MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

X	INDEX NO. 700054/09
84-16 QUEENS BOULEVARD REALTY CORP. AND CONTEMPO ACQUISITION, LLC,	MOTION SEQ. NO. 3
Plaintiffs,	BY: GRAYS, J.
- against -	DATED: March 9, 2011
RAYMOURS FURNITURE COMPANY, INC.,	
Defendant. X	

In this action to recover damages for breach of contract and for attorneys' fees, defendant Raymours Furniture Company Inc. (Raymours) seeks an order holding non-party Franklyn Estrella in civil contempt for his failure to comply with a subpoena duces tecum and ad testifcandum, imposing a fine in an amount equal to defendant's costs and expenses incurred in this motion, plus a statutory penalty of $250.00 and directing compliance with the subpoena by producing responsive documents within 7 days of the disposition of the motion, and appearing at a deposition within 10 days of the disposition of the motion.

On May 17, 2007 defendant Raymours entered into a lease agreement with plaintiffs 84-16 Queens Boulevard Realty Corp. and Contempo Acquisition, LLC, whereby Raymours agreed to lease two separately subdivided but contiguous parcels known as 86-46

and 86-50 Queens Boulevard, Elmhurst, New York, subject to certain terms and conditions. Franklyn Estrella, an architect, was retained by the plaintiffs in connection with obtaining a certificate of occupancy for the subject premises.

Defendant Raymours served a non-judicial subpoena duces tecum and ad testifcandum on non-party Franklyn Estrella on June 24, 2010, by serving a person of suitable age and discretion at his actual place of business and mailing a copy of the subpoena on June 30, 2010, by first class mail to his actual place of business, in an envelope bearing the legend "personal and confidential" and not indicating that it was from an attorney, in compliance with CPLR 2303. The subpoena required Mr. Estrella to produce the requested documents by August 5, 2010 and to appear for a deposition on August 12, 2010.

The parties to this action agreed, pursuant to a so ordered stipulation dated July 15, 2010, to extend the time in which to file the note of issue to September 24, 2010, and to conduct certain depositions on specific dates, including the deposition of Mr. Estrella on August 12, 2010.

Mr. Estrella did not object to the subpoena or indicate to Raymours that he needed additional time in which to produce the documents sought. Mr. Estrella did not produce the documents requested in the subpoena on August 5, 2010, and did not appear for a deposition on August 12, 2010. He produced a few drawings on August 13, 2010 which pertain to another property which is not the subject of this action.

Defendants personally served this motion for civil contempt on Franklyn

Estrella on September 23, 2010, pursuant to Judiciary Law § 781. The motion, originally made returnable for October 5, 2010, was thereafter adjourned on three occasions, and the motion was submitted on November 3, 2010. Mr. Estrella has defaulted in answering this motion.

The court is empowered, pursuant to Judiciary Law § 753(5) to punish for contempt "[a] person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or attend, or be sworn, or to answer as a witness". In order to hold a party in civil contempt for disobeying a subpoena, "[i]t is not necessary that such disobedience be deliberate; rather the mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party" *(Great Neck Pennysaver v Central Nassau Pubs*., 65 AD2d 616, 616-617 [1978]; see, also, Judiciary Law, § 753[a]). The party making the application for a civil contempt citation has the over-all burden of proof to establish, by clear and convincing evidence, that the court order or subpoena has been violated (*see, Yalkowsky v Yalkowsky*, 93 AD2d 834, [1983]).

Raymour has established that Mr. Estrella failed to comply with the subpoena, as he did not produce the requested documents and did not appear for the deposition, thereby impeding defendant's right to conduct a deposition and to obtain the documents sought. Since Mr. Estrella failed to oppose this motion, no factual dispute exists regarding his contempt, thereby obviating a need for a hearing (*see Automated Waste Disposal, Inc. v*

Mid-Hudson Waste, Inc., 50 AD3d 1073 [2008]).

Accordingly, defendant's motion is granted as follows: The court finds Franklyn Estrella in contempt and he is directed to pay Raymour a fine of $250.00, for his failure to comply with the subpoena (Judiciary Law § 773). Mr. Estrella is further directed to pay Raymour's reasonable attorney's fees and actual costs incurred in making this motion (Judiciary Law § 773; *see Dunn v Dunn*, 78 AD3d 649, [2010]; *Matter of Barclays Bank v Hughes*, 306 AD2d 406, 408, [2003]). Raymour is directed to submit an affidavit to the court detailing the attorney's fees and actual costs, along with a proposed order to be entered hereon. Mr. Estrella is directed to pay these amounts in full, within seven (7) days of being served with a copy of the order to be entered hereon, together with notice of entry.

Mr. Estrella may purge himself of contempt by (1) producing the requested documents, (2) appearing for a disposition of the motion within 10 days from the date of service of the order to be entered hereon, together with notice of entry, and (3) paying the defendant the full amount of the fine, costs and attorney's fees within 10 days from the date of service of the order to be entered hereon, together with notice of entry.

Upon the failure of Franklyn Estrella to pay the fine and costs, and upon proof by affidavit that more than ten days have elapsed since personal service of the order to be entered hereon upon Franklyn Estrella, and upon certified copy of this order, the defendant shall settle on ten days notice on Franklyn Estrella, a warrant of arrest to be executed by the Queens County Sheriff, authorizing and directing the Sheriff to apprehend Franklyn Estrella

and to bring him before the Court. Defendant shall serve a copy of the proposed warrant of arrest, together with a copy of the order to be entered hereon, on Franklyn Estrella, personally, pursuant to CPLR § 308 (1)(2) or (4). (Judiciary Law § 772).

Settle order.

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J.S.C.