

Zimmerman v 410-57 Corp.
2021 NY Slip Op 31663(U)
May 12, 2021
Supreme Court, New York County
Docket Number: Index No. 653569/2020
Judge: Kathy J. King
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING PART IAS MOTION 34

Justice

-----X
BETSY ZIMMERMAN, EDWARD ZIMMERMAN,
Plaintiff(s),
- V -
410-57 CORPORATION, THE BOARD OF DIRECTORS OF
THE 410-57 CORPORATION, JOSHUA FORMAN
Defendant(s).
-----X

INDEX NO. 653569/2020
MOTION DATE 02/01/2021
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135
were read on this motion to/for CONTEMPT.

Upon the foregoing papers, plaintiffs Betsy Zimmerman and Edward Zimmerman (collectively "Zimmermans") move by Order to Show Cause for the following relief:

(a) Pursuant to Judiciary Law § 753, finding defendants 410-57 Corporation (the "Corporation"), the Board of Directors of the 410-57 Corporation (the "Board") and Joshua Forman ("Forman"), (collectively "Defendants") in civil contempt of Justice Marin's October 29, 2020 order (the "Production Order"), which required, *inter alia*, that Defendants produce, on or before December 4, 2020, certain categories of documents withheld by Defendants;

(b) Pursuant to Judiciary Law § 773, awarding the Zimmermans attorneys' fees and costs as a result of Defendants' contemptuous behavior;

(c) Pursuant to CPLR § 6301 et seq., temporarily and preliminarily enjoining and restraining Defendants from destroying, spoliating or otherwise discarding the Corporation's books and records in violation of the Zimmermans' right to inspect those documents pursuant to common law, BCL §624 and the Production Order; and,

Upon the signing of the Order to Show Cause, the Court granted plaintiffs' application for a temporary restraining order pending the hearing date, which enjoined Defendants from

destroying, spoliating, or otherwise discarding the Corporation's books and records in its possession, custody, or control in violation of BCL §624 and the Production Order. Defendants oppose the requested relief, and on the return date herein the Court heard oral argument.

The Zimmermans are shareholders in the Corporation which owns the apartment building located at 410 East 57th Street, New York, NY. Defendant corporation is managed by the Board and defendant, Forman, was previously the President of the Board. The Zimmermans purchased shares in two apartments within the building on or about January 25, 2017 pursuant to a propriety lease with the Corporation. The underlying dispute in the matter arose from the Board's denial of the Zimmermans' application to perform alterations on their apartments, together with the Zimmermans' claims that the apartments have leaks, mold, old windows, and weak water pressure, among other things,

In relation to these issues, the Zimmermans served demands dated September 2019, March 2020 and, August 2020, pursuant to their statutory and common law right as shareholders to inspect corporate books and records. On August 3, 2020, the Zimmermans commenced the underlying action which included causes of action arising from denial of the alteration application and issues arising from the condition of the two apartments. Count 12 of the complaint also includes a demand for the corporate books and records as set forth in the Zimmerman's pre-action demands. Thereafter, the Zimmermans' moved by Order to Show Cause (the First Order to Show Cause) for an order directing Defendants to permit inspection of the corporate books and records, mirroring Count 12 of the complaint. Following a hearing on the return date of the First Order to Show Cause, Justice Alan C. Marin issued the Production Order, dated October 29, 2020, directing, *inter alia*, that "i) Defendants are to provide items a), h), i), j), and a copy of the insurance policy, on or before December 4, 2020; and ii) Defendant[s] shall file an answer by November 4, 2020.

Plaintiffs now move for contempt based on Defendants' failure to produce the corporate books and records as set forth in this Court's on-the-record decision from October 29, 2020¹ and restated in the Production Order. In opposition, Defendants, argue that, the plaintiffs fail to show that the requisite documents were not produced pursuant to the Production Order.

It is well settled that the elements necessary to support a finding of civil contempt are: (1) a lawful order of the court was in effect, clearly expressing an unequivocal mandate; (2) the appearance, with reasonable certainty, that the order was disobeyed; (3) the party to be held in contempt had knowledge of the court's order; and (4) prejudice to the right of a party to the litigation (see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; see also Judiciary Law § 753). In an application for contempt, the movant bears the burden of establishing contempt with clear and convincing evidence (*Tener v. Cremer*, 89 A.D.3d 75, 78 [1st Dept 2011]).

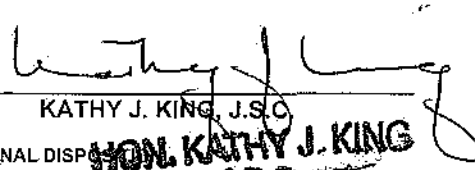
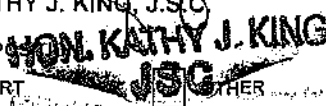
In the case at bar, while the plaintiffs established that Defendants had knowledge of the Production Order, a review of the record establishes that Defendants provided 430 pages of documents on or before December 4, 2020, pursuant to the Production Order. Further, in response to plaintiffs' claims that some of the documents provided were illegible, the record indicates that Defendants supplemented the production of those documents, which are attached to the moving papers as Exhibit H. Accordingly, the Court finds that Defendants did not disobey the Production order, and a finding of contempt is not warranted under Judiciary Law § 753.

Further, the Court notes that while the Production Order required the Defendants to file their answer on or before November 4, 2020, the Production Order did not include a preliminary conference schedule with a timetable for completion of disclosure pursuant to the Uniform Court

¹ The Court notes that conversion of the plaintiffs' requested relief in the First Order to Show Cause to relief sounding in discovery (October 29, 2020 Transcript) was premature, since defendants had not yet filed an answer.

Rules 202.12. Defendants properly assert that plaintiffs' demands contain requests for documents outside the scope of the Production Order. The Court finds that while said documents may be ultimately discoverable, they would be properly addressed within the subject of a Preliminary Conference Order.

Based on the foregoing, the Order to Show Cause is denied in its entirety, and all stays granted herein are vacated. The parties are hereby directed to appear for a virtual preliminary conference on June 3, 2021 at 3 p.m.

<u>5/12/2021</u>			
DATE		KATHY J. KING, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE	