

**Matter of Hoffman v Westchester County**

2011 NY Slip Op 33406(U)

December 12, 2011

Supreme Court, New York County

Docket Number: 102582/11

Judge: Saliann Scarpulla

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

PRESENT: ~~XXXXXXXXXX~~ Saliann Scarpulla - PART 19  
*Justice*

Russell Hoffman, Et Al.  
Westchester County,  
Et Al.

INDEX NO. 102582/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Art 78

	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 is determined in  
accordance with the accompanying  
decision/order

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/12/11

Saliann Scarpulla  
**SALIANN SCARPULLA** 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 19

----- X  
IN THE MATTER OF THE APPLICATION OF  
RUSSELL HOFFMAN, INDIVIDUALLY AND  
AS PRESIDENT OF HELM CAPITAL GROUP, INC.,

Index No.: 102582/2011

Petitioners,

Submission Date: 8/10/2011

- against-

WESTCHESTER COUNTY, JOHN WARNER,  
CHIEF CLERK NEW YORK COUNTY AND J.H.O.  
IRA GAMMERMANN,

**DECISION AND ORDER**

Respondents.

----- X  
For Petitioner: James Michael Lenihan  
235 Main Street  
White Plains, NY 10601  
For Respondent J.H.O. Gammernan:  
Eric T. Schneiderman, Attorney General  
120 Broadway, 24<sup>th</sup> Floor  
New York, NY 10271

**UNFILED JUDGMENT**

Papers considered in review of this petition:

Verified Petition . . . . . 1  
Verified Answer . . . . . 2

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding for a writ of prohibition, petitioner Russell Hoffman ("Hoffman"), Individually and as president of Helm Capital Group, Inc. seeks to stay an order for arrest issued by respondent J.H.O. Ira Gammernan ("Gammernan") on February 2, 2011, to vacate a prior order of contempt, and to stay all further contempt proceedings and post-judgment proceedings.

Hoffman is the president of Helm Capital Group, Inc. ("Helm"), defendant in the action *Jeffrey Hoffman v. Helm Capital Group, Inc.*, Index No.: 603109/2008 ("underlying action"). In that action, Hoffman's brother Jeffrey Hoffman sought to recover monies he allegedly loaned to Helm in or around 2005. On December 22, 2008, the parties in that case stipulated to the assignment of the case to Gammerman as Judicial Hearing Officer, with the "authority to exercise all the powers of a Justice of this court..."

On or about March 26, 2009, judgment was entered in the underlying action in favor of Jeffrey Hoffman and against Helm in the amount of \$539,612.24. Following entry of judgment, Jeffrey Hoffman commenced discovery pursuant to Article 52 to collect on the judgment, and sought to take Hoffman's deposition and to obtain certain business records. After Hoffman failed to appear on several occasions and failed to comply with certain court orders, Jeffrey Hoffman moved for an order of contempt. On March 15, 2010, Gammerman entered a Final Order of Contempt. Hoffman still failed to produce records and other subpoenaed documents.

On September 2, 2010, an arrest order was issued by Gammerman and on September 24, 2010, Hoffman was brought before the court and ordered to produce a complete set of Helm's bank records and any other documents relevant to determining the worth and location of Helm's assets. On December 22, 2010, Gammerman ordered Hoffman to produce the records by December 27, 2010 or face arrest and further fines. At a hearing conducted before Gammerman on January 3, 2011, the Court again ordered

[\* 4] Hoffman to produce the records, this time by January 31, 2011. According to Hoffman, the subject records were either destroyed, removed from the company, or being held by the accountants who are attempting to “restructure the books after [Jeffrey Hoffman] orchestrated an audit that it made it look like the company was virtually worthless.”

Hoffman’s counsel claimed that he was on trial on January 31, 2011 and sent an affirmation of actual engagement to Gammerman on January 30, 2011. Hoffman and his counsel did not appear in court on January 31, 2011 and as a result, Gammerman issued an Order for Arrest of Judgment Debtor filed February 2, 2011.

On March 3, 2011, Hoffman commenced this Article 78 proceeding seeking to prohibit Gammerman from holding him in contempt and to vacate the arrest order. At oral argument, this Court stayed the arrest warrant but did not vacate the contempt order. This Court indicated that Hoffman could appeal from the January 3, 2011 order, and shortly thereafter, Gammerman produced a so ordered copy of the January 3, 2011 transcript so that Hoffman could appeal. Hoffman did not perfect an appeal, and this proceeding was submitted for decision.

In his petition, Hoffman first alleges that as a judicial hearing officer, Gammerman was without legal or judicial authority to hold Hoffman in contempt or to issue an order or warrant for his arrest. Hoffman further explains that he did not appear in Court on January 31, 2011 because his counsel advised him that as Helm, a corporation, was the defendant in the underlying action, it could only appear through counsel, and counsel was

not available to appear in court before Gammerman that day. Finally, he claims that the records that Gammerman ordered him to produce are a trade secret and would negatively impact Helm and, in any event, many of the documents were removed or destroyed by Jeffrey Hoffman.

In opposition, Gammerman argues that Hoffman had an adequate remedy at law which he failed to exercise and therefore, the remedy of prohibition is unavailable. He further argues that in any event, there are no grounds for a writ of prohibition because he did not act without authority or in excess of his jurisdiction in any of his rulings or orders in the underlying action. The parties stipulated to have Gammerman hear and determine all aspects of the action and to exercise all of the powers of a Supreme Court Justice.

### Discussion

The remedy of prohibition is available only where there is a clear legal right, and then only when a court--in cases where judicial authority is challenged--acts or threatens to act either without jurisdiction or in excess of its authorized powers. *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988); *Lipari v. Owens*, 70 N.Y.2d 731, 732 (1987); *Galinson v. Graci*, 182 A.D.2d 819 (2<sup>nd</sup> Dept. 1992). However, prohibition does not lie, even if there has been an excess of jurisdiction, if there is available an adequate remedy, by way of appeal or otherwise. *Molea v. Marasco*, 64 N.Y.2d 718 (1984), *Mahl v. Donovan*, 191 A.D.2d 565 (2<sup>nd</sup> Dept. 1993).

Here, this Court gave Hoffman the opportunity to appeal from the "so ordered" January 3, 2011 transcript in which Gammerman ordered Hoffman to produce the subject records. He also had the opportunity to appeal from the contempt order and the underlying judgment. Hoffman failed to pursue these available remedies and has failed to provide any explanation for his failure to do so. Accordingly, the remedy of prohibition is not available.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Russell Hoffman, Individually and as president of Helm Capital Group, Inc. is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
December 7, 2011

ENTER:

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

*Salma Scarpulla*  
Salma Scarpulla, J.S.C.