

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA**

<p>In re: Case No. A01-00006-DMD</p> <p>TIMOTHY RICHARD MOYER,</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 7</p>
<p>LARRY D. COMPTON, Chapter 7 Trustee of the Bankruptcy Estate of Timothy Moyer,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SIRIPORN LEE MOYER,</p> <p style="text-align: center;">Defendant.</p>	<p>Adv. No. A02-90037-DMD</p>
<p>In re: Case No. A01-01337-DMD</p> <p>SIRIPORN LEE MOYER,</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 7</p>
<p>KENNETH BATTLE, Chapter 7 Trustee,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SIRIPORN LEE MOYER,</p> <p style="text-align: center;">Defendant.</p>	<p>Adv. No. A02-90036-DMD</p>

MEMORANDUM RE CONTEMPT

The trustees in these consolidated adversary proceedings have requested that this court issue a warrant for the arrest of the defendant, debtor Siriporn Moyer, for her failure to comply with a judgment and an order of contempt. Because of the seriousness of

the sanction requested by the trustees, the background of these cases will be discussed in detail.

Case Background

Defendant Siriporn Moyer is from Thailand. She does not speak or understand English very well. She married Timothy Moyer, a United States citizen, in Bangkok, Thailand, in May of 1987. The Moyers won the Thai lottery sometime after the marriage. Some of their winnings were used to purchase and/or improve two parcels of real property in Thailand. A residence sits on one of the parcels; an apartment building is on the other. Ms. Moyer's sister resides in the residence and her brother in the apartment. Both parcels were titled in the names of Ms. Moyer's siblings.

The Moyers moved to Alaska. They divorced in late 1999. The state court found that both the residence and the apartment were marital assets. The residence was awarded to Mr. Moyer and the apartment to Ms. Moyer. Ms. Moyer never conveyed her interest in the residence to Mr. Moyer.

Each of the Moyers filed an individual chapter 7 petition in 2001. In June of 2002, the trustees in the two bankruptcy cases initiated adversary proceedings against Ms. Moyer to recover the Thai residence and apartment building for the benefit of their respective bankruptcy estates. The two adversary proceedings were consolidated in October, 2002. Summary judgment was entered in favor of the trustees and against Ms. Moyer on June 9, 2003. Ms. Moyer's discharge was denied. In addition, the judgment directed her to instruct her brother and sister in Thailand to assist with the sale of the two parcels, with the proceeds of the sale going to the trustees. Alternatively, with respect to the residence, trustee Larry Compton could recover the value of the property from Ms. Moyer. The trustees were to also recover their costs of suit.

After the judgment was entered, the trustees' counsel, Diane Vallentine, mailed Ms. Moyer a letter which asked her to instruct her brother and sister to see an attorney with First Bangkok Law & Practice, Ltd., and execute powers of attorney so that the Thai parcels could be sold. Ms. Moyer was to contact Ms. Vallentine after she had done this. The letter advised Ms. Moyer that her failure to cooperate could result in serious consequences, including an order finding her in contempt of court.

In September, 2003, the trustees filed a motion for an order to show cause and order of contempt for Ms. Moyer's failure to comply with the judgment. The grounds for the motion were that Ms. Moyer hadn't responded to Ms. Vallentine's letter, nor had her siblings contacted the Thai attorney to assist with the sale of the realty. The trustees asked for monetary sanctions as well as an order advising Ms. Moyer that if she failed to comply with the judgment within 60 days she could be imprisoned.

A show cause hearing was held on October 9, 2003. Ms. Moyer was represented at this hearing by counsel Greg Oczkus. Mr. Oczkus informed the court that Ms. Moyer had contacted her brother in Thailand, but the brother contended the property was his and refused to cooperate in any sale by the Thai attorney. Ms. Vallentine stated that these efforts by Ms. Moyer were insufficient to satisfy the requirements of the judgment and that, if the siblings wouldn't comply with a request by Ms. Moyer to sell the property, the burden was on Ms. Moyer to sue them in Thai courts to compel compliance. After further discussion at the hearing, Ms. Vallentine proposed having the trustees' Thai attorney draft letters for Ms. Moyer's signature which would direct the siblings to sign powers of attorney so the parcels could be sold. The letters would be sent to Mr. Oczkus's office so Ms. Moyer could review and sign them. An English translation of the letters was also to be prepared for the trustees.

Five months after the show cause hearing, on March 14, 2005, a status conference was held in these consolidated cases. Ms. Vallentine appeared at this hearing; Mr. Oczkus was unavailable. Ms. Vallentine advised the court that she had drafted a letter to Ms. Moyer, but still needed to get the letter translated into Thai and then send it to Mr. Oczkus. The matter was continued without date.

A second status conference was held six months later, on September 5, 2005. At this hearing, Ms. Vallentine informed the court that she had sent Mr. Oczkus her draft letter for Ms. Moyer's review. Mr. Oczkus stated that he had been unable to contact Ms. Moyer and would be withdrawing from the case. A continued show cause hearing was scheduled for November 7, 2005.

At the continued show cause hearing, Ms. Moyer appeared on her own behalf, with a relative who served as a translator for her.¹ Ms. Vallentine stated that the trustees still wanted Ms. Moyer to instruct her siblings to go to the Thai attorney's office to sign powers of attorney so that the apartment and residence could be sold. Ms. Moyer, through her translator, said that she could tell her siblings to sign the paperwork, but it was their choice whether they signed or not. She also stated that her brother claimed the apartment was his, not hers. It was ultimately agreed that Ms. Vallentine would have the letter she had earlier drafted, which directed the siblings to sign powers of attorney, translated into Thai. Ms. Moyer would be given an opportunity to review that letter at a continued hearing. The continued hearing was scheduled for November 17, 2005. Ms. Moyer was instructed to attend the hearing unless she signed the paperwork for Ms. Vallentine before then.

Ms. Moyer did not appear at the continued hearing. At the trustee's request, an order of contempt was entered which imposed a fine of \$100 per day on Ms. Moyer for

¹The translator informed the court that she spoke Laotian, not Thai, but that the two languages were similar enough that she thought she could assist Ms. Moyer in understanding the proceedings.

each day she failed to comply with the earlier judgment. If Ms. Moyer didn't comply with the judgment within 60 days, the contempt order further provided that a monetary judgment would be entered in favor of the trustee in the sum of \$80,000.00, representing the value of the Thai residence, plus the per diem fines which had accrued through the date of the judgment. The order also stated that if Ms. Moyer failed to comply within 60 days, the court would issue a warrant for her arrest. Finally, the order provided that any additional monetary judgment entered as a result of Ms. Moyer's contempt would not be dischargeable in any subsequent bankruptcy proceeding. This order was personally served upon Ms. Moyer on November 20, 2005.²

Five months after the contempt order was issued, a status conference was held in these consolidated cases on April 18, 2006. Ms. Moyer appeared at this hearing with her daughter, who assisted with translation. Michelle Boutin appeared for the trustees. Ms. Boutin informed the court that Ms. Moyer hadn't complied with the judgment or the contempt order and requested that a money judgment be entered for the value of the property plus 60 days of the per diem fine. Ms. Boutin also asked that a warrant be issued for the arrest of Ms. Moyer and that she be held in confinement until her siblings had executed deeds so that the Thai parcels could be sold.

Ms. Moyer was given an opportunity to review the letters that had been translated into Thai.³ Once she reviewed them, she asked, through her daughter, if everything would be taken care of if she just signed the letters. Ms. Boutin said probably not, since these letters weren't the deeds and what ultimately needed to happen was for Ms.

²See Ntc. of Filing Return of Service, filed Apr. 18, 2006 [Docket No. 48].

³To the court's knowledge, this was the first time that Ms. Moyer had an opportunity to review the letters that had been translated into Thai. Although the trustees' counsel had indicated that these translations would be obtained at the October 9, 2003, show cause hearing, they were not actually prepared until more than two years later, sometime after the November 17, 2005, continued show cause hearing.

Moyer's siblings to sign over the parcels in Thailand so the trustees' Thai attorney could sell them. Ms. Moyer said even if she did sign the letters, she couldn't force her brother and sister to do anything. Ms. Boutin asked that Ms. Moyer be arrested. She stated that even though it was an extreme remedy, it was merited because several years had passed and Ms. Moyer still hadn't complied with the judgment. The matter was taken under advisement so the court could evaluate the appropriateness of the sanctions requested.

Contempt and Sanctions

The judgment entered on June 9, 2003, contained the following provisions:

1. The defendant Siriporn Moyer shall instruct the holder of title to real property described as:

Title Deed No. 30540, Land No. 1049, Survey No. 14168, Samut-Prakam Province, Thailand

to assist in the sale of the residence with the proceeds to go to Larry Compton as Trustee;

2. Alternatively, Plaintiff Larry Compton shall recover the value of the above-described real property from the defendant Siriporn Moyer;

. . .

1. The defendant Siriporn Moyer shall instruct the holder of title to real property described as:

Title Deed No. 30536, Land No. 10465, Survey No. 14164, Samut-Prakam Province, Thailand

to assist in the sale of apartments with the proceeds payable to Kenneth Battley, Trustee.⁴

⁴See Judgment entered June 9, 2003 [Docket No. 26].

The judgment doesn't specify *how* Ms. Moyer was to instruct her siblings to assist in the sale of the Thai realty. Nor does the judgment require Ms. Moyer to compel compliance from her siblings. She is only to instruct.⁵ The order of contempt, entered more than two years later, failed to clarify how Ms. Moyer could satisfy the judgment and avoid sanctions for contempt. That order simply stated that Ms. Moyer was in contempt for failing to comply with the judgment, "which affirmatively directed [her] to do certain acts."⁶

The judgment could conceivably be satisfied by Ms. Moyer making phone calls to her siblings and telling them to go see the Thai attorney. It appears Ms. Moyer has spoken to her brother about conveying the Thai property to the trustees for sale.⁷ However, at the September, 2003, hearing, the trustees' attorney said this type of informal contact "wasn't enough." It was more than two years after this hearing before written instructions considered satisfactory to the trustees had been translated into Thai. Ms. Moyer reviewed these instructions at a hearing on April 18, 2006, but she didn't sign them because she was told that even if she did, it wouldn't resolve matters.

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one."⁸ Orders must be sufficiently

⁵This duty was reiterated in Ms. Vallentine's letter to Ms. Moyer dated June 19, 2003, which stated, "Most important is that you immediately instruct Mr. Chaipayorn Soonhaseng and Mrs. Siriphen Khawjareon to go to the office of First Bangkok Law & Practice, Ltd. to execute powers of attorney to permit the sale of the properties to proceed." *See* Letter attached to Aff. of Diane Vallentine, filed Sept. 30, 2003 [Docket No. 29].

⁶Order of Contempt, entered Nov. 18, 2005 (Docket No. 44).

⁷At the hearing on October 9, 2003, Mr. Oczkus advised that Ms. Moyer had spoken to her brother, that the brother had told her he had talked to an attorney in Thailand, and that he didn't want to cooperate with the trustees and permit the sale of the property.

⁸*Int'l Longshoremen's Assn., Local 1291, v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76 (1967).

specific so that those who must obey them will know what is required.⁹ To find a party in civil contempt, “the moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.”¹⁰ I find that the trustees have failed to satisfy this burden. The judgment and contempt order only require that Ms. Moyer provide instructions to her siblings. Her failure to do so in a manner satisfactory to the trustees is due in part to their own delay in having acceptable written instructions translated into Thai. Moreover, when Ms. Moyer had the opportunity to review these instructions, she was told that even if she signed them, it wouldn’t be enough to satisfy the judgment. Considering the lack of specificity in the judgment and contempt order, particularly in light of the defendant’s limited understanding of English, a violation of the terms contained in these documents cannot be established under the clear and convincing standard.

Additionally, and more importantly, the court is troubled with the trustees’ ultimate expectations in this case: that Ms. Moyer not only instruct her siblings (as directed in the judgment), but that she compel their compliance with those instructions. The judgment does not direct the turnover of property. Even assuming Ms. Moyer did sign the demand letters drafted by the trustees’ counsel, and those letters were served on the siblings in Thailand, there is no guarantee that the siblings will follow the trustees’ instructions and consent to the sale of the property. The trustees recognized this problem at the time they filed their motion for summary judgment, stating, “If Ms. Moyer acts in accordance with the injunction, and any nominal title holder refuses to cooperate or asserts any interest, than [sic]

⁹*Id.*

¹⁰*Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190-91 (9th Cir. 2003).

that issue may be addressed through further proceedings in the bankruptcy proceedings or through proceedings initiated in Thailand by the respective trustees.”¹¹

The ability to comply with a contempt order is a crucial inquiry, and a party’s present inability to comply is a complete defense to civil contempt.¹² “A court should weigh all the evidence properly before it determines whether or not there is actually a present ability to obey.”¹³ Ms. Moyer has the present ability to execute the trustees’ written instructions. She also has the present ability to convey *her* interest in the properties to the trustees. The court can order her to do both of these acts. But a similar order could not be entered with respect to Ms. Moyer’s siblings, who reside in Thailand. This court lacks jurisdiction over the siblings. It can’t determine the extent of their interest in the Thai parcels, nor can it order them to convey the parcels to the trustees. The siblings hold legal title to the parcels, which they have occupied for several years. The evidence suggests they will contest, rather than cooperate with, any instruction from Ms. Moyer to convey the parcels to the trustees for sale.¹⁴ Under these circumstances, it doesn’t appear that Ms. Moyer has the present ability to compel the siblings to surrender the properties to the trustees. It is therefore questionable whether Ms. Moyer’s incarceration will achieve the trustees’ ultimate goal: sale of the Thai

¹¹Trustees’ Mem. in Supp. of Mot. for Summ. J., filed Mar. 5, 2003 [Docket No. 11], at p. 6.

¹²*United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996).

¹³*United States v. Ayres*, 166 F.3d 991, 994 (9th Cir. 1999), *citing Drollinger*, 80 F.3d at 393.

¹⁴Notwithstanding the state court decree that divided the Thai properties as marital assets, I feel that this case is distinguishable from those involving turnover of offshore trusts by recalcitrant debtors, in which the debtors have a greater degree of control over the agents in charge of the trust *res*. See, e.g., *Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d 1294, 1299-1300 (11th Cir. 2002); *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1242-43 (9th Cir. 1999).

properties. Additionally, “[a] contempt order may not use the contemnor as a ‘hostage’ to put pressure on third parties interested in his or her release from contempt.”¹⁵

Based on the present record, I find that incarceration is not an appropriate sanction at this time. The judgment directs Ms. Moyer to instruct her siblings, not compel their cooperation. Ms. Moyer can comply with this judgment, in a manner acceptable to the trustees, by signing the written instructions which have been translated into Thai. An order will be entered directing her to do this at a continued hearing before this court. If she fails to sign the instructions, the court will issue a warrant for her arrest as a sanction for her violation of that specific order.

The trustees ask for monetary sanctions against Ms. Moyer as well. They request that judgment be entered against her in the sum of \$80,000.00, representing the value of the Thai residence which was awarded to Mr. Moyer in the divorce. They also seek an award of \$6,000.00, representing the \$100 per day fine that was imposed by the contempt order. Finally, they ask for reasonable attorneys’ fees and costs.

[T]he contempt authority conferred on bankruptcy courts under § 105(a) is a *civil* contempt authority. As such, it authorizes only *civil* sanctions as available remedies.

We recently explained the difference between civil sanctions and criminal sanctions: Civil penalties must either be compensatory or designed to coerce compliance. In contrast, “a flat unconditional fine totaling even as little as \$50” could be criminal “if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance,” and the fine is not compensatory. This is so regardless of whether

¹⁵17 AM. JUR. 2D *Contempt* § 204 (2004); citing *United States v. Int’l Bhd. of Teamsters*, 899 F.2d 143, 147 (2nd Cir. 1990) [a court cannot, as a condition for purging contempt, coerce contemnor to order persons whose actions he may not rightfully control to forfeit substantial legal rights].

the non-compensatory fine is payable to the court or to the complainant. . . .

. . . .

Section 105 contains no explicit grant of authority to award punitive damages. Rather, the language of § 105(a) authorizes only those remedies “necessary” to enforce the bankruptcy code. The sanctions associated with civil contempt – that is, compensatory damages, attorney fees, and the offending [party’s] compliance – adequately meet that goal, rendering serious punitive sanctions unnecessary.¹⁶

The \$100 per diem fine is not compensatory, nor does it have a coercive effect upon Ms. Moyer. This debtor has already been denied her discharge. She works as a home health care provider, earning minimal income. I feel that imposition of the per diem fine would have a punitive, rather than coercive, effect upon her. It would provide no incentive for her to sign the trustee’s written instructions. But the remaining monetary damages requested by the trustees, which are compensatory in nature, are appropriate as sanctions for civil contempt. These monetary sanctions will be imposed upon Ms. Moyer, along with a warrant for her arrest, if she fails to appear at a continued hearing and sign the instructions which the trustees have prepared.

An order will be entered consistent with this memorandum.

DATED: May 31, 2006

BY THE COURT

DONALD MacDONALD IV
United States Bankruptcy Judge

¹⁶ *Dyer*, 322 F.3d at 1192-93 (citations omitted, emphasis in original).