

Georgitsi Realty, LLC v Armory Plaza, Inc.
2022 NY Slip Op 30128(U)
January 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 45669/2007
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 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 7th day of JAN. 2022.

PRESENT:

HON. WAYNE P SAITTA, Justice.

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GEORGITSI REALTY, LLC, 1504 REALTY LLC, ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN, and NEW HAMPSHIRE INSURANCE COMPANY a/s/o 1504 REALTY LLC,

Plaintiff

-against-

Index No. 45669/2007

MS 62, 64, 71,72,73

ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, BRICOLAGE DESIGNERS, INC., HENRY RADUSKY, DOUGLAS PULASKI, SANCHEZ ASSOCIATES P.C., LOUIS SANCHEZ, ABRAHAM HERTZBERG, WONGOOD CONSTRUCTION, XINGJIAN CONSTRUCTION, INC., IMMOBILIARIA BUILDERS CORP., DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION CORP., JAFCO GROUP INC., ABC INC./CORP./LLC/LP/ PARTNERS 1-9, and JOHN/JANE DOES 1-50,

DECISION, and ORDER

Defendants

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The following papers numbered read herein: NYSCEF DOC. NO.

Notice of Motion _____	518, 537, 677 _____
Affirmations in Support _____	518-520, 538-539, 668-676, 687-696 _____
Affirmations in Opposition _____	522, 523, 526-530, 574-576, 678-681 _____
Reply _____	699-700, 755-758 _____
Post Framed Issue Submissions _____	893-913 _____

Motion Sequence 62 - Failure to Appear for Deposition

Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, and MEMORIAL BAPTIST CHURCH OF BROOKLYN (the STRIMLING Plaintiffs) seek to hold Defendant JACK LOCICERO in contempt of five orders of this Court which directed him to appear for a deposition.

The Court order of August 2, 2018 granted Plaintiffs leave to depose JACK LOCICERO concerning the nature of the Defendants' assets and finances, pursuant to CPLR 5529. The order did not contain a date for the deposition and a date was never agreed to. On November 8, 2018, the Court issued a second order directing JACK LOCICERO to appear to be deposed on or before November 28, 2018.

JACK LOCICERO agreed to appear for the deposition on November 26, 2018, but Plaintiffs cancelled the deposition because JACK LOCICERO failed to produce requested financial records in advance of the deposition. On December 6, 2018, the Court ordered the LOCICEROS to produce various financial records 10 days before JACK LOCICERO's deposition. However, the order did not set a date for the deposition.

The Court issued an order on February 7, 2019 directing JACK LOCICERO to produce previously ordered financial records by February 11, 2019; and to appear for deposition on February 21, 2019 and February 22, 2019.

On February 19, 2019, JACK LOCICERO's attorney informed Plaintiffs' counsel that JACK LOCICERO would not appear for the Deposition on February 21st because he had a funeral to attend in Florida. His deposition was re-scheduled for March 1, 2019.

JACK LOCICERO did not appear for the Deposition on March 1, 2019 because he had been hospitalized for mild mitral regurgitation and mild tricuspid regurgitation.

On April 11, 2019, the Court issued a fifth order directing that JACK LOCICERO appear for a deposition on May 6, 2019. On May 3, 2019, JACK LOCICERO's attorney informed the parties that he once again could not appear for his Deposition due to "recurring health issues". Plaintiffs then moved to hold JACK LOCICERO in contempt for failing to appear for deposition. JACK LOCICERO was finally deposed on June 18, 2019.

Based on the above history, Plaintiffs have not sustained their burden of proving with reasonable certainty that JACK LOCICERO's failure to appear at several scheduled deposition dates did actually defeat, impair, impede or prejudice Plaintiffs' rights (*see Glanzman v. Fishman* 135 AD2d 493 [2d Dept 1987]; *Ketchum v. Edwards*, 153 NY 534 [1897]).

Motion Sequences 64 and 71 - Failure to provide accountings

The Court issued an order on March 18, 2019 which, among other things, required ARMORY PLAZA INC, ARMORY HEIGHTS LLC, JACK LOCICERO and LORENZO LOCICERO (the ARMORY Defendants) to provide monthly accountings of the income and expenditures from 406-408 15th Street ("the Building"). ARMORY HEIGHTS, LLC is the current owner of the Building. Defendant LORENZO LOCICERO is the sole member of ARMORY HEIGHTS, LLC and is the managing agent for the Building.

Plaintiff GEROGITSI and the STRIMLING Plaintiffs both have moved to hold the ARMORY Defendants in contempt for failing to provide the accountings for the months of April and May 2019 as required by the March 18th order.

Plaintiffs originally filed their contempt motions in June of 2019 alleging that the ARMORY Defendants did not provide accountings for April and May of 2019. They alleged that no accountings were provided until after the contempt motions were filed and that thereafter the monthly accountings were filed late and were inadequate.

In fact, the ARMORY Defendants did not send those monthly reports until January 2020. Reports for the year 2020 were not sent to all Plaintiffs until February 2021.

The ARMORY Defendants' failure to provide monthly accountings until Plaintiffs moved for contempt did impede the rights of the Plaintiffs and constituted a civil contempt of the order of March 18, 2019. Specifically, their failure interfered with the Plaintiffs ability to monitor whether the ARMORY Defendants were disposing of income in violation of the order. However, Plaintiffs have not shown that they have suffered any actual loss because of Defendants' failure. Therefore, Plaintiffs are entitled only to the statutory penalty of \$250 plus costs and expenses, including reasonable attorneys fee for making the contempt motions.

Additionally, Plaintiffs alleged in their reply papers that the accountings are so inadequate as to not constitute compliance with the order. Specifically, they complain that only a monthly total income was provided and that many of the expenditures do not indicate what they are for or do not have sufficient back up.

The ARMORY Defendants argue that the order did not specify any particular level of detail.

A report that merely gives a single monthly total for all income is not a monthly accounting within any fair meaning of the term nor can anyone have reasonably believed it complied with the order which was issued in lieu of appointing a receiver for the building. The clear purpose of ordering the monthly accounting was to enable Plaintiffs

to monitor whether Defendants were complying with the terms of the order restricting the use of the income from the Building.

The ARMORY Defendants and their failure to provide a breakdown of the income received, was calculated to and did in fact impede the rights of Plaintiffs by denying them with the information necessary to determine if the ARMORY Defendants were complying with the order.

In addition, in several instances the monthly accountings misstated the amount actually paid to American Express concealing the fact that Defendants had paid for non-building related charges from the building account.

Therefore, the Court finds the ARMORY Defendants in civil contempt of the order of this Court dated March 18, 2019 by failing to provide a detailed breakdown of the income received.

In addition to its compensatory function, civil contempt also has a coercive function that provides for penalties on a contemnor to compel them to comply with an order. In this case, it is appropriate to direct the ARMORY Defendants to remedy the deficiencies in the monthly accountings by providing Plaintiffs a revised accounting which lists each income transaction and identify the payor and the apartment or unit in the Building or parking area that the payment relates to, as well as to provide a description of each specific expenditure and which apartment unit or area of the building it relates to.

MS 72 and 73 – Expenditures in Violation of the Order

Plaintiff GEROGITSI and the STRIMLING Plaintiffs both have also moved to hold the ARMORY Defendants in contempt for making expenditures from the building income in violation of the order of March 18, 2019.

To hold a party in civil contempt, a court must find the alleged condemnor violated a lawful order of the court, clearly expressing an unequivocal mandate of which that party had knowledge, and that, as a result of the violation, a right of a party to the litigation was prejudiced (*S.R.Q.R. Co., Inc. v. United Rockland Holding Co., Inc.*, 136 AD3d 610, [2d Dept 2016]).

The order of March 18, 2019 is clear and unequivocal as to what limited expenditures are allowed and the ARMORY Defendants were aware of the order. The order prohibited the ARMORY Defendants from taking or receiving any income from the Building. The order further prohibited the ARMORY Defendants from making any expenditures from the income of the Building “other than paying the real estate taxes, water charges, insurance, utilities and existing mortgage on the aforementioned building, or for making necessary repairs to the aforementioned building, without further order of this Court”. This prohibition by definition barred Defendants from using income from the Building for personal expenses. While in some circumstances it could potentially be unclear if a specific repair was necessary, none of the disputed expenditures at issue in these contempt motions involve repairs to the building.

Plaintiffs assert five categories of expenditures which they allege violated the order: (1) the return of security deposits to tenants totaling \$82,037.50, (2) a payment of \$1,500 to John Natoli, Defendants’ engineer, (3) a payment of \$5,500 to SP Plus Corp relating to the parking garage, (4) payments to Con Edison for an account in the name of Anglor Holdings totaling \$25,649.10, and (5) payments made from the Building’s Citibank account to American Express for items not related to repairs to the Building.

The first category of disputed expenditures, the return of tenant security deposits, cannot reasonably be considered a necessary repair of the Building. Further, it does not

fall within any of the other expenditures permitted under the order. While the ARMORY Defendants may have had an obligation to return the deposits, they also had an obligation not to co-mingle the tenants' security deposits with their accounts. The Court finds that the ARMORY Defendants payment of the security deposits out of the Building's Citibank account was in violation of the Court order of March 18, 2019. Further, it prejudiced, impaired and impeded Plaintiffs' rights, as the purpose of the order was to secure the income from the Building to ensure sufficient funds to satisfy Plaintiffs' potential awards for damages, and now the money that was disbursed to cover security deposits is not available.

Similarly, the second disputed payment, that of \$1,500 to John Natoli, was not made for a repair to the building or any of the permitted categories under the order. Natoli is identified as an expert the ARMORY Defendants will call at trial. Although Defendant LORENZO LOCICERO claimed that he reimbursed the \$1,500 to the Building's Citibank account he did not provided any evidence that he in fact did so.

The third disputed payment, that of \$5,500 to the SP Plus Corporation, was made to settle a claim by the company hired by the ARMORY Defendants to manage the parking garage. The claims arose from a severe shortage in rental income from the garage which SP Plus managed and staffed for the ARMORY Defendants. SP Plus Corporation agreed to grant ARMORY HEIGHTS LLC a discount of \$21,332.65 and accept payment of \$5,500 to settle its claims. Plaintiffs claim that the ARMORY Defendants entered the same payment twice, once on December 30, 2020, and again on January 1, 2021. However, the statements from the Building's Citibank account indicate that there was not a double payment, that only one check for \$5,500 to SP Plus was issued.

The fourth disputed category were payments to Con Edison for an account in the name of Anglor Holding. Defendants testified that the Anglor Holding account was to pay for electrical service to the commercial/office units in the Building. Although no Con Edison bills were submitted, Plaintiff Georgitsi submitted leases for units Suite 4 and Suite M1A which were rented as offices and which corroborated Defendant LORENZO LOCICERO's testimony that the commercial tenants' utilities were included in the rent. Plaintiffs have therefore failed to demonstrate with reasonable certainty that the payments for the Anglor Holding account with Con Edison violated the terms of the order, which allowed for the payment of utilities.

The fifth category of disputed payments involved several payments made by LORENZO LOCICERO from the Building's Citibank account for items charged to an American Express card which Plaintiffs allege were for personal expenditures on the part of LORENZO LOCICERO.

The ARMORY Defendants' bank account for the Building was a Citibank checking account in the name of ARMORY HEIGHTS LLC. Defendant LORENZO LOCICERO made payments from the Building's Citibank account for expenses charged to an American Express account in the name of Louis E Locicero. Defendant LORENZO LOCICERO had sole control of both those accounts. The American Express Statements that were submitted detail the individual charges that were incurred and also contain handwritten notations by Defendant LORENZO LOCICERO indicating which expenditures were for Armory related expenses. When compared with the Citibank statements submitted, they demonstrate that LOENZO LOCICERO paid for many non-Armory related expenses from the Building's Citibank account.

The monthly accounting statements submitted by Defendants stated that only \$3,822.07 was paid from the Building's Citibank account for the American Express bill for the period ending March 20, 2019. However, LORENZO LOCICERO paid the entire American Express bill of \$22,698.55 for that period from the Building's Citibank account, even though only \$3,822.07 was for Armory related expenses. Thus \$18,876.48 was paid out of the Building's Citibank account for that period, in violation of the Order.

The monthly statements submitted by Defendants stated that only \$2,848.97 was paid from the Building's Citibank account for the American Express bill for the period ending April 19, 2019. However, LORENZO LOCICERO paid the entire American Express bill of \$5,811.39 for that period from the Building's Citibank account even though only \$2,898.97 was for Armory related expenses. Thus \$2,912.42 was paid out of the Building's Citibank account for that period, in violation of the Order.

The American Express bill submitted for the period ending May 20, 2019, indicates that only \$1,890.97 of the charges were related to Armory expenses. However, LORENZO LOCICERO paid the entire American Express bill of \$3,845.85 for that period from the Building's Citibank account. Thus \$1,954.88 was paid out of the Building's Citibank account for that period, in violation of the Order.

The American Express bills and the Citibank statements show that in 2020 and 2021 the ARMORY Defendants repeatedly paid for charges that were not related to Armory expenses, such as to Starbucks, Uber, Apple record store, Sirius Radio, World Wide Wrestling Network, and EZ Pass, from the Building's Citibank account.

These amounts for non-Armory related charges were: \$1,081.33 in February 2020; \$543.41 in May 2020; \$846.81 in June 2020; \$125.21 in July 2020; \$217.81 in August 2020; \$259.31 in September 2020; \$161.90 in October 2020; \$83.79 in November 2020;

\$338.47 in December 2020, \$260.52 in January 2021; \$420.20 in February 2021; and \$722.19 on March 5, 2021. Thus \$5,060.95 was paid out of the Building's account, in violation of the order in 2020 and 2021.

The total amount of the above payments to American Express for non-Armory expenses made from the Building's Citibank account was \$28,804.73.

The Court finds that the payment by Defendant LORENZO LOCICERO of \$82,037.50 in security deposits to various tenants, the payment of \$1,500 to Natoli and the payment of \$28,804.73 in American Express charges for non-Armory expenses were in violation of the order of March 18, 2019. These payments were calculated to and did impair, impede and prejudice the rights of Plaintiffs, as that money is not available to satisfy Plaintiffs' potential awards for damages.

The total of these payments is \$112,342.23, however \$7,347.59 was refunded to the Building's Citibank operating account to cover a portion of the payments made in violation of the order, leaving \$ 104,994.64 not reimbursed.

However, as the amount of Plaintiffs damages has not yet been determined it has not been established that the ARMORY Defendants' remaining assets are not sufficient to cover Plaintiffs' damages. Therefore, Plaintiffs have not demonstrated that they have yet suffered an actual loss at this time. Thus, the appropriate remedy for the expenditures made in violation of the order is to order the Defendants LORENZO LOCICERO and ARMORY HEIGHTS LLC to deposit the \$104,994.64 into Court.

Additionally, both the STRIMLING Plaintiffs and Plaintiff GEORGITSI are entitled to nominal damages of \$250 for their contempt motions for the failure to file accountings (MS 64 and 71) and for expenditures made in violation of the order (MS 72 and 73), as well as costs, disbursements, and reasonable attorneys' fees.

WHEREFORE, it is hereby ORDERED that the STRIMLING Plaintiffs' motion (MS 62) to hold Defendant JACK LOCICERO in contempt for failing to appear for a deposition is denied; and it is further,

ORDERED, that the STRIMLING Plaintiffs' motion (MS 64) to hold the ARMORY Defendants in contempt for failure to provide monthly accountings is granted; and it is further,

ORDERED, that Plaintiff GEORGITSI REALTY LLC's motion (MS 71) to hold the ARMORY Defendants in contempt for failure to provide monthly accountings is granted; and it is further,

ORDERED and ADJUDGED that Defendants ARMORY PLAZA INC, ARMORY HEIGHTS LLC, JACK LOCICERO and LORENZO LOCICERO are guilty of civil contempt of this Court's order of March 18, 2019, by failing to provide accountings and in not providing a breakdown of income received by; and it is further,

ORDERED that the ARMORY Defendants shall provide Plaintiffs a revised accounting which lists each income transaction and identifies the payor and the apartment or unit in the Building or parking area that the payment relates to, as well a description of each specific expenditure and which apartment unit or area of the building it relates to, within 90 days of the date of this Order and Judgement; and it is further,

ORDERED that the STRIMLING Plaintiffs' motion (MS 73) to hold the ARMORY Defendants in contempt for making expenditures in violation of the order of March 18, 2019 is granted as against Defendants LORENZO LOCICERO and ARMORY HEIGHTS LLC; and it is further,

ORDERED, that Plaintiff GEORGITSI REALTY LLC's motion (MS 72) to hold the ARMORY Defendants in contempt for making expenditures in violation of the order of March 18, 2019, is granted as against Defendants LORENZO LOCICERO and ARMORY HEIGHTS LLC; and it is further,

ORDERED and ADJUDGED, that Defendants ARMORY HEIGHTS LLC, and LORENZO LOCICERO are guilty of civil contempt of this Court's order of March 18, 2019, for making the above listed expenditures in violation of the order; and it is further

ORDERED, that Defendants ARMORY HEIGHTS LLC, and LORENZO LOCICERO are directed to deposit \$105,044.86 into Court within 30 days of service of this order with notice of entry; and it is further,

ORDERED that Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN are jointly awarded \$250 against Defendants ARMORY PLAZA INC, ARMORY HEIGHTS LLC, JACK LOCICERO and LORENZO LOCICERO, jointly and severally, pursuant to their motion to punish Defendants for contempt for failing to provide monthly accountings together with costs, disbursements, and fees; and it is further

ORDERED that Plaintiff GEORGITSI REALTY LLC is awarded \$250 against Defendants ARMORY PLAZA INC, ARMORY HEIGHTS LLC, JACK LOCICERO and LORENZO LOCICERO, jointly and severally, pursuant to its motion to punish Defendants for contempt for failing to provide monthly accountings together with costs, disbursements, and fees; and it is further

ORDERED that Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN are jointly awarded \$250 against Defendants ARMORY HEIGHTS LLC, and LORENZO LOCICERO, jointly and severally, on their motion to punish Defendants for contempt for failing for making expenditures in violation of the order of March 18, 2019, together with costs, disbursements, and fees; and it is further

ORDERED that Plaintiff GEORGITSI REALTY LLC is awarded \$250 against Defendants ARMORY HEIGHTS LLC, and LORENZO LOCICERO, jointly and severally, on their motion to punish Defendants for contempt for failing for making expenditures in violation of the order of March 18, 2019, together with costs, disbursements, and fees; and it is further

ORDERED that the STRIMLING Plaintiffs and Plaintiff GEORGITSI REALTY LLC are entitled to an award of reasonable attorneys' fees incurred in making the motions upon the submission of affidavits of legal services provided by their counsel.

This constitutes the decision, and order of the Court.



JSC

HON. WAYNE SAITTA
J.S.C.