

Greenaway v Tri-State Consumer Ins. Co.

2016 NY Slip Op 32781(U)

December 6, 2016

Supreme Court, Nassau County

Docket Number: 600260/14

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ELBERT GREENAWAY and AUGUSTINA
GREENAWAY, on behalf of themselves and all other
persons similarly situated,

TRIAL/IAS PART 37
NASSAU COUNTY

Plaintiffs,

Index No.: 600260/14
Motion Seq. No.: 08
Motion Date: 11/10/16

- against -

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits	1

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 2308, for an order holding non-party witness Ezron Lowther (“Lowther”) in contempt of court for disobedience of a judicial subpoena; and move for a warrant to be issued directing the Sheriff to bring non-party witness Lowther into this Court in order to secure his testimony and for failing to appear at a deposition for his testimony scheduled for September 12, 2016, as required by Judicial Subpoena; and move for an order directing non-party witness Lowther to pay defendant’s costs and attorney’s fees that were sustained as a result of non-party witness Lowther’s failure to comply with said subpoena. No opposition was submitted to the motion.

Counsel for defendant submits that, “[t]his lawsuit (the ‘Lawsuit’) arises out of the claim for insurance coverage for an alleged pipe break that occurred on or about January 27, 2013 at a residence owned by the Plaintiffs ELBERT GREENAWAY and AUGUSTA GREENAWAY (the ‘Greenaways’), located at 33 Glover Avenue, Yonkers, New York 10704 (the ‘Premises’).... The pipe break allegedly caused water damage to the Premises and damage to other personal property of the Greenaways. Tri-State issued a policy of homeowners insurance to cover the Premises. Tri-State filed its Amended Answer to this Lawsuit on March 25, 2016.... Tri-State asserts in its Answer, among other things, that the Greenaways committed fraud in the reporting of this claim in addition to failing to properly maintain the Premises. At the crux of the dispute is whether the Greenaways properly heated their home to protect the pipes from damage. From the outset of this Lawsuit, Tri-State has maintained that the failure of the Greenaways to properly maintain their home warrants Tri-State’s denial of the claim. At some point, Ezron Lowther, a plumber, allegedly installed a new boiler at the Premises. A central issue in this case is the date that Mr. Lowther installed the boiler. Specifically, there are conflicting accounts regarding whether the boiler was installed prior to or after the alleged water damage at the Premises. For example, the receipts for payment for the installation of the boiler issued by Mr. Lowther to the Greenaways reflect an installation date of the boiler *after* the alleged water loss.... Although the story has changed through the claim process, the only witness to testify about the installation, Mr. Greenaway, testified that the installation happened before the water damage at the Premises.... Mr. Greenaway also testified that the boiler was installed after the alleged water loss.... On or about June 21, 2016, I spoke with Mr. Lowther directly on the phone in order to confirm that Mr. Lowther was in fact the plumber who performed work at the Premises for the Greenaways

because of the need for clarification of the facts of this case. Mr. Lowther did in fact confirm that he remembered performing work for the Greenaways at the Premises. During my phone call with Mr. Lowther, I requested his testimony and informed him that I would be issuing a subpoena to obtain his testimony. Thereafter, on or about June 22, 2016, my office served a subpoena *duces tecum* and *ad testificandum* on Mr. Lowther, commanding his testimony at our offices on July 22, 2016 ('June 22nd Subpoena').... In the week prior to the deposition, this office called Mr. Lowther on several occasions to advise him of the deposition and confirm his attendance and availability. Mr. Lowther never answered the phone, so we left messages. Mr. Lowther never returned the calls. On July 22, 2016, Mr. Lowther failed to comply with the subpoena and did not show for his scheduled deposition.... On August 2, 2016, all parties appeared in front of the Honorable Denise L. Sher for a compliance conference. At this conference, we informed Judge Sher that Mr. Lowther failed to appear for his scheduled deposition and requested that Judge Sher issue a judicial subpoena to obtain the testimony of Mr. Lowther. Thereafter, on August 16, 2016, Judge Sher signed the judicial subpoena ordering Mr. Lowther to appear at the Nassau County Supreme Court on August 31, 2016 ('Judicial Subpoena').... On or about August 20, 2016, we served the Judicial Subpoena on Mr. Lowther.... Thereafter, at Plaintiff's request, we consented to reschedule Mr. Lowther's deposition for September 12, 2016. On or about August 24, 2016, we both mailed and attempted to serve Mr. Lowther with a letter indicating that his deposition was rescheduled for September 12, 2016.... In the week prior to the deposition, this office called Mr. Lowther on several occasions to advise him of the deposition and confirm his attendance and availability. Mr. Lowther never answered the phone, so we left messages. Mr. Lowther never answered the phone or returned the calls. On September 12, 2016, both parties appeared at the

Nassau County Supreme Court for deposition. However, Mr. Lowther again failed to appear....”

See Plaintiffs’ Affirmation in Support Exhibits A-J.

It is settled that “[i]n order to prevail on a motion to hold a party in contempt, the moving party must demonstrate that the party charged with contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the moving party’s rights.” See *Gomes v. Gomes*, 106 A.D.3d 868, 965 N.Y.S.2d 187 (2d Dept. 2013); Judiciary Law § 753; *Smith v. De Paz*, 105 A.D.3d 750, 962 N.Y.S.2d 631 (2d Dept. 2013); *Matter of Hughes v. Kameneva*, 96 A.D.3d 845, 946 N.Y.S.2d 211 (2d Dept. 2012); *GMCK Realty, LLC v. Mihalatos*, 95 A.D.3d 947, 944 N.Y.S.2d 220 (2d Dept. 2012). See also *Matter of Department of Env’tl. Protection of City of N.Y. v. Department of Env’tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 519 N.Y.S.2d 539 (1987); *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 439 N.Y.S.2d 316 (1981); CPLR §§ 5222(a), 5251 and 2308(a).

“Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their losses.” See *State of New York v. Unique Ideas*, 44 N.Y.2d 345, 405 N.Y.S.2d 656 (1978); *Berkowitz v. Astro Moving & Stor. Co.*, 240 A.D.2d 450, 658 N.Y.S.2d 425 (2d Dept. 1997). Pursuant to Judiciary Law § 773, the amount of a contempt fine should be sufficient to indemnify the aggrieved party for “actual loss or injury” caused “by reason of the misconduct.” *Matter of Barclays Bank v. Hughes*, 306 A.D.2d 406, 761 N.Y.S.2d 278 (2d Dept. 2003). See also *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279 (1983); *Dunn v. Dunn*, 78 A.D.3d 649, 911 N.Y.S.2d 96 (2d Dept. 2010); *Home Surplus of Brooklyn v. Home Surplus*, 3 A.D.3d 472, 769 N.Y.S.2d 904 (2d Dept. 2004); *Rechberger v. Rechberger*, 139 A.D.2d 906, 528 N.Y.S.2d 452 (4th Dept. 1988); CPLR § 2308. Accordingly, the party seeking a contempt order must prove actual loss, failing which “the court may only

impose a fine which does not exceed the complainant's costs and expenses, plus an additional \$250.00." *Berkowitz v. Astro Moving & Stor. Co.*, *supra* at 452. *See also Hamilton v. Murphy*, 79 A.D.3d 1210, 913 N.Y.S.2d 372 (3d Dept. 2010); *Rechberger v. Rechberger*, *supra*. Legal fees and disbursements are also recoverable. *See Matter of Claydon*, 103 A.D.3d 1051, 962 N.Y.S.2d 352 (2d Dept. 2013); *Alderman v. Alderman*, 78 A.D.3d 620, 909 N.Y.S.2d 916 (2d Dept. 2010); *Matter of Carol S. (Christine T. - Mary AA.)*, 68 A.D.3d 1337, 890 N.Y.S.2d 209 (3d Dept. 2009). *See also* Judiciary Law § 773.

Notably, "[a] motion to punish a party for civil contempt is addressed to the sound discretion of the court." *Hughes v. Kameneva*, *supra* at 846; *Collins v. Telcoa Intl. Corp.*, 86 A.D.3d 549, 927 N.Y.S.2d 151 (2d Dept. 2011); *Chambers v. Old Stone Hill Road Associates*, 66 A.D.3d 944, 889 N.Y.S.2d (2d Dept. 2009), *appeal dismissed* 14 N.Y.3d 747, 898 N.Y.S.2d 80 (2010). The burden of proof is on the proponent of the contempt motion and the contempt must be established by clear and convincing evidence. *See Gomes v. Gomes*, *supra*; *GMCK Realty, LLC v. Mihalatos*, *supra* at 849; *Town of Riverhead v. TS Haulers Inc.*, 68 A.D.3d 1103, 890 N.Y.S.2d 332 (2d Dept. 2009). *See generally McCain v. Dinkins*, 84 N.Y.2d 216, 616 N.Y.S.2d 335 (1994). To prevail on a motion for a finding of civil contempt it is necessary to establish that (1) a lawful court order clearly expressing an unequivocal mandate is in effect; (2) actual knowledge of the order by the person alleged to have violated the order; and (3) the violation has defeated, impaired, impeded or prejudiced the rights of a party. *See Vider v. Vider*, 85 A.D.3d 906, 925 N.Y.S.2d 189 (2d Dept. 2011). *See also* Judiciary Law §753.

A party may be found in contempt for failure to appear for a subpoenaed deposition and failure to produce documents (*see Matter of Barclays Bank v. Hughes*, 306 A.D.2d 406, 761 N.Y.S.2d 278 (2d Dept. 2003)) and a non-party may be found in contempt for failure to appear

for a subpoenaed deposition. *See Ravnikar v. Skyline Credit-Ride, Inc.*, 79 A.D.3d 1118, 913 N.Y.S.2d 339 (2d Dept. 2010). *See also Deans v. Jamaica Hosp. Medical Center*, 64 A.D.3d 744, 883 N.Y.S.2d 313 (2d Dept. 2009).

With these principles in mind, and upon the unopposed allegations of disobedience and noncompliance advanced, the Court finds that defendant has carried its burden with respect to its motion for civil contempt (*see Rose v. Levine*, 84 A.D.3d 1206, 923 N.Y.S.2d 689 (2d Dept. 2011); *Alderman v. Alderman, supra*; *Galanos v. Galanos*, 46 A.D.3d 507, 846 N.Y.S.2d 654 (2d Dept. 2007)) *i.e.*, it has produced clear and convincing evidence establishing that, *inter alia*, non-party witness Lowther disobeyed a clear and unequivocal order of the Court. *See generally Gomes v. Gomes, supra*; *Alderman v. Alderman, supra*; *Dunn v. Dunn, supra* at 650. More particularly, in not submitting any opposition to the motion, non-party witness Lowther did not dispute that he failed to comply with the judicial subpoena, nor has he articulated a viable explanation for his failure to do same. The record, therefore, supports the conclusion that non-party witness Lowther's conduct was "calculated to, or actually did, defeat, impair, impede or prejudice [defendant's] rights or remedies." *See* Judiciary Law § 770; *Dunn v. Dunn, supra* at 650; *Incorporated Vil. of Plandome Manor v. Ioannou*, 54 A.D.3d 365, 862 N.Y.S.2d 592 (2d Dept. 2008).

Accordingly, defendant's motion, pursuant to CPLR § 2308, for an order holding non-party witness Lowther in contempt of court for disobedience of a judicial subpoena; and for a warrant to be issued directing the sheriff to bring non-party witness Lowther into this Court in order to secure his testimony and for failing to appear at a deposition for his testimony scheduled for September 12, 2016, as required by Judicial Subpoena; and for an order directing non-party witness Lowther to pay defendant's costs and attorney's fees that were sustained as a result of

non-party witness Lowther's failure to comply with said subpoena, is hereby **GRANTED to the extent that it is**

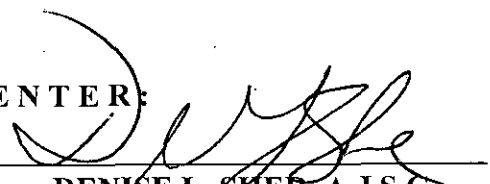
ORDERED that non-party witness Lowther is guilty of a contempt of court and is fined in the amount of \$250.00; and it is further

ORDERED that non-party witness Lowther shall have leave to purge himself of the contempt by appearing on January 10, 2017, at the Nassau County Supreme Court Building, IAS Part 37, 100 Supreme Court Drive, Mineola, New York, 11501, at 9:30 a.m. to address the issue of his non-compliance with the subject judicial subpoena, and by paying the aforementioned \$250.00 fine; and it is further

ORDERED that should non-party witness Lowther *fail* to appear in IAS Part 37, Nassau County Supreme Court, on January 10, 2017, at 9:30 a.m., this Court will entertain an application for further sanctions; and it is further

ORDERED that this Decision and Order must be personally served upon non-party witness Lowther with proof of service provided to the Court prior to the above scheduled return date.

This constitutes the Decision and Order of this Court.

ENTER: 
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 6, 2016

ENTERED
DEC 12 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE