

**Kissin v Good**

2009 NY Slip Op 31106(U)

May 13, 2009

Supreme Court, New York County

Docket Number: 111605/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.C. Justice

PART 1

Roger Kissin

INDEX NO. 111605/08

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 1

Adam Good

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

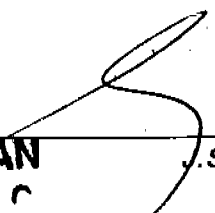
	PAPERS NUMBERED
<del>Notice of Motion</del> / Order to Show Cause <sup>Petition</sup> - Affidavits - Exhibits <u>A-TT</u>	<u>1, 2</u>
Answering Affidavits - Exhibits <u>1-3</u>	<u>3</u>
Replying Affidavits <u>- Exhs. A-C</u>	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and petition are  
decided in accordance with the attached  
decision, ~~and~~ order and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: May 13, 2009

MARTIN SHULMAN  
J.S.C. 

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 1

-----X  
 ROGER KISSIN as Administrator of the Estate of  
 FLORENCE KISSIN, Deceased and ROGER  
 KISSIN, Individually,

Index No.: 111605/08

Petitioners,

**Decision, Order & Judgment**

- against -

ADAM GOOD,

Respondent.

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Petitioners bring this enforcement proceeding by order to show cause ("OSC") and petition pursuant to CPLR §5221 seeking to hold respondent Adam Good ("respondent") in contempt of court based upon his failure to comply with various subpoenas petitioners served upon respondent pursuant to CPLR 5224. Respondent opposes the OSC and petition.

In a related action, petitioners obtained a judgment in the amount of \$209,452.00 against respondent's father, Lawrence Good, M.D. ("judgment debtor" or "Dr. Good"), which remains unsatisfied. As part of their numerous attempts to enforce the judgment, petitioners served respondent with subpoenas seeking his testimony and production of documents in May 2003 (Exh. D to OSC), June and July 2007 (Exhs. S and Y to OSC) and February 2008 (Exh. JJ to OSC). Petitioners commenced this proceeding on or about September 2, 2008 seeking, in addition to holding respondent in contempt, to impose a fine upon respondent in the judgment amount.

In opposition to the OSC and petition, respondent argues: 1) the instant contempt OSC was not personally served upon him; 2) a full copy of this OSC with

supporting papers was not served;<sup>1</sup> 3) the subpoenas were either improperly served or have lapsed; 4) petitioners seek duplicative information which may be obtained from the judgment debtor; 5) respondent is not in violation of any judicial order; and 6) imposition of a fine in the judgment amount is improper.

At the outset, the court rejects respondent's contention that the within OSC and petition could only be served upon him by in hand delivery. In signing the OSC, this court directed personal service upon respondent on or before September 5, 2008. Under CPLR §308, personal service upon a natural person may be effectuated in three different ways. Here, petitioners properly availed themselves of substituted service upon a person of suitable age and discretion at respondent's dwelling place under CPLR §308(2).

Turning to respondent's claim that the subpoenas were either improperly served or have lapsed, the court will examine each subpoena separately. The May 2003 subpoena (Exh. D to OSC) was served by mail upon a law firm which respondent claims never to have retained. The affidavit of service also contains no indication that a witness fee was served. As petitioners do not address these contentions, the court is constrained to find that the May 2003 subpoena was defective and therefore no basis exists to hold respondent in contempt with respect thereto.

Thereafter, petitioners served a further subpoena upon respondent in June 2007 (Exh. S to OSC) and re-served him with another subpoena in July 2007 (Exh. Y to

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<sup>1</sup> Respondent claims that he did not receive a complete copy of Exhibit S to the OSC until five days after the September 5, 2008 deadline for service. The parties ultimately resolved this issue by adjourning the OSC and entering into a lengthy scheduling order for the submission of responsive papers.

OSC). The June 2007 subpoena was served by conspicuous place service and respondent's only attempt to refute it consists of his conclusory statement that it was not served upon him personally and he is unfamiliar with the neighbor identified in the affidavit of service as having spoken to the process server. Respondent does not address the July 2007 subpoena. Petitioners concede that they were compelled to adjourn the return date of the July 2007 subpoena due to a scheduling conflict. The OSC alleges no attempts by petitioners to reschedule respondent's deposition.

Rather, it appears that petitioners abandoned the June and July 2007 subpoenas when they served respondent with another subpoena in February 2008 (Exh. JJ to OSC). With respect to this subpoena, respondent contests service of same by substituted service upon his doorman. A subpoena must be served in same manner as summons. See CPLR §2303(a). Here, the February 2008 subpoena was served in the same manner as a summons by substituted service pursuant to CPLR §308(2). Thus, the February 2008 subpoena is not defective by virtue of the fact that it was not served upon respondent by personal delivery.

As to respondent's claim that service upon his doorman is improper *per se*, it is well settled that a process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service, but where there is a sworn denial that delivery was accomplished, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of the evidence at a hearing. See *Bank of Am. Natl. Trust & Sav. Assn. v. Herrick*, 233 A.D.2d 351, 352 (2<sup>nd</sup> Dept 1996). Here, respondent's carefully worded affidavit in opposition contains no denial of service or any specific factual allegations rebutting the process server's affidavit of service. It is equally well settled

that conclusory or bald denials of service, lacking specific rebuttals of the contents of the affidavit of service, are inadequate to trigger a jurisdictional hearing (*Manhattan Savings Bank v. Kohen*, 231 A.D.2d 499 [2<sup>nd</sup> Dept. 1996]; *Fairmount Funding Ltd., v. Stefansky*, 235 A.D.2d 213 [1<sup>st</sup> Dept. 1997]) and insufficient to establish improper service. Accordingly, the court rejects respondent's contention that he cannot be held in contempt because the February 2008 subpoena was improperly served.

Respondent's remaining arguments are also unavailing. Petitioners do not seek duplicative information which may be obtained from the judgment debtor. Rather, given the undisputed circumstances, viz., Dr. Good and his wife's former payment of respondent's mortgage in exchange for occupancy of the mortgaged premises owned by him, petitioners should be allowed to explore respondent's financial connection to the judgment debtor. Notably, respondent does not cross-move to quash the subpoena as overbroad.

Respondent's claim that he is not in violation of any judicial order also lacks merit inasmuch as CPLR §5251 expressly provides that any person's failure to obey a subpoena served in an attempt to enforce a money judgment is punishable as a contempt of court, without need of any prior court order.

Having established proper service of the February 2008 subpoena upon respondent and respondent's failure to obey the subpoena not being disputed, the court finds that respondent must be found in contempt unless respondent complies with the subpoena duces tecum and ad testificandum (Exh. JJ to OSC) previously served upon him within 30 days after service of a copy of this order with notice of entry. In the event


of respondent's failure to so comply, petitioners shall be entitled to enter a judgment against respondent for the legal fees and costs petitioners incurred in connection with the instant application, plus a fine not to exceed \$250 (see Judiciary Law §773). The court declines to impose a fine in the judgment amount. While respondent's disobedience of the 2008 subpoena may have made collecting the judgment more difficult, the injury to petitioners "is the cost of the fruitless proceedings, not the amount of the judgment (citations omitted)." *Barclays Bank, PLC v. Hughes*, 306 AD2d 406, 408 (2<sup>nd</sup> Dept. 2003).

Accordingly, it is hereby

ORDERED that the OSC and petition are granted to the extent that respondent Adam Good shall be adjudicated in contempt of court upon his failure to comply with the subpoena duces tecum and ad testificandum (Exh. JJ to OSC) previously served upon him within 30 days after service of a copy of this order with notice of entry. Upon respondent's failure to so comply, petitioners shall settle an order on notice, together with an affirmation detailing the default, directing entry of a judgment against respondent for the legal fees and costs petitioners incurred in connection with the instant application, plus a fine of \$250.00.

This constitutes the Decision, Order and Judgment of this Court. Courtesy copies of this Decision, Order and Judgment have been provided to counsel for the parties.

Dated: New York, New York  
May 13, 2009

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Hon. Martin Shulman, J.S.C.