

**Arrowhead Capital Fin., Ltd. v Seven Arts Pictures
plc**

2015 NY Slip Op 30090(U)

January 26, 2015

Supreme Court, New York County

Docket Number: 601199/2010

Judge: Shirley Werner Kornreich

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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

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ARROWHEAD CAPITAL FINANCE, LTD.,

Plaintiffs,

-against-

**INTERIM
DECISION & ORDER**

SEVEN ARTS PICTURES PLC, SEVEN ARTS FILMED
ENTERTAINMENT, LTD., DEAL INVESTMENTS, LLC,
DEAL PRODUCTIONS, LLC, SEVEN ARTS
PICTURES, INC., SEVEN ARTS FUTURE FLOWS I,
RECTIFIER PRODUCTIONS, and POOL HALL
PRODUCTIONS, LLC,

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Defendants.

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SHIRLEY WERNER KORNREICH, J.

Plaintiff/judgment creditor, Arrowhead Capital Finance, Ltd. (Creditor), moves (Seq 009), to hold defendants Seven Arts Pictures, Inc., Deal Investments, LLC, Deal Productions, LLC, Rectifier Productions, LLC, and Pool Hall Productions, LLC (collectively, Debtors) and their officers, including Peter Hoffman, in civil contempt for failure to comply with post-judgment subpoenas duces tecum, dated October 9, 2014, that were issued by the Creditor, pursuant to CPLR 5224 (Subpoenas). Doc 403. The Creditor also seeks legal fees and costs incurred in enforcing the Subpoenas. This court entered a judgment against the Debtors on October 10, 2012, which was affirmed by the Appellate Division on October 17, 2013. The Debtors to whom the Subpoenas were directed do not include defendants Seven Arts Pictures, PLC (PLC) and Seven Arts Filmed Entertainment, Ltd (SAFE, with PLC, UK Entities).

The Debtors oppose on the grounds that: 1) they have no further responsive records in their possession, custody or control; 2) they are inactive; 3) Hoffman is their only agent and he has no

further records; 4) the Debtors transferred their assets and records to the UK Entities, which are in liquidation proceedings in the UK; and 5) the Debtors provided all of the tax returns that they had.¹

Hoffman and his daughter, Kate Hoffman, a/k/a, Katrin Marthe Hoffman (Kate) oppose on the grounds that: 1) Hoffman is not a judgment debtor; 2) Hoffman and the Debtors do not control non-party WirelessConnect, Inc. (WCI), which may have records; 3) Kate is not an officer or director of any of the defendants or WCI; and 4) the Creditor has not presented clear and convincing evidence of the Hoffmans' refusal or wilful neglect to comply with the Subpoenas.²

Hoffman has signed conflicting affidavits concerning the entity with custody of the Debtors' records. The Debtors admit that Hoffman is their only agent. Doc 423 (Memorandum of Law in Opposition), p 2. In response to the Subpoenas, Hoffman signed an affidavit swearing that he controls the Debtors, but that only the UK Entities have responsive documents. Doc 404. In response to this motion, Hoffman submitted another affidavit averring that WCI may have records that are responsive to the Subpoenas, but that the Debtors, Hoffman and Kate do not control WCI. Doc 424. However, the Creditor presents evidence that the UK Entities denied having responsive records. Docs 405 & 406. The record reflects that Hoffman asked SAFE's liquidator for a copy of the Creditor's request for documents. Doc 430. In response SAFE's liquidator said:

To the extent that you (or Kate) have books and records or other information belonging to SAFE that has not yet been passed to us, please would you (and she) do so without further delay in accordance with your duties under English law.

Id. Thus, SAFE's liquidator appears to believe that the Hoffmans might have records of the Debtors.

¹ It is undisputed that the Creditor received tax returns of one the Debtors.

² Neither the Debtors nor the Hoffmans challenged the motion on the ground of personal jurisdiction. *Benson Park Assoc. LLC v Herman*, 93 AD3d 609 (1st Dept 2012)(accused contemnor's challenge to personal jurisdiction waived if not raised in answering papers).

In addition, there is evidence that companies the Hoffmans control (or controlled) may have transferred the Debtors' responsive records to WCI. The record contains a 10-K statement of non-party Seven Arts Entertainment, Inc. (SAE) for the fiscal year ending June 30, 2013 (10K). Doc 414. The Debtors admit that WCI is the successor to SAE. Doc 423, p 2. The 10K states that: 1) SAE was formerly known as PLC; SAE continues "certain" business of PLC; 2) SAE received assets from PLC; 3) SAFE sold all of its film assets to SAE; and 4) SAE's Chief Executive Officer and Chief Operating Officer are Hoffman and Kate, respectively. Doc 414. On October 9, 2013, Kate signed a document affirming the truth of a "Statement of Affairs" relating to SAFE in its UK liquidation proceeding. Doc 397. The 5th Circuit Court of Appeals has ruled that SAE is the successor of the PLC. *Seven Arts Filmed Entm't v Jonesfilm*, 538 Fed Appx 444, fn 3 (5th Cir La. 2013). Thus, if the UK Entities' liquidators truthfully denied having records, although Hoffman previously swore that they did, and WCI has records, it got them from an entity that was controlled by the Hoffmans.

Discussion

In order to hold someone in contempt, the movant must show disobedience of a clear and unequivocal mandate of the court. *McCormick v Axelrod*, 59 NY2d 574, 583 (1983); *State v Unique Ideas, Inc.*, 56 AD2d 295, 297 (1st Dept 1977), *modified on other grnds*, 44 NY2d 345 (1978). A party moving for civil contempt arising out of noncompliance with a subpoena duces tecum bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that the party from whom the documents were sought had the ability to produce them. *Tener v Cremer*, 89 AD3d 75, 78 (1st Dept 2011). A hearing should be held where the party's ability to produce documents in compliance with a subpoena presents factual issues. *Id.* For a civil contempt, it is not necessary to show wilful disobedience, only that the

disobedience defeated, impaired, impeded, or prejudiced the rights or remedies of a party.

Gomes v Gomes, 106 AD3d 868, 869 (2d Dept 2013). A court should hold a hearing if there is a question of fact as to whether wilful false statements are made in response to a subpoena. *Bard & Margolies, Inc. v Leinweber*, 275 AD 772 (2nd Dept 1949).

The motion to hold Kate in contempt is denied. The Subpoenas were not directed to her. In addition, there is no showing that Kate Hoffman has any control over the Debtors, although she did act on behalf of SAFE in the UK liquidation.

The balance of the motion requires a hearing. Hoffman can be held in contempt for violating Subpoenas directed to the Debtors because he admits that he is the only person capable of responding to them on their behalf. *Estate of Rothko*, 84 Misc2d 830, 869 (Surr Ct NY Co 1975), *modified on other grounds*, 56 AD2d 499 (1st Dept 1977), *affirmed*, 43 NY2d 305 (1977); *Liberty Distributors, Inc. v West Hempstead Nursery & Garden Center, Inc.*, 58 Misc2d 240 (Dist Ct Nassau Co 1968), *affirmed* 62 Misc2d 905 (App Term 2d Dept 1970). However, there are questions of fact relating to the veracity of Hoffman's statement, as agent of the Debtors, that they have no records. As Hoffman has said that the UK Entities had the records, and now, disavows that, there is an issue of fact as to whether he willfully made a false statement to the court concerning the location, custody or control of the Debtor's records. In addition, if the Debtors truly do not have custody or control of the subpoenaed records, then they must explain how they came into the possession of WCI. The issues of whether Hoffman made false statements, how WCI got the Debtors' records, and the reasonable fees and costs incurred by the Creditor's counsel in enforcing the Subpoenas are referred to a Special Referee. Further, the court is directing the Debtors to produce Hoffman, their admitted agent, as a witness at the hearing. Accordingly it is

ORDERED that the motion to hold Kate Hoffman in contempt is denied; and it is further

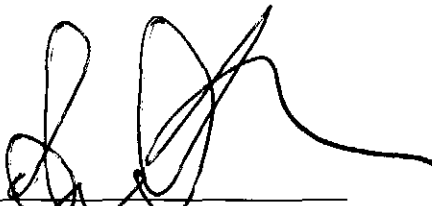
ORDERED that the issues of whether: 1) Peter Hoffman made wilful false statements about the location, custody or control of the Debtors' records; 2) how WCI got the Debtors' records; and 3) the reasonable attorneys' fees and costs incurred by plaintiff's attorney in enforcing the Subpoenas, including this motion and the reference; are referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine; and the balance of the motion is held in abeyance pending the Special Referee's determination or confirmation of his or her report; and it is further

ORDERED that the Debtors shall produce Peter Hoffman as a witness at the hearing before the Special Referee; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet,³ on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date.

Dated: January 26, 2015

ENTER:



J.S.C.

³ Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".