

**Goetz Fitzpatrick LLP v OTR Media Group, Inc.**

2022 NY Slip Op 30485(U)

February 15, 2022

Supreme Court, New York County

Docket Number: Index No. 157903/2018

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----X  
Goetz Fitzpatrick LLP,

Plaintiff(s),

-against-

OTR Media Group, Inc.,

Defendant(s).  
-----X

**DECISION/ORDER**

INDEX No.: 157903/2018  
Mot. Seq: 005

Present:  
Hon. Lynn R. Kotler, J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
OSC, affirmation in support, exhibits .....	145-157
Aff in opp.....	160
Petition, notice of petition and supporting docs under 512443/2018 (Kings County) ...	1-8
Opp under 512443/2018 (Kings County) .....	9-24
Attorney Balisok 10/12/21 Letter .....	161
1/4/22 Interim Order .....	162
Plaintiff's 1/10/22 Letter .....	163
10/12/22 Transcript .....	164

This is plaintiff Goetz Fitzpatrick LLP's ("Goetz Fitzpatrick") Order to Show Cause ("OSC") for contempt and sanctions against Sarah Noe and Ari Noe (together the "Noes"). Specifically, Goetz Fitzpatrick seeks to hold Sarah Noe ("Ms. Noe") in contempt for failing to comply with a Post-Judgment Subpoena *Duces Tecum and Ad Testificandum* dated July 27, 2021 and Aharon Noe a/k/a Ari Noe ("Mr. Noe") in contempt for violating a stipulation made in open court on August 17, 2021 in which he promised to produce responsive documents on or before September 20, 2021. The Noes oppose the OSC.

The Noes' counsel, Joseph Y. Balisok, Esq., filed an affirmation in opposition to the OSC, arguing that the court should deny the motion as to Sarah Noe because she filed a special proceeding in Kings County seeking a protective order quashing or limiting the underlying subpoena. Alternatively, Attorney Balisok contends that the subpoenas are unduly burdensome on Ms. Noe and should be limited or delayed until after Mr. Noe has produced his documents. Attorney Balisok further asserts that "Ms. Noe has also invoked her spousal privilege".

As for Mr. Noe, Attorney Balisok acknowledges that he missed the deadline to produce discovery and "[a]lthough late, Mr. Noe has now worked these last few days on gathering the responsive materials. He has answered each of the 36 demands. I expect to send the answers with accompanying documents to movant tomorrow (October 8, 2021)."

The OSC was returnable October 12, 2021 at 2:30pm, at which time both sides appeared and the court heard oral argument on the record. A copy of the transcript is filed on NYSCEF at Document Number 164.

At the outset, Attorney Balisok's improperly filed letter to the court requesting an *in camera* review (NYSCEF Document Number 161) is an *ex parte* request for affirmative relief not properly made on notice and an improper letter filed after a motion has been marked submitted and without leave of court in violation of this Part's Rules. Nonetheless, the court will consider the letter in an exercise of its discretion and in the interest of justice since this is a motion to hold the Noes in contempt. Moreover, the letter does not warrant a different result and as such, Goetz Fitzpatrick will not be prejudiced by the court's consideration of it.

The court will consider the OSC as to each of the Noes in turn.

Ms. Noe

On June 15, 2018, Ms. Noe filed a petition in Kings County Supreme Court under Index Number 512433/2018 to quash Goetz Fitzpatrick's subpoena dated May 10, 2018. The proceeding is entitled Sarah Noe v. Goetz Fitzpatrick LLP and according to NYSCEF, to date, there has not been a decision and the proceeding remains active. Meanwhile, Attorney Balisok filed a "Notice of Petition" dated September 15, 2021 to quash the underlying post-judgment subpoena dated July 27, 2021 which was sequenced as motion sequence 2 and Goetz Fitzpatrick filed opposition to Attorney Balisok's "motion". To date, there is no decision on motion sequence 2 filed on NYSCEF, either.

Attorney Balisok's argument that this court should deny Goetz Fitzpatrick's OSC as to Ms. Noe based upon her pending application to quash in Kings County is rejected. The underlying subpoena was captioned under the index number in the instant action in New York County, Index Number 157903/18. Ms. Noe's attempt to relieve herself of the obligation to respond to the subject subpoena by filing a defective notice of petition in a three-year-old proceeding pending in another county and before another justice is tantamount to forum/judge shopping and will not be countenanced by this court. Attorney Balisok's attempt to justify filing a defective notice of petition in the Kings County is without merit. Accordingly, the court rejects Ms. Noe's procedural arguments against the instant OSC.

Substantively, Attorney Balisok incorporates the so-called petition which argues that the underlying subpoena "seeks her duplicative, broad, unduly burdensome, and

unnecessary testimony and document production before the judgment debtor has been examined” and “seek[s] documents and testimony that are privileged under the spousal privilege of C.P.L.R. § 4502(b).” The court will take judicial notice of the file on NYSCEF under the Kings County Index Number and consider same.

The court rejects the first argument. The Noes cannot have it both ways insofar as Mr. Noe has repeatedly dragged out and delayed his own compliance with subpoenas, etc., and then Mrs. Noe wants to wait until Mr. Noe complies before she complies with a duly served subpoena on her. Certainly, the information cannot be considered duplicative while Mr. Noe has himself failed to provide much, if any, information. In any event, Goetz Fitzpatrick is entitled to information from Ms. Noe so that it can cross-reference that which Mr. Noe has produced to date.

As for the second argument, Goetz Fitzpatrick correctly points out that “[w]hile [Section 4502(b)] does establish such privilege under appropriate circumstances, [Ms. Noe] did not state what documents sought by Goetz Fitzpatrick LLP are protected, or why.” Here, Ms. Noe has only made a general claim of privilege. As such, the spousal privilege has not been properly invoked (*see i.e. Big Apple Concrete Corp. v. Abrams*, 103 AD2d 609 [1st Dept 1984]). Thus, Ms. Noe’s substantive arguments are also rejected.

Ms. Noe must therefore be held in contempt for failing to comply with the underlying subpoena for the reasons that follow. Goetz Fitzpatrick has established that Ms. Noe failed to respond to the subpoena and that her failure to do so was calculated to, or actually defeated, impaired, impeded or prejudiced Goetz Fitzpatrick’s rights or remedies (Judiciary Law § 753 [A] [5]; NY City Civ Ct Act § 210; *see also Matter of*

*McCormick v. Axelrod*, 59 NY2d 574, 583 amended 69 NY2d 652 [1983]; *Puro v. Puro*, 39 AD2d 873 [1st Dept 1972]; *Matter of County of Orange v. Rodriguez*, 283 AD2d 494 [2d Dept 2001]). Further, Goetz Fitzpatrick has shown that there are no alternative effective remedies available other than to hold Ms. Noe in contempt (*Farkas v. Farkas*, 201 AD2d 440 [1st Dept 1994]).

Ms. Noe has had actual notice of the instant motion and its notice provisions warn her that she may be punished by the imposition of a fine, or imprisonment, or both, thus complying with the requirements of Judiciary Law § 756. Nonetheless, Ms. Noe has not complied with the underlying subpoena.

Accordingly, Goetz Fitzpatrick's motion to hold Ms. Noe in contempt for failing to respond to the subpoena dated July 27, 2021 is granted. The court will grant Ms. Noe one final opportunity to respond to the subpoena dated July 27, 2021 and thereby **PURGE** the contempt. Ms. Noe's failure to respond to the subpoena dated July 27, 2021 within 20 days from personal service of this order with notice of entry upon her shall result in a fine of \$100 per day until she responds to the subject subpoena. Goetz Fitzpatrick may settle a judgment on notice along with an affirmation attesting to proof that this order was served with notice of entry upon Ms. Noe and her failure to purge the contempt.

The court now turns to Mr. Noe.

#### Mr. Noe

By way of background, in motion sequence 3, Mr. Noe moved for an order quashing a Post-Judgment Subpoena *Duces Tecum and Ad Testificandum* served upon him on June 30, 2021. That motion was returnable August 17, 2021, on which date

Goetz Fitzpatrick and Mr. Noe's counsel advised the court that Mr. Noe agreed to produce all documents responsive to the subject subpoena by September 20, 2021, and appear for a deposition on October 5, 2021. Although the court recalls that agreement being on the record, a copy of the transcript from August 17, 2021 has not been provided to the court. Meanwhile, both dates came and went without Mr. Noe's compliance.

At oral argument on the instant OSC on October 12, 2021, Attorney Balisok stated that his client produced "[s]ix months of bank statements". Meanwhile, plaintiff's counsel outlined what Mr. Noe failed to produce: the remainder of the bank statements, mortgage statements, tax returns, documents describing the large deposits into his bank account, documents regarding Mr. Noe's interest in personal property, no documents regarding tuition for his children's private schooling, documents related to the LLCs in which Mr. Noe has an ownership interest, i.e. information about the LLCs assets, what his ownership interest is, and what those LLCs were formed to do.

Attorney Balisok then asked on the record "for ten more days to supplement the information that we have already – significant information". When pressed as to why Mr. Noe only produced six months of bank statements for a Dime Savings Bank account, Attorney Balisok represented to the court:

MR. BALISOK: He asked for six months, and he ordered another, what's called – the ordered the rest of the months. We should have it, shortly.

THE COURT: No online banking? It's 2021.

MR. BALISOK: The problem was, there was a merger between two banks, and the bank that merged, Dime didn't have access to. So you have to order

them. So online was up to six months. If it was Chase, we could go back 24 months, but his bank – so he went there and he ordered it. We should have it shortly. But we did give six months, with the bank statements, and it does reflect what money is in the account.

...

As to the remainder of documents which Mr. Noe has failed to provide, the following relevant exchange took place on the record.

THE COURT: Does your client have any investment accounts?

MR. BALISOK: He has no brokerage accounts at all. He –

THE COURT: In his own name.

MR. BALISOK: Okay. Yes, your Honor. If you say so.

He has life insurance policies. He has a minority, non-controlling membership interest in multiple limited liability companies.

THE COURT: Okay. Which ones.

MR. BALISOK: All of them were disclosed, your honor.

THE COURT: What are the names? I want to know all of the limited liability companies where your client has a minority interest, and he can't disclose information, because he only has a minority interest.

MR. BALISOK: Okay. So there's going to be --I'm going to list them off. Some, he may have some control over, but I'll list the ones that we put in the response.

Splash Media Group, LLC.

THE COURT: And what kind of interest does he have in splash?

MR. BALISOK: He did not have the specifics of what his

ownership interest was, but --

THE COURT: Did you think to ask him?

MR. BALISOK: We asked, your Honor. He didn't have it available with him, but we requested the K-1s from his accountant, and his accountant said --

THE COURT: But the accountant is busy. All right.

MR. BALISOK: Your Honor, we made a request, and as soon as possible we'll forward it over to the plaintiff. I'll send over the K-1s showing what his membership interest is.

MR. SIMON: Your Honor, could I interject for half a second?

THE COURT: Sure.

MR. SIMON: Okay. I had previously subpoenaed Mr. Noe's accountant, and Mr. Noe's accountant, just like Mr. Noe, refused to produce anything without a court order. It was on, you know, September 20th, I expected, based on our August 17 hearing, where Mr. Noe didn't object to the production of the K-1s and tax returns, that he had spoken with his accountant and would convince the accountant to produce those documents, again, since there were no objections. So it was a surprise to me to learn that the accountant was too busy to produce. I'm happy to submit a proposed order that would require the accountant to produce immediately.

THE COURT: How is that, Mr. Balisok?

MR. BALISOK: I have no opposition to such an order, your Honor. I mean, we can circulate it. I will be more than happy to go through the list that we disclosed and find out what exactly is the membership percentage interest, and provide it to the plaintiff.

No proposed order has been submitted to the court as to the accountant, nor has

Mr. Noe made an application to extend his time to comply with his counsel's in-court representation that he would produce all responsive documents and/or otherwise modify said agreed-to obligation.

This is not the first time Mr. Noe has failed to comply with a court order. At this point, it is a matter of routine. Indeed, at the end of the oral argument on October 12, 2021, the court directed both sides to order the transcript of that appearance and split the cost. In a letter dated January 10, 2022, Goetz Fitzpatrick advised the court that it had not received payment for half of the transcript by that date.<sup>1</sup>

On this record, the court finds that Mr. Noe has also failed to comply with his agreement through counsel to respond to the subject subpoena. Providing a measly six months of bank statements and a list of LLCs he has some unspecified interest in falls woefully short of his obligation to provide a full and complete response to the subject subpoena. The court does not find that an *in camera* review is necessary to reach this determination, given the record before the court and counsel's own admissions as to what his client did and did not produce. Moreover, Attorney Balisok seeks to improperly shift his burden of determining his client's compliance to the court.

Accordingly, Mr. Noe is also held in contempt for failing to comply with the subpoena as his counsel agreed in court on August 17, 2021. The court will similarly grant Mr. Noe one final opportunity to fully respond to the subject subpoena and thereby **PURGE** the contempt. Compliance with the subject subpoena includes, but is not limited to: the remainder of the bank statements called for in the subpoena, mortgage

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<sup>1</sup> Goetz Fitzpatrick's 1/10/22 letter is properly considered by the court because it was solicited when both sides failed to submit a copy of the transcript to the court as previously directed (see interim order dated January 4, 2022).

statements, tax returns, documents describing the large deposits into his bank account, documents regarding Mr. Noe's interest in personal property, documents regarding tuition for his children's private schooling, documents related to the LLCs in which Mr. Noe has an ownership interest, i.e. information about the LLCs assets, what his ownership interest is, and what those LLCs were formed to do.

Mr. Noe's failure to respond to the subpoena within 20 days from personal service of this order with notice of entry upon him shall result in a fine of \$100 per day until he fully responds to the subject subpoena. Goetz Fitzpatrick may settle a judgment on notice along with an affirmation attesting to proof that this order was served with notice of entry upon Mr. Noe and his failure to purge his contempt.

Ancillary issues

Mr. Noe's deposition also remains outstanding. While Goetz Fitzpatrick would presumably like to go forward with his deposition after receiving all responsive documents, at some point that deposition needs to take place. Therefore, the court hereby directs Mr. Noe to appear for his previously agreed deposition on March 30, 2022. This date may not be adjourned absent prior court order upon a written showing of good cause. Further, this deposition is without prejudice to Goetz Fitzpatrick's right to take a further deposition if Mr. Noe's document discovery remains lacking before that date.

Finally, the Noes are directed to reimburse Goetz Fitzpatrick for half the cost of the transcript within 20 days from service of this order with notice of entry. Their failure to do so shall also result in a judgment for said amount, together with interest from the date Goetz Fitzpatrick paid for the transcript.

**CONCLUSION**

In accordance herewith, it is hereby

**ORDERED** that Accordingly, Goetz Fitzpatrick's OSC is granted as follows:

[1] Sarah Noe is held in contempt for failing to respond to the subpoena dated July 27, 2021. The court will grant Sarah Noe one final opportunity to respond to the subpoena dated July 27, 2021 and thereby **PURGE** the contempt. Sarah Noe's failure to respond to the subpoena dated July 27, 2021 within 20 days from personal service of this order with notice of entry upon her shall result in a fine of \$100 per day until she responds to the subject subpoena. Goetz Fitzpatrick may settle a judgment on notice along with an affirmation attesting to proof that this order was served with notice of entry upon Sarah Noe and her failure to purge her contempt; and

[2] Aharon Noe a/k/a Ari Noe is also held in contempt for failing to comply with the subpoena as his counsel agreed in court on August 17, 2021. The court will similarly grant Aharon Noe a/k/a Ari Noe one final opportunity to fully respond to the subject subpoena and thereby **PURGE** the contempt. Compliance with the subject subpoena includes, but is not limited to: the remainder of the bank statements called for in the subpoena, mortgage statements, tax returns, documents describing the large deposits into his bank account, documents regarding Aharon Noe a/k/a Ari Noe's interest in personal property, documents regarding tuition for his children's private schooling, documents related to the LLCs in which Aharon Noe a/k/a Ari Noe has an ownership interest, i.e. information about the LLCs assets, what his ownership interest is, and what those LLCs were formed to do.

Aharon Noe a/k/a Ari Noe's failure to respond to the subpoena within 20 days

from personal service of this order with notice of entry upon him shall result in a fine of \$100 per day until he fully responds to the subject subpoena. Goetz Fitzpatrick may settle a judgment on notice along with an affirmation attesting to proof that this order was served with notice of entry upon Aharon Noe a/k/a Ari Noe and his failure to purge his contempt.

And it is further **ORDERED** that Aharon Noe a/k/a Ari Noe shall appear for his previously agreed deposition on March 30, 2022. This date may not be adjourned absent prior court order upon a written showing of good cause. Further, this deposition is without prejudice to Goetz Fitzpatrick's right to take a further deposition if Mr. Noe's document discovery remains lacking before that date; and it is further

**ORDERED** that the Noes are directed to reimburse Goetz Fitzpatrick for half the cost of the transcript within 20 days from service of this order with notice of entry. Their failure to do so shall also result in a judgment for said amount, together with interest from the date Goetz Fitzpatrick paid for the transcript.

This constitutes the Decision and Order of the court.

Dated: New York, New York  
February 15, 2022

So Ordered:



**Hon. Lynn R. Kotler, J.S.C.**