

Fleetwood Fin., a Div. of IDB Leasing Inc. v Walter J. Dowd, Inc.

2016 NY Slip Op 32957(U)

July 18, 2016

Supreme Court, New York County

Docket Number: 113484/11

Judge: Barry Ostrager

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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 61

X

FLEETWOOD FINANCIAL, A DIVISION OF IDB
LEASING INC.

Plaintiff,

Index No. 113484/11

-against-

WALTER J. DOWD, INC. AND GORDON
CHARLOP,

Motion Seq. No. 007

Defendants.

X

GORDON CHARLOP,

Third-Party Plaintiff,

FILED

-against-

SEP 14 2016

DME SECURITIES LLC, MICHAEL BERGER,
JOHN COLVIN and WARREN MEYERS,

COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Defendants.

X

OSTRAGER, J:

Plaintiff Fleetwood Financial commenced this action to recover monies allegedly due on an equipment lease entered into with the corporate defendant Walter J. Dowd, Inc. (Dowd) and guaranteed by the individual defendant Gordon Charlop, an officer and director of Dowd. Charlop then commenced a third-party action seeking indemnification and contribution from Michael Berger, John Colvin and Warren Myers, who also were officers and directors of Dowd and each of whom had agreed to be personally responsible for 25% of any payments made by Charlop pursuant to the guaranty.¹

¹ After Dowd ceased operating, the third-party defendants allegedly were employed by DME Securities, LLC.

On July 16, 2012 a judgment in the sum of \$56,343.16 was entered in favor of plaintiff Fleetwood against defendants Dowd and Charlop pursuant to the June 7, 2012 Order of the Honorable Eileen A. Rakower. Thereafter, the action was assigned to this Court for the disposition of the third-party action. By Stipulation dated July 27, 2015, third-party defendants Berger and Meyers agreed to pay certain sums to third-party plaintiff Charlop in settlement of their proportionate share of the third-party claims. Colvin, however, failed to appear in court or otherwise participate in the settlement, which ultimately led to the withdrawal of his counsel with the permission of the Court based on allegations that Colvin had failed to communicate with his counsel.

After further proceedings were held with no appearance by Colvin, this Court on January 27, 2016 entered a judgment in favor of Charlop as the third-party plaintiff against Colvin as the third-party defendant in the amount of \$19,105.51, which was Colvin's proportionate share of Charlop's debt. Thereafter, Charlop served an Information Subpoena on Colvin in an effort to obtain information to enforce the judgment. When Colvin failed to respond, Charlop made the instant motion to hold Colvin in civil contempt.

According to the moving papers, Charlop sent Colvin the Information Subpoena by certified mail, return receipt requested, on January 27, 2016. A copy of the Information Subpoena and an affidavit of service is attached to the moving papers as Exhibit A, but no confirmation of receipt is included. Charlop then moved to compel Colvin to respond to the subpoena. Colvin did not respond to the motion, and on April 15, 2016, this Court granted the motion and ordered Colvin to respond to the Information Subpoena within 12 days of Charlop's service of a copy of the April 15

Order and a duplicate copy of the Information Subpoena on Colvin by regular and certified mail (Exh. C).

Service of the April 15 Order and a duplicate copy of the Information Subpoena was allegedly made by regular and certified mail on April 25, 2016 (see Aff of Service, Exh. E). The movant includes with his papers a printout from the US Postal Service website that indicates that the regular mail was delivered to Colvin's mailbox on April 27, but no evidence of receipt or delivery of the certified mail is included (Exh. F). When Colvin failed to respond, Charlop sent a letter to Colvin on May 17, 2016 by email and overnight Federal Express, advising Colvin of a final opportunity to respond before contempt proceedings would be initiated, and counsel has provided a printout from FedEx confirming delivery of that letter to Colvin's mailbox at his home address on May 18 (Exh. G). When Colvin still did not respond, Charlop served this motion by USPS Priority Mail to hold Colvin in civil contempt for his failure to comply with the April 15 Order directing a response to the Information Subpoena. An Affidavit of Service has been provided, and while no proof of delivery has been provided, there is a presumption of receipt when a mailing is made via the United States Postal Service. See e.g., *Jonathan Woodner Co. v Richard L. Higgins*, 179 AD2d 444 (1st Dep't 1992).

An Information Subpoena, a legal document that orders a debtor to answer questions about the location of its assets, can be served by registered or certified mail, return receipt requested. CPLR § 5224(a)(3); see also Siegel, NY Prac § 509 at 893 (5th ed 2011). Refusal or neglect to obey an Information Subpoena is punishable by a contempt of court. CPLR § 5251; see also Judiciary Law § 753(5). An application to punish for civil contempt may be commenced by notice of motion for contempt or by an

Order to Show Cause. Judiciary Law § 756. Civil contempt motions may be served by regular mail. See Siegel, NY Prac § 484 at 842-43 (5th ed 2011).

A finding of contempt is governed by Judiciary Law §753, which empowers the court to "punish, by fine or imprisonment, or either" based on a finding of "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" The Court of Appeals has summarized the contempt statute in a four-pronged test in *McCormick v. Axelrod*, 59 NY2d 574, 583 (1983)(citations omitted):

In order to find that contempt has occurred in a given case, it must be determined that [1] a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. [2] It must appear, with reasonable certainty, that the order has been disobeyed ... [3] Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party ... [4] Finally, prejudice to the right of a party to the litigation must be demonstrated ...

Plaintiff argues that all four requirements have been met here. The April 15, 2016 order directing Colvin to respond to the Information Subpoena within twelve days of service of the Order and Subpoena by regular and certified mail (1) clearly expresses "an unequivocal mandate." Plaintiff established (2) that Colvin disobeyed the Order by not responding to the Subpoena and (4) that the plaintiff is prejudiced by that failure to respond as plaintiff Charlop does not have the information necessary to enforce the judgment in his favor.

The third prong in *McCormick*, that "the party to be held in contempt must have had knowledge of the court's order," requires a more detailed analysis, as the movant bears the burden of establishing all elements of contempt, including the party's

knowledge of the Order, by clear and convincing evidence. *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 (2015). As indicated in *McCormick*, the test is knowledge, not service.

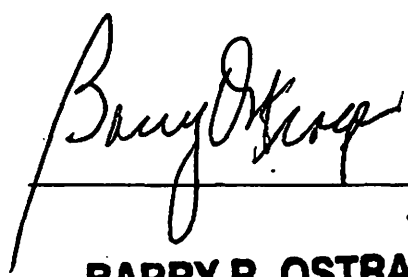
The record here establishes that Charlop made numerous attempts to serve Colvin with the Information Subpoena in the first instance in January 2016 and thereafter with the April 15, 2016 Order and the Information Subpoena. Although it is unclear whether Colvin ever actually received each and every copy of the April 15 Order and the Information Subpoena that was served because, for example, plaintiff has not provided a signed return receipt for any of the certified mailings, the Court finds that the proof is sufficient to establish "knowledge" of the Order by Colvin. For example, plaintiff provided evidence that the April 25 mailing of the April 15 Order with Notice of Entry and the Information Subpoena was actually delivered to Colvin's mailbox on April 27, 2016 (Exh. F). Plaintiff also proved delivery to Colvin's mailbox on May 18, 2016 of a letter explaining the existence of the order (Exh. G), and there is a presumption of receipt of the mailing of the documents as part of this contempt motion. Further, Colvin was well aware of the claims in this action against him via his initial representation by counsel and the service of a myriad number of documents thereafter, which presumably gave Colvin the necessary context to understand the import of the April 15, 2016 Order and Information Subpoena delivered to his residential address.

Accordingly, it is hereby

ORDERED that the motion by Third-Party Plaintiff Gordon Charlop to punish the Third-Party Defendant John Colvin for civil contempt is granted based on the papers submitted and Colvin's default in responding, unless Colvin purges the contempt by paying a \$250 fine and provides responses to the Information Subpoena pursuant to the

mandate of the April 15, 2016 Order of this Court within fifteen (15) days of service of a copy of this Order with Notice of Entry and the underlying Information Subpoena on Colvin by regular mail and certified mail, return receipt requested. Plaintiff is directed to settle an order on notice by regular mail and delivery of the necessary papers to the Clerk in Room 119.

Dated: July 18, 2016



J.S.C.
BARRY R. OSTRAGER
JSC