

We're Assoc. Co. v Duffy

2009 NY Slip Op 32134(U)

September 9, 2009

Supreme Court, Nassau County

Docket Number: 18056/06

Judge: William R. LaMarca

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ORDER AND JUDGMENT

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**WE'RE ASSOCIATES COMPANY,

Petitioner,**

**Motion Sequence #8
Submitted June 12, 2009
XXX**

-against-

INDEX NO: 18056/06

**JAMES P. DUFFY, ESQ.,

Respondent.**

The following papers were read on this petition:

Notice of Motion/Order to Show Cause.....	1
Affirmation in Opposition.....	2
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Counsel for respondent, JAMES P. DUFFY, ESQ., moves for an order, pursuant to CPLR §5015(a) and §2221(a), to vacate a prior order of the Court, dated April 24, 2009, granted without opposition, that found the respondent in contempt of Court. Petitioner, WE'RE ASSOCIATES COMPANY (hereinafter referred to as "WE'RE"), opposes the motion, which is determined as follows:

Respondent, JAMES P. DUFFY, ESQ. (hereinafter referred to as "DUFFY"), previously a *pro-se* litigant, now appears by counsel who seeks to vacate the order of the Court finding DUFFY in contempt of Court based upon an unopposed Notice of Motion,

and argues that the Notice of Motion was improper and defective, that service was ineffective in that DUFFY did not receive notice of the motion for contempt, that there is a meritorious defense to the underlying motion and that petitioner has not demonstrated his entitlement to the extreme relief of contempt. It is counsel for respondent's position that petitioner chose a method of service- regular mail at respondent's prior office and at the home of his wife in Roslyn, New York - that counsel knew would not afford respondent notice of the motion and, indeed, which respondent claims he never received. Counsel argues that the motion for contempt should have been brought by order to show cause, with the Court directing the manner of service, and that the Court erred in directing monetary sanctions against respondent in the full amount of the judgment, for which he was not personally responsible, and in directing incarceration without providing leave to purge. It is DUFFY's position that he has fully participated in this litigation since its inception and that the only reason he did not oppose the motion on the merits is because he did not receive the moving papers, which should have been served at the address designated by him for service of papers, a P.O. Box that he maintains in Manhasset where he receives his mail, or at the law firm in New York where he is presently Of Counsel.

In opposition to the motion, counsel for petitioner relates the long history of this matter wherein it has attempted to collect on a money judgment that it obtained, on June 20, 2006, against Berg and Duffy, LLP., a now defunct law firm, in the First District Court of Nassau County, in the sum of \$24,551.19. Because petitioner contended that respondent was the only member of Berg & Duffy, LLP., DUFFY was served with a subpoena duces tecum to take his deposition as an officer of the judgment debtor, however, when he personally appeared at the deposition, DUFFY failed to provide any

documents responsive to the subpoena. When a follow up letter requesting the documents was unsuccessful, counsel for petitioner filed a motion to hold DUFFY, as the sole member of Berg and Duffy, LLP., in contempt of Court. Said motion was initially denied, by Short Form order dated March 12, 2007, and was later recalled and modified, by Short Form Order dated July 2, 2008, in which the Court found that JAMES P. DUFFY, ESQ. had violated lawful process by failing to produce documents responsive to the subpoena. However, the Court gave DUFFY one last opportunity to comply with the September 19, 2006 subpoena and directed that he again appear at a deposition. The Court further directed, as follows:

. . . [t]hat should respondent, JAMES P. DUFFY, ESQ., fail to appear or produce the requested documents as demanded in the subpoena, or fail to adequately exercise due diligence in locating and obtaining the requested documents, the Court will entertain WE'RE's motion to hold respondent in contempt and for costs and penalties against JAMES P. DUFFY, ESQ. If any of the requested documents are unavailable, DUFFY should be prepared with an affidavit showing what documents are unavailable and why . . .

Short Form Order, dated July 2, 2008.

Thereafter, it appears that DUFFY attended the newly scheduled deposition, on August 11, 2008, but did not produce any documents responsive to the subpoena. Rather, he produced an affidavit setting forth the "due diligence" he purportedly exercised in attempting to find the documents. He testified that, after he was first deposed, on October 6, 2006, he took all of the documents that were specifically subpoenaed by petitioner from the law firm and brought them to his wife's home in Roslyn, New York. Therefore, despite the subpoena duces tecum demanding the documents and adjournment of the deposition pending their production, and despite his knowledge that petitioner was attempting to enforce the judgment against Berg and Duffy, LLP., DUFFY did not forward the documents

to WE'RE but rather removed them to his wife's home in Roslyn. Indeed, DUFFY testified at the second deposition that the documents brought to his wife's home were destroyed by flooding, on July 17 or 18, 2007, almost a year after they were demanded and nine (9) months after the adjourned deposition.

Subsequently, petitioner moved, once again, to find DUFFY in contempt of Court and argued that DUFFY never intended to produce the documents for WE'RE and that they have been frustrated in their attempt to enforce the judgment and discover assets of the allegedly defunct law firm. Counsel urged that the Court find that DUFFY had destroyed documents and evidence responsive to the subpoenas and that he be sanctioned accordingly. However, because the petitioner failed to include the mandated legend for contempt, the Court found that the motion was facially defective and could not form the basis for relief under Judiciary Law §773. The motion was denied, with leave to renew and, thereafter, petitioner corrected the legend on the motion for contempt and moved to find DUFFY in contempt, which was granted by the Court, without opposition, by Short Form Order, dated April 24, 2006, the order sought herein to be reargued and vacated.

Counsel for petitioner strongly argues that respondent was properly served, that prior motions to DUFFY have been served at his wife's house in Roslyn, New York, where DUFFY apparently resides when he is in New York (although he claims to be a resident of Monaco), and that there is no meritorious defense to the motion, and no basis to vacate the prior order of the Court. It is WE'RE's position that DUFFY's actions show an intentional, willful and complete disregard of the Court legal process which, alone, is contempt of Court. Moreover, counsel argues that the very documents that were

subpoenaed were brought to DUFFY's wife's home where they were allegedly destroyed by a flood, and lost forever, never to be replaced or recreated. Counsel rejects DUFFY's contention that it should have subpoenaed the banks and demanded that DUFFY sign an authorization for Berg and Duffy's IRS records, and claims that said records are insufficient to determine what assets were owned or held by the judgment debtor or whether fraudulent conveyances have occurred giving rise to potential avoidance claims under the Debtor and Creditor Law. Counsel for petitioner argues that there can be no meritorious defense to the deliberate acts of respondent in destroying the records needed to pursue collection of its judgment and that the fine awarded by the Court in the sum of the actual losses incurred by the creditor should stand.

It is well settled that "[c]ontempt is a drastic remedy which should not issue absent a clear right to such relief." *Coronet Capital Co. v Spodek*, 202 AD2d 20, 615 NYS2d 351 (1st Dept. 1994). To sustain a civil contempt pursuant to Judiciary Law § 753, "a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed." *McCain v Dinkins*, 84 NY2d 216, 616 NYS2d 335, 639 NE2d 1132 (C.A. 1994). It must appear with reasonable certainty that the order was knowingly disobeyed". *Coronet Capital Co. v Spodek*, *supra*. Moreover, the disobedience must be such that it was calculated, or actually did defeat, impair, impede or prejudice the rights and remedies of the complaining party. *Cf, McCormack v Axelrod*, 59 NY2d 574, 466 NYS2d 279, 453 NE2d 508 (C.A. 1983); *Matter of Department of Environmental Protection of the City of New York v Department of Environmental Conservation of the State of New York*, 70 NY2d 233, 519 NYS2d 539, 513 NE2d 539 (C.A. 1987).

Additionally, pursuant to CPLR § 5015 (a) (1), the Court which rendered a judgment or order may relieve a party from it if the party demonstrates both a reasonable excuse for the default and a meritorious defense (see, CPLR §5015 [a][1]; see *Titan Realty v Schlem*, 283 AD2d 568, 724 NYS2d 908 [2nd Dept. 2001]; *Matter of Gambardella v Ortov Light*, 278 AD2d 491 [2nd Dept. 2000]; *Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2nd Dept. 2000]). What constitutes a reasonable excuse is within the sound discretion of the Court. (*Parker v City of New York, supra*).

After a careful reading of the submissions herein, it is the judgment of the Court that the default judgment entered herein, finding the respondent in contempt of Court, cannot stand and must be vacated. Initially, the Court finds that service of the motion is questionable and, furthermore, that imposing a fine in the full amount of the judgment has been rejected by the Second Department, in *Barclays Bank, PLC v Hughes*, 306 AD2d 406, 761 NYS2d 278 (2nd Dept. 2003); *cf.*, *Frankel v. Frankel*, 111 AD2d 447, 488 NYS2d 825 (3rd Dept. 1985). Moreover, DUFFY's appearance at the second scheduled deposition, with an affidavit of due diligence with respect to the requested documents, as directed by the Court but rejected by petitioner's counsel, does not demonstrate that respondent knowingly disobeyed the order of the Court. Respondent cannot be held in contempt of Court for non-production of documents which never existed. Moreover, the prior order of the Court did not contain a direction enabling respondent to purge his contempt, as directed in Judiciary Law §774(1), with respect to civil contempt. Although the Court acknowledges the frustration experienced by the judgment creditor herein, a finding of contempt must be based upon a strict construction of the statutory directions. Based on

the foregoing, it is therefore

ORDERED, that DUFFY's motion to vacate the prior order of the Court, dated April 24, 2009, finding him contempt of Court is granted and said order is hereby vacated and deemed null and void; and it is further


ORDERED, that should WE'RE seek to move again for a finding of contempt against DUFFY, said application shall be made by order to show cause, so that the Court can direct the manner of service; and it is further

ORDERED, that since respondent has appeared by counsel, all future correspondence to respondent shall be made through counsel, LAZER, APTHEKER, ROSELLA & YEDID, P.C., 225 Old Country Road, Melville New York 11747, 631-761-0800.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 9, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
SEP 11 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE