

Cushnie v. Oiterong, 4 ROP Intrm. 216 (1994)
DOUGLAS F. CUSHNIE,
Plaintiff/Appellant,

v.

ALFONSO R. OITERONG, et al.,
Defendants/Appellees.

CIVIL APPEAL NO. 6-93
Civil Action No. 128-90

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 27, 1994

Attorney for Appellant: Douglas F Cushnie

Attorney for Appellees: David F. Shadel

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY L. MILLER, Associate Justice;
PETER T. HOFFMAN, Associate Justice.

HOFFMAN, Justice:

This case is an appeal from the August 17, 1993 order of the Trial Division holding attorney David Shadel in contempt of court for filing a third party complaint without leave of court, and for violating a previous court order by filing a motion to vacate a default judgment and a motion to consolidate the instant case with another lawsuit Shadel had filed. The court relied upon its inherent powers to find Shadel in contempt and imposed various sanctions, including costs, attorney fees, and a fine. Shadel denies any improper conduct and challenges the procedure by which he was found in contempt. We REVERSE the order for the reasons set forth below.

BACKGROUND

The facts of this appeal are based on court documents filed in the case of *Cushnie v. Oiterong and Gibbons*, Civil Action No. 128- **1217**-90. On June 20, 1990 a default judgment was entered against defendants Oiterong and Gibbons, who were not represented by counsel at the time. Defendants, having obtained the representation of attorney Barry Kinman, moved to set aside the default judgment, and on July 17, 1990, the court issued an order setting forth a schedule for the parties to submit written legal arguments on the motion. The order concluded: "Unless any of the parties requires a hearing, this Court will rule on the motion based on the submission of memorandum of points and authorities and other supporting papers." The parties

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then submitted the requested authorities but made no request for a hearing. The court did not rule upon the motion.

David Shadel replaced Kinman, who had left Palau, as attorney for defendants on January 7, 1992. On February 12, 1992, Shadel filed a further motion for relief from the default judgment with a proposed answer attached. Without a ruling on the motion to set aside the default judgment, Shadel filed a third party complaint on January 21, 1993, on behalf of his clients against various third party defendants. Simultaneously he also filed a separate lawsuit against the same parties that were named as third party defendants in the initial case. A week later he moved to consolidate the two cases, stating that the issues in the two cases were the same.

On February 16, 1993, the court issued an order requiring Shadel to show cause on March 29, 1993, why he should not be sanctioned and fined for filing pleadings without leave of court bringing in third party defendants. The hearing took place as ¶1218 scheduled, and the court issued an order on August 17, 1993, finding Shadel in contempt for violating the court's order of July 17, 1990, and for filing pleadings in violation of ROP Rule of Civil Procedure 14. The court imposed sanctions of costs and attorney's fees and a fine payable to the court.

DISCUSSION

I. Violation of Court Order

The first basis upon which Shadel was found in contempt was for violating the court's order of July 17, 1990. A trial court has available to it a variety of devices for compelling compliance with its orders. Foremost among these is the power to hold a party or lawyer in contempt of court. The contempt power derives from statute and court rule, as well as from the inherent powers of the court. Under the Palauan statutory scheme, civil contempt is provided for by 14 PNC § 2204, while the power to punish for criminal contempt is found in 14 PNC § 2203. Several of the rules found within the ROP Rules of Civil Procedure also provide for the imposition of contempt for the violation of certain orders issued under the rules. See, e.g., ROP Civ. Pro. 37(b)(1). In addition to its authority based on statutes and rules, a court has inherent powers to hold litigants and counsel in contempt for failing to abide by its orders.

The trial court specifically stated that its contempt citation was based on its inherent powers. It is well-settled that courts have inherent powers necessary to the carrying out of their functions as courts. While the doctrine of inherent powers remains ¶1219 poorly defined, it is firmly established that the power to punish for contempt is inherent in all courts. We review a court's imposition of sanctions pursuant to its inherent powers under an abuse of discretion standard.

Contempt can be either civil or criminal. The primary distinction between civil contempt and criminal contempt is whether the sanction imposed is coercive or punitive. A civil contempt proceeding is primarily coercive because a contemnor is able to avoid punishment through compliance. Criminal contempt, on the other hand, is primarily punitive because a court imposes

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an unconditional sentence to punish the contemnor for disrespecting the court's dignity or disobeying its order. Civil contempt is normally initiated by an aggrieved party, whereas criminal contempt is generally initiated by the court itself.

The due process requirements for imposing sanctions for contempt for violating an order of the court are substantially the same, regardless of whether the proceedings originate under a statute, court rule, or the inherent powers of the court, and irrespective of whether the proceedings are for civil or criminal contempt. In each case the elements of contempt include the existence of a court order, actual or constructive notice of the order, a violation of that order, and a violation that was neither accidental nor unintentional. Each of these elements must be established beyond a reasonable doubt.

ROP Rule of Criminal Procedure 42 sets forth the procedure to be followed in instances of criminal contempt, including the notice **1220** to be given.¹ We now hold that a contemnor in a civil contempt proceeding is also entitled to receive similar notice stating the time and place of the hearing, allowing a reasonable time for the preparation of the defense; the essential facts constituting the contempt charged; and whether the contempt charged is civil or criminal.

A finding of contempt for violating a court order must be based on an order that is clear and unambiguous. The order must be one that leaves no doubt or uncertainty, and it must be express rather than merely implied. Furthermore, any ambiguities will be resolved in favor of the person charged with contempt. In the present case the court's initial order ² did not clearly and expressly prohibit the filing of future pleadings, and therefore Shadel cannot be found to have violated it. It is on the basis of this requirement of a clear and unambiguous order that we must reverse the finding of contempt by the trial court. The order which Shadel is accused of violating did not clearly prohibit the conduct of which he is accused.

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II. Violation of Rules of Civil Procedure

The second basis for the contempt finding rested on Shadel's filing of a third party complaint without leave of court pursuant to Rule 14 of the ROP Rules of Civil Procedure.³ The

¹ Rule 42(b) provides in pertinent part: "The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such."

² The relevant part of the court's July 17, 1990 order is as follows: "The defendants are to file their motion to set aside the judgment with supporting paper[s] no later than July 20, 1990; and plaintiff shall file his response no later than August 10, 1990. Unless any of the parties requires a hearing, this Court will rule on the motion based on the submission of memorandum of points and authorities and other supporting papers."

³ The rule provides in pertinent part as follows:

When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files

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finding of contempt was based on the conclusion that Shadel needed the court's leave to file a third party complaint after a default judgment, but before an answer had been filed.⁴

Even if it were established that Shadel's actions in filing a third party complaint without leave of court was in violation of Rule 14, the question remains whether such conduct is punishable by way of contempt under the inherent powers of the court. Inherent powers, because they are not the creation of the democratic process, should be resorted to only when the conduct being sanctioned cannot be reached by the remedies provided by statute and court rule. If, in the informed discretion of the court, the remedies provided by statute and court rule are not sufficient to sanction adequately the behavior of a party or counsel, the court **1222** may then resort to its inherent powers.

If Shadel's conduct in filing the third party complaint was in fact a violation of Rule 14, such behavior, if sufficiently egregious, is punishable under the provisions of Rule 11.⁵ The latter rule imposes the demanding requirement that

[t]he signature of an attorney or trial assistant constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A violation of Rule 11 can result in the imposition of monetary sanctions of the sort that were imposed against Shadel, including the payment of reasonable expenses incurred by other parties and the reasonable fee of an attorney or trial assistant. The court therefore had no need to resort to its inherent powers in judging the appropriateness of Shadel's conduct.

In considering whether to impose Rule 11 sanctions, the trial court should avoid hindsight and resolve all doubts in favor of the signer of the pleading. Sanctions are not appropriate where there are differing interpretations of the law or where contrary controlling authority is not obvious. The underlying issue of whether a third party complaint can be filed without leave of court after a default judgment has been entered is not essential to our decision today and therefore will not be decided. Our inquiry is **1223** limited to whether Shadel's behavior was of such a nature as to justify the imposition of sanctions, and we hold that it was not. The record in this case convinces us that Shadel did have a good faith argument, based on the language of Rule

the third-party complaint not later than ten (10) days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action

⁴ In the present case no answer was ever filed. The court's statement in its August 17, 1993 order to the contrary was erroneous because the document referred to was merely a proposed answer.

⁵ As with contempt, sanctions may not be imposed under Rule 11 without notice and an opportunity to be heard.

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14 and case law, for the actions he took in filing the third party complaint.⁶

CONCLUSION

The court abused its discretion by finding Shadel in contempt because neither the court's previous order nor the rules of court clearly proscribed his conduct. The August 17, 1993 order of the Trial Division is hereby REVERSED.

⁶ Rule 14(a) states that a "third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten (10) days after he serves his original answer." This language at least technically supports Shadel's contention inasmuch as no answer had been filed.

We have found no case law directly on point. Shadel cites *AmQuip Corp. v. Pearson*, 101 F.R.D. 332 (E.D. Pa. 1984), a case involving a motion to open a confessed judgment and for leave of court to file a third-party complaint. The court opened the judgment, allowed the defendant to file his answer, and stated that he did not require leave of court to serve the third-party complaint. The *AmQuip* case, although involving a judgment that was reopened rather than a default judgment that had not yet been set aside, provides at least some additional authority for Shadel's position.