

Matter of Hancock v Arts4All, Ltd.

2013 NY Slip Op 32459(U)

October 7, 2013

Sup Ct, New York County

Docket Number: 604417/2006

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

HANCOCK, JUDITH L. INDEX NO. 604417/2006

-against- MOTION DATE _____

ARTS4ALL, LTD. A/K/A "A4A MOBILE, LTD." MOTION SEQ. NO. 012

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

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

Answering Affidavits — Exhibits _____ No (s). _____

Replying Affidavits _____ No (s). _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Plaintiff's motion is denied pursuant to the decision and order dated October 7, 2013.

FILED
OCT 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-7-13 Marcy Friedman, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

- 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 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

_____ X
In the Matter of the Application of
JUDITH L. HANCOCK,

Petitioner,

Index No.: 604417/2006

For an Order Under Sections 725 (c) and 1315 (c)
And (d) of the New York Business Corporation
Law and the New York Common Law
Directing an Inspection of The Stockholders Ledger,
Financial Statements, And Other Books and
Records of Arts4All, Ltd. And Directing Disclosure
Of Arts4All’s Payment of Legal Fees of Its
Officers and Directors, And For an Order Under
Section 211 Of the Delaware General Corporation
Law And New York Common Law Compelling
Arts4All, Ltd. to Hold Timely Annual Shareholders
Meetings,

DECISION/ORDER

FILED
OCT 15 2013
NEW YORK
COUNTY CLERK'S OFFICE

- against -

ARTS4ALL, LTD. a/k/a “A4A MOBILE, LTD.”

Respondent.

_____ X

This is a proceeding brought by Judith L. Hancock (Hancock), a shareholder of Arts4All, Ltd. a/k/a “A4A Mobile, Ltd” (Arts4All), for access to the company’s books and records. The petition sought production of 17 specific “Items.” By decision and order dated January 6, 2009, this Court (Fried, J.) referred the issue of whether Hancock was entitled to relief under her first and second demand requests to a Special Referee to hear and report. By report dated June 26, 2009, Special Referee Louis Crespo recommended that Arts4All be ordered to produce “Items 1,

5, 6, 7, 8, 10, 11, 12, 15, 16, and 17.” (Hancock Aff. In Support, Ex. 2 [Special Referee Louis Crespo’s Report and Recommendation dated June 26, 2009 [Special Referee’s Report]] at 37.) By order dated January 26, 2010 (January 26, 2010 order), this Court (Fried, J.) confirmed the Special Referee’s Report. (Hancock Aff., Ex. 3.) On April 26, 2012 at a status conference, the court (Fried, J.) granted Hancock leave to file a motion seeking to punish Arts4All for contempt of his prior order.

Hancock moved to punish Arts4All, Arts4All’s counsel Zachary R. Greenhill, Esq. and Greenhill’s law firm, Law Offices of Zachary R. Greenhill, P.C. (collectively, Greenhill) for contempt. In a decision on the record on February 26, 2013 (February 26, 2013 decision), the transcript of which was so ordered on March 18, 2013, the court denied the branch of the motion to punish Arts4All for contempt, without prejudice to a new motion to be brought on by order to show cause. The court granted the motion only to the extent of ordering that Greenhill produce “the items referred to in Item 12 of the attachment to the petition and ordered by the Referee, in Paragraph 41 of his Report.” (See Feb. 26, 2013 Transcript at 21.) Item 12 was a demand for “[l]egal engagement letters, retention agreements and legal bills” between Greenhill and Arts4All. The March 18, 2013 order directed that the Item 12 documents be produced within thirty days of service of the order on Greenhill with notice of entry.

Hancock now moves for an order (i) seeking to punish Arts4All for contempt of the January 26, 2010 order; and (ii) seeking to punish Greenhill for contempt for, among other things, making “new manifestly false statements of alleged fact to the Court after petitioner filed her first contempt motion,” and for assisting Arts4All in continuing to violate the January 26, 2010 order. (See Order to Show Cause dated April 3, 2013.)

New York Judiciary Law §753(A)(1) provides that a court has the power to punish, by fine or imprisonment, “disobedience to a lawful mandate of the court” which defeats, impairs, impedes, or prejudices the rights of a party to a civil action or proceeding. For a party to be held in contempt “[i]t must appear, with reasonable certainty, that the order has been disobeyed, that the party “had knowledge of the court’s order,” and that “prejudice to the right of a party to the litigation [has been] demonstrated.” (McCormick v Axelrod, 59 NY2d 574, 583 [1983].) The party seeking an order to punish for contempt must establish by clear and convincing evidence that the alleged contemnor violated the clear and unequivocal mandate of the court. (See Simens v Darwish, 104 AD3d 465, 466 [1st Dept 2013]; Cervena v Bressler, 2013 NY Slip Op 5789, *1 [2d Dept 2013].)

In the moving papers, Hancock alleges that Arts4All should be punished for failing to produce the documents ordered to be produced by the January 26, 2010 order. On May 22, 2013, after the instant contempt motion was served,¹ Arts4All produced the documents that it claims are responsive to the Items which the confirmed Special Referee’s Report recommended be produced. (Greenhill Aff., ¶ 47.) In the reply papers, Hancock acknowledges that certain documents were produced. However, she alleges that the production was inadequate as to six of the requested Items. (Hancock Reply Aff., ¶ 12.) According to Hancock, these six Items were deficient because documents were missing or because the affidavit attesting that responsive documents do not exist was insufficient. (Id., ¶¶ 11-12.)

Specifically, Hancock alleges that Arts4All’s production of Item 6 was insufficient

¹ The affidavits of service indicate that Hancock served the order to show cause and accompanying papers on Arts4All and Greenhill on April 8, 2013.

because Arts4All has not provided New York Tax Form CT-240 for 2000, 2001, and 2003, as directed by the Special Referee. (Special Referee's Report, Conclusions of Law, ¶ 22.)

Greenhill claims that Arts4All "was not required to file . . . these New York CT-240 forms." (Greenhill Aff., ¶ 52.) The court holds that if these CT-240 forms exist, Arts4All must produce them. If they do not exist, then Arts4All must produce an affidavit on personal knowledge. Throughout this opinion, when an affidavit on personal knowledge is directed, Arts4All shall produce an affidavit by a custodian of Arts4All's records that a diligent search of the records was made, the date thereof, and that such items were not found.

Hancock further alleges that Arts4All's production of Item 7 was insufficient because Arts4All failed to provide any Delaware franchise tax returns for 2005-2008, as directed by the Special Referee.² (Special Referee's Report, Conclusions of Law, ¶ 22.) Greenhill, in his affidavit in opposition, attests that Arts4All "was not required to file . . . Delaware returns." (Greenhill Aff., ¶ 52.) This court finds that if these documents exist, they should be produced by Arts4All. If the Delaware tax returns or franchise tax returns do not exist, then Arts4All must produce an affidavit on personal knowledge.

In her reply affidavit, Hancock also alleges that Arts4All has failed to produce Item 11 which requests "[t]he videotapes produced by the two cameras that Arts4All used to film the shareholders meeting held on December 28, 2005." (Petition, Attachment A.) Hancock asserts that she attended the shareholders meeting on December 28, 2005 and saw that there were two videocameras present. (Hancock Reply Aff., ¶ 13.) Hancock also attests that, after that meeting,

² Greenhill states in his affidavit that he has produced Arts4All's Federal, New York, and New Jersey tax returns for 2005, 2006, 2007, and 2009. Although the Special Referee recommended that Arts4All produce 2008 (and did not mention 2009), Hancock does not object to Arts4All's production of these tax returns.

she “viewed the footage of such meeting on an ordinary television set in Arts4All’s offices.” (Id.)

The Special Referee recommended

“ . . . that an order issue directing Arts4All, Ltd., to turn over a copy of (Item 11) the films, photographs, videotapes or audio tapes of the shareholder meeting within 30-days of the service of an order and if no such document or film or tape or audio or the like exist, then it be ordered to submit a detailed affidavit by a current officer or director of the respondent explaining in detail the factual circumstances of the nonexistence of the same as well as a detail [sic] explanation by the person with knowledge describing the efforts made to locate the subject document noted above and explaining why it or copies or any other format of the recording of such shareholder meeting could not be found or why same do not exist or whether the same may exist in original form. Moreover, such affidavit should be as detailed as to whether any such original or videotape was discarded or destroyed and the circumstances of such destruction or discarding in view of the litigation that existed and was ongoing between the parties.”

(Special Referee’s Report, Conclusions of Law, ¶ 34.) Greenhill asserts in his affidavit that “[t]hese Items do not exist.” (Greenhill Aff., ¶ 60.) He further cites the affidavit of Arts4All’s former president Richard Humphrey, sworn to on July 12, 2011, stating that a videotape does not exist of the December 28, 2005 annual shareholders meeting. (Greenhill Aff., Ex. D [Humphrey Aff.], ¶ 15.) Humphrey suggests that the videotape does not exist because Justice Rolando Acosta, who presided over a prior proceeding between the parties, never ordered production of the videotape. (Id.) Humphrey’s assertions are irrelevant, as they ignore the Special Referee’s express directives as to production of the videotape or an affidavit detailing the reasons for the non-production. This court therefore holds that if a recording of the December 28, 2005 shareholders meeting exists in any format, it must be produced by Arts4All.³ To the extent that

³ If the December 28, 2005 shareholders meeting was recorded directly onto the video camera, Arts4All shall produce a copy of the recording on said camera. If it cannot be transferred to a portable media form, Arts4All shall produce an affidavit attesting to the existence of the recording and explaining why it cannot be copied or transferred.

Arts4All argues that Hancock's failure to pay production costs is a basis for withholding material responsive to this item (Humphrey Aff., ¶ 15.), Arts4All has not produced any order conditioning the production on payment by Hancock. Moreover, the Special Referee's Report unconditionally directs production. If a recording of the December 28, 2005 shareholders meeting does not exist, then Arts4All shall produce an affidavit on personal knowledge with the information specified in the Special Referee's Report.

Hancock also alleges that Arts4All has failed to produce documents related to Item 16, which calls for "Arts4All's document retention policy in effect at any time after January 1, 2001." (Petition, Attachment A.) Greenhill attests that Arts4All "has produced these documents to petitioner." (Greenhill Aff., ¶ 64.) Hancock states that she has "personal knowledge that a document retention policy was adopted in or about 2001" and that Arts4All has not produced any documents relating to any policy on retention of documents. (Hancock Reply Aff., ¶ 24.) Arts4All is directed to either produce any written documents setting forth the document retention policy or an affidavit on personal knowledge that no such documents exist or that the documents already produced (identified by Bates numbers) are the only responsive documents.

Hancock further asserts that Arts4All has failed to produce the W-2 form for Richard Humphrey for 2003 as requested in Item 17. Greenhill attests in his affidavit that "[r]espondent does not have the W-2 for 2003. If Arts4All does not have Humphrey's W-2 for 2003, it must provide an affidavit on personal knowledge.

With respect to the contempt claim against Greenhill, Hancock argues that Greenhill violated this court's February 26, 2013 decision by failing to produce the Item 12 documents in a timely manner. As noted above, the March 18, 2013 order directed Greenhill to produce the

documents within thirty days of service of the order on Greenhill with notice of entry. The affidavit of service submitted by Hancock states that she served the February 28, 2013 decision and March 18, 2013 order on Arts4All and Greenhill on March 22, 2013. (Hancock Aff., Ex. 11.) Greenhill attests, without opposition, that he served the Item 12 documents on April 22, 2013 by overnight mail. (Greenhill Aff., ¶¶ 45, 62-63.) Therefore, the court finds that service of the Item 12 documents was timely under the March 18, 2013 order.⁴

The branch of the motion for contempt against Arts4All will accordingly be denied on condition that Arts4All timely produces the documents and affidavits specified in this decision.

Hancock also seeks an order punishing Greenhill for contempt for alleged misstatements made at the oral argument on February 26, 2013, and for allegedly aiding and abetting Arts4All's contempt. This court finds that the alleged misstatements are not a basis for a finding of contempt under Judiciary Law § 753. To the extent that Hancock seeks sanctions against Greenhill pursuant to 22 NYCRR § 130-1.1, this court, in its discretion, declines to award sanctions. In addition, as the court has denied the contempt motion with respect to Arts4All on the conditions set forth above, it further holds that Greenhill is not liable for aiding and abetting Arts4All's alleged contempt.

While the instant motion is denied on the stated conditions, the court notes that no further delays or insufficiencies in Arts4All's or Greenhill's responses to the court's orders can be tolerated. Conversely, petitioner must follow a rule of reason in assessing the sufficiency of Arts4All's compliance. The parties must put an end to what the Appellate Division, in an appeal

⁴ While Hancock alleges that the April 22, 2013 production was "grossly incomplete," she fails to detail the alleged inadequacies. (Hancock Reply Aff., ¶ 45.)

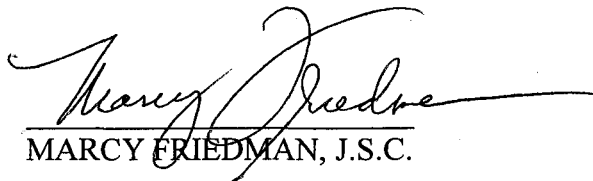
in the prior related proceeding, described as “the parties repeated non-compliance with the court’s disclosure orders, and their conduct throughout the course of this litigation [which] has been ‘dilatory, evasive, obstructive and ultimately, contumacious.’” (Arts4All, Ltd. v Hancock, 54 AD3d 286, 286 [1st Dept 2008].)

It is hereby ORDERED that petitioner Judith L. Hancock’s motion to punish Arts4All, Ltd. a/k/a “A4A Mobile, Ltd.”, Zachary R. Greenhill, Esq., and the Law Offices of Zachary R. Greenhill, P.C. for contempt is denied on the condition that Arts4All produce the documents and/or affidavits set forth in this decision; and it is further

ORDERED that the documents and/or affidavits required by this decision shall be served within 30 days of service of this order with notice of entry. The order shall be served on Arts4All, Ltd. a/k/a “A4A Mobile, Ltd.” by personal delivery of a copy of the order to the New York Secretary of State with a courtesy copy by mail to Zachary R. Greenhill. The order shall be served on Zachary R. Greenhill and the Law Offices of Zachary R. Greenhill, P.C. by personal delivery of a copy of the order to the Law Offices of Zachary R. Greenhill, P.C. with a copy to Zachary R. Greenhill by regular and certified mail, return receipt requested; and it is further

ORDERED that the parties shall appear in Part 60 (60 Centre Street, Room 248, New York, New York) for a status conference on January 30, 2014 at 2:30 p.m.

Dated: New York, New York
October 7, 2013


MARCY FRIEDMAN, J.S.C.