

B&M Kingstone, LLC v Mega Intl. Commercial Bank Ltd.

2019 NY Slip Op 30896(U)

March 29, 2019

Supreme Court, New York County

Docket Number: 158577/2014

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

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B&M KINGSTONE, LLC, AS ASSIGNEE OF SUPER VISION
INTERNATIONAL, INC., A FLORIDA CORPORATION,

Plaintiff,

- v -

MEGA INTERNATIONAL COMMERCIAL BANK LTD. F/K/A
INTERNATIONAL COMMERCIAL BANK OF CHINA,

Defendant.

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INDEX NO.

158577/2014

MOTION DATE

MOTION SEQ. NO.

007

DECISION AND ORDER

The following documents, filed with NYSCEF, were considered by this Court in rendering its determination: 285-288; 294; 312-319; 322-323; and 327.

Petitioner B&M Kingstone, LLC ("B&M") commenced this proceeding to enforce a judgment against non-party judgment debtors, who may have accounts and/or authority to draw with respondent Mega International Commercial Bank Ltd. (Mega), formerly known as the International Commercial Bank of China. B&M now moves for an order granting it legal fees incurred in connection with a previous motion to hold Mega in contempt of court. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

The underlying facts and the procedural history of this proceeding were stated in detail in the decision and order of this Court dated April 25, 2018 and entered April 27, 2018 (Doc. 325). This Court therefore presumes the parties' familiarity with the facts and provides only a brief recitation of this proceeding's history as it relates to the instant motion.

In August 2014, B&M served Mega with an information subpoena accompanied by questionnaires (2014 Information Subpoena), seeking any record of accounts or property in which each judgment debtor may have had an interest. Mega responded that its New York branch did not have any accounts or property belonging to the judgment debtors. In September 2014, B&M commenced the instant proceeding.

By order to show cause dated September 9, 2014 (motion sequence number 001), B&M moved to compel Mega to provide information sought in the 2014 Information Subpoena or, in the alternative, to hold Mega in contempt of court. By order dated September 15, 2014, this Court (Wright, J.) granted the motion “solely to the extent of directing [Mega] to respond to the information subpoena, a/p/o.” Doc. 36. In an accompanying decision dated September 16, 2014, Justice Wright stated that, although he was denying the portion of the motion “seeking contempt and a restraint of assets located in a foreign branch of [Mega],” Mega was required to respond to the information subpoena. *Id.*

Mega appealed and, in August 2015, the Appellate Division, First Department affirmed Justice Wright’s order. *See Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259, 267 (1st Dept 2015). In December 2015, Mega responded to the 2014 Information Subpoena.

In September 2016, B&M served Mega with a subpoena duces tecum (“Subpoena Duces Tecum”) and two subpoenas ad testificandum (“Deposition Subpoenas”, together with the Subpoena Duces Tecum, “the 2016 Subpoenas”). Mega did not comply. By order to show cause dated October 19, 2016 (motion sequence number 002), B&M moved to compel compliance with the 2016 Subpoenas or, in the alternative, to hold Mega in contempt (2016 Contempt Motion).

Mega moved to quash the 2016 Subpoenas (motion sequence number 003) and for a protective order.

By decision and order dated December 9, 2016, Justice Wright addressed the 2016 Contempt Motion (“the 2016 Contempt Order”). He noted that B&M was seeking to hold Mega in contempt “for failing to comply with an information subpoena and a testimonial subpoena,” that he had “granted a previous contempt motion to the extent of directing [Mega] to comply with the information subpoenas” and that the decision was affirmed by the Appellate Division. Thus, Justice Wright granted the motion to hold Mega in contempt and “once again directed [Mega] to respond to the information subpoenas seeking account information.” Doc. 161. In addition, Justice Wright found Mega “responsible to [B&M] for legal fees incurred in bringing this motion” and directed “[B&M] [to] move for such relief on proper papers.” *Id.*

In another decision and order, also dated December 9, 2016, Justice Wright addressed Mega’s motion (“the 2016 Quash Order”, together with the 2016 Contempt Order “the 2016 Orders”). He denied the motion “as to the information subpoenas, and granted [the motion] as to the other subpoenas served on [Mega], as more fully set forth in a decision [on] the contempt motion made by [B&M].” Doc. 162. The parties appealed both orders.

B&M and Mega could not agree on what these decisions required them to do. B&M took the position that the 2016 Contempt Order’s reference to an “information subpoena” required compliance with the Subpoena Duces Tecum and that the 2016 Quash Order quashed only the Deposition Subpoenas. Mega, on the other hand, believed that all of the 2016 Subpoenas had been quashed and that the 2016 Contempt Order merely required a response to the 2014 Information Subpoena.

In February 2017, B&M moved (motion sequence number 005) to resettle and/or reargue the 2016 Contempt Order, seeking an order directing Mega to comply with the 2016 Subpoenas and to pay B&M attorneys' fees incurred in bringing the 2016 Contempt Motion. In support of its motion, B&M argued that Mega's interpretation of the 2016 Contempt Order, i.e., that it required compliance with the 2014 Information Subpoena, was incorrect, because the 2014 Information Subpoena "was not the subject of the [2016 Contempt Motion]" and "had been fully litigated in 2014 before this Court and the Appellate Division." Doc. 194, ¶ 10. B&M argued that Mega's position was "untenable," because "[i]t defies logic to have held Mega Bank in [c]ontempt and ordered it to pay attorneys' fees regarding a two year old [sic] subpoena for which a finding of contempt was not sought." *Id.*, ¶ 13. Mega also moved to reargue the 2016 Contempt Motion (motion sequence number 006), seeking an order vacating the 2016 Contempt Order and denying the motion in its entirety with prejudice.

By decision and order dated June 2, 2017 ("the June 2017 Order"), Justice Wright denied B&M's motion to resettle and reargue, stating as follows:

"[B&M] seeks to re-settle my decision of December 9, 2016 to 'correct' its language to provide that [Mega] is to respond to [B&M's] subpoenas requiring the production of documents, as well as subpoenas *ad testificandum*. [B&M] has mis-read my December 9, 2016 decision, as it does no more than confirm the decision of the Appellate Division, which affirmed my order directing [Mega] to respond to information subpoenas served on it [131 AD3d 259]. This was the only relief granted in that order. In a second decision, decided the same day, I granted a motion by [Mega] that sought to quash the other subpoenas served by [B&M]. That is the status quo: [Mega] must respond to the information subpoenas and no others. As I find nothing confusing in the order addressed by this motion, it is denied as to re-settlement, as the proposed re-settlement, to wit, directing [Mega] to respond to [B&M's] then current (2016) document subpoenas. The only issue I addressed in the December 2016 decision was compliance with 2014 subpoenas, as should be evident from the 2015 decision of the Appellate Division, which could not have addressed anything done in 2016. There is in the

record of this case, no order for [Mega] to appear for deposition, and therefore, there can be no contempt as to those subpoenas, which were quashed as per my decision of December 9, 2016. Further, as to the current request, [B&M] was not awarded legal fees, but was allowed to move for legal fees, a significant difference, as the motion would allow [Mega] to dispute both the nature and need for the legal fees sought. I did not direct [Mega] to comply with any subpoena *duces tecum*, only information subpoenas.”

NYSCEF document number 290 at 1-2.

By decision and order dated July 18, 2017¹ (“the July 2017 Order”, together with the June 2017 Order, “the 2017 Orders”), this Court granted Mega’s motion to reargue.² Justice Wright stated that the 2016 Contempt Order “did not decide any question of [Mega’s] compliance or non-compliance with subpoenas *ad testificandum* or *duces tecum*. The decision only directed that [Mega] respond to information subpoenas served on it. The contempt can be purged by such compliance.” Doc. 292.

In August 2017, B&M moved for an order granting it legal fees, pursuant to the 2016 Contempt Order.

B&M contends that this Court has already found that Mega is responsible for the legal fees that it (B&M) incurred in bringing the 2016 Contempt Motion and that it is therefore entitled to collect \$44,401.80. It argues that the 2017 Orders did not disturb the determination that Mega was obligated to pay those fees, but merely clarified that B&M had to make the instant motion to collect them.

In response, Mega asserts that the 2017 Orders make clear that this Court never ordered it to comply with the 2016 Subpoenas nor held Mega in contempt for its failure to do so. In addition,

¹ The decision is incorrectly dated 2016, rather than 2017.

² Notably, the decision mistakenly refers to Mega’s motion as a motion to reargue the decision and order of “October 19, 2016.” NYSCEF document number 292. However, it is apparent that the decision addresses the 2016 Contempt Order, dated December 9, 2016.

Mega argues that there is no contempt in connection with the 2014 Information Subpoena, since Mega responded to it in 2015 and B&M admitted that the 2014 Information Subpoena was not at issue in the 2016 Contempt Motion. Mega also points out that this Court did not award legal fees, but merely granted B&M permission to move for them. Finally, it contends that the fact that the 2016 Contempt Motion gave Mega no notice that it might be held in contempt for noncompliance with the 2014 Information Subpoena constitutes a jurisdictional defect rendering any contrary contempt finding in the 2016 Contempt Order a legal nullity.

Judiciary Law § 773 provides, in pertinent part, that:

“If an actual loss or injury has been caused to a party to an action or special proceeding, by reason of the misconduct proved against the offender, . . . a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court.”

Here, B&M fails to establish that it suffered a loss caused “by reason of the misconduct proved against the offender.” Judiciary Law § 773. First, the 2016 Contempt Order is not proof of Mega’s misconduct. In bringing the 2016 Contempt Motion, B&M sought compliance with the 2016 Subpoenas. However, the subsequent 2017 Orders make clear that the 2016 Contempt Order neither required Mega to comply with the 2016 Subpoenas nor held it in contempt for its failure to do so. Doc. 290 at 2; Doc. 292. Justice Wright stated that the 2016 Contempt Order merely required Mega to respond to the 2014 Information Subpoena (*see* Doc. 290 at 2) and that any related contempt “[could] be purged by such compliance.” Doc. 292. B&M does not present any evidence of Mega’s failure to comply with the 2016 Contempt Order. Thus, it is not entitled to attorneys’ fees. *See Kiperman v Steinberg*, 234 AD2d 518, 519 (2d Dept 1996) (finding that it was error to grant attorneys’ fees without a prior finding of contempt). Even assuming, arguendo, that Mega were in contempt for its failure to comply with the 2014 Information Subpoena, B&M

fails to provide any evidence of the legal fees it incurred in seeking compliance with the 2014 Information Subpoena. The legal bills it submits relate solely to the 2016 Contempt Motion, which only sought compliance with the 2016 Subpoenas. *See* Doc. 286, ¶ 6, Exhibit B; *see also* Doc. 194, ¶ 13 (B&M's counsel stating that the 2016 Contempt Motion did not seek contempt in connection with the 2014 Information Subpoena). Because B&M fails to demonstrate "that such legal fees constituted an actual loss or injury related to the contempt," it is not entitled to collect the same. *See Gottlieb v Gottlieb*, 137 AD3d 614, 618 (1st Dept 2016); *see also* Judiciary Law § 773.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by petitioner B&M Kingstone, LLC is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

3/29/2019

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

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REFERENCE

KATHRYN E. FREED, J.S.C.