

**Investec Bank PLC v Opalgem Invs. Corp.**

2015 NY Slip Op 30081(U)

January 16, 2015

Supreme Court, New York County

Docket Number: 652120/10

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
INVESTEC BANK PLC f/k/a/ INVESTEC BANK  
CORPORATION,

Plaintiff,

-against-

OPALGEM INVESTMENTS CORP. (a/k/a  
Opalgem Limited), *et al.*,

Defendants.  
-----X

BARBARA JAFFE, J.:

**For plaintiff:**

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**For defendants:**

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By order to show cause, plaintiff moves pursuant to CPLR 5251 and Judiciary Law 753(A)(5), 773, and 774 for an order adjudging defendants Krishnamurthy Chandra, individually and as principal of Opalgem Investments, Inc., Elite International Finance, and Rockmans Investment Incorporated, and Lakshmi Chandra in contempt for violating an order compelling them to respond to post-judgment information subpoenas. The subpoenaed parties oppose the motion.

**I. PERTINENT BACKGROUND**

On March 4, 2014, a judgment was entered in plaintiff's favor against the subpoenaed parties in the sum of \$14,138,452.65, plus interest. (NYSCEF 101, 102). On March 21, plaintiff served information subpoenas on them and their attorney. (NYSCEF 114, 166, 167). By email dated July 2, 2014, plaintiff's counsel indicated that he would agree to a short extension of the Chandra's time to comply with the subpoenas on several conditions. (NYSCEF 168). By email

dated July 3, 2014, counsel satisfied some of the conditions. (*Id.*). By email dated July 10, 2014, plaintiff's counsel advised opposing counsel that given the default in responding to the subpoenas, plaintiff would seek to enforce them, including by seeking to hold them in contempt. (NYSCEF 169).

By order dated October 15, 2014, the subpoenaed parties were ordered to comply within 15 days of the date of the decision. By letter emailed on October 29, 2014, plaintiff's counsel advised counsel that failure to comply fully with the order by October 30 would result in him filing a motion seeking to hold Chandra in contempt. (NYSCEF 171).

On or about November 12, 2014, I signed plaintiff's proposed order to show cause seeking to hold the subpoenaed parties in contempt for failing to comply with the information subpoenas. On November 13, 2014 plaintiff served the subpoenaed parties with the order to show cause.

## II. CONTENTIONS

Arguing that the subpoenaed parties have disregarded their obligations to respond to the information subpoenas, plaintiff seeks to hold them in contempt pursuant to Judiciary Law § 753, imprison them until such time as they provide the necessary information, and impose on them a fine of \$25,000 each. Plaintiff alleges having duly served them and their attorney with the subpoenas, which receipt was confirmed, the Chandras have failed to comply. (NYSCEF 165).

In opposition, Chandra alleges that the warning at the bottom of the first page of the order to show cause is not in bold type, and is thus defective and unenforceable. (NYSCEF 181). By affidavit dated November 20, 2014, Chandra denies having willfully disobeyed the October 15 order, and asserts that his many attempts to produce the requested documents have been

rebuffed by plaintiff's counsel. He claims to have been abroad and unable to comply until September 5, 2014 and that he provided dates that he would be available for depositions. Following the issuance of the October 15 order, he also asserts that his counsel advised plaintiff that the documents would be mailed by November 11, along with proposed deposition dates. Instead, plaintiff advised that he was in default of the October 15 order. By letter dated November 11, 2014, his counsel responded to plaintiff's counsel allegations. Chandra included responses to the subpoena. (NYSCEF 182).

In reply, plaintiff contends that the notice and warning in the subpoena are bolded and even if not, the alleged defect is not jurisdictional as the subpoenaed parties and counsel were timely served and appeared to contest the motion. In any event, plaintiff argues that having warned the attorney for the subpoenaed parties that it would be seeking an order holding them in contempt, they were aware that such an order would be sought. (NYSCEF 198).

### III. ANALYSIS

Pursuant to Judiciary Law § 753:

A court of record has power to punish, by fine and 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 . . . [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.

Judiciary Law § 756 provides that an application for an order seeking to punish someone for contempt:

shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold:

**WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT**

## OF COURT.

The Legislature has mandated the statutory warning to ensure that alleged contemnors are immediately apprised of the nature of the proceeding and the possible penalties. (*Chaves v New York City Police Dept.*, 2009 NY Slip Op 31229[U] [Sup Ct, New York County 2009]; *Stevens Plumbing Supply Co. v Bi-Cnty. Plumbing & Heating Co.*, 94 Misc 2d 456, 457 [Sup Ct, Nassau County 1978]). The statute thus limits a court's power to punish for contempt, and must be strictly construed. (21 NY Jur 2d Contempt § 8). An application that does not contain the notice and warning on its face is jurisdictionally deficient. (*Matter of Estate of Devine*, 126 AD2d 491, 495 [1<sup>st</sup> Dept 1987]; *Barreca v Barreca*, 77 AD2d 793 [4<sup>th</sup> Dept 1990]; *Bank Leumi Trust Co. of New York v Taylor-Cishahayo*, 147 Misc 2d 685, 687-688 [Civ Ct, New York County 1990]). Thus, the application must meet each requirement of the statute in order for it to be valid. (*Stevens Plumbing Supply Co.*, 94 Misc 2d 456).

As the goal is to ensure adequate notice to the proposed contemnor, the sufficiency of the document is assessed based on its appearance as it effects notice. Small deviations from the statutory requirements may be found to affect the presentation, thereby reducing the prominence of the warning. (*Bank Leumi Trust Co. of New York*, 147 Misc 2d 685, 691; *Stevens Plumbing Supply Co.*, 94 Misc 2d 456).

Some deviations may be insignificant. In *James W.D. v. Sandra C.*, the respondent had a long history of violating visitation orders and being served with prior contempt petitions. Thus, the Court held that she was on notice of the possibility of incarceration and that the deficiencies in the notice and warning provisions did not cause her any undue prejudice. (44 AD3d 423 [1<sup>st</sup> Dept 2007]).

Here, the order to show cause served on the subpoenaed parties contains a warning, but it

does not appear to be bolded. The alleged differences between the font of the warning and the font of the rest of the document do not satisfy the statutory requirement that the warning be bolded. (See *Bank Leumi Trust Co. of New York*, 147 Misc 2d 689 [warning irregularly stamped, typed in less than eight-point type, missing punctuation failed to satisfy statutory requirements]). That the warning on the conformed copy is bolded is immaterial.

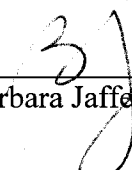
Absent sufficient evidence demonstrating that the subpoenaed parties had reason to know of the ramifications of an order to show cause for contempt, the defect is material. That counsel notified defense counsel of his intent to seek an order of contempt does not approach the circumstances presented in *James W.D. v. Sandra C.* Consequently, the application for an order of contempt does not comply with the requirements set forth in Judiciary Law § 756.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order to show cause for contempt is denied for lack of jurisdiction.

ENTER:

  
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Barbara Jaffe, JSC

DATED: January 16, 2015  
New York, New York