

Discovery Transp. Corp. v Gabriel-Nunez

2010 NY Slip Op 32266(U)

August 17, 2010

Sup Ct, NY County

Docket Number: 103843/10

Judge: Joan M. Kenney

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

PRESENT: KENNEY
Justice

PART 8

DISCOVERY TRANSPORTATION CORP
- v -
JUAN GABRIEL - NUÑEZ,
ET AL.

INDEX NO. 103843/10
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/17/10

Joan M. Kenney
J.S.C.
JOAN M. KENNEY

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 8

-----X
DISCOVERY TRANSPORTATION CORP.,

Plaintiff,

-against-

Index #
103843/10

JUAN GABRIEL-NUNEZ, THE NEW DISCOVERY
CAR & LIMO LLC., DARIO MATOS, PUBLIO
LORENZO, ELIZARDO MATEO, MIGUEL ESPINAL,
JOSE VARGAS, RAMON ROBLES, NELSON LOPEZ
and KARIN REYES,

DECISION &
ORDER

FILED
AUG 24 2010
Defendants. NEW YORK
COUNTY CLERK'S OFFICE

KENNEY, JOAN, M., J.

Papers considered in review of this motion to punish for civil contempt:

Papers	Numbered
Order to Show Cause, Affidavit, Affirmation, and Exhibits	1-6
Opposition Papers, Affirmation, Affidavits with Exhibits	7-11

Plaintiff's Counsel:
Gregory Gallo, Esq.
The Pelligrino Law Firm
43-39 21 Street, Suite 204
Long Island City, NY 11101
(718) 729-4700

Defendant's Counsel:
Nestor Rosado, Esq.
55 Overlook Terrace, Suite 1H
New York, New York 10033
(212) 781-4808

In this action that essentially alleges that defendants, who were also plaintiff's officers and shareholders, have committed ultra vires acts against plaintiff. Plaintiff seeks an Order of Contempt against defendants due to defendants' failure to conduct a fair election of officers as per the terms of a "So Ordered" stipulation dated May 26, 2010 (the stipulation).

This action was commenced with service of the pleadings and an Order to Show Cause, dated March 24, 2010, seeking, *inter alia*, a Temporary Restraining Order (TRO). The parties entered into the

stipulation, wherein the parties agreed to, *inter alia*, refrain from harassing or interfering with the operation of the business, and hold a special shareholders meeting on June 29, 2010. Additionally, the parties agreed that prior to the special shareholder's meeting certain individuals would be responsible for the day-to-day operation of the business. The purpose of the special meeting was to conduct an election of officers of plaintiff (President, Vice President, Secretary and Treasurer). The election was to be supervised by the parties attorneys. Pursuant to the terms of the stipulation:

"Each shareholder shall be notified and each shareholder attending the meeting shall execute a waiver of notice of the shareholder's meeting. Notice shall be effectuated by the base's two-way radio system to those shareholders who drive for-hire vehicle's for plaintiff base (sic). For any shareholder who does not drive a for-hire vehicle, the method of notice shall be via first class mail to the last known address of the shareholder. The parties agree to broadcast notice of the shareholder's meeting several (at least once every four hours) times every day commencing on Friday, May 28, 2010."

It is uncontested that an unsupervised election of some kind took place on June 29, 2010, and officers were allegedly elected in accordance with the terms of the stipulation. However, Peter Lopez (Lopez) alleges that he was not permitted to return to the premises in order to operate plaintiff's business, as per the terms of the stipulation. Further, Lopez states that when he attempted to

engage in his role as defined in the stipulation, he was told by Jose Vargas, Juan Gabriel-Nunez, Dario Matos, Publico Lorenzo, Nelson Lopez and Elizardo Mateo, that "the judge's order had nothing to do with them and that they were not compelled to obey it." (See, Lopez affidavit in support).

According to the defendants, Lopez refused to take part in the operation of the business, nor did he participate in the special election. Furthermore, it is alleged that Lopez has not been prevented from entering the premises. Defendants claim that Lopez came to the office on June 2, 2010, stayed a few minutes, left the premises, and has never returned.

Defendants state that the election took place in accordance with the terms of the stipulation. To evidence this, defendants annex copies of a list of the shareholders, including their addresses, and copies of corresponding certificates of mailing that allegedly provided the shareholders with written notice of the special meeting. In fact, defendants allege that Lopez and other shareholders of plaintiff have been harassing defendants.

Annexed to the opposition papers, defendants have provided the minutes from the special shareholders meeting and they indicate the Elizardo Mateo was elected President, Santos Jimenez was elected Vice President and Tonin Sanchez was elected Secretary. Defendants also annexed "sign-in" sheets for the shareholders who attended the meeting, and voted for the slate of officers who were allegedly

elected.

CPLR 5104 provides for the enforcement of a judgment or order by contempt, which is not enforceable under either Article 52 or CPLR 5102.

Judiciary Law § 753 empowers a court of record to punish for civil contempt for misconduct where a right or remedy of a party to a civil action or a special proceeding pending in the court may be defeated, impeded, or prejudiced in specified cases. It governs the punishment for civil contempt where there is an actual loss or injury to the aggrieved party as a result of the offender's conduct. Section 753 [A] states in pertinent part as follows:

"A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, . . . for disobedience to a lawful mandate of the court"

It is uncontested that the parties conducted what purports to be an "election." Unfortunately, the election was conducted without the benefit of the supervision of the parties' attorneys. In the court's view without the supervision of the attorneys a proper election cannot be noticed or ratified by the shareholders. It is unclear from the papers before the court that either plaintiff, or defendants' rights have been impaired, impeded or prejudiced. This Court Ordered an election to take place with the

supervision of the attorneys. The mandate was clear, and unambiguous. However, the attorneys merely relied on their clients to conduct the election in accordance with both the corporate by-laws and the terms of the stipulation this Court "So Ordered."

To sustain a finding of civil contempt based upon a violation of a court order, it must be shown that the mandate purportedly violated was clear and explicit and the violation established with reasonable certainty. *Richards v Estate of Kaskel*, 169 AD2d 111 (1st Dept 1991) citing, *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 (1st Dept 1983). There must also be a showing that the conduct complained of was "calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies" of a party to a civil proceeding. *Id* at 122; Judiciary Law § 753 [A] [3].

Analysis of all the relevant considerations in the instant matter leads to the inescapable conclusion that defendants are not literally in contempt. This application is denied without prejudice, with the caveat that yet another election is to occur, in accordance with the corporate by-laws and the terms of the parties' prior stipulation. Moreover, the attorneys mistaken belief that their clients would behave like professionals was misplaced. Substantial compliance with the court's direction, where there is a reasonable excuse for variance from the court's order, and where it has not been conclusively shown that the other party's right's have been prejudiced thereby, is a defense to a

contempt application. Conforti v Goradia, 234 AD2d 237 (1st Dept 1996).

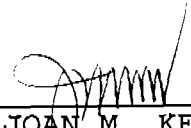
Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties' attorneys shall notice and supervise another election of officers for Discovery Transportation Corp. at a time and place to be determined by counsel and in accordance with the by-laws and prior stipulation of the parties as "So Ordered" by this Court.

Dated: August 17, 2010

E N T E R:



HON. JOAN M. KENNEY
J.S.C.

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE