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

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

GRAND PACIFIC FINANCE CORP.

INDEX NO. 601164/09

MOTION DATE

-v-

97-111 HACK, LLC, ET AL.

MOTION SEQ. NO. 10

MOTION CAL. NO.

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 1/15/13

BARBARA JAFFE 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 : PART 12

----------x

GRAND PACIFIC FINANCE CORP.,

Plaintiff,

- against -

97-111 HALE, LLC, 100-114 HALE, LLC, HALE CLUB, LLC, ELI BOBKER, BEN BOBKER, and JOE BOBKER,

Defendants.

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Index No. 601164/09E

Mot. seq. no. 010
Subm.: 9/5/12

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Paul H. Schafhauser, Esq.
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New York, NY 10016
212-592-1400

For defendants:
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By order to show cause dated June 11, 2012, plaintiff, the holder of an unsatisfied judgment against defendants-debtors, moves pursuant to CPLR 5251 and Judiciary Law § 753 for an order adjudging defendants and certain related non-parties in contempt for violating a March 2012 court order compelling them to respond to information subpoenas. The subpoenaed parties oppose the motion.

I. PERTINENT BACKGROUND

On May 23, 2011, judgment was entered in plaintiff's favor against defendants in the sum of $13,710,123.36 plus interest. On May 24, 26, and 27, 2011, plaintiff served information subpoenas on defendants and non-parties Bluebell Assets LLC (Bluebell) and Checkmate Holdings, LLC (Checkmate). According to defendants, Checkmate is managed and 99 percent owned by Eli Bobker. Checkmate manages and is the sole member of Hale Club, LLC (Hale

Club), and Hale Club is the managing member of 97-111 Hale, LLC (97-111) and 100-114 Hale, LLC (100-114), which are its only interests. After plaintiff commenced the instant action, Hale Club's interest was assigned to Checkmate. Bluebell is managed by Ben Bobker who owns 99 percent of it.

When plaintiff did not receive responses to the information subpoenas, it moved pursuant to CPLR 2308 to compel responses; the subpoenaed parties moved to quash them and sought a protective order. These motions were resolved by decision and order dated March 15, 2012 in which the judge previously assigned to this case granted plaintiff's motion to compel and denied the subpoenaed parties' motion on the ground that the information subpoenas sought information related to the extent or location of defendants' assets, and were "tailored only to gather information that would assist plaintiff in enforcing the judgment." (March 2012 order, at 3-5). Accordingly, the subpoenaed parties were directed to provide responsive documents and information within 20 days of the date on which the decision was issued.

The subpoena responses served by the subpoenaed parties are all dated April 23, 2012, except for the Hale Club's response which is dated April 9, 2012 and Joe Bobker's response which is dated August 16, 2012. Plaintiff's counsel avers that responses were received from Eli, Ben, 97-111, 100-114, Checkmate, and Bluebell on May 2, 2012, and from Hale Club on or about May 14, 2012.

By letter dated May 18, 2012, plaintiff's counsel informed counsel for the subpoenaed parties that a contempt motion would follow if they did not send fully responsive subpoena answers, including all of the demanded documents, on or before May 21, 2012. It is undisputed that on May 21, 2012, some of the subpoenaed parties provided some additional documents.

As of June 11, 2012, the date of the instant order to show cause, Joe still had not responded. Oral argument was scheduled for September 5, 2012, by which time plaintiff had received Joe's response. On August 17, 2012, plaintiff received from the other subpoenaed parties additional responses, including information and documents.

II. APPLICABLE LAW

The purpose of civil contempt is to compel compliance with a court order or compensate a party injured by the disobedience of a court order. (*State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). "[T]o prevail on [such] a motion . . . the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing a right of another party to the litigation." (Judiciary Law § 753[A]; *Riverside Cap. Advisers, Inc. v First Secured Cap. Corp.*, 43 AD3d 1023, 1024 [2d Dept 2007]).

Generally, "the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party." (*Yalkowsky v Yalkowsky*, 93 AD2d 834, 835 [2d Dept 1983]). However, in cases involving responses to judgment enforcement devices, the party moving for contempt must show that the alleged contemnor engaged in wilful neglect or refusal. (CPLR 5251; *Gray v Giarrizzo,* 47 AD3d 765, 766 [2d Dept 2008]).

Truthful answers and responsive documents within the subpoenaed party's possession or control are required. (*See Arko MB LLC v O'Neel*, 95 AD3d 742, 742 [1st Dept 2012]). "It is patent that, pursuant to CPLR 5223, 'all matter relevant to the satisfaction of the judgment' is discoverable and 'the public policy is to put no obstacle in the path' of those seeking to enforce a judgment." (*U.S. Bank Nat. Assn. v APP Intern. Fin. Co.*, 100 AD3d 179 [1st Dept 2012], *quoting*

Siemens & Halske GmbH. v Gres, 77 Misc 2d 745 [Sup Ct, New York County 1973], *affd* 43 AD2d 1021 [1st Dept 1974]).

Whether a violation is *de minimis* "is relevant to a determination of the extent to which the plaintiffs' rights have been defeated, impaired, impeded or prejudiced." (*Great Neck Pennysaver v Central Nassau Publs.*, 65 AD2d 616, 617 [2d Dept 1978]). As to the quality of responses, contempt may lie where answers to an information subpoena are "on their face, false and evasive, amounting to no answer at all." (*Quantum Heating Servs. v Austern,* 100 AD2d 843, 844 [2d Dept 1984]). However, the party moving for contempt must show that the subpoenaed witness possessed or had reasonable access to the information sought in order to hold the witness in contempt. (*Gray*, 47 AD3d at 766).

The party moving for contempt bears the burden of proving the contempt by clear and convincing evidence (*Riverside*, 43 AD3d at 1024), which "requires a finding of high probability" (*Matter of Eichner [Fox]*, 73 AD2d 431, 469 [2d Dept 1980], *mod on other grounds* 52 NY2d 363, *cert denied* 454 US 858 [1981]; *Usina Costa Pinto, S.A. v Sanco Sav. Co.,* 174 AD2d 487 [1st Dept 1991] [proof or standard is "reasonable certainty"]).

III. ANALYSIS

A. Contentions

Plaintiff asserts that the subpoenaed parties' responses were untimely and insufficient, and that in failing to respond to the information subpoenas fully, the subpoenaed parties have materially impeded and frustrated its right to enforce the judgment. (Affirmation of Paul H. Schafhauser, Esq., dated June 7, 2012). It describes the supplemental responses as untimely, non-responsive and intentionally vague, such that they are equivalent to no response, and argues

that the scope, breadth, and volume of the deficiencies support a contempt finding. It also asserts that defendants have not remitted any money toward the judgment, and that their evasive and vague responses are part of a concerted attempt to impede and frustrate its right to enforce the judgment. (Reply Affirmation, dated Aug. 20, 2012 [Reply Aff.]).

In opposition, the subpoenaed parties jointly argue that the subpoena questions are unnecessarily duplicative and/or that they demand information and documents not in their possession or already in plaintiff's possession, and that they are not obliged to collate responsive information to plaintiff's satisfaction. While they acknowledge that some responses may be vague, the subpoenaed parties assert that they are sufficient, and that their violations, if any, are *de minimis*. Finally, they argue that plaintiff has not met its burden of showing that it suffered any prejudice as a result of their actions. (Affirmation of Marc M. Coupey, Esq., dated July 18, 2012).

For the first time, in reply, plaintiff asserts that it has been prejudiced by the subpoenaed parties' conduct in that they have incurred fees and expenses and spent time in attempting to obtain the subpoena responses. (Reply Aff.).

B. Sufficiency of responses

1. Joe Bobker

Plaintiff complains that Joe served his response on or about August 6, 2012, four months after the deadline imposed in the March 2012 order. The untimeliness of the response, in and of itself, is insufficient to support a finding of willful neglect or refusal. (*Syndicate Bldg. Corp. v City Univ. of New York*, 159 Misc 2d 898 [Ct Cl 1993]; Siegel, NY Prac § 509 [2012]).

It also claims that Joe's answers to questions 8, 11, 15, 17, 20, 32, 33, 35, 37, 41, 43, 44,

and 45 are deficient because they are not credible given Joe's sophistication, lack of truthfulness, and the likelihood that he acted a certain way or possesses certain information.

Absent any non-speculative or non-conclusory basis alleged for concluding that Joe has information or documents which he purposely withholds, contempt does not lie. (*See eg Arko MB LLC*, 95 AD3d at 742-743 [plaintiff failed to show by clear and convincing evidence that documents sought existed and were in defendant's possession at time subpoenas served]; *Gray*, 43 AD3d at 766 [contempt finding unwarranted as defendant denied having possession of or access to certain information sought in information subpoena and plaintiff submitted no evidence to contrary]; *Koch v Sheresky, Aronson & Mayefsky LLP*, 2011 WL 6008339 [Sup Ct, New York County 2011] [while plaintiff asserted that documents were missing, evidence submitted did not establish sufficiently that documents had been withheld]).

However, Joe failed to respond to questions 13 and 40 and must do so, and his answers to questions 19, 39, 46, 52, and 55 are vague and must be supplemented with specific, detailed answers.

While questions 22, 23, 24, and 36 are broad, Joe must provide more detailed answers, and to the extent he does not understand a question that contains legal jargon, he may consult with his attorney in formulating an appropriate response.

Joe referred plaintiff to his accountant for information as to questions 25, 26 and 56, an answer which is inappropriate given his burden to retrieve the information from the accountant and provide it to plaintiff. He must also thus answer these questions with more detail.

2. Eli Bobker

While Eli's response to question 8 may be vague insofar as he describes the approximate

fair market value of the Bobker Family Trust as "minimal due to Foreclosure actions and litigation," there is no obligation for Eli to obtain an appraisal of the Trust for this purpose.

Eli must name his spouse in response to question 12. He has sufficiently answered question 19. Eli's answers to questions number 22, 25, 26, 29, 30, 36, 37, 40, 41, 42, 43, 44, 45, 46, 54, 58, and 59 are vague and must be supplemented with specific, detailed answers. Whether or not he believes that transfers or gifts or other such items are "material" is irrelevant.

3. Ben Bobker

Ben must supplement his answers to questions 8, 27, 41, 42, 43, 46, 56, 58, and 59 with more detail, and need only supplement his answer to question 22 by providing specific details about his home loan.

Otherwise, Ben's answers are sufficiently specific and detailed, including his answer to question number 37 in which he described the approximate fair market value of his membership interest in Bluebell Assets, LLC as "minimal" absent any obligation to obtain a financial appraisal. Similarly, Ben's answer to question 40 that he could not locate any loan documents related to his home mortgage is sufficient absent any reason to believe that he did not conduct a reasonable search for the documents.

4. 97-111 Hale, LLC

97-111 Hale, LLC must supplement its answers to questions 19, 29, 30, 46, and 60. Answers such as "n/a" or "not available" are insufficiently specific and must be supplemented to provide whether it has none of the information and/or documents sought or if no such information or documents exist.

5. 100-114 Hale, LLC

100-114 Hale, LLC must supplement its answers to questions 19, 29, 30, 46, and 60. As "n/a" or "not available" are insufficient answers, it must specify whether it has none of the information and/or documents sought or if no such information or documents exists.

6. Hale Club, LLC

Hale Club, LLC must supplement its answers to questions 8, 9, 19, 41, and 56.

7. Checkmate Holdings, LLC

Checkmate must supplement its answers to questions 8, 10, 18, 19, 22, 25, 26, 29, 30, 32, 33, 35, 36, 38, 42, 45, 46, and 58. Referring plaintiff to Eli Bobker's responses is unacceptable.

8. Bluebell Assets, LLC

Bluebell must supplement its response to questions 1-26, 28-46, 49, and 58. It is irrelevant that Bluebell is not a judgment debtor or that it possesses the same information as the judgment debtors; each question must be answered with specific detail.

C. Contempt

While plaintiff has shown that the subpoenaed parties' responses were untimely and that many were vague, it has not established, by clear and convincing evidence, that they are willfully neglectful or that they refused to comply. (*Cf BT Ams., Inc. v Foisi Broadcasting Network*, 2010 WL 1922737, 2010 NY Slip Op 31099[U] [Sup Ct, NY County 2010] [defendant held in contempt for failure to respond to subpoena]; *Reliance Ins. Co. v JP Maguire Co. Inc.*, 2009 WL 4737597, 2009 NY Slip Op 32851(U) [Sup Ct, NY County 2009] [same]; *contrast e.g. Arko MB LLC*, 95 AD3d at 742-743 [contempt not found where answers to deposition questions could have been more detailed and no showing made that documents existed and were in defendant's

possession at time subpoena was served]).

The subpoenaed parties are now directed to provide more detailed responses, free of any indication that they seek to skirt their obligations to answer directly and without artifice, and their failure to do so may constitute evidence of willful neglect or refusal.

Arguments raised for the first time in reply are not entertained. (*Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]).

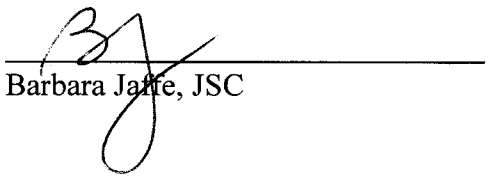
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for contempt is denied except to the extent indicated above, and without prejudice to renew if the subpoenaed parties fail to comply with this order; it is further

ORDERED, that the subpoenaed parties are directed to serve plaintiff with their responses as specified in this order within 20 days of service on them of a copy of this order.

ENTER:



Barbara Jaffe, JSC

DATED: January 15, 2013
New York, New York