

The Commrs. of the State Ins. Fund v Yildirim

2008 NY Slip Op 32619(U)

September 22, 2008

Supreme Court, New York County

Docket Number: 0400110/2008

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

Index Number : 400110/2008

INDEX NO. _____

COMMISSIONERS

MOTION DATE _____

vs

YILDIRIM, MUHARREN

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

PUNISH FOR CONTEMPT

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 ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 25 2008

COUNTY CLERK'S OFFICE
NEW YORK

SEP 22 2008

Dated: Sept 22, 2008

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
THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

Petitioner,

-against-

MUHARREN YILDIRIM and
SELIM YALCHIN,

Respondents,

RIDE CONSTRUCTION, INC.,

Judgment Debtor.
-----X

DECISION/ORDER

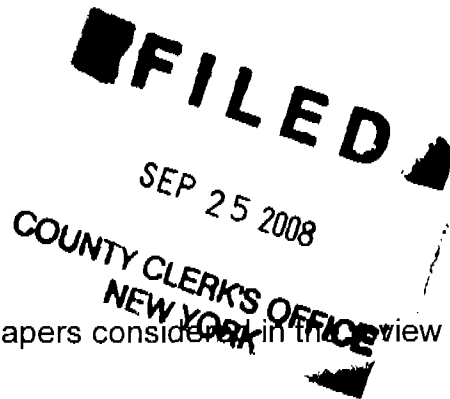
Index No.: 400110/2008

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.



Recitation, as required by CPLR 2219 [a], of the papers considered in the view of this (these) motion(s):

Papers

Numbered

N/P & Verified Pet [punish for contempt] w/exhs 1

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

This is a petition to hold respondents Muharren Yildirim and Selim Yalchin ("respondents") in civil contempt for disobeying the Subpoena and Subpoena Duces Tecum to Take Examination of Witness with Restraining Notice ("subpoenas") that petitioner served the respondents, dated November 13, 2006. Petitioner is the Commissioner of the State Insurance Fund, a New York State agency that provides workers' compensation and disability insurance for its customers ["SIF"].

SIF commenced a prior action in Supreme Court, New York County against the corporate respondent ("Ride") seeking unpaid premiums. Ride defaulted in that action

[The Commissioners of the State Insurance Fund v. Ride Construction, Inc., Index No. 401619/04] and the Clerk entered a default money judgment against Ride in the amount of \$41,130.29. That judgment, filed November 19, 2004, remains unsatisfied.

The respondents have answered this petition and they oppose it on several bases. First, they argue that the petitioner abandoned the subpoenas, or waived its right to enforce them by delaying some 14 months in bringing this petition, or seeking any other relief from the court. Alternatively, respondents argue that they are willing to be deposed, and are ready to do so on any date ordered by the court. In reply, petitioner provides copies of two (2) "so ordered" stipulations that the parties signed after SIF brought this petition. The stipulations set forth dates for respondents' depositions. Those dates have passed, but the deposition did not take place.

Under CPLR § 5222 (b) petitioner has the right to obtain financial disclosure from the principals of Ride to aid it in the recovery of the money it is due and its collection efforts. CPLR § 5251; Gabor v. Renaissance Associates, 170 AD2d 390 (1st Dept 1991); See also: Skylake State Bank v. Solar Heat and Insulation, 148 Misc2d 559 (Sup Ct., N.Y. Co. 1990). The failure to comply with a subpoena issued by an officer of the court shall be punishable as a contempt of court. CPLR § 2308 [a].

On a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. DRL §245; 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). Furthermore, the actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the

* 4]
other side. Farkas v. Farkas, 209 AD2d 316 (1st Dept. 1994). A party seeking contempt must show that there are no alternative effective remedies available. Farkas v. Farkas, 201 AD2d 440 (1st Dept. 1994).

Neither respondent has provided his sworn affidavit, but only rely on the affirmation of their lawyer, who does not have personal knowledge of the facts. Petitioner has proved, and it is unrefuted, that both respondents had actual knowledge of the subpoenas and their terms. Petitioner has also proved that the respondents disregarded the subpoena by failing to appear with the documents and their deposition. Ottomanelli v. Ottomanelli, 17 AD3d 647 (2nd Dept 2005).

Although SIF tried to reschedule the depositions, the respondents have twice agreed to appear, but then at the last moment, asked that the depositions be rescheduled. On the other hand, SIF did not seek to enforce the subpoenas for over a year and petitioner has not proved that only an order of contempt will result in the appearance by respondents for their deposition, or that less harsh, alternative effective remedies are ineffective. Farkas v. Farkas, supra.

Therefore, the court will set a date on which the depositions must be held. If the respondents do not appear, then petitioner can renew its motion for contempt based upon this order.

Respondents shall be deposed on **OCTOBER 22, 2008 at 10:00 a.m.** at the office of plaintiff's counsel. The depositions will proceed in the order of the caption. This is a firm date that cannot be adjourned other than by a written stipulation that is so-ordered by the court, or a separate order of the court issue upon a showing of good cause.

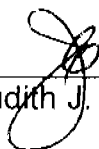
Petitioner's motion is granted only to the extent provided, otherwise it is denied, including that branch of its motion seeking the cost of enforcement.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York
September 22, 2008

So Ordered:



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

FILED
SEP 25 2008
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NEW YORK