

Discover Tech., LLC v Arcovis, LLC
2016 NY Slip Op 30750(U)
April 19, 2016
Supreme Court, New York County
Docket Number: 651355/2015
Judge: Scarpulla Saliann
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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DISCOVER TECHNOLOGIES, LLC,

Petitioner,

-against-

ARCOVIS, LLC and HARRY JONES,

Respondents.
-----X

DECISION/ORDER / Judgment

Index No. 651355/2015
Motion Seq. 001

HON. SALIANN SCARPULLA, J.:

Petitioner Discover Technologies, LLC (“Discover”) commenced this special proceeding to enforce a judgment that it obtained against respondent Arcovis, LLC (“Arcovis”) in another action entitled, *Harry Jones, a member on behalf of Arcovis, LLC v. Natalya Voskresenskaya and Discover Technologies, LLC*, Index No. 652092/2013 (“the underlying action”).

In the petition, Discover seeks an order: (a) holding Arcovis in contempt for failure to respond to a subpoena *duces tecum* and *ad testificandum* dated March 10, 2015 (“the subpoena”) and finding that Arcovis is liable for attorney’s fees in this proceeding; (b) compelling Arcovis to produce documents and the witness Harry Jones (“Jones”) for a deposition; (c) holding Jones personally liable for the judgment, as well as attorney’s fees in this proceeding; and (d) compelling Jones to disclose his finances and use of Arcovis and any other business entities (motion seq. 001). In a separate motion, Discover moves to strike Arcovis and Jones’ opposition to the petition as untimely (motion seq. 002). The motions are consolidated for disposition.

The underlying action arose from a dispute over an alleged breach of a nondisclosure agreement between Arcovis, a technology firm that develops team collaborative software, and Discover. According to the complaint in that action, Arcovis is a limited liability company with

two members, Harry Jones and Natalya Voskresenskaya. The plaintiffs, identified as “Harry Jones, a member on behalf of, Arcovis, LLC,” alleged that Discover breached the nondisclosure agreement by divulging and utilizing Arcovis’ proprietary information, which they obtained upon hiring Voskresenskaya. The plaintiffs further alleged that Voskresenskaya breached her fiduciary duties to Harry Jones, and tortiously interfered with prospective contractual relations by directly contracting with Discover in place of Arcovis.

Justice Melvin Schweitzer ultimately dismissed the complaint against Discover in the underlying action, and granted a judgment of attorney’s fees to Discover against plaintiffs Harry Jones, a member of Arcovis, LLC, in the amount of \$81,807.60. Discover now moves for an order holding Arcovis in contempt based on its failure to adequately respond to the subpoena.

Discussion

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. Judiciary Law § 753; *McCain v. Dinkins*, 192 A.D.2d 217, 219 (1st Dep’t 1993). The actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. *Farkas v. Farkas*, 209 A.D.2d 316, 319 (1st Dep’t 1994).

Under CPLR § 5223, a party has the right to obtain financial disclosure to aid it in the recovery of the money it is due and its collection efforts. Further, a judgment creditor may pursue a contempt finding when an information subpoena is disregarded. CPLR § 5251.

After Discover filed the petition, I scheduled a hearing to take place on July 28, 2015. The respondents failed to appear at the hearing or file an opposition at that time. On August 5, 2015, the respondents filed opposition papers to the petition. Discover contends that the petition should

be granted because respondents did not provide a reasonable excuse for the delay in filing their opposition, and the Court should strike respondents' opposition papers as untimely.

Although Discover argues that Arcovis' opposition should be stricken, I accept Arcovis' opposition papers. Arcovis' counsel stated in his affidavit that he did not receive an e-court notice regarding the hearing date, and that he corresponded with Discover's counsel on that date to confirm that the Court would consider the petition on the papers. However, Arcovis' contention that neither Jones nor Arcovis were properly served with the petition is insufficient to raise an issue of fact as to service. The affidavits of service submitted by Discover are *prima facie* evidence that service was properly made, and neither Jones nor Arcovis submitted an affidavit denying service or specifying any other facts to rebut the process server's affidavits. *Deutsche Bank Nat. Trust Co. v. Quiones*, 114 A.D.3d 719, 719 (2d Dep't 2014).

Based on the petition and the opposition papers, Discover has established its need to access the information requested in the subpoena to aid the enforcement of the judgment against Arcovis. Discover demonstrates that Arcovis failed to provide responsive documents and failed to produce Jones for a deposition in response to the subpoena. In addition, Discover shows that Jones was a party to Arcovis' contempt in failing to respond to the subpoena. *1319 Third Ave. Realty Corp. v. Chateaubriant Restaurant Development Company, LLC*, 57 A.D.3d 340, 341 (1st Dep't 2008); *Carmody-Wait* 2d § 140:135 (noting that an "individual may not use his or her position as sole stockholder and president of a corporation to shield himself or herself from contempt proceedings when disobeying court orders"). I find that Arcovis and Jones' disobedience of the subpoena has defeated, impaired, impeded or prejudiced Discover's right to ascertain information about Arcovis' financial resources.

Accordingly, I grant the petition to hold Arcovis and Jones in contempt. I impose a \$250 fine on the respondents, and I award reasonable attorney's fees and costs of this proceeding to Discover against Arcovis. Arcovis and Jones may fully purge this contempt finding and the corresponding sanction by producing documents and the witness Harry Jones for a deposition in response to the subpoena, within a reasonable time (60 days or less) after this order is entered.

Discover further seeks to hold Jones personally liable for the judgment by piercing the corporate veil of Arcovis. Discover argues that Arcovis' veil should be pierced because it is a shell company dominated and controlled by Jones. Further, Discover claims that Jones had no basis to sue on Arcovis' behalf in the underlying litigation, and that Jones has moved contracts and business opportunities out of Arcovis into other companies that he owns.

After reviewing the evidence submitted on this petition I find that, at this time, Discover has failed sufficiently to submit evidence to show that Jones exercised complete domination over Arcovis, and that he should be held personally liable for Arcovis' judgment. See CPLR 5225; *O'Brien-Kreitzberg & Associates v. K.P., Inc.*, 218 A.D.2d 519, 519 (1st Dep't 1995). I therefore deny this portion of the petition without prejudice to renewal after Jones and Arcovis produce the post-judgment discovery set forth in this order and judgment.

Although I find that Discover has not made out its veil piercing claim at this time, I find that Jones, as a member of Arcovis, is liable for Arcovis' contempt in failing to respond to the subpoena. As a party to the contempt, Jones may be punished for the disobedience of the subpoena. *1319 Third Ave. Realty Corp. v. Chateaubriant Restaurant Development Company, LLC*, 57 A.D.3d 340, 341 (1st Dep't 2008); *Carmody-Wait* 2d § 140:135 (noting that an "individual may not use his or her position as sole stockholder and president of a corporation to shield himself or herself from contempt proceedings when disobeying court orders").

In accordance with the foregoing, it is hereby:

ADJUDGED that Discover Technologies, LLC's petition for an order holding Arcovis, LLC and Harry Jones in contempt is granted (motion seq. no. 001); and it is further

ADJUDGED that Arcovis, LLC and Harry Jones are held in civil contempt. The respondents are directed to produce documents and the witness Harry Jones for a deposition in response to petitioner's subpoena within a reasonable time (60 days or less) after this order is entered. This is a final opportunity to purge the contempt; and it is further

ORDERED that each respondent that fails to comply with this purge must pay a fine of \$250 payable to petitioner Discover Technologies, LLC; and it is further

ORDERED that in the event the purge does not occur, petitioner Discover Technologies, LLC may submit a warrant of arrest for the respondent Harry Jones; and it is further

ORDERED that in the event the purge does not occur, respondent Arcovis, LLC is liable for Discover's reasonable attorney's fees incurred in this proceeding; and it is further


ORDERED that petitioner Discover Technologies' claim for piercing the corporate veil of Arcovis, LLC to hold Harry Jones personally liable for the judgment and attorney's fees is denied at this time, without prejudice to renewal; and it is further

ORDERED that petitioner Discover Technologies, LLC's motion to strike Arcovis, LLC and Jones' opposition to the petition is denied (motion seq. 002).

This constitutes the Decision, Order and Judgment of the Court.

DATE :

4/19/16



SCARPULLA, SALIANN, JSC