

Smith & Krantz, LLP v Ceccarelli Weprin PLLC
2022 NY Slip Op 33047(U)
September 7, 2022
Supreme Court, New York County
Docket Number: Index No. 650023/2016
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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SMITH & KRANTZ, LLP,

Plaintiff,

- v -

INDEX NO. 650023/2016

MOTION DATE 07/11/2022,
06/29/2022

MOTION SEQ. NO. 003 004

CECCARELLI WEPRIN PLLC,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for PUNISH FOR CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action to recover upon a promissory note dated March 4, 2014, the parties, two law firms, entered into a settlement agreement dated June 7, 2018, so-ordered by the court, whereby the defendant agreed, *inter alia*, to immediate entry of a judgment in the sum of \$245,000.00 and waived all counterclaims. Judgment was entered on September 27, 2018. The judgment was not satisfied.

On or about November 20, 2020, the plaintiff served an information subpoena on the defendant seeking documents and a deposition. The subpoena sought documents such as bank statements, payroll records, and copies of loans and mortgages “which have or may contain information concerning the judgement debtor’s property, income and other means relevant to the satisfaction of the judgment.” The defendant did not comply. The plaintiff moved pursuant to CPLR 5223 and 2308(b) to compel compliance with the information subpoena or for an order holding the defendant in contempt for failing to comply (MOT SEQ 002). The defendant cross-moved to quash the subpoena pursuant to CPLR 2304.

By an order dated March 30, 2021, the court granted the motion to the extent of directing the defendant to comply within 60 days without prejudice for the plaintiff seek further relief if the defendant failed to comply, and denied the defendant's cross-motion. In that order, the court cautioned the defendant that failure to comply with an information subpoena is governed by CPLR 2308(b), which allows the court to issue a warrant directing a sheriff to bring a witness before the person or body who issued the subpoena and, if the subpoenaed individual "refuses without reasonable cause to be examined," the court, "upon proof by affidavit, may then issue a warrant directed to the sheriff of the county where the person is, committing him to jail, there to remain until he [or she] submits to do the which he [or she] was so required to do or is discharged according to law." Notwithstanding the order and warning, the defendant failed to comply. It produced no documents and failed to appear for a deposition.

The plaintiff now moves for an order punishing the defendant for contempt (MOT SEQ 003). The defendant again cross-moves to quash the same subpoena. Upon the papers submitted, the motion is granted to the extent that the defendant is directed to comply in full with the information subpoena dated November 20, 2020, within 30 days of service of this order with notice of entry and, upon any failure to comply with the court's directives, a contempt hearing shall be scheduled, without further motion practice, upon the plaintiff's filing an affirmation of noncompliance. The hearing would be to determine whether the defendant's conduct defeated, impaired, impeded, or prejudiced the plaintiff's rights. The cross-motion is denied.

As on the prior motion, the plaintiff has demonstrated the need for the disclosure sought, and sufficiently stated the "circumstances or reasons" that support disclosure. Kapon v Koch, 23 NY3d 32 (2014). Further, for purpose of this motion, the plaintiff has also established that the defendant failed to comply with the information subpoena and this court's order granting the prior motion and denying the defendant's cross-motion. It is undisputed that "[f]ailure to comply with the subpoena is punishable as a contempt of court." CPLR 5223. The court finds the defendant's arguments in opposition to the plaintiff's contempt motion to be without merit. Indeed, the defendant does not deny entering into the settlement agreement, failing to make payment as agreed and failing to comply with the information subpoena and this court's prior order. For similar reasons, the defendant has not established entitlement to the relief sought in the cross-motion to quash the subpoena.

First, the defendant is barred by law of the case from moving for second time to quash the same subpoena in the same action. See Martin v City of Cohoes, 37 NY2d 162 (1975); Verdi v Dinowitz, 204 AD3d 627 (1st Dept. 2022); Mohamed v Defrin, 45 AD3d 252 (1st Dept. 2007). In any event, the motion is without merit. A motion to quash a subpoena should be granted only when the futility of uncovering anything legitimate is obvious or the information sought is “utterly irrelevant to any proper inquiry.” Kapon v Koch, supra at 32. A subpoena may also be challenged if it encompasses materials that are privileged or “clearly irrelevant” or palpably overbroad and in need of pruning. Grotallio v Soft Drink Leasing Corp., 97 AD2d at 383 (1st Dept. 1983). Nor may a subpoena be used as a tool of harassment or for a proverbial “fishing expedition to ascertain the existence of evidence.” Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). The defendant does not challenge the subpoena on any of the these grounds. In its papers, the defendant merely asserts that the settlement was the result of coercion, fraud or misrepresentation by the plaintiff and that the plaintiff then waited too long to try to enforce the judgment against the defendant and should now be barred from doing so upon the principle of laches. The defendant also devotes much space attempting to relitigate the underlying facts of the case and rehashing the events leading to execution of the settlement agreement and complains that the plaintiff has since refused to renegotiate the agreement. None of this constitutes a basis to quash the information subpoena in whole or part.

While MOT SEQ 003 was pending, the defendant moved separately to vacate the 2018 judgment pursuant to CPLR 5015(a)(3), again alleging fraud and misrepresentation by plaintiff’s counsel in the execution of the settlement agreement, and for an order directing the parties to participate in an ADR program (MOT SEQ 004). The plaintiff opposes on the grounds that the motion seeking vacatur, made four year after the judgment was entered, is untimely and without merit and the request for mediation on the merits should be denied since the matter is long concluded, with only enforcement of the judgment remaining. The motion is denied for those reasons. Furthermore, it is well settled that public policy favors enforcement of stipulations of settlement, particularly those entered in open court. See McCoy v Feinman, 99 NY2d 295 (2002); Nieborak v W54-7 LLC, 203 AD3d 439 (1st Dept. 2022); Pruss v Infiniti of Manhattan, Inc., 180 AD3d 163 (1st Dept. 2020). “Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.” Hallock v State of New York, 64 NY2d 224, 230 (1984). No such showing was made here.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion to punish the defendant for contempt (MOT SEQ 003) is granted to the extent that the defendant is directed to comply in full with the information subpoena dated November 20, 2020, within 30 days of service of this order with notice of entry and, upon any failure to comply with the court's directives, a contempt hearing shall be scheduled, without further motion practice, upon the plaintiff's filing of an affirmation of noncompliance and notifying the Part 42 Clerk of such filing, and it is further

ORDERED that the defendant's cross-motion to quash (MOT SEQ 003) is denied; and it is further

ORDERED that the defendant's motion to vacate the judgment and for other relief (MOT SEQ 004) is denied in its entirety.

This constitutes the Decision and Order of the court.

9/7/2022

DATE

CHECK ONE:

SEQ 003

SEQ 003 X-MOT

SEQ 004

X

CASE DISPOSED

GRANTED

GRANTED

GRANTED

X

DENIED

DENIED

X DENIED

X

NON-FINAL DISPOSITION

GRANTED IN PART

GRANTED IN PART

GRANTED IN PART

OTHER

OTHER

OTHER


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON