

Platt v GC ENG & Assoc. Eng'g, P.C.

2014 NY Slip Op 31579(U)

June 18, 2014

Sup Ct, New York County

Docket Number: 115516/2010

Judge: Jr., Alexander W. Hunter

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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: **ALEXANDER W. HUNTER, JR.**
Justice

PART 33

Platt, Morris

INDEX NO. 115516/10

-v-

GC Eng + Associates

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for Quash Subpoena, Fix Conditions

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 the memorandum
decision and order annexed hereto.*

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

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

ALEXANDER W. HUNTER JR.

Dated: 6/18/14

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 33**

-----X
Application of

Index No.: 115516/2010

Morris Platt and LES Realty Group LLC,

Decision and Order

Petitioners-Judgment Debtors,

For and Order Pursuant to Article 75 of the CPLR
Vacating a Certain Arbitration Award and Compelling
Arbitration of a Certain Controversy

-against-

GC ENG & Associates Engineering, P.C.

Respondent-Judgment Creditor.
-----X

HON. ALEXANDER W. HUNTER, JR.

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

The motions to quash a subpoena, designated as motion sequences 005 and 006, and the motion for an order of contempt, designated as motion sequence 007, are consolidated for joint disposition and decided herein.

The motion by petitioners-judgment debtors ("petitioners") pursuant to C.P.L.R. 2304 to quash the subpoena issued to Dime Savings Bank of Williamsburg ("Dime Bank") as being overly broad is granted. The motion by petitioners pursuant to C.P.L.R. 2304 to quash the subpoena issued to Bank Leumi USA ("Bank Leumi") as being overly broad is granted. The motion by petitioners pursuant to C.P.L.R. 5240 to vacate or modify the restraining notice issued to Bank Leumi in regards to petitioner LES Realty Group LLC ("LES") is granted, to the extent that the restraining notice is strictly limited to the assets of petitioner LES. The motion by respondent-judgment creditor ("respondent") to hold petitioners and PLT Realty Group LLC ("PLT"), a non-party to this action, in contempt for failure to comply with a subpoena is denied.

This court issued an order on April 25, 2011, and an amended judgment on October 24, 2011, which confirmed an arbitration award of \$129,230.65 in favor of respondent ("the Judgment"). To date, no part of the Judgment has been satisfied.

On August 9, 2013, respondent issued three subpoenas and a restraining notice. A subpoena and restraining notice was issued to petitioner LES seeking written responses to nine questions and production of certain documents within seven days of service ("Subpoena A"). A subpoena was issued to petitioner Morris Platt as member/officer of PLT seeking documents and to take a deposition on matters relevant to satisfaction of the Judgment with a return date of September 27, 2013 ("Subpoena B"). A subpoena was issued to Dime Bank seeking documents and a deposition on matters relevant to satisfaction of the Judgment with a return date of September 18, 2013 ("Subpoena C"). On November 4, 2013, respondent issued a subpoena to Bank Leumi seeking documents and to take a deposition on matters relevant to satisfaction of the

Judgment with a return date of December 16, 2013, and a restraining notice regarding the assets of petitioner LES ("Subpoena D").

Neither petitioner LES, PLT, Dime Bank, nor Bank Leumi appeared on the return dates for the depositions. In addition, none of the subpoenas has resulted in the production of requested documents. Counsel for petitioners affirms that on September 15, 2013, he left a voice mail message for counsel for respondent, Ms. Carol Sigmond, requesting that Subpoena C be withdrawn. On October 2, 2013, Ms. Carol Sigmond affirms that she wrote a letter to petitioner LES (Respondent's Exhibit E) allowing them another seven days to respond to the nine questions and produce the documents subject to Subpoena A or be held in contempt. Neither attempt at communication between opposing counsel was successful.

Petitioners aver that: (1) Subpoena C should be quashed because it seeks records well beyond the scope of the Judgment and unduly puts the burden of investigation on Dime Bank to cull the relevant and responsive documents from its files; (2) Subpoena D should be quashed because the subpoena seeks records well beyond the scope of the Judgment and as previous requests to respondent to withdraw over-broad subpoenas have been ignored, a similar request with regards to Subpoena D will be futile; and (3) with respect to the restraining notice issued to Bank Leumi, although it explicitly states that it is in regards to petitioner LES, due to its unclear language, Bank Leumi has been forced to restrain assets related to petitioner Morris Platt and should therefore be vacated or explicitly limited to assets of petitioner LES.

Respondent avers that: (1) based on records located on the Automated City Register Information System ("ACRIS"), petitioners and PLT are affiliates with common interests to frustrate collection of this debt; (2) with regards to Subpoenas A and B, there is no excuse or explanation for the lack of response on the part of petitioners and PLT; (3) despite its best efforts, respondent has been unable to enforce the Judgment, and as such, petitioners should be punished for civil contempt and have a fine imposed as the court sees fit; (4) as a managing member of both PLT and petitioner LES, petitioner Morris Platt is in the best position to purge them of contempt, and failing to do so would make him liable for contempt as well; and (5) the continued refusal by petitioners to comply with Subpoenas A and B has been calculated to and does defeat, impair, impede, and prejudice respondent.

In opposition, petitioners aver that: (1) Subpoenas A and B should be quashed because respondent failed to properly serve the subpoenas; (2) even finding that Subpoenas A and B were properly served, respondent is seeking the wrong remedy for non-compliance; the proper procedure for non-compliance with a non-judicial subpoena is to move in Supreme Court to compel compliance; and (3) respondent filed a motion for contempt knowing the relief sought is inappropriate and should therefore pay attorney's fees of at least \$1,500.

"Courts have broad discretionary power, under CPLR Article 52, to control and regulate the enforcement of a money judgment in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." **Gryphon Domestic IV, LLC v. APP Intern. Finance Co.**, 58 A.D.3d 498, 498 (1st Dept. 2009); see also, **Guardian Loan Co. v. Early**, 47

N.Y.2d 515 (1979). C.P.L.R. 5251 provides in pertinent part that “[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title...shall each be punishable as a contempt of court.” In order to hold a party in civil contempt with respect to a post-judgment subpoena, the movant must demonstrate the alleged contemnor’s refusal or willful neglect.

Judiciary Law 753(A)(5) provides in pertinent part that a court “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....”

C.P.L.R. 2308(b) provides in pertinent part that “if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars.”

When faced with noncompliance of a non-judicial subpoena by a party, the proper procedure is to move to compel compliance with the subpoena. Disobedience of a subpoena cannot be punished as contempt unless compliance is judicially ordered. **See Reuters Ltd., v. Dow Jones Telerate Inc., 231 A.D.2d 337 (1st Dept. 1997); Dias v. Consolidated Edison Company of New York, Inc., 116 A.D.2d 453 (1st Dept. 1986)**. The question of proper service notwithstanding, failure by petitioners to comply with non-judicial Subpoenas A and B herein cannot serve as a basis for a finding of contempt. Accordingly, the motion by respondent for an order punishing petitioners for civil contempt is denied.

Under C.P.L.R. 5223, the judgment creditor may, “at any time before a judgment is satisfied or vacated...compel disclosure of all matter relevant to the satisfaction of the judgment” by issuing a non-judicial subpoena pursuant to C.P.L.R. 5224. However, such subpoenas issued to third parties should be quashed where lengthy requests contained within would cause unreasonable annoyance, disadvantage, and prejudice to those non-parties. **Young v. Torelli, 135 AD2d 813, 815 (2d Dept. 1987)**. “[T]he scope of discovery permitted under C.P.L.R. 5223 as to third parties is limited to (1) information those third parties have relevant to the judgment debtor’s assets and/or (2) information those third parties have relevant to the concealment or transfer of assets made by the judgment debtor where such assets could be used to satisfy the judgment but for the transfers.” **Lupe Development Partners, LLC v. Pacific Flats I, LLC, 2013 NY Slip Op 31891(U) (Sup Ct, NY County 2013)**. Subpoenas should specify the records sought and, where a subpoena is over-broad, the witness is not obligated to cull the good from the bad. **See Grotallio v. Soft Drink Leasing Corp, 97 A.D.2d 383 (1st Dept. 1983) citing People v. Doe, 39 AD2d 869 (1st Dept. 1972); Koch v. Sheresky, Aronson & Mayefsky LLP, 33 Misc 3d 1228(A), 2011 N.Y. Slip Op. 52150(U) (Sup Ct, NY County 2011)**. Courts have the option to quash those subpoenas in their entirety, rather than prune them. **Riverside Capital**

Advisors, Inc. v. First Secured Capital Corp., 28 AD3d 457, 460 (2d Dept. 2006).

In the instant action, although Subpoenas C and D seek some documents from non-parties which are no doubt relevant to petitioners' assets. Subpoenas C and D also contain over-broad language demanding records of entities tangentially related to petitioner Morris Platt, place the burden on Dime Bank and Bank Leumi to determine what information would be relevant to satisfying the Judgment and seek records without a time frame/limitation. Without a narrower subpoena to focus their search, Subpoenas C and D are overly broad and burdensome. It would be unreasonable for the non-party entities which were issued these subpoenas to have to determine which documents directly address respondent's demand for materially relevant information and which documents do not. Accordingly, the motion by petitioners for an order quashing Subpoenas A and B is granted.

"A restraining notice may be issued by...the attorney for the judgment creditor as officer of the court.... [i]t shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered...." **C.P.L.R. 5222**. Restraining notices issued pursuant to C.P.L.R. 5222 are effective against assets in which the judgment debtor has an "interest," and they "only reach property and debts with such a connection to the judgment debtor." **AG Worldwide v. Red Cube Mgmt. AG, No. 01 Civ. 1228, 2002 WL 417251, at *8 (S.D.N.Y. Mar. 15, 2002) citing JSC Foreign Economic Ass'n Technostroyexport v Intl. Dev. and Trade Services, Inc., 295 F Supp 2d 366, 391 (SDNY 2003)**. The Subpoena D restraining notice issued to Bank Leumi refers to the assets of petitioner LES and should not have caused a restraint on the assets of petitioner Platt. If the intent of respondent was to restrain the personal assets of petitioner Platt, the notice could have easily indicated as much. The restraining notice issued to Bank Leumi was misleading and should only be enforced against the assets of petitioner LES.

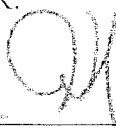
Accordingly, the motion by petitioners for an order modifying the restraining notice issued to Bank Leumi on the assets of LES is granted.

Accordingly, petitioners are is directed to serve a copy of this order with notice of entry on respondent and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 18, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR.

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK