

Scott v National R.R. Passenger Corp.
2018 NY Slip Op 31440(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 450071/16
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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CARL SCOTT,

Plaintiff(s),

-against-

NATIONAL RAILROAD PASSENGER CORPORATION,
et al.,

Defendant(s).

DECISION/ORDER

INDEX NO.: 450071/16

Present:

Hon. Lynn R. Kotler, J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

NYSCEF Doc No.

Defs' OSC, affirm, exhs.....	41-51
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LYNN R. KOTLER, J.:

Defendants move for an order adjudicating non-party ACU SCAN IMAGING, LLC ("ACU SCAN"), in contempt for its failure to comply with Defendants' Personal Appearance and Subpoena Duces Tecum (the "subpoena") served on March 28, 2018 upon ACU Scan. There is no opposition to the motion, despite proof of service upon plaintiff and ACU Scan. Nor did either party appear for oral argument of this motion. Therefore, this motion has been submitted to the court on default.

In this action, plaintiff seeks to recover for personal injuries he sustained as a result of a slip and fall. On or about November 30, 2015, plaintiff served a response to defendants' demands, which included a HIPAA compliant authorization to obtain the diagnostic images/films taken at ACU SCAN located at 106-01 101st Avenue, Ozone Park, New York 11416. Defendants have provided a copy of plaintiff's response and the authorization. Although plaintiff has provided copies of MRI reports taken of plaintiff's bilateral knees by ACU SCAN, ACU SCAN has failed to provide defendants with copies of the MRI films taken of the right and left knee on March 6, 2015.

Defense counsel represents that it has contacted ACU SCAN 11 times requesting the diagnostic images, and ACU SCAN has failed to provide same. Thereafter, defendants served the subpoena on March 28, 2018 demanding that a record custodian from ACU SCAN appear at defense counsel's office On April 16, 2018 and bring the original MRI Films taken on March 6, 2015. Defense counsel represents that ACU SCAN failed to appear on April 16, 2018 and has failed to respond to the subpoena, despite follow-up requests regarding same.

Defendants maintain that they will be prejudiced if ACU SCAN continues to ignore the Subpoena. Therefore, defendants seek an order holding ACU SCAN in contempt. 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 [A] [5]; CPLR § 2308[b][1];. *see also Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 *amended* 69 N.Y.2d 652 [1983]; *Puro v. Puro*, 39 AD2d 873 [1st Dept 1972]). 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 (*Matter of County of Orange v. Rodriguez*, 283 AD2d 494 [2d Dept 2001]). A party seeking contempt must show that there are no alternative effective remedies available (*Farkas v. Farkas*, 201 A.D.2d 440 [1st Dept 1994]).

Defendants have proven that this motion was properly served on ACU SCAN (Judiciary Law § 761; *Minzer v. Heffner Agency Inc.*, 214 A.D.2d 547 [2d Dept 1994]); *Hampton v. Annal Mgt. Co.*, 168 Misc.2d 138 [Sup Ct NY Co 1996]). The notice provisions of the motion warn ACU SCAN that it may be punished by the imposition of a fine, or imprisonment, or both, thus complying with the requirements of Judiciary Law § 756. Defendants have also established that the documents sought in the subpoena will aid in the preparation of their case at trial (CPLR § 5251; *Matter of Gabor v. Renaissance Assoc.*, 170 A.D.2d 390 [1st Dept 1991]). Further, although ACU SCAN had actual knowledge of the subpoena and its terms, it disregarded same, failed to appear and failed to produce documents (*Ottomanelli v. Ottomanelli*, 17 A.D.3d 647 (2d

Dept 2005). The failure to comply with a subpoena issued by an officer of the court shall be punishable as a contempt of court (CPLR § 2308 [a]).

Defendants have established that ACU SCAN's disobedience of the subpoena has defeated impaired, impeded or prejudiced their right to ascertain information about the plaintiff's injuries and physical condition (Judiciary Law § 753 [a]; *Farkas v. Farkas, supra*; *Great Neck Pennysaver v. Central Nassau Publications*, 65 A.D.2d 616 [2d Dept 1978]). Finally, defendants have shown that there are no alternative effective remedies available. Defendants' motion, to hold ACU SCAN in contempt for failing to comply with the subpoena, is granted.

ACU SCAN is therefore in civil contempt. The court will, however, give ACU SCAN one **FINAL** opportunity to **PURGE** the contempt. Defendants are directed to personally serve a copy of this decision/order along with the subpoena on ACU SCAN. Within 10 days from the date of service, ACU SCAN can purge the contempt by appearing and satisfying the Court that it is unable to pay the fine or responding to the subpoena. If ACU SCAN fails to comply with this **PURGE**, the Clerk shall enter a money judgment against ACU SCAN and in favor of the defendants in the sum of \$500 as punishment for its contempt of court upon the filing by defense counsel of an affirmation attesting to such compliance, without the need for further order from the court (Judiciary Law § 773).

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion for an order adjudicating non-party ACU SCAN IMAGING, LLC in contempt is hereby GRANTED upon default; defendants have proven that ACU SCAN IMAGING, LLC was served with Defendants' Personal Appearance and Subpoena Duces Tecum dated March 28, 2018 and failed to produce documents in disregard of said subpoena; and it is further

ORDERED that ACU SCAN IMAGING, LLC's disobedience of the subpoena has defeated, impaired, impeded or prejudiced defendants' right to prepare their case for trial and

defendants have no alternative effective remedies available because ACU SCAN IMAGING, LLC is in possession or custody of diagnostic films taken of plaintiff's left and right knees; and it further

ORDERED that ACU SCAN IMAGING, LLC is held in civil contempt. Defendants are directed to personally serve a copy of this decision/order along with the subpoena on ACU SCAN IMAGING, LLC. Within 10 days from the date of service, ACU SCAN IMAGING, LLC can purge the contempt by appearing and satisfying the Court that it is unable to pay the fine or responding to the subpoena. This is a **FINAL** opportunity to **PURGE** the contempt; and it is further

ORDERED that if ACU SCAN IMAGING, LLC fails to comply with this **PURGE**, as punishment, the Clerk shall enter a money judgment against ACU SCAN IMAGING, LLC and in favor of defendants in the sum of \$500 upon defense counsel's filing of an affirmation attesting to such non-compliance, without the need for further order from the court.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 6/24/18
New York, New York

SO ORDERED:



Hon. Lynn R. Kotler, J.S.C.