

**Elkay Plastics Co., Inc. v AstZen Group LLC**

2023 NY Slip Op 31952(U)

June 7, 2023

Supreme Court, New York County

Docket Number: Index No. 652784/2022

Judge: Melissa A. Crane

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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. MELISSA A. CRANE PART 60M**

*Justice*

-----X

ELKAY PLASTICS CO., INC.,

Plaintiff,

- v -

ASTZEN GROUP LLC, BRYAN A. MCKENNA

Defendant.

-----X

INDEX NO. 652784/2022

MOTION DATE 05/16/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for CONTEMPT.

This commercial dispute stems from several arbitration awards and interim awards issued in the matter of *Elkay Plastics Co., Inc. v. AstZen Group LLC and Bryan A. McKenna, Esq.* (AAA Case No. 01-21-0004-8037), involving petitioner Elkay Plastics Co., Inc. (“Elkay”), and respondents AstZen Group LLC (“AstZen”) and Bryan A. McKenna, Esq. (“McKenna”). The court presumes familiarity with the facts underlying this 2022 case but provides the following procedural facts as relevant to this motion.

In its August 1, 2022 dated petition, Elkay moved to confirm the second interim award and final interim award, and also sought the costs incurred in this case, prejudgment interest, and post judgment interest (Doc 14 [Notice of Petition]). On January 17, 2023, the court granted the petition and confirmed the second interim award [dated 4/26/22] and the final award [dated 7/25/22] rendered in petitioner’s favor, and as against the respondents (Doc 26 [1/17/23 Decision]).

Now, in Motion Sequence No. 02, Elkay moves for an order, pursuant to CPLR 2308(b), holding respondent McKenna in contempt of court, adjudging McKenna liable to Elkay in an amount not to exceed \$50, and issuing a warrant directing a sheriff to bring McKenna into Court

or, alternatively, compelling McKenna to comply with the March 2, 2023 dated information subpoena served upon him (Doc 33 [Notice of Motion]). For the reasons discussed below, the motion is granted in part.

### **Discussion**

In support of its motion, Elkay argues that the information subpoena was personally served upon McKenna on March 3, 2023 (Doc 34 [Surprenant Affirmation] ¶ 4; Doc 36 [Information Subpoena AOS]). Elkay further argues that the information subpoena listed a return date that was seven (7) days after the initial service, meaning that McKenna had until March 10, 2023 to respond (Doc 34 [Surprenant Affirmation] ¶ 5). Elkay has also submitted copies of the affidavit of service for the Information Subpoena (Doc 36 [Subpoena AOS]), as well as the affidavit of service for this motion for contempt (Doc 37 [Contempt Motion AOS]).

In his [late] affirmation in opposition, McKenna contends that “[o]n April 25, 2023, [he] sent by email to Petitioner’s counsel [his] response to the information subpoena sent by Petitioner” (Doc 39 [McKenna Affirmation]). To support his position, McKenna submits a copy of the email transmission he sent to Elkay’s counsel, Ms. Surprenant (*id.*).

The court permitted petitioner to file a reply to McKenna’s late opposition. In its reply, petitioner contended that McKenna’s response disclosed nothing relating to the relevant escrow account, that he also failed to mention his separate CitiBusiness checking account and the dozens of transfers and payments into and out of these accounts, that he has actively engaged in numerous deceptions before the court, that he falsely affirmed that he responded to the subpoena when he was fully aware that his response was insufficient and misleading, and that his refusal to comply with the subpoena has prevented Elkay from satisfying the judgment issued by this court (Doc 43 [Reply]).

First, McKenna did not respond to the information subpoena in the required 7-day period. Thus, he has waived any objections he could have raised to the information subpoena (*see Lantern Endowment Partners, LP v Bluefin Servicing Ltd.*, 2023 N.Y. Slip Op. 31240[U], 4 [Sup Ct, NY County 2023] [“(Defendant’s) failure to object to the Information Subpoena or move to quash the Information Subpoena within the time permitted under CPLR 5224(a)(3) amounts to waiver.”], citing *Cornell Fed. Credit Union v Thorpe*, 199 AD2d 936, 937 [3d Dept 1993], *In re Landberg v National Enterprises Inc.* [Sup Ct, New York County 2006]). The Information Subpoena was served on March 3, 2023 and the response was due on March 10, 2023. McKenna does not contest that he received the subpoena on March 3, 2023.

Next, McKenna’s tardy 4/25/23 response to the information subpoena is deficient (Doc 44 [Response to Subpoena]). The information subpoena served on McKenna sought information regarding his assets so that Elkay might satisfy its judgment against him. Specifically, the subpoena required McKenna to “[i]dentify all accounts held at any bank, savings and loan association, or other financial institution, in which [McKenna] [has] a legal, equitable, or beneficial ownership interest” (Doc 35 [Information Subpoena]). Additionally, McKenna was required to “[i]dentify by date, amount, and payee of any and all distributions or payments of any kind made to [him] in the last two (2) years...” (*id.*). Based on petitioner’s submissions in reply, McKenna failed to include the escrow account underlying the transaction in this dispute in his response. Additionally, other information subpoenas that Elkay served on other entities, such as Citibank (Doc 45 [Citibank Information Subpoena]), demonstrate that McKenna’s response also failed to mention or include various transfers from that escrow account to other accounts, including ones that he controls at that same bank. Specifically, McKenna did not mention the CitiBusiness checking account into which he began transferring funds from the escrow account shortly after Elkay made its first deposit on January 29, 2021.

McKenna's tardy response to the information subpoena is deficient at least with respect to inquiry 6. Thus, McKenna is in civil contempt of the Information Subpoena dated 3/2/23. In order to purge itself of the contempt, McKenna must serve a supplemental response to the information subpoena or pay his obligation under the judgment within 30 days of service of this order upon him. If McKenna fails to purge this contempt within 30 days of service of this decision and order with notice of entry, petitioner may move for an order seeking additional relief. Pre-motion conferences are required.

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

**ORDERED** that Motion Seq. No. 02 is granted in part; and it is further

**ORDERED and ADJUDGED** that Respondent McKenna is in contempt of the March 2, 2023 information subpoena; and it is further

**ORDERED and ADJUDGED** that that the contempt was calculated to and did actually defeat, impair, impede, and prejudice the rights of the judgment creditor herein, and it is further

**ORDERED** that for the contempt of this court, McKenna is fined the sum of \$50 to be paid to judgment creditor's attorney, Greenberg Traurig, LLP, within ten (10) days after service of a copy of this order with notice of entry, and it is further

**ORDERED** that defendant Bryan A. McKenna, Esq. must purge his contempt by adequately supplementing his response to the March 2, 2023 dated information subpoena or satisfying the judgment against him in the amount of \$4,778,425.80, plus any applicable interest, within 30 days after service of this order with notice of entry upon him; and it is further

**ORDERED** that petitioner shall serve a copy of this order with notice of entry upon all respondents by certified mail, return receipt requested, and proof of service of this order must be filed with the County Clerk in accordance with the procedures set forth in the Protocol on

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-filing” page on the court’s website –[www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

6/7/2023

DATE



MELISSA A. CRANE, J.S.C.

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