A Hearing is Necessary, Right? Not So Fast

By Michael F. LoFrumento

In a recent Nassau County case that had sadly become a four-year odyssey, my client's former husband contumaciously reduced his total support obligation by nearly $5,000 per month despite having lost his application for a downward modification, as well as, his subsequent request for leave to reargue with the newly assigned judge who adhered to the previous judge's decision denying the requested support reduction. Contemporaneously with the husband's downward modification application, my client cross-moved to hold her former husband in contempt for his failure to pay his total monthly support obligation as required by the parties' Stipulation of Settlement, which was incorporated, but not merged into the parties' Judgment of Divorce. Indeed, for nearly two years after his downward modification was denied, the husband continued to deduct thousands of dollars per month from his support obligation in contravention of the parties' Judgment of Divorce.

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Given that the ex-husband had remarried, his Net Worth Statement was devoid of any assets and his alleged monthly expenses were not substantiated. As a result, the court permitted financial discovery. At the ex-husband's deposition, he readily admitted that he was aware of the Court Order obligating him to pay monthly support to my client, that he was aware his request for a downward modification was denied, and that, in spite of those facts, he continued to deduct thousands of dollars each month from his support obligation to my client.

While this matter was being litigated, the Second Department decided a remarkably similar case. In *Shemtov v. Shemtov*, 153 A.D.3d 1295 (2nd Dept. 2017), the Second Department granted the husband's stay of Nassau Supreme Court Justice Pardes' Order remanding Mr. Shemtov to jail after he was found to be in civil contempt of court for his failure to pay arrears of $32,400. On its surface, the *Shemtov* matter seemed like any other run of the mill contempt finding. However, in *Shemtov*, Judge Pardes determined that Mr. Shemtov was in civil contempt of the lower court's support order without first conducting a hearing on his defense that he had an inability to pay the court-ordered support obligation. As a result, Mr. Shemtov appealed.

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In its decision, the Second Department pointed out that to succeed on a contempt application, the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation (*see* Judiciary Law § 753[A][3]; *El–Dehdan v. El–Dehdan*, 26 N.Y.3d 19, 29, 19 N.Y.S.3d 475, 41 N.E.3d 340; *Matter of Fitzgerald*, 144 A.D.3d 906, 907, 41 N.Y.S.3d 271). Once the movant establishes these factors, the burden shifts to the alleged contemnor.

In determining that a party accused of contempt is not automatically entitled to a hearing, the Second Department held:

> A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense (*see Matter of Fitzgerald*, 144 A.D.3d at 907, 41 N.Y.S.3d 271; *Matter of Savas v. Bruen*, 139 A.D.3d 736, 737, 30 N.Y.S.3d 673; *El–Dehdan v. El–Dehdan*, 114 A.D.3d 4, 17, 978 N.Y.S.2d 239, *affd.* 26 N.Y.3d 19, 19 N.Y.S.3d 475, 41 N.E.3d 340). Contrary to the defendant's contention, the Supreme Court did not err by, in effect, granting that branch of the plaintiff's motion which was to hold him in civil contempt without first conducting a hearing on the defense of an inability to pay. The defendant's papers submitted in opposition failed to raise a factual dispute warranting a hearing.

Fortunately for Mr. Shemtov, his underlying divorce settled shortly before the Second Department's decision. Notwithstanding, the *Shemtov* decision is an important one for the responsible practitioner when considering whether or not it is necessary to engage in a costly hearing to establish contempt.

In the recent case referenced at the beginning of this article, I was confronted with this very issue. Given that the court is overburdened with emergent and pressing matters, my client and I found ourselves being "bumped" from the trial calendar for matters that had greater priority. Indeed, we appeared for trial on three separate occasions only to be told (apologetically, I might add) that that the court had a continuing trial or had an emergency motion that took priority. Feeling my client's frustration with the process, I suggested that based upon the newly decided *Shemtov* case that we simultaneously submit party affidavits in lieu of a hearing, which would thereby allow the court to decide the contempt issue on papers alone. After all, the ex-husband had previously acknowledged in his affidavits and at his deposition that an order existed that obligated him to pay support to my client, that he was aware of that order, that he disobeyed that order by failing to pay my client the full amount of support to which she was entitled and that my client was prejudiced by her former husband's failure to pay. These factors coupled with the denial of the ex-husband's downward modification established how much was owed and that the ex-husband had the ability to pay his support obligation.

The esteemed judge that we were before listened to my unorthodox request. Argument ensued, given that my adversary was insistent that we withdraw the contempt component since a hearing was necessary to find someone in contempt. However, the *Shemtov* case clearly held that a hearing was not necessary if a factual dispute was not raised. As a result, the judge permitted affidavits and removed the matter from the trial calendar.

While the prospect of jailing an individual without the benefit of a hearing seems contrary to our legal beliefs, the *Shemtov* decision rightfully allows for such a result under right circumstances. As a result, the *Shemtov* decision permits practitioners and judges to streamline the contempt process, while simultaneously reducing the burden that falls on our judiciary. Moreover, *Shemtov* should provide pause for the alleged contemnor that jail time may come much faster than they think.

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