

C.C. v A.R.

Supreme Court of New York, Kings County

September 30, 2020, Decided

No Number in Original

Reporter

2020 N.Y. Misc. LEXIS 6769 *; 2020 NY Slip Op 20245 **

[1]** C.C., Plaintiff, against A.R., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: As Corrected October 6, 2020.

Prior History: *Crocker C. v. Anne R.*, 49 Misc. 3d 1202(A), 26 N.Y.S.3d 724, 2015 N.Y. Misc. LEXIS 3421 (Sept. 18, 2015)

supreme court continuing an ongoing evidentiary hearing on the issues, including criminal contempt, by virtual means because a global pandemic was an "exceptional circumstance" allowing it to proceed on all aspects of the proceeding, and a husband created the "necessary" element by declining to participate in an in-person proceeding. Pursuant to [Judiciary Law § 2-b\(3\)](#), a court of competent jurisdiction had the authority to order a trial or hearing to proceed virtually over the objections of a party even where one of the remedies sought was criminal contempt. The husband failed to allege that a virtual proceeding would not satisfy the elements of testimony under oath, the opportunity for contemporaneous cross-examination, the opportunity to view the witness's demeanor, and preservation of a record of the witness's testimony.

Outcome

Motion denied.

Core Terms

in-person, courthouse, notebook, protocols, criminal contempt, evidentiary hearing, proceedings, court system, spyware, pandemic, circumstances, Appearance, Courts, postpone, affirms

Case Summary

Overview

HOLDINGS: [1]-There was no judicial prohibition on the

LexisNexis® Headnotes

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > Sanctions > Contempt > Criminal Contempt

[HN1](#) [↓] **Contempt, Civil Contempt**

Pursuant to [Judiciary Law § 2-b\(3\)](#) a court of competent jurisdiction has the authority to order a trial or hearing to proceed virtually over the objections of a party even where one of the remedies sought is criminal contempt.

Governments > Courts > Judicial Comity

[HN2](#) Courts, Judicial Comity

The federal courts cannot, dictate if, when, and how state criminal courts reopen or schedule in-person appearances. To do so would violate fundamental principals of comity and federalism, and would result in federal supervision of state procedures and proceedings.

Criminal Law & Procedure > Trials > Judicial Discretion

[HN3](#) Trials, Judicial Discretion

It is not within the purview of a litigant or counsel to assess whether the protocols established are adequate.

Constitutional Law > State Constitutional Operation

Governments > Courts > Authority to Adjudicate

[HN4](#) Constitutional Law, State Constitutional Operation

Pursuant to [Judiciary Law § 2-b\(3\)](#), the court has the power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it. This authority is vested in the Courts by the New York State Constitution which permits courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law. [NY Const. art. VI](#), 30.

Governments > Courts > Authority to Adjudicate

[HN5](#) Courts, Authority to Adjudicate

The court does not need the consent of parties to fashion "innovative procedures" where "necessary" to

effectuate the powers and jurisdiction of the court.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

[HN6](#) Criminal Process, Right to Confrontation

Even a one-way live, closed-circuit television testimony can satisfy the [Confrontation Clause of the Federal Constitution](#) under certain circumstances, and where the essential safeguards of testimonial reliability are present, specifically, where evidence presented against a criminal defendant is subject to rigorous testing in the context of an adversary proceeding before the trier of fact.

Civil Procedure > Appeals > Notice of Appeal

[HN7](#) Appeals, Notice of Appeal

In this imperfect world, the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal.

Counsel: Maria Coffinas, Esq., Attorney for Plaintiff, Coffinas & Lusthaus PC, Brooklyn, New York.

Daniel Nottes, Esq., Attorney for Defendant, Cassin & Cassin LLP, New York, New York.

Judges: [*1] HON. JEFFREY S. SUNSHINE, J.S.C.

Opinion by: JEFFREY S. SUNSHINE

Opinion

Jeffrey S. Sunshine, J.

Introduction

[HN1](#)¹ This Court determines that pursuant to [Judiciary Law Section 2-b\(3\)](#) a court of competent jurisdiction has the authority to order a trial or hearing to proceed virtually over the objections of a party even where one of the remedies sought is criminal contempt.

This is a proceeding continuing in the midst of an ongoing pandemic emergency *inter alia* **[**2]** to hold plaintiff-husband in civil and criminal contempt after having been found to have engaged in spoliation of evidence and violation of automatic orders related to the installation of and attempted deletion of iPhone spyware and to consider sanctions against defendant for alleged perjury for making a false affidavit to this Court regarding her knowledge about that spyware.

On September 22, 2020, plaintiff-husband, moved by e-filed order to show cause [motion sequence # 33] requesting the following relief: "1) vacating the virtual hearing scheduled for September 30th from 10:00 a.m. to 1:00 p.m. and October 1, 2020, 2:00 p.m. to 4:30 p.m. on the basis that proceeding with a virtual hearing is severely prejudicial to Plaintiff; and 2) postponing an in-person hearing until the Unified **[*2]** Court System determines the most effective protocols and best practices to safeguard the health and safety of litigants and attorneys for in-person matrimonial trials at the Kings County Courthouse and specifically authorizes such trials to take place; and 3) Such other and further relief as may seem just and proper. The Court heard oral argument on September 25, 2020.¹

Procedural History

This Court has written numerous detailed decisions related to the spyware issue and those written decisions, including the facts and procedural history detailed therein, must be read in conjunction with this decision.

This Court expended vast judicial resources related to plaintiff's actions related to his use of spyware, his invocation of his [Fifth Amendment](#) privilege and his subsequent spoliation of evidence. The culminating effect of plaintiff's actions resulted in the Court by written

decision, *inter alia*, striking plaintiff's pleadings as to certain equitable distribution relief not related to the children. Those written decisions must be read in conjunction with this decision as they fully outline the procedural history details of this protracted litigation.

The Court notes that throughout this litigation plaintiff **[*3]** asserted his [Fifth Amendment](#) right in regards to all questions related to his use of spyware ; however, after this Court struck his pleadings in the February 5, 2018 decision (*58 Misc. 3d 1221(A), 100 N.Y.S.3d 609* and after the Court issued the financial decision after trial (September 17, 2019), plaintiff subsequently conceded in a sworn affidavit dated November 18, 2019 that he had repeatedly installed and used various spyware applications to monitor and "listen in" on the wife in support of an application to reopen discovery based upon his allegation that defendant knew about his use of spyware during the marriage and that she made a false affidavit to this Court regarding that knowledge. Plaintiff now asserts that the defendant all along knew he had installed the spyware equipment and that she herself has now committed perjury.

At this time, all issues between the parties except for the cross-applications seeking awards of counsel fees, defendant's application that the Court hold plaintiff in both civil and criminal contempt and the issue of whether sanctions against defendant are warranted (see *C.C. v. A.R.*, *66 Misc. 3d 1211(A), 120 N.Y.S.3d 716 [January 14, 2020]* are resolved.

The hearing on these remaining limited issues commenced before this Court on March 4, **[**3]** 2020: defendant represented by counsel **[*4]** and plaintiff was appearing *pro se*. During this litigation, plaintiff has been represented by two (2) attorneys. This is the third time plaintiff has retained his current counsel to represent him in this matter.

During the evidentiary hearing on March 4, 2020, numerous exhibits of evidence were admitted into evidence. At the conclusion of the proceeding that day a dispute arose as to the admissibility of portions of a notebook that plaintiff had included in his list of proposed evidence. Pending a determination as to the admissibility of the notebook in its entirety or just the pages selected by the plaintiff the Court took custody of the notebook. The matter was adjourned to March 20, 2020. On March 16, 2020, in response to the COVID-19 crisis, the Unified Court System in-person court proceedings were temporarily limited to "essential" matters. On March 19, 2020, one day before the

¹ Defendant appeared for oral argument but plaintiff did not. Plaintiff's counsel waived plaintiff's appearance on the record and oral argument proceeded.

scheduled continuation of the evidentiary hearing, plaintiff once again re-retained his current counsel for the third time in this litigation.

On June 5, 2020, this Court conducted a virtual status conference in this matter. During that conference, there was a discussion related to the logistics of proceeding. [*5] Based upon that discussion, the Court informed counsel that any objections to appearing virtually must be made in a timely manner so as not to further delay the conclusion of this matter. The matter was adjourned, on consent, to continue the evidentiary hearing on September 30, 2020 and October 1, 2020 either in-person or virtually depending on the protocols in place for the Courts inside the City of New York.

1) Plaintiff Objects to Proceeding In-Person or Virtually

Plaintiff's counsel criticizes the court system over the initial actions taken in March 2020 regarding the pandemic emergency which resulted in the cessation of in court operations except for essential applications and affirms that she is "willing to appear for an in-person continuation of the hearing in this case **only after I am satisfied** that the best practices are in place at the courthouse to ensure my client's and my health and safety [**emphasis added**]" and that "[u]ntil that time, the continued hearing in this matter should be postponed." At the same time, she also affirms that she believes this Court is prohibited from virtually continuing the ongoing evidentiary hearing.

2) Evidence Objection To Virtual Appearance

[*6] Plaintiff's counsel incorrectly asserts that the Kings County Courthouse is and has been "closed" due to the pandemic and that she has been, in effect, prohibited from reviewing the evidence admitted on March 4, 2020, including the "notebook", prior to her being re-retained and, as such, it would be prejudicial to plaintiff to continue the evidentiary hearing. Plaintiff's counsel argues in her affirmation in support of the order to show cause that this notebook "contains a critical page of evidence" despite her repeated representations that she has not seen this notebook. She affirms that she is "willing to review that journal in the courthouse if I am granted permission to enter the courthouse in order to do so, however **only after being assured that my health will be safeguarded [emphasis added]**." It is unclear what assurances plaintiff's [****4**] counsel seeks in addition to the Unified Court System's protocols which

are already in place. These are the same protocols that have been in place for months throughout the pandemic emergency as this Court has been performing its duties from the courthouse.

Plaintiff's counsel contends that even if she was able to examine the notebook in advance she would "have no way of entering it in evidence [*7] during a virtual hearing", if it was accepted into evidence by the Court, because the notebook itself is physically in the courthouse.

3) Criminal Contempt Objection To Virtual Appearance

Plaintiff's counsel cites *dicta* from a decision issued by a court of concurrent jurisdiction in support of her proposition that this Court is not permitted to conduct a virtual hearing on the issue of criminal contempt inasmuch as it could result in a party being imprisoned.

Defendant-wife's counsel's affirmation, dated September 23, 2020 stated that he and his client "take no position on the relief sought in Plaintiff's motion, [A.R.] is desirous of bringing this case to resolution in the safest manner possible for the benefit of everyone involved "

The Law

Safety Measures For In-Person Proceedings/Review of Evidence

The Court notes that court staff, including Justices of the Supreme Court, chambers staff, part clerks, court officers, clerical staff, maintenance personnel and other employees of the court system in Kings County Supreme Court, have been working in the courthouse, observing those established protocols, for months. There have been proceedings conducted in the courthouse on a limited basis [*8] and jurors have been summoned for petit jury trials to commence in the next few weeks. While keeping foot traffic at a minimum the Court has provided methods for physical access to the Courthouse to the public on a case-by-case basis.

These are unprecedented times: fortunately, global pandemics have not been commonly faced in New York. All aspects of social infrastructure and daily-life face the challenging task of mindfully restarting in-person operations. There are Administrative Orders available on

the Court website which provide guidance and instructions regarding court operations and safety protocols. When there is an individual who tests positive in a courthouse a public notification is made on the website. The Courts are open to serve the people of New York State through a hybrid of virtual and increasingly in-person proceedings, which were regionally adapted to take into account different regions of the State. These protocols and Administrative Orders were disseminated and posted to the New York State Court website.

The authority and autonomy of the Unified Court System to establish and implement the appropriate measures for in-person court proceedings was recently recognized by [*9] the Southern District of New York Federal Court in [Bronx Defenders v Office of Court Administration \(2020 U.S. Dist. LEXIS 134029, 2020 WL 4340967 \[S.D.N.Y., July 28, 2020\]\)](#). In *Bronx Defenders*, plaintiff challenged the Uniform Court System determination that in-person proceedings could resume and sought an injunction from the Federal Court to halt in-person appearances in New York City Criminal Court. That application was denied and the case was dismissed with a finding by the Southern District of [**5] New York Federal Court that [HN2](#) [↑] the Federal Courts:

cannot, dictate if, when, and how state criminal courts reopen or schedule in-person appearances. To do so would violate fundamental principals of comity and federalism, and would result in federal supervision of state procedures and proceedings in direct contradiction of [O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 \(1974\)](#)" (2020 U.S. Dist. LEXIS 134029, 2020 WL 4340967 at *1).

[HN3](#) [↑] Similarly, it is not within the purview of a litigant or counsel to assess whether the protocols established are adequate; however, neither is plaintiff nor his counsel, under the facts and circumstances presented, required to appear in-person for the conclusion of the trial. The Court notes that plaintiff has every interest in seeking to delay the resolution of this matter inasmuch as he faces possible incarceration.

This Court has previously made arrangements for others to conduct in-person [*10] review of documents in the courthouse that observe social distancing and all protocol guideline procedures adopted by the Unified Court System. The Court notes that it is not the purvey of this Court nor of plaintiff to deem the protocols established and adopted by the Uniform Court System as "sufficient" or not: nor is there a need for plaintiff to

reach that determination because there is no requirement for plaintiff to appear in-person. Virtual proceedings are available precisely to fit these situations. To hold otherwise: to deem that any individual could be arbitrarily left to determine for him or herself that she did not believe that courthouses were safe would, in effect, grant any litigant *carte blanc* to postpone - indefinitely - any proceeding in which he or she did not want to appear. Certainly, such an outcome will not stand. This case need not be an exception.

Examination of Evidence

Plaintiff and plaintiff's counsel, knowing about the notebook, chose not to even request an opportunity to review, in person, the record and evidence of this evidentiary hearing. Only, on the eve of the continued hearing, did plaintiff formally raise the issue despite this date being selected [*11] nearly three (3) months ago. Under the existing protocols in Kings County Supreme Court, arrangements could have been made for in-person review of a case file in a proper way.

Plaintiff's counsel's contention that the notebook's location in the courthouse bars her, logistically, from offering it into evidence is unfounded. If plaintiff's counsel seeks to admit it into evidence and if the Court grants that application there is no logistical impediment to the notebook being marked into evidence inasmuch as the notebook is, as plaintiff's counsel points out, already in the courtroom. This Court is, and has been, working in the courthouse for many months and therefore there is no logistical impediment to this Court marking said item into evidence if such a ruling is made.² This part is participating in the Evidence Pilot

²In the capacity of Statewide Coordinating Judge for Matrimonial Cases, this Court is spearheading an evidence pilot project which will utilize the NYSCEF e-filing system for uploading evidence separately by attorneys for identification and with court permission for in camera inspection. After hearing objections, or on consent, the Court may number the documents and move them into evidence. There are drop down menus for court exhibits and judicial notice as well as witness and evidence lists. There is also a drop down menu for submission of evidence for in camera inspection of documents with court permission. Documents can even be introduced and shared in real time for purposes of impeachment during cross-examination. Additionally, evidence previously admitted can be uploaded into the virtual platform and shared with counsel and/or shown to parties/witnesses using screen sharing as needed during the proceeding. The Court notes that had this application been made timely, the

program, which [**6] was announced in Chief Judge Janet DiFiore's broadcast on September 28, 2020.

Criminal Contempt Not A Bar To A Virtual Hearing

Plaintiff's counsel cites no binding authority on this Court, nor is this Court aware of any, that would prohibit this Court from continuing with the evidentiary hearing on the issue of criminal contempt under the facts and circumstances [**12] presented.³

HN4 Pursuant to [New York Judiciary Law 2-b\(3\)](#), the Court has the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This authority is vested in the Courts by the New York State Constitution which permits courts latitude to adopt procedures not specified in the statutes where such procedures are consistent with general practice as provided by the law ([NY Const, Art VI, 30](#); see also [People v Ricardo B., 73 NY2d 228, 232, 535 N.E.2d 1336, 538 N.Y.S.2d 796 \[1989\]](#)).

HN5 The Court of Appeals upheld this authority in *People v Wrotten* where it ruled that the Court does not need the consent of parties to fashion "innovative procedures" where "necessary" to effectuate the powers and jurisdiction of the Court ([14 N.Y.3d 33, 37, 923 N.E.2d 1099, 896 N.Y.S.2d 711 \[2009\]](#)). In *People v. Wrotten*, defendant was indicted with first-degree assault and two counts of robbery in the first degree: the Court permitted the complaining witness to testify by live two-way video technology.⁴ 4 Similar to plaintiff in the case before this Court, the defendant in [People v. Wrotten](#) faced the possibility of imprisonment yet the Court of Appeals still found that there was no prejudice to defendant not being able to confront the complainant in-person where complainant appeared by live two-way

evidence could have been made available virtually to counsel and the parties months ago for virtual review. Plaintiff's failure to make this request has not prejudiced him: it threatened to prejudiced the defendant and to waste judicial resources.

³ This Court does not adopt the *dicta* proffered in [S.C. v. Y.L. 67 Misc. 3d 1219\(A\), 2020 NY Misc LEXIS 2267 \[Cooper, J.\]](#).

⁴ In *People v Wrotten*, defendant was a home health aid and complainant was a 83-year old man who alleged that defendant hit him from behind with a hammer and demanded money. Complainant suffered five head wounds and two broken fingers. Defendant in that matter faced imprisonment.

television feed. As [**13] such, in the case at bar, plaintiff's contention that this Court is *prohibited* from virtually continuing the evidentiary hearing based upon his possible [**7] imprisonment if he is found guilty of criminal contempt is unavailing.

The Court further notes that, while not dispositive of this issue, the technology available at this time exceeds the technology available when *People v Wrotten* was decided in 2009.⁵⁶⁶ In fact, even prior to *People v Wrotten* decision, the United States Supreme Court had determined that **HN6** even a *one-way* live, closed-circuit television testimony could satisfy the [Confrontation Clause of the Federal Constitution](#) under certain circumstances ([Maryland v Craig, 497 US 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 \[1990\]](#)) and where the essential safeguards of testimonial reliability were present, specifically, where evidence presented against a criminal defendant was subject to rigorous testing in the context of an adversary proceeding before the trier of fact ([Maryland v. Craig 497 US at 845](#); see also [People v Wrotten, 14 NY3d at 39](#)).

In the case at bar, plaintiff has not alleged that a virtual proceeding as available to him before his Court would not satisfy the elements of testimony under oath, the opportunity for contemporaneous cross-examination, the opportunity for the judge and parties [**14] to view the witness's demeanor as he or she testifies and preservation of a record of the witness's testimony (see generally [Maryland v. Craig 497 US at 851](#); see also [People v Wrotten, 14 NY3d at 39](#)).⁷

In *People v Wrotten*, the New York Court of Appeals noted that live televised testimony is an exceptional procedure to be used "in exceptional circumstances" as "necessary". This Court finds that this global pandemic

⁵ As early as 1990, the Court of Appeals has upheld the use of two-way televised testimony (see [People v Cintron, 75 NY2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 \[1990\]](#)). Certainly the technology available today far exceeds that available in 1990.

⁶ Given that technology and its various uses have been central in this litigation, it is notable that the first generation iPhone was released in June 2007, less than two (2) years before *People v Wrotten* was decided. Certainly with the many advances in technology in the intervening years the Court is even more equipped to provide virtual proceedings today than it was in 1990 (*People v Cintron*) or 2009 (*People v Wrotten*).

⁷ Numerous additional federal cases are cited in *People v Wrotten* where live video testimony has been permitted under a variety of circumstances.

is an "exceptional circumstance" allowing this Court to proceed on all aspects of this proceeding, including the issue of criminal contempt, by virtual means. The Court also finds that plaintiff himself has created the "necessary" element, as detailed in *People v Wrotten*, by declining the opportunity to participate in an in-person proceeding.

As detailed herein-above, there is no judicial prohibition on this Court continuing the ongoing evidentiary hearing on the issues presented, including criminal contempt, by virtual means.

This Court is aware that this is a challenging time with uncertainty for everyone and that it may be perceived by some that a virtual proceeding is not a perfect scenario; however, there are no perfect trials whether in-person or virtually. [HNZ](#) [↑] As the Court of Appeals has noted again and again, " in this imperfect world, [*15] the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal" (*People v. Rivera*, 39 NY2d 519, 523, 349 N.E.2d 825, 384 N.Y.S.2d 726 [1976]; see also *People v. Harris*, 57 NY2d 335, 442 N.E.2d 1205, 456 N.Y.S.2d 694 [1982]; *People v Parris*, 4 NY3d 41, 823 N.E.2d 827, 790 N.Y.S.2d 421 [2004]). **[**8]**

Defendant represents that she is prepared to appear in-person or virtually on September 30, 2020 but that she desire this matter to come to a conclusion. Plaintiff asserts that he objects to any means of concluding this proceeding. As much as plaintiff resists a final determination on these issues, defendant is also entitled to a conclusion of this matter. This Court will not allow plaintiff to prolong this litigation.

Under the unique facts and circumstances presented, this Court will not direct this plaintiff to participate in an in-person proceeding; however, this Court has found no binding authority that would prohibit this Court from proceed with the virtual proceeding.

This Court will not abide plaintiff's attempt to use a global pandemic as a sword and a shield to further delay the resolution of this proceeding.

To provide for an in-person review of the notebook, counsel shall contact chambers so that arrangement can be made for counsel and plaintiff, if he so desires, to enter the Courthouse **[*16]** at a time agreed upon between 10:00 AM and 12 PM on Thursday October 1, 2020. A courtroom on the second floor is available so that there is no need to use an elevator. The plaintiff may bring hand sanitizer or use the newly installed

dispensers that are located in the building. Counsel and her client must wear proper face masks at all times when in the courthouse and they may wear gloves when handling the notebook. If defendant wishes to examine the notebook again he may also make arrangements with chambers staff. The Court is also as an accommodation willing to make copies of the notebook for both sides when appropriate.

To accommodate this review, the trial will be delayed one (1) day: it will recommence virtually on October 1, 2020 at 2:15 PM by the Teams platform. This one (1) day postponement will also provide counsel additional time to review the current pilot protocols for offering and submitting evidence and the notebook.

While breakout rooms for Teams are not yet operational, the Court will accommodate reasonable requests for opportunities for counsel to speak with clients privately via telephone or for a side bar with the Court without clients present. The Teams platform allows **[*17]** parties and counsel to see each other and the Court simultaneously

There is no doubt that all of our lives have been impacted by the events around us; however, there are viable alternatives and that is to continue virtually - that provides additional safeguards to all involved. The defendant's right to conclude cannot be subjugated to plaintiff's unreasonable position that this Court must indefinitely postpone any continuation of the on-going trial. The Court is willing to accommodate the plaintiff's counsel as to in person proceeding in a courtroom under these circumstances but will not allow her and her client to oppose any virtual proceeding.

ENTER FORTHWITH:

HON. JEFFREY S. SUNSHINE

J.S.C.

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