ORDERED.

Dated: September 11, 2018

Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

Nina Michelle Weisman,

Debtor.
_____/

Case No. 6:14-bk-03752-CCJ
Chapter 13

ORDER DENYING MOTION BY RESIDENCES AT VILLA MEDICI CONDOMINIUM ASSOCIATION, INC. TO HOLD DEBTOR IN CONTEMPT AND FOR SANCTIONS

This case came before the Court for trial on the Motion by Residences at Villa Medici Condominium Association, Inc. (the "Association") to Hold Debtor in Contempt and for Sanctions (Doc. No. 67, the "Motion for Contempt"). The Court having taken evidence and considered the record in this case, denies the Motion for Contempt.

Background

The Debtor, Nina Michelle Weisman (the "Debtor"), filed for relief under Chapter 13 of the Bankruptcy Code on April 1, 2014. The Debtor is disabled and receives monthly disability payments of about $1,100. The Debtor's non-filing spouse works in the restaurant industry and earns approximately $1,200 to $1,800 a month. The Debtor and her non-filing spouse have three

children, all under the age of ten. In her schedules, the Debtor discloses monthly household expenses totaling $1,900.[1] The Debtor's plan payment is approximately $800.00 per month.[2]

The Debtor and her family reside in a condominium unit located in Orlando, Florida (the "Condo"). The Debtor values the Condo at approximately $67,000 in her bankruptcy schedules.[3] Because the Debtor purchased the Condo with her disability settlement, the Condo is not encumbered by a mortgage. The Condo is, however, encumbered by a $37,000 lien held by the Association for past due association fees, attorney fees and costs.[4] The Debtor's confirmed Chapter 13 plan pays the Association's claim in full over five years.[5]

About a year after the Debtor filed this case, the Condo's central cooling system (the "AC Unit") stopped working. To cool the Condo, the Debtor placed a portable air cooling unit in a window (the "Window Unit"). The Association notified the Debtor that the Window Unit violated the Association's Declaration of Condominium. The Debtor did not remove the Window Unit as requested. The Association filed a motion for stay relief to obtain a state court injunction that would require the Debtor to cure the Window Unit violation (the "Motion for Stay Relief").[6] Before a hearing on the Motion for Relief from Stay, the Debtor repaired the AC Unit and removed the Window Unit.

At the hearing on the Motion for Stay Relief, the parties announced a settlement and agreed to the entry of an order (the "Agreed Order").[7] The Agreed Order enjoins the Debtor from violating certain provisions of the Association's Declaration of Condominium during the pendency of this case, including that:

> No awnings, window guards, light reflective materials, ventilators, fans or air conditioning devices shall be used in or about the Condominium, except as shall have been approved by the Association, which approval may be

> withheld on purely aesthetic grounds within the sole discretion of the Association.

The Agreed Order further provides that any willful violation of these provisions "shall be punishable by contempt."

The Debtor complied with the Agreed Order for a year. Unfortunately, the AC Unit stopped working again and the Debtor began using the Window Unit to cool the Condo. The Association notified the Debtor that the Window Unit violated the Agreed Order. A couple of months later the Association filed the Motion for Contempt. By the Motion for Contempt, the Association requests that this Court hold the Debtor in contempt for violating the Agreed Order, sanction the Debtor by awarding the Association its attorney fees and costs, and grant the Association stay relief to enforce the sanction award by foreclosing on the Condo.

At trial on the Motion for Contempt, the Association relied on the testimony of Mr. Ronald Smith to demonstrate that the Debtor violated the Agreed Order. Mr. Smith is a maintenance technician employed by the Association's management company. Mr. Smith testified that he fully inspects the Association's property once every week or two, and has done so for the last 1 ½ years. During his inspections, Mr. Smith observed the Window Unit on the Condo. From December 2016 to May 2017, Mr. Smith took photographs demonstrating that the Window Unit was on the Condo on five different days.[8] Although the Window Unit may have been placed in different windows, Mr. Smith could not recall a time during his visits that the Window Unit was not present on the Condo.

The Association also relied on the testimony of Mr. Robert Anthony and affidavits filed by Mr. Anthony and Spencer M. Gledhill, to demonstrate that the Association incurred attorney fees and costs due to the Debtor's violation of the Agreed Order. From November 1, 2016 through the

trial date on October 5, 2017, the Association's attorneys billed approximately 30 hours related to the Motion for Contempt and trial. Based on the attorneys' hourly billing rates ranging from $250 to $400 per hour, the Association incurred almost $10,000 of attorney fees and costs solely related to the Motion for Contempt.

The Debtor candidly admits that she sometimes placed a Window Unit on the Condo after entry of the Agreed Order. She testified that she did so only when it was extremely hot outside in order to protect the safety and health of her family. The Debtor stated that it would cost about $5,000 to repair the AC Unit, and she did not have the funds available to repair it.

When in use, the Debtor placed the Window Unit at the back of the Condo. The Debtor described the back of the Condo as having limited visibility to others given the location and surrounding shrubbery. The Debtor does not recall how many times she placed the Window Unit on the Condo, but disagrees that all the photographs taken by Mr. Smith occurred after entry of the Agreed Order. The Debtor testified that she now has a new portable air cooling unit that may be used inside of the Condo and that she is attempting to save funds to repair the AC Unit.

Discussion

Bankruptcy courts have inherent civil contempt powers to enforce compliance with its orders.[9] In civil contempt matters, the movant must present "clear and convincing" evidence that a court order was violated.[10] "This clear and convincing proof must also demonstrate that 1) the order was valid and lawful; 2) the order was clear, definite and unambiguous; and 3) the alleged violator had the ability to comply with the order."[11] Upon a prima facie showing that a court order was violated, the burden then shifts to the alleged violator to establish a "present inability to comply that goes beyond a mere assertion of inability…", with evidence to support that claim.[12]

The court's inquiry in civil contempt matters focuses on whether the alleged violator complied with the order at issue, and not the alleged violator's subjective beliefs or intent to comply with the order.[13] But, as held by the Eleventh Circuit, "a person who attempts with reasonable diligence to comply with a court order should not be held in contempt."[14]

Here, the Debtor does not argue that the Agreed Order was invalid, unlawful, unclear or ambiguous. Instead, the Debtor argues that she tried to comply with the Agreed Order but could not comply altogether because she had no monies to fix the AC Unit and needed to cool the Condo for the health and safety of her family. The Debtor complied with the Agreed Order for about a year. An unforeseen event -- the second breakdown of the AC Unit -- caused the Debtor to temporarily use the Window Unit. The Debtor attempted to repair the AC Unit, but could not afford to do so. The Debtor limited her use of the Window Unit to "hot days," and would remove it as soon as she could. The pictures taken by Mr. Smith demonstrate that the Debtor moved the Window Unit to other locations and indicate that the Debtor would remove the Window Unit. When in use, the Debtor placed the Window Unit in an inconspicuous area at the back of the Condo.

The Debtor used the Window Unit over a short period of time – intermittently for less than six months. From December 2016 to May 2017, Mr. Smith photographed the Window Unit on the Condo for only five days. And, although the Court does not doubt Mr. Smith's testimony that he does not recall a time that the Window Unit was not on the Condo, Mr. Smith admittedly does not inspect the Condo daily. The Debtor testified that she is using the new portable unit, and no longer possesses the Window Unit. The Association does not dispute that the Debtor is now in compliance with the Agreed Order. All of the foregoing circumstances and actions by the Debtor

demonstrate "reasonable diligence" on her part to comply with the Agreed Order. Accordingly, the Court finds that the Debtor is not in contempt. Based on this finding, no sanctions are awarded.

For the reasons stated above, it is:

ORDERED:

1. The Motion for Contempt (Doc. No. 67) is denied.

2. Each party shall bear its own attorney fees and costs.

Clerk's office to serve.

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[1] Doc. No. 15.
[2] Doc. No. 59.
[3] Doc. No. 15.
[4] POC No. 6. According to the proof claim attachments, the lien consists of past due association fees totaling about $13,000 and about $24,000 of attorney fees and costs.
[5] Doc. No. 59.
[6] Doc. No. 45.
[7] Ex. No. 2.
[8] Ex. Nos. 3, 5, 7, 8, and 9.
[9] *See In re Ocean Warrior, Inc.*, 835 F.3d 1310, 1316 (11th Cir. 2016).
[10] *See Howard Johnson Co., Inc., v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990); *Delta Sigma Theta Sorority, Inc., v. Bivins*, 2015 WL 1400435 (M.D. Fla. March 26, 2015).
[11] *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000) (citation omitted).
[12] *Howard Johnson*, 892 F.2d at 1516 (citation omitted).
[13] *See Howard Johnson*, 892 F.2d at 1516; *Delta Sigma*, at *2; *Smith Barney, Inc. v. Hyland*, 969 F. Supp 719, 722-23 (M.D.Fla. 1997).
[14] *Newman v. Graddick*, 740 F.2d 1513,1525 (11th Cir. 1984); s*ee also Frenchy's Corporate, Inc. v. Frenchy's Pizzeria & Tavern, Inc*., 2018 WL 3104452 (M.D. Fla. June 6, 2018).