

Howera v New York City Health & Hosp. Corp.
2022 NY Slip Op 33998(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 850285/2014
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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AHMED S. M. HOWERA,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITAL
CORPORATION, BELLEVUE HOSPITAL CENTER,
SANJAY BHAGIA, M.D., JENNIFER SHANGKUAN, M.D.,
DANIEL LUGASSY, M.D., KARALYNN OTTERNESS, M.D.,
LEONID DROZHININ, M.D., ARIEL FRIEDMAN, M.D.,
CHERYL DEDIOS, WWP OFFICE, LLC, GEORGE
COMFORT & SONS, INC., THE CITY OF NEW YORK,
WHIPPET TRANS CORP., and ALPHA B. JALLOH,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for

CONTEMPT.

Upon the foregoing documents, the court denies Plaintiff Ahmed S.M. Howera's ("Plaintiff") motion to hold non-parties SL Green Realty Corp. ("SL") and Classic Security LLC ("Classic") (collectively "non-parties") in contempt for failing to comply with so-ordered judicial subpoenas.

This case stems from three distinct claims: (1) a trip and fall incident in a sidewalk tree well located near 825 8th Ave, New York, New York, on January 3, 2013; (2) an automobile accident on May 26, 2013; and (3) claims for medical malpractice stemming from the treatment of both incidents.

Plaintiff now moves to hold non-parties SL and Classic in contempt for failing to comply with so-ordered judicial subpoenas, Plaintiff argues in substance that he sought certain records from Defendant WWP Office, LLC ("WWP") in connection with the sidewalk trip and fall. Plaintiff contends that WWP did not provide the requested discovery because upon the sale of the property located at 825 8th Avenue, WWP transferred its records to the new owner, non-party SL.¹ As such, Plaintiff served SL with a subpoena to obtain discovery related to this accident.

¹ In an affidavit, dated July 19, 2021, Peter Duncan, Defendant George Comfort & Son's ("Comfort") President, stated that Comfort managed the subject property and that WWP sold the property in October 2017.

Additionally, Plaintiff served non-party Classic, the company that provided security for the subject property, with a subpoena to obtain discovery related to this accident. Plaintiff further argues in substance that neither of the non-parties responded to the subpoena by providing documents or appearing for depositions. Moreover, Plaintiff contends that the court should disregard any responses from the non-parties as being untimely. Therefore, Plaintiff moves to hold the non-parties in contempt for failing to comply with the subpoenas.

SL and Classic oppose Plaintiff's motion for contempt. The non-parties argue in substance that Classic only became aware of the subpoena upon service of the instant motion.² The non-parties further argue in substance that Classic notified Plaintiff that it did not have any records responsive to Plaintiff's demands as the incident took place over nine (9) years ago and it is Classic's policy to retain records for only seven (7) years. The non-parties contend that Classic offered to provide Plaintiff with an affidavit attesting that it does not have records responsive to Plaintiff's demands. The non-parties further contend that Plaintiff refused to accept the affidavit, as he wanted the motion to proceed. Similarly, the non-parties argue in substance that SL does not have any records or information responsive to Plaintiff's discovery demands. The non-parties contend that SL did not own the property at the time of Plaintiff's accident and acquired a partial interest in the property on October 18, 2017, four (4) years after Plaintiff's accident. The non-parties argue in substance that SL had its managing agent for the premises conduct a search of the requested documents and no records were available.

Additionally, the non-parties contend that despite having their New York City business addresses, Plaintiff served each entity through the Secretary of State for the State of New York. The non-parties argue in substance that as of the date of their opposition to Plaintiff's motion for contempt, neither business received the subpoenas from the Secretary of State.

Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a non-party of "matter material and necessary in the prosecution or defense of an action" in possession of the nonparty, as long as the non-party is apprised of the "circumstances or reasons such disclosure is sought or required" (CPLR 3101[a][4]).

A party seeking to hold another party in civil contempt bears the burden of proof (*see McCain v Dinkins*, 84 NY2d 216, 225-227 [1994]; *Rupp-Elmasri v Elmasri*, 305 AD2d 394, 395 [2003]). To prevail on a motion to hold another in civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court mandate, thereby prejudicing a right of another party to the litigation (*see Rupp-Elmasri v Elmasri, supra; see also* Judiciary Law § 753[A][3]; *Goldsmith v Goldsmith*, 261 AD2d 576 [1999]). The contempt must be proven by clear and convincing evidence (*see Raphael v Raphael*, 20 AD3d 463 [2005]). An application to adjudicate a party in contempt is treated in the same fashion as a motion, and a hearing need not be held if an issue of fact is not raised (*see Mulder v Mulder*, 191 AD2d 541 [1993]).

² Both non-parties are represented by the same counsel, who was retained by Classic first. Plaintiff's counsel agreed to adjourn the motion to allow Classic time to respond. Shortly thereafter, SL retained the same counsel. However, Plaintiff refused to consent to adjourn the motion to allow counsel to oppose the motion on behalf of both non-parties.

There are two forms of sanctions applicable to a non-party that disregards an attorney-issued subpoena: "contempt of court" (*Ling v Sans Souci Owners Corp.*, 187 AD3d 755 [2d Dept 2020]) and a \$150 penalty plus damages sustained by reason of the failure to comply (*Essa Realty Corp. v J. Thomas Realty Corp.*, 932 NYS2d 760 [Sup Ct, New York County 2011]).

A non-party can be held in contempt "upon such notice as the court deems appropriate and accords with due process" (*Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482, 483, [1st Dept 2003]).

The elements necessary to support a finding of civil contempt include, (1) "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect" (*see Matter of McCormick v Axelrod* (59 NY2d 574, 583 [1983]); (2) it must appear, with reasonable certainty, that the order was disobeyed" (*id.*); (3) the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party (*id.*); and (4) prejudice to the right of a party to the litigation must be demonstrated (*id.*; *see Karg v Kern*, 125 AD3d 527, 528-529 [1st Dept 2015]).

In the present case, the court denies Plaintiff's motion seeking to hold the non-parties in contempt for their alleged failure to provide responses to Plaintiff's subpoenas. The court finds that the non-parties attempted to respond to Plaintiff's demands and Plaintiff refused to accept their responses. Although, the court finds that the non-parties do not maintain records responsive to Plaintiff's demands, the court directs the non-parties to serve Plaintiff with affidavits from the individuals responsible for conducting the search for records indicating the type of search or searches performed and the results of such search or searches.

To the extent not expressly addressed herein, the court considered all arguments raised and denies Plaintiff's motion seeking to hold the non-parties in contempt.

As such, it is hereby

ORDERED that the court denies Plaintiff Ahmed S.M. Howera's motion to hold non-parties SL Green Realty Corp. and Classic Security LLC in contempt; and it is further

ORDERED that the court directs non-parties SL Green Realty Corp. and Classic Security LLC to serve affidavits from the individuals responsible for conducting the search for records indicating the type of search or searches performed and the results of such search or searches within thirty (30) days of the date of this order.

This constitutes the decision and order of the court.


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11/18/2022
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE