

**Allied Bldg. Prod. Corp. v Apex Bldrs. &
Contrs. Corp.**

2008 NY Slip Op 33014(U)

October 22, 2008

Supreme Court, Nassau County

Docket Number: 16141/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

ALLIED BUILDING PRODUCTS, CORP.,

Plaintiff,

- against -

APEX BUILDERS & CONTRACTORS CORP.
d/b/a APEX SIDING MICHAEL L. STATHAKIS
and ANDREW COLLAZOS,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 16141/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The plaintiff moves for an order finding the defendant Michael L. Stathakis in contempt of court for the violation and non compliance with the subpoena previously served upon that defendant; for an order finding the defendant Andrew Collazos in contempt of court for the violation and non compliance with the subpoena previously served upon that defendant; for an order granting the plaintiff/judgment creditor a fine in the amount that remains due and owing of the plaintiff's judgment; for an order granting the plaintiff/judgment creditor attorneys' fees to cover the costs and expenses incurred by the plaintiff as a result of the defendant's contempt; for an order directing a warrant be

issued committing the defendant Michael L. Stathakis to the Nassau County jail until that defendant purges the contempt; and for an order directing a warrant be issued committing the defendant Andrew Collazos to the Nassau County jail until that defendant purges the contempt. The defendant Andrew Collazos opposes this motion. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

The plaintiff's attorney states, in a supporting affirmation dated June 30, 2008, judgment was duly entered in the underlying action on November 9, 2007, in favor of the plaintiff against these defendants for \$30,228.51, and docketed in the Office of the Clerk of Nassau County on November 9, 2007. The plaintiff's attorney states a subpoena dated January 8, 2008, was served upon the defendant Michael L. Stathakis to appear for an examination before a notary public on February 6, 2008, at the Supreme Court, Nassau County, but this defendant failed to appear. The plaintiff's attorney states a subpoena dated March 20, 2008, was served upon the defendant Andrew Collazos to appear for an examination before a notary public on April 21, 2008, at the Supreme Court, Nassau County, but this defendant failed to appear that day and on subsequent adjourned dates, and did not respond to some correspondence. The plaintiff's attorney asserts the conduct of both defendants was calculated to and actually did defeat, impair, impede, and prejudice the rights and remedies of the plaintiff/judgment creditor because the plaintiff/judgment creditor has been unable to obtain information on matters relevant to the satisfaction of the judgment as authorized by law. The plaintiff's attorney avers, in

addition to being unable to enforce the judgment against the defendants, the plaintiff has been damaged in the amount of \$1,522.50 which sum constitutes attorney's fees and costs expended as a result of the defendants' contempt.

The attorney for the defendant Andrew Collazos notes, in an opposing affirmation dated October 7, 2008, the instant matter stems from a default judgment entered in favor of the plaintiff against the defendant in or about November 2007, and a construction agreement between the plaintiff and the defendant Michael Stathakis and Apex Building & Contractors, Corp. for construction material allegedly sold and delivered by the plaintiff. The attorney for the defendant Andrew Collazos states the underlying instrument which the plaintiff seeks to enforce against the defendant Andrew Collazos is a fraudulent credit application and agreement entered between the plaintiff and the defendant Michael Stathakis. The attorney for the defendant Andrew Collazos claims, while the defendant Andrew Collazos' name appears on that instrument, another person applied for the credit application, and simply used the defendant Andrew Collazos' information. The attorney for the defendant Andrew Collazos notes the defendant Michael Stathakis and another unknown person operated Apex Building & Contractors, Corp., and the defendant Andrew Collazos was uninvolved with that business, and in the underlying application or the other defendants. The attorney for the defendant Andrew Collazos reports the defendant Andrew Collazos first learned of this litigation when served with a subpoena for a deposition, and at that point retained the affirrant. The

attorney for the defendant Andrew Collazos describes, in detail, the subsequent circumstances of this matter, including various court proceedings, emergencies and interoffice exchanges between counsel for the parties. The attorney for the defendant Andrew Collazos points out the plaintiff is aware the defendant Andrew Collazos appeared before the Court on the morning of July 29, 2008, in an effort to comply with the subpoena. The attorney for the defendant Andrew Collazos asserts the plaintiff has not the burden in establishing the defendant Andrew Collazos is contempt of the post judgment subpoena, so the motion should be denied in its entirety.

A party seeking to hold another party in civil contempt has the burden of proving the contemptuous conduct by clear and convincing evidence (*see Rupp-Elmasri v. Elmasri*, 305 A.D.2d 394, 395, 758 N.Y.S.2d 524; *Yeshiva Tifferes Torah v. Keshet Intl. Trading Corp.*, 246 A.D.2d 538, 539, 667 N.Y.S.2d 759). In order to punish a judgment debtor for contemptuous conduct in reference to a CPLR article 52 money judgment enforcement device, the judgment creditor must establish the judgment debtor's "refusal or willful neglect" (CPLR 5251; *see Weinstein-Korn-Miller*, N.Y. Civ. Prac. ¶ 5251.05 [2d ed.]). A subpoenaed witness must be shown to be in possession of or have reasonable access to the information sought in order for the subpoenaed witness to be held in civil contempt (*see generally Yalkowsky v. Yalkowsky*, 93 A.D.2d 834, 835, 461 N.Y.S.2d 54)

Gray v. Giarrizzo, 47 A.D.3d 765, 766, 850 N.Y.S.2d 549 [2nd Dept., 2008].

In order to hold a party in civil contempt for disobeying a subpoena, "[i]t is not necessary that such disobedience be deliberate; rather the mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party" (*Great Neck Pennysaver v Central Nassau Pubs.*, *supra*, pp 616-617; see, also, Judiciary Law, § 753, subd A). The party making the application for a civil contempt citation, in this case plaintiff, has the over-all burden of proof to establish, by clear and convincing evidence, that the court order or subpoena has been violated (*see Hart*,

Schaffner & Marx v Alexander's Dept. Stores, 341 F2d 101, 102;
Stringfellow v Haines, 309 F2d 910, 912)

Yalkowsky v. Yalkowsky, 93 A.D.2d 834, 835, 461 N.Y.S.2d 54 [2nd Dept., 1983].

When the applicant has satisfied his initial burden of going forward, the burden shifts to the party opposing the motion to hold it in contempt to rebut the inference of continuing possession by providing a “reasonable explanation for ... noncompliance” (*Sigety v Abrams, supra*, p 974; *see, also*, CPLR 2308, subd [a]) (*Yalkowsky v. Yalkowsky, supra*, at 835). Here, the defendant Andrew Collazos has rebutted the inference of continuing possession by furnishing such a reasonable explanation for the alleged noncompliance, so the motion is denied as to that defendant only.

Accordingly, this motion is granted only as to the defendant Andrew Collazos, and it is ORDERED AND ADJUDGED that the defendant Michael L. Stathakis is in contempt of court for the violation and non compliance with the subpoena previously served upon that defendant, the defendant Michael L. Stathakis' contempt was calculated to and did actually defeat, impair, impede, and prejudice the rights of the plaintiff/judgment creditor, and it is further ORDERED that for the contempt of this Court, the defendant Michael L. Stathakis be and hereby is fined the sum of \$250, plus granting the plaintiff/judgment creditor attorneys' fees to cover the costs and expenses incurred by the plaintiff as a result of the defendant's contempt within 20 days after personal service of a copy of this order with notice of entry on the defendant Michael L. Stathakis and counsel for defendant, and it is further


ORDERED that the defendant Michael L. Stathakis will be purged of the contempt by paying the sum fined and the costs and expenses and attorneys' fees, by answering under oath certain questions by appearing for a deposition within 20 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 order with notice of entry upon the attorney for Michael L. Stathakis, the judgment debtor and defendant and of the failure of the defendant Michael L. Stathakis to pay the fine and costs as aforesaid, answer under oath the questions at the deposition, and/or appear for that deposition by the date fixed by the court to purge the contempt, an application may be made that a further fine be imposed on the defendant Michael L. Stathakis, or that the defendant Michael L. Stathakis be held in contempt upon proof that personal service of the application has been made upon him.

So ordered.

Dated: **October 22, 2008**

ENTERED:
ENTERED
 OCT 30 2008
 HARRIS COUNTY CLERK


 J. S. C.
 HON. ANTONIO I. BRANDVEEN

NON FINAL DISPOSITION XXX

FINAL DISPOSITION