

Hoggard v Cheever Dev. Corp.

2023 NY Slip Op 30817(U)

March 9, 2023

Supreme Court, New York County

Docket Number: Index No. 655604/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

DESMOND HOGGARD and ASHLEY CLARK,

Plaintiffs,

- v -

CHEEVER DEVELOPMENT CORP., SHEER TAPING,
ERIC GRAVES, and LIBERTY MUTUAL INSURANCE
COMPANY D/B/A LIBERTY MUTUAL SURETY,

Defendants.

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INDEX NO. 655604/2018

MOTION DATE 06/22/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 94

were read on this motion for CONTEMPT.

Upon the foregoing documents, the motion to hold defendant Eric Graves in contempt for repeated failures to appear for deposition and for disobedience of a related subpoena duces tecum and ad testificandum dated April 28, 2022, is granted without opposition for the reasons set forth in the affirmation of Lloyd Ambinder, Esq. dated June 16, 2022 (NYSCEF Doc. No. 77), and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, plaintiffs have attempted to take Graves' deposition on several prior occasions, having previously noticed his deposition for September 2, 2020 (notice to take deposition, NYSCEF Doc. No. 65), and issued subpoenas for July 15, 2021 (subpoena duces tecum and ad testificandum dated June 21, 2021, NYSCEF Doc. No. 66), and February 24, 2022 (subpoena duces tecum and ad testificandum dated February 7, 2022, NYSCEF Doc. No. 68). Graves failed to appear on any of the foregoing dates, nor did he produce the documents and records demanded in the subpoenas (Ambinder affirmation, NYSCEF Doc. No. 77 ¶ 28).

Plaintiffs moved to compel Graves' appearance for deposition, and on April 14, 2022, and the court granted the motion, which was unopposed (*see*, decision and order, NYSCEF Doc. No. 72). The court directed that Graves appear at the offices of plaintiffs' counsel for deposition, and bring with him the items sought in the subpoenas, on or before June 3, 2022 (*id.*). The court also placed Graves on notice that failure to comply with the order would allow plaintiff to seek further relief, "including but not limited to the issuance of a warrant to a sheriff to bring defendant Eric Graves before the court to be deposed" (*id.*).

Plaintiffs served Graves with a copy of the order with notice of entry, as well as a further subpoena directing him to appear for deposition on May 19, 2022, by leaving a copy of the paper with a person of suitable age and discretion at Graves' residence on May 4, 2022, and mailing a copy to the same address the following day (affidavit of service, NYSCEF Doc. No. 74). Graves failed to appear for deposition on May 19, 2022, or at any other time prior to the court-ordered deadline to do so of June 3, 2022 (Ambinder affirmation, NYSCEF Doc. No. 77, ¶¶ 21-22). Plaintiffs then made the instant motion by Order to Show Cause, which order was signed by the court on June 22, 2022, requiring Graves to show cause why he should not be held in contempt for failing to appear for deposition as required by subpoena on the above mentioned dates; why a warrant should not issue directing the sheriff to bring Graves before the court to secure his testimony; and why he should not be required to pay plaintiffs' costs and reasonable attorneys' fees sustained due to Graves' failure to comply (order to show cause [Seq. 004], NYSCEF Doc. No. 80). Oral argument was set for July 12, 2022, and subsequently adjourned several times (interim orders [Seq. No. 004], NYSEF Doc. Nos. 85, 89, 90). Graves received adequate notice of each hearing (affidavits of service, NYSCEF Doc. Nos. 82, 86, 92). The court heard argument on October 27, 2022, and Graves failed to appear.

An application for civil contempt requires proof that “a lawful order of the court, clearly expressing an unequivocal mandate, was in effect” (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983], *amended* 60 NY2d 652 [1983]). Further, “[i]t must appear, with reasonable certainty, that the order has been disobeyed . . . [that] the party to be held in contempt . . . had knowledge of the court's order . . . [and] prejudice to the right of a party to the litigation must be demonstrated” (*id.*). The party applying for a contempt finding has the burden to prove these elements by “clear and convincing evidence” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Both the CPLR and the Judiciary Law provide that the failure to appear and give testimony when subpoenaed to do so shall be punishable as a contempt of court (CPLR 2308[a] [“Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court”]; Judiciary Law § 753[A][5] [punishing for civil contempt “(a) person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness”]).

Here, it is undisputed that Graves has failed to appear for deposition on four separate occasions, in connection with which he has also disobeyed three subpoenas, as well as this court’s order requiring Graves to appear for deposition on or before June 3, 2022 (decision and order, NYSCEF Doc. No. 72). Further, Graves has failed to produce the items listed in the subpoenas as ordered (*id.*). Graves offers no opposition to the motion, and has at no time offered any excuse for his failure to appear. Graves’ failure to comply has prejudiced plaintiffs’ ability to prosecute their case (Judiciary Law § 753[A]; *Matter of McCormick*, 59 NY2d at 583). Given Graves’ previous pattern of noncompliance, taking him into law enforcement custody is the only means by which Graves may be compelled to obey the mandates of this court. Accordingly, the court finds Graves to be in contempt of court for his failure to appear for deposition, to obey the

subpoenas issued for his testimony, and to obey this court's order compelling compliance with the same, and a warrant shall issue for Graves' arrest due to his failure to comply with the processes of this court. In addition, plaintiffs are entitled to recover their costs and reasonable attorneys' fees incurred as a result of Graves' failure to comply with the subpoenas and the court's prior order (Judiciary Law § 773; *Holskin v 22 Prince St. Assoc.*, 178 AD2d 347, 348 [1st Dept 1991]).

Accordingly, it is hereby

ORDERED that the motion for an order of contempt is granted without opposition; and it is further

ADJUDGED that defendant Eric Graves is guilty of a civil contempt of court in that he willfully disobeyed the provisions of the subpoenas duces tecum dated July 15, 2021, February 7, 2022, and May 4, 2022, as well as the provisions of the order of the court dated April 14, 2022, by reason of his failure to appear for a deposition and to produce documents and records as lawfully mandated; and it is further

ORDERED that defendant Eric Graves must appear for a deposition at the offices of plaintiffs' counsel and produce the records sought by subpoena on or before March 31, 2023, and in doing so shall purge his contempt; and it is further

ORDERED that plaintiffs shall serve defendant Eric Graves with a copy of this order and another copy of the court's prior order dated April 14, 2022, on or before March 15, 2023, and file proof of such service on or before March 17, 2023; and it is further

ORDERED that plaintiffs shall submit an itemization of their costs and reasonable attorneys' fees incurred on or before March 23, 2023, by electronic filing, with a copy by email

to the Principal Court Attorney of Part 38 (ssyaggy@nycourts.gov) as set forth in the Part Rules; and it is further

ORDERED that if defendant Eric Graves fails to comply with the provisions of this order, then plaintiffs shall submit an ex parte order for the issuance of a warrant of incarceration directing the Sheriff of any County of the State of New York wherein defendant Eric Graves may be found to seize and arrest said Eric Graves forthwith and bring him before this court to be committed or for such further disposition as the court shall direct.

This constitutes the decision and order of the court.



<u>3/9/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE