

**The Associated Press v Corporate Express Delivery,
Ltd.**

2008 NY Slip Op 32109(U)

July 14, 2008

Supreme Court, New York County

Docket Number: 0102959/2007

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 102959/2007
ASSOCIATED PRESS
VS.
CORPORATE EXPRESS DELIVERY
SEQUENCE NUMBER : 003
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 per attached

FILED

JUL 29 2008

NEW YORK
COUNTY CLERK'S OFFICE



Dated: 7/14/08

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE
Per attached.

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : I.A.S. PART 17

-----X
 THE ASSOCIATED PRESS,

Plaintiff

Index No. 102959/07

-against-

Motion Seq 003

CORPORATE EXPRESS DELIVERY, LTD.

Defendant

-----X

Plaintiff moves for an order renewing its prior motion for contempt against Defendant and Defendant's non-party President, Harry Waiser, and for confirmation of a Special Referee's Report, dated January 2, 2008. Defendant and Waiser oppose the motion. The genesis of this motion was a judgment which was granted on default by the Clerk of the Court on April 12, 2007, against Defendant, a messenger service business, and Plaintiff's subsequent attempts to collect on that judgment.¹

Plaintiff brought a contempt motion against Defendant and Waiser, dated May 30, 2007, because Waiser failed to respond to a subpoena duces tecum, served on May 2, 2007, and information subpoenas served on May 3, 2007 (the subpoenas).² Although

¹In a related case The Associated Press v JP Morgan Chase, Index no. 113042/07, this Court ordered the turnover of funds from an account maintained at Chase in the name of the corporation.

²As Plaintiff notes, a non-party witnesses may be held in contempt if that witness is personally served with the motion for contempt and has knowledge of the underlying order (see Judiciary Law §753 (a) (5); Citibank, N.A. v Anthony Lincoln-Mercury, Inc., 86 AD2d 828 [1st Dept 1982]). If Waiser is found in contempt, he can also be personally fined, in the amount of the judgment, based on "his active participation in assisting the

Waiser eventually appeared for a deposition on July 11, 2007, gave testimony, and agreed to subsequently produce various documents, no documents were ever produced, purportedly because of a corporate office move and allegedly damaged computer.³ Accordingly, by Decision and Order, dated October 15, 2007, this Court referred to a Special Referee, the issues of whether the corporate move and allegedly damaged computer (or any other valid reason) prevented Defendant and non-party Waiser from complying with the subpoenas, whether non-party Waiser should be held personally liable for the amount of the judgment based on active participation in assisting Defendant in evading the subpoenas for the purpose of frustrating Plaintiff's recovery of its judgment; and the amount of damages due, if any, under CPLR 2308.

Waiser failed to appear at the hearing before the Special Referee, after it was adjourned once as final, and after written notice of the adjourn date was mailed to Waiser. As has been his pattern in the past, Waiser made minimal efforts to participate in this litigation, utilizing new lawyers at several junctures. The Special Referee concluded that "[i]n light of the defendant, Corporate Express Delivery, Ltd., and non-party Harry

corporate respondent in evading" a judgment (Vastwin Investments, Ltd. Vv Aquarius Media Corp., 295 AD2d 216 [1st Dept 2002]; see also Corpuel v Galasso, 240 AD2d 531 [2d Dept 1997] [wife was found personally responsible for judgment against her husband based on the record which revealed "an elaborate scheme to defeat the collection of that judgment]).

³At his deposition, Waiser testified that he is the sole owner of Defendant and is the President. He also testified that his wife is the Vice President and there are no other officers.

Waiser, failure to appear for this hearing, I find and recommend that their failure to comply with the subpoena duces tecum and informational subpoena was intentional and that Harry Waiser should be personally liable for the amount of the judgment, \$35,218.96, along with statutory interest, from April 13, 2006.” However, when speaking to Plaintiff on the record at the hearing, the Special Referee had the following concern “I don’t know if without them being present you have any ability to show that the failure to appear was intentional. I guess that I can assume it is intentional by the failure to appear at the hearing. I mean other than that, I don’t know how else” and “I will find the failure to appear here is an indication of active participation to evade the subpoena.”

Discussion

Defendant and Waiser’s new attorney, who has submitted a well briefed argument, maintains that the motion should be denied because Defendant and Waiser were abandoned by prior counsel in violation of CPLR 321(c) and because the Referee’s conclusions were solely based upon Waiser’s failure to appear at the Reference, as opposed to any substantive evidence (he also notes that Waiser actually appeared for his deposition after the initial contempt motion was filed). That attorney correctly notes that personal liability for a corporate debt is the exception, rather than the rule and cites Barclays Bank, PLC v Hughes (206 AD2d 406 [2d Dept 2003] [“a contemnor’s lack of cooperation does not render him liable for the entire amount of the uncollected judgment . . . The rationale for these holdings is that while a lack of cooperation may make collecting

the judgment more difficult, the loss or injury occasioned by the lack of cooperation is the cost of the fruitless proceedings]).

Defendant and Waiser's argument that the Reference is invalid because the prior law firm of Eisenberg & Margolis, LP did not make a motion to withdraw, pursuant to CPLR (b) (2), and because CPLR 321 (c) would prohibit any further proceedings absent a requisite thirty day notice, is misplaced. CPLR 321 (c) only applies where "an attorney dies, becomes physically ill or mentally incapacitated, or is removed, suspended or otherwise becomes disabled." Here, as there is no indication that the attorney died, was incapacitated or suspended from the practice of law, CPLR 321 (c) is inapplicable. It does appear, however, that the former attorney failed to file the appropriate motion to be relieved as counsel.⁴ However, even assuming that Eisenberg & Margolis, LLP acted improperly, Waiser has not explained his own failure to personally appear at the Reference, either to give testimony or to seek an adjournment. Thus, the motion cannot be denied on that ground.

However, the Court is concerned that the Referee's conclusions were based solely upon Waiser's failure to appear at the Reference. Plaintiff cites numerous cases indicating that "[a] trier of fact may draw the strongest inference that the opposing

⁴Despite the letter to the Court from Eisenberg & Margolis, dated December 17, 2007, stating that the firm was not retained in this action (but agreed to appear only at the deposition of non-party Waiser), Court computer records list Eisenberg & Margolis, LLP as Defendant's counsel of record in this action.

evidence permits against a witness who fails to testify in a civil proceeding” (Nassau County Dept. Of Social Servs. v Denise J., 87 NY2d 73 [1995] [the trier of fact was entitled to infer that the mother knowingly used cocaine during pregnancy and neglected her baby based on the mother’s failure to appear at a hearing and evidence that her baby tested positive for cocaine]). However, no evidence was presented at the hearing, other than Waiser’s notification of the hearing date. Although the Court agrees that the Referee was entitled to conclude that Waiser’s failure to appear at the Reference was intentional, and therefore, no reason excusing compliance with the subpoenas was proffered, some evidence apart from Waiser’s failure to appear is needed to support a finding that Waiser should be held personally liable for the amount of the judgment based on his alleged active participation in assisting Defendant to evade the subpoenas in order to frustrate Plaintiff’s recovery of its judgment.

Plaintiff apparently understood that deficiency and attempted to correct it by arguing in Reply “[w]hen all the evidence that was already in the record on AP’s May 2007 motion for contempt was then added to CED’s and Waiser’s failure to appear and give testimony. . . Referee Doyle was fully entitled to infer that . . . Waiser assisted CED’s evasion of the subpoenas in order to frustrate AP’s judgment-enforcement efforts.” However, the Referee never took judicial notice of the court record or based his decision on anything other than Waiser’s failure to appear at the hearing. Moreover, although Plaintiff alleges in Reply that Defendant and Waiser admitted that they violated

restraining notices and resumed business under a new name, no such evidence was submitted at the hearing. Although Waiser's failure to cooperate with Plaintiff and the Court may be the result of Waiser's attempt to actively assist Defendant in evading collection on a judgment, Plaintiff bears the burden of proof in this regard. Court orders should not be flouted; however, post judgment collection efforts should not transmute corporate liability into personal liability, absent the requisite proof.

It is hereby

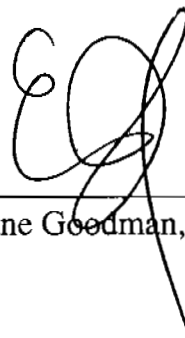
ORDERED that the Special Referee's Report, dated January 2, 2008, is vacated and the matter is remanded to the Special Referee for a new hearing based on the Decision and Order October 15, 2007, and this Decision and Order; and it is further

ORDERED that Plaintiff may bring a new motion for contempt in connection with a motion to vacate or confirm the Referee's Report.

This Constitutes the Decision and Order of the Court.

Dated: July 14, 2008

ENTER:



Hon. Emily Jane Goodman, JSC