

<b>Stavrou v Contogouris</b>
2005 NY Slip Op 30319(U)
March 28, 2005
Supreme Court, New York County
Docket Number: 108965/02
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

RICHARD B. LOWE III

PRESENT: \_\_\_\_\_

PART 54

0108965/2002

STAVROU, NICOLAOS  
VS  
CONTOGOURIS, SPYRO C.,

INDEX NO. \_\_\_\_\_

MOTION DATE 8/18/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

SEQ 5

PUNISH FOR CONTEMPT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED  
MEMORANDUM DECISION.

**FILED**  
MAR 30 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 3/28/05

RICHARD B. LOWE III J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----x  
NICOLAOS STAVROU, DECANA INC., PRESTIGE  
HOLDINGS INC.,

Petitioners,

Index No. 108965/02

-against-

SPYRO C. CONTOGOURIS, JAMES P. NESPOLE,  
FULBRIGHT & JAWORSKI, L.L.P., MARK KRASSNER,  
COHEN & KRASSNER, RICHARD B. FELDMAN,  
JOHN DOES 1-100 as holders of the property, books and  
records of Decana, Inc.,

Respondents.

-----x  
**Richard B. Lowe, III, J.:**

In this Article 78 special proceeding, petitioners Nicolaos Stavrou (Stavrou), Decana Inc. (Decana), and Prestige Holdings Inc. (Prestige) sought to enjoin respondent Spyro C. Contogouris (Contogouris) from acting as a director and officer of Decana and Prestige after being properly removed from these corporations by written consent of shareholders, dated April 5, 2002. On May 6, 2002, this court granted a temporary restraining order (TRO), enjoining Contogouris, and all persons acting under his direction or in concert with him, from dealing with the property of Decana and Prestige (motion sequence no. 001). Here, petitioners move, pursuant to New York Judiciary Law (Judiciary Law) § 756, to punish Contogouris and his wholly-owned company, Schanson Capital Management LLC (Schanson), for civil and criminal contempt for: (1) their alleged violation of the TRO; and (2) Contogouris's alleged submission of a false affidavit (motion sequence no. 005).

**BACKGROUND**

The facts of the underlying case are further discussed in this Court's September 17, 2002

decision. Petitioner Prestige is a Delaware holding company for certain subsidiaries that own and operate real estate, including petitioner Decana, a New York corporation, and Ashford-on-the-Bayou (AOB), and 2100 WLS Inc. (2100 WLS), two Texas corporations. Petitioner Stavrou is the appointed director, president, treasurer and secretary of Decana. Respondent Contogouris is a former director and officer of Decana and Prestige, and solely owns and controls non-party Schanson, a Texas limited liability company, until Schanson forfeited its existence on February 13, 2004. According to the Texas Secretary of State, Contogouris was Schanson's registered agent for service of process.

#### Prior Motions

In motion sequence number 001, as stated above, petitioners moved for a TRO which the court granted on May 6, 2002, enjoining Contogouris, and all persons acting under his direction or in concert with him from dealing with the property of Decana and Prestige in any manner other than to release information requested by Stavrou. A stipulation and order, dated June 7, 2002, modified the TRO to allow Contogouris to pay certain ordinary business expenses. In motion sequence number 002, petitioners moved for judgment on the pleadings. On September 17, 2002, this court entered a final order and judgment regarding motion sequence numbers 001 and 002 in favor of petitioners, prohibiting Contogouris from acting as a director or officer of Decana, a New York corporation. On September 24, 2002, the Court of Chancery of Delaware also prohibited Contogouris from acting as a director and officer of Prestige, a Delaware corporation.

In motion sequence number 003, in November 2002, petitioners moved to hold Contogouris in contempt of the TRO, asserting that Contogouris made large unauthorized

payments to Raymond Rekuc (Rekuc), an accountant working for Contogouris, Decana and Prestige, and Lisa Serwin (Serwin), a bookkeeper for Contogouris. In response, Contogouris filed a supplemental affidavit, sworn to on November 18, 2002, in which he swore that after the filing of this lawsuit, he did not touch the assets of Decana or Prestige for any purpose other than for the payment of ordinary business expenses.

#### Related Action

On or about November 20, 2002, Decana and Changole instituted a related action against Contogouris and Schanson, entitled Decana Inc. v Contogouris, Index No. 604247/02 (Decana Action), seeking to hold Contogouris liable for misdirected funds. In 2004, petitioners allege that they discovered, through third party disclosure in the Decana Action, that Contogouris received and transferred three Internal Revenue Service (IRS) tax refund checks to his wholly-owned Texas company, Schanson Capital Management LLC (Shanson): (1) a \$457,206.84 check issued to Prestige on June 18, 2002; (2) a \$178,638.50 check issued to AOB on April 1, 2002; and (3) a \$141,575.00 check issued to 2100 WLS on April 9, 2002.

#### Present Motion

On or about May 19, 2004, petitioners filed a notice of motion to punish Contogouris and Schanson for criminal and civil contempt for: (1) the alleged violation of the May 6, 2002 TRO by Contogouris's receipt of the IRS tax refund checks issued to Prestige, AOB, and 2100 WLS, and transfer to Schanson; and (2) Contogouris's alleged submission of the false supplemental affidavit, sworn to on November 18, 2002 (motion sequence no. 005). Petitioners seek damages in the sum of \$777,420.34 for the three tax refund checks, interest, and attorneys' fees. Petitioners served the notice of motion for criminal and civil contempt on Contogouris's

attorneys, Akin Gump Strauss Hauer & Feld LLP (Akin Gump).

#### DISCUSSION

Judiciary Law §§ 750 (A) and 753 (a) (2) afford the court with the power to punish for criminal and civil contempt. Preliminary injunctions are within the class of judgments enforceable by contempt proceedings. For a finding of civil contempt, the movant needs to show that there is sufficient evidence to establish a violation of an unequivocal mandate to a reasonable degree of certainty. See Soho Alliance v World Farm Inc., 300 AD2d 22 (1<sup>st</sup> Dept 2002). To support the finding of criminal contempt, the movant needs to show that there is sufficient evidence to prove beyond a reasonable doubt that the alleged contemnor deliberately and willfully violated the preliminary injunction. See New York City Coalition to End Lead Poisoning v Giuliani, 668 NYS2d 1, 3 (1<sup>st</sup> Dept 1997).

At the outset, the court finds that, although Judiciary Law § 756 allows petitioners to commence a contempt motion by notice of motion, and Judiciary Law § 760 allows this motion to be brought after the September 17, 2002 final judgment, this proceeding is premature because petitioners failed to properly serve Contogouris and Schanson.

#### Contogouris

The motion for civil contempt against Contogouris is denied because there was no court order allowing petitioners to serve Contogouris's attorneys, rather than Contogouris personally. Judiciary Law § 761 provides that an application to punish for civil contempt "shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge."

The motion for criminal contempt against Contogouris is also denied because the

authorization to serve a party's counsel is only sufficient for civil contempt, not criminal contempt. When the penalty of criminal contempt arising out of a civil action is sought, the contempt proceeding is considered separate from the civil action and must be properly commenced by personal service upon the alleged contemnor; such failure to do so is a "jurisdictional defect requiring reversal." Clinton Corner H.D.F.C. v Lavergne, 279 AD2d 339, 341 (1<sup>st</sup> Dept 2001); see also Matter of Grand Jury Subpoena Duces Tecum Served Upon Morano's of Fifth Avenue, Inc., 144 AD2d 252, 256 (1<sup>st</sup> Dept 1988); Lu v Betancourt, 116 AD2d 492, 494 (1<sup>st</sup> Dept 1986). Personal service for criminal contempt "is indispensable and this is based on the well settled principle of the common law, that no person shall be condemned unheard." People v Balt, 34 AD2d 932, 933 (1<sup>st</sup> Dept 1970).

#### Schanson

"[W]here the contemnor is not a party to the underlying action, the order to show cause must be personally served upon the accused." Hampton v Annal Mgmt. Co., Ltd., 168 Misc 2d 138, 139 (App Term, 1<sup>st</sup> Dept 1996) (finding mail service to defendant company's employee was insufficient to confer jurisdiction over defendant company for civil contempt motion).

Petitioners argue that nonparty Schanson failed to maintain an office in Texas, and that Schanson's registered agent, Contogouris, could not be personally served in Texas. Therefore, petitioners allege that they had no choice but to serve Stuart N. Wilson, an attorney appearing on behalf of Contogouris in certain related Texas litigation. This court disagrees. According to Article 2.11 (B) of the Texas Business Corporation Act,

[w]henver a corporation shall fail to . . . maintain a registered agent in this State, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served.

Petitioners should have served the Texas Secretary of State with the notice of motion for Schanson.

Assuming proper service is made, petitioners may seek leave to recommence this civil and criminal contempt proceeding against Contogouris and Schanson.


Accordingly, it is

ORDERED that plaintiffs' motion to hold respondent Spyro C. Contogouris, and non-party Schanson Capital Management LLC in civil and criminal contempt, pursuant to New York Judiciary Law § 756, is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: New York, New York  
March 28, 2005

ENTER:

  
\_\_\_\_\_  
J.S.C.  
RICHARD B. LOWELL III

**FILED**  
MAR 30 2005  
NEW YORK  
COUNTY CLERK'S OFFICE