

Poretsky v Bartleby & Sage, Inc.

2023 NY Slip Op 33300(U)

September 20, 2023

Supreme Court, New York County

Docket Number: Index No. 652968/2018

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR **PART** **34M**

Justice

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GRETA PORETSKY,

Plaintiff,

- v -

BARTLEBY AND SAGE, INC., SAGE GENERAL
STORE, INC., DAVIDOFF HUTCHER & CITRON, LLP,
DAVID WANDER, LESLIE NILSSON,

Defendants.

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INDEX NO. 652968/2018

MOTION DATE 07/20/2023

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283

were read on this motion to/for CONTEMPT.

In this action for, among other claims, breach of contract and breach of fiduciary duty, plaintiff Greta Poretsky (plaintiff), now moves pursuant to CPLR § 2308 and/or Judiciary Law § 753, to hold non-parties, David Wander (Wander) and Davidoff, Hutcher & Citron, LLP (DHC) (collectively, the non-parties) in contempt for their alleged willful disobedience of this Court’s May 19, 2023 decision and order (the May 2023 order) directing the non-parties to immediately and substantively respond to the subpoenas issued against each of them and for attorneys’ fees in the amount of \$5,000.00 for bringing this application. Wander opposes the motion. For the following reasons, the motion is granted.

On August 24, 2019, the non-parties, who were at the time defendants in this matter moved to dismiss plaintiff’s claims against them (motion sequence 002). On January 15, 2019, the motion to dismiss was granted. On February 21, 2019, plaintiff served a subpoena duces tecum upon DHC and a subpoena ad testificandum upon Wander. The non-parties did not respond. On April 12, 2019, plaintiff moved to hold the non-parties in contempt for failing to respond to the subpoenas, and on May 9, 2019, the non-parties cross-moved to quash (motion sequence 003). On July 25, 2019, plaintiff’s motion for contempt was denied, and the cross-motion to quash the subpoenas was granted. On August 10, 2020, DHC filed a notice of appearance as counsel for the remaining defendants, Bartelby and Sage, Inc. Sage General Store, Inc., and Leslie Nilsson. On August 25, 2020, plaintiff moved to disqualify Wander from representing the remaining defendants (motion sequence 005). On October 14, 2020, plaintiff’s motion to disqualify was denied. On January 19, 2021, plaintiff moved to renew her motion to disqualify the non-parties from representing the remaining defendants in this action and plaintiff’s motion to quash (motion sequence 006). On May 22, 2023, plaintiff’s motion to renew was granted, and the non-parties were directed to respond to the subpoena by June 23, 2023. Specifically, the May 2023 order states that Wander and DHC “[s]hall respond to [p]laintiff’s

subpoenas and provide the information and/or evidence requested in the subpoenas, over their objections, within thirty days of Entry of this Order (NYSCEF doc. no. 282 at 4). Notice of entry of the decision and order in motion sequence 006 was filed on May 24, 2023, and served by NYSCEF upon DHC, counsel for Wander. The non-parties have not responded to the respective subpoenas.

“To prevail on a motion to punish for civil contempt, the movant must establish, by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct” (*Bernard-Cadet v Gobin*, 94 AD3d 1030, 1031 [2d Dept 2012]; *see* Judiciary Law § 753[A][3]).

Plaintiff establishes her entitlement to an order holding the non-parties in contempt. The May 2023 order explicitly and in no uncertain terms directed the non-parties to respond to the subpoenas by a date certain, and there is no dispute that the non-parties failed to respond to the subpoenas. The Court further finds that the non-parties action were calculated to, and actually did defeat, impair, impede, or prejudice the plaintiff’s rights and remedies (*see Mendoza-Pautrat v Razdan*, 160 AD3d 963, 964 [2d Dept 2018] [“Prejudice is shown where the party’s actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party”] [internal quotation marks and citations omitted]). There is clear and convincing evidence that the non-parties refusal to comply with the subpoenas impeded plaintiff’s ability to prosecute her case. The non-parties’ failure to respond to the subpoenas deprive plaintiff of, among other things, communications between Wander/DHC concerning the remaining defendants’ letter to a mortgage consultant and other mortgage issues, which are relevant to plaintiff’s claims.

Instead, Wander contends that he did not have notice of the May 2023 order because he left DHC in August 2021. There is no dispute that DHC was served a copy of the May 2023 order. In fact, on May 18, 2023, the Court emailed all counsel of record listed on NYSCEF, including counsel for DHC, directing them to review the proposed decision and order resolving motion sequences 006 and 007, and further stated that “[a]ny objections to be made to the Court by May 19, 2023, or waived.” Neither DHC nor Wander opposed. Further, DHC represented Wander in the initial motion to hold DHC and Wander in contempt, and there is no indication that DHC was relieved as counsel by stipulation or by motion pursuant to CPLR 321(a) or that DHC appeared on behalf of Wander on a limited basis pursuant to CPLR 321(d) (*see Farage v Ehrenberg*, 124 AD3d 159, 165 [2d Dept 2014] [“counsel’s authority as an attorney of record in a civil action continues unabated until the withdrawal, substitution, or discharge is formalized in a manner provided by CPLR 321”]). As DHC was counsel for Wander at the time plaintiff served the notice of entry of the May 2023 order, and DHC was counsel for Wander at the time, the Court finds that Wander had notice of the May 2023 order and its directives.¹

To the extent that Wander argues that he does not have documents responsive to the subpoena, Wander may state as much in his response to the subpoena., not in opposition to

¹ While not raised by the parties, a contempt hearing is not required, as there is no factual dispute that the Court is unable to resolve on the papers alone (*see Jaffe v Jaffe*, 44 AD3d 825, 826 [2d Dept 2007] [“A hearing is not mandated in every instance where contempt is sought; it need only be conducted if a factual dispute exists which cannot be resolved on the papers alone”] [internal quotation marks and citations omitted]).

plaintiff's motion for contempt (*see Carl Andrews & Assocs., Inc. v Off. of Inspector Gen. of State*, 85 AD3d 633, 634 [1st Dept 2011]).

Plaintiff has also established his entitlement to fees related to the instant application. “Judiciary Law § 773 permits recovery of attorney's fees from the offending party by a party aggrieved by the contemptuous conduct” (*Vider v Vider*, 85 AD3d 906, 908 [2d Dept 2011] [internal quotation marks and citations omitted]). “Counsel fees that are documented and directly related to contemptuous conduct are generally recoverable unless proven excessive or reduced in a court's reasoned decision” (*id.* [internal quotation marks and citations omitted]). Plaintiff does not submit any proof demonstrating the fees she is entitled. Accordingly, this matter is scheduled for a hearing to determine the amount of attorneys' fees and costs owed to plaintiff in connection with the instant motion.

Accordingly, it is hereby

ORDERED that the application of plaintiff, Greta Poretsky, to punish non-parties, David Wander and Davidoff, Hutcher & Citron, LLP, for contempt of court is granted; and it is further

ORDERED and ADJUDGED that non-party David Wander is guilty of contempt of court for failure to comply with the May 19, 2023 decision and order, requiring him to respond to the February 21, 2019 subpoena, and David Wander shall comply with such decision and order within twenty (20) days of receipt of a copy of this order; and it is further

ORDERED that non-party David Wander has the opportunity to purge himself of the contempt by complying with the May 19, 2023 decision and order issued in connection with this action within twenty (20) days of receipt of this order; and it is further

ORDERED and ADJUDGED that non-party Davidoff, Hutcher & Citron, LLP, is guilty of contempt of court for failure to comply with the May 19, 2023 decision and order, requiring it to respond to the February 21, 2019 subpoena, and Davidoff, Hutcher & Citron, LLP shall comply with such decision and order within twenty (20) days of receipt of a copy of this order; and it is further


ORDERED that non-party Davidoff, Hutcher & Citron, LLP has the opportunity to purge himself of the contempt by complying with the above-referenced May 19, 2023 decision and order issued in connection with this action within twenty (20) days of receipt of this order; and it is further

ORDERED that the issue of attorneys' fees to be assessed against the non-parties is referred to a Special Referee to hear and determine, and that within sixty (60) days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that plaintiff's request for legal fees, costs and expenses, plus an additional \$250.00 as to each party, is granted pursuant to Judicial Law §§ 753 and 773, which shall be furnished to counsel for plaintiff within twenty (20) days; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

9/20/2023
DATE

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