Site Plan”).

¹ The Judgment is based on an Agreement for Judgment filed by the parties (Docket No. 20) and thereafter endorsed by this Court (Docket No. 21).

² The Judgment defines the “Facility” as “a 120 foot Above Ground Level multi-carrier wireless telecommunications tower facility (with a 4 foot lightning rod on the top thereof), related appurtenances and access and utility routes” and the “Site” as 182 Camden Street, Rockland, Maine.

Judgment (Docket No. 22).

Despite the clear and unambiguous terms of this Court's Judgment, the fact that the Judgment was a result of a fully negotiated Agreement for Judgment between the parties (Docket Nos. 20 and 21), and the passage of more than two months, the Board and the City have now repeatedly refused to grant Bay the Zoning Relief explicitly ordered by this Court. In fact, as detailed in paragraphs 14-19 of the Declaration of Vincent Granese (filed herewith), the Board has now twice *formally* refused to comply with the terms of the Judgment. The Judgment is clear and unambiguous. The Defendants have actual notice of the terms of the Judgment and are fully capable of complying with those terms. The Board and the City are therefore in clear and convincing contempt of this Court's Judgment. The fact of Defendants' contempt is beyond dispute. At issue is the appropriate remedy.

A. THE DEFENDANTS ARE IN CLEAR CONTEMPT OF THE JUDGMENT.

“To prove civil contempt, a movant must show that (1) the alleged contemnor had notice of the order, (2) the order was clear and unambiguous, (3) the alleged contemnor had the ability to comply with the order, and (4) the alleged contemnor violated the order.” *Fed. Trade Comm'n v. Health Research Labs., LLC*, No. 2:17-CV-00467-JDL, 2020 WL 4431497, at *3 (D. Me. July 31, 2020) (internal quotations omitted) (citing *Hawkins v. Dep't of Health & Human Servs. for New Hampshire, Com'r*, 665 F.3d 25, 31 (1st Cir. 2012)). “The test is whether the putative contemnor is able to ascertain from the four corners of the order precisely what acts are forbidden.” *Hearts with Haiti, Inc. v. Kendrick*, No. 2:13-CV-00039-JAW, 2015 WL 732659, at *10 (D. Me. Feb. 20, 2015) (internal quotations and citation omitted). “[T]he movant must make this demonstration with clear and convincing evidence.” *Hawkins*, 665 F.3d at 31.

Here, there is no question that the Defendants had notice of the Judgment. They entered into an Agreement for Judgment upon which the Judgment is based. The Judgment could not be more clear or unambiguous – the Defendants are required to grant all Zoning Relief necessary for Bay to construct and operate its wireless communications facility at the 182 Camden Street site. The Defendants have now had more than two months in which to comply with the Judgment and have now twice conducted public meetings at which they refused to grant the required Zoning Relief. Granese Decl. at ¶¶ 14-19. In fact, at its January 5 meeting, the Board explicitly rejected approval of the Zoning Relief in favor of asking the Rockland City Council for authority to consult with another lawyer. Granese Decl. at ¶ 18. Similarly, the City’s building department has advised that Bay’s building permit application will not be considered until the Board grants Bay its Zoning Relief. Granese Decl. at ¶ 16.

The evidence of the Defendants’ contempt is far beyond clear and convincing; it is irrefutable.

B. THIS COURT HAS BROAD DISCRETION TO FASHION AN APPROPRIATE REMEDY AND TO IMPOSE APPROPRIATE SANCTIONS.

Pursuant to Fed R. Civ. P. 70(a), “[i]f a judgment requires a party to convey land, to deliver a deed or other document, *or to perform any other specific act* and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party’s expense—by another person appointed by the court” and “[w]hen done, the act has the same effect as if done by the party” (emphasis added). Under the plain terms of Fed R. Civ. P. 70(e), “[t]he court may also hold the disobedient party in contempt.” Here, given the Defendants’ repeated refusal to perform as agreed and ordered, both remedies are appropriate here, as is the imposition of monetary sanctions.

“[T]he district court enjoys wide latitude in its choice of sanctions.” *AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 426 (1st Cir. 2015). “Civil contempt sanctions are designed either to compensate the injured party or to coerce the defendant into complying with a Court’s order.” *F.T.C. v. Case Equip. Co.*, 826 F. Supp. 579, 580 (D. Me. 1993); *see also Health Research Labs*, 2020 WL 4431497, at *3 (“Civil contempt may be imposed to compel compliance with a court order or to compensate a party harmed by non-compliance.” (citing *United States v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005))). “There is no dichotomous split between coercion and punishment, however, and a civil contempt sanction may evidence a punitive flavor.” *AngioDynamics*, 780 F.3d at 426. “In crafting a monetary sanction, a court must bear in mind not only the factual circumstances of the particular case but also the purpose for imposing the sanction in the first place.” *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 344 F.3d 16, 20 (1st Cir. 2003). “In a civil contempt proceeding, a monetary sanction, assessed for the purpose of compensating the complainant for losses sustained by reason of the contemnor’s acts, is within the universe of permissible sanctions.” *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 78 (1st Cir. 2002). However, “a monetary sanction need not be perfectly commensurate, dollar for dollar, with the aggrieved party’s actual loss.” *Goya Foods*, 344 F.3d at 21. “[M]athematical exactitude is not required: so long as a sanction is reasonably proportionate to the offending conduct, the trial court’s quantification of it ought not to be disturbed.” *Id.*

Fines of as much as \$1000 per day have been deemed permissible as a means to dissuade contemnors from “further violation of the court’s order.” *In re Special Proceedings*, 373 F.3d 37, 46 (1st Cir. 2004) (rejecting argument that “\$1,000–a–day fine threatened is ‘punitive’” because “its obvious purpose is to compel compliance and far more severe fines for civil contempt have been upheld for this purpose”); *see also U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine*,

LLC., 261 F. Supp. 2d 17, 34 (D. Me. 2003) (issuing “Order Enjoining For Civil Contempt Defendant, Atlantic Salmon Of Maine, LLC, From Further Violation Of The Court’s Order Of February 13, 2003”).³

Finally, “[a]n award of attorney’s fees and costs is not uncommon for successful contempt motions.” *Hearts with Haiti*, 2015 WL 732659, at *16.

Here, Bay’s principal interest is in the immediate issuance of all necessary Zoning Relief so as to avoid additional lost profits on its operation of the Facility. A \$1000 fine for every day of Defendants’ further non-compliance is likely to effect this result, as is an award of the \$77,038.35 in fees and costs that Bay has already incurred if all Zoning Relief is not granted by the Defendants on or before February 4, 2021. Should the Defendants thereafter continue in their contempt of the Judgment, this Court is expressly authorized to and should appoint “another person” (at Defendants’ expense) to carry out the specific acts required of the Defendants by the Judgment. Additionally, Bay has incurred unnecessary legal expenses as a result of the Defendants’ contempt and should also be awarded the fees and expenses incurred with respect to its motion.

RELIEF REQUESTED

Accordingly, Bay respectfully requests that:

- a) pursuant to Fed. R. Civ. P. 70(e), this Court declare the Board and City to be in contempt of the Judgment;
- b) this Court order the Board and the City to each pay the sum of \$1000 per day until they are each in full compliance with their unambiguous obligations to grant the Zoning Relief;

³ Me. Rev. Stat. tit. 30-A, § 2607 also provides that: “[a] municipal official who neglects or refuses to perform a duty of office commits a civil violation for which a fine of not more than \$100 for each offense may be adjudged, when no other penalty is provided. The fine shall be recovered on complaint to the use of the municipality.” Bay is not, however, currently pursuing direct sanctions against the individual members of the Planning Board.

- c) this Court award Bay the entirety of the fees and costs it has incurred to date if the Defendants are not in full compliance with the Judgment on or before February 4, 2021;
- d) if the Defendants are not in compliance with the Judgment on or before February 4, 2021, pursuant to Fed. R. Civ. P. 70(a), this Court “order the [issuance of the Zoning Relief] be done—at the disobedient party’s expense—by another person appointed by the court”;
- e) this Court award Bay its attorneys’ fees and costs with respect to this motion; and
- f) this Court enter such other and further relief as it deems necessary and just.

Dated: January 13, 2021

Respectfully submitted,

BAY COMMUNICATIONS III LLC

By its attorneys,

/s/ Kellie W. Fisher

DRUMMOND WOODSUM

Kellie W. Fisher

David M. Kallin

84 Marginal Way, Suite 600

Portland, ME 04101

Telephone: (207) 772-1941

Facsimile: (207) 772-3627

Email: kfisher@dwmlaw.com

dkallin@dwmlaw.com

- and -

BROWN RUDNICK LLP

Wayne F. Dennison (admitted pro hac vice)

Brian M. Alosco (admitted pro hac vice)

One Financial Center

Boston, MA 02111

Telephone: (617) 856-8200

Facsimile: (617) 856-8201

wdennison@brownrudnick.com

balosco@brownrudnick.com

CERTIFICATE OF SERVICE

I, Kellie W. Fisher, hereby certify that on this date I have caused a true copy of the foregoing Plaintiff's Motion for Contempt and Incorporated Memorandum of Law in Support to be filed via the Court's CM/ECF electronic filing system ("CM/ECF"), which sent notice to all parties receiving notification through CM/ECF.

Dated: January 13, 2021

/s/ Kellie W. Fisher
Kellie W. Fisher