

**Lima v Fort Wash. Intercontinental Assoc., LLC**

2024 NY Slip Op 30688(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 452241/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

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RAFAEL LIMA,

Plaintiff,

- v -

FORT WASHINGTON INTERCONTINENTAL ASSOCIATES, LLC, STELLAR MANAGEMENT, LAURENCE GLUCK, RAMSES CAPELLAN

Defendants.

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INDEX NO. 452241/2021

MOTION DATE 01/02/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66

were read on this motion to/for CONTEMPT.

In this residential landlord-tenant action seeking, inter alia, a declaration that plaintiff is a rent-stabilized tenant, plaintiff moves to hold defendants in contempt for their failure to comply with discovery orders.

BACKGROUND

This is plaintiff's second contempt motion. Plaintiff's first motion, filed on August 11, 2023, alleged that defendants missed their court-ordered deadlines to (1) produce deponents pursuant to plaintiff's May 11, 2023 subpoena, and (2) respond to plaintiff's April 1, 2022 deficiency letter (MS #1, NYSCEF Doc No 31). In support, plaintiff submitted an email exchange between plaintiff's counsel and defendants' counsel in which plaintiff's counsel made several attempts to set deposition dates (NYSCEF Doc No 29); and a copy of plaintiff's deficiency letter, to which defendants did not respond (NYSCEF Doc No 30). On September 21, 2023, the parties appeared for a status conference, during which defendants were directed to respond to plaintiff's deficiency letter by October 5, 2023 and produce deponents for depositions

to take place on October 24, 2023 (NYSCEF Doc No 35). That same day, defendants filed their opposition to plaintiff's motion, arguing that the contempt issue was no longer ripe, since the new deadlines set by the status conference order had not yet passed (NYSCEF Doc No 34). Defendants' opposing papers did not address plaintiff's allegations that defendants failed to comply with prior discovery orders. Defendants produced Smajlje Srdanovic for a deposition on October 24, 2023,<sup>1</sup> in which he repeatedly stated that Francine Schiff would be the appropriate person to ask the questions posed to him (NYSCEF Doc No 55). On November 16, 2023, the parties appeared for another status conference, during which plaintiff's motion was denied, with leave to file a second contempt motion if plaintiff was not given the opportunity to depose Schiff and re-depose Srdanovic by December 15, 2023 (NYSCEF Doc No 49).

As contemplated by the December 15, 2023 status conference order, when defendant failed to produce these deponents, plaintiff filed the instant motion on December 27, 2023 for contempt and to compel compliance with the court's prior orders (MS #2, NYSCEF Doc No 60). Plaintiff also seeks an award of attorney's fees in connection with his attempts to depose defendants and in bringing both contempt motions. On January 18, 2024, the parties submitted a stipulation of adjournment, whereby plaintiff planned to depose Schiff and reserved the right to re-depose Srdanovic by March 1, 2024 (NYSCEF Doc No 62). On January 30, 2024, defendants filed their opposition, arguing—in similar fashion to their MS #1 opposition—that plaintiff's motion is unripe because the new discovery deadlines set in the stipulation have not yet passed (NYSCEF Doc No 64). Defendants also argue that the subpoenas are too broad and vague though they admit they did not timely object to them. Once again, defendants do not address

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<sup>1</sup> Plaintiff notes that it was only after plaintiff's first contempt motion that defendants agreed to produce a deponent, and even then, his knowledge of the subject matter of the case was inadequate (*compare* NYSCEF Doc No 52 [subpoena designation request] *with* NYSCEF Doc No 55 [Srdanovic deposition transcript]).

plaintiff's allegations that defendants failed to comply with prior orders, nor do they explain their non-compliance. The parties appeared for another status conference on February 22, 2024, during which plaintiff's counsel advised that defendant's counsel still had not responded to plaintiff's April 1, 2022 deficiency letter, nor had he responded to communications regarding scheduling Srdanoric and Schiff for depositions (NYSCEF Doc No 67).

### DISCUSSION

Pursuant to Judiciary Law § 753(A)(3), “[a] court of record has power to punish . . . 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 order to prevail on a motion for contempt, the moving party must demonstrate: (1) a lawful order of the court clearly expressing an unequivocal mandate was in effect; (2) with reasonable certainty that the order has been disobeyed; (3) the party to be held in contempt had knowledge of the court's order; and (4) prejudice to the right of a party to the litigation (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). The movant has the burden to establish contempt by clear and convincing evidence (*id.* at 19).

Plaintiff has met this burden. First, the status conference orders and stipulation of adjournment (NYSCEF Doc Nos 21, 22, 24, 39, 41, 49, 63) clearly indicate that defendants were ordered to produce the deponents and respond to plaintiff's deficiency letter. More specifically, the status conference order dated November 16, 2023 provided that the Srdanoric and Schiff depositions were to take place by December 15, 2023 (NYSCEF Doc No 49). Second, as demonstrated by the stipulation filed on January 18, 2024 indicating that these tasks were still

incomplete as of that date, defendants failed to comply with these orders.<sup>2</sup> Defendants do not argue that they failed to comply with the November 16, 2023 order; rather, they argue that they cannot be held in contempt because they have not (yet) disobeyed the more recent stipulation, which gave them an extension that has not yet passed<sup>3</sup> (NYSCEF Doc No 62 [setting a deposition deadline of March 1, 2024]). However, that the parties stipulated to an extension does not negate defendants' failure to comply with the November 16, 2023 order by the time the stipulation was entered into. Moreover, as of February 22, 2024—eight days before the extended deposition deadline of March 1, 2024—plaintiff's counsel still had not heard back from defendants' counsel regarding the scheduling of the depositions, demonstrating that defendants continue to be uncooperative and that depositions are unlikely to take place even by the most recently extended deadlines (NYSCEF Doc No 67). Third, defendants had knowledge of the court's order, as counsel for defendants appeared at the November 16, 2023 conference during which the December 15, 2023 deadline was set (NYSCEF Doc No 49), and all other status conferences during which they were directed to allow depositions and respond to plaintiff's deficiency letter (NYSCEF Doc Nos 21, 22, 24, 39, 41). Finally, defendants' non-compliance with the court's directives has prejudiced plaintiff's rights, as he has not had the opportunity to depose a person with knowledge of the subject matter of the case (NYSCEF Doc No 55), nor has he received adequate responses to his interrogatories and document demands dated November 15, 2021 (NYSCEF Doc No 30).

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<sup>2</sup> Also notable are the communications between counsel for the parties evidencing prior non-compliance (NYSCEF Doc No 54) and that deadlines to accomplish these two tasks were repeatedly extended *after* the then-existing deadline had passed (NYSCEF Doc Nos 21, 24, 39, 49).

<sup>3</sup> This argument has been made before. Yet, even when it was accepted in MS #1, and defendants were given an extension to make the required production and responses (NYSCEF Doc No 49 [extending deadlines to December 15, 2023]), they failed to comply by that date. In light of this failure, defendants will not be given another extension.

Since plaintiff has demonstrated defendants' contempt by clear and convincing evidence, and defendants have offered no explanation for their failure to comply with the discovery orders except to refer to extensions provided after the fact, plaintiff's motion for contempt and to compel compliance with court orders will be granted.

In light of this determination, the court is required to impose a penalty that is remedial in nature and effect and that is the least possible exercise of the court's power to achieve the proposed end of compliance with its orders (*McCain v Dinkins*, 84 NY2d 216, 229 [1994]). An appropriate penalty under the circumstance is awarding plaintiff attorney's fees and costs in bringing this motion (*Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 173 A.D.3d 401, 402 [1st Dept 2019]). Plaintiff, however, will not be awarded attorney's fees and costs expended in bringing the prior motion, which was denied, or in connection with communicating with opposing counsel.

### CONCLUSION

Accordingly, it is

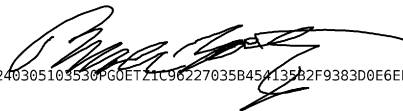
ORDERED that plaintiff's motion to punish defendants for contempt is granted; and it is further

ORDERED that defendants are guilty of contempt of court; and it is further

ORDERED that defendants are compelled to respond to plaintiff's April 1, 2022 deficiency letter and produce Schiff and Srdanoric for depositions, and may purge their contempt by so doing within twenty days of service of notice of entry of this order; and it is further

ORDERED that plaintiff is awarded his attorney's fees and costs incurred in bringing the instant motion, only; and it is further

ORDERED that within twenty days of notice of entry of this order, plaintiff shall submit his attorneys' fees and costs incurred by litigating the instant contempt motion; within fifteen days thereafter defendants are to submit any objections to the fees and costs sought by plaintiff; submissions shall be submitted via NYSCEF and emailed to the Part 47 Clerk at SFC-Part47-Clerk@nycourts.gov.

  
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3/5/2024  
DATE

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PAUL A. GOETZ, 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