

**128-13 Rockaway Blvd. Corp. v Ferraro Bros.
General Contrs., Inc.**

2007 NY Slip Op 32847(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 6445-06/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

128-13 Rockaway Boulevard Corporation d/b/a
Ozone Park Lumber,

Plaintiff,

- against -

FERRARO BROS. GENERAL CONTRACTORS,
INC., MICHAEL FERRARO a/k/a MICHAEL A.
FERRARO and CARMINE FERRARO a/k/a
CARMINE E. FERRARO,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 6445/06

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	_____
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves, unopposed, for an order pursuant to CPLR 5251 finding the defendant Michael Ferraro in contempt of Court for failing to comply with a subpoena properly served upon him; for an order pursuant to Judiciary Law § 773 granting the plaintiff/judgment creditor a fine against the defendant Michael Ferraro in an amount that remains due and owing under the plaintiff's unsatisfied judgment; for an order granting the plaintiff/judgment creditor attorney fees to cover the costs and expenses incurred by the plaintiff/judgment creditor as a result of the defendant Michael Ferraro's contempt of

Court ; for an order directing the Clerk of the Court to issue a warrant of arrest committing the defendant Michael Ferraro to the County Jail in the County where the defendant Michael Ferraro may be found until the defendant Michael Ferraro purges himself of his contempt of Court pursuant to Judiciary Law §§ 772 and 773. The underlying action resulted in a \$223,454.75 judgment duly entered and docketed in the Office of the County Clerk for the County of Nassau on June 23, 2006, in favor of the plaintiff as judgment creditor against the defendants, including the defendant Michael Ferraro a/k/a Michael A. Ferraro.

The plaintiff's attorney states, in a supporting affirmation dated July 11, 2007, a subpoena dated May 18, 2007, was properly served on the defendant Michael Ferraro by plaintiff's counsel on June 1, 2007. The plaintiff's attorney points out that subpoena required the defendant Michael Ferraro to appear for an examination under oath before a notary public at 9:30 a.m., on June 27, 2007, at the Supreme Court of the State of New York, County of Nassau, 100 Supreme Court Drive, Lower Level, Room 5, Mineola, New York. The plaintiff's attorney asserts an associate of the affirmant's office appeared on that date, time and place to examine the defendant Michael Ferraro concerning the defendant's property, income, assets and other means, however the defendant Michael Ferraro failed to appear, and his default was noted by an officer of the Court on the face of the subpoena by stamp, notation and signature.

The plaintiff's attorney contends, by failing to appear at the examination, the

defendant Michael Ferraro had calculated his conduct would impair, impede and prejudice the rights and remedies of the plaintiff, the judgment creditor. The plaintiff's attorney maintains the plaintiff's rights and remedies were in fact impaired and prejudiced because the plaintiff was unable, and continues to be unable to obtain information on matters relevant to the satisfaction of the plaintiff's judgment as authorized by law. The plaintiff's attorney avers the plaintiff has been paid \$27,751.75 toward the plaintiff's outstanding judgment, but a \$195,703.00 balance together with interest from June 23, 2006, remains due and owing to the plaintiff. The plaintiff's attorney also asserts the plaintiff has been damaged in the amount of \$359.00, as attorney's fees and costs, as a result of the defendant Michael Ferraro's failure to appear at the scheduled examination.

CPLR 5251 provides, in pertinent part:: "Refusal or willful neglect of any person to obey a subpoena...pursuant to this title...shall...be punishable as a contempt of court."

Judiciary Law 772 provides, in pertinent part:

Upon the return of an application to punish for contempt, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed.

Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. Where the commitment is ordered to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules...and the defendant has not appeared upon the return of the application, the final order directing punishment and commitment of the offender shall include a provision granting him leave to purge himself of the contempt within ten days after personal service of the order by performance of the act or duty the omission of which constitutes the misconduct for which he is to be

punished, and the act or duty to be performed shall be specified in the order. Upon a certified copy of the order, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the act or duty specified has not been performed, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition as the court in its discretion shall direct.

Judiciary Law 773 provides, in pertinent part:

If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Where it is not shown that such an actual loss or injury has been caused, a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner.

If a fine is imposed to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules...and it has not been shown that such an actual loss or injury has been caused and the defendant has not appeared upon the return of the application, the order imposing fine, if any, shall include a provision granting the offender leave to purge himself of the contempt within ten days after personal service of the order by appearing and satisfying the court that he is unable to pay the fine or, in the discretion of the court, by giving an undertaking in a sum to be fixed by the court conditioned upon payment of the fine plus costs and expenses and his appearance and performance of the act or duty, the omission of which constitutes the misconduct for which he is to be punished. The order may also include a provision committing the offender to prison until the fine plus costs and expenses are paid, or until he is discharged according to law. Upon a certified copy of the order imposing fine, together with proof by affidavit that more than ten days have elapsed

since personal service thereof upon the offender, and that the fine plus costs and expenses has not been paid, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such other disposition as the court in its discretion shall direct.

Kevin Miller, a licensed process server, states in an affidavit of service dated June 4, 2007, the deponent served the subpoena by delivering a copy of it to Carmine Ferraro, a person of suitable age and discretion, at 486 Croydon Road, Garden City, New York, the dwelling house, usual place of abode of the defendant Michael Ferraro, on May 31, 2007, at 6:00 p.m. Miller also states completing service of the subpoena by mailing a copy of it on June 1, 2007, by depositing a copy of the subpoena to 486 Croydon Road, Garden City, New York in a 1st Class postpaid properly addressed envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Post Office in the State of New York. Miller describes Carmine Ferraro, another defendant in the underlying action, as male, white, brown hair, 21 to 35 years old, 5'4" to 5'8" in height, and weighing 131 to 160 pounds.

Miller states, in another affidavit of service dated July 19, 2007, the deponent served the instant notice of motion and request for judicial intervention by affixing a copies of those documents to the door of 486 Croydon Road, Garden City, New York, the dwelling house, usual place of abode of the defendant Michael Ferraro, on July 18, 2007, at 4:30 p.m. Miller also states he was unable, with due diligence to find the recipient, the

defendant Michael Ferraro, or a person of suitable age and discretion, having called on July 13, 2007, at 6:05 p.m., July 14, 2007, at 10:35 a.m., and July 17, 2007, at 7:50 a.m. Miller also states completing service of the subpoena by mailing a copy of it on July 19, 2007, by depositing a copy of the subpoena to 486 Croydon Road, Garden City, New York in a 1st Class postpaid properly addressed envelope marked “Personal and Confidential” in an official depository under the exclusive care and custody of the United States Post Office in the State of New York.

This Court has carefully reviewed and considered all of the papers submitted on this motion. “Any of the four methods of personal service enumerated in CPLR 308 are sufficient to confer jurisdiction under these circumstances” (*Corpuel v. Galasso*, 240 A.D.2d 531, 532, 659 N.Y.S.2d 65 [2d Dept.,1997]). It appears the services of the subpoena and the instant motion here were proper under the circumstances. With respect to the amount of a contempt fine, the Second Department has noted:

Pursuant to Judiciary Law § 773, the amount of a contempt fine should be sufficient to indemnify the aggrieved party for “actual loss or injury” caused “by reason of the misconduct” (emphasis supplied) (*see Matter of Lembo v. Mayendia-Valdes*, 293 A.D.2d 789, 739 N.Y.S.2d 775; *Rechberger v. Rechberger*, 139 A.D.2d 906, 907, 528 N.Y.S.2d 452). Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their losses (*see State of New York v. Unique Ideas*, 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301; *Berkowitz v. Astro Moving & Stor. Co.*, 240 A.D.2d 450, 658 N.Y.S.2d 425). The party seeking a contempt order must prove actual loss, failing which “the court may only impose a fine which does not exceed the complainant’s costs and expenses, plus an additional \$250” (*Berkowitz v. Astro Moving & Stor. Co.*, *supra* at 452, 658 N.Y.S.2d 425; *Rechberger v. Rechberger*, *supra*). Legal fees and disbursements are also recoverable

(see *Children's Vil. v. Greenburgh Eleven Teachers' Union Fedn. of Teachers, Local 1532, AFT, AFL-CIO*, 249 A.D.2d 435, 671 N.Y.S.2d 503)

Barclays Bank v. Hughes, 306 A.D.2d 406, 761 N.Y.S.2d 278, 279-280 [2d Dept.,2003].

The plaintiff clearly demonstrated that the defendant Michael Ferraro acted, in violation of a court order, which was “calculated to or actually did defeat impair, impede, or prejudice” its rights (see Judiciary Law 773). The plaintiff has also demonstrated that it suffered in actual loss or injury caused by reason of the defendant Michael Ferraro’s misconduct, an undisputed amount, hence a hearing is unnecessary in order to sufficiently indemnify the plaintiff for the wrongdoing here (see *Home Surplus of Brooklyn, Inc. v. Home Surplus, Inc.*, 3 A.D.3d 472, 769 N.Y.S.2d 904[2d Dept. 2004]). The Second Department has also stated:

we note that an application to adjudicate a party in contempt is treated in the same fashion as a motion (Judiciary Law, § 772) and a hearing must be held if issues of fact are raised (CPLR 2213; see *Matter of McDonnell v. Frawley*, 23 A.D.2d 729, 730, 257 N.Y.S.2d 689; *State of New York v. Unique Ideas*, 56 A.D.2d 295, 297, 392 N.Y.S.2d 12, *mod on other grounds* 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301). Conversely, a hearing is not necessary when there is no “factual dispute as to [the party’s] conduct unresolvable from the papers on the motion” (Siegel, New York Practice, § 484, p 649; see *Friendly Ice Cream Corp. v. Great Eastern Mall*, 51 A.D.2d 883, 381 N.Y.S.2d 368, *app. dsmd.* 39 N.Y.2d 1032, 387 N.Y.S.2d 248, 355 N.Y.S.2d 303)

Quantum Heating Services Inc. v. Austern, 100 A.D.2d 843, 844, 474 N.Y.S.2d 81 [2d Dept.,1984].

However, the Appellate Division’s ruling limits this Court to state the plaintiff is entitled only to its actual costs and expenses, including legal fees and disbursements plus the statutory fine of \$250 (see *Quantum Heating Services Inc. v. Austern*, 100 A.D.2d 843,

474 N.Y.S.2d 81 [2d Dept.,1984]. The motion Court cannot impose a fine against the defendant Michael Ferraro in the amount of the judgment owed to the plaintiff (*see Barclays Bank v. Hughes*, 306 A.D.2d 406, *supra*).


NOW, upon reading and filing the notice of motion; the affirmation in support of the motion; the subpoena served here, with proof of service; and the defendant Michael Ferraro having failed to answer, the motion is determined as provided.

It is **ORDERED** that the motion is granted solely to the extent the Court finds the defendant Michael Ferraro in contempt of Court, grants the plaintiff the payment of the statutory fine of \$250.00, together with attorney's fees and costs in the amount of \$359.00 unless the defendant Michael Ferraro appears pursuant to the subpoena within 10 days after service of a copy of this order with notice of entry.

So ordered.

Dated: **September 10, 2007**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEEN

FINAL DISPOSITION XXX NON FINAL DISPOSITION

ENTERED

SEP 12 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE