

McGrail v 201 East 116th St. Realty Corp.
2013 NY Slip Op 31631(U)
July 18, 2013
Sup Ct, New York County
Docket Number: 110421/2010
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 110421/2010
MCGRAIL, SHANE
vs.
201 EAST 116TH ST.
SEQUENCE NUMBER : 005
PUNISH FOR CONTEMPT

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

CALL # 37

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

FILED
JUL 23 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 7-18-13
JUL 18 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,

DECISION/ORDER
Index No. 110421/2010
Seq. No. 005

-against-

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

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
NEW YORK,

Defendants.

FILED

JUL 23 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.....
OTHER.....

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

Defendants 201 East 116th St. Realty Corp., Silver Star Management Corp., Silver & Silver Properties, LLC, Silver & Silver Properties, Inc., and Bank of America Corporation move for an Order pursuant to CPLR§ 2308 and Judiciary Law§753(A)(5), holding Emma Zeao in contempt of Court or compelling her compliance with the Non-Party Witness Subpoena. Neither plaintiff nor the City has submitted any opposition to the instant motion.

After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion in part.

Factual and procedural background:

This is an action wherein plaintiff seeks monetary damages for personal injuries he allegedly sustained on January 9, 2010, when he tripped and fell on an abandoned tree well in front of a building located at 201 East 116th Street, in New York County. Consequently, plaintiff commenced the instant action via the filing of a Summons and Complaint dated July 28, 2010. On January 14, 2011, a Verified Answer to said Complaint was served on behalf of defendants 201 East 116th St. Realty Corp., Silver Star Management Corp., Silver & Silver Properties, LLC and Silver & Silver Properties, Inc. In the Answer, Silver admits that the building was owned by 201 East 116th St. Realty Corp. On August 27, 2010, The City of New York served its Answer. A Verified Answer was served on behalf of Bank of America Corporation on or about November 10, 2010.

Lester Schwab Katz & Dwyer, LLP was subsequently substituted as attorneys of record for Bank of America Corporation in a stipulation on December 20, 2012. In plaintiff's Supplemental Response to Defendant's Demand for Witness Information, dated May 1, 2012, Emma Zeao was disclosed as a witness. The aforementioned firm drafted a Non-Party Witness Subpoena dated August 31, 2012, directing Ms. Zeao to appear for a deposition scheduled for October 24, 2012. On September 6, 2012, said subpoena was personally served on her (see Exhibit "G"). Additionally, a Notice to Take Examination Before Trial of a Non-Party Witness was served on the attorneys for the other parties on September 27, 2012.

Prior to the scheduled deposition, Ms. Zeao telephoned the aforementioned firm and requested an adjournment due to a death in her family. Her request was honored. However, after several attempts to re-schedule said deposition by telephone, another subpoena was personally served

upon her on January 18, 2013, directing her to appear for a deposition on February 20, 2013. This affidavit of service is annexed as Exhibit "H." Consequently, Ms. Zeao failed to appear. A statement noting her absence was placed on the record. Ms. Zeao failed to provide an explanation for her absence and never contacted counsel to re-schedule her deposition.

Conclusions of law:

CPLR§2308(b) provides, in pertinent part, that

Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court ... A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he or she was directed to produce by the subpoena, or to subscribe his or her deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him or her to jail, there to remain until he or she submits to do the act which he or she was so required to do or is discharged according to law....."

New York Judiciary Law § 753(A)(5) provides

A. A court of record has the power to punish, by fine and imprisonment, or either, a neglect or violation by duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

In order to make a finding of civil contempt, the court must find that the actions complained of were "calculated to, or actually did defeat, impair, impede, or prejudice defendant's rights or

remedies” (*Taveras v. General Trading Co., Inc.*, 73 A.D.3d 659, 659 [1st Dept. 2010]; *Clinton Corner H.D.F.C. v. Lavergne*, 279 A.D.2d 339, 341 [1st Dept. 2001]; *Gray v. Giarrizzo*, 47 A.D.3d 765, 766 [1st Dept. 2008]). The party seeking a contempt order bears the burden of proof (*Rupp-Elmasri v. Elmasri*, 305 A.D.2d 394, 395 [2d Dept. 2003], citing *McCain v. Dinkins*, 84 N.Y.2d 216, 227 [1994]), and such proof must be clear and convincing (*Matter of Kraemer v. Strand-O’Shea*, 66 A.D.3d 901, 901 [2d Dept. 2009]; *Arko MB LLC v. O’Neel*, 95 A.D.3d 742 [1st Dept. 2012]).

In the case at bar, the Court finds that Silver has provided clear and convincing evidence in the nature of two affidavits of service, that Ms. Zeao was aware of her duty to appear at two scheduled depositions, and failed to do so. Her apparent willful disregard certainly rises to the level of contempt of court. However, the Court will afford Ms. Zeao one more opportunity to appear at another deposition to be scheduled by movants. If she again fails to appear, the Court will then seriously consider appropriate sanctions.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that Emma Zeao appear at a deposition to be scheduled by movants; and it is further

ORDERED that movants shall serve a copy of this order on plaintiff, the City and Ms. Zeao; and it is further

ORDERED that said subpoena shall include in very large letters, that failure to comply may result in a fine and/or jail; and it is further

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

DATED: July 18, 2013
JUL 18 2013

FILED
JUL 23 2013
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


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