

City of New York v OTR Media Group, Inc.
2017 NY Slip Op 32535(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 451559/2014
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN

PART 33

Justice

-----X

CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD

INDEX NO. 451559/2014

Judgment Creditor,

MOTION DATE

- v -

MOTION SEQ. NO. 002

OTR MEDIA GROUP, INC.,

Judgment Debtor,

ARI NOE,

DECISION AND ORDER

Person Subpoenaed.

-----X

The following e-filed documents, listed by NYSCEF document number 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78 were read on this motion to VACATE

The instant motion by OTR Media Group, Inc. (OTR), and its chief executive officer, Ari Noe, seeks to vacate an Order of Contempt, dated April 18, 2016, that found OTR and Noe guilty of civil contempt and issued a warrant for Noe's arrest pursuant to CPLR 5015. In the alternative, OTR seeks to renew the initial proceeding pursuant to CPLR 2221(e). Judgment Creditors – City of New York and the New York City Environmental Control Board (ECB) (collectively, the City) – jointly oppose the motion to which OTR and Noe reply. The decision and order are as follows:

OTR is an outdoor advertising company that places large scale advertising signs across the five boroughs. The operation of outdoor advertising signs is subject to legal framework of the Zoning Resolution, the Administrative Code, and the Rules of the City of New York (see Zoning Resolution §§ 22-32, 32-62, 32-63, 42-52; Administrative Code §§ 28-502, 503 et seq.; 1 RCNY §§ 49-12, 49-15[a]). The New York City Department of Buildings (DOB) enforces those provisions (see City Charter § 643). Violations are subject to civil penalties (see Administrative Code § 23-502.6). One enforcement vehicle is to enter any monetary penalty for ECB violations as judgments with the County Clerk. The City docketed numerous judgments against OTR relating to its numerous uncontested violations. In an effort to collect on the judgments, the City served subpoenas on OTR and Noe. The City brought this supplemental proceeding pursuant to Article 52 of the CPLR to hold OTR and Noe in contempt for failure to respond to subpoenas.

By way of background, since 2008, the ECB has imposed over \$2,000,000 in civil penalties against OTR (City Opp, Horan Aff., ¶10). In 2011, OTR filed for bankruptcy protection thereby staying the City's enforcement efforts (*In re OTR Media Group, Inc.*, United States Bankruptcy Court, Eastern District of New York, index No. 1-11-47385). Collection efforts resumed in 2014, after a voluntarily dismissal of the Chapter 11 case¹ when the City filed certain judgments with the County Clerk in January 2014. The City attempted to collect judgments totaling \$1,026,000 (the "Schedule A judgments") by levying on monies owed to OTR from its clients and, thus, served subpoenas on those companies.

In February 2014, OTR commenced an action pursuant to CPLR 5240 before this court to enjoin the City's enforcement efforts (*OTR v. The City of New York*, index No. 151531/2014). In April 2014, the City commenced a separate action against OTR (First Contempt Proceeding), for an order of contempt and for failure to comply with discovery measures, specifically the failure to obey subpoenas for depositions and to produce documents (*The City of New York v. OTR Media Group, Inc.*, New York County index No., 400401/2014)

In the First Contempt Proceeding, this court issued an Interim Discovery Order and 'so ordered' a stipulation (Interim Discovery Order) by which the parties agreed that OTR, Ari Noe and Michael Eisenberg, OTR's chief financial officer, would produce responsive documents by a certain date, subject to a nondisclosure agreement, and that Noe and Eisenberg would appear for depositions; and in turn, the First Contempt Proceeding would be withdrawn. Consequently, this court dismissed OTR's June 2014 action to enjoin the City's enforcement efforts under index No. 151531/2014.

In July 2014, the City commenced the instant proceeding alleging that OTR violated the Interim Discovery Order. This court issued a conditional Temporary Restraining Order on the City's enforcement while requiring OTR to deposit \$25,000 per month into an escrow account. OTR noticed an appeal on this court's dismissal of index No. 151531/2014 and sought an emergency stay of the City's enforcement on the judgments.

The First Department, on an interim basis, granted OTR's request for a stay conditioned on a requirement that OTR increase its payment into the escrow account each month to \$50,000. In a subsequent order, the First Department denied OTR's motion for a stay pending appeal and vacated the order granting the interim

¹ The bankruptcy Trustee moved for dismissal or conversion in that action because OTR (i) failed to disclose the conviction and incarceration of its principal, Ari Noe, for criminal tax fraud, (ii) paid excessive compensation to Noe, and (iii) grossly mismanaged the estate by operating signage in exchange not for money that could be used to pay creditors such as the City, but rather, for season tickets and luxury suite passes to Yankees games and gift certificates to a spa (City Mot, Horan Aff ¶ 12).

relief (*see OTR Media Group, Inc. v City of New York*, index No. 151531/14, App Div 1st Dept, September 4, 2014, M-3389). The appeal was submitted in the October 2016 term according to First Department's website (<https://www.nycourtsystem.com/applications/ad1/civilsearch.php>, search by case index No. 151531/14).

Following the expiration of the Interim Discovery Order, Index No. 400401/2014, in October 2015, and pursuant to a letter agreement with the City, OTR agreed to continue making installment payments in the amount of \$60,000 per month and to comply with certain outstanding discovery obligations. OTR stopped making monthly payments in April 2016, and since then the City has not collected anything further towards the outstanding judgments nor has OTR complied with further discovery.

In the instant action by OTR, the court calendared a hearing for April 13, 2016 — a date specifically selected by OTR — but they failed to appear. On April 18, 2016, based on paper submissions, this court signed an order holding OTR and Noe in civil contempt and issued a warrant of arrest for Noe (“the Contempt Order”). OTR’s instant motion seeks to vacate that order, or in the alternative, to renew the instant proceeding pursuant to CPLR § 2221.

In the interim, OTR pursued an appeal of the Contempt Order in this action, index No. 451559/14, and sought a stay. The First Department granted the motion for a stay to the extent that Noe’s arrest warrant was stayed on the condition respondents perfected their appeal for the December 2016 Term without prejudice to the City to move to vacate the stay should respondents fail to so perfect, and without prejudice to this Court to vacate the Contempt Order if Noe complied with outstanding court orders (*see City of New York v OTR Media Group, Inc.*, index 451559/14, App Div 1st Dept, September 1, 2016, M-2427).

OTR also commenced another proceeding, index No. 154107/2016, that contested the way in which the City applied OTR’s payments on certain judgments and OTR sought a satisfaction of judgment. The City moved to dismiss that action. Those motions are decided contemporaneously with today’s decision and order under index No. 154107/2016. In connection with that action, the City complied with OTR’s request to apply the money paid to the Schedule A judgments first before applying it to any other outstanding ECB judgments. The City completed that process on June 22, 2016, and an accounting was provided to OTR on July 14, 2016.

In August 2016, OTR commenced yet another action, index No. 156877/2016, to enjoin the enforcement of the outstanding judgments. In that matter, OTR moved for an order that the City accept certain payments in lieu of enforcement. That motion is also decided contemporaneously with today’s decision and order under index No. 156877/2016.

In July 2016, the NYC Department of Buildings (DOB) commenced an OATH proceeding to revoke OTR's DOB registration and outdoor advertising license based on the outstanding civil penalties stemming from numerous zoning violations. An Administrative Law Judge found that OTR, having "maintained a running balance of hundreds of thousands of dollars in unpaid fines since at least 2010," "appears to have made a decision that the accumulation of unpaid fines was a cost of doing business" (*Department of Buildings v OTR Media Group, Inc.*, OATH index No. 1835 [2016, Zorgniotti, ALJ]). Based on those findings, DOB revoked OTR's registration and license as an outdoor advertising agency.

In August 2016, OTR commenced a special proceeding pursuant to Article 78 of the CPLR in Kings County Supreme Court seeking to annul its registration revocation, Kings County Supreme Court, index No. 515196/2016. By cross-motion in September 2016, the City moved to change venue to Supreme Court in New York County. The record in the action before this court is devoid of any official court order regarding venue. According to OTR, Justice Levine in Kings County Supreme Court denied the City's cross-motion to change venue at a hearing on May 26, 2017 (index No 515196/16, motion sequence 4, Frank Seddio, Esq. Aff dated 9/13/17 at ¶ 17). On October 25, 2017, Justice Levine determined that the revocation of OTR's "license [was] disproportionate to the alleged offense and shocking to the judicial conscience" (*OTR Media Group, Inc. v New York City Department of Buildings*, Sup Ct, Kings Cty, October 25, 2017, Levine, J., index No. 515196/2016). That order also permitted the City additional time to "answer or argue whether some lesser penalty may be justified" (*id.*).

The court's electronic file indicates that the Article 78 petition remains undecided and a motion filed by the DOB to reargue the October 25, 2017 order (motion sequence 005) is pending with a future appearance date on January 26, 2018, (<https://iapps.courts.state.ny.us/webcivil/FCASMain>, search by case index No. 515196/2016, Kings Supreme Court). It is notable that, because of a stay in the Article 78 litigation, OTR was able to renew its registration through January 13, 2019 (Kings County Supreme Court, index No. 515196/2016, motion sequence 005, Magsino Aff, ¶ 8).

Returning to the instant action and OTR's pending motion, OTR claims that the Schedule A judgments for which the subpoenas were issued were satisfied pursuant to the Interim Agreement between the City and OTR. OTR submits that it paid over 1.3 million dollars to the City towards the judgments, fully satisfying them by January 15, 2016 (Noe Aff, ¶10). OTR claims that the City misrepresented that outstanding judgments remain when it commenced this action (Schwartz Memo, p 7). In the alternative, OTR seeks renewal based on what it considers new evidence – letters from the City showing that the judgments upon which the

subpoenas were based had been satisfied at the time the City sought the Contempt Order.

In opposition, the City claims that OTR failed to satisfy the Schedule A judgments for years, which necessitated the City's enforcement efforts. As discussed above, the City's enforcement measures led to the Interim Discovery Order, which OTR allegedly violated, prompting this action. The City maintains that the Schedule A judgments remained outstanding at the time it obtained the Contempt Order in April 2016. That being the case, the City concedes that the Schedule A judgments have been satisfied (Horan Aff in Opposition, ¶58). The City, on consent, reapplied OTR's payments to satisfy the Schedule A judgments in June 2016 – after the April 2016 Contempt Order. Mainly, the City's argument against vacating the Contempt Order and warrant of arrest is to have a record of OTR's misconduct (*id.*).

Pursuant to CPLR 5015 (2) and (3), the court may relieve a party from a judgment upon such terms as may be just where there is newly discovered evidence or a misrepresentation by an adverse party. Neither section is applicable here. Even though OTR claims that the City misrepresented the status of the outstanding judgments to the court when it sought the Contempt Order, there is no dispute that at the time of the Contempt Order, OTR remained indebted to the City for hundreds of thousands of dollars. After the Contempt Order, the City adjusted OTR's payments to match the Schedule A judgments. There is no newly discovered evidence or any misrepresentation to support a determination to vacate the Contempt Order. Nor is there any newly discovered evidence for the purposes of renewal pursuant to CPLR §2221(e).

Accordingly, OTR and Noe's motion is denied in its entirety.

This constitutes the decision and order of the court.

11/28/2017

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE