

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 8163

STEVEN MCRAE,

Plaintiff,

v.

KYLE RUSSELL CURTIS,

Defendant.

**ORDER TO SHOW CAUSE AND
NOTICE OF HEARING**

1. THIS MATTER is before the Court as a result of the Court's Order on Amended Motion to Show Cause entered 13 May 2021, ("13 May 2021 Order," ECF No. 61), setting a hearing for 25 June 2021 (the "Second Show Cause Hearing"). This was the Defendant Kyle Russell Curtis' ("Mr. Curtis") second opportunity to show cause why he should not be held in civil contempt pursuant to section 5A-21 of the North Carolina General Statutes for failure to comply with the Court's Partial Judgment by Default (the "Judgment") entered on 23 January 2020. (ECF No. 17.)

2. Mr. Curtis failed to appear. Consequently, the Court issues this Order, requiring Mr. Curtis to appear and show cause why he should not be held in criminal contempt pursuant to section 5A-11 of the North Carolina General Statutes for his failure to appear and to comply with this Court's 13 May 2021 Order. In addition, Mr. Curtis remains required to provide reasons why he should not be held in civil contempt for his continuing failure to comply with the Judgment. Because the Court finds probable cause to conclude that Mr. Curtis will not appear for hearing as

ordered, contemporaneously with this Order, the Court also issues an Order for Mr. Curtis' arrest.

3. The Court does not repeat but incorporates by reference the procedural history in this matter as stated in the Court's 19 April 2021 Order on Amended Motion to Show Cause. ("19 April 2021 Order" ¶¶ 2–11, ECF No. 57.)

4. Based on the pleadings of Record and having considered all relevant matters, the Court finds the following facts and makes the following conclusions of law.

Findings of Fact

5. The Court entered Partial Judgment by Default on 23 January 2020. The Judgment required Mr. Curtis to do two things within fourteen days: (1) return administrative control and primary ownership rights of the NonSequitur podcast, YouTube Channel, and other accounts associated with the parties' business endeavor, to Plaintiff; and (2) provide Plaintiff with all financial documents associated with NonSequitur's financial affairs and financial condition.

6. Mr. Curtis made an effort to comply with the Judgment on 4 February 2020, by electronically filing with the Court a series of documents he entitled, "Order Compliance & Financial Consideration," (ECF No. 18), but his effort was seriously lacking. Among other things, Mr. Curtis did not produce valid usernames and passwords necessary to return control of the web-based accounts to Plaintiff, and he did not provide all of the required financial documents.

7. This Court alerted Mr. Curtis to these deficiencies by Order dated 13 April 2020, expressly warning him that the Court's only means of compelling his compliance with the Judgment was imprisonment for as long as the civil contempt continued. (Order Mot. Show Cause & Mot. Set Aside ¶ 7, ECF No. 26.)

8. Following a lengthy period allowing for circumstances resulting from the Covid-19 pandemic, on 2 February 2021, this Court issued an Order requesting a status report from each of the parties. (ECF No. 53.) Only Plaintiff responded, alerting the Court to Mr. Curtis' continuing failure to comply with the Judgment (ECF No. 54.)

9. Accordingly, on 19 April 2021, this Court entered another Order, this time finding that probable cause existed to determine that Mr. Curtis had willfully failed to comply with the Court's Judgment and setting a hearing for Mr. Curtis to appear and show cause why he should not be held in civil contempt. (19 April 2021 Order.) The parties were invited to file additional materials or testimony by affidavit prior to the hearing. The hearing date was set for 11 May 2021.

10. Mr. Curtis, who is now *pro se*,¹ registered as a party and created an account for filing materials with the Court electronically. When doing so, he provided both his e-mail address and his physical address. On three occasions, Mr. Curtis has filed materials electronically, evidencing his knowledge and ability to use the Court's electronic-filing system. (*See* Order Compliance & Financial Consideration; Mot. Set Aside, ECF No. 19; Mot. Set Aside Default J. – Revised, ECF No. 20.)

¹ Mr. Curtis was represented by counsel, at various times, earlier in the case. The Court granted his most recent counsel's request to withdraw on 20 November 2020. (ECF No. 51.)

11. Pursuant to North Carolina Business Court Rule (“BCR”) 3.8, Mr. Curtis was notified that the Court would transmit all orders, decrees, judgments, and other matters through the Court’s electronic-filing system, which, in turn, would generate a Notice of Filing to all counsel and, in this case, to him as a *pro se* defendant. BCR 3.8 makes clear that the issuance by the electronic-filing system of a Notice of Filing for any order, decree, or judgment constitutes entry and service of the order, decree, or judgment.

12. Neither BCR 3.8 nor the North Carolina Rules of Civil Procedure provide or contemplate that any other form of service is required.

13. Mr. Curtis has not moved pursuant to BCR 3.2 to be relieved from his obligation to use the Court’s electronic-filing system.

14. While not required to do so, the Court made efforts to have the Randolph County Sheriff’s Department hand-deliver a copy of the Court’s 19 April 2021 Order to Mr. Curtis at his address of record. An affidavit from the deputy who attempted service states that the deputy was unsuccessful in this effort and was informed by Mr. Curtis’ mother, who was present at the address, that Mr. Curtis had moved to Raleigh four months prior. (*See* Randolph County Sheriff’s Office Return of Service, ECF No. 60.)

15. Even if true that Mr. Curtis physically moved, a change of physical address does not affect one’s e-mail address, and it is Mr. Curtis’ responsibility to provide accurate information and otherwise to comply with the rules of this Court.

16. In response to the Court's 19 April 2021 Order, Plaintiff submitted an affidavit stating his position with respect to the rights and financial information he is due from Mr. Curtis. (ECF No. 58.) Once again, Mr. Curtis did not respond in any respect.

17. At the hearing on 11 May 2021, Plaintiff was present by counsel and was heard. Mr. Curtis did not appear.

18. This Court entered an Order on 13 May 2021, in which it stated: "Were it not for the potential for Covid-19 concerns in this unprecedented time, Mr. Curtis' *pro se* status, Mr. Curtis' earlier – albeit insufficient – attempt to respond to the Judgment, and the gravity of the consequences for contempt, which include imprisonment, this Court would issue an Order to Show Cause requiring Mr. Curtis now to come forward and show cause as to why he should not be held in *criminal* contempt for his failure to abide by the Court's Order to appear on 11 May 2021. However, under the circumstances, the Court will schedule a second hearing to afford Mr. Curtis a final opportunity to either comply with the Judgment or appear and show cause as to why he should not be held in civil contempt." (13 May 2021 Order ¶ 18.)

19. In its 13 May 2021 Order the Court again warned that its "only means of compelling compliance of a person found in civil contempt is imprisonment as long as the civil contempt continues," and, as such, "Mr. Curtis should be prepared to be placed in the custody of the Sheriff of Guilford County should he not comply with the Judgment and the Court make an appropriate finding of civil contempt." (13 May

2021 Order, ¶ 20.) The Court further warned, “The Court is affording Mr. Curtis a third and final opportunity to comply with the Judgment and, failing compliance, a second opportunity to show cause as to why the Court should not find him in civil contempt. *Should Mr. Curtis fail to make good use of this opportunity, the Court is prepared to move forward with criminal contempt proceedings.*” (13 May 2021 Order ¶ 21 (emphasis added).)

20. A hearing was set for 25 June 2021² to give Mr. Curtis a second opportunity to appear and show cause why he should not be held in civil contempt for failure to comply with the Judgment.

21. To ensure Mr. Curtis had notice of the proceedings given their serious nature, on 1 June 2021 a Wake County Sheriff personally served Mr. Curtis at his place of residence with printed copies of (1) the Judgment, (2) the 19 April 2021 Order, (3) the 13 May 2021 Order; (4) the Order Continuing Hearing, (ECF No. 62), and (5) Instructions for Associating Pro Se Account with Case on Electronic-Filing System, (ECF No. 64), (Wake County Sheriff’s Office – Aff. Service Kyle Curtis (“Aff. Service”), ECF No. 63)

22. Mr. Curtis did not appear at the hearing on 25 June 2021, and he did not respond with any of the required information and documentation specifically listed in the 13 May 2021 Order. (¶ 19.)

² The Hearing to Show Cause was originally set for 26 May 2021, but it was reset to 25 June 2021, by Order dated 25 May 2021, to ensure that the Wake County Sheriff’s Department had located and served Mr. Curtis.

23. To date, Mr. Curtis has failed to comply with the Judgment, and he has failed on two occasions to comply with this Court's orders to appear and show cause.

24. Plaintiff has filed an affidavit recounting Mr. Curtis' history of failure to comply with the Court's orders in support of a probable cause finding pursuant to section 5A-16(b) of the North Carolina General Statutes. (Contempt Aff.)

Conclusions of Law

25. The Court concludes that Mr. Curtis has repeatedly violated its orders necessitating a show cause hearing to address two separate charges of contempt: a charge of civil contempt for failing to comply with the Judgment; and a charge of criminal contempt for failing to appear and show cause in accordance with the Court's 13 May 2021 Order.

A. Civil Contempt

26. North Carolina's civil contempt statute provides:

- (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
 - (1) The order remains in force;
 - (2) The purpose of the order may still be served by compliance with the order;
 - (2a) The noncompliance by the person to whom the order is directed is willful; and
 - (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C.G.S. § 5A-21(a).

27. The purpose of civil contempt is “to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.” *Tyll v. Berry*, 234 N.C. App. 96, 102 (2014) (citation omitted). The Court may initiate civil contempt proceedings upon a finding of probable cause. See N.C.G.S. § 5A-23(a); see also *Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC LEXIS 20, at *6 (N.C. Super Ct. Feb. 26, 2016). “ ‘Probable cause refers to those facts and circumstances within [the judicial official’s] knowledge and of which he has reasonably trustworthy information which are sufficient to warrant a prudent man in believing that’ the alleged contemnor is in civil contempt.” *Young v. Mastrom, Inc.*, 149 N.C. App. 483, 484–85 (2002) (quoting *State v. Williams*, 314 N.C. 337, 343 (1985)).

28. Proceedings for civil contempt may be commenced “by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt.” N.C.G.S. § 5A-23(a). Such an order may be issued on the affidavit of one with an interest in enforcing the order and a finding by the presiding judicial official that there is probable cause to believe the alleged contemnor should be held in contempt. *Id.*; see also *Shumaker v. Shumaker*, 137 N.C. App. 72, 76 (2000). Once it is determined that probable cause exists, the burden shifts to the alleged contemnor to show that he should not be held in contempt, that he lacks the means to comply, or that his noncompliance was not willful. *Shumaker*, 137 N.C. App. at 76.

A court’s only means of compelling compliance of a person found in civil contempt is imprisonment as long as the civil contempt continues, subject to certain time limitations. See N.C.G.S. § 5A-21(b). An order holding a party in civil contempt must specify how the party may “purge

himself or herself of the contempt,” N.C.G.S. § 5A-23(e), and imprisonment must end once the person has purged himself or herself of contempt, N.C.G.S. § 5A-22(a). “Because civil contempt seeks to coerce compliance rather than to punish, the purge provision is essential to a civil contempt order.”

Red Valve, Inc. v. Titan Valve, Inc., 2019 NCBC LEXIS 57, *79–80 (N.C. Super. Ct. Sept. 3, 2019) (quoting *Ray Lackey Enters., Inc. v. Vill. Inn Lakeside, Inc.*, 2016 NCBC LEXIS 9, at *23 (N.C. Super. Ct. Jan. 29, 2016)).

29. Based on materials and affidavit testimony filed to date, the Court finds that probable cause exists to find that Mr. Curtis willfully violated Court’s January 23, 2020 Judgment, and specifically that he has failed to provide the information and documents ordered to be produced. (13 May 2021 Order ¶19).

30. The Court’s 23 January 2020 Judgment remains in effect. Likewise, the Court’s 13 May 2021 Order specifying the documents and other information that Mr. Curtis is required to produce to satisfy the Judgment remains in effect. The purpose of those Orders may still be served by Mr. Curtis’ compliance with them.

31. Mr. Curtis’ non-compliance appears to be willful. “Noncompliance with a court order is willful when it involves ‘either a positive action (a “purposeful and deliberate act”) in violation of a court order or a stubborn refusal to obey a court order (acting with “knowledge and stubborn resistance”).’ ” *Plasman*, 2016 NCBC LEXIS 20, at *8 (quoting *Hancock v. Hancock*, 122 N.C. App. 518, 525 (1996)).

32. Mr. Curtis’ “stubborn refusal” to comply with the Court’s Judgment is well-documented in this case. (See 19 April 2021 Order; 13 May 2021 Order.)

33. Moreover, Mr. Curtis has notice of, and appears to be able to comply with, the Court’s order. The Wake County Sheriff’s Office served the orders on him

personally, (*see* Aff. Service), so he is well-aware of them. The documents and information at issue are either in his possession or available to him as evidenced by his prior submission. (Order Compliance & Financial Consideration.) Nevertheless, he has neither complied nor made any attempt to comply with the Court's Judgment since 3 February 2020 despite the Court's warnings regarding the consequences of his noncompliance.

34. Mr. Curtis' failure to comply with the Judgment and then failure to appear for, not one but two, show cause hearings as ordered by the Court strongly suggests that he has acted willfully to disobey orders of this Court.

35. Nevertheless, the Court will make no final findings of fact or conclusions of law with respect to "ability" or "willfulness" until it hears from Mr. Curtis. *See Teachey v. Teachey*, 46 N.C. App. 332, 334 (1980) (stating that to support a finding of willfulness in failing to comply, there must be evidence establishing as an affirmative fact that the party possessed the means to comply with the order at some time after the entry of the order); *Reece v. Reece*, 58 N.C. App. 404, 406–07 (1982) ("A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court." (citing *Jolly v. Wright*, 300 N.C. 83 (1980)); *McMiller v. McMiller*, 77 N.C. App. 808, 809–10 (1985) (vacating an order for civil contempt because the record was unclear as to what evidence—if any—was taken to show the party's ability or lack of present ability to comply).

36. Mr. Curtis is again directed to paragraph 19 of the Court's 13 May 2021 Order for a list of the documents and information he is required to provide Plaintiff.

B. Criminal Contempt

37. Under N.C.G.S. § 5A-11(a)(3), a court may find a person in criminal contempt for the “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.” “‘Willfulness’ in [the criminal contempt] statute means an act ‘done deliberately and purposefully in violation of law, and without authority, justification, or excuse.’” *State v. Phair*, 193 N.C. App. 591, 594 (2008) (quoting *State v. Chriscoe*, 85 N.C. App 155, 158 (1987)). Our Court of Appeals has also stated that the “willfulness” element of criminal contempt “involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.” *Forte v. Forte*, 65 N.C. App. 615, 616 (1983) (citing *Mauney v. Mauney*, 268 N.C. 254 (1966); *West v. West*, 199 N.C. 12 (1930)).

38. Criminal contempt may be direct or indirect. N.C.G.S. § 5A-13. Direct contempt is behavior that takes place in the Court’s presence and may be punished summarily at the moment the contempt occurs. N.C.G.S. §§ 5A-13–5A-14; *In re Nakell*, 104 N.C. App. 638, 650–51 (1991) (affirming trial court’s holding of attorney in direct criminal contempt for repeatedly interrupting the judge, refusing to stop talking, failing to sit down, and encouraging his client to be disruptive).

39. “Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure [for a plenary hearing] required by [N.C.]G.S. [§] 5A -15.” N.C.G.S. § 5A-

13(b). Failure to appear for a hearing as ordered is indirect criminal contempt. *Cox v. Cox*, 92 N.C. App. 702, 707 (1989) (determining that a party's failure to appear in response to a show cause order was indirect contempt because the court had no direct knowledge of facts to establish that the failure to appear was willful).

40. Punishment for criminal contempt includes censure, imprisonment up to 30 days, fine not to exceed five hundred dollars (\$500.00) or any combination of the three. N.C.G.S. § 5A-12(a).

41. The Court will hold a plenary hearing on 15 July 2021 at 10:00 AM in Courtroom 3D of the Guilford County Courthouse, 201 South Eugene Street, Greensboro, North Carolina 27401. Mr. Curtis is ORDERED to appear and show cause why he should not be held in criminal contempt and sentenced in accordance with N.C.G.S. § 5A-12(a) for his failure to follow the Court's 13 May 2021 Order.

42. Mr. Curtis is aware of his right to counsel. Should he retain counsel, a Notice of Appearance should be filed at least three days prior to the 15 July 2021 hearing.

C. Order for Arrest

43. Pursuant to N.C.G.S. § 5A-16(b), "[i]f a judicial official who initiates plenary proceedings for contempt under [N.C.]G.S. [§] 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, [s]he may issue an order for arrest of the person, pursuant to [N.C.]G.S. [§] 15A-305."

44. Mr. McRae submitted an affidavit to this Court contending that probable cause exists to find that Mr. Curtis will not appear voluntarily at the contempt proceedings against him given Mr. Curtis's prior behavior. (Contempt Aff.) In support of that contention, Mr. McRae provides that Mr. Curtis has not complied with the Court's Judgment entered eighteen months ago in this case, (Contempt Aff. ¶ 2), Mr. Curtis failed to appear at the first show cause hearing on 11 May 2021, (Contempt Aff. ¶ 3), Mr. Curtis failed to appear at the Second Show Cause Hearing held on 25 June 2021, (Contempt Aff. ¶ 4), and Mr. Curtis has not communicated in any way with Mr. McRae or Mr. McRae's counsel, (Contempt Aff. ¶ 5).

45. The Court finds probable cause to believe that Mr. Curtis will not appear for the contempt proceedings against him scheduled for 15 July 2021. A separate Order For Arrest will issue.

Conclusion

46. IT IS HEREBY ORDERED that Defendant Kyle Russell Curtis SHALL APPEAR before the Court at 10:00 AM on Thursday, 15 July, 2021 in Courtroom 3D of the Guilford County Courthouse, 201 South Eugene Street, Greensboro, North Carolina 27401, to SHOW CAUSE why he should not be found in **criminal contempt for failing to comply with the Court's 13 May 2021 Order;**

47. IT IS FURTHER ORDERED that Defendant Kyle Russell Curtis SHALL APPEAR before the Court at 10:00 AM on Thursday, 15 July 2021 in Courtroom 3D of the Guilford County Courthouse, 201 South Eugene Street, Greensboro, North Carolina 27401, to SHOW CAUSE why he should not be found in **civil contempt for failing to comply with the Judgment in this matter.**

48. IT IS FURTHER ORDERED that Mr. Curtis immediately update his address on the Court's electronic-filing system to reflect his current residence and that he follow the directions the Court has provided to associate himself with the case in the Court's electronic system. Should Mr. Curtis change his address in the future, he is ORDERED to update that change on his user profile in the Court's electronic-filing system within 24 hours of his change of address.

49. Should Mr. Curtis decide to retain counsel, he should do so promptly and shall have such counsel file a Notice of Appearance at least three (3) days in advance of the 15 July 2021 hearing.

50. Nothing in this Court's orders prevents the parties from engaging in discovery in accordance with the Business Court Rules and North Carolina Rules of Civil Procedure.

IT IS SO ORDERED, this the 30th day of June, 2021.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases