

**Tabor v Swig**

2023 NY Slip Op 33643(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151945/2022

Judge: Leslie A. Stroth

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

**PRESENT: HON. LESLIE A. STROTH** PART 12

Justice

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TIMOTHY TABOR, AKIKO TABOR,  
Plaintiff,

- v -

KENT SWIG,  
Defendant.

INDEX NO. 151945/2022  
MOTION DATE 06/13/2023,  
06/13/2023  
MOTION SEQ. NO. 001 003

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 76, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The above-referenced contempt proceeding is a companion action to *Timothy Tabor, et al. v 148 Duane LLC*, index no. 156655/2018 (the underlying action). In the underlying action, plaintiffs Timothy Tabor and Akiko Tabor seek declaratory judgment and injunctive relief for the alleged refusal of their landlord 148 Duane LLC to provide them with, *inter alia*, shelter from the elements, elevator service, fire safety precautions, air conditioning, or adequate heat.<sup>1</sup> An order and judgment was entered in the underlying matter in the amount of \$197,633.30, with continuing payment obligations (the judgment). *See* NYCEF doc. no. 4.

Timothy Tabor and Akiko Tabor (petitioners) commenced this proceeding against Kent Swig (Mr. Swig or respondent), member of 148 Duane LLC, seeking to hold him in contempt for

<sup>1</sup> The procedural history of that matter is more fully set forth in this Court's decision and order dated October 16, 2023 which grants, in part, plaintiffs' motion to liquidate the appeal bond, under index no. 156655/2018.

“failing to respond and appear for deposition after being duly served with an information subpoena, subpoena duces tecum and deposition subpoena” in aid of enforcing the judgment in the underlying action. *See* NYSCEF doc. no. 4.

### I. Motion for Contempt

By order to show cause (motion sequence 001), petitioners seek to hold respondent in contempt pursuant to Judiciary Law §§ 752, 754, and 756, and CPLR 2308 and 5251. On May 27, 2022, upon respondent’s representation that he responded to the information subpoena and that he attempted to negotiate a date for his deposition, Justice Barbara Jaffe ordered that:

Petitioners’ application for an order holding respondent in contempt to be held in abeyance pending the production of respondent of proof of having sent to petitioners’ counsel more than 1,000 documents, or sending them to petitioners’ counsel within 20 days of the date of this order, and respondent’s appearance for a deposition within 30 days thereafter.” *See* NYSCEF doc. no. 29.

Justice Jaffe further ordered that, “...if respondent fails to comply timely, petitioner may submit an affirmation of non-compliance, at which time the motion for contempt will be decided.” *Id.*

On April 21, 2023, petitioners submitted an affirmation of non-compliance regarding the allegedly outstanding discovery that has not been provided. *See* NYSCEF doc. no. 88. Petitioners also affirm that respondent sat for a deposition on August 5, 2022, August 11, 2022, and November 10, 2022. Respondent does not respond to petitioners’ affirmation of non-compliance.

Pursuant to Judiciary Law § 753(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.

Notably, “[a]pplications to punish as a civil contempt the noncompliance with court directives are generally addressed to the sound discretion of the court.” *In re Hildreth*, 28 AD2d 290, 292 (1st Dept 1967). Further, “contempt adjudication generally requires the exercise of the court’s discretion in determining the nature and extent of the punishment to be imposed, in determining

whether or not the respondent should have an opportunity to purge himself of the contempt and in fixing the conditions relative thereto." *Id.*

It is uncontested that Mr. Swig appeared for a deposition on three separate dates August 5, 2022, August 11, 2022, and November 10, 2022. Moreover, Mr. Swig also at least partially complied with Justice Jaffe's order in that he provided his voluminous responses to the information subpoena and subpoena duces tecum, as directed. Petitioners take issue with the sufficiency of the document responses, not whether respondent sent the over 1,000 documents to them. Accordingly, in the Court's discretion, a judgment of contempt is excessive at this time, and respondent must be afforded the opportunity to respond to the purported deficiencies raised by petitioners.

Therefore, the parties are directed to appear for a compliance conference to determine what discovery remains outstanding, and for the Court to set a final deadline for same, after which petitioners may renew their contempt motion provided respondent fails to comply.

## **II. Motion to Quash and/or for a Protective Order**

In an attempt to enforce the judgment, petitioners also served a subpoena duces tecum and ad testificandum dated December 6, 2022, upon Ms. Kawana Mills, the administrative assistant of Kent Swig. Petitioners seek to depose Ms. Mills about the money judgment issued by the Court in this action, although she is not a party to this action.

Non-party Ms. Mills moves to quash the subpoena on the grounds that, *inter alia*, no leave of court has been given for discovery in this special proceeding. Petitioners oppose and cross-move for an order granting leave to issue and serve the subpoenas on Ms. Mills and directing her to comply with same.

Pursuant to CPLR 5223, "[a]t any time before a judgment is satisfied or vacated," a judgment creditor may issue a subpoena on a non-party seeking disclosure of material "relevant to

the satisfaction of the judgment.” Moreover, in a contempt proceeding, such as this, leave of court must be obtained before proceeding with discovery. *See* CPLR 408; *Long Island Trust Co. v Rosenberg*, 82 AD2d 591, 597-98 (2d Dept 1981) (allegations of non-party contempt must be brought in a special proceeding). A court will quash discovery subpoenas that have been pursued without leave of court in a special proceeding. *See In re Burden*, 5 AD3d 1, 2-3 (1st Dept 2004) (subpoenas quashed in underlying related proceeding where respondent failed to comply with CPLR 408).

At the outset, the Court notes that it compelled Ms. Mills’ compliance with a substantially similar subpoena in the underlying action in a decision and order dated October 16, 2023.<sup>2</sup> In essence, this motion, although brought within a special contempt proceeding, is duplicative of the relief sought in the underlying motion. However, this matter is a special proceeding, which requires leave of the Court to conduct discovery. In this special proceeding, petitioners were required to seek leave of Court before issuing the subpoena and causing it to be served on Ms. Mills. They did not seek leave. As such, the subpoena is a nullity and is properly quashed.

Moreover, even if petitioners had appropriately sought leave to conduct discovery, the subpoenas served upon Ms. Mills are wholly irrelevant to the central issues in this proceeding, which solely involves civil contempt against Mr. Swig for his purported failure and/or refusal to respond to subpoenas. Ms. Mills is not a party to this action, and the broad subpoenas served upon her will not serve to establish whether Mr. Swig has failed to comply with a prior court order. Therefore, the subpoenas at issue are not only duplicative of those served in the underlying action, but they are also irrelevant to allegations and relief sought in the instant petition.

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<sup>2</sup> Unlike here, no prior leave of Court is needed in the underlying action, which is not a special proceeding and for which “[t]here shall be full disclosure of all material and necessary.” CPLR 3101 (a).

As such, the motion of non-party Kawana Mills to quash the subpoena dated December 6, 2022, and petitioners' cross-motion for leave to conduct discovery is denied.

**III. Conclusion**

Accordingly, it is

ORDERED that petitioners' order to show cause for contempt (motion sequence 001) is denied, without prejudice to renew their application following conference with the Court; and it is further

ORDERED that the motion of non-party Kawana Mills to quash and/or for a protective order (motion sequence 003) is granted to the extent of quashing the subpoena duces tecum and ad testificandum served upon her dated December 6, 2022; and it is further

ORDERED that the matter is scheduled for a conference on November 30, 2023 at 2:15 p.m. at 80 Centre Street, Room 328, New York, New York, to determine what discovery remains outstanding, and for the Court to set a final deadline for same.

The foregoing constitutes the decision and order of the Court.

<u>10/17/2023</u> DATE	<u>/s/ Hon. Leslie A. Stroth /s/</u> LESLIE A. STROTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE