

Alpert v Alpert

2010 NY Slip Op 31011(U)

April 20, 2010

Sup Ct, NY County

Docket Number: 028490/1985

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 028490/1985

ALPERT, JACK L.

vs

ALPERT, ZANE

Sequence Number : 047

PUNISH FOR CONTEMPT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-6

7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the aforesaid decision and order.*

FILED

APR 27 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/20/10

JANE S. SOLOMON 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: IAS PART 55

-----X

JACK L. ALPERT, as a director of
STILLWATER, INC., in the right of
STILLWATER, INC., and JACK L.
ALPERT and ABRAHAM ALPERT, as
Trustees of Two Trusts created under
the Will of Hyman Alpert, in the
Right of STILLWATER, INC.,

Plaintiffs,

-against-

ZANE ALPERT, et al.,

Defendants.

-----X

Index No. 028490/1985
DECISION AND ORDER

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

SOLOMON, J.:

In this motion for civil contempt, judgment creditor, the Estate of Jack L. Alpert, pursuant to CPLR 5251 and Article 19 of the Judiciary Law, seeks an order directing that (i) non-parties Lugo International, Inc (Lugo) and Martin I. Suss, C.P.A. (Suss) be held in contempt for violation of a Subpoena Duces Tecum issued to Lugo; (ii) Lugo and Suss be directed to comply with the Subpoena; (iii) a fine for civil contempt be imposed. Lugo and Suss jointly oppose the motion on substantive and procedural grounds.

FACTS

Plaintiffs were granted final judgment against Defendant Zane Alpert (Zane) on December 20, 1994 in the amount of \$13,347,436.41. Less than \$800,000 has been collected to

date. Zane was ordered to pay \$3,000 per month towards fulfillment of his liability under the judgment. He did not do so and was found guilty of civil contempt in 1998. Beginning in 1997, Zane was employed by Lugo, a New York Corporation, based in Lichtenstein, owned by a single individual located in either the Ukraine or Russia, and funded by a "private foundation" solely through wire transfers from a Swiss bank. Plaintiffs allege that Lugo exists only to hide Zane's assets. Suss is Lugo's accountant and has stated that he does not know the source of Lugo's assets.

In order to ascertain the nature of Lugo and to aid in collecting the judgment due, Plaintiffs served a post-judgment subpoena on Lugo, care of Suss, in July of 2009, seeking procurement of records regarding compensation paid by Lugo to Zane. Such information was given and Suss testified that he has no knowledge regarding the source of the deposits to Lugo's account and that he is "not really sure" of the nature of Lugo's business. Plaintiffs then issued a subpoena on Chase Bank, and received Lugo's bank statements.

On November 3, 2009 the subject subpoena was issued pursuant to CPLR 5224(a)(2) (Affidavit of Service, attached to Motion, Ex. F). It was returnable on November 24 (Motion, Ex. E) and sought the production of Lugo's income tax returns and financial statements from January 1, 2004 to the date of the

[* 4]

subpoena. Neither Lugo nor Suss complied. On November 30, 2009, Plaintiffs' attorney sent a letter to Suss, directly, stating that Lugo had defaulted on the subpoena (Letter, dated November 30, 2009, attached to Motion, Ex. I). Lugo's and Suss's attorney responded by letter dated December 3, 2009, objecting to the subpoena on ground that it was "palpably improper . . . and, as such, is a nullity" (Letter, dated December 3, 2009, attached to Motion, Ex. J). This motion followed.

DISCUSSION

Chapter 52 of the CPLR governs the enforcement of money judgments. Under CPLR 5223, the judgment creditor may compel disclosure of all matters relevant to the satisfaction of the judgment, by serving a subpoena upon any person, including third parties (*ICD Group, Inc. v. Israel Foreign Trade Co. (USA) Inc.*, 224 AD2d 293, 294 [1st Dept, 1996]). Section 5224(a)(2) allows a judgment creditor to serve a subpoena duces tecum requiring the production of books and papers for examination.

Suss and Lugo argue that Plaintiffs have brought this motion improperly. They contend that, because they are not parties to the underlying action, a special proceeding is required.

Clearly, where a contemnor is a party to the action from which the enforcement subpoena arises, the application to punish for contempt is initiated by motion (*Siegel, New York*

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Practice, 4th Ed., § 484, p. 815); however, "[a] nonparty witness who is not privy to that action and is about to be made a party to a proceeding which may result in fine and incarceration is entitled to the same level of notice required to institute any special proceeding against any new party" (*Long Island Trust Co. v. Rosenberg*, 82 AD2d 591, 598 [2nd dept, 1981][emphasis added]). The service required by a special proceeding is the same as that required in a summons and complaint (CPLR 403[c]). CPLR 308 governs service upon Suss, as an individual, and CPLR 311 for Lugo.

Plaintiffs contend that Suss and Lugo were properly served with process, and, therefore, had the requisite notice. Plaintiffs supply sufficient evidence that Suss was served by in-hand delivery on March 9, 2010, and that Lugo was served by in-hand delivery to Suss, as its managing agent, and by service of two copies of the moving papers to the Secretary of State (see, Affidavits of Service, attached to Reply Affirmation, Ex. Q). Accordingly, Suss and Lugo had the requisite notice, and the court has jurisdiction over them.

Suss and Lugo next argue that the December 3 letter provided a substantive objection to the subpoena, and that such an objection placed a burden on Plaintiffs to seek an order compelling compliance with the subpoena. In support, they cite CPLR 3122(a), which states in relevant part:

* 6]
"Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure . . . shall serve a response which shall state with reasonable particularity the reasons for each objection. . . ." (CPLR 3122[a]).

By its language, CPLR 3122(a) governs only those subpoenas issued under CPLR 3120 and 3121. It is uncontested that the instant subpoena was issued in accordance with CPLR 5224(2). Therefore, CPLR 3122(a) is inapplicable, and even were it applicable, Suss and Lugo's objection was not served until thirty days after the issuance of the subpoena, making the objection untimely.

Finally, Suss and Lugo argue that Plaintiffs have failed to demonstrate any entitlement to Lugo's tax returns. They do not challenge the portion of the subpoena demanding the turnover of Lugo's financial statements, and this branch of the subpoena remains valid. Plaintiffs counter that their entitlement to Lugo's tax returns stems from their belief that Lugo is essentially acting as a shield against the judgment credit owed.

Because of their confidential and private nature, disclosure of tax returns is generally disfavored and "the party seeking disclosure must make a strong showing of necessity . . . and demonstrate that the information contained in the returns is unavailable from other sources" (*Gordon v. Grossman*, 183 AD2d

669, [1st Dept, 1992])). The party seeking to compel production of a tax return "must identify the particular information the return will contain and its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through redaction of extraneous information (*Nanbar Realty Corp. v. Pater Realty Co.*, 242 AD2d 208, 209-10, [1st dept, 1997])).

Plaintiffs state that they believe the tax returns will shed light on the connection between Lugo's mysterious funding and Zane's "salary" checks. However, they do not particularly explain what they expect the tax returns will show. Nor do they explain why the other information that they have already received from Suss, Lugo and Chase Bank is insufficient or unproductive, and there appears to be no issue regarding inaccessibility, as Suss and Lugo seem to have materially complied with the prior subpoenas. Therefore, the objection to production of the tax returns is well founded.

Under all of the circumstances, it cannot be said that Lugo and Suss have willfully failed to comply with the subpoena, even though the subpoena validly sought Lugo's financial statements.

Accordingly, it hereby is

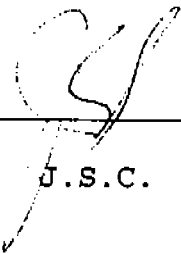
ORDERED that Plaintiffs' motion for contempt is denied;

and it further is

ORDERED that Suss and Lugo turn over to Plaintiffs a copy of Lugo's financial statements in accordance with the November 3, 2009 subpoena, and such documents shall be made available within 10 days from service of a copy hereof with notice of entry. Failure to fully comply shall give rise to contempt.

Dated: April 20, 2010

ENTER:



J.S.C.

JAMIE S. SOLOMON

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APR 27 2010
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