

Golden Bridge LLC v Dana

2023 NY Slip Op 31654(U)

May 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 516017/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May 2023

HONORABLE FRANCOIS A. RIVERA

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GOLDEN BRIDGE LLC d/b/a
GOLDEN BRIDGE FUNDING LLC,

DECISION & ORDER
Index No.: 516017/2022

Plaintiff,

- against -

ISRAEL DANA,

Defendant.
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On January 23, 2023, plaintiff Golden Bridge LLC filed an order to show cause seeking an order pursuant to CPLR §§ 2308 and 5251 finding defendant Israel Dana (hereinafter Dana or defendant) in civil and criminal contempt based on Dana's alleged willful refusal to produce documents and appear for a deposition pursuant to a subpoena duces tecum and ad testificandum.

On February 3, 2023, the Court signed the order to show cause, set the return date for March 6, 2023, and directed personal service of the order to show cause on the defendant on or before February 17, 2023.

On March 15, 2023, the Court signed an order superseding the February 3, 2023, order to show cause. The March 15, 2023, order set the return date for April 20, 2023, and directed personal service of the order on the defendant on or before April 4, 2023.

The plaintiff was directed to file proof of service and produce a copy of the proof of service on the return date.

On March 23, 2023, the plaintiff filed proof of service of the March 15, 2023, order as directed. The defendant did not appear on the return date of the instant motion or submit opposition to same.

BACKGROUND

On June 8, 2022, the plaintiff obtained a Kings County Clerk judgment by confession against the defendant in the amount of \$1,090,225.00 pursuant to CPLR 3218. On September 2, 2022, the plaintiff filed an affidavit with the Kings County Clerk's office attesting to the service upon the defendant by plaintiff's process server, Melissa Bondi (hereinafter Bondi) of a subpoena duces tecum and ad testificandum with a restraining notice (hereinafter the subpoena papers). The subpoena papers advised the defendant, inter alia, that he was commanded to appear and attend before a notary public at Zeichner Elliman & Krause LLP, 1211 Avenue of the Americas, 40th Floor, New York, New York 10036 at 10:00 a.m. on September 22, 2022, and at any recessed or adjourned date for the taking of a deposition under oath upon oral questions on all matters relevant to the satisfaction of the judgment. The defendant was further commanded to produce for examination by September 12, 2022, the books, papers, and records that were set forth on a Schedule attached to the subpoena. The defendant did not respond to the subpoena.

MOTION PAPERS

The plaintiff's motion papers consist of the January 23, 2023, order to show; the March 15, 2023, superseding order to show cause; an affirmation of service, a memorandum of law, an affirmation in support and three annexed exhibits labeled A through C. Exhibit A is a copy of the judgment by confession. Exhibit B is a copy of the subpoena papers. Exhibit C is an affidavit of service of the subpoena papers.

LAW AND APPLICATION

CPLR § 5224 provides as follows:

“Subpoena; procedure. (a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served: 1. a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein; or 2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or 3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope.”

CPLR § 2303 provides in pertinent part as follows:

“Service of subpoena; payment of fees in advance. (a) A subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons, except that where service of such a subpoena is made pursuant to subdivision two or four of section three hundred eight of this chapter, the filing of proof of service shall not be required and service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter, or upon the later of the affixing or mailing of the subpoena, if made pursuant to subdivision four of section three hundred eight of this chapter.”

Judiciary Law § 753(a)(5), titled, “Power of courts to punish for civil contempt,”

provides in pertinent as follows:

“(a) 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, in any of the following cases: [...] (5) 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.”

No subpoena under CPLR 5224 commences a special proceeding. Each is but an adjunct of the action that gave rise to the judgment, and ordinarily bears its caption. But the subpoena is one of the so-called “supplementary proceedings,” which means that when used in conjunction with a judgment of a town or village court, it must issue out of the supreme court or a county court (*see* CPLR 5221; Siegel, *New York Practice* §§ 492, 493 [5th Ed. 2011]).

CPLR 2308 (a) pertains to disobedience of a judicial subpoena and provides in pertinent part as follows:

“(a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply (CPLR 2308).”

CPLR 5251 provides in pertinent part as follows.

“Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an

examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court (CPLR 5251).”

CPLR § 2305(b) provides that a subpoena duces tecum may be joined with a subpoena ad testificandum or may be issued separately. The plaintiff served a CPLR 5224 subpoena upon the defendant directing him to appear for a deposition and to produce certain documents. Bondi testified to making prior attempts to effect personal service of the subpoena papers upon the defendant at his residence in Brooklyn, New York on the following dates and times in August of 2022; on the 15th at 11:51 AM, the 17th at 2:11 p.m., the 18th at 7:27 p.m., the 20th at 8:18 p.m., the 23rd at 7:44 a.m. and at 9:02 a.m. After these unsuccessful attempts at personal delivery of the subpoena papers, Bondi then affixed them to the door of the residence on August 23, 2022, at 9:02 AM. Bondi then mailed a copy of the subpoena papers to the defendant at the above address with the envelope marked “personal and confidential” (CPLR 308) not indicating on the outside thereof, by return address or otherwise that the subpoena papers were from an attorney or concerns an action against the defendant.

Bondi’s affidavit demonstrates that the plaintiff served the subpoena papers on the defendant using affix and mail service as set forth in CPLR 308 (4). However, a plaintiff may only resort to service pursuant to CPLR 308 (4) where service pursuant to CPLR 308 (1) and (2) cannot be made with due diligence (*County of Nassau v Lotosky*, 34 AD3d 414 [2d Dept 2006]). To satisfying the due diligence requirement of CPLR 308 (4), it must be shown that the process server made genuine inquiries about the defendant's

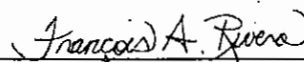
whereabouts and place of employment (*Est. of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007]). There is nothing in the record to indicate that the process server made any attempt to inquire about the defendant's whereabouts and place of employment (*County of Nassau v Yohannan*, 34 AD3d 620 [2d Dept 2006], citing *Walker v Manning*, 209 AD2d 691, 619 [2d Dept 1994]). Under these circumstances, the attempted service of the subpoena papers upon the defendant pursuant to CPLR 308 (4) was defective as a matter of law. Consequently, the instant motion seeking an order holding the defendant in contempt for failing to respond to the subpoena papers must be denied (*Matter of Cadles of Grassy Meadows II, L.L.C. v ASI 2, Inc.*, 26 Misc 3d 1218 [A] [Sup Ct, Kings County 2010]).

CONCLUSION

The order to show cause by plaintiff Golden Bridge seeking an order pursuant to CPLR §§ 2308 and 5251 finding defendant Israel Dana in civil and criminal contempt for willful refusal to produce documents and appear for deposition pursuant to subpoena duces tecum and ad testificandum is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.