GMSR
Greines, Martin, Stein & Richland LLP

Law Offices
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 Fax (310) 276-5261
www.gmsr.com

March 7, 2013

The Honorable Presiding Justice and Associate Justices
Court of Appeal
Second Appellate District, Division Five
300 South Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Re: **1680 Property Trust, et al., v. Ampton Investments, Inc., et al.**
2d Civil No. B235731

Honorable Presiding Justice and Associate Justices:

Plaintiffs respectfully submit the following letter brief in response to this Court's February 27, 2013 request. The answers to the Court's questions are as follows:

1. **Have defendants complied with plaintiffs' subpoenas within 30 days of the January 23, 2013 New York Supreme Court order?**

No.

Even if defendants were to respond to the subpoenas at some later date, they still would not have timely complied with the New York Supreme Court order. They never requested an extension. Accordingly, as contemplated by the New York court order, plaintiffs have filed a further motion for contempt sanctions. (2nd Supplemental Request for Judicial Notice, Ex. A, filed concurrently with this letter.)

Defendants did finally pay the $500 contempt sanction imposed by the New York court order, but defendants did not pay within ten days as required, and they did not obtain an extension to do that either. They remain in contempt of court.

2. Are there any authorities in this jurisdiction or others addressing whether the disentitlement doctrine can be applied to an appellant that is in violation of an order of a jurisdiction other than the jurisdiction in which the disentitlement doctrine might be applied?

Yes.

Plaintiffs have found no California authorities that have addressed the issue. Defendants cling to language in *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, that the disentitlement doctrine prevents a party from seeking assistance from the court while that party is in contempt of the "courts of this state." (*Id.* at p. 277.) However, neither in *MacPherson*, nor in any other California decision that repeats the "courts of this state" language, was there an issue of whether the requisite contempt could only be of "courts of this state." *MacPherson* and similar cases all involved contempt of court orders issued in this state. Accordingly, the "courts of this state" language is dictum, not precedent. Language in a judicial opinion must be understood in accordance with the facts and issues before the court, and an opinion is not authority for propositions not considered. (*Kinsman v. Unocal Corp* (2005) 37 Cal.4th 659, 680.)

The issue has been decided in other jurisdictions, however, and not in dictum. The courts of these jurisdictions hold that as long as there is a connection with pending case, the disentitlement doctrine applies even if the party is in contempt of a court of a different jurisdiction:

- *In re Prevot* (6th Cir. 1995) 59 F.3d 556, was a child custody dispute between a mother living in Tennessee and a father – a fugitive from a state court criminal conviction in Texas – living in France. The father sought the aid of a federal district court in Tennessee for return of the children to France. The district court granted the requested relief. The Sixth Circuit reversed. The appellate court held that the father's contempt of the Texas state court conviction disentitled him to avail himself of the auspices of the federal courts: "It does not matter that the court of conviction and the court from whose processes the fugitive is excluded are from different sovereigns." (*Id.* at p. 566.)

- *Broadway v. City of Montgomery, Alabama* (5th Cir. 1976) 530 F.2d 657, was a federal civil rights action. The appellate court dismissed the plaintiff's appeal because he was a fugitive from a state court criminal conviction: "It is immaterial that the custody from which he fled is that of another sovereign." (*Id.* at p. 659.)[1]

- *Conforte v. C. I. R.* (9th Cir. 1982) 692 F.2d 587, was an appeal from a decision of a federal Tax Court. The appellant was a fugitive from a federal criminal tax conviction in Nevada. The appellate court dismissed the appeal, quoting *Molinaro v. New Jersey* (1970) 396 U.S. 365, 366, for the proposition "that an individual who seeks to invoke the processes of the law while flouting them has no entitlement 'to call upon the resources of the Court for determination of his claims.'" (692 F.2d at p. 589.)

- The plaintiff in *Doyle v. U. S. Department of Justice* (D.D.C. 1980) 494 F.Supp. 842, sought the aid of the District of Columbia federal court under the Freedom of Information Act. But the plaintiff was a fugitive from a criminal conviction in a Connecticut federal court, and the district court refused to hear his case. (*Id.* at p. 845.) The D.C. Circuit affirmed, per curium, concluding that so long as the petitioner is evading federal authority, he may not demand that any federal court service his complaint. (*Doyle v. U. S. Dept. of Justice* (D.C. Cir. 1981) 668 F.2d 1365, 1365-1366.)[2]

- And a case referred to in the Court's February 23, 2013 letter, *U. S. v. $6190.00 in U. S. Currency* (D. Or., Feb. 20, 2008, No. CV04-295-MA) 2008 WL 474379, was an action to forfeit currency allegedly used in a conspiracy to violate immigration laws. The federal district court dismissed a claim to the currency by a fugitive from a state criminal proceeding arising from the same underlying conduct. The court rejected the claimant's argument that his claim should be heard because he was a

---

[1] See also: *Morrell v. Kramer* (N.D. Cal., June 25, 2001, No. C 98-4138VRW) 2001 WL 764947 *6 ("It does not matter that the former fugitive fled from the custody of another sovereign"); *Brin v. Marsh* (D.D.C. 1984) 596 F.Supp. 1007 (fugitive from court martial charges disentitled to sue for military retirement benefits).

[2] *Daccarett-Ghia v. C.I.R.* (D. C. Cir. 1996) 70 F.3d 621, held that *Doyle* had been superseded in part, but that the result in *Doyle* – dismissal – remained the correct result in light of the relationship between the subject matters of the civil and criminal cases. (70 F.3d at p. 626, fn. 4.)

fugitive from state, not federal, prosecution, and therefore not snubbing the federal court. The court interpreted 28 U.S.C. section 2466, as authorizing courts to disallow a party from using federal court resources in a civil forfeiture action where that party is evading the jurisdiction of *any* court in which a related criminal case is pending. (*U. S. v. $6190.00 in U. S. Currency*, 2008 WL 474279 at *3.) The Ninth Circuit affirmed that decision in *United States v. $6290.00 in United States Currency* (9th Cir. 2009) 581 F.3d 881, 888 [section 2466 "applies to fugitives from both state and federal criminal proceedings"].)[3]

This Court's February 27, 2013 letter refers to additional cases. None of those cases forecloses application of the disentitlement doctrine in this case. Most would support application of the doctrine. Plaintiffs will briefly discuss these cases as well:

- In *Ortega-Rodriguez v. United States* (1993) 507 U.S. 234, the Supreme Court held that where a convicted defendant's flight and recapture occurred before his appeal was heard, his former fugitive status did not necessarily have the required connection to the appellate process to justify dismissal of his appeal. The Court decided the case based on its authority as policy-overseer for federal courts (*id.* at p. 244), not in any way limiting how California courts might apply their own disentitlement doctrine.[4]

- *March v. Levine* (6th Cir. 2001) 249 F.3d 462, arose from a battle between a father and maternal grandparents over child visitation rights. The grandparents wrongfully removed the children from the father's custody in Mexico and brought them to Tennessee. The grandparents sought to invoke the disentitlement doctrine to bar the father from seeking his children's return to Mexico on the ground that the father had been held in contempt of court in an Illinois grandparent visitation proceeding that was later closed and in a Tennessee probate proceeding in which he failed to turn over a hand bag and a baby blanket. The Sixth Circuit held that the Tennessee district court did not abuse

---

[3] Section 2466 effectively abrogated the Supreme Court's limitation on the disentitlement doctrine in civil forfeiture cases in *Degen v. United States* (1996) 517 U.S. 820, 828.

[4] The U.S. Supreme Court had previously held that the federal constitution did not bar a state from applying disentitlement rules that the Supreme Court might not. (*Estelle v. Dorrough* (1975) 420 U.S. 534, 535-536.)

its discretion in refusing to disentitle the father from seeking return of his children. The appellate court said it would decline to expand the disentitlement doctrine to permit dismissal where the contempt was unrelated to the conduct of the current proceeding and was either moot or trivial. (*Id.* at p. 470.) In our case, defendants' contempts are neither moot nor trivial.

- The appellate court in *State v. Brabham* (2011) 301 Conn. 376 [21 A.3d 800], held that even though a fugitive criminal defendant had returned to custody, his conduct nevertheless disentitled him to appeal his criminal conviction where his flight from custody undermined the integrity, efficiency or dignity of the appellate process. (*Id.* at p. 806.)

- In *U. S. v. Barnette* (11th Cir. 1997) 129 F.3d 1179, the appellate court dismissed appeals from civil contempt orders where the appellants had disobeyed those orders, acted to effect a stay of the orders against them despite the appellate court having denied them a stay, and continued to evade bench warrants. The court held that for purposes of the disentitlement doctrine, the appellant "need not be a fugitive in a criminal matter," and that dismissal was justified where it would be inequitable to allow an appellant to use the resources of the courts only if the outcome is an aid to him, where there was a need to avoid prejudice to the opposing party, and to discourage flights from justice. (*Id.* at p. 1183.) In our case, defendants (a California lawyer and a corporation represented by major law firms) respect courts processes only when it suits their own purposes.

- Finally, the district court in *U. S. v. Funds Held in the Name of or for the Benefit of Wetterer* (E.D. N.Y. 1995) 899 F.Supp. 1013, refused to entertain a corporation's objections in civil forfeiture proceedings where the corporation was the alter ego of a fugitive from criminal charges arising from the same underlying events. (*Id.* at pp. 1032-1053.) In our case, the appeal and the New York proceedings arise from the same underlying events and judgment.

3. How, if at all, does the fact that the New York state court orders in issue relate directly to the enforcement of a California judgment affect the disentitlement analysis?

That fact directly affects the disentitlement analysis.

A common principal that can be gleaned from the cases discussed above is that the disentitlement doctrine may be applied across jurisdictions as long as there is a connection between the contempt proceedings and the case pending on appeal. In our case, there is an inextricable connection between the California appeal from the judgment and the New York proceedings to enforce the California judgment. The New York court, while acting under its own sovereignty, is essentially an extension of the California courts for purposes of enforcing the California judgment. The enforcement proceedings are in New York only because that is where the defendants reside and work. If the proceedings were in California, there would be no question that the disentitlement doctrine should be invoked. (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 380; *Tobin v. Casaus* (1954) 128 Cal.App.2d 588 [defendant failed to appear for debtor's examination in a deliberate effort to frustrate enforcement of judgment without complying with legal requirements for a stay].)

Both this Court and the New York court have rejected defendants' requests for stay of enforcement of the judgment. Defendants' filing of purported appeals from the New York domesticated judgment and orders do not permit him to ignore that court's orders or the California judgment.[5] By refusing to comply with enforcement procedures

---

[5] As plaintiffs have pointed out in their prior pleadings, defendants' purported appeals from the New York domesticated judgment and from the order compelling them to answer subpoenas were untimely. Moreover, as to the domesticated judgment, defendants never even moved to vacate it; it is final. And their appeal from the contempt order does not permit appellate review of the prior subpoena order either, because the contempt order is independent of the validity of the subpoena order. Under New York law, court orders must be obeyed unless and until they are reversed on appeal. (*Seril v. Belnord Tenants Assn.* (N.Y.App.Div. 1988) 139 A.D.2d 401.) The subpoena order is not subject to appeal at this time. (*Bergin v. Peplowski* (N.Y.App.Div 1991) 173 A.D.2d 1012, 1014.)

in New York, appellants are point blank flouting a California judgment and should be disentitled to pursue their appeal in a California court.

Respectfully submitted,

LOVE & ERSKINE, LLP
Richard A. Love
Kathleen M. Erskine

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster

By_____
Marc J. Poster

Attorneys for Plaintiffs and Respondents Herbert W. Stoltenberg, trustee of 1680 Property Trust, Michael L. Epsteen, trustee of Michael L. Epsteen Trust, Stephen Ellis Gordon, trustee of Stephen Ellis Gordon and Linda S. Gordon Revocable Trust, and Ruth Ann Runnells-LaMonica, trustee of The LaMonica Family Trust