

**Rubin v Salters**

2011 NY Slip Op 30341(U)

February 3, 2011

Sup Ct, Nassau County

Docket Number: 011687/07

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

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MARK RUBIN, individually and derivatively on behalf  
and in the right of PRODIGY HOMES, LLC, MJJ  
REALTY CO., LLC, MJM SOUTH CAROLINA, INC.,  
MJM NORTH CAROLINA, INC., MJM LOUISIANA  
CORPORATION and MJM CAPITA PARTNERS, INC.,

Plaintiffs,

INDEX NO.: 011687/07  
MOTION DATE: 1/13/11  
SEQUENCE NO.: 29

- against -

JAMES SALTERS, DANISMINE CORP., CATALYST  
DEVELOPMENT CORP., SALTERS AND SALTERS,  
MARTIN J. BUSH, RICHARD BUCKHOLZ, and, as  
nominal derivative defendants, PRODIGY HOMES, LLC,  
MJM REALTY CO., LLC, MJM SOUTH CAROLINA,  
INC., MJM NORTH CAROLINA, INC., MJM LOUISIANA  
CORPORATION and MJM CAPITAL PARTNERS, INC.,

Defendants.

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Papers read on this motion:

Order to Show Cause for Contempt .....	1
Affidavit in Opposition of James J. Salters .....	2

**PRELIMINARY STATEMENT**

Defendant Buckholz moves by Order to Show Cause for a finding of civil and criminal contempt against James Salters and Martin J. Bush for failure as follows:

a. Pursuant to Judiciary Law §753(A)(3), declaring Salters and Bush in civil contempt for failure to comply with Court mandates of March 25 2009, June 23, 2009 and June 21, 2010 in which the Court directed Salters and Bush to pay Howard Fielstein ("Fielstein") fees for service as a neutral forensic accountant;

b. Pursuant to Judiciary Law § 773 imposing on Salters and Bush fines in amounts sufficient to indemnify Buckholz, Plaintiff, Rubin and Fielstein for expenses incurred by them in connection with Fielstein's appointment, and directing payment to Buckholz, Rubin and Fielstein;

c. Committing Salters and Bush to prison as punishment for civil contempt for a fixed period and until any and all fines and damages imposed by the Court are paid, pursuant to Judiciary Law § 773;

d. Declaring Salters and Bush in criminal contempt for willful disobedience of Court Mandates;

e. Imposing punishment pursuant to Judiciary Law § 751 on Salters and Bush by \$1,000 fine on each and 30 days of imprisonment for each violation;

f. Discharging Fielstein due to Salters' and Bush's willful non-cooperation with Fielstein in his investigation, including failure to respond to requests for information by Fielstein;

g. Pursuant to CPLR § 3126, precluding Salters and Bush from testifying, objecting, cross-examining, or offering up any evidence at the inquest on damages to be held before Referee Dana based on their willful failure to cooperate with Fielstein's investigation and their willful failure to pay Fielstein for his services; and

h. Awarding Buckholz costs, disbursements and reasonable attorney's fees in connection with this application.

Salters has submitted an affidavit in opposition to the requests. He asserts that the Court has previously ruled that the burden of payment will not be shifted until after the Liability Hearing; that the Court has previously determined that he should be permitted to defend himself, cross-examine and introduce witnesses in order to mitigate damages; Fielstein's work is not directly related to the case and his services were incurred in an effort to achieve settlement only; previous application have resulted in determinations that no further decisions will be rendered

until the conclusion of the Liability Hearings; he is unable to open disks submitted together with the motion; Buckholz and Rubin have needlessly delayed the Liability Hearing; and Rubin and Buckholz have already testified that there is no liability by the defendants to the plaintiffs.

He then requests that the Order to Show Cause be denied in its entirety, that Rubin and Buckholz be held in contempt for failure to comply with the Court's directive that the Liability Hearing take place on October 22, 2009, that the Court direct Referee Dana to review defendant's Bates Stamps 1 — 300 before any inquest is scheduled, and that if no Hearing is scheduled immediately, that the defendants be determined to have no liability to plaintiffs.

#### DISCUSSION

By Order dated March 27, 2009, the Court appointed Howard M. Fielstein ("Fielstein") of Margolin, Winer & Evens, LLP as an independent forensic accountant. At Salters' suggestion, the cost of these services was to be split equally among Rubin, Buckholz, Bush & Salters. Salters paid an initial \$1,500, but has failed to pay his \$2,532.50 share as invoiced by Fielstein on 5/11/09 or his overdue balance of \$2,250.00, for a total of \$4,782.50. Salters' claim that the Court has not shifted the burden of payment, despite his spoliation, is correct. He is not the subject of a contempt motion for failure to pay the total balance due Fielstein, only his share.

Defendant Bush, against whom a default judgment has been entered for his failure to answer, has allegedly paid none of the \$6,250.00, representing his 25% share of the fee for the independent forensic accountant.

Defendant Bush is in default on the motion and defendant Salters has appeared by affidavit dated January 11, 2011. The motion return date was January 13, 2011, and the parties who appeared on that date had not yet received a copy of the document.

It is significant that Salters does not deny that he is in default on his payment of his share of the outstanding balance due Fielstein. In addition to the Order of March 27, 2009, the Court further directed that outstanding balance be paid within 30 days of the Order of October 22, 2009. (Exh. "X"). Salters and Bush are in violation of these clear directives of the Court, and are guilty of civil contempt in violation of Judiciary Law § 753 (3).

#### Civil Contempt

Civil contempt has as its aim the vindication of a private party to litigation and any

sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate.<sup>1</sup> To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed.<sup>2</sup> The party to be held in contempt must have knowledge of the order, although actual service on the party is not required.<sup>3</sup> In order to find a party in contempt, actual prejudice to a party to the litigation must be demonstrated.<sup>4</sup>

The Court now exercises its discretion in shifting the cost of the independent forensic accountant. Bush is directed to pay to Fielstein his unpaid share of the statement, in the amount of \$6,282.50, and \$3,141.25 to both Rubin and Buckholz, constituting reimbursement of 50% of their share of the fees incurred. Salters is directed to pay the outstanding balance of his share, \$4,782.50 to Fielstein and \$3,141.25 to each of Rubin and Buckholz, as reimbursement for expenditure for the forensic accounting services of Fielstein.

#### Criminal Contempt

Unlike civil contempt, criminal contempt is intended to punish, since it involves an offense against judicial integrity, and is designed to protect the process rather than reimburse another for their loss.<sup>5</sup> “Although the line between the civil and criminal contempt may be difficult to draw in a given case and the same act may be punishable as both a civil and criminal contempt, the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct.”<sup>6</sup>

Whether a party is entitled to the panoply of rights attendant to a criminal trial depends

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<sup>1</sup> *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *See also, Thorsen v. Nassau County Civil Services Com'n.*, 32 A.D.3d 1037 (2d Dept. 2006).

<sup>2</sup> *Pereira v. Pereira*, 35 N.Y.2d 301, 308 (1974).

<sup>3</sup> *People ex rel. Stearns v. Marr*, 181 N.Y. 463, 470 (1905).

<sup>4</sup> *Matter of McCormick v. Axelrod* at 583.

<sup>5</sup> *King v. Barnes*, 113 N.Y. 476 (1889).

<sup>6</sup> *McCain v. Dinkens*, 84 N.Y.2d 216, 226 (1994), citing *Matter of McCormick v. Axelrod*.

upon whether the criminal contempt is petty or serious.<sup>7</sup> In that case the Supreme Court determined that where the contemplated penalty was 24 months imprisonment, the party was entitled to a jury trial.

Judiciary Law § 751 limits the punishment for criminal contempt to a \$1,000 fine and 30 days in jail, consistent with a petty offense. Nevertheless, while a jury trial would not be required, in the event of a criminal contempt hearing, for conduct not committed in the presence of the Court, the offender is entitled to an opportunity to be heard after notice.<sup>8</sup> The Court at this time finds Bush and Salters are not in criminal contempt.

The Court, however, reserves its right to reopen the criminal contempt matter on notice to defendants Bush and Salters in the event of their failure to comply with this Order of the Court.

Movant also seeks to preclude defendants Bush and Salters from participating in the assessment of damages, assigned to Court Attorney/Referee Thomas Dana. “Unless the damages sought in an action are for a ‘sum certain or for a sum which can by computation be made certain’ (CPLR 3215, subd [a], judgment against a defaulting party may be entered only upon application to the court along with notice to the defaulting party and ‘a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages’.”<sup>9</sup>

In circumstances in which the trial court barred defendant from participating in an inquest proceeding, the Second Department, “(a)ssuming arguendo that an order precluding the defendant from offering proof at the inquest may have been warranted . . .”, nevertheless conditioned the preclusion on defendant’s disclosing the requested financial materials, and appear for an examination before trial. It noted, however, that if disclosure is not forthcoming, ‘the appropriate remedy in this case is to preclude the defendant from offering proof at the inquest’.<sup>10</sup> The decision did not, however, preclude defendant from participating in cross-

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<sup>7</sup> *Bloom v. State of Ill.*, 391 U.S. 194 (1968).

<sup>8</sup> *Matter of Douglas v. Adel*, 269 N.Y. 144, 147 (1935).

<sup>9</sup> *Rokima Optical Co., Inc. v. Camera King, Inc.*, 63 N.Y.2d 728 (1984), citing *Reynolds Securities v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568 (1978).

<sup>10</sup> *Grande v. Grande*, 129 A.D.2d 612, 613 (2d Dept. 1987).

examination, even if there was no compliance with the conditional order of preclusion.

In this case given the default of Bush in appearing at all, and the striking of Salters' answer for spoliation of evidence, the Court determines that neither defendant Bush or Salters are authorized to produce witnesses or offer documents in the course of the inquest. They are authorized to participate, but only to the extent of cross-examining witnesses, based solely upon documents submitted by plaintiff in connection with the inquest hearing.

Movant also requests the award of counsel fees incurred in connection with this application to the Court. As a general proposition, awards of counsel fees are limited to those provided for by agreement or statute.<sup>11</sup> No such agreement or statute has been enunciated, and the Court therefore declines to award counsel fees.

This constitutes the Decision and Order of the Court.

Dated: February 3, 2011

  
J.S.C.

**ENTERED**

FEB 07 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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<sup>11</sup> *Hempstead General Hosp. V. Allstate Ins. Co.*, 106 A.D.2d 429 (2d Dept. 1984); *aff'd*. 64 N.Y.2d 958 (1985).