

Fishman v Roxanne Mgt.

2006 NY Slip Op 30205(U)

December 27, 2006

Supreme Court, New York County

Docket Number:

Judge: Joan Madden

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HON. JOAN A. MADDEN
J.S.C.

PART 11

Index Number : 106121/2003

FISHMAN, MICHAEL

INDEX NO. _____

vs
ROZANNE MANAGEMENT

MOTION DATE 9-14-06

Sequence Number : 003

MOTION SEQ. NO. _____

PUNISH FOR CONTEMPT

MOTION CAL. NO. _____

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 _____

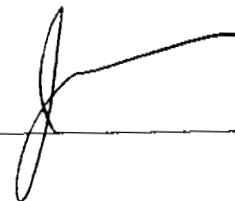
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum Decision, Order + Judgment*

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 418).

Dated: December 27, 2006



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
MICHAEL FISHMAN (successor to Gus Bevona)
as President of Local 32B-32J
SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO,

Index No. 106121/03

Petitioner,

- against -

ROXANNE MANAGEMENT,

Respondent.
-----X

JOAN A. MADDEN, J.:

Petitioner Michael Fishman as President of Local 32B-32J Service Employers International Union, AFL-CIO (hereinafter "the Union"), moves to punish respondent Roxanne Management, Roxann Management, and Roxann Management Corp for contempt for failing to (i) obey the order and judgment dated filed on June 24, 2004 ("the Judgment") and (ii) comply with an Information Subpoena with Restraining Notice and a Deposition Subpoena with Restraining Notice seeking information as to the location of assets from which the Union could satisfy payment of the Judgment.

Background

This proceeding was brought to confirm an arbitration award made in connection with a grievance involving the November 1, 1995 discharge of Juan Mendez ("Mendez"), a member of the Union, from his position as a doorman and porter at a building located at 215 West 90th Street in Manhattan ("the Building"). The named respondent, Roxanne Management, was alleged to be the managing agent of the Building. During the arbitration and litigation, the named respondent was represented on the merits by Robert Gosseen, Esq., of Gallagher Gosseen Faller & Crowley ("the Gosseen firm").

The issue now before the court arises out of respondent Roxanne Management's failure to satisfy that portion of the Judgment entered in favor of the Union in the amount of \$100,738.86.¹ According to the affirmation of counsel for the Union, while Roxanne Management was named as the respondent to the proceeding based on "the name and spelling provided to the Union and maintained in the Union's files... the proper corporate name of the entity appears to be 'Roxann Management Corp.'" In support of this statement, the Union submits an affirmation in opposition submitted to the court during the underlying litigation in which counsel for the Gosseen firm identifies her client as Roxann Management Corp and indicates that Roxann Management Corp was incorrectly sued as Roxanne Management. The Union also submits stipulations, correspondence, and papers in which the Gosseen firm variously indicates that it represents Roxanne Management, Roxann Management Corp., and Roxann Management. Counsel for the Union further states that "Roxann Management is registered as a New York corporation and has its principal place of business at the same address as the named respondent," but provides no proof to support this statement.

On March 15, 2006, in an effort to collect on the unpaid Judgment, the Union served an Information Subpoena with restraining notices by regular mail on "Roxann Management Corp" seeking to restrain the assets of the judgment debtor, Roxanne Management, and requesting that Roxann Management Corp respond to thirteen questions which, inter alia, inquired as to the relationship between Roxann Management Corp. and Roxanne Management.

On May 15, 2006, the Union served by personal service a subpoena on "Roxann Management Corp." which included a restraining notice and sought to compel Roxann

¹The Appellate Division, First Department modified part of the Judgment by deleting a direction that Mendez be reinstated by a non-party Boshany Associates Ltd. See Fishman v. Roxanne Management, 24 AD3d 365 (1st Dept 2005).

Management Corp to appear for deposition and produce documents on June 7, 2006.

When the subpoenas were not responded to, counsel for the Union contacted Mr.

Gosseen. Mr. Gosseen responded by email dated May 31, 2006, stating that:

Roxann Management, whom we represent cannot respond to your information subpoena. Roxann Management has no records relating to the captioned entity "Roxanne Management," nor any information relating to that party to your lawsuit.

In a subsequent email dated June 6, 2006, Mr. Gosseen confirmed his position, writing that:

As I informed you in writing May 31st, Roxann Management cannot respond to your information subpoena. Roxann Management has no records relating to the captioned, entity "Roxanne Management," nor any information relating to that party to your lawsuit. Hence no representative from Roxann Management will appear at the June 7th deposition. The difference is more than some alleged typographical error. So far as we know, there is no "Roxanne Management." If, by chance, there is, it is an entity having no connection or affiliation with Roxann Management.

Based on the refusal of Roxann Management Corp./Roxann Management to respond to the subpoenas, the Union now moves for contempt, and also seeks to amend the Judgment to add name Roxann Management, and Roxann Management Corp. as judgment debtors, arguing that the two proposed additional entities and Roxanne Management are alter-egos of each other.

In opposition to the motion, Roxann Management Corp./Roxann Management² maintains that it is not required to satisfy the judgment or to respond to the subpoenas as it has no connection to the named respondent, Roxanne Management. It further argues that the difference between Roxann Management Corp and Roxanne Management is not a harmless typographically error, that the Union was put on notice throughout the litigation of the error, and that it cannot

²In the opposition papers, Mr. Gosseen refers to his client as "the respondent."

now be corrected by amending the Judgment.

Motion For Contempt

“Although a proceeding to punish for civil contempt is a civil proceeding, it is quasi criminal in character. Therefore [a] petitioner must be required to establish an affirmative case by more than a fair preponderance of the evidence.” Hynes v. Hartman, 63 AD2d 1, 3 (1st Dept), appeal dismissed 45 NY2d 838 (1978). At the same time, however, to hold a party in civil contempt, “it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs or prejudices the rights of a party.” Sabella 4E74 Partnership v. Learnard, 2002 WL 31663224 (App Term 1st Dept)(citations and internal quotations omitted); see also, Ryan v. Caputo, 222 AD2d 438 (2d Dept), lv denied, 87 NY2d 895 (1995).

The remedy of contempt is unavailable to enforce money judgments (See CPLR 5104), but may be used to implement the enforcement devices provided under Article 52, including information subpoenas and restraining notices. See Siegel, Practice Commentaries, Book 7B, McKinney’s Consol. Laws of NY, C5251:1, at 519. CPLR 5251 provides that the “refusal or willful neglect of any person to obey a subpoena or restraining notice... shall each be punishable by contempt. The issue of whether contempt sanctions under CPLR 5251 should be applied rests in the sound discretion of the court. See, Dickson v. Ferullo, 96 AD2d 745 (4th Dept 1983).

Here, the refusal of Roxann Management Corp./ Roxann Management to respond to the subpoenas based on the alleged lack of information relating to Roxanne Management warrants a finding of contempt in view of Gosseen firm’s representation of Roxanne Management throughout this litigation, and the absence of any denial by Roxann Management Corp./Roxann

Management that one or both of them acted as the managing agent for the relevant building.³ Moreover, even assuming arguendo that the named respondent and Roxann Management Corp./Roxann Management are not interchangeable such that the latter two could not be considered parties to the underlying proceeding, as non-parties they would nonetheless be required to either comply with information subpoenas, or to seek a protective order. Doors v. Greenberg, 151 AD2d 550, 551 (2d Dept 1989)(holding non-party in contempt and rejecting non-party respondent's contention that he was not required to comply with subpoena since he was not a party to the underlying litigation). In this case, they did neither, and instead chose to deny any connection with Roxanne Management, even though their counsel represented Roxanne Management throughout the litigation, and by doing so impaired, impeded and prejudiced the Union's ability to collect on the Judgment.

Under these circumstances, Roxann Management Corp./Roxann Management should be held in contempt for their failure to comply with the information subpoenas, and may purge this contempt by complying with the court's order set forth below. On the other hand, Roxann Management Corp./Roxann Management cannot be held in contempt with respect to the restraining notices as it is unclear from the record whether they violating these notices.

Request To Amend Judgment

Under CPLR 5019 a judgment "shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers...not affecting a substantial right of a party." This provision has been interpreted by the courts to permit the amendment of a judgment to cure "ministerial errors" which do not affect substantive rights. See Haggerty v Market Basket Enterprises, Inc., 8

³In contrast, there is an insufficient basis for holding Roxanne Management in contempt since the subpoenas were not directed to it,

AD3d 618 (2d Dept 2004).

Thus, it has been held that a misdescription or an incorrect designation of parties or their capacities is a defect in a judgment that may be corrected by amendment. See City of Long Island v. Madden, 271 AD 793 (2d Dept 1946), appeal denied, 271 AD 931 (1947)(substituting the name “Lu Vina Madden” for defendant “Lee Vina Madden”); Emmons v. Hirschberger, 269 AD 789 (2d Dept 1945), aff’d, 295 NY 680 (1946)(permitting judgment to be amended to substitute individual members of partnership for name of partnership based on admissions in defendants’ answer that could be construed as indicating that members were the owners of the truck involved in accident).

In contrast, the courts have denied motions to amend judgments with respect to substantive matters, such as substituting individual liability for corporate liability (Cyrjaque v. Flatbush Classic Express Shipping, Inc., 8 Misc3d 134 (A); 803 NYS2d 17, 2005 WL 1713332 (App Term 2nd and 11th Jud. Districts), or reflecting the judgment debtor’s post-judgment name change (Haggerty v Market Basket Enterprises, Inc., 8 AD3d at 618).

In this case, although the Union asserts the proposed amendment to add Roxann Management Corp. and Roxann Management as judgment debtors is a ministerial change since the proposed additional debtors are interchangeable with Roxanne Management, it provides insufficient evidence to support this assertion. Compare National Refund & Utilities v. Plummer Realty Corp., 22 AD3d 430 (1st Dept 2005)(permitting posttrial amendment of caption to reflect unnamed entity as defendant where the “persuasive documentary evidence” reflects that proposed new entity and the named entity were used interchangeably by their purported principals and that unnamed entity was the intended subject of lawsuit); Fink v. Regent Hotel, Ltd., 234 AD2d 39 (1st Dept 1996)(permitting amendment of misnomer in caption based on proof that

non-designated entity was intended subject of lawsuit.)

Under these circumstances, the Union's request to amend the Judgment is denied without prejudice to renewal following receipt of responses to the Union's information subpoenas which may provide evidence regarding the relationship between the named respondent, Roxanne Management, and Roxann Management Corp./Roxann Management

Conclusion

In view of the above, it is

ORDERED that the request by petitioner to amend the Judgment is denied without prejudice to renewal upon sufficient evidence; and it is further

ORDERED and ADJUDGED, that Roxann Management Corp./Roxann Management are guilty of a contempt of court for their failure to answer in writing under oath certain written questions accompanying an information subpoena in supplementary proceedings and to submit to a deposition and produce the requested documents; and it is further

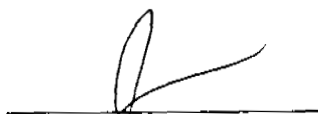
ORDERED AND ADJUDGED that the contempt was calculated to and did actually defeat, impair, impede, and prejudice the rights of the petitioner/ judgment creditor herein and it is further

ORDERED that Roxann Management Corp./Roxann Management will be purged of the contempt by answering in writing under oath certain written questions accompanying the subpoena which was heretofore served upon it, and appearing by a representative with knowledge for a deposition within ten (10) days after personal service of a copy of this order with notice of entry; and it is further

ORDERED that upon proof by affidavit of the personal service of a copy of this decision and order with notice of entry thereof upon Roxann Management Corp./Roxann Management,

and the failure of Roxann Management Corp/Roxann Management to answer in writing under oath the questions annexed to the information subpoena heretofore served upon them and/or to appear at a deposition and provide documents by the date fixed by the court herein to purge the contempt, an application may be made for a fine or other appropriate penalty.

DATED: December 27, 2006



J.S.C

~~Check One: FINAL DISPOSITION NON-FINAL DISPOSITION~~

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).