

**Tyson v City of New York**

2013 NY Slip Op 32195(U)

September 11, 2013

Supreme Court, New York County

Docket Number: 111651/2006

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT  
Justice

PART 5

Index Number : 111651/2006  
TYSON, JAMES  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 004  
PUNISH FOR CONTEMPT  
*CAL: # 68*

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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**

SEP 18 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9-11-13  
SEP 11 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

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 5

-----X  
JAMES TYSON FOR HIMSELF AND AS PARENT  
AND GUARDIAN FOR DAVID NATHANIEL TYSON,  
AN INFANT, AND KAREN TYSON,

Plaintiffs,

-against-

DECISION/ORDER  
Index No. 111651/2006  
Seq. No. 004

THE CITY OF NEW YORK, "JANE" AYALA AND  
ISRAEL SOTO, INDIVIDUALLY AND AS  
EMPLOYEES OF THE CITY OF NEW YORK,  
DEPARTMENT OF EDUCATION,

Defendants.

**FILED**  
SEP 13 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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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.....	.....3-7 (B-F)
OTHER.....	.....

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

Plaintiffs move for an Order "pursuant to Judiciary Law 753,756 and 773 to hold Deborah Walker in contempt of court for failure to comply with the subpoena ad testificandum to appear at a deposition that was duly served on her on May 7, 2013, and upon finding such contempt, issuing a warrant of commitment directing any Sheriff to immediately arrest and compel the attendance of Deborah Walker for such time as the Court may direct and/or the imposition of such fines as the Court may impose, until such time as she complies with the subpoena, and directing her to pay all costs and expenses, including reasonable attorneys' fees associated with her contemptuous conduct;

or in the alternative, conditionally granting such relief if Deborah Walker does not appear and give testimony on the date set by the Court.”

After a review of the papers presented, all relevant statutes and case law, the Court **denies the motion without prejudice.**

Factual and procedural background:

Plaintiffs seek monetary damages for injuries allegedly sustained as a result of an assault by defendant Ayala, an employee of the City of New York, (“the City”), on plaintiff David Nathaniel Tyson (“David”), and defendants’ failure to provide or obtain proper medical treatment for David subsequent to said assault. Plaintiffs assert that while Deborah Walker is not a party to the instant suit, she was “defendants’ employee, and she communicated with the plaintiffs about their concerns and complaints immediately after and regarding the events alleged in the complaint.” ( Motion, p.2, ¶ 4).

Plaintiffs also assert that on March 13, 2012, defendants were instructed to produce “Dr. Walker” for a deposition on May 14, 2012, to the extent that she was still employed by the City. Plaintiffs first became aware of “D. Walker” as a person with knowledge of the allegations in the complaint in October 2011, when defendants disclosed a document which indicated that Walker spoke with plaintiffs in response to a complaint made by James Tyson concerning defendants’ treatment of his son David. Via a response to a March 13, 2012 Order, defendants stated that “D. Walker” was no longer employed by the City. Thereafter, by consent order dated July 10, 2012, the City provided plaintiffs with Walker’s last known residence - 207 West 147<sup>th</sup> Street, Apt. 5C, New York, New York.

Consequently, on May 7, 2013, plaintiffs attempted to serve Walker with a Subpoena Ad Testificandum, a Deposition Notice, and a check for a witness fee in the amount of \$15.00. ( Exh. F). Said Subpoena commanded Walker to appear on June 10, 2013 at 10:00 am, to be deposed at plaintiffs’ counsel’s office at 74 Trinity Place, Suite 1550, New York, New York. Service of these

documents was effected by leaving them at the aforementioned address, with Leilah Walker, a person of suitable age and discretion, who identified herself as Walker's daughter, and confirmed that Walker also resided at that address. Said documents were also subsequently mailed to Walker at this address.

Walker did not contact plaintiffs' counsel prior to the deposition and failed to appear at the deposition. A statement noting her default was placed on the record. Immediately thereafter, plaintiffs' counsel, Lauren M. Reiff, Esq., wrote Walker a letter on June 10, 2012, noting her absence at the deposition and advising her of the penalties associated with failure to comply with a subpoena. Walker was also advised to contact Ms. Reiff within seven days of the date of the letter to reschedule the deposition, and that failure to do so would result in counsel making the instant motion. ( Exh. G). Said letter was mailed by certified mail, return receipt requested, with a copy by first class mail. ( Exh. H). To date, counsel has not received any reply from Walker, and the copy sent by certified mail was returned to counsel's office as unclaimed on July 8, 2013.

Plaintiffs argue that Walker's testimony is imperative because it will provide vital evidence as to the emotional state of plaintiffs immediately after the events alleged in the complaint occurred; will corroborate plaintiffs' account of the events alleged; and the effect said events had on David. Thus, her willful and calculated failure to comply has defeated, impaired and prejudiced plaintiffs' rights and remedies, necessitating that she be held in contempt of court.

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 with-

out 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 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 or imprisonment or either, a neglect or violation of 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 (*Tavares v. General Trading Co., Inc.*, 73 A.D.3d 659, 659 [1<sup>st</sup> Dept. 2010]; *Clinton Corner H.D.F.C. v. Lavergne*, 279 A.D.2d 339, 341 [1<sup>st</sup> Dept. 2001]; *Gray v. Giarrizzo*, 47 A.D. 3d 765, 766 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 2010] ).

In the case at bar, the Court does not find that plaintiffs have sufficiently established clear and convincing proof that Walker’s failure to appear at the deposition and/or her failure to respond to counsel’s letter is indicative of a willful, deliberate attempt to defeat, impede or prejudice their case. No evidence has been presented of a pattern of willful disregard exhibited by Walker. Indeed,

her failure to appear and/or respond could be attributed to a countless number of reasons, which do not necessarily indicate a deliberate attempt to circumvent justice.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion to hold Deborah Walker in contempt of court is denied; without prejudice; and it is further

ORDERED that Deborah Walker appear at a deposition to be scheduled by movants, and it is further

ORDERED that movants shall serve a copy of this order on defendants, and Deborah Walker; 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 if Deborah Walker fails to comply with a second subpoena to appear at the deposition, movant shall be permitted to re-visit the issue of contempt with this Court; and it is further

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

DATED: September 11, 2013

SEP 11 2013

**FILED** ENTER:  
SEP 18 2013  
NEW YORK  
COUNTY CLERKS OFFICE

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