

Hoffinger Stern & Ross, LLP v Oberman

2010 NY Slip Op 31467(U)

June 8, 2010

Sup Ct, NY County

Docket Number: 115125/09

Judge: Judith J. Gische

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SCANNED ON 6/14/2010

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. *Writon*

PART 10

Index Number : 115125/2009
HOFFINGER STERN & ROSS, LLP
vs.
OBERMAN, JEFFREY
SEQUENCE NUMBER : 001
PUNISH FOR CONTEMPT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: JUN 08 2010

JJG
HON. JUDITH J. GISCHE 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: PART 10

-----x

HOFFINGER STERN & ROSS, LLP,

Plaintiff,

- against -

JEFFREY OBERMAN,

Defendant.
-----x

DECISION/ORDER

Index No.: 115125/09
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

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JUN 14 2010
NEW YORK
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Papers **Numbered**
Pltf's n/m [contempt] w/MWG affid, exhs 1

Upon the foregoing papers, the decision and order of the court is as follows:

A judgment was entered against defendant, Jeffrey Oberman, on December 30, 2009 in the amount of \$104,270.31. On March 5, 2010, plaintiff, Hoffinger, Stern & Ross, LLP, served defendant with a subpoena ad testificandum and duces tecum to take his deposition.

Presently before the court is plaintiff's motion to hold defendant in contempt for non-compliance with the subpoena, punishing defendant by fine of at least \$1,261.00 and other costs. The subpoena identified several classes of financial documents to be produced, including tax returns, shareholder agreements, loan applications, leases, and stock certificates. Though due proof of service has been filed with the court and defendant was served by mail, this motion is before the court on default.

Plaintiff has also filed proof that defendant was personally served with the subpoena at his residence. Such service complies with CPLR § 308. Despite proper service of the subpoena, no one appeared on behalf of defendant to testify and produce the documents requested.

Discussion

Under CPLR § 5224 (a), a deposition subpoena and a subpoena duces tecum must be served in the same manner as a summons. Service upon a natural person must be made in the manner provided under CPLR § 308. Plaintiff's service of the subpoena complies with the due process requirements of CPLR § 308.

Under CPLR § 5222 (b), a plaintiff has the right to obtain financial disclosure to aid it in the recovery of the money it is due and its collection efforts. CPLR § 5251; Gabor v. Renaissance Associates, 170 A.D.2d 390 (1st Dept. 1991); *See also*: Skylake State Bank v. Solar Heat and Insulation, 148 Misc.2d 559 (Sup. Ct., N.Y. Co. 1990). The failure to comply with a subpoena issued by an officer of the court shall be punishable as a contempt of court. CPLR § 2308 (a).

On a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. DRL § 245; Judiciary Law § 753[A][3]; *See also*: McCormick v. Axelrod, 59 N.Y.2d 574, 583 *amended* 69 N.Y.2d 652 (1983); Puro v. Puro, 39 A.D.2d 873 (1st Dept. 1990). Furthermore, the actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. Farkas v. Farkas, 209 A.D.2d 316 (1st Dept. 1994). A

party seeking contempt must show that there are no alternative effective remedies available. Farkas v. Farkas, 201 A.D.2d 440 (1st Dept. 1994).

Plaintiff has established that defendant's disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about defendant's financial resources. Judiciary Law § 753 [a]; Farkas v. Farkas, 209 A.D.2d 316 (1st Dept. 1994); Great Neck Pennysaver v. Central Nassau Publications, 65 A.D.2d 616 (2d Dept. 1978). Plaintiff has shown that without the information, plaintiff cannot easily enforce its judgment because the financial information it seeks is not public information and, therefore, not otherwise available to it for inspection. Therefore, plaintiff's motion for contempt is granted as follows:

Defendant is in civil contempt. The court will, however, allow defendant to purge his contempt by responding to the information subpoena within TEN DAYS of being personally served with an entered copy of this Decision and Order. This is a FINAL opportunity to PURGE the contempt. If defendant fails to comply with this PURGE, the Clerk shall enter a money judgment against defendant in the sum of \$1,261.00, upon plaintiff's attorney filing a sworn affidavit attesting to such compliance, without the need for further order from the court. The sum of \$1,261.00 represents: \$250.00 as punishment for its contempt of court, pursuant to Judiciary Law § 773; \$95.00 for its RJI fee; \$45.00 for its motion fee; \$146.00 for stenographer costs, as per invoice; and \$725.00 for process server fees, as per invoice.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for an order adjudicating defendant, Jeffrey Oberman, in contempt is hereby GRANTED upon default; plaintiff has proved that defendant was served with the subpoena requiring it to take oral deposition and produce documents, but disregarded the subpoena; and it is further

ORDERED that defendant's disobedience of the subpoena has defeated, impaired, impeded or prejudiced plaintiff's right to ascertain information about defendant's financial resources and plaintiff has no alternative effective remedies available; and it is further

ORDERED that defendant is held in civil contempt. Defendant is directed to respond to the subpoena within TEN DAYS of being personally served with a copy of this Order and the subpoena itself. This is a FINAL opportunity to PURGE the contempt; and it is further

ORDERED that if defendant fails to comply with this PURGE, as punishment, the Clerk shall enter a money judgment against defendant in the sum of \$1,261.00, upon plaintiff's attorney filing a sworn affidavit attesting to such compliance, without the need for further order from the court; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
June 8, 2010

FILED

Ordered:

JUN 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

HON. JUDITH J. GISCHE, J.S.C.