

**Star Indus., Inc. v Innovative Beverages, Inc.**

2010 NY Slip Op 32739(U)

September 28, 2010

Supreme Court, Nassau County

Docket Number: 013306-03

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**STAR INDUSTRIES, INC.,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 013306-03**

**INNOVATIVE BEVERAGES, INC.,  
d/b/a GECKO TEQUILA, INC. and  
VINCENT VIOLA,**

**Motion Seq. Nos. 14 and 15  
Submission Date: 8/9/10**

**Defendants.**  
-----X

**Papers Read on these Motions:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Plaintiff's memorandum of Law in Support.....X**
- Notice of Cross Motion, Affirmation in Support,  
Exhibit and Affidavit in Support.....X**
- Reply Affirmation in Support,  
Affidavit in Support/Opposition and Exhibits.....X**

This matter is before the court on 1) the motion filed by Plaintiff Star Industries, Inc. ("Star Industries" or "Plaintiff") on May 19, 2010, and 2) the cross motion filed by non-party Respondents Straight Up Brands, Inc., Straight Up Productions, Inc. and David McCallen ("Respondents") on July 28, 2010, both of which were submitted on August 9, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion to the extent that the Court imposes a fine on Respondent McCallen in the sum of \$25,000 for his contumacious conduct as set forth in the Court's decision dated October 2, 2009 adjudging McCallen in contempt for violations of prior court orders; and 2) denies Respondents' motion in its entirety.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order, pursuant to New York Judiciary Law § 753(A), imposing a term of incarceration on Respondent David McCallen (“McCallen”), for the findings of contempt made by the Court in its decision dated October 2, 2009 (“Contempt Decision”) (Ex. A to P’s Motion). Respondents oppose Plaintiff’s motion.

Respondents move for an Order 1) vacating and dismissing the contempt proceeding commenced by Plaintiff’s Notice of Motion dated July 19, 2007; or, alternatively 2) vacating the Report of Special Referee Thomas V. Dana dated April 8, 2009 (“Contempt Report”); 3) vacating the Order of Special Referee Thomas V. Dana dated May 5, 2010 (“Referee’s Decision”); and 4) vacating, *nunc pro tunc*, the Restraining Notices served by Plaintiff on September 11, 2006 and September 10, 2007.

### B. The Parties’ History

The history of this matter is set forth in the Contempt Report and Contempt Decision and is incorporated herein by reference. In the Contempt Decision, the Court found Respondent McCallen liable for numerous separate counts of contempt based, *inter alia*, on his failure to answer Information Subpoenas and issuance of funds to third parties in violation of restraining orders.

With the consent of counsel, the Court subsequently issued an Order of Reference that referred the outstanding issues relating to damages and attorney’s fees in connection with the Contempt Decision, to Special Referee Thomas V. Dana (“Referee”) pursuant to CPLR 4317 §§ (a) and (b) for the Referee to hear and determine. On May 5, 2010, the Referee issued his Decision ordering that “plaintiff recover from the respondents, to include David McCallum [sic - should be McCallen], individually, jointly and severally, the sum of \$360,084.46 to include attorney’s fees, costs, expenses and disbursements with statutory interest thereon to run from September 11, 2006 to the date of entry of judgment herein” (Ex. F to P’s motion at p. 10).

### C. The Parties’ Positions

Plaintiff submits that the Court should impose a term of incarceration against Respondent McCallen in light of his numerous violations of court orders for which the Court has adjudicated him in contempt.

Respondents submit that they are entitled to the relief sought on the grounds that 1) Plaintiff failed to properly commence the underlying contempt proceeding; 2) the applicable restraining notices were improperly issued and served; 3) Plaintiff has not established the existence of a court order that Respondents violated; and 4) the Referee's Decision erroneously awarded legal fees for matters allegedly unrelated to the Contempt Decision.

Respondents also oppose Plaintiff's application for an Order incarcerating McCallen, submitting that civil contempt sanctions should be remedial and compensatory, rather than punitive. Respondents note that three of the cases cited by Plaintiff involved unpaid child support in the context of a divorce proceeding, a different scenario than the matter at bar, a corporate dispute involving an application to adjudicate a non-party in contempt.

### RULING OF THE COURT

#### A. Respondents' Motion with respect to the Referee's Decision

The Referee's Decision, which addressed outstanding issues relating to attorney's fees and damages, was issued in May of 2010 pursuant to "hear and determine" Orders of this Court. Where a referee acts pursuant to a hear and determine reference, he possesses all the powers of a court in performing a like function and his decision stands as the decision of a court. *Muir v. Cuneo*, 251 A.D.2d 638, 639 (2d Dept. 1988), citing CPLR §§ 4301 and 4319. An application to reargue the substantive issues decided by the Referee pursuant to a hear and determine reference should be directed to the Referee for resolution, and the Supreme Court has no authority either to entertain reargument of the merits or confirm the referee's decision. *Id.* Once judgment is entered on the referee's decision, that determination may be reviewed upon an appeal from the judgment. *Id.* Accordingly, the appropriate procedure for Respondents to challenge the Referee's Decision is an appeal of the Referee's Decision and the Court will not rule on Respondents' motion with respect to the Referee's Decision.

#### B. The Contempt Decision

By contesting the Plaintiff's motions for contempt on the merits without timely objecting that it did not comply with the notice and warning requirements of Judiciary Law § 756, McCallen waived any objections to the validity of the motions based on those requirements. *Laland v Edmond*, 13 A.D.3d 451 (2d Dept. 2004); *see also Matter of Rappaport*, 58 N.Y.2d 725, 726 (1982).

The Court declines to modify or vacate the Contempt Decision, concluding that the Court properly confirmed the determinations of the Referee that Respondents have committed contemptible acts. The Court also denies Respondents' motion to vacate the Restraining Notices.

### C. Civil Contempt Penalties

Unlike fines for criminal contempt where deterrence is the aim and the State is the aggrieved party entitled to the award, civil contempt fines must be remedial in nature and effect. *State of New York v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349 (1978). The award should be formulated not to punish an offender, but solely to compensate or indemnify private complainants. *Id.*

Plaintiff cites several cases in support of his request for incarceration of McCallen, including *Astrada v. Archer*, 71 A.D.3d 803 (2d Dept. 2010), which, Plaintiff's counsel asserts, stands for the proposition that "incarceration [was] ordered for violation of court order requiring the return of a real estate down payment" (P's Memorandum of Law at p.7). In *Astrada, supra*, the Second Department, *inter alia*, affirmed the trial court's order granting the branch of plaintiff's motion to hold a defendant in contempt of court based on her failure to comply with an order directing her to return the plaintiff's down payment and pay statutory interest to the plaintiff within 10 days after being served with notice of entry of the order. *Id.* at 805-806. In that order adjudging the defendant in contempt, the trial court directed the defendant's incarceration in the event she failed to return the plaintiff's down payment and pay statutory interest to the plaintiff within 10 days. *Id.* at 806. The defendant subsequently purged her contempt by returning the down payment and paying statutory interest to the plaintiff. *Id.* Thus, the Appellate Division in *Astrada* affirmed the decision of the trial court adjudging the defendant in contempt, but did not have occasion to rule on the issue of whether the incarceration of the contemnor was appropriate because defendant purged the contempt within the time prescribed by the trial court and, therefore, was never incarcerated.

Plaintiff also cites, *inter alia*, *Scarano v. Scarano*, 63 A.D.3d 716 (2d Dept. 2009) and *Berliner v. Berliner*, 33 A.D.3d 744 (2d Dept. 2006) as cases in which incarceration was appropriately imposed after a finding of contempt. Those cases involved the incarceration of a parent who failed to make required support child payments. Those cases are thus markedly

different from the present case in which Plaintiff seeks to incarcerate a non-party in a business dispute.

D. Application of these Principles to the Instant Action

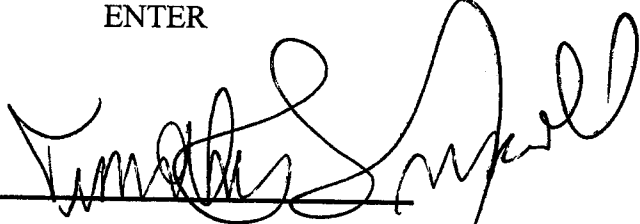
While the Court has the authority to impose a period of incarceration as to Respondent McCallen, the Court declines to do so. The Referee properly determined that Respondent McCallen committed contemptible acts, and the Court, accordingly, confirmed that determination. The Court, however, did not assume responsibility for this matter until May of 2009, after many of the relevant orders had been issued. Thus, the Court did not supervise the discovery that led to the initial referral of this matter to the Referee, and does not have first hand knowledge of the conferences and communications regarding the Respondents prior to that referral. Accordingly, the Court cannot conclude, under the circumstances, that incarceration is appropriate.

Nevertheless, the Court is troubled that McCallen has not complied with clear and unequivocal court orders. Thus, the Court imposes a fine of \$25,000 on Respondent McCallen and directs him to pay that sum to Plaintiff within one hundred and twenty (120) days of the date of this Order. The Court directs Plaintiff's counsel to serve a copy of this Order, with Notice of Entry, upon 1) Respondents' counsel via regular mail, and 2) upon Respondent via certified mail, return receipt requested, within twenty (20) days of the date of this Order.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
September 28, 2010

ENTER  
  
HON. TIMOTHY S. DRISCOLL

J.S.C  
**ENTERED**  
SEP 30 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE