

**J.P. Morgan Chase Bank, N.A. v Strands Hair Studio,
LLC**

2011 NY Slip Op 32802(U)

October 25, 2011

Supreme Court, Nassau County

Docket Number: 15554/08

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

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

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X
**J.P. MORGAN CHASE BANK, N.A., as successor-by-
assignment from The Bank of New York,**

TRIAL/IAS PART 21

INDEX # 15554/08

Plaintiff,

-against-

**STRANDS HAIR STUDIO, LLC., SHARON A. PAYNE
a/k/a SHARON A. ROLLOCK-PAYNE,**

Defendants.

-----X
SHARON A. PAYNE,

Third-Party Plaintiff,

-against-

STEPHANIE ORR a/k/a STEPHANIE JONES,

Third-Party Defendant.

-----X

By so-ordered stipulation of counsel (Brown, J., May 11, 2011) a hearing was directed to determine whether third-party defendant Stephanie Orr a/k/a Stephanie Jones should be held in contempt due to an alleged failure to comply with two orders of this court (Palmeri, J., May 18, 2010 and November 16, 2010).

The original action involved enforcement of a loan agreement made by defendant Strands Hair Studio that was guaranteed by defendant/third-party plaintiff, Sharon Payne. The case history reveals entry of judgment in favor of the plaintiff, J.P. Morgan Chase, against the defendant, Strands Hair Studio, and defendant/third-party plaintiff, Sharon Payne, in the amount of \$58,195.38 (Palmeri, J., August 21, 2009). By order of this court, the third-party action was severed from the main action (Palmeri, J., December 17, 2009).

On or about January 29, 2010, third-party plaintiff served a "Demand for the Production of Documents" upon counsel for the third-party defendant. The Demand states in relevant part that the following documents shall be produced:

"1. All books and records concerning every business operating at the premises known as 2077 Grand Avenue, Baldwin, New York, including, but not limited to certificates of incorporation, licenses of the business and/or employees of said business, tax returns, financial statements, payroll records, general ledgers and general journals, whether kept on paper or store electronically. . .

3. All bank statements concerning any account into which revenues received by any business operating at the premises known as 2077 Grand Avenue, Baldwin, New York are deposited, including, but not limited to bank accounts in the name of the Third-Party Defendant."

By order of this court (Palmeri, J., May 18, 2010) Justice Palmeri directed the third-party defendant to comply, by 5:00 p.m. on June 1, 2010, with document demand numbers 1 and 3 from 2006 until the date of his order. Document demand number 2 was stricken. Justice Palmeri further directed that if third-party defendant failed to timely comply within the aforesaid directed period, third-party defendant would be precluded from offering any evidence at a trial, in a motion or in any other matter associated with this case. All other sanctions were denied.

By further order of this court, Justice Palmeri clarified his prior order of May 18, 2010 stating, "The imposition of the penalty of preclusion is not intended to be the sole and only remedy for non-compliance with the Court's Prior Order, and in the event of non-compliance, Payne may seek and the court shall consider such other remedies as the Court considers just and proper." (Palmeri, J., November 16, 2010)

The only witness at this hearing was third-party defendant Stephanie Orr. She testified that she worked at Strands from February 2007 through December 2009. A New York State license was issued to her pursuant to Article 27 of the General Business Law to operate an appearance enhancement business at Strands located at 2077 Grand Avenue, Baldwin, New York. Ms. Orr testified that she operated a nail and hair salon at that location. The testimony revealed that Ms. Payne purchased the business with Ms. Orr, and Ms. Orr then purchased a former beauty salon diagonally across the street at 2068 Grand Avenue on or about January 2010. Ms. Orr testified that she maintained a separate bank account for that business location.

Ms. Orr testified that her lawyer read the contents of Justice Palmeri's May 18, 2010 order to her. Further, she had knowledge of the order and the language it contained. However, Ms. Orr testified that she has no recollection when she learned of the content of that order, nor did she have any knowledge of the contents of the November 16, 2010 order.

Ms. Orr further testified that she was aware that she had to produce all books and records concerning every business operating at the premises 2077 Grand Avenue, Baldwin. She alleged that she produced everything she had in May 2009, including a general ledger. However, she conceded that she did not provide the bank statements and that between February 2007 and December 2009 she received monthly personal bank statements for the business located at 2077

Grand Street known as Strands. In reality, Ms. Orr conducted the corporate business through her personal bank account. As of the date Ms. Orr testified, she was still in possession of these bank statements. There was also a laptop computer that contained business records which allegedly crashed in December 2008 and in the summer of 2009. Before the first computer crash, Ms. Orr did not believe any of the computer records were turned over to third-party plaintiff Payne. Ms. Orr also states that she did not produce any further documents subsequent to May 2009.

On cross-examination, Ms. Orr testified that Ms. Payne left the business and removed a computer from 2077 Grand Avenue. Before the computer was removed, she alleges that she did not have any books or records with respect to the business located at 2077 Grand Avenue. Ms. Orr testified that subsequent to that date she was paying the expenses for the business. In May 2009, Ms. Payne returned to 2077 Grand Avenue with her attorney. At that time Ms. Orr provided her with documents such as receipts for spa services and bill payments.

"In order to find a party in civil contempt of court pursuant to Judiciary Law § 753, the applicant must demonstrate by clear and convincing evidence that the alleged contemnor has intentionally engaged in conduct which violated a lawful order of the court clearly expressing an unequivocal and explicit mandate (*see McCain v. Dinkins*, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335, *Pereira v. Pereira*, 35 N.Y.2d 301, *Ottomanelli v. Ottomanelli*, 17 A.D.3d 647, *Hoglund v. Hoglund*, 234 A.D.2d 794, 651 N.Y.S.2d 239), thereby prejudicing the right of a party to the litigation (see Judiciary Law § 753 [A]; *Matter of Department of Env'tl. Protection of City of N.Y. v. Department of Env'tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 240)." (*Miller v Miller*, 61 AD3d 651).

"Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Finally, prejudice to the right of a party to the litigation must be demonstrated." (*McCormick v Axelrod*, 59 N.Y.2d 574 [1983])

"To sustain a civil contempt, a lawful judicial order [or judgment] expressing an unequivocal mandate must have been in effect and disobeyed" (*McCain v. Dinkins*, 84 N.Y.2d 216, 226 [1994]). In support of her motion to hold third-party defendant in contempt, third-party plaintiff was required to establish with reasonable certainty that third-party defendant failed to turn over the books and records as documented in discovery demands 1 and 3 that were in her possession at the time of the prior discovery order (see *Pennington v Woytash*, 59 A.D.3d 1035; *Matter of Hynes v. Hartman*, 63 A.D.2d 1, 4, *appeal dismissed* 45 N.Y.2d 838, *Matter of Hynes v. Sloma*, 59 A.D.2d 1014, 1015–1016,)

Ms. Orr conceded that her attorney read Justice Palmeri's May 18, 2010 court order to her. As a result, she was aware that demands numbered 1 and 3 were proper and she had to comply with those numbered demands. Further, Ms. Orr admitted that she conducted business for Strands through her personal account from February 2007 through December 2009. It is clear to this court that Ms. Orr still has these "personal" bank statements. Demand number three required that all bank statements concerning any account which received revenue for the business operating as 2077 Grand Avenue, Baldwin, New York, be produced, which included bank accounts in the name of Ms. Orr. Therefore, these personal accounts were clearly directed to be turned over as directed by Justice Palmeri's May 18, 2010 order.

In the case at bar, the court finds that third-party defendant Stephanie Orr had knowledge of Justice Palmeri's order of May 18, 2010, that she failed to comply with it, that her failure was calculated to and did, in fact, prejudice the rights and remedies of third-party plaintiff Sharon A. Payne. Accordingly, the court adjudges the third-party defendant to be in wilful default of Justice Palmeri's order of May 18, 2010 in that third-party defendant failed to provide third-party plaintiff with the aforesaid bank statements for the period February 2007 through December 2009 inclusive.

Accordingly, the application to hold third-party defendant, Stephanie Orr a/k/a Stephanie Jones, in contempt is **GRANTED**, and it is further

ORDERED, that pursuant to this court's order dated May 18, 2010 (Palmieri, J.), third-party defendant is hereby precluded from offering any evidence at trial. Third-party defendant is fined \$250.00 plus the amount of actual costs, expenses, disbursements and counsel fees incurred by the third-party plaintiff relative to the disobedience of the order (*see Matter of Lembo v Mayendia-Valdes*, 293 AD2d 789 [2002]; *Rechberger v Rechberger*, 139 AD2d 906, 907 [1988]). Where no actual money damages have been incurred, Judiciary Law § 773 permits a court to impose a fine not exceeding the complainant's costs and expenses and an additional \$250 thereto. Furthermore, it is well settled that counsel fees and disbursements may be awarded against the contemptuous party (*see Matter of Lembo supra*; *Matter of Daniels v Guntert*, 256 AD2d 940 [1998]).

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of **CCP on**

November 2, 2011 at 9:30 a.m. for a hearing to determine the amount of reasonable counsel fees, costs and expenses to be awarded to third-party plaintiff relative to the disobedience of the order.

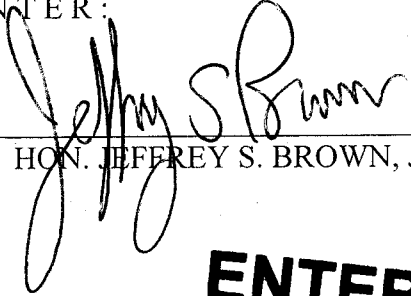
A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee as he or she deems appropriate.

Movant is directed to serve a copy of this order with notice of entry upon counsel for the third-party defendant.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 19, 2011

ENTER:

HON. JEFFREY S. BROWN, JSC

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ENTERED
OCT 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE
Steven Greenfield,
869 Dune Road
Westhampton, NY