

McGrail v 201 East 116th St. Realty Corp.

2013 NY Slip Op 30569(U)

March 15, 2013

Sup Ct, New York County

Docket Number: 110421/2010

Judge: Kathryn E. Freed

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SCANNED ON 3/25/2013

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

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 110421/2010
MCGRAIL, SHANE
vs
201 EAST 116TH ST.
Sequence Number : 004
PUNISH FOR CONTEMPT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CALL # 43

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

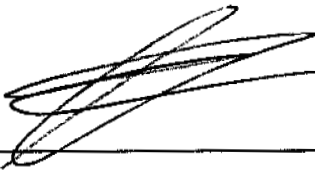
FILED

MAR 25 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3-15-13
MAR 15 2013


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: CASE DISPOSED **NON-FINAL DISPOSITION**
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
SHANE MCGRAIL,

Plaintiff,

-against-

201 EAST 116TH ST. REALTY CORP., SILVER
STAR MANAGEMENT CORP., SILVER &
SILVER PROPERTIES, LLC., SILVER & SILVER
PROPERTIES, INC., BANK OF AMERICA
CORPORATION AND THE CITY OF NEW YORK

Defendants.

DECISION/ORDER
Index No.: 110421/2010
Seq. No.: 004

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

FILED

MAR 25 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 3-4.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR§ 3201 and Judiciary Law§ 753(A)(5),
holding plaintiff Maxine Bailey in contempt of court or compelling her compliance with a Non-Party
Witness Subpoena. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants the
motion only to the extent that it will sign an order compelling Ms. Bailey's compliance with said

subpoena.

Factual and procedural background:

Plaintiff is suing for injuries he allegedly sustained on January 9, 2010, as a result of a trip and fall on an abandoned tree well in front of a building located at 201 East 115th Street (a/k/a 2125 Third Avenue), New York, New York. Subsequently, he commenced the instant action via a Summons and Complaint on July 28, 2010.

On January 14, 2011, defendants served a Verified Answer, wherein defendant Silver concedes that the building was owned by 201 East 116th Realty Corp. On August 27, 2010, the City served its Verified Answer. Additionally, Bank of America Corporation served its Verified Answer on November 10, 2010.

In plaintiff's Supplemental Response to Defendants' Demand for Witness Information, dated May 1, 2012, Maxine Bailey was disclosed as a witness. Consequently, defendants' counsel drafted a Non-Party Witness Subpoena, dated August 31, 2012, which was personally served on her on September 9, 2012. Said subpoena directed Ms. Baily to appear for a deposition scheduled for October 24, 2012. Moreover, on September 27, 2012, a Notice to Take Examination Before Trial of a Non-Party Witness was served on counsel for the other parties. Following the service of the subpoena on her, Ms. Baily telephoned defendants' counsel and stated that she was a witness to the accident, as well as the alleged condition. She further stated that she had received the subject subpoena and would be present on the designated deposition date. However, on that day, Ms. Baily failed to appear. A brief statement was placed on the record noting her absence.

Defendants Silver now assert that since Ms. Bailey failed to proffer an explanation for her absence, she should be held in contempt of court pursuant to CPLR§ 2308 and New York Judiciary

Law§ 753(A)(5). In the alternative, defendants Silver assert that she should be compelled to comply with the subpoena pursuant to CPLR§ 2308(b).

Conclusions of law:

It is well settled that “[c]ontempt is a drastic remedy which should not be granted absent a clear right to the relief” (Pinto v. Pinto, 120 A.D.2d 337, 338 [1st Dept. 1986]; *see also* Benson Park Associates LLC v. Herman, 93 A.D.3d 609 [1st Dept. 2012]). Additionally, to warrant such relief, the aggrieved party must show that the witness willfully failed to comply with the subpoena (*see* The Board Of Managers Of the Atrium Condominium v. West 79th Street Corp., 17 A.D. 3d 108 [1st Dept. 2005]).

Judiciary Law§ 753(A)(5) provides that a court has the power to punish, “[a] person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or the answer as a witness.”

In order to ascertain if contempt has occurred, several criteria must be met (*see i.e.* Thompson v. Pollack, 59 A.D.3d 525 [2d Dept. 2009]). First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; second, it must also appear, with reasonable certainty, that the order has been disobeyed; third, the party to be held in contempt must have had knowledge of the court’s order, although service of said order on the party is not necessary; and finally, it must be demonstrated that the party to the litigation has been prejudiced as stated in Judiciary Law§ 753 (A)), (*id.* at 527).

In the case at bar, the Court has reviewed the subpoena sent to Ms. Bailey, in addition to the affidavit of personal service, both annexed to the instant motion as exhibits. While it would seem that all of the aforementioned criteria have been met, the Court is still not convinced that Ms.

Bailey's actual failure to appear was willful or deliberate. Indeed, defendants have not proffered any evidence that her failure to appear was the result of deliberate non-compliance. It does not appear that following her failure to appear, defendants' counsel made any follow-up efforts to contact her, to determine the reason(s) for her absence. Thus, in consideration of this, the Court is not willing to hold a non-party witness, whose failure to appear has not been fully explained, in contempt of court.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion to hold Maxine Bailey in contempt is granted only to the extent that the Court will sign an order compelling her compliance with a Non-Party Witness Subpoena; and it is further

ORDERED that included in said Non-Party Witness Subpoena is language that apprises Ms. Bailey that failure to appear may result in her arrest; and it is further

ORDERED that Ms. Bailey is to be served personally; and it is further

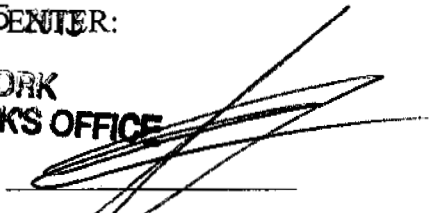
ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this constitutes the decision and order of the Court.

FILED

DATED: March 15, 2013

MAR 25 2013
NEW YORK
COUNTY CLERKS OFFICE



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

MAR 15 2013