

West v Lo Duca

2023 NY Slip Op 31007(U)

February 2, 2023

Supreme Court, New York County

Docket Number: Index No. 160250/2019

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

JOSEPH H. WEST,

Plaintiff,

- v -

PAUL LO DUCA,

Defendants.

-----X

INDEX NO. 160250/2019

MOTION DATE 11/30/2022

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 62, 63, 64, 65, 66, 67, 68, 69, and 70 (Motion 003)

were read on this motion to/for COMPEL COMPLIANCE WITH INFORMATION
SUBPOENA/CONTEMPT/ATTORNEYS' FEES.

In this action to recover damages for defamation, the plaintiff moves pursuant to CPLR 5223 and 2308(b) to compel the defendant to comply with an information subpoena personally delivered to him on September 2, 2022, and for an award of attorneys' fees. The defendant does not oppose the motion. The motion is granted to the extent that (a) the defendant is held in civil contempt, and if he does not purge the contempt by appearing for a deposition on March 21, 2023, at 10:00 a.m., or at any later date and time agreed to by the plaintiff, and thereupon comply with the subpoena by then giving testimony at the offices of the plaintiff's counsel, or at any other place of the plaintiff's choosing, or remotely if the plaintiff consents to conduct the deposition remotely, the court shall schedule a hearing to determine the penalty for the contempt and (b) the plaintiff shall be awarded attorneys' fees incurred in making this motion. The motion is otherwise denied.

After the defendant defaulted in appearing in this action, the court conducted an inquest. By decision and order after inquest dated April 9, 2021, as amended April 13, 2021, this court concluded that the plaintiff was entitled to recover the sum of \$500,000 from the defendant. The

court directed the Clerk of the court to enter judgment against the defendant in the principal amount of \$500,000, plus statutory prejudgment interest at the rate of 9% per annum from July 8, 2020. On September 2, 2021 and, thus, prior to the entry of the judgment, the plaintiff served an information subpoena upon the defendant. By order dated October 20, 2021, this court denied the plaintiff's motion to compel the defendant to comply with that subpoena or, alternatively, to hold him in contempt, on the ground that CPLR 5223 is only available as a post-judgment remedy. On November 5, 2021, the court entered judgment in favor of the plaintiff and against the defendant in the total sum of \$561,049.52. On September 2, 2022, the plaintiff served a new subpoena upon the defendant by personal delivery, directing him to appear at the offices of the plaintiff's attorney on October 4, 2022. The defendant failed to appear on that date. This motion ensued.

CPLR 5223 provides that

“[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.”

That statute “speaks to the production of documents and materials relevant to the enforcement of the judgment” (*Matter of Cave Cr. Invs., Inc. v Urban FT Group, Inc.*, 176 AD3d 573, 573 [1st Dept 2019]). CPLR 5223 provides a judgment creditor the right to subpoena a party or nonparty witness to compel disclosure relevant to the satisfaction of the judgment (*see generally Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.*, 131 AD3d 259, 266 [1st Dept 2015]).

The definition of a “judicial subpoena” includes subpoenas that are made returnable before the court (*see Irizarry v New York City Police Dept.*, 260 AD2d 269, 271 [1st Dept 1999]; *Matter of Cambridge Packing Co, Inc. v LaJaunie*, 2019 NY Slip Op 30689[U], *3, 2019 NY Misc LEXIS 1210, *3-4 [Sup Ct, N.Y. County, Mar. 18, 2019] [Kelley, J.]; *4720 15th Ave., LLC v*

Jacobson, 2017 NY Slip Op 30318[U], *3-4, 2017 NY Misc LEXIS 615, *4 [Sup Ct, N.Y County, Feb. 17, 2017]; *Lyon Financial Services v Pinto Trading Co.*, 2009 NY Slip Op 51783[U], *2-3, 24 Misc 3d 1237[A], 2009 NY Misc LEXIS 2164, *5-6 [Sup Ct., Kings County, Aug. 17, 2009]).

Although the subject subpoena was not returnable in court, it nonetheless must be characterized as a judicial subpoena, inasmuch as the definition of that term also

“embraces subpoenas issued by an officer of the court (such as an attorney) at any stage of a judicial proceeding, regardless of whether the subpoena was specifically returnable in court”

(*Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d 557, 558 [1st Dept 2021]; see *Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d 614, 614 [1st Dept 2020]; see also *Matter of Ling v Sans Souci Owners Corp.*, 187 AD3d 755 [2d Dept 2020]). Hence, CPLR 2308(b)(1), which applies only to nonjudicial subpoenas, and requires that a motion to compel compliance be made prior to seeking a contempt ruling, is not applicable here (see *Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d at 614; cf. *Reuters, Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337, 341 [1st Dept 1997] [applying that rule to enforcement of nonjudicial subpoena; *Dias v Consolidated Edison Co. of New York, Inc.*, 116 AD2d 453, 454 [1st Dept 1986] [same]), and that branch of the motion seeking relief pursuant to that section must be denied. Rather, upon the defendant’s failure to comply with the information subpoena issued by the plaintiff’s attorney, the plaintiff was entitled immediately to move to hold the defendant in civil contempt (see *Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d at 558; *Douglas Elliman, LLC v TWP Real Estate, LLC*, 189 AD3d at 614).

“In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed” (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; see Judiciary Law § 753[A][3]). The movant also must 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 movant’s rights (see *450 West 14th St.*

Corp. v 40-56 Tenth Avenue, LLC, 15 AD3d 166, 167 [1st Dept 2005]; see also *Dietrich v Michij*, 57 AD3d 1527, 1527 [4th Dept 2008] [applying rule to judgment debtor who refused to comply with prior order]). “[W]ilfulness is not an element of civil contempt” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 35 [2015]). A civil contempt must be proven by clear and convincing evidence (see *Classe v Silverberg*, 168 AD3d 603, 604 [1st Dept 2019]). CPLR 2308(a) provides that the “[f]ailure to comply with a subpoena issued by a judge, clerk or officer of the court,” such as an attorney, “shall be punishable as a contempt of court” (see *Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d at 558) in the same manner as an order expressing an unequivocal mandate (see *Wenig Saltiel, LLP v Bozeman*, 76 Misc 3d 135[A], 2022 NY Slip Op 50939[U], *2, 2022 NY Misc LEXIS 4993, *3 [App Term 2d Dept, 2d, 11th & 13th Jud Dists, Sep. 23, 2022]).

The plaintiff has established by clear and convincing evidence that the defendant failed to comply with the judicial subpoena that was personally delivered to him, and that the contempt impaired and prejudiced the plaintiff’s rights. Hence, the defendant must be held in civil contempt. The defendant may purge his contempt by appearing for a deposition as set forth herein.

Although CPLR 2308(a) does not expressly provide for an award of attorneys’ fees incurred in making a successful contempt motion in connection with a judicial subpoena, the court is authorized by Judiciary Law § 773 to award such fees in connection with a motion pursuant to CPLR 2308(a) (see *Impact Car Park v Mutual Redevelopment Houses*, 2021 NY Slip Op 30950[U], *4-5, 2021 NY Misc LEXIS 1316, *5-6 [Sup Ct, N.Y. County, Mar. 26, 2021]). A contemnor must also pay a penalty of \$150 to a successful movant (see CPLR 2308[a]).

In light of the foregoing, it is

ORDERED that the plaintiff’s motion is granted to the extent that

- (a) the defendant is held in civil contempt and, if he does not purge the contempt by appearing for a deposition on March 21, 2023, at 10:00 a.m., or at any later date and time agreed to by the plaintiff, and thereupon comply with the subpoena by then giving testimony at the offices of the plaintiff’s counsel, or at any other place of the plaintiff’s choosing, or remotely if the plaintiff

consents to conduct the deposition remotely, the court shall schedule a hearing to determine the penalty for the contempt; and

(b) the plaintiff shall be awarded his reasonable attorneys' fees incurred in making the instant motion upon submitting to the court an affirmation of attorneys' services,


and the motion is otherwise denied; and it is further,

ORDERED that, on or before March 21, 2023, the defendant shall pay the plaintiff the sum of \$150.00 as and for a statutory penalty; and it is further;

ORDERED that, on or before February 17, 2023, the plaintiff shall serve a copy of this order with notice of entry upon the defendant either by personal delivery or, if the email address is still active, via email at Loduca@barstoolsports.com.

This constitutes the Decision and Order of the court.

2/2/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<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"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE