

Kahn v Enbar

2011 NY Slip Op 31192(U)

April 26, 2011

Sup Ct, NY County

Docket Number: 115691/2010

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Michele Kahn, as Receiver,
etc.

INDEX NO.

115691/10 *th*

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -
Adam Enbar et al.

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 ANNEXED DECISION AND ORDER.**

Settle Order/Judgment.

Dated: 4/26/11

[Signature]
J.S.C.

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: CIVIL TERM PART 12

-----X
MICHELE KAHN AS RECEIVER OF
50 EAST 119TH STREET, LLC,
Petitioner,

Index Number 115691 /2010
Mot. Seq. No. 001
Submission Date March 28, 2011

against

ADAM ENBAR and FLATIRON EQUITIES LLC,
Respondents.
-----X

**DECISION AND ORDER AND
JUDGMENT**

For Petitioner:
Kahn & Goldberg, LLC
By: Michele Kahn, Esq.
708 Third Avenue, 19th Floor
New York, New York 10017
(212) 687-5066

For Respondents:
No appearance

Papers considered in review of this petition for contempt:

Papers	Document Number
Amended Notice of Motion, Affidavits, and Exhibits	1

PAUL G. FEINMAN, J.:

In a related mortgage foreclosure proceeding, petitioner in this special proceeding, Michele Kahn, Esq., was appointed to act as Receiver for a property located at 50 East 119th Street, New York, New York (Property) (Pet. Ex. A). In her capacity as Receiver, she now moves pursuant to Judiciary Law § 753 for an order adjudicating respondents Adam Enbar and Flatiron Equities LLC in civil contempt of this court's prior orders. Neither defendant has appeared or opposed this application. For the reasons which follow, the petition is granted to the extent indicated.

Section 5104 of the Civil Practice Law and Rules provides that an order may be enforced by serving a certified copy of the order upon the party or other person or entity required to obey it and, if the party or entity refuses or wilfully neglects to obey it, then the party or entity may be

punished for contempt of the court. Article 19 of the Judiciary Law provides that a court has “the power to punish, by fine and imprisonment, . . . misconduct, by which a right or remedy to a civil action or special proceeding pending in the court may be defeated, impaired, impeded, or prejudiced” (Judiciary Law § 753 [A]). The purpose of the fine is not to punish, but to compensate or indemnify the complainant (*see State of New York v Unique Ideas, Inc.*, 44 NY2d 345, 349 [1978]). Fines, costs, and counsel fees may be assessed (Judiciary Law § 773; *see Quantum Heating Services Inc. v Austern*, 121 AD2d 437, 438 [2d Dept. 1986] [holding that reasonable attorney fees may be included as part of the fine in the absence of actual damages]). Under the statute, the fine may not exceed the amount of the complainant’s costs and expenses, plus an additional \$250.00 (Judiciary Law § 773).

A respondent who fails to appear at the contempt hearing waives any due process rights it may have had to the hearing, including arguing that a finding of contempt is not warranted (*see Green v Green*, 288 AD2d 436, 337 [2d Dept. 2001]). Where as here, when the respondents have not appeared, and there is no actual loss or injury, upon granting the petition, the order must include a provision providing leave to the offenders to purge themselves of the contempt within 10 days after personal service of the order (Judiciary Law § 773). It is the burden of the contemnor to demonstrate that it has purged the contempt or that it is impossible to do so (*Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 57 AD3d 870, 871 [2d Dept. 2008]).¹

¹The contemnor is to appear within 10 days after personal service of the order and satisfy the court that it is unable to pay the fine or, in the discretion of the court, to give an undertaking in an amount fixed by the court conditioned upon payment of the fine plus costs and expenses and the respondent’s appearance and performance of the acts or duties at issue in the contempt proceeding (Judiciary Law § 773).

Here, the January 10, 2010 clear and unambiguous order appointing petitioner as Receiver also directed petitioner to collect and receive all the rents and license fees that were unpaid, due, or hereafter to become due (Pet. Ex. A). It also authorized petitioner to institute and carry on all legal proceedings necessary for the protection of the Property (*id.*). Furthermore, the court ordered anyone holding any deposits or advances of rental as security, rent lists, orders, unexpired and expired leases, agreements, correspondence, notices and registration statements, relating to rental space or facilities in the premises, to turn them over to the Receiver when requested (*id.*).

On June 9, 2010, petitioner served a Notice to Attorn to Receiver with an attached Order of the Court with notice of entry on respondent Flatiron Equities LLC by ordinary mail (Pet. Ex. C). Flatiron was the property manager of 50 East 119th Street. The Notice to Attorn included the Receiver's demands that Flatiron pay over to the Receiver all rents, deposits, advances of rental payments, and security deposits, as well as a demand to stop managing and operating the Property.

Flatiron allegedly did not turn over the requested monies or documents, and has remained unresponsive to Receiver's telephone and written requests (Pet. ¶ 9-12). Instead, petitioner has documentary evidence showing that Flatiron has continued to collect rents from at least some tenants, with one such letter dated October 28, 2010, and signed by "Adam Enbar/Property Manager" (Pet. Ex. E, G).² Petitioner thus argues that Flatiron continues to collect rent and manage the Property, and also has told at least one tenant to ignore the Receiver (Pet. ¶ 13-17; Pet. Ex. E, F, G, H). Petitioner states that she has been unable to collect rent from 13 tenants and

²An invoice dated September 9, 2010, to a different tenant is merely signed "Management Office" (Pet. Ex. E).

believes this is due to actions by Flatiron (Pet. ¶ 18-20).

By facsimile and mail, petitioner wrote to Flatiron on November 1, 2010, reminding it that it had been informed several months prior and several times thereafter, both by telephone and in writing, that she had been appointed Receiver with particular duties in regard to the building, and warning that because Flatiron refused to stop management and collection of rents, she was prepared to file a motion for contempt (Pet. Ex. D). No response was received, and defendants have not provided any of the requested information or documentation relating to the Property (Pet. ¶ 12).

Petitioner commenced this special proceeding by filing this petition on December 3, 2010, and filing an amended notice of petition on December 9, 2010, and then serving both Flatiron and its property manager, Enbar. After this petition was marked submitted on January 21, 2011, the parties to the underlying proceeding, and petitioner herein, were scheduled to appear in February for a compliance conference with the court, which was adjourned on consent to March 16, 2011, and then again until May 25, 2011. The court was also asked to hold this petition in abeyance until March 28, 2011, in the expectation of forthcoming compliance by Flatiron and Enbar; however, the court has since been notified that there has not been compliance and a decision is necessary. Neither respondent has answered the petition or otherwise appeared.

The court has the power to punish an individual or entity "regardless of whether he was a party to the underlying action or not, as long as he had been personally served and had knowledge of the . . . order." (*Citibank, N.A. v Anthony Lincoln-Mercury, Inc.*, 86 AD2d 828, 829 [1st Dept. 1982]; see also *Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482, 483 [1st Dept. 2003] [holding that where the record showed that the defendants were served with the

summons and complaint, the default judgments, the information subpoenas, the contempt motion, and the contempt order, it “defie[d] credulity” to believe that one of the defendants, although not a party to the action, was unaware of the documents, and could not be punished for defendants’ contempt]). Service on a nonparty to the underlying action, such as the respondents are here to the foreclosure proceeding, must follow the same requirements of a special proceeding. A nonparty “who is not privy to that action and is about to be made a party to a proceeding which may result in fine and incarceration is entitled to the same level of notice required to institute any special proceeding against any new party.” (*Alpert v Alpert*, 2010 NY Slip Op 31011U, *5 [Sup Ct, NY County 2010]; *Long Island Trust Co. v Rosenberg*, 82 AD2d 591, 598 [2d Dept. 1981]).

Service on Flatiron Equities LLC

Service of process on a limited liability company is governed by CPLR 311-a, and alternatively by Article 3 of the Limited Liability Company Law. Limited Liability Company Law § 303 provides that service of process may be made by serving the office of the New York State Secretary of State as the agent of a domestic limited liability company. Service is made by “personally delivering to and leaving with . . . any person authorized by the Secretary of State to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process . . . Service of process on such limited liability company shall be complete when the secretary of state is so served.” (LLCL § 303 [a]).

According to the affidavit of service, Flatiron was served by service on the Secretary of State on December 20, 2010. (LaPointe Aff.). The petition included the mandatory warning indicating that the motion seeks punishment for contempt (Judiciary Law § 756). This service comports with the service requirements set forth under Limited Liability Company Law § 303

(a). Hence, service of process on Flatiron was complete. As the time to answer has elapsed and Flatiron has not appeared to defend itself, it is deemed in default.

Service on Adam Enbar

CPLR 308 provides that personal service of process is required on an individual by in-hand delivery, by service on an authorized person and by mail, or by affixing to the door of a business or home and by mail. CPLR 312-a (a) provides an alternative to CPLR 308 in which a petition may be served by "mailing to the person to be served, by first class mail, postage prepaid, a copy of the . . . notice of petition, together with two copies of a statement of service by mail and acknowledgment of receipt . . . with a return envelope, postage prepaid, addressed to the sender." Service is complete when the signed acknowledgment is mailed or delivered to the sender. (CPLR 312-a [b]).

Petitioner attempted twice after filing the amended notice of petition to serve Enbar at different addresses alleged to be his address by personal delivery pursuant to CPLR 308 (1).³ First, petitioner attempted to serve Enbar, care of Flatiron Equities, on December 14, 2010, at 1:30 pm at 111 Fifth Avenue, 9th Floor, New York, NY, but the building's security guard stated that there was no Enbar at that location and that the 9th floor was occupied by a modeling agency (Figueroa Aff.). Second, petitioner attempted to serve Enbar on December 15, 2010, at 1:00 pm at 264 Elizabeth Street, Apt. 3, New York, NY, but no one answered the door bell and the directory of the building listed another name for the apartment occupant (Pringle Aff.).

Petitioner then mailed Enbar the petition, care of Flatiron Equities, by first class mail on

³Petitioner's initial attempt to serve Enbar by personal delivery was on December 8, 2010, one day before the amended notice of petition was filed on December 9, 2010 (Mills Aff.). Service was attempted upon him, care of Flatiron Equities, at 46 Trinity Place, Suite 200, New York, NY, but there was no listing for his name at this address.

December 17, 2010, to the Trinity Place address. However, simply mailing the petition does not comport with service under CPLR 308 (2) or (4), nor with the alternative of CPLR 312-a which requires the mail to be accompanied by an acknowledgment of receipt which is to be returned to the sender. Thus, the court lacks personal jurisdiction over Enbar.

Accordingly, the court denies this branch of the petition with leave to re-serve the petition and a copy of this decision and order on Enbar in accordance with CPLR 308 or CPLR 312-a. If petitioner believes that service in accordance with CPLR 308 (1) (2) or (4) is impracticable, she may, of course, apply upon motion without notice, for an order directing such other manner of service as the court may direct pursuant to CPLR 308 (5).

Petitioner having established through her affidavit and documentary evidence that respondent Flatiron Equities LLC, has wilfully failed to comply with the court's Order and the Notice to Attorn in that it has continued to collect rents and operate the Property, and refused to account and turn over funds or records to Receiver Kahn although notified on many occasions to do so, and Flatiron failing to answer the petition or appear on the return date, the petition is granted without opposition.

Settle order and judgment on five days' notice adjudicating Flatiron Equities LLC in contempt of this court's January 10, 2010 order and imposing a fine in the amount of \$250, and awarding the costs and expenses of the complainant, here \$3,500, pursuant to Judiciary Law § 773, to be paid within 10 days after personal service of a copy of the court's decision, order and judgment.

Said order and judgment should also provide that the respondent Flatiron Equities LLC may purge this contempt by completing the following within 10 days of personal service upon it of a copy of the court's order with notice of entry: a) turn over to the Receiver and account for


all security deposits; b) turn over to the Receiver and account for all rents and proceeds it has collected and all expenses it has paid for the Property from July 1, 2010, to the present; c) turn over to the Receiver all books and records for the Property, including but not limited to all leases, rent rolls, contracts, Quickbooks, accounting and financial records, checkbooks, bank statements, contracts, and government filings; d) send a letter to all tenants of the Property stating that the Receiver and her managing agent are in control of the Property and that all rents are to be paid to the Receiver until further Order of the Court; e) provide contact information for all vendors, suppliers, employees, or agents of the Property.

Said order and judgment should further provide in the event of respondent's failure to purge the contempt, or to pay the fine and costs, that petitioner may apply ex parte for an order of commitment upon proof by affidavit of default in payment and compliance with the other requirements.

Finally, the order should provide that the petition to punish Adam Enbar individually for contempt is denied without prejudice to renewal upon re-service of a copy of the petition and this decision and order upon him.

This constitutes the court's decision.

Dated: April 26, 2011
New York, New York



J.S.C.