

624 W. 47th St., LLC v Flom
2022 NY Slip Op 30872(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 653320/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

624 WEST 47TH STREET, LLC,
Plaintiff,

- v -

GARY FLOM, ALEXANDER BOYKO, and VENJAMIN
NILVA,

Defendants.

-----X

INDEX NO. 653320/2017
MOTION DATE 01/20/2022
MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 136, 137, 138, 139, 140

were read on this motion to/for CONTEMPT/MODIFY PRIOR ORDER.

In this action to recover on a guaranty of a commercial lease, commenced by notice of motion for summary judgment in lieu of complaint, the plaintiff/judgment creditor moves pursuant to Judiciary Law § 753(A)(3) and CPLR 5251 to hold the defendant/judgment debtor Alexander Boyko in civil contempt of court for his neglect or refusal to comply with this court's October 18, 2021 turnover order. That order directed Boyko to turn over assets belonging to Selvant Investing Group, Ltd. (Selvant), and held in accounts at Morgan Stanley Dean Witter & Co. (Morgan Stanley), in an amount sufficient to satisfy the judgment entered against him by the plaintiff. The plaintiff also moves pursuant to CPLR 5225(a) and (c) to modify the October 18, 2021 turnover order to add a provision directing Morgan Stanley to turn over those assets to the plaintiff. Boyko opposes the motion, claiming that he is neither an officer nor a director of Selvant, that Selvant is owned by his son, Andrey Boyko, and that, consequently, he cannot sign any documents effectuating a turnover or take any steps to accomplish that goal.

That branch of the motion seeking to hold Boyko in contempt is granted, and the matter is set down for a hearing to determine the appropriate sanction. That branch of the motion

seeking leave to amend the turnover order is denied as academic, in light of this court's January 21, 2022 Decision, Order, and Judgment in *Matter of 624 W. 47th St., LLC v Morgan Stanley* (Index No. 153114/2021), granting the plaintiff's petition in that proceeding to compel Morgan Stanley to turn over the subject assets.

The facts of this dispute are set forth in detail in the October 18, 2021 turnover order. In that order, this court found that Boyko had an equitable ownership interest in Selvant's accounts with Morgan Stanley, inasmuch as he directly paid personal expenses out of those accounts, and had signature authority in connection with the accounts. The order thus directed that

“on or before December 20, 2021, the defendant Alexander Boyko shall take all steps necessary and sign and submit to Morgan Stanley Dean Witter & Co. all papers necessary to turn over and transfer, to the plaintiff, 624 West 47th Street, LLC, or to the Sheriff of the City of New York, on behalf of the plaintiff, the sum of \$306,902.03, plus simple interest at 9% per annum from September 10, 2020, from accounts maintained at Morgan Stanley Dean Witter & Co. in the name of Selvant Investing Group, Ltd., including, but not limited to, accounts ending in the numbers 163, 254, and 128.”

The court also denied Boyko's cross motion to vacate the April 20, 2021 restraining notice that the plaintiff had served upon Morgan Stanley. Despite the clear directive of the turnover order, Boyko refused to sign any papers or submit them to Morgan Stanley, or even attempt to submit them, and now claims that he has no authority to sign the papers.

CPLR 5251 provides, in relevant part, that the “[r]efusal or willful neglect of any person to obey a[n] . . . order granted, pursuant to this title . . . shall . . . be punishable as a contempt of court.” “In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed” (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; see Judiciary Law § 753[A][3]). The applicant must also establish that the party to be held in contempt engaged in conduct that was calculated to and actually did defeat, impair, impede, and prejudice the rights of the applicant (see *450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC*, 15 AD3d 166, 167 [1st Dept 2005]; see also *Dietrich v*

Michii, 57 AD3d 1527, 1527 [4th Dept 2008] [applying rule to judgment debtor who refused to comply with prior order]). “[W]ilfulness is not an element of civil contempt” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 35 [2015]). A civil contempt must be proven by clear and convincing evidence (see *Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]). A person who is directed to turn over assets pursuant to a turnover order may be held in civil contempt for failure to comply with the turnover order (see *Knopf v Feldman & Assoc., PLLC*, 2019 NY Slip Op 51226[U], *2-3, 64 Misc 3d 1222[A], 2019 NY Misc LEXIS 4248, *5, [Sup Ct, N.Y. County, Jul. 16, 2019]).

The plaintiff established, by clear and convincing evidence, that Boyko’s refusal to execute papers directing Morgan Stanley to turn over Selvant’s assets in an amount sufficient to satisfy the underlying judgment against him constituted conduct that was calculated to and actually did defeat, impair, impede, and prejudice the plaintiff’s rights. It is of no moment that Boyko contends that he is not an officer, director, or owner of Selvant, or even that he has a good-faith belief that Morgan Stanley will not process paperwork that he signed. The turnover order clearly directed him to execute and deliver such paperwork to Morgan Stanley and, once he has done so, he will have discharged his obligation under the turnover order, even if Morgan Stanley thereafter declines to recognize his authority over Selvant’s accounts. Boyko is thus held in civil contempt. The court notes, however, that Morgan Stanley has itself been directed by this court, in a related proceeding, to turn over the portion of Selvant’s accounts in its possession that would satisfy the underlying judgment (see *Matter of 624 W. 47th St., LLC v Morgan Stanley*, Index No. 153114/2021 [Sup Ct, N.Y. County, Jan. 21, 2022] [Kelley, J.]).

In light of the issuance of the turnover order in the related proceeding against Morgan Stanley, the plaintiff’s request for identical relief against Morgan Stanley in this action has been rendered academic, as there is no need for the issuance of two turnover orders directing Morgan Stanley to turn over the same asset.

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that Alexander Boyko is held in civil contempt for his failure to comply with the terms of this court's October 18, 2021 order, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear remotely on April 12, 2022, at 10:00 a.m., via the Microsoft Teams Conference application, for a hearing to determine the extent of the sanction or punishment to be imposed upon Alexander Boyko with respect to his contempt, unless he purges the contempt prior to that date by signing the appropriate paperwork and delivering it to Morgan Stanley Dean Witter & Co.

This constitutes the Decision and Order of the court.

3/11/2022

DATE

[Handwritten signature in blue ink]
JOHN J. KEENEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: