

Kaplan Belsky Ross v Hosseiniyar

2011 NY Slip Op 30223(U)

January 18, 2011

Sup Ct, Nassau County

Docket Number: 001553-08

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

KAPLAN BELSKY ROSS,

Decision and Order

Plaintiff,

**MOTION SUBMITTED:
November 15, 2010
MOTION SEQUENCE:03
INDEX NO. 001553-08**

-against-

MONIR HOSSEINIYAR,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause	1
Affidavit in Opposition	2
Reply Affidavit	3

The Plaintiff, Kaplan Belsky Ross, LLP, moves this court, by Order to Show Cause, for a finding of contempt against Defendant, Monir Hosseiniyar, based upon Defendant's failure to comply with an information subpoena. For the reasons that follow, the Plaintiff's motion is granted.

Procedural History

A judgment in the amount of \$77,173.89 was entered by the Plaintiff and against the Defendant on October 22, 2009 (Ex. "B" to Plaintiff's Reply Affidavit). Following the entry of judgment, the Plaintiff served upon the Defendant an information subpoena on December 23, 2009. This information subpoena was served via certified mail/return receipt requested to the Defendant at 67-00 192nd St., Apt 702, Fresh Meadows, NY 11365 (Ex. "A" to Plaintiff's Reply

Affidavit). The return receipt slip indicates that the subpoena was signed for although it is unclear who actually signed the receipt. This court notes that the name of the person who signed the mail receipt does not appear to be that of the Defendant (Ex. "A" to Plaintiff's Reply Affidavit).¹

In July, 2010, the Plaintiff moved this Court for an order to compel the Defendant to comply with the information subpoena (Ex. "B" to Plaintiff's Reply Affidavit). By order of this Court dated August 17, 2010, the Plaintiff's motion was granted and the Defendant was directed to provide answers to the subpoena, with the admonition that the failure to comply could result in additional penalties and orders pursuant to CPLR 2308. This order was served upon the Defendant by regular mail and certified mail/return receipt requested on August 19, 2010.

The Defendant again failed to provide responses to the information subpoena and, accordingly, the Plaintiff moved this Court for an order of contempt. In support of its motion, the Plaintiff submitted an attorney affirmation, this Court's order dated August 17, 2010 directing the Defendant to respond to the information subpoena, and proof of service indicating that Plaintiff mailed a copy of the August 17, 2010 order to the Defendant, by regular and certified mail/return receipt requested, to Defendant's last known address at 67-00 192nd Street, Apt 702, Fresh Meadows, NY 11365-3736 ("previous address").

On October 19, 2010, the Defendant submitted her opposition to the motion for contempt, which contained responses to the information subpoena. Defendant's responses to the information subpoena, which, for the most part, indicated "N/A", were not made under oath as required by CPLR 5224(a)(3) (Ex. to Affidavit in Opposition).² In her affidavit in opposition, the Defendant stated:

I didn't receive any letter to appear at the Court, because I was not living in my previous address, and I didn't have any forwarding address with post office. I was

¹ While the Plaintiff provided proof of service of the information subpoena, there is no proof that the information subpoena was actually received by the Defendant (*Mailman & Flag DDS v Belvecchio*, 195 Misc2d 275 [Sup Ct App Term 2002] [although plaintiff affirmed that information subpoena was served upon defendant by certified mail/return receipt requested, plaintiff did not establish that envelope containing information subpoena was signed by defendant or anyone acting on his behalf, or even that it was received]; 54 NY Jur § 308 [actual receipt of subpoena is necessary as a predicate for contempt]). However, Defendant did obtain the information subpoena and provided responses thereto at a later date and, thus, the Plaintiff's failure to provide proof of actual receipt by the Defendant is not only academic but has been waived by the Defendant (*Laland v Edmond*, 13 AD3d 451 [by proceeding on the merits and not objecting to the father's failure to comply with the statutory notice and warning conditions, the mother waived any objections as to the validity of the contempt motion based on those requirements]; *Nelson v Nationwide Measuring Service, Inc.*, 59 AD2d 717 [2d Dept 1977]).

² The Defendant indicated under oath at a later time that the information subpoena was completed by her and that the statements contained therein were true and accurate to the best of her knowledge (Ex. "D" to Plaintiff's Reply at p 4).

not living in my previous address since July 1st 2010. I have been unemployed since January 2010, I have been having serious medical problems and been under Dr's treatment. And now I am facing the contempt of the Court, which I never received the letter to appear at the Court. I filled out the information subpoena and sent it to Kaplan, Belsky, Ross via fed ex before October 12, 2010. I answered all the questions to the best of my knowledge and he is not satisfied, and Mr. Ross requested I answer the questions under oath, which I did. Again, he is not satisfied with the answers the questions he was asking me, was not from information subpoena. I am asking the court to please remove the motion (withdraw the motion).

(Affidavit in Opposition).

On the return date of the motion, both parties appeared before this Court. The Plaintiff agreed to withdraw the motion for contempt provided that the Defendant answered questions under oath. During that questioning, the following testimony was elicited: The Defendant presently is living with a friend at 73-07 164th Street in Fresh Meadows and does not pay any rent there. Defendant refused to provide the name of the friend with whom she lives (Ex. "D" to Plaintiff's Reply at p 5). The Defendant moved from her previous address at 67-00 192nd Street in Fresh Meadows on June 30, 2010 (Ex. "D" to Plaintiff's Reply at pps 5-6). Defendant does not know the name of the landlord of her previous apartment (Ex. "D" to Plaintiff's Reply at p 6). The Defendant paid rent for her previous apartment by check drawn from her Citibank account (Ex. "D" to Plaintiff's Reply at p 6). Defendant still has an account at Citibank but refused to provide the account number or any other information with respect to the Citibank account, despite the fact that Defendant understands that under the subpoena she is required to give information concerning all of her assets (Ex. "D" to Plaintiff's Reply at pps 6-8). Notably, while the Defendant indicated under oath that she had a bank account at Citibank, her handwritten response to the information subpoena stated that she did not have a bank account anywhere (Ex. "D" to Plaintiff's Reply at p 8). Defendant also indicated that she was terminated from her last employment in January 2010 and that she is receiving unemployment in the amount of \$430 per week (Ex. "D" to Plaintiff's Reply at pps 8-9). When the Defendant was asked questions with respect to her divorce, she answered that she does "not have to answer all those questions" (Ex. "D" to Plaintiff's Reply at p 10). Defendant also asserted that she did not remember if she had any joint stock brokerage accounts or interests with her husband (Ex. "D" to Plaintiff's Reply at pps 11-12). Defendant further stated that she was not sure of the status of her divorce proceeding but nevertheless refused to give the Plaintiff any information with regard to the divorce proceeding, including the name of her divorce attorney (Ex. "D" to Plaintiff's Reply at pps 17-18). The Defendant also refused to provide the name of her accountant or a copy of her 2009 tax return (Ex. "D" to Plaintiff's Reply at pps 18-19).

The answers to the proposed questions were insufficient and elusive, according to the Plaintiff, and thus, the motion for contempt was never withdrawn (Ex. "D" to Reply Affidavit).

Analysis

In order to prevail on a motion for contempt, the moving party must demonstrate that the party charged violated a “clear and unequivocal court order, thereby prejudicing a right of another party to the litigation” (*Rienzi v Rienzi*, 23 AD3d 447, 449 [2d Dept 2005]; *see also Dankner v Steefel*, 41 AD3d 526 [2d Dept 2007]). Moreover, the “refusal or willful neglect of any person” to respond or obey an information subpoena is punishable as a contempt of court (CPLR 5251).

Pursuant to CPLR 5223, “[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . . [and] failure to comply with the subpoena is punishable as a contempt of court.” Disclosure of “all matter relevant to the satisfaction of the judgment” is a “generous standard and permits the creditor a broad range of inquiry” through the judgment debtor (McKinney’s Practice Commentaries by David D. Siegel, C5223:2). In that regard, CPLR 5223 encompasses a “broad criterion authorizing investigation through any person shown to have any light to shed on the subject of the judgment debtor’s assets or their whereabouts” (Siegel, NY Practice § 509).

Here, the information subpoena sought highly pertinent and material information. The Defendant’s responses, both on paper and under oath, were, on their face, false and evasive, amounting to no answer at all. Given the absence of any explanation for these nonresponsive answers, coupled with the Defendant’s outright refusal to answer certain questions relevant to the satisfaction of the judgment, this Court hereby finds the Defendant in contempt of court (*Quantum Heating Services Inc. v Austern*, 100 AD2d 843 [2d Dept 1984]; *Sepulveda v Aviles*, 7 Misc3d 1021(A) [Sup Ct NY County 2005]). Accordingly, it is hereby:

ORDERED that the Plaintiff’s motion for an order adjudicating Defendant in contempt of court for her failure to comply with an information subpoena served on December 23, 2009, is granted; and, it is further

ORDERED AND ADJUDGED that Defendant’s disobedience of the subpoena has defeated, impaired, impeded, and prejudiced the Plaintiff’s rights 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 may purge this contempt by appearing for a deposition in the Supreme Court, Nassau County, Lower Level, to be sworn to at such time and answer questions put to her by counsel, said deposition to occur within 15 days after service upon her of a copy of this order as directed herein (excluding the day of service), or the next business day if such period ends on a Saturday, Sunday or legal holiday. Another date and time may be selected by the parties, but such date, once established, shall have the same force and effect as if set down in this Order. This is a FINAL opportunity to purge the contempt; and, it is further

ORDERED that if Defendant fails to comply with this purge provision, and upon Plaintiff counsel's filing of a sworn affidavit attesting to proper service of this Order and the failure of the Defendant to appear and purge the contempt thereunder, as punishment, the Clerk shall enter a money judgment against the Defendant in the sum of \$250, and the court shall issue a warrant directing the sheriff of any county of the State of New York, wherein Defendant may be found, committing the Defendant to jail, there to remain until Defendant provides complete responses to the questions put forth to her as per the information subpoena or until she is discharged according to law, pursuant to CPLR 2308.

This shall constitute the decision and order of the Court.

Dated: January 18, 2011



Hon. Vito M. DeStefano, J.S.C.

ENTERED

JAN 24 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**