

Feldman Lumber-US LBM, LLC v CCI Contr., Inc.
2021 NY Slip Op 32251(U)
November 10, 2021
Supreme Court, Kings County
Docket Number: Index No. 512060/2021
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of
the Supreme Court of the
State of New York, held in
and for the County of
Kings, at the Courthouse,
at Civic Center, Brooklyn,
New York, on the 10th day
of November 2021

HONORABLE FRANCOIS A. RIVERA

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Feldman Lumber-US LBM, LLC d/b/a Feldman Lumber,

Plaintiff,

-against-

DECISION & ORDER
Index No. 512060/2021

CCI Contracting, Inc. and William Cavalieri,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on August 23, 2021 under motion sequence number one, by Feldman Lumber-US LBM, LLC d/b/a Feldman Lumber (hereinafter Feldman) seeking an order: (1) finding the defendant William Cavalieri (hereinafter Cavalieri) in contempt of court for the violation and non-compliance with the subpoena previously served upon the defendant; (2) granting Feldman attorney's fees to cover the costs and expenses incurred by Feldman as a result of Cavalieri's contempt and \$250.00 in addition thereto; and (3) directing that a warrant be issued, committing Cavalieri to the Kings County Jail or the Jail of any County where he may be found until Cavalieri purges himself of his contempt. The motion is unopposed.

-Notice of Motion
-Affirmation in Support
-Exhibits A-C
-Affirmation of Service
-RJI
-Affidavit of Service

BACKGROUND

On May 20, 2021, Feldman commenced the instant action by filling a summons with notice with the Kings County Clerk's office (hereinafter KCCO). On May 28, 2021,

Feldman filed an affidavit of service of the summons with notice on defendant CCI Contracting, Inc. (hereinafter CCI) with the KCCO. On June 1, 2021, Feldman filed an affidavit of service of the summons with notice on defendant Cavalieri with the KCCO. On July 13, 2021, Feldman submitted a proposed judgment to the KCCO. On July 14, 2021, the Kings County Clerk entered a judgment in favor of Feldman against CCI and Cavalieri in the total sum of \$51,527.05.

On August 23, 2021, Feldman filed a copy of a subpoena and an affidavit of personal service of the subpoena upon Cavalieri. The subpoena informed Cavalieri that Feldman obtained a judgment against CCI and Cavalieri. It commanded Cavalieri to appear and attend before a notary public on August 10, 2021 at 9:30 A.M. in the forenoon of that day at Diamond Court Reporting, 16 Court Street, Suite 907, Brooklyn, New York 11241 to be examined under oath concerning the property, income, or other means of CCI and Cavalieri for satisfying such judgment. It also warned that failure to attend and false swearing at such examination, would be punishable as a contempt of court.

Cavalieri did not appear or attend the scheduled examination.

LAW AND APPLICATION

On July 14, 2021, the Kings County Clerk entered a money judgment in favor of Feldman and against CCI and Cavalieri in the total sum of \$51,527.05. In or around August 23, 2021, Feldman, utilizing the devices contained in CPLR Article 52 for the enforcement of a money judgment, served a subpoena duces tecum upon Cavalieri. Upon Cavalieri's noncompliance, Feldman filed the instant notice of motion seeking, inter alia, an order finding Cavalieri in contempt and directing compliance with the subpoena.

CPLR 5251 provides as follows:

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.

CPLR 2303 (a) provides in pertinent part as follows:

(a) A subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons, except that where service of such a subpoena is made pursuant to subdivision two or four of section three hundred eight of this chapter, the filing of proof of service shall not be required and service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter, or upon the later of the affixing or mailing of the subpoena, if made pursuant to subdivision four of section three hundred eight of this chapter (NY CPLR 2303 (McKinney))

CPLR 2303 provides for subpoena service “in the same manner as a summons,” thereby invoking CPLR 308 and the diverse provisions within it, which govern summons service. CPLR 308 applies to service on a natural person. Refusal or neglect to obey an information subpoena is punishable as a contempt of court under CPLR 5251 and Judiciary Law § 753 (5).

The affidavit of Feldman’s process server shows that service of the information subpoena upon Cavalieri was attempted pursuant to CPLR 308 [4]. In particular, the process server made three attempts in 2021 to personally serve the information subpoena upon Cavalieri. The first attempt was made on July 19, 2021 at 7:22 A.M.; the second was made on July 20, 2021 at 7:33 P.M.; and the third was made on July 21, 2021 at

10:35 A.M. Each of these attempts was made at 34 Sachem St., East Rockaway, New York which the plaintiff's process server alleged was Cavalieri's last known residence. The process server further alleged that on July 21, 2021 at 10:35 A.M. the process server affixed the subpoena to the door of the aforesaid address; and mailed a copy to Cavalieri at this address on July 21, 2021.

Feldman may only resort to service pursuant to CPLR 308 [4] where service pursuant to CPLR 308 [1] and [2] cannot be made with due diligence (*County of Nassau v Letosky*, 34 AD3d 414 [2nd Dept 2006]). The due diligence requirement of CPLR 308 [4] must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (*id.*). In *O'Connell v Post* (27 AD3d 630 [2nd Dept 2006]), service under circumstances similar to those here was found insufficient to confer personal jurisdiction. In *O'Connell*, two of the attempts at service occurred on a weekday during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work. In the case at bar, all three attempts were made on weekday hours when Cavalieri could have been expected to be working or in transit to or from work.

The affidavit of the plaintiff's process server, together with the papers submitted with the instant motion also failed to demonstrate that the process server attempted to ascertain the business address of Cavalieri and to effectuate personal service at that address pursuant to the provisions of CPLR 308 [1] and [2] (*County of Nassau v Long*, 35 AD3d 787 [2nd Dept 2006]). To satisfy the "due diligence" requirement of CPLR 308 [4], it must be shown that the process server made genuine inquiries about the defendant's

whereabouts and place of employment (*see Sanders v Elie*, 29 AD3d 773, 774 [2nd Dept 2006]). Consequently, Feldman did not effectuate proper service of the information subpoena upon Cavalieri.

CONCLUSION

The motion by Feldman Lumber-US LBM, LLC d/b/a Feldman Lumber for an order finding the defendant William Cavalieri in contempt of court for the violation and non-compliance with the subpoena previously served upon him is denied.

The motion by Feldman Lumber-US LBM, LLC d/b/a Feldman Lumber for an order granting it attorney's fees to cover the costs and expenses it incurred due to Cavalieri's contempt and \$250.00 in addition thereto is denied.

The motion by Feldman Lumber-US LBM, LLC d/b/a Feldman Lumber for an order directing that a warrant be issued, committing Cavalieri to the Kings County Jail or the Jail of any County where he may be found until Cavalieri purges himself of his contempt is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.