

**Giardina v James**

2020 NY Slip Op 34126(U)

December 9, 2020

Supreme Court, New York County

Docket Number: 156209/2019

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

GIARDINA et al.

INDEX NO. 156209/2019

- v -

MOT. DATE

JAMES

MOT. SEQ. NO. 3

The following papers were read on this motion to/for consolidate, quash and cross-motion for contempt, sanctions
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

This is petitioner's third attempt to quash subpoenas served by respondent. Previously, in a decision/order dated October 29, 2019, the court denied the petition to quash said subpoenas and disposed of this proceeding. That decision was affirmed by the First Department in a decision/order dated July 9, 2020 (185 AD3d 451). Meanwhile, petitioners moved to renew the prior motion as well as for a stay. In a decision/order dated September 24, 2020.

Now, petitioners' counsel explains in his affirmation that petitioners move "to Quash certain subpoenas and consolidate the instant Article 78 proceeding with its original action, People v Richmond Capital et al. (sic) indexed 451368/2020." In turn, respondent cross-moves for contempt and/or sanctions. Specifically, respondent seeks: "an Order pursuant to Judiciary Law § 753(A) holding Petitioners Robert Giardina, Michelle Gregg, and Jose Dasilva in contempt of Court and ordering each Respondent to pay individual fines of \$250, plus fines payable by each Respondents of \$12,675, reflecting the NYAG's expenses in responding to Petitioners' Motion to Quash and to Consolidate and preparing the instant Cross-Motion; or (2) in the alternative, an Order of sanctions pursuant to 22 NYCRR 130-1.1 awarding the NYAG with fees in the amount of \$12,675". There is no opposition to the cross-motion despite proof of service via filing on NYSCEF.

For the reasons that follow, the motion is denied and the cross-motion is granted in part. At the outset, there is nothing to consolidate as this is a disposed proceeding. The other action pending is a special proceeding pursuant to Executive Law § 63(12) against Giardina, Gregg, Richmond, and four other individuals and entities concerning their merchant cash advance business. Moreover, even if this proceeding was not disposed, as respondent correctly points out, this proceeding does not overlap in any meaningful way with the other action and therefore there is no legitimate concern that "different outcomes" could occur. Accordingly, the motion to consolidate is denied.

Dated: 12/9/20

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [X] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

In connection with the underlying subpoenas, petitioners argue that respondent does not need the information sought vis-à-vis the subpoenas, it is “plainly clear” that petitioners are “subjects of a federal criminal investigation” and respondent is “working along side (sic) criminal investigators”. The court deems these arguments as an inappropriate attempt to renew and/or reargue the prior motions. Assuming *arguendo* that such relief is available, petitioners have both failed to demonstrate that there are “new” facts here which were reasonably not previously proffered or that the court overlooked or misapprehended any facts or law when it denied the petition and prior motion. Accordingly, the motion is denied in its entirety.

The court now turns to the cross-motion. Respondent has established through the affirmation of her counsel that numerous attempts were made to secure petitioners’ compliance with the underlying subpoenas following this court’s 10/29/19 order directing petitioners to comply with the subpoenas and the First Department’s affirmance of that order. Despite those efforts, petitioners have failed to appear and provide testimony. 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]; NY City Civ. Ct. Act § 210; see also *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 amended 69 NY2d 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 AD2d 440 [1st Dept 1994]).

The cross-motion was served upon the petitioners via filing on NYSCEF. By commencing this proceeding, petitioners have submitted to the jurisdiction of this court as well as service by NYSCEF filing (Judiciary Law § 761; *Minzer v. Heffner Agency Inc.*, 214 AD2d 547 [2d Dept 1994]); *Hampton v. Annal Mgt. Co.*, 168 Misc2d 138 [Sup Ct NY Co 1996]).

The notice provisions of the motion warn the petitioners that they may be punished by the imposition of a fine, or imprisonment, or both, thus complying with the requirements of Judiciary Law § 756. Respondent has also established that the testimony and documents sought in the subpoenas will aid in her investigation of the merchant cash advance business and that petitioners’ knowledge thereof and specific roles in said business is otherwise relevant to that investigation (CPLR § 5251; *Matter of Gabor v. Renaissance Assoc.*, 170 AD2d 390 [1st Dept 1991]). Indeed, it is law of the case that respondent “demonstrated a good faith basis for issuing the subject subpoenas” (10/29/19 decision/order) and “[r]espondent was authorized to issue” the subpoenas (185 AD3d 451). Further, although the petitioners had actual knowledge of the subpoenas and their terms, as well as this court’s 10/29/19 order directing them to comply therewith, they disregarded both the subpoenas and the 10/29/19 order and failed to produce documents or appear for a deposition (*Ottomanelli v. Ottomanelli*, 17 AD3d 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]). Further, the failure to comply with a court order is also punishable as civil contempt (*McCain v. Dinkins*, 84 NY2d 216 [1994]). Respondent has established that petitioner’s disobedience of both the subpoena and this court’s 10/29/19 order has defeated impaired, impeded or prejudiced her right to ascertain information about the merchant cash advance business and petitioners’ knowledge thereof and role therein (Judiciary Law § 753 [a]; *Farkas v. Farkas, supra*; *Great Neck Pennysaver v. Central Nassau Publications*, 65 A.D.2d 616 [2d Dept 1978]). Finally, respondent has shown that there are no alternative effective remedies available. Accordingly, respondent’s cross-motion to hold petitioners in contempt for failing to comply with the subpoena, is granted.

The court will grant petitioners one final opportunity to comply with the subpoenas and thereby purge the contempt. Petitioners failure to do so shall be punishable as a fine of \$250 against each petitioner in the form of a money judgment.

Respondent further seeks reimbursement of her costs and expenses via contempt and alternatively in the form of sanctions pursuant to 22 NYCRR 130-1.1. Specifically, she seeks “the costs and expenses incurred by the NYAG in responding to Petitioners’ meritless Motion and preparing the present Cross-Motion.”

Pursuant to Judiciary Law § 773, the court may award reasonable costs and expenses, including attorneys fees, to an aggrieved party as a result of contemptuous conduct (see *Stewart v. Smith, Sheriff* 186 AD 755 [1st Dept 1919]; see *i.e. Rosenberg v. New York State Office of Parks, Recreation, and Historic Preservation*, 132 AD3d 684 [2d Dept 2015]). The purpose of the fine imposed by this section is to indemnify the aggrieved party (*Stewart, supra*; see also *State v. Unique Ideas, Inc.*, 44 NY2d 345 [1978]).

Meanwhile, the court may also award to any party or attorney in any civil action or proceeding the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false.

Having found, on default, that petitioners are in contempt for failing to comply with the subpoenas and the 10/29/19 order, respondents are entitled to reimbursement of their attorney’s fee and costs incurred in connection with making this motion. Even if petitioners purge their contempt, as a separate basis for granting such relief, the court also finds that petitioners’ motion was frivolous within the meaning of the court rules. It is both without merit, as evidenced by its dispatch in this decision, and its sole purpose was to delay the need to comply with the underlying subpoenas and this court’s order. Petitioners cannot simply ignore lawful subpoenas for which all avenues to quash have been soundly rejected. Indeed, petitioners’ frivolous conduct is amplified by their failure to even oppose the cross-motion.

Respondent’s counsel has established that the work performed to oppose the motion and make the cross-motion was reasonable and commensurate with the record before the court. Further, the court finds that respondent’s counsel’s hourly rates are also fair and appropriate given their background and experience. Accordingly, the court grants respondent a money judgment of \$12,675 against petitioners, joint and several, for the attorneys fees and expenses incurred in opposing the motion and making the cross-motion.

## CONCLUSION

Accordingly, it is hereby

**ORDERED** that petitioner’s motion is denied in its entirety; and it is further

**ORDERED** that the cross-motion is granted as follows:

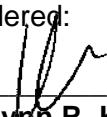
[1] petitioners are held in civil contempt. The Court will, however, give the petitioners one **FINAL** opportunity to **PURGE** the contempt. Respondent is directed to personally serve a copy of this decision/order along with the subpoena on the petitioners. Within 30 days from the date of service, the petitioners can purge the contempt by appearing and satisfying the Court that they are unable to pay the fine or respond to the respective subpoena. If the petitioners fail to comply with this **PURGE**, the Clerk shall enter a money judgment against each petitioner who fails to comply, in favor of respondent, in the sum of \$250 as punishment for their contempt of court upon respondent’s attorney filing a sworn affidavit attesting to such compliance, without the need for further order from the court (Judiciary Law § 773); and

[2] as a result of petitioners’ contempt and as punishment for petitioners’ frivolous conduct, the court hereby directs the Clerk to enter a money judgment in favor of respondent and against petitioners, joint and severally, for \$12,675, as an award for reasonable costs and expenses,

including attorneys fees, to respondent due to petitioners' contemptuous conduct as well as for sanctions due to their frivolous conduct in filing the instant motion.

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: 12/9/20  
New York, New York

So Ordered:  
  
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Hon. Lynn R. Kotler, J.S.C.