

B&M Kingstone, LLC v Mega Intl. Commercial Bank Ltd.

2022 NY Slip Op 30481(U)

February 24, 2022

Supreme Court, New York County

Docket Number: Index No. 158577/2014

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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B&M KINGSTONE, LLC, AS ASSIGNEE OF SUPER
VISION INTERNATIONAL, INC., A FLORIDA
CORPORATION,

INDEX NO. 158577/2014

Petitioner,

MOTION SEQ. NO. 008 and 009

- v -

MEGA INTERNATIONAL COMMERCIAL BANK LTD.
F/K/A INTERNATIONAL COMMERCIAL BANK OF CHINA,

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

HON. DAVID B. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 1, 3-8, 13, 28, 36, 53, 68, 154, 155, 179, 184, 290, 292, 325, 328, 330, 357-385, 390-392, 398-414, 416-420, 428, 431, 433, 435-456, 480

were read on this motion to/for CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 009) 422-427, 429, 434, 457-478, 481

were read on this motion to/for ATTORNEYS' FEES

Petitioner, B&M Kingstone, LLC, as Assignee of Super Vision International, Inc., a Florida Corporation (“B&M”), commenced this proceeding to enforce a judgment against certain non-party judgment debtors who reportedly have accounts or authority to draw with respondent, Mega International Commercial Bank Ltd. f/k/a International Commercial Bank of China (“Mega”). Motions designated Sequence Numbers 008 and 009, which are consolidated for disposition, involve B&M’s latest efforts to hold Mega in contempt for allegedly failing to respond to subpoenas.

In Motion Sequence Number 008, B&M moves, pursuant to Judiciary Law §753, for an order holding Mega in contempt for failing to produce a witness in good faith, as required by a

prior decision of this Court, and awarding damages and attorneys' fees. Alternatively, B&M seeks an order (1) determining the meaning and availability of the Bank Examination Privilege ("BEP"); (2) finding that B&M's subpoena questions are outside the scope of the BEP; and (3) compelling Mega to participate in depositions.

In Motion Sequence Number 009, Mega moves, pursuant to CPLR 5240, for an order requiring B&M to defray the reasonable costs and attorneys' fees incurred by Mega in responding to B&M's deposition subpoenas and the instant contempt motion.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this proceeding are detailed in this Court's prior decisions (*see e.g.*, Decision and Order of April 27, 2018, NYSCEF Doc. No. 325). This Court presumes that the parties are familiar with the facts, and provides only a brief recitation of the history of this proceeding insofar as it relates to the motions herein.

In 2003, a Florida court entered judgment in the amount of \$39,240,275.57 (the "Florida Judgment") in favor of Super Vision International, Inc. ("Super Vision") and against non-parties Jack Caruso, Samson Wu, Thomas Wu, Ruby Lee, Optic-Tec International Corporation, Shangai Quialong Optic-Tech International, Marsam Trading Corporation, Marsam Trading Corporation (HK) Ltd., and Travis Pochintesta (collectively, "Judgment Debtors") (*see* Florida Judgment, NYSCEF Doc. No. 3). Super Vision claimed that the Judgment Debtors had engaged in counterfeiting, civil theft, and misappropriation of its proprietary information (*id.*). On January 7, 2004, Judgment Debtor Samson Wu executed a Consent to Disclosure of Bank Account Information, directing any bank in which he may have an account to disclose his bank information to the attorneys for the judgment creditors (*see* NYSCEF Doc. No. 4). The Florida Judgment was later entered and recorded in Nassau County, New York, in favor of B&M (*see*

Transcript of Judgment, NYSCEF Doc. No. 6). The judgment was also domesticated in Panama (*see* Transcript, NYSCEF Doc. No. 482, p. 19).

B&M is the Assignee of Super Vision (see Assignment of Judgment, NYSCEF Doc. No. 5). Mega has multiple branches, including branches in New York and Panama (*see* Petition, NYSCEF Doc. No. 1). Mega reportedly maintains bank accounts for the judgment debtors and/or is in possession of assets belonging to them (*id.*).

B&M served Mega at its New York branch with several Article 52 post-judgment subpoenas, including an Information Subpoena Restraining Notice and Questionnaire (NYSCEF Doc. No. 8), and a Subpoena Duces Tecum (NYSCEF Doc. No. 7). The Questionnaire inquired, among other things, whether Mega had a record of any account in which each judgment debtor may have an interest and whether the judgment debtor was indebted to Mega in any manner ((NYSCEF Doc. No. 8, *supra*). Mega's New York branch objected and responded to the Subpoena Duces Tecum, stating that it was not in possession of any accounts of the judgment debtors (*see* Responses and Objections to Subpoena Duces Tecum, NYSCEF Doc. No. 13). The New York branch provided similar responses to the Questionnaire (see NYSCEF Doc. No. 53).

B&M commenced this proceeding to restrain bank accounts held by Mega for the judgment debtors, to compel Mega to respond to the subpoenas, and to hold Mega in contempt for failing to comply with the subpoenas (*see* Petition, *supra*). On September 8, 2014, this Court (Wright, J.), signed an order to show cause which, among other things, restrained Mega from releasing any funds held in accounts of the judgment debtors (*see* Order to Show Cause, NYSCEF Doc. No. 28). By order entered September 19, 2014, Justice Wright granted B&M's motion for, among other things, a contempt order based on Mega's failure to comply with the Information Subpoena, to the extent of directing Mega to respond to the Information Subpoena

with respect to Judgment Debtor Samson Wu (*see* Order [Motion Sequence No. 001], NYSCEF Doc. No. 36). In the order, this Court stated, in part, that “Samson Wu ... has agreed, in writing to the disclosure of any accounts which he may own or use by virtue of his having the right to draw” (*id.*). This Court further stated that:

“Although it does not appear that Mr. Wu has an account in the New York branch of Mega, ... Mega does ... apparently have the ability to access information, at least as to accounts in other branches throughout the world. I make this deduction because the bank, in submitting opposing papers, does not deny such access”

(*id.*). Additionally, this Court determined that Mega failed to demonstrate that foreign laws prevented the enforcement of the Information Subpoena and noted that, at least as to Samson Wu, any concerns as to foreign law were waived by his consent to disclose (*see id.*).

The Appellate Division, First Department, affirmed, finding that the terms of Samson Wu’s Consent to Disclosure of Bank Account Information required compliance with the Information Subpoena (*see Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259 [1st Dept 2015]). The Appellate Division found that New York lacked general jurisdiction over Mega’s branches outside the state, but that this Court’s “general personal jurisdiction over the bank’s New York branch permits it to compel that branch to produce any requested information that can be found through electronic searches performed there” (*id.* at 267).

Mega objected to the Information Subpoena “to the extent that providing responsive information is unduly burdensome” and that “B&M has not provided sufficiently specific information about individual judgment debtors for Mega to identify responsive information” (Responses and Objections to Information Subpoena, NYSCEF Doc. No. 155]). In its answer, Mega’s New York branch denied that it has “a record of any account or property in which the

judgment debtor(s) may have an interest, whether under the name of the debtor(s), under a trade or corporation name, or in association with others” (*id.*).

On September 6, 2016, B&M served a new Subpoena Duces Tecum and two Subpoenas Ad Testificandum upon the Senior Vice President of Mega’s New York branch (Subpoenas, NYSCEF Doc. No. 184). On October 19, 2016, Justice Wright signed an order to show cause directing Mega to show why an order should not be entered:

“(i) pursuant to CPLR 5251, finding [Mega] in contempt of Court for the failure to appear by witnesses and produce documents in compliance with the Subpoenas Ad Testificandum and Subpoena Duces Tecum dated September 6, 2016 which were duly served on Respondent on September 6, 2016 and September 7, 2016 respectively and setting this matter down for a Contempt Hearing to determine damages; (ii) in the alternative, pursuant to CPLR 5225 compelling Respondent Mega Bank’s compliance with the Subpoenas Ad Testificandum dated September 6, 2016 which were duly served on Respondent on September 7, 2016 [by] producing Vincent S.M. Huang and Huei-Ying Chen and/or their successors for examination; (iii) in the alternative, pursuant to [CPLR 5224], compelling Respondent’s compliance with the Subpoena Duces Tecum dated September 6, 2016 which was duly served on Respondent on September 6, 2016; and (iv) granting the Petitioner herein such other and further relief as the Court may deem just and proper”

(Order to Show Cause, NYSCEF Doc. No. 68).

By order entered December 9, 2016, the Court (Wright, J.S.C.) granted another motion to hold Mega in contempt, stating, in part that:

“[B&M was] seeking information about judgment-debtors who allegedly held accounts with [Mega]. In an order of mine dated September 14, 2014, I granted a previous contempt motion to the extent of directing [Mega] to comply with the information subpoenas. That decision was affirmed by the Appellate Division
...

Since this is the second motion to hold [Mega] in contempt, and there has been a notice of entry served, the motion to hold [Mega] in contempt is granted, and [Mega] is again directed to respond to the information subpoenas seeking account information”

(Order [Motion Sequence No. 002], NYSCEF Doc. No. 161). The same day, Justice Wright granted the branch of Mega's motion that sought to quash the Subpoena Duces Tecum, and denied the branch of the motion that sought to quash the Information Subpoena (*see* Order [Motion Sequence No. 003], NYSCEF Doc. No. 162).

On December 28, 2016, B&M served four Subpoenas Ad Testificandum, again seeking the testimony of certain of Mega's employees, including Vincent S.M. Huang, senior vice president and general manager of Mega's New York branch, Huie-Ying Chen, and Chien-Du Jan (*see* Subpoenas, NYSCEF Doc. No. 179).

By order entered August 14, 2017, Justice Wright denied, among other things, B&M's motion to resettle the December 9, 2016 order stating, in part, that:

“[B&M] has mis-read my December 9, 2016, decision, as it does no more than confirm the decision of the Appellate Division, which affirmed my order directing [Mega] to respond to information subpoenas served on it This was the only relief granted in that order. In a second decision, decided the same day, I granted a motion by [Mega] that sought to quash the other subpoenas served by [B&M]. That is the status quo: [Mega] must respond to the information subpoenas and no others”

(Order [Motion Sequence No. 005], NYSCEF Doc. No. 290).

By order entered August 16, 2017, Justice Wright granted Mega's motion to reargue the October 19, 2016 decision and, upon reargument, stated, in part, that “that decision did not decide any question of [Mega's] compliance or non-compliance with the subpoenas The decision only directed that [Mega] respond to information subpoenas served on it. The contempt can be purged by such compliance” (Order [Motion Sequence No. 006], NYSCEF Doc. No. 292).

By order entered April 27, 2018, this Court (Freed, J.) (1) denied the branch of Mega's motion that sought to quash the four December 2016 subpoenas, but granted Mega the right to

determine which one of the witnesses whose testimony has been sought pursuant to the four deposition subpoenas will first be produced at deposition, subject to (a) B&M's right to move to renew the branch of its cross motion which sought to compel Mega to produce any remaining witnesses whose testimony had been sought by those subpoenas and (b) Mega's right to object and move for appropriate relief; (2) denied the branch of Mega's motion that sought an order protecting it and its employees from B&M's future attempts to violate the December 9, 2016 Quash Order and to seek pre-action discovery; (3) denied the branch of Mega's motion that sought costs and reasonable attorneys' fees in connection with the motion; (4) denied the branch of B&M's cross motion that sought attorneys' fees from Mega in connection with its contempt motion; (5) denied the branch of B&M's motion that sought an order compelling Mega to comply with the September 2016 subpoena, and holding Mega in contempt for failure to do so; (6) denied the branch of B&M's cross motion that sought to hold Mega in contempt for failing to produce witnesses in accordance with the December 2016 deposition subpoenas; (7) denied the branch of B&M's cross motion that sought to compel Mega to comply with the four December 2016 deposition subpoenas; and (8) denied the branch of B&M's cross motion that sought attorneys' fees related to the cross motion (*see* Order [Motion Sequence No. 004], NYSCEF Doc. No. 325).

By order entered April 5, 2019, Justice Freed denied B&M's motion for legal fees in connection with a previous motion to hold Mega in contempt of court (Order [Motion Sequence no. 007], NYSCEF Doc. No. 328).

In this latest motion, B&M seeks to hold Mega in contempt for failing to produce a witness in good faith, pursuant to the Court's April 27, 2018 order, and to recover damages and attorneys' fees. Alternatively, B&M seeks a determination of the meaning and availability of the

BEP, a finding that its subpoena questions are outside the scope of the BEP, and an order compelling Mega to participate in depositions.

Mega seeks an order defraying its attorneys' fees and costs incurred in responding to deposition subpoenas and the instant motion.

LEGAL CONCLUSIONS

B&M's Motion for Contempt (Mot. Seq. 008)

Judiciary Law §753(A)(3) empowers a Court to “punish, by fine and imprisonment, a neglect or violation of a duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced,” including a person’s “disobedience of a lawful mandate of the court.” In order to succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor violated a clear and unequivocal court order, and that the violation prejudiced a right of a party to the litigation (*see McCain v Dinkins*, 84 NY2d 216, 225-226 [1994]; *Kalish v Lindsay*, 47 AD3d 889, 891 [2d Dept 2008]). The party seeking to hold another in civil contempt for failing to respond to a subpoena “has the burden of proving the contemptuous conduct by clear and convincing evidence” (*Gray v Giarrizzo*, 47 AD3d 765, 7666 [2d Dept 2008]).

B&M essentially argues that Mega willfully failed to produce a witness whose testimony is sought pursuant to the four December 28, 2016 subpoenas, and which testimony is mandated by the April 27, 2018 order of this Court. As noted above, this Court’s April 27, 2018 order, among other things, granted Mega the right “to determine which one of the witnesses whose testimony has been sought pursuant to the four deposition subpoenas will first be produced at deposition,” subject to B&M’s right to move “to renew the branch of its cross motion which

seeks to compel [Mega] to produce any of the remaining witnesses whose testimony has been sought by those subpoenas,” and subject to Mega’s right “to object and move for appropriate relief” (Order, NYSCEF Doc 325, *supra*).

In response to the Court’s order, Mega produced Ming-Chien Lin a/k/a Daniel Lin (“Daniel Lin”), the Vice President and Deputy General Manager, as well as a compliance officer, of Mega’s New York branch (*see* Transcript, Examination Before Trial (“EBT”) of Lin, NYSCEF Doc. 359). Daniel Lin testified, in part, that Mega’s New York branch is “not able to see what customers [in Mega’s Panama branch] are doing, and that the New York branch would “only know ... what they claim, which is there’s some kind of a transaction, ... based on the electronic forms, the standardized international form in a specific format with specific information” (*id.*, p. 62).

B&M essentially maintains that counsel for Mega repeatedly objected to the deposition questions and prevented Daniel Lin from responding to relevant compliance questions that were within his expertise and essential to determining whether the judgment debtors concealed or transferred assets to avoid satisfying the Judgment. B&M also asserts that two former employees of Mega have offered EBT testimony contradicting Daniel Lin’s testimony that Mega’s New York branch cannot access information from accounts maintained by other branches.

At an EBT held on March 15, 2019, Siraj Abdurrati, a former consultant to Mega who reviewed alerted wire activity for it, testified, in part, that “[t]here was a system that we would use which is an intranet as a portal that allowed [us to] communicate with other branches, you know, log in and we send a message to another branch if we have a question about activity conducted by another branch ...” (Transcript of Abdurrati, NYSCEF Doc. No. 365, p. 23). Also,

at an EBT held on March 16, 2019, Cathy LaFurge, the former Senior Quality Assurance and Head Team Leader of Mega's Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") Department, testified, in part:

"The head office of Mega Bank is in Taiwan. This New York branch and the Panama branch are, yes, independent locations, but they – obviously, we had to get the information through the computer systems to be able to do the lookback. I know that we did contact the Panama branch for additional information at points in time when we were doing documentations"

(Transcript, EBT of LaFurge, NYSCEF Doc. No. 363, pp. 52-53). Cathy LaFurge also specifically stated that the IT people in Mega's New York branch had the ability to access information from the Panama branch (*id.*, p. 43).

In addition, B&M maintains that documentary evidence exists that several of the Judgment Debtors have been fraudulently concealing assets by transferring the assets through Mega's Panama branch, and that its New York branch failed to perform electronic searches of the Panama branch. B&M offers an affidavit of Brett Mikkelson, head investigator of a Panamanian private investigative firm, who states, in part, that:

"For the past 15+ years, I have been investigating the Wu Judgment Debtors, and the movement and concealment of their assets, on behalf of [B&M] ...
What began as an investigation into intellectual property theft and concealment of assets later turned into an investigation into Mega ... as a result of evidence which ... showed the Bank's involvement with Judgment Debtors and the movement of their assets.
During my investigation, I have uncovered key pieces of information which clearly show that the Wu Judgment Debtors have been fraudulently concealing their assets by transferring said assets through branches of Mega ... from one judgment debtor to alter-ego corporations for which the Wu Judgment Debtors have a controlling interest.
I am aware that the Wu Judgment Debtors did, in fact, maintain accounts at the Colon Free Zone Branch of Mega Bank in Panama for at least the period of January 1, 2008 to January 11, 2016.

In March 2018, I was personally able to view and take a photograph of the computer screen at Mega Bank which shows that Stefanie, S.A., an alter-ego corporation for the Wu Judgment Debtors, maintained an account in Mega Bank ... The ownership and control of Stefanie, S.A. by Judgment Debtor Samson Wu is a well-known fact made evident in various legal documents wherein Samson Wu signed on behalf of Stefanie, S.A.”

(Mikkelson Affid, NYSCEF Doc. No. 375). B&M also asserts that emails, photographs, and bank records exist which show that Mega aided in the concealment of assets belonging to the Judgment Debtors (*see* NYSCEF Doc. Nos. 376, 378-380).

Mega asserts that Siraj Abdurrah and Cathy LaFurge were merely short-term independent contractors, and not Mega employees, who cannot offer competent evidence about its operations, and that their testimonies are laden with inaccuracies. Mega also asserts that the affidavit of Brett Mikkelson is based primarily on inaccurate, hearsay information.

B&M fails to show, by clear and convincing evidence, that Mega disobeyed a clear and unequivocal Court mandate so as to justify a finding of contempt. The submissions reveal that, pursuant to the Court’s April 27, 2018 order, Mega produced Daniel Lin for deposition. Dissatisfied with Daniel Lin’s testimony, B&M filed the instant contempt motion. However, B&M did not recall Daniel Lin to testify or exercise its right to renew its cross motion to compel Mega to produce any of the remaining witnesses, as directed by the Court (*see* Transcript, NYSCEF Doc. No. 482, pp. 9-11, 36-38). In addition, Mega gave B&M the opportunity to identify another witness, which B&M did, but, after Mega determined that the witness was no longer under its control, B&M did not subpoena the witness for deposition (*see id.*, pp. 9-11). Nor did B&M serve Mega’s New York branch with a subpoena or document demand for a search of the Panama branch (*id.*, pp. 41-43).

The submissions reveal that Mega complied with the April 27, 2018 order to produce a witness for deposition, and this Court finds no reason to compel it to do so, or to hold it in contempt. Thus, the branch of the motion that seeks a contempt order based on Mega's noncompliance with the April 27, 2018 order is denied.

B&M's request for relief regarding the BEP is also denied since it did not recall Daniel Lin to testify and there are no specific deposition questions before the Court. "[A]ny determination the Court would make would be merely advisory since it can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). The request for damages and attorneys' fees is denied since B&M cannot show actual loss or injury as the result of a contempt (*see Gottlieb v Gottlieb*, 137 AD3d 614, 618 [1st Dept 2016]).

Mega's Motion for Attorneys' Fees and Costs (Mot. Seq. 009)

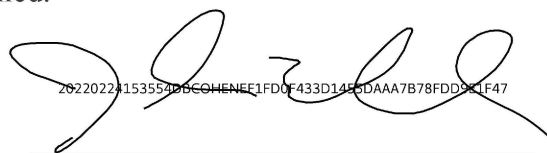
Mega seeks an order, pursuant to CPLR 5240, requiring B&M to defray its reasonable attorneys' fees, exceeding \$434,893.00, and costs of \$19,786.40 incurred in defending the instant contempt motion. The motion is denied. CPLR 5240 empowers the Court to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The statute grants the Court broad discretionary power to control and regulate the enforcement of a money judgment under Article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Guardian Loan Co., Inc. v Early*, 47 NY2d 515, 519 [1979]). Here, however, B&M may properly seek "discovery from either the judgment debtor or a third-party in order to determine whether the judgment debtor [] concealed any assets or transferred any assets so as to defraud the judgment

creditor or improperly prevented the collection of the underlying judgment” (*George v Victoria Albi, Inc.*, 148 AD3d 1119, 1119 [2d Dept 2017])[internal citations omitted].

Accordingly, it is hereby:

ORDERED that the motion for contempt by petitioner B&M Kingstone, LLC (mot. seq. 008) is denied; and it is further

ORDERED that the motion by respondent Mega International Commercial Bank L.T.D. seeking attorneys’ fees and costs (mot. seq. 009) is denied.



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2/24/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE