

**On the Beach Enter., LLC v Zackson**

2008 NY Slip Op 32608(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0108901/2004

Judge: Judith J. Gische

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

PRESENT: GISCHE  
Justice

PART 10

ON THE BEACH ENTERTAINMENT, LLC

INDEX NO.

108901/04

- v -

BRAD ZACKSON

MOTION DATE

MOTION SEQ. NO.

02

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

defendants failed to appear (11:20am).  
The motion is submitted on default.

7/24/08

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

SEP 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK

SEP 22 2008

Dated: \_\_\_\_\_

JUDITH J. GISCHE, J.S.C. 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: PART 10**

-----X  
On the Beach Entertainment, LLC,

Plaintiff,

-against-

Brad Zackson,

Defendant.

**DECISION/ ORDER**  
Index No.: 108901/2004  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

SEP 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
Recitation, as required by CPLR § 2219, of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's OSC [contempt] w/AJC affirm, exhs .....	1
Proof of service (4 docs) .....	2, 3, 4, 5

-----X

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

In this and two (2) other prior actions in Supreme Court, New York County, plaintiff On the Beach Entertainment, LLC ("plaintiff") obtained money judgments against defendant Brad Zackson ("Zackson") in connection with promissory notes that Zackson personally guaranteed. Zackson signed affidavits of confession of judgment in this action and each of the other actions.

Plaintiff has served four separate Information Subpoenas with Restraining Notices ("subpoenas") upon David Binet ("Binet"), BZ Group, Inc. ("BZG"), The Dynamic Group ("Dynamic") and Zackson seeking information about Zackson's income and/or assets, including accounts receivables. The information is being sought to enforce each of the money judgments plaintiff has obtained against Zackson. Binet is the principal of Dynamic and Zackson is the principal of BZG.

There is nothing wrong with plaintiff bringing enforcement proceedings under the same action it obtained the underlying judgment. CPLR § 5225 Gabor v. Renaissance Associates, 170 AD2d 390 (1<sup>st</sup> dept. 1991). Thus, plaintiff can pursue his contempt motion insofar as this action is concerned to enforce the \$150,000 money judgment it obtained under the within Index Number.

Plaintiff, however, cannot, in this action, enforce the \$50,000 money judgment it obtained under Index Number 112070/04, or the \$150,000 money judgment it obtained under Index Number 112069/04. These are separate money judgments that plaintiff can enforce under those Index Numbers, or by commencing a separate action. Therefore, the branches plaintiff's motion related to Index Number 112070/04 and Index Number 112069/04 are denied without prejudice. The court will, however, consider and decide whether plaintiff has proved it is entitled to the relief sought in the within action.

This motion has been submitted to the court on default. The alleged contemnors did not appear for oral argument, as directed, or serve opposition to the motion. Although on default, the motion must be denied because the subpoenas plaintiff seeks to enforce were improperly served.

### **Discussion**

CPLR § 5222 requires that a restraining notice and information subpoena be served in the same manner as a summons or by certified mail, return receipt required. CPLR § 308 allows for service upon a person of suitable age and discretion with a copy of the subpoena mailed to the individual's actual place of business. Service upon a corporation must be made in the manner provided under CPLR § 311. Plaintiff,

however, served Binet, Dynamic and Zackson by leaving the subpoenas with Chris Makos, an individual who identified himself as "an office worker" where Binet and Zackson work and where Dynamic has an office. Makos refused to sign for, or accept the subpoena on behalf of Binet and there is no proof of mailing. CPLR § 308 (2). Although Makos was served with papers for Dynamic, it is unclear whether Dynamic is corporation, limited partnership, limited liability corporation, etc. Thus, the process server should have ascertained from Makos whether, for example, he is an agent authorized to accept service on behalf of Dynamic if it is, in fact, a corporation. CPLR § 311. Although Makos also accepted the subpoena for Zackson who was at a meeting, there is no proof of mailing for this individual either. CPLR § 308 (2).

The subpoena was also improperly served upon BZG. BZG is a corporation. The subpoena was left with China Tec, an individual who identified himself as an "office worker," and refused to accept papers on behalf of BZG. Compounding matter is the "affidavit of substituted service" which identifies the person served as "Chris Makos, a worker at the premises [who] would not accept service."

Since this is a motion to punish Binet, BZG, Dynamic and Zackson for civil contempt, plaintiff has the burden of demonstrating that the alleged contemnors have violated a clear and unequivocal court order that was known to them. 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). Plaintiff has failed to meet its burden because it has not proved it properly served the subpoenas. Therefore, although this motion to punish for contempt is submitted on default, without opposition, it must be denied.

**Conclusion**

Plaintiff's motion to punish Binet, BZG, Dynamic and Zackson in contempt for their failure to comply with its restraining notice and information subpoena is denied for the reasons stated. The motion, to the extent it seeks relief in connection with other actions (Index Number 112070/04 and Index Number 112069/04) is denied, without prejudice.

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

This constitutes the decision and order of the court.

Dated: New York, New York  
September 23, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
SEP 26 2008  
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NEW YORK