

**Pavarini Mcgovern, LLC v HFZ KIK 30th St. Owner,
LLC**

2021 NY Slip Op 32574(U)

December 6, 2021

Supreme Court, New York County

Docket Number: Index No. 160940/2020

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

-----X

PAVARINI MCGOVERN, LLC,
Plaintiff,

- v -

HFZ KIK 30TH STREET OWNER, LLC, HFZ KIK 30TH
STREET, LLC

Defendant.

-----X

INDEX NO. 160940/2020

MOTION DATE 07/02/2021,
08/16/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 30, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 73

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 66, 67, 68, 69, 70, 71, 72, 74

were read on this motion to/for CONTEMPT.

Hon. Frank P. Nervo, J.S.C.

The Court heard argument on these motions on October 12, 2021, where it reserved decision; the minutes were filed by counsel on November 1, 2021 (NYSCEF Doc. No. 73).

Petitioner seeks findings of contempt as against HFZ KIK 30TH Street Owner LLC (hereinafter “KIK Owner”) and HFZ KIK 30TH Street LLC (hereinafter “KIK 30”) for failure to provide verified statements of books and records, pursuant to Lien Law § 76, as ordered by this Court’s April 27, 2021

decision and Order (NYSCEF Doc. No. 18). In opposition, KIK 30 and KIK Owner contend that compliance with the Court's prior order is impossible, and cross-move to vacate their alleged default.

I. PRIOR ORDER

Where a beneficiary of an Article 3-A Lien Law trust requests verified statements and records, the trustee is obligated to provide same (*Matter of East Coast Wholesalers v. Moran Co.*, 42 Ad2d 605 [2d Dept 1973]). The production of documents or books without the requisite verified statement is insufficient to meet a trustee's obligation (*id.*). Consequently, KIK 30's and KIK Owner's production of certain documents without verified statements, which they contends are all of the responsive documents in their possession, fails to comply with this Court's prior order and fails to meet, as a matter of law, their obligations under Lien Law § 76 (*id.*). As such, the Court finds that KIK 30 and KIK Owner have failed to comply with a lawful order of this Court.

II. CONTEMPT

Where a party has failed to comply with a court order, and such failure has defeated, impaired, impeded or prejudiced another party's right or remedy, the Court may punish the non-complying party for contempt (Judiciary Law § 753). Notwithstanding, contempt may be mitigated where a party's compliance

with a court order is impossible and a party has made a good faith showing of their attempts to comply (*In re Hildreth*, 28 AD2d 290, 293 [1st Dept 1967]; see generally Judiciary Law § 775). However, where the impossibility of compliance is self-created, there can be no mitigation and contempt sanctions shall still lie, notwithstanding that the impossibility of compliance was done to avert catastrophic economic consequences (*People ex rel. McGoldrick v. Douglas*, 286 AD 807 [1st Dept 1955]). A party “will not be heard to invoke a disability created by [the party’s] own contumacious conduct as an excuse for failing to comply” (*IBE Trade Corp. v. Litvineko*, 288 AD2d 125 [1st Dpet 2001]). While applications to punish for civil contempt are, generally, addressed to the sound discretion of the Court, “[o]f course, if it appears that the inability of [a party]... to perform was occasioned by his flagrant or wrongful act... there is little room for the exercise of discretion” (*In re Hildreth*, 28 AD2d at 292-93).

Here, this Court ordered KIK 30 and KIK Owner to provide verified statements, pursuant to Lien Law § 76, (NYSCEF Doc. No. 18). It is undisputed that KIK 30 and KIK Owner did not comply. Thereafter, the ownership of KIK 30 and KIK Owner changed and the personnel responsible for maintaining the instant records and verifying statements related to same left KIK 30’s and KIK Owner’s employ. Seven months after petitioner sought a

verified statement, and in opposition to these contempt proceedings, KIK 30, for the first time, advised it was not a trustee under the Lien Law. Notably, KIK 30 did not raise this as a defense to the initial Lien Law motion, as it entirely failed to oppose that motion (*see mot. seq. 001 – NSYCEF Doc. No. 18*). While KIK 30 and KIK Owner have provided some bank statements, general ledgers, balance sheets, and accounts payable sheets, they concede they have not provided a verified statement in accordance with the Lien Law (NYSCEF Doc. No. 73 at P. 10-12).

To the extent that KIK 30 and KIK Owner cannot comply with the Court's prior order directing same to provide a verified statement in accordance with Lien law § 76, the Court finds such impossibility was solely created by the change in corporate ownership of KIK 30 and KIK Owner and subsequent loss of employees tasked with same. Put simply, the Court finds KIK 30's and KIK Owner's impossibility of compliance is self-created, and does not excuse their contempt (*supra*).

Turning to an appropriate sanction, petitioner seeks a rebuttable presumption that a diversion of trust funds has occurred by KIK Owner. As against KIK 30, petitioner seeks attorney's fees for the delay in advising

petitioner, and the Court, that KIK 30 is not a trustee under the Lien Law, as this has resulted in a substantial waste of counsel's and judicial resources. The Court finds such sanctions reasonable, given that neither monetary sanctions nor commitment are likely to purge the contempt, in addition to the inescapable conclusion that petitioner's counsel's resources were wasted on a proverbial goose-chase related to KIK 30's failure to disclose it was not a trustee in opposition to the initial Lien Law motion (Judiciary Law § 775).

III. CROSS-MOTION

Although stylized as a motion to vacate a default judgment, there being no default judgment, respondents' cross-motion is deemed a motion to reargue/renew.

The purpose of reargument is to provide “a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law” (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR § 2221[d][2]). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*id.*). Nor is reargument a proper forum to present arguments different from

those originally asserted (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992] *lv. dismissed in part and denied in part* 80 NY2d 1005 [1992]).

Here, motion sequence 001 was unopposed, and respondents were served with notice of same (NYSCEF Doc. Nos. 55-60). It is beyond cavil that respondents were aware of those proceedings, having sought petitioner's consent to adjourn the petition in order to compile responsive documents (*id.*). Respondents, having failed to oppose the motion, may not wait and see if a decision will be averse to their interests before raising a defense to same - namely that they are not Lien Law trustees. That defense, and the facts underlying it, were available to the defendants at the time motion sequence 001 was submitted, and do not form a basis for renewal or reargument. Furthermore, and of note, respondents did not seek relief from the Court's prior order until petitioner moved to hold them in contempt - waiting until this motion to cross-move for same.

To the extent that the cross-motion seeks vacatur of the Court's decision on motion sequence 001 on the basis of law office failure or similar, the Court finds same unavailing.

Accordingly, it is

ORDERED that respondent's motion is granted inasmuch as respondents, HFZ KIK 30TH Street Owner LLC and HFZ KIK 30TH Street LLC, have willfully failed to obey this Court's prior order dated April 27, 2021; and it is further

ORDERED that the respondents' disobedience actually did defeat, impair, impede or prejudice the rights and remedies of the petitioner; and it is further

ORDERED that sequestration, posting of a bond and/or entry of a further judgment would not lie or would be ineffectual; and it is further

ORDERED that as an appropriate sanction for such contempt, as against HFZ KIK 30TH Street Owner LLC, the Court issues a rebuttable presumption that a diversion of trust funds has occurred by HFZ KIK 30TH Street Owner LLC; and it is further

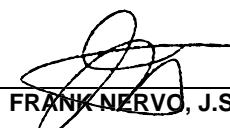
ORDERED that as an appropriate sanction for such contempt, as against HFZ KIK 30TH Street LLC, it shall pay reasonable attorney's fees to petitioner's

counsel for bringing the instant motions, as well as an appropriate sanction, if any, as ordered by the Court for the substantial waste of judicial resources. Such fees and sanction, with interest from the date of this order, in addition to any future sanctions or costs, shall be determined at the time of trial, absent order otherwise, in furtherance of judicial economy; and it is further

ORDERED that should the parties reach agreement on the amount of attorney’s fees due petitioner’s counsel, they shall file a stipulation regarding same to NYSCEF on or before February 11, 2022; and it is further

ORDERED that the cross-motion to vacate the Court’s prior order is denied in its entirety; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied.

<u>12/06/2021</u> DATE			 FRANK NERVO, 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"/>	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