

Telephone Dynamics Corp. v Morrissey

2009 NY Slip Op 31961(U)

August 13, 2009

Supreme Court, Nassau County

Docket Number: 008558-04

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

**HON. TIMOTHY S. DRISCOLL
Justice Supreme Court**

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TELEPHONE DYNAMICS CORP.,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 008558-04

Motion Seq. No: 3

**MATTHEW MORRISEY and
MB TELEPHONES, INC.**

Submission Date: 5/27/09

Defendants.

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Papers Read on this Motion:

Order to Show Cause, Attorney Affirmation in Support and Exhibits.....x

This matter is before the court on the Order to Show Cause filed by Plaintiff Telephone Dynamics Corp. on December 12, 2008 and submitted on May 27, 2009, seeking to adjudge Defendant Matthew Morrissey in contempt for his violation of and non-compliance with a Subpoena to Take Examination of Judgment Debtor. The Court grants Plaintiff's motion in part and denies it in part. The Court adjudges Defendant Matthew Morrissey in contempt and imposes a fine of \$200.00, plus statutory costs associated with the making of the motion. The Court further directs that Morrissey may purge himself of the foregoing contempt by appearing for a deposition in the Supreme Court, Nassau County, Lower Level, 100 Supreme Court Drive, Mineola, New York 11501. That deposition shall be conducted at 10:00 a.m., 20 days after personal service upon Morrissey of a copy of this order (excluding the day of service), or the next business day, if such period ends on a Saturday, Sunday or legal holiday. An alternative date and time may be selected by the parties and memorialized in writing, but once established said date shall have the same force and effect as if expressly directed by this Order. The Court also directs Morrissey, at least 5 days prior to the deposition as directed above, to produce to

Telephone Dynamics the documents demanded in the Subpoena to Take Examination of Judgment Debtor Subpoena.

BACKGROUND

A. Relief Sought

Plaintiff Telephone Dynamics Corp. (“Telephone Dynamics” or “Plaintiff”) seeks an Order, pursuant to CPLR §§ 5104 and 5251, punishing Defendant Matthew Morrissey (“Morrissey”), a judgment debtor, for failing to comply with a Subpoena to Take Examination of Judgment Debtor (“Subpoena”) dated July 8, 2008 and served on Morrissey on July 23, 2008. No opposition has been submitted to Plaintiff’s Show Cause.

B. The Parties’ History

On July 23, 2008, Telephone Dynamics served the Subpoena on Morrissey in connection with proceedings that Telephone Dynamics commenced to enforce its judgment against Morrissey. Telephone Dynamics provides a copy of its judgment against Morrissey and Defendant MB Telephones, Inc. (“Judgment”), which is in the sum of \$334,119.80, plus interest (\$65,970.45) and costs (\$780.00), for a total of \$400,870.25.

The Subpoena, dated July 8, 2008, directed Morrissey to appear at a stated location in Mineola, New York on August 4, 2008 at 2:00 p.m. for, *inter alia*, “the taking of a deposition under oath upon oral or written questions on all matter relevant to the satisfaction of such judgment.” The Subpoena, further, directed Morrissey to produce certain designated records, including but not limited to corporate and personal income tax returns and bank statements. Counsel for Telephone Dynamics affirms that Morrissey failed to appear at the time and place the Subpoena directed. Counsel for Telephone Dynamics waited for fifty (50) minutes and then placed a statement on the record reflecting Morrissey’s failure to appear.

C. The Parties’ Positions

Telephone Dynamics seeks an Order punishing Morrissey for contempt of the Subpoena by the imposition of 1) a fine, 2) a direction that Morrissey pay Telephone Dynamics’ costs of filing this motion, and/or 3) imprisonment.

No opposition has been submitted to this motion.

RULING OF THE COURT

To sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that

party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced. *Incorporated Village of Plandome Manor v. Ioannou*, 54 A.D.3d 365, 366 (2d Dept. 2008); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073, 1074 (2d Dept. 2008); *Goldsmith v. Goldsmith*, 261 A.D.2d 576, 577 (2d Dept. 1999); Judiciary Law § 753(A)(3).

It is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party. *Hinkson v. Daughtry-Hinkson*, 31 A.D.3d 608 (2d Dept. 2006), quoting *Jim Walter Doors v. Greenberg*, 151 A.D.2d 550, 551 (2d Dept. 1989). The Court's power to punish a person for civil contempt is discretionary and the Court should exercise that discretion in light of the facts and circumstances in each particular case. *In re Hildreth*, 28 A.D.2d 290, 292 (1st Dept. 1967).

Telephone Dynamics has demonstrated that Morrissey violated a lawful and unequivocal mandate, the Subpoena, and that Morrissey had knowledge of the Subpoena. Moreover, the record demonstrates that Morrissey's noncompliance with the Subpoena may have defeated, impaired, impeded and prejudiced the rights of Telephone Dynamics by preventing it from obtaining information that would aid it in satisfying its judgment. See Judiciary Law § 770; see also *Jim Walter Doors v. Greenberg*, 151 A.D.2d 550 (2d Dept. 1989); *Quantum Heating Services Inc. v. Austern*, 100 A.D.2d 843, 844 (2d Dept. 1984) (trial court properly adjudged officer of judgment debtor corporation in contempt, without hearing, for failure to comply with subpoena *duces tecum*).

With respect to the penalty for a civil contempt, Judiciary Law § 773 provides in relevant part that "[i]f an actual loss or injury has been caused to a party to an action or special proceeding * * * a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party." Civil contempt fines must be remedial in nature and effect, *State of New York v. Unique Ideas*, 44 N.Y.2d 345, 349-350 (1978), as any penalty imposed is designed not to punish, but rather to compensate the injured private party or to coerce compliance with the court's mandate or both. *Matter of Department of Env'tl. Protection of City of N.Y. v. Department of Env'tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 (1987); see also *Barclays Bank v. Hughes*, 306 A.D.2d 406, 407 (2d Dept. 2003); *Quantum Heating Services Inc. v. Austern*, *supra*; CPLR § 2308(b).

The party seeking a contempt order must prove actual loss, without which the Court may only impose a fine that does not exceed the complainant's costs and expenses, plus an additional \$250. *Barclays Bank v. Hughes*, supra, at 407; see also *Rechberger v. Rechberger*, 139 A.D.2d 906, 907 (4th Dept. 1988). Counsel fees, if properly documented, are also recoverable as an item of the aggrieved party's costs and expenses. *Gardner v. Carson*, 295 A.D.2d 709, 710 (3d Dept. 2002); *Costanza v. Costanza*, 213 A.D.2d 1043 (4th Dept. 1995); see also *Ellenberg v. Brach*, 88 A.D.2d 899 (2d Dept. 1982) (legal costs and expenses recoverable only when plaintiff has not suffered actual damages). While Telephone Dynamics asks the Court, *inter alia*, to require Morrissey to pay for the costs that Telephone Dynamics incurred in filing this motion, Telephone Dynamics does not provide documentation establishing what those costs are.

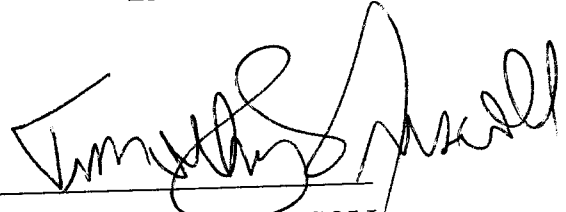
Under all the circumstances, the Court concludes that a fine of \$200.00, plus statutory costs associated with the making of the motion, constitute an appropriate penalty. Morrissey may purge himself of the foregoing contempt by appearing for a deposition in the Supreme Court, Nassau County, Lower Level, 100 Supreme Court Drive, Mineola, New York 11501. That deposition shall be conducted at 10:00 a.m., 20 days after personal service upon Morrissey of a copy of this order (excluding the day of service), or the next business day, if such period ends on a Saturday, Sunday or legal holiday. An alternative date and time may be selected by the parties and memorialized in writing, but once established said date shall have the same force and effect as if expressly directed by this Order. Additionally, at least 5 days prior to the deposition as directed above, Morrissey shall produce to Telephone Dynamics the documents demanded in the Subpoena.

In the event of Morrissey's failure to appear and purge the contempt as the Court has directed above, and upon proof attesting to service of this Order, the Court will entertain a properly supported application for reasonable counsel fees, and/or any additional, legally recoverable expenditures attributable to Morrissey's contemptuous conduct. *Daniels v. Guntert*, 256 A.D.2d 940 (3d Dept. 1998); *Lamb v. Amigone*, 12 A.D.3d 1165, 1166 (4th Dept. 2004).

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
August 13, 2009


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 20 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE