Sage Realty Corp. v Walsh
2023 NY Slip Op 30061(U)
January 4, 2023
Supreme Court, New York County
Docket Number: Index No. 158983/2021
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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SAGE REALTY CORPORATION,

Petitioner,

- v -

ANDREW WALSH,

Respondent.

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INDEX NO. 158983/2021

MOTION DATE 08/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for CONTEMPT.

On July 28, 2020, the petitioner, Sage Realty Corporation, entered a judgment in the principal sum of $2,752,763.25 (the judgment) against non-party ERG Property Advisors, LLC (the judgment debtor). No part of the judgment has been satisfied. On September 30, 2021, the petitioner commenced this proceeding pursuant to CPLR 5225 and 5227 to satisfy the judgment by means of a directive that the respondent, Andrew Walsh, pay to it a debt he allegedly owed to the judgment debtor upon maturity. Specifically, the petitioner alleged that on December 10, 2020, the judgment debtor and an entity named ERG Capital Advisors, LLC (ERGCA), had commenced an action against the respondent in the Supreme Court of the State of New York, County of Nassau, under Index No. 614326/2020 (the Nassau County action). In the Nassau County Action, the judgment debtor and ERGCA averred that the respondent breached two promissory notes (the notes) with the judgment debtor and ERGCA, respectively, in the aggregate sum of $400,000.00. The notes were purportedly issued in connection with the respondent's acquisition of a 20% interest in the judgment debtor in or around January 1, 2017. According to the judgment debtor and ERGCA, the respondent defaulted in making payments under the notes, leaving a balance of $150,000.00 due under each note. Thus, the petitioner claimed entitlement to payment of any debt owed by the respondent to the judgment debtor in the Nassau County action (SEQ 001).

Submissions by the respondent in opposition to the petition indicated that on or about October 1, 2021, approximately two weeks prior to service of the petition, the respondent entered into a settlement agreement with the judgment debtor resolving the judgment debtor's claims in the Nassau County action (the settlement agreement). Pursuant to the terms of the settlement that were disclosed, the respondent purportedly agreed to relinquish his 20% equity interest in the judgment debtor and abandon any claim to repayment of funds he had paid

towards such interest. None of the respondent's submissions established the total consideration exchanged by the respondent and the judgment debtor. The judgment debtor discontinued the Nassau County action with prejudice on November 2, 2021.

By a decision and order dated March 2, 2022, the court granted the petition, over the respondent's opposition. Specifically, the court directed that the respondent, within 45 days of the order, (1) deliver to the Sheriff of the City of New York or to a City Marshal, all of the shares or certificates representing, evidencing, or reflecting any and all ownership interest of the judgment debtor, and (2) deliver to the petitioner the value of any other consideration he agreed to transfer to the judgment debtor, pursuant to the settlement agreement, each in order to satisfy the judgment, up to the sum of $2,752,763.25. The court further noted that the submissions before it did not elucidate whether the respondent had already transferred any consideration contemplated by the settlement agreement to the judgment debtor. Nonetheless, the court opined, to the extent that the respondent did turn over his shares and any other consideration to the judgment debtor, the timeline of events presented by the parties raised questions as to whether the respondent did so in violation of a restraining notice the petitioner served on him on October 14, 2021. The court directed that in the event that evidence revealed consideration had been transferred by the respondent to the judgment debtor prior to October 14, 2021, the petitioner was entitled to make an application for a further judgment against the respondent as the proof would justify.

The petitioner now moves pursuant to CPLR 5251, 5225, 5227, and Judiciary Law 753(3) to hold the respondent in contempt for failure to comply with the court's March 2, 2022, order, and for violating the October 14, 2021, restraining notice served on the respondent. The respondent opposes the motion and cross-moves to dismiss the petition. The petitioner opposes the cross-motion.

To begin, the respondent's cross-motion to dismiss the petition and all claims therein is procedurally improper insofar as the petition was granted by the court's decision and order dated March 2, 2022. Such decision and order has not been vacated, nor have any grounds for vacatur been asserted by the respondent. Moreover, the respondent has not moved or presented any rationale sufficient to reargue or renew its opposition to the petition. Accordingly, the respondent's cross-motion to dismiss the petition is denied. The arguments in the respondent's moving papers are considered only as opposition to the instant application.

It is undisputed that, following the issuance of the March 2, 2022, decision and order, the respondent has turned over no shares representing his ownership interest in the judgment debtor or any other consideration he agreed to transfer pursuant to the settlement agreement. The petitioner avers that such conduct demonstrates that the respondent has willfully refused to comply with the court's directive. The petitioner further asserts that the respondent violated its October 14, 2021, restraining order based on the judgment's debtor's November 2, 2021, filing of a notice of discontinuance in the Nassau County action.

The respondent denies violating either the court's order or the restraining notice. He submits a new affidavit wherein he avers he relinquished his 20% equity interest in the judgment debtor on October 1, 2021, and possessed no assets owed to the judgment debtor pursuant to the settlement agreement as of the dates of the restraining notice and subsequent court order. The respondent has also submitted the 14-page settlement agreement, dated October 1, 2021, on its cover page. The settlement agreement, which is executed by the respondent, the judgment debtor, and ERGCA, provides, in relevant part, that the respondent shall transfer his 20% interest in the judgment debtor to James Guarino, managing member of the judgment debtor and ERGCA, at a closing to be held concurrently with execution of the settlement agreement or at some other mutually agreed upon date. The settlement agreement further contains a representation that, concurrent with the settlement agreement, the respondent was delivering to Guarino assignments of his interests. However, no executed assignment has been provided to the court. No other terms in the settlement agreement require the respondent to pay or transfer any property to the judgment debtor.

Under Judiciary Law § 573, a court of record "has power to punish, by fine and imprisonment, or either, a neglect or violation of 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." Judiciary Law 573(A). In order to support a finding of civil contempt, it must be determined (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that it appears, with reasonable certainty, that the order has been disobeyed, (3) that the party to be held in contempt had knowledge of the order, and (4) there is demonstrated prejudice to the right of a party to the litigation. Matter of McCormick v Axelrod, 59 NY2d 574, 583 (1983); see El-Dehdan v El-Dehdan, 26 NY3d 19, 29 (2015); Bernard-Cadet v Gobin, 94 AD3d 1030, 1031 (2nd Dept. 2012). The burden is on the party moving for civil contempt to establish the foregoing elements by clear and convicting evidence. El-Dehdan v El-Dehdan, supra at 29; see Tener v Cremer, 89 AD3d 75, 78 (1st Dept. 2011); Bernard-Cadet v Gobin, supra at 1031; Rienzi v Rienzi, 23 AD3d 447, 449 (2nd Dept. 2005).

Here, the petitioner fails to carry its burden of establishing by clear and convincing evidence that the respondent violated either the October 14, 2021, restraining notice or the March 2, 2022, court order.

As to the restraining notice, the petitioner presents as evidence of a purported violation only the notice of discontinuance in the Nassau County action, which was filed after service of the restraining notice. However, the filing of a notice of discontinuance does not violate the restraining notice. Nor does the fact that such notice was filed on November 2, 2021, amount to clear and convincing proof that the asset transfer contemplated by the October 1, 2021, settlement agreement was not performed until after October 14, 2021.

As to the court's order, the court expressly noted therein that it was not apparent from the parties' submissions whether the respondent had actually turned over any of the consideration it agreed to transfer to the judgment debtor under the settlement agreement. Nor was it clear whether the respondent's interest in the judgment debtor comprised the entirety of

the consideration agreed to. To be sure, in arguing the petition, the parties had not submitted the settlement agreement and the respondent provided no information as to the date upon which his obligations under the settlement agreement had been fulfilled. Thus, the court's directive that consideration for the settlement agreement be turned over contemplated the possibility that some or all of the subject consideration might have transferred to the judgment debtor at a prior date, either before or after service of the restraining notice. Now, the respondent avers, under oath, that he relinquished his equity interest in the judgment debtor on October 1, 2021. He further avers that he has made no conveyance of any property or money to the judgment debtor after receipt of the restraining notice. Finally, he submits the settlement agreement to support his assertions that, *inter alia*, the only consideration he agreed to exchange to settle the Nassau County action was his interest in the judgment debtor.

The petitioner responds to this evidence by pointing to the absence of an executed assignment, blank dates and other minor terms in the settlement agreement, and the settlement agreement's provision that a stipulation of discontinuance be filed in the Nassau County action within 10 calendar days of closing. The petitioner's attempts to cast doubt on the respondent's submissions miss the point, however. It is not the respondent's burden on the instant application to establish by clear and convincing evidence that he transferred his interest in the judgment debtor prior to service of the restraining notice. Rather, it is incumbent upon the petitioner to produce evidence demonstrating that the restraining notice and/or the court's order were, in fact, violated. Bare speculation that the respondent is lying to and intentionally misleading the court is not sufficient to meet the petitioner's burden.

Accordingly, it is

ORDERED that the petitioner's motion pursuant to CPLR 5251, 5225, 5227, and Judiciary Law 753(3) to hold the respondent in contempt for failure to comply with the court's March 2, 2022, order, and for violating the October 14, 2021, restraining notice served on the respondent, is denied; and it is further

ORDERED that the respondent's cross motion to dismiss the petition is denied as procedurally improper.

This constitutes the Decision and Order of the court.

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

1/4/2023
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER