

Mazzei v All Is. Equity, Inc.

2011 NY Slip Op 31754(U)

June 16, 2011

Sup Ct, Nassau County

Docket Number: 13529/10

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MICHAEL MAZZEI,

Plaintiff,

- against -

ALL ISLAND EQUITY, INC. and THOMAS
DEBONIS,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 13529/10

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves pursuant to CPLR 5251 and Judiciary Law § 753 to adjudge the defendant in contempt of court, to compel and direct the defendant to comply with a post judgment subpoena and to punish the defendant by fine or imprisonment for willful and deliberate failure to comply with a post judgment subpoena. The plaintiff also seeks a \$5000.00 award for reasonable counsel fees and disbursements payable to the plaintiff's attorney with leave to seek further counsel fees. The defendant opposes the motion as frivolous, and requests the motion be denied, or in the alternative set the matter down for a hearing.

The plaintiff commenced the underlying action in July 2010 against this defendant and a corporate defendant. The Nassau County Clerk entered a default judgment against the defendant on November 10, 2010. The judgment remains unsatisfied. The plaintiff's attorney served the defendant with the post judgment subpoena for a January 28, 2011 deposition, but the defendant failed to appear.

The plaintiff's attorney states, in a February 4, 2011 affirmation, the defendant was personally served with the post judgment subpoena. The plaintiff's attorney asserts there is no other remedy other than the contempt procedure. The plaintiff's attorney contends the plaintiff's financial rights have been frustrated by the defendant's nonappearance. The plaintiff's attorney avers a warrant should issue to the Nassau County Sheriff's Department to arrest the defendant, and to have the defendant serve the maximum incarceration permitted by law.

The defense attorney details, in a March 28, 2011 affirmation, the alleged background of the financial dealings of these parties, and the underlying circumstances of the action prior to the default. The defense attorney asserts the alleged substituted service of the summons and complaint and the alleged service of entry of judgment notice were improper. The defense attorney avers the defendant does not dispute service of the post judgment subpoena directing the plaintiff to appear for a January 28, 2011 deposition and produce certain documents. The defense attorney states the defendant called the law offices of the plaintiff's attorney several times to ascertain about the judgment and the

subpoena, but his calls were never returned by the plaintiff's attorney, so he did not appear on January 28, 2011. The defense attorney contends that nonappearance was not a wilful, deliberate and unjustified attempt to frustrate and impede the plaintiff's rights.

The defense attorney refers to another Nassau County Supreme Court action against the defendant's wife, and adds the lack of response by opposing counsel and the similarity of that matter with this action resulted in this defendant's assumption albeit incorrect that this action was closed nor discontinued. The defense attorney states a defense motion to vacate the default judgment is forthcoming. The defense attorney details the circumstances of this order to show cause; the defense attorney states the defendant was never personally served with the instant motion; and the defense attorney submits opposing counsel's conduct was improper regarding service of the instant motion.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. 22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

The Court determines the parties have not met their burdens with respect to the provision sanctions under 22 NYCRR § 130-1.1.

Judiciary Law § 753 (5) provides:

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, in any of the following cases: A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

Judiciary Law § 754 provides, in pertinent part:

In a case specified in section seven hundred and fifty-three, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offense must be punished as prescribed in the following sections of this article.

So, the Second Department holds:

Pursuant to Judiciary Law § 753, a court wishing to punish a party for violating a temporary restraining order or preliminary injunction can only impose a fine or imprisonment, or both. The Supreme Court exceeds its authority when it fashions a remedy not contemplated by the statute (*see Pitterson v. Watson*, 299 A.D.2d 467, 750 N.Y.S.2d 317; *McCain v. Dinkins*, 192 A.D.2d 217, 601 N.Y.S.2d 271; *Couture v. Garland*, 105 A.D.2d 1158, 482 N.Y.S.2d 182)

Parker v. Top Homes, Inc., 58 A.D.3d, at 819; *see also Pitterson v. Watson*, 299 A.D.2d 467, 750 N.Y.S.2d 317 [2nd Dept.,2002].

Judiciary Law § 773 provides:

If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Where it is not shown that such an actual loss or injury has been caused, a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

The defendant failed to comply with a post judgment subpoena. The defendant fails to proffer a reasonable excuse for January 28, 2011 nonappearance and failure to provide certain documents at the deposition. The Court determines the defendant committed the offense charged; and it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the plaintiff. The Court holds the defendant in civil contempt for violating a post judgment subpoena (*see* Judiciary Law §


770).

Accordingly, the motion is granted only to the extent the Court finds the defendant is in contempt of Court ,has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the plaintiff. The Court imposes a \$250.00 fine and the plaintiff is awarded the sum of \$5000 as reasonable attorneys fees and costs against the defendant Thomas Debonis. This order shall be conditional unless the defendant purges himself of contempt by appearing in compliance with the post judgment subpoena within 10 days of personal service of a copy of this order

So ordered.

Dated: **June 16, 2011**

ENTER:


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NASSAU COUNTY
COUNTY CLERK'S OFFICE

FINAL DISPOSITION