Pensmore Invs., LLC v Gruppo, Levey & Co.
2015 NY Slip Op 30650(U)
April 23, 2015
Supreme Court, New York County
Docket Number: 650002/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PENSMORE INVESTMENTS, LLC,

Plaintiff,

-against-

GRUPPO, LEVEY & CO., GRUPPO, LEVEY HOLDINGS, INC., GRUPPO, LEVEY PARTNERS, INC., THE JANE MICHAEL 1999 TRUST, CLAIRE GRUPPO as trustee for THE JANE MICHAEL 1999 TRUST, THE CLAIRE GRUPPO TRUST, the trustee for THE CLAIRE GRUPPO TRUST, JANUARY MANAGEMENT, INC., MAGIC MANAGEMENT, LLC, CLAIRE GRUPPO, HUGH LEVEY, WILLIAM SPRAGUE, and EVAN LEVEY,

Defendants.

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Index No.: 650002/2014

DECISION & ORDER

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WENDY LEVEY,

Petitioner,

-against-

PENSMORE INVESTMENTS, LLC, HUGH LEVEY, JOHN DOES, and JANE DOES,

Respondents.

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Index No.: 151395/2015

SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with the procedural history and factual background of the underlying dispute in this litigation – namely, plaintiff's multi-year saga of attempting to collect a debt, now worth in excess of $2.6 million, from defendants.[1] What was once a mere summary judgment in lieu of complaint on notes (Index No. 653628/2011) (the Original Action), due to defendants' refusal to pay, has ballooned into an enforcement proceeding involving veil piercing and fraudulent transfer claims and, most recently, has spilled over into the Leveys' pending

[1] All capitalized terms not defined herein have the same meaning as in the court's prior summary judgment decision dated April 8, 2014. *See* Main Action, Dkt. 52.

divorce proceedings. Wendy, Hugh's wife, has filed a petition challenging the court's recent turnover order.

The Original Action was settled. Defendant Gruppo Levey Holdings, Inc. (GLH) acknowledged it owed plaintiff $1,701,222.26 and agreed to pay off the amount by September 2013, and defendants Levey and Sprague each guaranteed $625,000 of the GLH debt. The defendants defaulted and the instant action (Index No. 650002/2014) (the Main Action) followed, based upon the Settlement Agreement. Judgment was granted against both Sprague and Levey in the amounts of the guarantee plus interest, and the remaining causes of action were severed and continued.

Before the court are: motion sequence number 009, defendants' motion to dismiss in the Main Action; motion sequence number 011, plaintiff's motion to hold defendants in contempt in the Main Action; and motion sequence number 001 under Index No. 151395/15 (the Petition). They are consolidated for disposition. For the reasons that follow, the motions are granted in part and denied in part.

I. Procedural History

In the Main Action, plaintiff filed its second amended complaint (the SAC) on October 29, 2014. *See* Main Action, Dkt. 133.[2] The SAC asserts eight causes of action: (1) breach of the Settlement Agreement against all defendants; (2) veil piercing against all defendants except Sprague; (3) fraudulent inducement of the Settlement Agreement against GLC, GLH, Hugh Levey (Hugh), and Claire Gruppo (Claire); (4) unjust enrichment against the JM Trust,[3] the CG Trust, January Management, Claire, Hugh, and Evan Levey (Hugh's son) (Evan); (5) aiding and

[2] Citations to the Main Action's docket are denoted "Main Action, Dkt. _". Citations to the Petition's docket are denoted "Petition, Dkt. _".

[3] The various new defendant entities are discussed and defined further below.

abetting fraudulent inducement against GLP, GLC, January Management, Claire, and Hugh; (6) fraudulent transfers, under New York Debtor & Creditor Law (DCL) §§ 271, 272, 273, and 278, against GLH; (7) fraudulent transfers, under DCL § 275, against GLH and Hugh; and (8) fraudulent transfers, under DCL §§ 274 and 276, against GLH, GLC, GLCP, January Management, Magic Management, Hugh, Claire, and Evan.

On November 5, 2014, most of the defendants[4] moved to dismiss the second through eighth causes of action and all claims against GLCP, January, Magic, and Claire. Plaintiff filed its opposition on November 17, 2014. Before defendants filed their reply, based on the judgement against him, on November 20, 2014, plaintiff moved for an order directing Hugh to turn over his personal property located in two of his residences, an apartment on Fifth Avenue in Manhattan and a home in Greenwich, Connecticut. *See* Main Action, Dkt. 154 (Motion Seq. 010). Oral argument on these motions was held on February 3, 2015. *See* Main Action, Dkt. 174 (2/3/15 Tr.).

The court reserved on the motion to dismiss, but decided the turn-over motion at oral argument:

> [W]hat I am ordering at this point is that Mr. Levey, who is subject to my jurisdiction, turn over all of his personal property from the Greenwich home to the sheriff, and that he assign all his personal property in the Fifth Avenue apartment to Pensmore, which then Pensmore can, at that point, turn the assignment over to the sheriff.

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[4] The only defendants not part of the motion are: the JM Trust, the CG Trust, Evan, and Sprague. Some of these defendants may not have been served with the SAC at the time the motion was filed. Evan, who is represented by separate counsel, filed an answer on November 11, 2014. *See* Main Action, Dkt. 149. Discovery recently provided to plaintiff revealed more entities controlled by Hugh and Claire, such as Frog Pond Partners. In light of these disclosures, and in light of the overwhelming motion practice thus far, the court *sua sponte* grants plaintiff leave to further amend the SAC to add these entities should it wish to do so. The additional defendants, of course, may move to dismiss.

> When Mr. Levey does this **he is to identify the specific property in the Fifth Avenue home** that – in that assignment, **and I am ordering him to specifically identify all of his personal property** in the Fifth Avenue home and assign **that** property to Pensmore, and as I said in regard to the Greenwich home, turn over his personal property from the Greenwich home.
>
> This will be turned over to the sheriff, the sheriff will auction it and whatever is left over in excess of the judgment will be returned to Mr. Levey. And I would ask that plaintiff submit an order to this effect.

See id. (2/3/15 Tr. at 6) (emphasis added). On February 6, 2015, the court entered plaintiff's proposed order (the Turnover Order), which required Hugh to provide plaintiff with a list of his personal property in the Manhattan apartment by February 11, 2015. *See* Main Action, Dkt. 172 at 2. After such list was provided, the turnover to the sheriff and sale was to occur. *See id.*

Before the deadline for Hugh to provide the list of his property, Hugh's wife, Wendy, filed the Petition on February 9, 2015. Wendy also moved by order to show cause (1) to consolidate the Petition with the Main action; (2) to intervene in the Main Action; (3) for a declaratory judgment that Hugh's personal guaranty of the settlement agreement in the prior action (*see* Main Action, Dkt. 52 at 2-3) was a fraudulent conveyance; (4) for vacator of the judgment entered on the Guaranty on July 23, 2014 (*see* Main Action, Dkt. 94); and (5) a stay of execution of the Turnover Order. *See* Petition, Dkt. 34.

II. Wendy's Petition

In support of her Petition, Wendy submitted an affidavit containing a narrative of the history of the Leveys' 42-year marriage. *See* Petition, Dkt. 5. Wendy claims to be the sole owner of much of the personal property in the two residences, particularly in the Manhattan apartment. Wendy, a nursery school teacher, however, submits virtually no documentation

substantiating her claims.[5] Indeed, at oral argument, though Wendy's counsel repeatedly averred that determining title is the primary issue, he provided scant evidence. To wit, the only evidence of title in the record is a policy insuring some of the subject personal property – *but the policy's beneficiary is Hugh, not Wendy*. *See* Petition, Dkt. 75.

Wendy proffers no valid basis to further stay the Turnover Order because there is no admissible evidence in the record establishing that she is the sole owner of any of the subject property. The pending divorce proceedings will ultimately adjudicate the distribution of marital property. Nonetheless, in an enforcement proceeding prior to the entry of a final judgment of divorce, a creditor may procure the turnover of a judgment debtor's assets, even where the debtor's spouse asserts a claim in the divorce proceedings that the subject property should be deemed martial property. *Musso v Ostashko*, 468 F3d 99, 107 (2d Cir 2006); *see Hallsville Capital, S.A. v Dobrish*, 87 AD3d 933, 934 (1st Dept 2011) (Domestic Relations Law [DRL] does not create any vested interest before judgment); *see also United States v Butler*, 543 Fed Appx 95, 96-97 (2d Cir 2013) ("New York state law does not create any interest in marital property prior to a judgment dissolving the marriage"), quoting *Musso*, 468 F3d at 105 ("A spouse without legal title has no interest in marital property prior to obtaining a judgment creating such an interest, for the concept of marital property only exists 'as an ancillary remedy to the dissolution of a marriage'"), quoting *Leibowits v Leibowits*, 93 AD2d 535, 541 (2d Dept 1983) (O'Connor, J., concurring); *see generally Charles Schwab & Co., Inc. v Makowska*, 999 FSupp2d 459, 463-64 (EDNY 2014) (collecting cases).

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[5] For instance, Wendy relies on prior bankruptcy proceedings and her alleged inheritance of certain property to justify her claims of sole ownership. Wendy, however, provides no supporting documentation other than lists she generated for the purpose of litigation. Such lists, to be clear, are not supported by any underlying documentation or admissible proof of any kind.

Notwithstanding Wendy's arguments to the contrary, property with the potential to be deemed martial property is not immune from seizure prior to entry of a final judgment of divorce. *See Charles Schwab*, 999 FSupp2d at 464-65; *see also Fields v Fields*, 15 NY3d 158, 163 (2010) (DRL § 263 a "creates statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden rests with the titled spouse to rebut that presumption"; separate property should be construed "narrowly") (citations omitted). "[S]eparate property means: '(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.'" *Commodity Futures Trading Com'n v Walsh*, 17 NY3d 162, 170 n.4 (2011), quoting DRL § 236(B)(1)(d):

The proper course of action here is effectuation of the Turnover Order, albeit with certain amendments. Pursuant to the schedule set forth at the end of this decision, Hugh must provide the list of personal property as directed in the Turnover Order. To the extent Wendy has admissible documentary evidence (i.e., *not* lists prepared by Wendy or her counsel) that conclusively proves *sole* title, as opposed to joint ownership or the possibility that such property will be equitably distributed to her in the divorce proceedings, she is to produce such documentation. Plaintiff is directed to ensure that Wendy's property is not converted. On this

record, Wendy's proffered belief that her own assets are subject to seizure as a result of this action is unsubstantiated and appears unfounded.[6]

Plaintiff and Wendy must work together to effectuate the Turnover Order. Wendy may not, however, seek to delay enforcement of the Turnover Order in the hope that a ruling on equitable distribution in the divorce proceedings will shield Hugh's interest in the subject property from seizure. The proper venue for the Leveys' fight over their assets is their divorce proceeding. The matrimonial issues do not belong in this case.

Additionally, the branch of Wendy's motion that seeks to collaterally attack the court's prior summary judgment decisions is denied. Wendy's only substantive argument – that Hugh's personal guaranty of the February 19, 2013 Settlement Agreement between plaintiff and GLC was without consideration – was an argument asserted by Sprague on the prior motion and was rejected by the court. *See* Main Action, Dkt. 52 at 6. Even if Wendy had standing to assert this argument, it fails for the same reason the argument failed for Sprague – namely, that when one personally guaranties his company's monetary obligations, a benefit to the guarantor is presumed. *See id.* (collecting cases).

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[6] Wendy's affidavit is somewhat misleading. While the court will not dissect her allegations, three in particular bear mentioning. First, with respect to the allegation that defendants' corporate structure (e.g., that the Greenwich home and Wendy's daycare were owned by January Partners) was something not known to Wendy is belied by her own signature on the very documents effectuating such structure. *See, e.g.*, Petition, Dkt. 82 at 34 (Wendy's signature on the January Partners Limited Partnership Agreement). Second, Wendy's claim that she had no communications with Hugh after December 2012, when she supposedly discovered Hugh's alleged defalcations, is belied by their April 5, 2013 email exchange about the very purportedly secret entities at issue, such as January Partners and January Management. *See* Petition, Dkt. 82 at 71-72. No acrimony appears in these emails. Third, the notion that Wendy is an innocent bystander and victim of Hugh's alleged fraudulent transfers is difficult to reconcile with the record on this motion, which demonstrates that Wendy's credit card bills and mortgage were being paid for by Hugh's companies. While Wendy herself may not have participated in the day-to-day management of the defendant entities, Wendy's attempt to distance herself from them is uncompelling.

Finally, as Wendy has no other grounds to justify her participation in the Main Action, her motion to intervene is denied. *See Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 (1st Dept 2010) (intervention allowed only when proposed intervenor has "a bona fide interest in an issue involved in that action"). Wendy's involvement shall be limited to the effectuation of the Turnover Order, the procedure for which is set forth below.

III. Defendants' Motion to Dismiss

The court now turns its attention back to the Main Action. As noted earlier, in the court's April 8, 2014 summary judgment decision, the court set forth the procedural history of and allegations in this litigation. The court assumes familiarity with that decision, which upheld the veil piercing claims against GLC and GLH,[7] but dismissed such claims against Hugh and Claire without prejudice and with leave to replead. As a result of that decision, plaintiff was granted broad financial discovery. So far, the discovery has provided ample evidence that, not only were Hugh and Claire moving money between GLC and GLH without respect to corporate formalities and with a clear intent to avoid creditors, but that Hugh and Claire actually were doing so within a broader universe of companies than those originally named as defendants.

To begin, there is GLC and GLH, the original defendants. *See* SAC ¶¶ 11-12. GLC is a subsidiary of GLH. *Id.* There is also Gruppo, Levey Partners, Inc. (GLP), another entity plaintiff recently discovered that, as discussed below, is allegedly being used to circumvent the subject restraining notices. ¶ 13. Next are two trusts. The first is The Jane Michael 1999 Trust (the JM Trust); Claire is the trustee and Hugh is the beneficiary. ¶ 14. The second is the Claire Gruppo Trust (the CG Trust); the SAC does not identify its trustee or beneficiary. ¶¶ 16-17. Then there are the January entities, January Partners and January Management. ¶ 18. Hugh and

[7] For this reason, the court will not discuss the sufficiency of the allegations against GLC and GLH since the claims against them were already deemed to be sufficiently pleaded.

Wendy formed January Partners in December 2002 for the purpose of transferring to it title to the Greenwich home. *See* Dkt. 82 at 2. January Partners' incorporation documents identify January Management as its general partner. *See id.* at 5. January Management is owned by Hugh and is also controlled by Evan. *See* SAC ¶ 18. As for Magic Management, this entity allegedly owns Wendy's afterschool activity center called "74th Street MAGIC," which she opened in 1995. *See* Petition, Dkt. 5 at 6. Between July 2011 and April 2012, Hugh caused Magic Management to transfer more than $150,000 to GLH and GLP to pay GLC's bills. *See* SAC ¶¶ 78-80. $76,750 was paid directly to Hugh, and $1,000 was used to pay Claire's credit card bill. ¶ 79.

The SAC is replete with examples of Hugh and Claire transferring money between corporate defendants without regard to corporate formalities. Plaintiff alleges GLH was artificially kept cash poor to avoid judgments against it, while money flowed though GLC and the other companies in order to pay expenses. Moreover, once plaintiff served restraining notices on the original set of defendants, defendants began using GLP, the other newly named defendants, and Claire's personal money to keep funding their business. Despite vast amounts of money flowing though the defendant entitles, plaintiff still has not been paid.

For these reasons, and the ample record on this motion, no serious discussion as to the pleading sufficiency of the SAC is needed. The standards for piercing the cooperate veil to hold Hugh, Claire, and the new defendants liable for GLH's payment obligation under the Settlement Agreement are set forth in the prior summary judgment decision and apply equally to the new defendants. *See generally Fantazia Int'l Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 (1st Dept 2012). Additionally, where, as here, deliberate undercapitalization and countless other badges of fraud [*see CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. L.P.*, 25 AD3d

301, 303 (1st Dept 2006); *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999)] are alleged, and myriad specific examples of allegedly fraudulent transfers are provided in the SAC, dismissal of the DCL claims is not warranted.

In any event, dismissal of the SAC is not really what is at stake.[8] Rather, it is plaintiff's contempt motion that most merits the court's focus.

IV. Plaintiff's Motion for Civil and Criminal Contempt

Plaintiff's contempt motion is primarily predicated on defendants' alleged violations of two restraining notices served on Claire. First, after judgment was entered against GLH [*see* Main Action, Dkt. 178 at 6], on April 10, 2014, plaintiff served Claire with a restraining notice. *See id.* at 11. Second, after judgment was entered against Hugh [*see id.* at 20], on July 24, 2014, plaintiff served Claire with another restraining notice. *See id.* at 26.

In support of its motion to hold Claire in contempt for violating these restraining notices, plaintiff submits Claire's personal bank records – which were produced by defendants to plaintiff in response to court ordered discovery – showing that Claire continued paying defendants' bills after she was served with restraining notices. Claire made payments to GLH's prior counsel in connection with this litigation, and even made two $10,000 payments to Hugh's divorce attorneys. *See* Main Action, Dkt. 178 at 99; Main Action, Dkt. 179 at 6. Claire also allegedly opened up new GLP accounts, knowing that moving money though GLH's and GLC's accounts would be problematic. Between April 10, 2014 and October 31, 2014, Claire wired more than $375,000 to GLP to pay for GLH's expenses. *See* Main Action, Dkt. 182 at 11-13 (summary of transactions with citations to bank records). Claire also wired $104,800 to the JM Trust and Frog

[8] The only new claims that would have merited discussion were the third cause of action for fraudulent inducement of the Settlement Agreement and the fifth cause of action for aiding and abetting the fraudulent inducement. Plaintiff withdrew these claims without prejudice in a stipulation dated March 31, 2015. *See* Main Action, Dkt. 198.

Pond Partners (an entity owned 49% by Hugh) to further help Levey pay his bills. *See id.* at 14-15. Then too, on July 24, 2014, plaintiff served Evan with a restraining notice on Magic Management. *See* Main Action, Dkt. 179 at 45. Between July 31, 2014 and October 29, 2014, Magic Management wired $27,000 into a January Management account. *See* Main Action, Dkt. 182 at 15-16.

Defendants do not (nor can they) dispute the occurrence of these transactions, nor do they meaningfully dispute the allegations that the manner in which the transfers were made was for the purpose of providing a continued source of funding for GLH and Hugh despite the subject judgments and retaining notices. Defendants simply argue that they should not be held in contempt because these transfers do not violate Article 52 of the CPLR.

"A party seeking to enforce a judgment may seek to restrain or prohibit the transfer of a judgment debtor's property in the hands of a third party pursuant to CPLR 5222(b)." *Verizon New England, Inc. v Transcom Enhanced Servs., Inc.*, 21 NY3d 66, 70 (2013). CPLR 5222(b) provides:

> A restraining notice served upon a person **other than the judgment debtor** or obligor is effective only if, at the time of service ... he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest ..., or if the judgment creditor ... has stated in the notice that ... the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such person, including any specified in the notice ... shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property ... to any person other than the sheriff or pursuant to an order of the court[.]

(emphasis added). CPLR 5251 provides that a person who refuses to obey a restraining notice may be held in contempt of court.

There is scant appellate precedent fleshing out the standard for determining when a judgment-debtor has an "interest" in funds held by a non-judgment debtor. This court, as well as other New York trial courts, have relied on *Ray v Jama Prods., Inc.*, 74 AD2d 845 (2d Dept 1980), for the proposition that "the judgment debtor need not have physical possession of the assets for the creditor to reach them; it is enough if the debtor derives a benefit from the assets." *Strachman v Palestinian Auth.*, 2008 WL 2413020 (Sup Ct, NY County 2008) (Kornreich, J.); *see Briarpatch Ltd. v Briarpatch Film Corp.*, 2013 WL 2728572, at *9-10 (Sup Ct, NY County 2013) (Bransten, J.) ("One may not circumvent the mandates of a restraining notice by claiming that the judgment debtor has no interest in the money merely because he will not acquire physical possession of such money. The fact that a judgment debtor will directly benefit from the payment of this sum is sufficient to require the party served with the restraining notice to comply with the provisions or be subject to the appropriate legal sanction"); *Melcher v Apollo Medical Fund Mgmt. LLC*, 2013 WL 6123785, at *3 (Sup Ct, NY County 2013) (Schweitzer, J.) ("the judgment debtor need not have physical possession of the assets for the creditor to reach them; it is enough if the debtor derives a benefit from the assets"); *Rosenstein v Kravetz Realty Group, LLC*, 2011 WL 1456301 (Sup Ct, NY County 2011) (Jaffe, J.) ("restraining notice valid [where] judgment debtor has interest where monies are to be used to satisfy debts and expenses")

In applying this rule, the First Department has held that where "evidence demonstrates that a judgment debtor regularly has used another's bank account as a 'recipient' of the debtor's personal assets or as a source for payment of the debtor's expenses, the account may be restrained under [Article 52]." *Bingham v Zolt*, 231 AD2d 479 (1st Dept 1996), citing *ERA Mgmt., Inc. v Morrison Cohen Singer & Weinstein*, 199 AD2d 179 (1st Dept 1993).

There is little doubt that Claire and Hugh knowingly and steadfastly refused to satisfy plaintiff's judgment against GLH. Instead, they devised an array of alternative means of financing GLH while ensuring GLH remains judgment proof on a judgment of less than $3 million. On this record, there appears to be no question of fact that defendants' money was fungible. Money moved from Claire to Hugh to the various corporate entities and trusts, with no legitimate corporate basis.[9]

The instant contempt motion turns on the separate standards for civil and criminal contempt. "Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate." *McCain v Dinkins*, 84 NY2d 216, 226 (1994), citing *McCormick v Axelrod*, 59 NY2d 574, 583 (1983). A defendant may be held in civil contempt when there is "clear and convincing evidence that defendant knowingly disobeyed clear and unequivocal orders of the court." *Simens v Darwish*, 104 AD3d 465, 466 (1st Dept 2013), citing *McCormick*, 59 NY2d at 582-83. A hearing is not required to hold a party in civil contempt when there is no question of fact that a court order was knowingly violated. *See Yonamine v New York City Police Dep't*, 121 AD3d 598 (1st Dept 2014), citing *Cashman v Rosenthal*, 261 AD2d 287 (1st Dept 1999) ("Supreme Court properly held defendant in civil contempt without holding a hearing, since it was clear from the papers submitted to the court that there was no issue of fact to be resolved"); *see 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co.*, 57 AD3d 340, 341 (1st Dept 2008) ("since there were no issues of fact to be resolved at a hearing, it was proper for the court to make a finding of contempt without a hearing"); *see also Gryphon Domestic VI, LLC v APP Int'l Fin. Co.*, 58 AD3d 498, 499 (1st Dept

[9] To be sure, despite the robust nature of this record, this is not a motion for summary judgment.

2009) ("To sustain a finding of civil contempt based on alleged violation of a court order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate").

Moreover, "[a]lthough the line between the civil and criminal contempt may be difficult to draw in a given case and the same act may be punishable as both a civil and a criminal contempt, the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct." *McCain*, 84 NY2d at 226; *see Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 (2d Dept 2012) ("The same act may be punishable as both a criminal and civil contempt"). That being said, the purposes of civil contempt and criminal contempt differ. Civil contempt "is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate"; "[a] criminal contempt, on the other hand, involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates." *Dep't of Envtl. Protection of the City of New York v Dep't of Envtl Conservation of the State of New York*, 70 NY2d 233, 234 (1987). "Unlike civil contempt, the aim in a criminal contempt proceeding **is solely to punish** the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory." *Id.* (emphasis added). To hold a party in criminal contempt, a hearing must be held and a willful disobedience of a court order must be proved beyond a reasonable doubt. *Muraca v Meyerowitz*, 49 AD3d 697, 698 (2d Dept 2008), citing *County of Rockland v Civil Serv. Empls. Ass'n*, 62 NY2d 11, 16 (1984). Pursuant to Judiciary Law § 751, a party held in criminal contempt can be jailed for up to 30 days.

Plaintiff seeks criminal contempt. Plaintiff avers that only jail time will cause Hugh and Claire to take their obligations to plaintiff and the court seriously. While this may be true, at this juncture, the court will not order such a harsh remedy. Nor will the court hold either of them in civil contempt. While defendants are testing the limits of the court's patience, the record on this motion does more to justify veil piercing than contempt since most of the money used to fund GLH appears to have come from Claire's personal funds. But for Claire using her own money, GLH would not be able to pay its expenses, such as its payroll. None of the challenged transfers appear to have made it substantially more difficult for plaintiff to collect its judgment. The proper remedy is not contempt; it is veil piercing. Once GLH's debt can be collected from whichever defendant has its cash, plaintiff can finally be made whole. Accordingly, it is

ORDERED that defendants' motion to dismiss the second amended complaint is denied, except to the extent that the third and fifth causes of action are dismissed without prejudice in accordance with the parties' March 31, 2015 stipulation; and it is further

ORDERED that plaintiff's motion for civil and criminal contempt is denied; and it is further

ORDERED that Wendy Levey's motion to intervene is denied; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, Hugh shall e-file the "Itemized List Affidavit" described in the Turnover Order (*see* Dkt. 172 at 2); within 7 days thereafter, counsel for plaintiff, defendants, and Wendy shall meet and confer to draft a supplemental turnover order that ensures Wendy can be notified of and participate in the process by which the property is turned over and sold, such that if Wendy can prove (in the manner set forth in this decision) that she solely owns any of such property, plaintiff can ensure

that property solely owned by Wendy's is not sold and also that Wendy is paid half of the proceeds from the sale of any jointly owned property; and it is further

ORDERED that plaintiff shall e-file and fax to Chambers a final amended turnover order no later than 21 days after this order is entered on the NYSCEF system, along with a *joint* letter from plaintiff's, defendants', and Wendy's counsel setting forth any disputes over plaintiff's proposed language, and, if there are any such disputes, the court will contact the parties to set up a telephone conference before the final turnover order is entered; and it is further

ORDERED that the balance of the relief sought in Wendy Levey's petition is denied, and the Clerk is directed to enter judgment dismissing the petition filed under Index No. 151395/2015.

Dated: April 23, 2015

ENTER:

J.S.C.