

Key Growth Invest LP v Fawer
2020 NY Slip Op 33818(U)
November 16, 2020
Supreme Court, New York County
Docket Number: 157291/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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KEY GROWTH INVEST LP,
Plaintiff,

- v -

MARK FAWER, MELISSA FAWER
Defendant.

INDEX NO. 157291/2017
MOTION DATE N/A, N/A
MOTION SEQ. NO. 006, 007

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 191, 201, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 306, 307, 308, 310, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 326, 327, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339

were read on this motion to/for RENEWAL

The following e-filed documents, listed by NYSCEF document number (Motion 007) 167, 168, 169, 170, 171, 172, 173, 186, 187, 188, 189, 190, 192

were read on this motion to/for MODIFY ORDER/JUDGMENT

The Motion Sequence No. 006 by Plaintiff Key Growth ("Key Growth") for an order: (1) Renewing the Court's Order in Motion Sequence No. 005 dated November 25, 2019 ("Order") (NYSCEF 126) pursuant to CPLR 2221(e), 5226, 5232, 5240, 6301 et. seq. to (a) increase the monthly installment payments by Defendants Mark and Melissa Fawer ("Defendants" or "the Fawers") and (b) direct that payments be made directly to Key Growth from Mark Fawer's current employer, Greenspoon Marder, or subsequent employer; (2) Holding the Fawers in default and contempt of court pursuant to CPLR 5104, 5240, 5251, NY Judiciary Law § 753 and the Court's inherent authority for (a) failing to comply with the Order's payment provision, (b) failing to comply with the Order's discovery provision, and (c) submitting false and misleading testimony and directing an accounting, discover [sic] as well as imposing monetary sanctions, other appropriate sanctions and ordering imprisonment absent a purging of the Fawers' contempt; (3) Awarding injunctive relief pursuant to CPLR 5240, CPLR 6301 et. seq. including but not limited to (a) directing Greenspoon Marder to pay Key Growth directly, (b) directing the Sheriff or other officer to access the Fawers' apartment and inventory their personal property, and (c) directing the Fawers to provide any financial or other information on an on-going basis as the Court may deem appropriate; and (4) For any other relief deemed just, proper and equitable is DENIED and otherwise is deemed ACADEMIC; and further it is ORDERED that,

The Motion Sequence No. 007 by the Fawers for an order (1) pursuant to 5015(a)(2) relieving Defendants from the Order based upon newly discovered evidence, (2) pursuant to 5015(a)(2) modifying the Order based upon newly discovered evidence, and (3) and for such other and further relief deemed just, proper and equitable is deemed ACADEMIC as the Fawers have apparently paid¹ the remaining judgment.²

BACKGROUND

On August 15, 2017, a judgment by confession (“Judgment”) was entered in favor of the Plaintiff against the Defendants in the amount of \$313, 294.18, which provided for 24% interest from June 10, 2017—the date of default—through August 15, 2017—the date of the entry of the judgment. (Judgment, NYSCEF Doc Nos 005, 142.)

On or around June 15, 2018, Key Growth allegedly served the Fawers with post-judgment subpoenas, which requested the following discovery to be produced:

- “(1) All employment, partnership, independent contractor or agreements entered into or active during the period January 1, 2016 through present between you and any employer, partnership, entity or person from which you received payments, fees or other remuneration;
- (2) All documents reflecting any monies paid to you or on your behalf during the period January 1, 2016 through October 31, 2017, whether as draws, salary, advances, expense reimbursement loans, remuneration, or otherwise;
- (3) All documents reflecting any monies received by you or paid on your behalf during the period January 1, 2016 through October 31, 2017 from any other source (i.e. trusts, annuities, insurance proceeds, gifts, bequests etc.);
- (4) Documents setting forth the nature and location of all of your assets, marital and personal, including but not limited to any real property, equipment, bank accounts, stocks, bonds, negotiable instruments, investments, interests in LLCs or other privately held businesses, trusts, contract rights, claims or causes of action;
- (5) Documents setting forth the name and address of the businesses or investment enterprises in which you have an interest as officer, director, principal, partner, co-venturer or controlling shareholder;
- (6) Documents related to any mortgage for any real property that you own;
- (7) Documents related to any other indebtedness (i.e. tax liens, payments on notes etc.);
- (8) Documents related to your reasonable monthly expenses (i.e. mortgage, rent, automobile, education, healthcare, etc.); and
- (9) all other books, papers, or records in your possession or control which have or may contain information concerning your property, indebtedness, income, or other means for satisfying the judgment or justify the failure to

¹ At the time of this order, a satisfaction piece pursuant to CPLR 5021 has not yet been filed.

² Key Growth additionally requests to set the post-judgment “penalty” rate of interest at 24%. Said dispute is not part of this motion.

satisfy the judgment.” (NYSCEF Doc No 25; *see also* NYSCEF Doc Nos 50, 51.)

On August 22, 2018, the parties stipulated that “[t]he Fawers shall pay Key Growth \$7, 500 per month during the period from: August 2018 through November 30, 2018 (“Effective Period”) which amounts shall be credited against the Judgment[.]” (Stipulation ¶ 1, NYSCEF Doc Nos 31, 143.) The parties further stipulated that “the subpoenas [were] enforceable and remain[ed] active[.]” (*Id.* ¶ 5.) The parties further stipulated that “[n]othing contained [in the stipulation] shall prejudice Key Growth’s rights to recover after the Effective Period any amounts under the Judgment including but not limited to accrued interest, cost and fees including attorneys’ fees[.]” (*Id.* ¶ 6.) The parties further stipulated as follows:

“The Fawers during the Effective Period shall not in this or any other proceeding contest the validity or enforceability of the Judgment and this stipulation shall act as a forbearance against doing so. Any costs and fees, including reasonable attorney’s fees incurred by reason of the Fawer’s [sic] assertion of an affirmative defense during the period of this stipulation against the Judgment or default under this Agreement in this or any other proceeding shall automatically entitle Key Growth to recover those costs and fees.”

(*Id.* ¶ 7.)

On January 29, 2019, when the August 22, 2018 stipulation was no longer in effect and the parties having failed to agree on a resolution, Key Growth moved pursuant to CPLR 5226 for an installment payment order. (Memo in Supp [Motion Seq. No. 002], NYSCEF Doc No 037.)

On March 6, 2019, this Court granted Key Growth’s motion (Motion Seq. No. 002) to the extent, as relevant here, that the issue of the amount of the installment payments pursuant to CPLR 5226 to be paid to Key Growth from the Fawers was referred to the Special Referee Part to hear and report with recommendations. (Order entered March 6, 2019, and e-filed March 8, 2019, NYSCEF Doc No 144.) The Court further ordered “that the branch of [Key Growth’s] motion in the alternative pursuant to CPLR 2308 and 3124 to compel compliance with the subpoenas accepted by judgment debtors including a bond for discovery-related costs is granted to the extent that [the Fawers] are to appear for depositions in accordance with the subpoenas annexed to exhibit D of the motion on or before April 19, 2019, and are to bring with them response[s] to any related discovery previously demanded by Plaintiffs.” (*Id.*)

On April 18, 2019, as submitted into the record, Key Growth’s counsel allegedly sent a letter to the Fawers’ then counsel regarding the deposition of the Fawers. (Letter and previous emails, NYSCEF Doc No 55.) This letter states that Key Growth’s counsel, Samuel Blaustein (“Blaustein”), attempted to depose the Fawers during the week of March 25, 2019. (*Id.*) The letter further states that the Fawers’ then counsel Mr. Arthur Lebedin (“Lebedin”) stated that the Fawers were unavailable for a deposition until the second week of April. (*Id.*) According to the letter, Blaustein then asked to depose the Fawers “on any day during the week of April 15, 2019.” (*Id.*) “On April 1, 2019, [Lebedin [allegedly] wrote that [he] would confirm what day [he]

would produce [his] clients.” (*Id.*) On Monday morning, April 15, 2019, Blaustein wrote to Lebedin saying “despite the passage of two weeks, [he] had not confirmed what day [he] would produce [his] client.” (*Id.*) Blaustein in his letter states that he has not received a response to his email and he then called Lebedin’s office on April 17, 2019 and left a message requesting a call back. (*Id.*) In the letter, Blaustein further states that on April 17, 2019, Lebedin requested a two-week adjournment “that would result in a deposition after the April 19, 2019 deadline[.]” (*Id.*)

On April 19, 2019—the scheduled date of the deposition—Lebedin sent a letter to the Court asking to adjourn the EBT to the week of April 29, 2019, “due to Mr. Fawer’s hectic work/travel schedule over the last two months and the impending Passover holiday which have made it difficult to set a certain date this month.” (NYSCEF Doc No 53.) Lebedin further noted that “[t]he Fawers made it clear that they will be available on the week of the 29th. Upon requesting Plaintiff’s consent to this adjournment, the request was denied.” (*Id.*) Notwithstanding Key Growth’s refusal to consent to the adjournment, Mr. Fawer was not produced for an EBT on April 19, 2019. (Apr 24, 2019 J.H.O. Hearing Tr, NYSCEF Doc No 103, at 12:25-14:03.)

Although the Fawers failed to appear for the Court-ordered EBTs before, the parties appeared before the judicial hearing officer, the Honorable Alice Schlesinger, J.H.O., on April 24, 2020, April 30, 2019, and July 11, 2019. (J.H.O. Hearings, NYSCEF Doc Nos 103, 104, 105.) Mr. Fawer was called as a witness at the J.H.O. hearing on April 30, 2019 (although he had failed to previously appear for a deposition), and was questioned by counsel for Key Growth, Blaustein pursuant to the Court’s March 6, 2019 Order. (Apr 30, 2019, J.H.O Hearing Tr at 12:14, NYSCEF Doc No 104.) At the next J.H.O. hearing dated July 11, 2019, Mr. Fawer’s testimony continued where he was questioned on direct and cross. (July 11, 2019 J.H.O. Hearing Tr, NYSCEF Doc No 105.) Blaustein stated at the J.H.O. hearing dated April 30, 2019 that his office “offered to take Mr. Fawer’s deposition on a multitude of dates in March and April ... and that the deposition never happened.” (Apr 30, 2019, J.H.O Hearing Tr at 05:21-06:09, NYSCEF Doc No 104.)

On September 23, 2019, the J.H.O. issued a report recommending that installment payments of \$10,000 be made monthly, reasoning that the Fawers originally were paying pursuant to the stipulation \$7,500 per month and now that they were no longer paying mortgage charges, they would soon stop making car-related payments for a Mercedes that they were leasing, and they had certain savings from the tuition deduction, they could afford to pay the additional \$2,500 per month. (J.H.O. Report, NYSCEF 145.) The J.H.O. also noted that the judgment had increased to \$425,000 due to the 9% interest. (*Id.*)

In its November 25, 2019 Order (“Order”), this Court adopted the J.H.O.’s above recommendation “in full.” (Order [Mot. Seq. No. 5], NYSCEF Doc No 146.) Accordingly, the Court ordered that the Fawers were to make monthly installment payments to Key Growth on the first business day of each month of \$10,000 beginning December 2, 2019, until the Judgment was satisfied in full. (*Id.*) The Court further ordered that “the branch of the motion pursuant to CPLR 3126 is granted to the extent that Plaintiff shall serve discovery demands on Defendants on or before December 5, 2019, and Defendants shall respond on or before December 24, 2019, and defendant Mark Fawer shall appear for a deposition on or before January 6, 2020, which shall continue day by day until completion, and defendant Melissa Fawer shall appear for a

deposition on or before January 8, 2020, which shall continue day by day until completion[.]” (*Id.*)

It is undisputed that the Fawers made late payments for the months of December 2019 and January 2020. It is also undisputed that the Fawers failed to make a payment in February 2020.

On December 9, 2019, Blaustein sent a letter to the Court stating that “[o]n November 27, 2019 counsel for the Fawers advised [him] that his client was out of the country for several weeks and requested to delay the first payment until December 20, 2019. ... Key Growth consented for a week extension through December 9, 2019. On December 6, 2019, counsel for the Fawers again asked to delay making the payment. On December 9, 2019 a partial payment of \$2, 000 was allegedly sent to [his] office. ... No response concerning document discovery or deposition dates has been provided.” (NYSCEF Doc No 148.) Blaustein in his letter also asked to “serve a levy on Mr. Fawer’s employer, Greenspoon Marder LLP, in order to ensure payments per the Order.” (*Id.*) Mr. Blaustein further asked for a conference with the Court. (*Id.*)

In their December 10, 2019 response letter, the Fawers’ then-counsel Arthur Lebedin (“Lebedin”) did not dispute that the Fawers have only made a partial payment for the month of December. (NYSCEF Doc No 147.) Lebedin stated that this was due to an understanding that the Fawers’ insurance would not cover a larger portion of certain alleged health care costs. (*Id.*) Lebedin also stated that “[his] office did not receive a request for discovery demands as was ordered but simply received a general request stating that, ‘discovery requests remain active.’” (*Id.*) Lebedin further stated that “a levy on Mr. Fawer’s employer ... would be both procedurally inappropriate ... and substantively inappropriate as it is essentially asking for a way to work around the wage garnishment and levy rules and limits under CPLR.” (*Id.*)

On December 12, 2019, the Court held an in-person conference. (NYSCEF Doc Nos 130, 149.) As reflected in the transcript, the Court noted that the Fawers had only paid \$ 2,000 out of the \$ 10,000 that was owed for the month of December. (Ex H, Dec 12, 2019 Tr. at 3:04-10, NYSCEF Doc No 149.) The Court directed the Fawers to comply with the Court’s Order. (*Id.*)

According to Key Growth’s moving papers in Motion Sequence No. 006, following the December 12, 2019 conference, the only documents received by Key Growth were (1) a copy of a health insurance claim form dated December 10, 2019; (2) Mr. Fawer’s December 20, 2019 and January 4, 2020 paystubs, and (3) a copy of the Fawers’ common charges for December 2019 pasted into an email. (Blaustein Affirm ¶ 9, NYSCEF Doc No 141.)

According to the Fawers’ moving papers in Motion Sequence No. 007, pursuant to a December 31, 2019 letter from Mr. Fawer’s employer Greenspoon Marder LLP, Mr. Fawer learned that he was not going to receive a bonus at work and that his employer Greenspoon Marder LLP’s Executive Committee informed him that \$150,000 of his compensation would be deferred due to the low performance and low profitability of his group. (*See* the Fawers’ Attorney’s Affirm dated Feb 26, 2020, NYSCEF Doc No 168; *see also* Mr. Fawer Affirm in Merit dated Feb 3, 2020, NYSCEF Doc No 169.) Mr. Fawer asserts in his February 3, 2020 affirmation of merit that “[his] compensation has been indefinitely deferred[.]” (Mr. Fawer

Affirm in Merit ¶ 3, NYSCEF Doc No 169.) The Fawers' counsel asserts in his affirmation, dated February 26, 2020, that the deferment of compensation "is scheduled to last until June of 2020 at a minimum, but may continue indefinitely[.]" (See the Fawers' Attorney's Affirm ¶ 8, NYSCEF Doc No 168.)³

On January 7, 2020, Mrs. Fawer and Mr. Fawer were deposed. (The Fawers' EBTs, NYSCEF Doc Nos 154, 155.)

On January 14, 2020 the Court held a status conference and entered a status conference order providing that Defendants had not complied with discovery, requested a status update concerning discovery, and set a future conference date of April 7, 2020.⁴ (Jan 14, 2020 Status Conference Order, NYSCEF Doc No 131; see also NYSCEF Doc No 193.)

On January 15, 2020, Key Growth served Post-EBT Discovery Requests. (Post-EBT requests, NYSCEF Doc No 156.) Key Growth specifically requested the following:

1. "Documents sufficient to identify the account numbers for the Fawers' Citibank and TD Bank checking accounts ("Accounts"). See Mark Fawer Deposition Transcript ("Mark Depo") P. 8; Melissa Fawer Deposition Transcript ("Melissa Depo.") P. 13-14.
2. All account statements for the Accounts from January 1, 2018 to present. See Mark Depo P. 8.

³ The Court held virtual hearings as part of Motion Sequence Nos 006 and 007 to make findings as to the Fawers' income and reasonable expenses for the then-unmooted Motion Sequence Nos 006 and 007. At the September 2020 oral hearing, Mr. Fawer stated that in addition to the alleged \$ 150, 000 performance reduction, "[d]ue to the economic fallout of COVID-19, [his] compensation specifically was reduced ... from December of 2019 to starting with the first paycheck following that announcement in March of 2020[.]" (Sept 23, 2020 Tr at 06:12-07:18, NYSCEF Doc No 312, see also Ex D [Firm letter dated April 3, 2020], NYSCEF Doc No 210.) Mr. Fawer's 2019 and 2020 Pay Statement shows the below biweekly net pay from his employer Greenspoon Marder LLP. (NYSCEF Doc Nos 151, 207, 266; see also NYSCEF Doc No 281; NYSCEF Doc No 312 at 13:10-25-14:06; Excel sheets submitted to the court.)

Pay Period	Net Pay Biweekly
• 07/07/2019-07/19/2019	\$ 34,237.04
• 07/21/2019-08/03/2019	\$ 34,237.04
• 08/03/2019-11/xx/2019	\$34,237.04
• 12/22/2019-01/04/2020	\$ 30,512
• 01/05/2020-01/18/2020	\$ 30,512
• 01/19/2020-02/01/2020	\$ 30,536.75
• 02/02/2020-02/15/2020	\$ 24,935.92
• 02/16/2020-02/29/2020	\$ 25,438. 25
• 03/01/2020-03/13/2020	\$ 23,284.03
• 03/15/2020-03/28/2020	\$ 23,016.28
• 03/29/2020-04/11/2020	\$ 21,272.92
• 04/12/2020-09/xx/2020*	\$ 21,298 (*biweekly)

⁴ The April 7, 2020 conference was not held as scheduled due to a stay in court proceedings in response to the COVID-19 pandemic.

3. All documents concerning out-of-pocket expenses actually paid by the Fawers for Mrs. Fawers health care from January 1, 2019 to present to the extent not set forth in the Account statements. *See* Mark Depo. P. 14-18; Melissa Depo. P. 12.
4. All documents concerning expenses actually paid by the Fawers for or on behalf of their children from January 1, 2019 to present to the extent not set forth in the Account statements. *See* Mark Depo. P. 21, Melissa Depo P. 7-9.
5. All of Mr. Fawer's bi-weekly or other payroll statements from the time he joined Greenspoon Marder in June 2018 to present. *See* Mark Depo. P. 13.
6. All documents sufficient to identify any outstanding credit card debt by the Fawers. *See* Melissa Depo P. 25.
7. A copy of the Fawer's most recent family plan cell phone, internet and other recurring services bills. *See* Melissa Depo. P. 26.
8. Any other documents responsive to Key Growth's previously served requests." (*Id.*)

On February 3, 2020, Key Growth sent a status-update letter to the Court "jointly with the consent of Defendants" in which Key Growth stated that it "served [the Fawers] Post-EBT Document Requests." (Key Growth's Feb 3, 2020 Letter to the Court, NYSCEF Doc No 132.) Key Growth through its counsel wrote that "[t]he most important documents to Key Growth are the Fawers' bank records identified at the depositions and proof of their alleged monthly expenses. Responses are due by the Fawers tomorrow, February 4, 2020." (*Id.*) In the letter, Key Growth stated that the parties have not yet reached a resolution in the case. (*Id.*) Key Growth further stated that it intended to "file a motion to amend the monthly payment amount and to impose a levy directly against Mr. Fawer's \$1.2 million Greenspoon Marder salary." (*Id.*)

Blausten in his affirmation (Motion Seq. No. 006) stated that at the time of the February 3, 2020 letter, the Fawers had only provided "*de minimis* items." (Blaustein Affirm ¶ 16, NYSCEF Doc No 141, citing Ex S.)

On the same day of February 3, 2020, the Fawers sent a separate letter to the Court stating a change in financial circumstances, with part of Mr. Fawer's monthly income allegedly deferred. (*See* Defendants' February 3, 2020 Letter to the Court, NYSCEF Doc No 133; *see also id.* FN 3.) Based on the alleged change in circumstances, the Fawers asked the Court to modify the Order and reduce the monthly payment amount. (Defendants' February 3, 2020 Letter to the Court, NYSCEF Doc No 133.)

On February 4, 2020, the Court directed a teleconference during which it was agreed: (1) that the time for the Fawers to reply to post-EBT discovery would be extended until February 14, 2020, and (2) that absent any emergency, motions concerning requests to modify the Order would be made on notice as opposed to Order to Show Cause. (NYSCEF 139; *see also* Joint Letter to the Court dated Feb 10, 2020, NYSCEF Doc No 161.)

According to Key Growth's moving papers (Motion Seq. No. 006), on February 14, 2020, the Fawers provided one document, a December 2019 Citi account statement. (Blaustein Affirm ¶ 19, NYSCEF Doc No 141.)

On February 21, 2020, Key Growth filed Motion Sequence No. 006. In sum and substance, Key Growth has argued that the Fawers should be held in contempt due to, inter alia, non-compliance with the Court's orders and Key Growth has further argued that the installment payments should be increased.

On February 26, 2020, the Fawers filed Motion Sequence No. 007. In sum and substance, the Fawers argued that due to a change in the Fawers' circumstances (\$150,000 reduction in income), they were entitled to a modification of the Court's prior order of \$10,000 monthly installment payments.

The Court held oral hearings in the case on July 10, 2020, August 19, 2020, September 23, 2020, September 30, 2020, October 15, 2020, October 20, 2020, and October 26, 2020 regarding the Fawers' income and expenses. (Oral Hearing Trs at NYSCEF Doc Nos 201, 310, 312, 328, 340, 347.)

On October 26, 2020, defense counsel informed the Court that the Fawers intended to pay the judgment in full.

The Court was informed that as of November 4, 2020, the Fawers had made partial payments of \$108, 037.83 in partial satisfaction of the Judgment. (NYSCEF Doc No 346.)

The Court was informed that on November 5, 2020, the Fawers made a payment of \$283, 739.78, apparently in full satisfaction of the Judgment, thereby making Motion Sequence No. 007 academic and making the branch of Motion Sequence No. 006 requesting an upward modification of the monthly installments academic. (KG November Letter, NYSCEF Doc No. 355.) Therefore, the only remaining issues before the Court at present as argued by Key Growth's counsel is the branch of Key Growth's motion (Motion Seq. No. 006) pertaining to contempt and other relief.

On November 6, 2020, parties submitted post-hearing supplemental letters to the Court.⁵ (NYSCEF Doc Nos 355, 356.)

Lastly, the Court notes again that Key Growth has moved for another order (Mot. Seq. No. 008) under Art. 50 of the CPLR awarding it costs and attorneys' fees, setting the post-default "penalty" rate of interest at 24%, setting this matter down for a hearing or inquest. (NYSCEF Doc Nos 348-53.) As part of the new motion, Key Growth seems to ask for attorney fees as part of an agreement between the parties. This is not an issue that is fully briefed at this time and is not part of Motion Sequence Nos. 006 and 007.

⁵ Key Growth, for the first time, argues in its letter to the Court dated November 6, 2020, that the disbarment of Mr. Fawer is warranted for failing to produce evidence and submitting misleading testimony and/or evidence. (NYSCEF Doc No 355 at 4-5.) Because this belated argument is raised for the first time in a one-time only supplemental letter to the Court, it should be disregarded and rejected. (*See cf. Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992].)

A. Parties Contentions

1. Affirmation and Memorandum in Support of the Motion

The branch of Key Growth's motion (Motion Seq. No. 006) asking to renew the Order granting the installment of monthly payments and increasing said payments, and asking to award injunctive relief regarding said installment payments is academic as the Judgment (as entered on August 15, 2017) has apparently been paid in full.⁶ Therefore, the only remaining branch of Key Growth's present motion is an application to hold the Fawers in contempt for failing to comply with the Order's payment and discovery provisions. In addition, Key Growth's counsel Blaustein in his affirmation specifically asks for "costs, fees and monetary sanctions[.]" (Blaustein Affirm ¶ 2, NYSCEF Doc No 141.)

Key Growth argues that "only compliance under threat of the harshest possible sanctions, including imprisonment, is sufficient to compel compliance with the Court's lawful directives." (Memo in Supp at 7.) Key Growth further argues that the Fawers failed to comply with the Court's Orders "for months requiring Court intervention on no less than three separate occasions after the issuance of the Order." (*Id.* at 8.) Key Growth adds that "[n]othing short of contempt will deter the Fawers[.]" (*Id.*)

Key Growth argues that a finding by the Court of civil contempt is warranted for the Fawers' breaches of the Order as the Fawers have (1) failed to make installment payments as directed by the Order, (2) failed to provide discovery as directed by the Order, and (3) submitted false or misleading testimony including but not limited to their interest in an entity known as Melimar, Inc., and grossly overstated their monthly expenses. (Memo in Supp at 7, NYSCEF Doc No 166; *see also* Blaustein Affirm ¶ 8.)

First, Key Growth argues that "late payments were made in December 2019 and January 2020 and no payment for February has been received." (Blaustein Affirm ¶ 8 FN 1, citing Gitlin Aff [NYSCEF Doc No 164].)

Second, Key Growth argues that the Fawers failed to provide the requisite discovery in a timely fashion as directed by the Order. (Memo in Supp at 5-6.) According to Key Growth, the only documents that it received following the December 12, 2019 conference were:

- (1) "[A] copy of a health insurance claim form dated December 10, 2019 (redacted copy attached as Exhibit I);
- (2) Mr. Fawer's December 20, 2019 and January 4, 2020 paystubs (copies attached as Exhibit J); and
- (3) a copy of the Fawers' common charges for December 2019 pasted into an email (copy attached as Exhibit K). Each of the foregoing documents was served between January 6 and 7, 2020." (Blaustein Affirm ¶ 9, NYSCEF Doc No 141.)

⁶ As stated in FN 2, the dispute as to the 24% post-judgment "penalty" rate of interest is not before this Court at present. Such dispute does not have a bearing on the payment of the Judgment as recorded in August 2017.

Further, Key Growth argues that “[o]n February 3, 2020 the parties submitted a joint letter indicating that the Fawers had been deposed but they had not provided documents other than the *de minimis* items attached as Exs. G-I[.].” (*Id.* ¶ 16, citing Ex S.)

Lastly on discovery, Key Growth argues that on February 14, 2020, the Fawers provided only one document, a December 2019 Citi Bank account statement which was largely insufficient to satisfy the post-EBT requests. (Blaustein Affirm ¶ 19.)

Third, Key Growth argues that the Fawers “have submitted false and misleading testimony in an attempt to misuse Melissa Fawer’s serious health condition as a basis to ignore this Court’s clear and unequivocal Orders.” (Memo in Supp at 7.) Key Growth specifically argues that Mr. Fawer was untruthful about his testimony as to his capacity as an officer of Melimar, Inc., a New York-based investment company. Additionally, Key Growth argues specifically that:

“Following [Blaustein’s] receipt of the deposition transcripts, [he] completed additional research and on January 16, 2020 located an affidavit executed by Mr. Fawer in his capacity as an officer of Melimar, Inc., a New York-based investment company, in an action seeking millions of dollars in damages. The affidavit directly contradicts Mr. Fawer’s testimony that he held no other employment and had no other sources of income. [Blaustein] immediately informed the Fawers’ counsel of this discovery in writing and provided a copy of the affidavit, demanded an explanation and explained that [he] would raise the issue to the Court absent a proper [explanation].” (Balstein Affirm ¶ 13, citing Ex P [January 16, 2020 email with attachment].)

Key Growth relatedly argues that “[l]ater on January 16, 2020, counsel for the Fawers responded only that Mr. Fawer represented that he was no longer an officer of Melimar and received no income in the past year only.” (*Id.* ¶ 14., citing Ex Q.)

Key Growth through its counsel further argues that:

“On January 17, 2020, after receiving another email indicating that Mr. Fawer resigned from Melimar, [Blaustein] informed counsel for the Fawers that based upon a search of New York public records that we determined that – contrary to his message – Melimar was an active business based at the Fawers home and that Melissa Fawer was a licensed real estate broker working for Melimar. In sum, the Fawers’ testimony was apparently false and at least materially misleading.”

(*Id.* ¶ 15, citing Ex R; *see also* Balstein Affirm FN 2 [“I subsequently discovered, according to New York County Supreme Court records, Melimar, Inc. has been a party to multiple litigations including but not limited to *Melimar, Inc. v. Avant Capital Partners LLC et al.*, (Sup. Ct. NY Co. Index No. 653903/2015) in which Melissa Fawer and Mark Fawer testified that Melissa Fawer is an employee of Melimar and that Melimar was in the real estate business. Additionally, Melimar entered into a settlement to receive payments in *Melimar, Inc. v. 270 Davidson, LLC et al.* (Sup. Ct. NY Co. Index No. 652105/2011[.]”)

2. The Fawers' Opposition

In opposition and as relevant here, the Fawers argue that they have complied with the Court's Order by making payments for December 2019 and January 2020 despite their hardship in doing so and have complied with depositions and the production of documents as directed. (Memo in Opp at 2-3, NYSCEF Doc No 175.)

The Fawers further argue that “[t]o avoid noncompliance with the Court’s Order, the Fawers immediately applied to the Court to modify the Court’s Order based on an additional review of their financial affordability considering Mark Fawer’s recent ... reduction in compensation and Mrs. Fawer’s ongoing, rising and unpredictable medical expenses.” (*Id.* at 4.) Relatedly, the Fawers further argue that Mr. Fawer’s compensation from Greenspoon Marder was reduced after the Order was entered. (*Id.* at 6.) The Fawers further argue that in the month of December alone, “the Fawers incurred over \$15, 000 in uninsured, out of pocket medical expenses for [Mrs. Fawer].” (*Id.*; *see also* Fawer Affirm ¶ 3 [internal citation omitted]; *see also* NYSCEF Doc Nos 212-15.)

Further, Mr. Fawer states that “[he] had not earned any income from Melimar, Inc.” at least for the past two years. (Fawer Affirm. ¶ 9.) The Fawers further request that the Court records in this matter be sealed for good cause shown. (Memo in Opp at 10-11.) The Fawers further request hearings with the Court to establish their inability to make the installment payments. (*Id.* at 4.)

3. Key Growth's Reply

In reply, Key Growth argues that contempt is warranted as “the Fawers have not produced documents concerning their reasonable monthly expenses and have been provided repeated opportunities to purge their contempt.” (Reply Memo at 6, NYSCEF Doc No 185.) Specifically, Key Growth asserts that the Fawers produced “nothing more than a health insurance claim form, recent paystubs and a common charge statement, arguing that none of which concern their reasonable monthly expenses as against Mr. Fawer’s \$1.2 million salary.” (*Id.* [internal citation omitted].). Key Growth contends that “[t]o compound matters, the Fawers committed perjury at their depositions, including about their affiliation with Melimar, Inc., and never produced bank records for the period requested without raising any objection.” (*Id.* [internal citation omitted].)

DISCUSSION

CPLR 5210, entitled “Power of court to punish for contempt,” states:

“Every court in which a special proceeding to enforce a money judgment may be commenced, shall have power to punish a contempt of court committed with respect to an enforcement procedure.”

CPLR 5251, entitled “Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale,” states in relevant part:

“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 ... shall each be punishable as a contempt of court.”

NY Judiciary Law § 753, entitled “Power of courts to punish for civil contempts” states in relevant part:

“(A) A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

...

3. A party to the action ... for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.”

NY Judiciary Law § 773, entitled “Amount of fine,” states in relevant part:

“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, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, 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. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Where it is not shown that such an actual loss or injury has been caused, a fine may be imposed, not exceeding the amount of the complainant’s costs

and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section. ...”

“A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court.” (*Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 [2d Dept 2009].) However, before a court may make a finding of civil contempt, the movant must establish by clear and convincing evidence that:

- (1) a lawful order of the court, that was in effect clearly expressed an unequivocal mandate,
- (2) to a reasonable certainty, the order was disobeyed,
- (3) the contemnor knew about the order although need not be served with the order, and
- (4) that the movant was prejudiced.

(*Matter of McCormack v Axelrod*, 59 NY2d 574, 583 [1983]; *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].) The burden then shifts to the alleged contemnor to refute the movant’s showing, or to offer evidence of a defense, such as an inability to comply with the order. (*El-Dehdan*, 26 NY3d at 29.) A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense. (*Id.*)

If the court finds that an alleged contemnor has caused an actual loss to the movant, then a fine “sufficient to indemnify the [movant]” must be imposed. (*See* Judiciary Law § 773; *see also Blue Outdoor Media LLC v Silverpoint Media Group LLC*, 2019 NY Slip Op. 31018[U], 1 [NY Sup Ct, New York County, 2019].) The movant must request or establish the amount of damages. (*Fed. Deposit Ins. Corp. v Richman*, 98 AD2d 790, 792 [2d Dept 1983].) The fine may include attorneys’ fees and costs. (*See* Judiciary Law § 773; *see also Schwartz v Schwartz*, 79 AD3d 1006, 1010 [2d Dept 2010]; *Matter of Diorio v City of Peekskill Common Council*, 13 AD3d 523, 525 [2d Dept 2004].)

If no “actual loss” has been found, the court may impose a fine “not exceeding the amount of the [movant’s] costs and expenses” plus \$250. (Judiciary Law § 773.) “Costs and expenses” in the statute means the costs and expenses of the motion to punish for contempt, and not the entire costs of the proceeding out of which the alleged contempt arose. (10 Carmody-Wait 2d § 66:42; *Fed. Deposit Ins. Corp.*, 98 AD2d at 792.)

“Once the [movant] has met the burden of establishing contempt, it is incumbent upon the alleged contemnor to proffer evidence of an inability to pay. Vague and conclusory allegations of inability to pay or perform are not acceptable; rather, courts require a specific showing of the contemnor’s economic status.” (21 NY Jur. 2d Contempt § 119 [2020]; *see also El-Dehdan*, 26 NY3d 19.)

In matters where the judgment debtor has failed to comply with an installment-payment order due to financial inability, “better practice would dictate that before an order of contempt issue the judgment debtor be brought before the court and examined by the judge to determine his financial status and the possibility of payments in the amount ordered.” (*Caruso v Schilingo*, 23 AD2d 627, 627 [4th Dept 1965]; *Bank of Smithtown v Troy & Troy, P.C.*, 56 Misc 3d 1220(A) [NY Sup, Suffolk County, 2017]; 54 NY Jur. 2d Enforcement and Execution of Judgments § 325.) Contempt is “a ‘back-up device’ in the enforcement of money judgments pursuant to CPLR 5251.” (*Koegler v Amraly*, 68 Misc 3d 1204(A) [Sup Ct 2020].)

The purpose of an order of civil contempt is “vindication for individuals who have been injured or harmed by a contemnor’s failure to obey a court order.” (*Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 630 [2d Dept 2012].) As such, “[c]ivil contempt fines must be remedial in nature and effect and awards should be formulated not to punish an offender, but solely to compensate or indemnify private complainants.” (*Id.* [internal quotation marks omitted]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994] [“Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate.”].) Civil contempt is “designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court’s mandate or both.” (*Dept. of Env’tl. Protection of City of New York v Dept. of Env’tl. Conservation of State of NY*, 70 NY2d 233, 239 [1987]; *see also People v Sweat*, 24 NY3d 348, 357-58 [2014] [stating that for civil contempt, imprisonment serves “the remedial purpose of compelling compliance” whereas imprisonment for criminal contempt is “designed to inflict a sanction for past conduct”].)

In the present case, Key Growth must establish by clear and convincing evidence that a lawful order of the Court, known to the parties, has been disobeyed and that the actions of the alleged contemnor have been calculated to, or actually defeated, impaired, impeded or prejudiced its rights or remedies. (*See Matter of McCormack v Axelrod*, 59 NY2d 574, 583 [1983]; *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].) Although Key Growth established that a lawful order of the Court, known to the parties, has been disobeyed, it fails to establish that, at present, due to the actions of the Fawers, its rights or remedies have been defeated, impaired, impeded or prejudiced.

In the Order, the Court ordered and directed the Fawers to make monthly installment payments of \$10,000 on the first business day of each month. It is undisputed in the record that a late payment was made in December 2019. Further, it is undisputed in the record that a late payment was made in January 2020. Next, it is undisputed in the record that no payment was made in February 2020. On February 3, the Fawers, in a letter to the Court, argued an inability to comply with the Order.

Thereafter, on February 26, 2020, the Fawers in Motion Sequence No. 007 moved to reduce the installment payments. The Court then ordered oral hearings with respect to Motion Sequence Nos 006 and 007 to take testimony to make findings as to the Fawers’ income and reasonable expenses and consider contempt. As revealed during the oral hearings and accompanying documents submitted to the Court, the Fawers spent in excess of \$6,000 on food for at least the months of July and November of 2019 and February and September of 2020;

spent in excess of \$13,000 on clothes in the month of November 2019; nearly \$20,000 for two weeks from July 3, 2020 through July 17, 2020 for a summer rental home; and \$20,000 for another two weeks from July 31, 2020 until August 14, 2020; and \$7,000 for a week from September 2, 2020 through September 9, 2020. (Income statements submitted to Court in Excel; NYSCEF Doc Nos 282-83; NYSCEF Doc Nos 320, 321, 322.) The Fawers have also apparently not paid their federal income taxes for the years 2017, 2018, and 2019, or monthly mortgage payments. (See *Berkshire Bank v Fawer*, 2019 NY Slip Op. 32189[U], 5 [NY Sup Ct, New York County 2019], *affd*, 2020 NY Slip Op. 05806 [1st Dept 2020].) Further, the Fawers have chosen to make payments toward other nonlegal obligations such as their adult children's school payments in excess of \$30, 000 and their daughter's wedding in excess of at least \$ 30, 000. (NYSCEF Doc Nos 279-280, 286, 287, 289, 312 at 58:9-11 [school]; NYSCEF Doc Nos 340 at 48:11-24; 299; Excel sheets submitted to the Court showing further payments in Nov 2019, Feb 2020, and Sept 2020 [wedding].) Having been so advised by the parties, the Court acknowledges that the Fawers have paid to Key Growth \$283,739.78 in apparent satisfaction of the Judgment. (NYSCEF Doc No 005.) This is in addition to the previous payments of \$108, 037.83 in partial satisfaction of the Judgment. (NYSCEF Doc No 346.) As such, the Court need not make a finding as to whether the aforementioned expenses were reasonable or unreasonable.

Further, with regard to the branch seeking civil contempt, as stated by Key Growth itself, that motion for contempt was made "to compel compliance with the Court's lawful directives" and was made because "[n]othing short of contempt [would] deter the Fawers[.]" (Key Growth Memo in Supp at 7, 8.) Now that the Judgment has been paid and there is no longer a need for further installment payments, the requested relief of seeking compliance with the ordered installment payments in the Order has been rendered academic. At this time, holding the Fawers in contempt would only serve to punish them, which is not the intended purpose of civil contempt. (See *McCormick v Axelrod*, 59 NY2d 574, 582-83 [1983], *amended*, 60 NY2d 652 [1983] ["Civil contempt has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right."]; *Planning Bd. of Town of N. Elba v Zoning Bd. of Appeals of Town of N. Elba*, 75 AD2d 686, 687 [3d Dept 1980] ["The punishment imposed on the civil contempt found was punitive and, therefore, an abuse of judicial discretion, and for that reason must be vacated and set aside in its entirety."]; *The Town Bd. of the Town of Southampton v R.K.B. Realty, LLC*, 2010 NY Slip Op. 31452[U] [NY Sup Ct, Suffolk County 2010], *affd sub nom, Town of Southampton v R.K.B. Realty, LLC*, 2012 NY Slip Op. 00200 [2d Dept 2012] ["The penalty to be imposed for a civil contempt is intended to compensate the injured party or coerce compliance with the Court's mandate, or both."]; see also *Ginter Logistics Serv. Co., Ltd. v ACH Frgt. Forwarding, Inc.*, 07 CIV 8677 LAP, 2010 WL 4455402, at *2 [SDNY Oct. 21, 2010] ["Civil contempt sanctions are used as a coercive measure in order to compel *future* compliance."] [emphasis added].) Again, at present, there is no longer any compliance to compel.

To the extent that Plaintiff is also seeking discovery sanctions that are separate and apart from a theory of civil contempt—which Plaintiff's counsel seemed to state on record during a conference before this Court—the Court denies that as well. Again, the Court is by no means condoning how the Fawers have conducted themselves. However, taking all circumstances into consideration—including the fact that Key Growth has apparently received full satisfaction of

the Judgment, plus statutory interest of 9% on the Judgment from the date of entry up to the date of payment—the Court finds that such sanctions are not appropriate at this stage. Due to any lateness of the payment of the Judgment, Key Growth has now received the outstanding judgment with the statutorily mandated post-judgment interest at 9%. Further, if Key Growth prevails on its recent motion (Seq. 008)—which it contends is of a non-frivolous nature—it argues it would also be entitled to receive a “post-judgment penalty rate of interest at 24%.” (NYSCEF Doc No 349 [Mot. Seq. No. 008].) Again, Motion Sequence No 008 is not before this Court at this time.

Further, the Court notes that there has been overall compliance with the Court’s Orders as evidenced by the fact that Key Growth has apparently recovered the amount owed by the Fawers, as set forth in the Judgment, and, in fact, that Key Growth is recovering the Judgment in lump-sum as opposed to in monthly installment payments. For all these reasons, the Court finds that it is not appropriate to hold the Fawers in civil contempt. The Court, having considered all the other arguments made by Key Growth, finds them unavailing.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Motion Sequence No. 006 by Plaintiff Key Growth for an order: (1) Renewing the Court’s Order in Mot. Seq. No. 5 dated November 25, 2019 (NYSCEF 126) pursuant to CPLR 2221(e), 5226, 5232, 5240, 6301 et. seq. to (a) increase the monthly installment payments by Defendants Mark and Melissa Fawer and (b) direct that payments be made directly to Key Growth from Mark Fawer’s current employer, Greenspoon Marder, or subsequent employer; (2) Holding the Fawers in default and contempt of court pursuant to CPLR 5104, 5240, 5251, NY Judiciary Law § 753 and the Court’s inherent authority for (a) failing to comply with the Order’s payment provision; (b) failing to comply with the Order’s discovery provision; and (c) submitting false and misleading testimony and directing an accounting, discover [sic] as well as imposing monetary sanctions, other appropriate sanctions and ordering imprisonment absent a purging of the Fawers’ contempt; (3) Awarding injunctive relief pursuant to CPLR 5240, CPLR 6301 et. seq. including but not limited to directing Greenspoon Marder to pay Key Growth directly; directing the Sheriff or other officer to access the Fawers’ apartment and inventory their personal property; and (c) directing the Fawers to provide any financial or other information on an on-going basis as the Court may deem appropriate; and (4) For any other relief deemed just, proper and equitable is DENIED and is otherwise deemed ACADEMIC; and it is further,

ORDERED that the Motion Sequence No. 007 by Defendants Mark Fawer and Melissa Fawer for an order (1) pursuant to 5015(a)(2) relieving Defendants from its November 25, 2019 order based upon newly discovered evidence, (2) pursuant to 5015(a)(2) modifying its November 25, 2019 order based upon newly discovered evidence, and (3) and for such other and further relief deemed just, proper and equitable is deemed ACADEMIC as the Fawers have paid what the Fawers assert is the remaining judgment, including principal and interest; and it is further,

ORDERED that the counsel shall serve a copy of the instant decision and order with notice of entry within 10 days of the filing of the instant decision and order; and it is further,

The foregoing constitutes the decision and order of this Court.

11/16/2020
DATE


ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE