

4720 15th Ave. LLC v Jacobson
2017 NY Slip Op 30318(U)
February 17, 2017
Supreme Court, New York County
Docket Number: 160220/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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4720 15TH AVENUE LLC,

Plaintiff,

-against-

DR. LAWRENCE JACOBSON,

Defendant.
-----X

Index No.160220/2014

Seq. No. 007

Decision and Order

Kelly O'Neill Levy, J.:

Plaintiff, 4720 15th Avenue LLC ("Plaintiff"), moves, pursuant to CPLR 2308, for an order of contempt against defendant, Dr. Lawrence Jacobson ("Defendant"), for his violation of a subpoena ad testificandum and an information subpoena (collectively, the "Subpoenas"), and seeks sanctions in the amount of \$250 pursuant to Judiciary Law § 773. Plaintiff also seeks costs, expenses and attorneys' fees incurred as a result of Defendant's violation of the Subpoenas pursuant to CPLR 2308 and Judiciary Law § 773. Plaintiff further seeks an order compelling Defendant to comply with the Subpoenas. Defendant opposes the motion as to the contempt order and any sanctions and awards pursued, but does not oppose the motion as to the compliance order, and has already submitted sworn responses to Plaintiff's questionnaire in compliance with the information subpoena.

Background

In January 2010, Defendant rented from Plaintiff the ground floor of the premises located at 4720 15th Avenue, Brooklyn, New York 11219. In 2013, Plaintiff brought a landlord-tenant action against Defendant for failing to tender monthly rent. Defendant defaulted. Defendant

vacated the ground floor premises and Plaintiff accordingly discontinued the landlord-tenant action and on October 20, 2014, commenced an action in this court alleging causes of action for breach of contract and unjust enrichment.

Plaintiff did not respond to the Summons and Complaint, and the court granted Plaintiff's motion for a default judgment on February 23, 2015. A judgment in the amount of \$128,741.11 was entered against Defendant. Plaintiff proceeded with a post-judgment collection and a restraint was issued on Defendant's bank account. After having his bank account restrained, Defendant took his first action and filed a motion to vacate the judgment entered against him, contending he had not been served in the underlying action. This court stayed the enforcement of the default judgment and ordered a traverse hearing in order to determine if Defendant was properly served with the Summons and Complaint. Defendant did not appear for the traverse hearing, and the court confirmed the finding of the referee that the Defendant had been properly served and denied his motion to vacate the default judgment.

In July of 2016, a New York City Marshal executed the default judgment upon Defendant's property at his place of business and scheduled a sale of same for September 7, 2016. On September 6, 2016, Defendant filed an Order to Show Cause seeking to vacate the execution and notice of sale by the Marshal, and on September 7, 2016, this court declined to sign Defendant's Order to Show Cause.

On September 13, 2016, Plaintiff served Defendant with the Subpoenas. The information subpoena sought information concerning the location and sources of Defendant's assets and income, and the subpoena ad testificandum scheduled a post-judgment deposition of Defendant for October 20, 2016 at Plaintiff's counsel's firm. Defendant's secretary called Plaintiff's

counsel requesting that the post-judgment deposition be rescheduled to a date more convenient for Defendant. Counsel agreed and the deposition and document production deadline was adjourned to November 9, 2016.

On November 8, 2016 at 6:55 p.m., the evening before the rescheduled deadline, attorney Reuben Fuller-Bennett of Fishman Rozen LLP, who had not yet been retained by Defendant, advised Plaintiff that Defendant would not be appearing for the scheduled deposition. Plaintiff responded that it had already adjourned the deposition for Defendant's convenience and would not reschedule further. Defendant did not appear. On November 9, 2016, James Fishman of Fishman Rozen LLP, now retained by Defendant, wrote to Plaintiff's counsel that he would contact them to discuss the matter further once he had an opportunity to review the file and meet with his client. Defendant's counsel made no further contact.

Defendant failed to submit timely opposition papers, and his counsel stated that "[w]hen the Defendant forwarded the Order to Show Cause to my office, firm staff incorrectly entered it onto the firm calendar," and so counsel did not become aware of the correct hearing date until January 10, 2017, one day before the hearing. Nevertheless, Defendant contends that while he will comply with the Subpoenas, the motion for a contempt order and sanctions against him, and for awards to Plaintiff, should be denied pursuant to CPLR 2308(b), which governs non-judicial subpoenas.

Analysis

Disobedience of subpoenas is governed by CPLR 2308. In the case at bar, the Subpoenas are non-judicial subpoenas governed by 2308(b). *Lyon Fin. Servs., Inc. v. Pinto Trading Co.*, 24 Misc. 3d 1237(A) (Sup. Ct. 2009) (explaining that what distinguishes a judicial from a non-

judicial subpoena is where it is returnable and that judicial subpoenas are those which are returnable in a court, and non-judicial subpoenas as those which are not returnable in a court); CPLR § 5224(a)(3)(iv) ("failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter"). CPLR 2308(b), in pertinent part, states:

[I]f a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply.

In the case of judicial subpoenas, a person who fails to comply runs the risk of being held in contempt based directly on that failure to comply. *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341 (1st Dep't 1997). In contrast, a person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed. *Id.* Thus, a failure to comply with a non-judicial subpoena may not serve as a basis for an order of contempt but may serve as a basis for a motion to compel. *Lyon Fin. Servs., Inc. v. Pinto Trading Co.*, 24 Misc. 3d 1237(A) (Sup. Ct. 2009). Courts may impose costs and a penalty, each not to exceed \$50.00, as well as damages sustained by reason of the failure to comply. CPLR 2308(b); *see State Comm'n for Human Rights on Complaint of Gendron v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. of U. S. & Canada, Local No. 13*, 56 Misc. 2d 98, 104 (Sup. Ct. 1968) (finding costs, penalty, and damages totaling a sum of \$300.00 reasonable and just under

the circumstances for the disobedience of non-judicial subpoenas).

Here, Plaintiff adjourned the Subpoenas deadline at Defendant's request in order to accommodate him; and the evening before the rescheduled deadline, Plaintiff received an email from an attorney not yet retained by Defendant stating that Defendant will not appear. Defendant was provided additional time to prepare for the Subpoenas deadline, which included time to retain counsel. While contempt is not the appropriate legal remedy pursuant to CPLR 2308, Plaintiff is entitled to \$50.00 in costs, \$50.00 as penalty, along with \$153.87 for court reporter costs plus \$114.47 in costs for serving Subpoenas, totaling \$268.34 as damages. *See Barkan v. Barkan*, 271 A.D.2d 466, 466 (2d Dep't 2000) (awarding damages for court reporter and process server costs). Additionally, Plaintiff is awarded costs and expenses as damages associated with the instant motion, and Plaintiff shall provide documentation establishing such costs and expenses by submission of an affirmation by March 6, 2017. Defendant does not seek to quash the subpoenas and this court does not reach the issue as to whether any portion of the Subpoenas is improper.

For the reasons stated above, the motion is granted in part and denied in part. The court finds that costs, penalty, and damages totaling the sum of \$368.34 for failure to comply with the subpoena ad testificandum and information subpoena are appropriate pursuant to CPLR 2308(b), along with costs and expenses associated with the instant motion. Defendant is compelled to comply with the subpoena ad testificandum and information subpoena, to the extent he already has not, and violation thereof will result in a finding of contempt. Sanctions pursuant to Judiciary Law § 773 and an order holding Defendant in contempt are unwarranted at this time.

Accordingly, it is

ORDERED that defendant Dr. Lawrence Jacobson is to comply with the subpoena ad testificandum and the information subpoena, to the extent he already has not, in accordance with a deadline to be scheduled by the parties involved; and it is further

ORDERED that, pursuant to CPLR 2308(b), defendant Dr. Lawrence Jacobson is to pay plaintiff 4720 15th Avenue LLC the amount of \$368.34 for costs, penalty and damages sustained by reason of the failure to comply with the subpoenas; and it is further

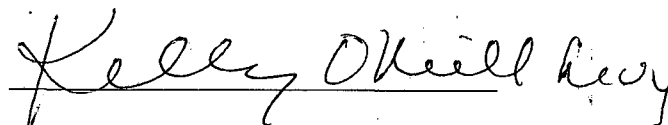
ORDERED that plaintiff 4720 15th Avenue LLC is awarded costs and expenses as damages associated with the instant motion, and plaintiff is directed to provide documentation establishing such costs and expenses by submission of an affirmation by March 16, 2017; and it is further

ORDERED that the motion is denied in all other respects.

This constitutes the decision and order of the court.

DATED: February 17, 2017

ENTER:


HON. KELLY O'NEILL LEVY J.S.C.