

First Funds, LLC v Dante's Cucina, Inc.

2024 NY Slip Op 30991(U)

March 26, 2024

Supreme Court, New York County

Docket Number: Index No. 107276/2008

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

-----X

FIRST FUNDS, LLC,

Plaintiff,

- v -

DANTE'S CUCINA, INC., d/b/a DANTE'S RESTAURANT,
and PASQUALE PICCA,

Defendants.

-----X

INDEX NO. 107276/2008

MOTION DATE 10/24/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13

were read on this motion for CONTEMPT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, the motion to hold defendant Pasquale Picca in contempt of court is granted, without opposition, for the reasons set forth in the moving affirmation of Joseph Sussman, Esq. (NYSCEF Doc. No. 5) and the exhibits attached thereto, in which the court concurs, as summarized herein.

An application for civil contempt requires proof that “a lawful order of the court, clearly expressing an unequivocal mandate, was in effect” (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983], *amended*, 60 NY2d 652 [1983]). Further, “[i]t must appear, with reasonable certainty, that the order has been disobeyed . . . [that] the party to be held in contempt . . . had knowledge of the court's order . . . [and] prejudice to the right of a party to the litigation must be demonstrated” (*id.*). The party applying for a contempt finding has the burden to prove these elements by “clear and convincing evidence” (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Both the CPLR and the Judiciary Law provide that the failure to appear and give testimony when

subpoenaed to do so shall be punishable as a contempt of court (CPLR 2308[a] [“Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court”]; Judiciary Law § 753[A][5] [punishing for civil contempt “(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”]).

Here, defendant Picca previously failed to respond to a post-judgment information subpoena duly served on him by plaintiff to provide documents and testimony in aid of enforcing the judgment obtained against him. This court, by the Hon. Laurence Love, granted plaintiff’s prior motion to hold Picca in contempt of court to the extent of directing him to respond to plaintiff’s subpoena within 30 days of service on Picca of a copy of the decision and order with notice of entry, and to appear for a deposition within 20 days of compliance with the subpoena (decision and order, NYSCEF Doc. No. 3 at 1). The court also advised Picca that on his failure to comply with the order, “this Court may issue sanctions, including but not limited to fine and/or arrest, upon the filing of an affirmation of non-compliance” (*id.* at 2).

Plaintiff served a copy of the order with notice of entry on Picca, who received the documents and then tore them up in front of the process server (affidavit of service of decision and order, NYSCEF Doc. No. 11). He failed to comply with the dictates of the order to respond to the subpoena and appear for a deposition, prompting plaintiff to make the instant motion for contempt (Sussman affirmation, NYSCEF Doc. No. 5, ¶ 12). When the motion papers were served on defendant, he identified himself to the process server, took the papers, “and then denied he was the defendant and attempted to hand them back and refuse service” (affidavit of service of motion papers, NYSCEF Doc. No. 13).

Picca offers no opposition to the motion, and has at no time offered any excuse for his failure to appear. Picca's failure to comply has prejudiced plaintiff's ability to prosecute its case (Judiciary Law § 753[A]; *Matter of McCormick*, 59 NY2d at 583). Given Picca's previous pattern of noncompliance, incarceration is the only means by which Picca may be compelled to obey the mandates of this court. Accordingly, the court finds him in contempt for his failure to appear for deposition, to obey the subpoenas issued for his testimony, and to obey this court's order compelling compliance with the same, and a warrant shall issue for Graves' arrest upon his failure to comply with the provisions of his order. In addition, plaintiffs are entitled to recover their costs and reasonable attorneys' fees incurred as a result of Graves' failure to comply with the subpoenas and the court's prior order, as well as a fine of \$250 (Judiciary Law § 773; *Holskin v 22 Prince St. Assoc.*, 178 AD2d 347, 348 [1st Dept 1991]).

Accordingly, it is hereby

ORDERED that the motion is granted without opposition, and it is further;

ADJUDGED that defendant Pasquale Picca is guilty of a civil contempt of court in that he willfully disobeyed the provisions of the subpoena duces tecum and deposition subpoena dated December 13, 2022, as well as the provisions of the order of the court dated June 5, 2023, by reason of his failure to appear for a deposition and to produce documents and records as lawfully mandated; and it is further

ORDERED that defendant Pasquale Picca must appear for a deposition at the offices of plaintiffs' counsel and produce the records sought by subpoena on or before April 30, 2024; and it is further

ORDERED that defendant Pasquale Picca shall pay to plaintiff's counsel the amount of \$250 as provided by Judiciary Law § 773; and it is further

ORDERED that plaintiffs shall submit an itemization of their costs and reasonable attorneys' fees incurred on or before April 9, 2024, by electronic filing, with a copy by email to the Principal Court Attorney of Part 38 as set forth in the Part Rules; and it is further

ORDERED that plaintiffs shall serve defendant Pasquale Picca in hand with a copy of this order and another copy of the court's prior order dated June 5, 2023, on or before April 2, 2024, and file proof of such service on or before April 5, 2024; and it is further

ORDERED that defendant Pasquale Picca may purge his contempt by complying with the subpoena, appearing for deposition, and paying the fine and plaintiff's costs and reasonable attorneys' fees as set forth above; and it is further

ORDERED that if defendant Pasquale Picca fails to comply with the provisions of this order, then plaintiff shall submit an ex parte order for the issuance of a warrant of incarceration directing the Sheriff of any County of the State of New York wherein defendant Pasquale Picca may be found to seize and arrest said Pasquale Picca forthwith and bring him before this court to be committed or for such further disposition as the court shall direct.

This constitutes the decision and order of the court.

ENTER:



<u>3/26/2024</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<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