

Payrolling Partners, Inc. v Kelly
2020 NY Slip Op 31135(U)
March 16, 2020
Supreme Court, Orange County
Docket Number: EF003883-2016
Judge: Catherine M. Bartlett
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

PAYROLLING PARTNERS, INC.,

Plaintiff,

-against-

EDWARD KELLY III and ED KELLY ALL-STATE,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003883-2016
Motion Date: March 16, 2020

The following papers numbered 1 to 3 were read on Plaintiff's motion to punish

Defendant Edward Kelly III for contempt and for other relief:

Notice of Motion - Affidavit / Exhibits - Affidavit of Service 1-3

Upon the foregoing papers it is ORDERED that Plaintiff's motion is disposed of as follows:

This is a post-judgment proceeding to enforce a Default Judgment entered on December 19, 2017 against defendant Edward Kelly III in the sum of \$140,523.05. The attorney for Plaintiff, the judgment creditor, issued a Subpoena Ad Testificandum and Duces Tecum dated September 5, 2019 in an effort to enforce the Default Judgment. The subpoena required Mr. Kelly to produce certain books, papers and records and to appear for a deposition on October 5, 2019. Plaintiff's counsel also issued an Information Subpoena dated September 4, 2019. Plaintiff tenders a process server's affidavits establishing due and timely service of both

subpoenas upon Mr. Kelly. Plaintiff having further established that Mr. Kelly failed to produce the requested documents and information and failed to appear for his deposition, it now moves for an order (1) holding Mr. Kelly in civil and criminal contempt, (2) compelling compliance with the aforesaid subpoenas, (3) issuing a warrant of arrest until Mr. Kelly purges his contempt, and (4) imposing fines, attorney's fees and costs. There is no opposition.

Article 52 of the Civil Practice Law and Rules governs proceedings for the enforcement of a money judgment. In such a proceeding, CPLR §5224 authorizes the service of "any or all" of enumerated kinds of subpoenas, including (1) "a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein"; (2) a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein"; and (3) "an information subpoena."

CPLR §5251 explicitly provides that refusal to obey an Article 52 subpoena is punishable as a contempt of court:

Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

Only in the case of information subpoenas, and not in the case of deposition subpoenas or subpoenas for documents, does Article 52 require a motion to compel compliance, per CPLR §2308(b), before a contempt sanction may be imposed. *See*, CPLR §5224(a)(3)(iv) (providing that "failure to comply with an information subpoena shall be governed by subdivision [b] of section 2308 of this chapter, except that such motion shall be made in the court that issued the underlying judgment"); *Lyon Financial Services, Inc. v. Scapes Professional Landscape, Inc.*,

27 Misc.3d 1233(A), 911 NYS2d 693 (Sup. Ct. Rockland Co. 2010).¹ Accordingly, a judgment debtor may be held in contempt where, as here, he has refused to obey a CPLR Article 52 subpoena. *See, Kaywood v. Cigpak, Inc.*, 258 AD2d 623 (2d Dept. 1999); *Jim Walter Doors v. Greenberg*, 151 AD2d 550 (2d Dept. 1989).

A hearing is not required to determine the willfulness of Defendant Kelly's conduct in disobeying the subpoena. "In order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party." *Palmieri v. Town of Babylon*, 167 AD3d 637, 640 (2d Dept. 2018); *Jim Walter Doors v. Greenberg, supra*. *See also, Kaywood v. Cigpak, Inc., supra*. Here, there can be no question but that Mr. Kelly's disobedience of the Article 52 subpoena demanding his appearance for a deposition and the production of documents relevant to the satisfaction of the money judgment against him has impaired, impeded and prejudiced Plaintiff's right to enforce the judgment.

¹Since the availability of a contempt remedy is in this case governed by CPLR Article 52 and not CPLR Article 23, the question whether a subpoena issued by an attorney and returnable at a place other than a courthouse is a "judicial subpoena" per CPLR §2308(a) or a "non-judicial subpoena" per CPLR §2308(b) is immaterial. Somewhat surprisingly, that question appears not to have been finally resolved, and lower courts are split on the issue. *See, Brooks v. City of New York*, 178 Misc.2d 104, 105 (Sup. Ct. N.Y. Co. 1998) ("returnable in a court" means "within a court action or proceeding", not "in a courthouse"). *Cf. contra, Rubino v. 330 Madison Co., LLC*, 39 Misc.3d 450, 451 (Sup. Ct. N.Y. Co. 2013); *Lyon Financial Services v. Pinto Trading Co.*, 24 Misc.3d 1237(A) (Sup. Ct. Kings Co. 2009). Inasmuch as Article 52 proceedings for the enforcement of a money judgment are not court actions or proceedings *per se*, it is arguable that Article 52 subpoenas are not "returnable in a court." Nevertheless, CPLR §§ 5224 and 5251, read together, provide that the refusal to obey an Article 52 subpoena (except for an information subpoena) is punishable as a contempt of court regardless of whether the judgment creditor has first moved to compel compliance.

The court accordingly finds defendant Edward Kelly III to be in civil contempt of the court by reason of his refusal to comply with the Subpoena *Ad Testificandum* and *Duces Tecum* dated September 5, 2019.

It is therefore

ORDERED AND ADJUDGED, that the defendant, EDWARD KELLY III, be and hereby is declared guilty of contempt of Court in having willfully disobeyed the Subpoena *Ad Testificandum* and *Duces Tecum* dated September 5, 2019 in failing to respond thereto, and it is further

ORDERED AND ADJUDGED, that the said failure, refusal, and neglect of defendant EDWARD KELLY III to comply with the said Subpoena *Ad Testificandum* and *Duces Tecum* was calculated to and actually did impair, impede, and/or prejudice the rights and remedies of the Plaintiff judgment creditor relevant to the satisfaction of the Default Judgment entered on December 19, 2017, and it is further

ORDERED AND ADJUDGED, that defendant EDWARD KELLY III be and hereby is charged the sum of \$100.00 for motion costs as permitted by the CPLR, and it is further

ORDERED AND ADJUDGED, that defendant EDWARD KELLY III is directed to comply with the aforesaid Subpoena *Ad Testificandum* and *Duces Tecum* and Information Subpoena within twenty (20) days after service of this Decision, Order and Judgment, and it is further

ORDERED AND ADJUDGED, that defendant EDWARD KELLY III will be purged of the contempt by paying to Plaintiff's attorney, within twenty (20) days after service of this Decision, Order and Judgment, the motion costs imposed, as specified above, and fully

complying with the Subpoena *Ad Testificandum* and *Duces Tecum* and Information Subpoena which are the subject of this proceeding. Upon the failure of defendant EDWARD KELLY III to purge himself of his contempt, an application may be made for a warrant directing the sheriff or other enforcement officer of any jurisdiction wherein defendant EDWARD KELLY III may be found to seize and arrest said EDWARD KELLY III forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition, including without limitation a hearing to determine said Defendant's liability for criminal contempt and Plaintiff's attorney's fees, as the court shall direct, and it is further

ORDERED, that the Sheriff of any County to whom a certified copy of this order shall be delivered, shall on receipt thereof arrest said EDWARD KELLY III forthwith and bring him before this court to be committed or for such other disposition as the court shall direct, and it is further

ORDERED, that a ten (10) day stay is granted to the Defendant for leave to appeal to the Appellate Division, Second Department for a stay pending appeal.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: March 16, 2020 E N T E R

Goshen, New York


HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE