

Matter of Matarazzo v L.R. Royal Inc

2011 NY Slip Op 34238(U)

December 20, 2011

Supreme Court, Nassau County

Docket Number: 024081/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. RANDY SUE MARBER

JUSTICE

TRIAL/IAS PART 18

X

In the Matter of the Application of

TODD MATARAZZO,

Petitioner,

Index No.: 024081/09
Motion Sequence...02
Motion Date...10/11/11

-against-

For an Order Compelling the Arbitration by
L.R. ROYAL INC D/B/A ROYAL
CONSULTANTS,

Respondent,

X

Papers Submitted:

- Order to Show Cause.....X
- Affidavit in Opposition.....X
- Memorandum of Law.....X
- Reply Memorandum of Law.....X

The Petitioner, TODD MATARAZZO's ("Petitioner" or "Matarazzo") Order to Show Cause seeking an order, pursuant to CPLR § 5104, holding the Respondent in contempt is determined as hereinafter provided.

Pursuant to the order¹ of this court entered June 29, 2010, the Petitioner's

¹Although the Respondent filed a Notice of Appeal of the order, the Petitioner failed to perfect the appeal and, on April 26, 2011, the appeal was dismissed.

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application was granted and the Respondent, L.R. Royal Inc. d/b/a Royal Consultants and its Successors were directed to proceed to arbitration regarding a dispute between the parties which arose under a written employment² agreement. The Respondent was directed to pay the outstanding balance of \$3,431.25³ to reopen the arbitration proceedings.

As the Respondent has failed to comply with the terms of the subject order, the Petitioner now seeks to hold respondent in contempt. Judiciary Law § 753 (A) (3) provides that a court may punish for contempt the neglect or violation of a duty, or other misconduct, or disobedience to a lawful mandate of the court or a judge thereof. An order of a court of competent jurisdiction which is not void on its face constitutes the lawful mandate of the court. *Dalessio v. Kressler*, 6 A.D.3d 57 (2d Dept. 2004).

A contempt citation is a drastic remedy which should not be granted absent a clear right to such relief. *Pinto v. Pinto*, 120 A.D.2d 337, 338 (1st Dept. 1986).

To sustain a finding of civil contempt based upon a violation of a court order it is necessary to establish that a lawful court order was in effect and the alleged violator had actual knowledge of its terms. *Sterngass v. Town of Clarkstown*, 27 A.D.3d 550 (2d Dept. 2006). The question of whether to grant a civil contempt motion and, if so, the fixing of an appropriate remedy rests in the sound discretion of the court upon consideration of the

²Respondent is a registered mortgage broker that arranges residential and commercial mortgages. Petitioner was hired by Respondent as a mortgage sales manager pursuant to an employment agreement for the period May 14, 2004 through May 13, 2008.

³Respondent contends that the American Arbitration Association was, and still is, demanding payment of \$23,968.75 which Respondent does not have the funds to pay.

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surrounding circumstances. *Collins v. Telcoa Intl. Corp.*, 86 A.D.3d 549, 550 (2d Dept. 2011). Civil contempt does not require proof that the offending conduct was deliberate or wilful. The mere act of disobedience, regardless of the motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices a party's rights or remedies. *Matter of Philie v. Singer*, 79 A.D.3d 1041, 1042 (2d Dept. 2010).

To succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor, with knowledge of its existence, violated a clear and unequivocal court order and that violation prejudiced a right of a party to the litigation. *Alderman v. Alderman*, 78 A.D.3d 620 (2d Dept. 2010); *Town of Huntington v. Reuschenberg*, 70 A.D.3d 814, 815 (2d Dept. 2010); *Matter of Thorsen v. Nassau County Civ. Serv. Com'n*, 32 A.D.3d 1037 (2d Dept. 2006). Although the party to be held in contempt must have had knowledge of the court's order, it is not necessary that the order actually have been served upon the party. *Matter of McCormack v. Axelrod*, 59 N.Y.2d 547, 583 (1983), *amended* 60 N.Y.2d 652 (1983).

The movant bears the burden of proving contempt by clear and convincing evidence. *Dankner v. Steefel*, 41 A.D.3d 526, 528 (2d Dept. 2007). A party who assists another in violation of a judicial mandate can be equally as guilty of contempt as the primary contemnor. *Matter of McCormack v. Axelrod*, *supra*, at p. 584. The requirements are that the non-party had knowledge or notice of the court order and acted, either in concert or in privity, with the party to whom the court's order was directed and the non-party acted

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affirmatively to cause or facilitate violation of the order. *L&R Exploration Venture v. Grynberg*, 31 Misc3d 1219(A) [N.Y. Sup. 2011]. The aim of imposing a penalty for civil contempt is not to punish but, rather, to compensate the injured party for the loss of, or interference with, the benefits of the court mandate. The element which serves to elevate a contempt from civil to criminal is the level of wilfulness with which the contempt is carried out. *Muraca v. Meyerowitz*, 49 A.D.3d 697, 698 (2d Dept. 2008).

While a hearing is not mandated in every instance where contempt is sought (*Jaffe v. Jaffe*, 44 A.D.3d 825, 826 [2d Dept. 2007]), a hearing must be held on a motion to adjudicate a party in contempt where the papers present issues of fact which cannot be resolved on the papers alone. *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073, 1074 (2d Dept 2008).

Here the motion papers present issues of fact as to the legal status of the Respondent, L.R. Royal Inc. At issue is whether said corporation has, as alleged, surrendered its New York State license/mortgage broker registration certificate and filed a certificate of dissolution. Additional, at issue is whether it is financially unable to comply with the terms of the order at issue and whether New View Mortgage Corp., allegedly established by the husband of the sole owner and officer of the Respondent, L.R. Royal Inc., may be held liable for the debts and obligations of the Respondent as a successor corporation thereto.

With respect to Lisa Marqulefsky, the purported Chairman/CEO of the

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Respondent, L.R. Royal, Inc., the court notes that in order for the court to punish a non-party for contempt, jurisdiction must be acquired by personal service of the application for contempt. An application to punish for civil contempt does not constitute a separate independent proceeding but is brought on by a notice of motion in the principal action in which the subject order was issued. If, however, the alleged contemnor was not a party to the action out of which the contempt arises, the application to punish a non-party for contempt must take the form of a special proceeding. *Ortega v. City of New York*, 11 Misc3d 848, 861 (N.Y. Sup. 2006).

The record establishes that the non-party, Lisa Marqulefsky, was not named as a respondent in the underlying arbitration, was not personally served with the Order to Show Cause⁴ in this proceeding and the corporate veil has not been pierced. The court, therefore, lacks jurisdiction over her. Judiciary Law § 761; *Moore v. TD Bank, N.A.*, 79 A.D.3d 989, 990 (2d Dept. 2010).

This matter should be set down for a hearing to determine the disputed issues with respect to the Respondent, L.R. Royal Inc. d/b/a Royal Consultants and its Successor.

Accordingly, it is hereby

ORDERED, that subject to the discretion of the Justice there presiding this matter shall appear on the calender of CALENDAR CONTROL PART ON **FEBRUARY 23, 2012 at 9:30 a.m.** The directive with respect to the hearing is subject to the right of the

⁴A review of the Order to Show Cause in this proceeding shows that service on the Respondent was to be by personal service and upon the Respondent's attorney, Ira Scot Meyerowitz, pursuant to CPLR § 2103 (b) (1) or (3).

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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; and it is further

ORDERED, that the Petitioner shall serve and file a Note of Issue no later than THIRTY (30) days after entry of this order in default of which the action shall be deemed abandoned. The Note of Issue shall be accompanied by a copy of this order and proof that jurisdiction has been obtained over all necessary parties and a statement that a copy of such order has been mailed to all parties to the original Petition within twenty (20) days after entry of this order.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
December 20, 2011



Hon. Randy Sue Marber, J.S.C.