

H.D. Smith Wholesale Drug Co. v Custom LTC, LLC

2010 NY Slip Op 30373(U)

February 22, 2010

Supreme Court, New York County

Docket Number: 650090/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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H.D. Smith Wholesale Drug Co.,

Plaintiff,

- against -

Custom LTC, LLC.,

Defendant.

-----X

DECISION/ORDER

Index No.: 650090/07
Seq. No.: 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Plt's Motion (contempt) w/ BK affirm, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

In the underlying action, the parties entered into a stipulation of settlement. Defendant defaulted under the stipulation and the clerk entered a money judgment against defendant in the amount of \$42,500.00.

Presently before the court is plaintiff's motion to enforce the deposition and information subpoena it served on Jordan Fogel, defendant's vice president (CPLR § 5210) and for the costs and expenses incurred of this motion including legal fees. The subpoena, which was served on December 11, 2009, identified several classes of financial documents to be produced, including tax returns, financial statements,

evidence of transfers, and bank statements. Though due proof of service has been filed with the court and defendant Custom LTC, LLC. and its Vice President, Jordan Fogel, were served by regular mail, this motion is before the court on default.

Plaintiff has also filed proof that defendant was served with the subpoena through Barbara Fogel, a managing/authorized agent of the LLC., who was authorized to accept service on behalf of the LLC. Such service complies with LLC § 302(b)(1), 303 and BCL § 305, 306. Despite proper service of the subpoena, no one appeared on behalf of defendant to testify and produce the documents requested.

Discussion

Under CPLR § 5224 (a), a deposition subpoena and a subpoena duces tecum must be served in the same manner as a summons. Service upon a corporation must be made in the manner provided under CPLR § 311. Plaintiff's service of the subpoena complies with the due process requirements of CPLR § 311.

Under CPLR § 5222 (b), a plaintiff has the right to obtain financial disclosure to aid it in the recovery of the money it is due and its collection efforts. CPLR § 5251; Gabor v. Renaissance Associates, 170 AD2d 390 (1st Dept 1991); See also: Skylake State Bank v. Solar Heat and Insulation, 148 Misc2d 559 (Sup Ct., N.Y. Co. 1990). The failure to comply with a subpoena issued by an officer of the court shall be punishable as a contempt of court. CPLR § 2308 (a).

On a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. DRL §245; Judiciary Law § 753[A][3]; See also:

McCormick v. Axelrod, 59 NY2d 574, 583 *amended* 69 NY2d 652 (1983); Puro v. Puro, 39 AD2d 873 (1st dept. 1990). Furthermore, the actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. Farkas v. Farkas, 209 AD2d 316 (1st Dept. 1994). A party seeking contempt must show that there are no alternative effective remedies available. Farkas v. Farkas, 201 AD2d 440 (1st Dept. 1994).

Plaintiff has established that defendant's disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about defendant's financial resources. Judiciary Law § 753 [a]; Farkas v. Farkas, 209 AD2d 316 (1st Dept 1994); Great Neck Pennysaver v. Central Nassau Publications, 65 AD2d 616 (2d Dept 1978). Finally, plaintiff has shown that without the information, plaintiff cannot easily enforce its judgment. Therefore, plaintiff's motion for contempt is granted.

Defendant is therefore in civil contempt. The court will, however, order defendant to respond to the information subpoena within FIVE DAYS of being served with a copy of this Order. This is a FINAL opportunity to PURGE the contempt. If defendant fails to comply with this PURGE, the Clerk shall enter a money judgment against defendant in the sum of \$500 as punishment for its contempt of court upon plaintiff's attorney filing a sworn affidavit attesting to such compliance, without the need for further order from the court.

Legal Fees

Generally, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). There is no provision within Article 52 allowing plaintiff to recover its legal fees. Furthermore, there is no agreement¹ providing that defendant shall pay plaintiff's attorneys fees. Consequently, each side is responsible for its own legal fees.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for an order adjudicating defendant Custom LTC, LLC. in contempt is hereby **GRANTED** upon default; plaintiff has proved that Custom LTC, LLC. was served with the subpoena requiring it to take oral deposition and produce documents, but disregarded the subpoena; and it is further

ORDERED that Custom LTC, LLC.'s disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about Custom LTC, LLC.'s financial resources and plaintiff has no alternative effective remedies available; and it is further

ORDERED that Custom LTC, LLC. is held in civil contempt. Custom LTC, LLC. is directed to respond to the subpoena within FIVE DAYS of being served with a copy of this Order and the subpoena itself. This is a FINAL opportunity to PURGE the contempt; and it is further

¹ No copy of the underlying stipulation has been provided to the court.

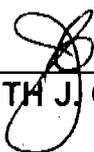
ORDERED that if Custom LTC, LLC. fails to comply with this PURGE, as punishment, the Clerk shall enter a money judgment against Custom LTC, LLC. in the sum of \$100 for each day Custom LTC, LLC. fails to appear, starting from five days following service of a copy of this order and subpoena until such time as there is compliance.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 22, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
FEB 25 2010
NEW YORK
COUNTY CLERKS OFFICE