

Matter of Barrow

2010 NY Slip Op 32012(U)

July 19, 2010

Supreme Court, New York County

Docket Number: 601901/08

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos
Justice

PART 53

Index Number : 601901/2008

IN THE MATTER OF

vs

CHENNAI CAFE INC

Sequence Number : 004

CONFIRM/REJECT REFEREE REPORT C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Motion is decided in accordance with
accompanying Memorandum Decision.

Dated: 7/19/08

Charles E. Ramos
CHARLES E. RAMOS *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: COMMERCIAL DIVISION

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In the Matter of the Application of DARWIN
BARROW, Petitioner, for an Order for the
Inspection of the Books and Records and
Balance Sheet and Profit and Loss Statement
of CHENNAI CAFÉ, INC., the Proceeding being
against CHENNAI CAFÉ, INC., and RAFI
AMANNULLA and MUTHO ADIMULLOOLAM, Principal
Shareholders of said Corporation, and for
a Restraining Order against all three
Respondents.
-----x

Index No. 601901/08

FILED
JUL 29 2010
NEW YORK
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Charles Edward Ramos, J.S.C.:

Darwin Barrow ("Petitioner") moves pursuant to CPLR § 4403 for an order ("Order") confirming the report of Referee, Lancelot B. Hewitt ("Referee") to inquire and report, appointed pursuant to an order of this Court dated the April 13 2009, on the grounds that the Referee's report ("Report") was within scope of reference and is supported by an overwhelming preponderance of the evidence.

On the basis of the Report, Petitioner moves pursuant to CPLR § 5104 to direct that Respondents Chennai Café, Inc. ("Chennai Café"), Rafi Amannulla, and Mutho Adimuloolam (together, "Respondents"), be held in contempt for failing to comply with the Court's order dated December 15, 2008. In addition, Petitioner seeks sanctions and an award of damages and punitive damages.

Background

The facts set forth herein are taken from the petition and the Report, unless otherwise noted.

Chennai Café is a vegetarian kosher Indian restaurant, located on 129 East 27th Street, in Manhattan. Petitioner

purchased sixty-six shares of Chennai Café from non-party Jorah N. Macrya, on December 24, 2007, becoming a one-third owner.

According to Petitioner, Respondents failed to permit him to inspect Chennai Cafe's balance sheets, and profits and loss earnings statements, despite his proper demand (Petition, ¶ 5). Further, Petitioner alleges that Respondents are engaging in a fraudulent scheme to dissipate corporate assets of Chennai Cafe.

Following the refusal of his demand to inspect the corporate books and records, Petitioner commenced this petition. On December 15, 2008, this Court ordered Respondents to grant access to Petitioner and produce copies of Chennai Cafe's receipts and disbursement journals, sales receipts, bank statements and sales and income tax returns for a specified time period (Exhibit 2, annexed to the Barrow Aff.).

According to Petitioner and his accountant, Respondents failed to produce all of the records, and did not produce any sales receipts and cleared checks for the aforementioned period.

Subsequently, this Court referred the issue of whether Respondents complied with the order and granted Petitioner access to inspect certain corporate books and records, and whether the Respondents were in contempt for not granting access, to a referee to hear and report with recommendations.

During the hearing before the Referee, Respondents testified under oath that they had fully complied with the Court's order, and provided all of the corporate documents in their possession. With respect to the sales receipts that were not produced,

Amannulla testified that it was the practice to keep sales receipts for seven to ten days before being discarded (Referee's Report, ¶ 13).

Furthermore, Amannulla testified that Chennai Café was cited for a violation by the New York City Department of Health, and was directed not to maintain sales receipts on the premises due to a "roach" problem (*id.*).

The Referee concluded that the Petitioner established "by a reasonable degree of certainty, that respondents have knowingly disobeyed a clear and unequivocal mandate of the court by failing to comply with the court's order" (Referee's Report, Findings of Fact, ¶ 1).

Moreover, the Referee found that Amannulla was not credible as to the manner in which the restaurant maintained sales receipts, and as to the testimony concerning the "roach problem" (Referee's Report, Findings of Fact, ¶ 6).

Additionally, the Referee determined that Amannulla "was not credible with respect to his testimony that Respondents complied with the Court's Order" (*id.*).

In conclusion, the Referee determined that the evidence demonstrates that Respondents "failed to produce for inspection each of the specific books and records of Chennai for the period ordered by the Court," and on this basis, found the Respondents in contempt (*id.*, at 7).

Discussion

"A Referee's determination is limited to the scope of the reference" (*Matter of AMC Computer Corp.*, 38 AD3d 402, 403 [1st Dept 2007]). Here, the Court expressly defined the scope of reference as limited to the issue of credibility (Testimony, at 7).

The Referee determined that the Respondents were not credible with respect to their testimony as to the production and maintenance of corporate documents. Therefore, the Referee's findings were within the scope of reference, and Respondents fail to persuade otherwise. Moreover, as to the Respondents' credibility (or lack thereof), the Referee found that Respondents "knowingly disobeyed a clear and unequivocal mandate of the court, which resulted in prejudice to the rights of Barrow ... [and] are therefore in contempt of Court" (Referee's Report, at 7).

As the trier of fact, the referee determines whether or not the testimony is colored intentionally or unintentionally by those factors (*Lauria v. Lauria*, 187 AD2d 888, 889 [3rd Dept 1992]). Moreover, a referee's report should be confirmed whenever the findings are substantially supported by the record (*United States Trust Co. v Olsen*, 194 AD2d 481, 482 [1st Dept 1993]).

Respondents unconvincingly argue in opposition that the Referee "erred in law by failing to appreciate the difference between the failure to produce the documents that the Respondents possessed and the documents that the respondents did not have."

Additionally, Respondents contend that the Referee's findings are in error because "Respondent Amannulla reiterated ... that the Respondents had provided all the documents that they had in their possession." The Court rejects these assertions.

Because the Referee's findings were within the scope of the reference, the findings are substantially supported by the record, and Respondents fail to demonstrate any basis for setting aside the Referee's Report, the Petitioner's motion to confirm the Report is granted to the extent that it finds the Respondents in contempt of this Court's order, and this Court adopts the findings of the Referee.

Notwithstanding the findings of the Report, the record contains unmistakable evidence of contempt. In order to find a party in civil contempt, "a lawful judicial order expressing a clear and unequivocal mandate must have been in effect and disobeyed. Moreover, the party to be held in contempt must have had knowledge of the order, which results in prejudice to the rights of another party" (Judiciary Law § 753; *McCain v Dinkins* 84 NY2d 216, 226 [1994]).

The record demonstrates that the Respondents failed to obey this Court's clear order to provide access to and produce specific corporate records, which Respondents failed to do and failed to give a credible excuse for its failure to do so. The Respondents' failure to produce the corporate records was a willful disregard of a judicial order expressing a clear and unequivocal mandate, which resulted in prejudice to the rights of

the Petitioner.

As a penalty, Petitioner seeks sanctions and an award of damages. Generally, a court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery orders (*Pearl v Pearl*, 266 AD2d 366, 366 [2nd Dept 1999]). One option is to prohibit the disobedient party from supporting or opposing designated claims or defenses, and from producing in evidence things or items of testimony (CPLR § 3126).

To invoke the remedy of preclusion, "the court must determine that the offending party's failure to comply with discovery demands was willful, deliberate and contumacious" (CPLR § 3126 [2]; *Siegman v Rosen*, 270 AD2d 14, 14 [1st Dept 2000]). "Generally, willfulness can be inferred when a party repeatedly fails to comply with [an Order], coupled with inadequate excuses for those defaults" (*id.*). Compliance with an order to disclose requires both a timely response and a good faith effort to address the request meaningfully (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

Here, Respondents repeatedly failed to comply with the Court's order to produce documents. The Respondents' excuse that the restaurant routinely discarded sales receipts as the result of a "roach" problem is simply not credible, displays a shocking disregard for the Court's order, and fails to grasp the gravity of the Petitioner's allegations in the petition.

Therefore, the Court determines that the penalty of preclusion is appropriate. Respondents should be precluded from offering or relying at trial on evidence that relates to, confirms or disputes information potentially contained on any documents that they failed to produce pursuant to the order. In addition, the Court finds it appropriate to direct the fact-finder to draw all inferences favorable to the Petitioner with respect to all financial matters.

Finally, with respect to that portion of the motion that seeks to enjoin Respondents from dissipating Chennai Cafe's assets and income, the existence of conflicting allegations from the Petitioner and Respondents pertaining to fraudulent and deceitful practices require a factual hearing. Therefore, this portion of the motion shall be held in abeyance until an evidentiary hearing can be held.

Accordingly, it is


ORDERED that the petitioner's motion is granted to the extent that the report of the referee is confirmed in its entirety; the respondents are hereby held in contempt for failure to comply with the Court's order dated December 15, 2008; respondents shall be precluded from offering or relying at trial on any evidence that relates to, confirms or disputes information potentially contained on any documents that they failed to produce pursuant to the order produce and the petitioner is entitled to a favorable inference with respect to financial matters.

The parties are hereby directed to appear for a preliminary conference on September 13, 2010 at 10:30 AM for the purposes of scheduling remaining discovery before an evidentiary hearing can be held.

This shall constitute the decision and order of the Court.

Dated: July 19, 2010

ENTER:



J.S.C.

CHARLES E. RAMOS

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