

Honeedew Inv. Ltd. v Abadi
2023 NY Slip Op 30346(U)
January 31, 2023
Supreme Court, New York County
Docket Number: Index No. 652654/2017
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

-----X

HONEEDEW INVESTING LIMITED,

Plaintiff,

- v -

CARLOS ABADI and BARBARA ABADI,

Defendant.

-----X

INDEX NO. 652654/2017

MOTION DATE 09/03/2021

MOTION SEQ. NO. 009

**DECISION, ORDER +
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 230, 231, 232, 233, 234, 235, 236, 237, 238, 250, 251, 266, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 314, 315, 316, 317, 318

were read on this motion to/for

PUNISH FOR CONTEMPT

In this action to recover damages arising from the defendants' failure to make payments pursuant to a settlement agreement, upon affidavits of confession of judgment submitted by each defendant, a judgment was entered against the defendants, jointly and severally, in the principal sum of \$4,603,408.23 on May 17, 2017 (the New York judgment). By an order dated June 4, 2021, the court, *inter alia*, granted in part the fourth application of the plaintiff judgment creditor to punish the defendant judgment debtors for civil contempt, in this instance for failing to comply with this court's temporary restraining order dated March 22, 2019, and decision and order dated January 12, 2019, as well as an order of the Appellate Division, First Department (Singh, J.) dated March 29, 2019. As relevant here, the court found that the defendants did, in fact, violate multiple court orders and directed the parties to appear for a remote hearing on the issue of whether the defendants' disobedience of the subject orders defeated, impaired, impeded, or prejudiced the plaintiff's rights. The hearing was conducted on August 11, 2021.

Contempt is a drastic remedy which should not be granted absent a clear right to such relief." Pinto v Pinto, 120 AD2d 337, 338 (1st Dept. 1986). To prevail on a motion to punish a party for civil contempt, a party must establish that the party to be held in contempt violated a clear and unequivocal court order, known to the parties. See Judiciary Law § 753(A)(3); see also McCormick v Axelrod, 59 NY2d 574 (1983), amended 60 NY2d 652 (1983). The movant 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 movant. See 450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC, 15 AD3d 166 (1st Dept. 2005); Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V., 304 AD2d 482 (1st Dept. 2003).

As more fully explained in the court's June 4, 2021, decision and order, the evidence proffered by the plaintiff on the instant contempt motion compelled the determination that the defendants violated (1) this court's temporary restraining order dated March 22, 2019, (TRO) enjoining the defendants and/or their agents from transferring, diminishing, or disposing of "any property," including data and information, belonging to Abadi & Co. (the Company), and directing the defendants to provide login and password information for several Company accounts within three days; (2) the Appellate Division, First Department's order dated March 29, 2019, which modified the TRO to a limited extent and ordered the defendants to "comply with all other aspects of the TRO within 24 hours"; and (3) this court's decision and order dated January 12, 2021, directing that the defendants turn over the remaining Company items in the defendants' possession. Rather than comply with the foregoing mandates, the defendants transferred Company assets to themselves, engaged in deletions and diminishment of Company property, falsely represented that they had no accounts at JP Morgan Chase Private Bank, and purged emails to hide information and conceal data, all in knowing violation of the prior orders. Thus, the only issue to be addressed at the August 11, 2021, hearing was whether the defendants' conduct did defeat, impair, impede, or prejudice the rights of the plaintiff.

At the hearing, the plaintiff adduced proof that, on February 27, 2019, it purchased for \$20,000.00 all of the Company's assets as of November 27, 2018, pursuant to a Sheriff's execution in furtherance of the New York judgment and notice of execution previously served by the plaintiff. Thereafter, the plaintiff discovered that the defendants failed to turn over certain of the Company's assets. The plaintiff made an application to this court for the preservation and turnover of the missing items (SEQ 003), which ultimately resulted in the issuance of the three orders described above. As previously determined, the defendants willfully failed to preserve and turn over Company assets in accordance with the three orders. The plaintiff's principal testified at the hearing that, as a result of the defendants' conduct, the plaintiff lacks the records it needs to reconcile the Company's books and determine where Company money, including \$16 million the plaintiff invested in the Company, has gone, and cannot operate the Company. By this evidence, the plaintiff established that the defendants' conduct defeated, impaired, impeded, and prejudiced the plaintiff's right to collect on the New York judgment, most of which remains unpaid, insofar as the defendants, at best, purposely obscured the location of recoverable assets and, at worst, unlawfully transferred such assets in direct violation of restraining notices and orders.

Generally, the appropriate punishment for a party found to be in civil contempt is the imposition of a fine sufficient to indemnify the aggrieved party for any actual loss or injury. See Judiciary Law § 773; MacArthur I, Inc. v Fields, 188 AD3d 493, 496 (1st Dept. 2020). Where no actual loss or injury has been demonstrated, however, the court may award as a fine \$250.00 plus the aggrieved party's costs and expenses, including reasonable legal fees. See Judiciary Law § 773; see Vastwin Investments, Ltd. v Aquarius Media Corp. 295 AD2d 216, 217 (1st Dept. 2002); 317 West 87th Associates v Dannenberg, 170 AD2d 250, 250-51 (1st Dept. 1991); Matter of Beiny, 164 AD2d 233, 238 (1st Dept. 1990). Contrary to the plaintiff's propositions, actual damages for purposes of civil contempt do not include attorney's fees and costs; in other words, the court may not elect to impose a fine consisting of *both* actual damages and attorney's fees

for the same contemptuous act. Rather, Judiciary Law § 773 “distinguishes between the amount of the fine assessable in two separate types of civil contempt proceedings: ‘one where actual damage has resulted from the defendants’ contemptuous acts and one where there may be prejudice to a complainant’s rights but it is not shown that such an actual loss or injury has been caused.’” Town of Southampton v R.K.B. Realty, LLC, 91 AD3d 628, 631 (2nd Dept. 2012) (quoting State v Unique Ideas, Inc., 44 NY2d 345 [1978] [internal quotation marks omitted]); see 3855 Broadway Laundromat v 600 W. 161st St. Corp., 156 AD2d 202, 203 (1st Dept. 1989). Thus, costs and expenses, including reasonable attorney’s fees in the matter of the application to punish the contemnor, are to be awarded only where actual damages for contumacious acts are not calculable. See Vastwin Investments, Ltd. v Aquarius Media Corp., *supra* at 217; Town of Southampton v R.K.B. Realty, LLC, *supra* at 631; Bennett Bros., Inc., v Floyd Bennett Farmers Market Corp., 16 AD2d 897, 897 (1st Dept. 1962).

Here, the plaintiff fails to establish by clear and convincing evidence a sufficient non-speculative connection between the full \$20,000.00 sum it paid for the Company’s assets and the value of the specific assets, including certain information and data, that the defendants withheld and/or destroyed in violation of subsequent court orders. Inasmuch as the defendants are the only parties aware of the contents of the missing materials, this is unsurprising. Moreover, the plaintiff referred on other occasions to the \$16 million it invested in the Company, suggesting that the defendants’ conduct deprived it of a value far greater than \$20,000.00. The wide range of potential damages proposed by the plaintiff provides further indication that actual damages are not calculable.

Nonetheless, the plaintiff is entitled to a fine of \$250 plus attorney’s fees incurred in connection with its application. The plaintiff’s principal testified at the hearing, and time records submitted into evidence by the plaintiff’s counsel support, that the plaintiff paid the total sum of \$58,640.77 in connection with this matter between February 10, 2021, and July 30, 2021. However, both the plaintiff and its counsel indicated at the hearing that the total sum includes amounts charged in connection with a subsequent application filed under MOT SEQ 010. The court’s own review of the time records further indicates that such sum includes amounts charged in connection with the separate contempt application filed under MOT SEQ 005 and related hearing, and MOT SEQ 008, as well as amounts charged for such vague entries as “[l]engthy conversation with [client].” Only amounts charged in connection with the application that was the subject of the August 11, 2021, hearing, that is, MOT SEQ 009, are properly recoverable here. Upon the court’s review of the evidence, \$22,471.61 is determined to approximate the sum actually expended by the plaintiff in attorney’s fees related to the instant contempt application.

Accordingly, it is

ORDERED that the motion of the plaintiff to hold the defendants Carlos Abadi and Barbara Abadi in contempt of court is granted to the extent provided herein; and it is further

ORDERED AND ADJUDGED that the conduct of the defendants Carlos Abadi and Barbara Abadi was willfully contemptuous of this court and was calculated to and actually did defeat, impair, impede, or prejudice the rights of the plaintiff inasmuch as the defendants Carlos Abadi and Barbara Abadi violated the court's orders dated March 22, 2019, and January 12, 2019, and the order of the Appellate Division, First Department (Singh, J.), dated March 29, 2019; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the defendants, by Federal Express or Overnight Mail, within 10 days of receipt thereof; and it is further

ORDERED that the defendants Carlos Abadi and Barbara Abadi shall be fined, jointly and severally, pursuant to Judiciary Law § 773, to the extent that they shall pay to the plaintiff the sum of \$250.00 plus the attorneys' fees and costs incurred by the plaintiff in moving to hold the defendants in contempt in the sum of \$22,471.61; and it is further

ORDERED that the Clerk shall enter an award in favor of the plaintiff, Honeedew Investing Limited, and against the defendants, Carlos Abadi and Barbara Abadi, jointly and severally, in the total sum of \$22,721.61.

This constitutes the Decision, Order, and Judgment of the court.

1/31/2023
DATE


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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE