

**72 Poplar Townhouse LLC v Board of Mgrs. of the
72 Poplar St. Condominium**

2024 NY Slip Op 32866(U)

August 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 501530/20

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

-----X
72 POPLAR TOWNHOUSE LLC,

Plaintiffs, Decision and order

- against -

Index No. 501530/20

BOARD OF MANAGERS OF THE 72 POPLAR
STREET CONDOMINIUM, RON SION, AMY LEE,
MICHAEL ROSNER, RAKESH MANGAT AND
TORA FISHER BUCKWORTH,

Defendants, August 6, 2024

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The plaintiff has moved seeking to compel subpoenas served upon defendants Amy Lee, Michael Rosner, Rakesh Mangat and Tora Fisher Buckworth and to hold them in contempt for failing to respond to prior subpoenas. Further, the plaintiff seeks attorney fees and costs in connection with the filing of numerous motions seeking these subpoenas. The defendants oppose the motion. Papers have been submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, property located at 72 Poplar Street in Kings County is a cooperative that consists of thirteen residential units and a separate townhouse. Two sets of by-laws were adopted which materially differed in the way common charges were assessed against the unit owners. The by-laws presented by the offering plan stated that common expenses would be assessed

based upon the percentage of ownership of the common interest. However, the by-laws that were recorded changed the percentage owed by the owner of the townhouse. To resolve the discrepancy between the two versions of the by-laws the board called a special meeting to resolve the discrepancy. All of the unit owners participated and a vote to reconcile the discrepancy was approved by 82% of the unit owners. The plaintiff was unhappy with the vote and instituted the within lawsuit. The complaint asserts causes of action for a declaratory judgement the vote and subsequent amendment is void, breach of contract, breach of fiduciary duty, fraud and estoppel. On February 7, 2024 the Appellate Division affirmed the dismissal of some causes of action asserted against the individual defendants but reinstated the causes of action alleging breaches of a fiduciary duty and fraud (see, 72 Poplar Townhouse, LLC v Board of Managers of the 72 Poplar St. Condominium, 224 AD3d 645, 206 NYS3d 89 [2d Dept., 2024]).

The only issue that requires resolution at this time is whether the plaintiff is entitled to attorney's fees and costs that were incurred due to the failure of the individual defendants to comply with subpoenas served.

Pursuant to CPLR §2308(a) the failure to comply with a subpoena can result in contempt of the court and a "penalty not

exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply" (id). Further, pursuant to Judiciary Law §773 such damages that flow from contempt of the court may include reasonable attorney fees (Schwartz v. Schwartz, 79 AD3d 1006, 913 NYS2d 313 [2d Dept., 2010]). Thus, in order to impose any such sanction there must be a finding of contempt.

To establish civil contempt it must be demonstrated there was a lawful order "expressing an unequivocal mandate" and there is reasonable certainty the order was disobeyed and the party being held in contempt knew of the order of the court (McCormick v. Axelrod, 59 NY2d 574, 466 NYS2d 279 [1983]). These requirements must be established by clear and convincing evidence (El-Dehedan v. El-Dehedan, 26 NY3d 19, 19 NYS3d 475 [2015]).

On March 19, 2021 the four defendants were served with subpoenas. Such subpoenas, served by an attorney and an officer of the court are considered judicial subpoenas (see, CadleRock Joint Venture L.P. v. Patterson, 199 AD3d 557, 158 NYS3d 66 [1st Dept., 2021]). Moreover, in an order dated November 17, 2021 the court required the defendants to comply with the subpoenas. There really is no dispute the defendants did not comply with the subpoenas and appear for depositions until the filing of this order to show cause. The defendants argue they did not commit any civil contempt because no rights of the plaintiff were

impaired thereby. It is certainly true that there can be no finding of any contempt if the party is afforded an opportunity to purge the contempt (Yang v. Luo, 103 AD3d 661, 960 NYS2d 129 [2d Dept., 2013]). Thus, "a contemnor will be allowed to purge the contempt by performing the act required, or by undoing the act constituting the contempt" (Carver Federal Savings Bank v. Shaker Gardens Inc., 167 AD3d 1337, 90 NYS3d 653 [3rd Dept., 2018]). In this case although the defendants did not respond to the subpoenas, they have now done so, belatedly purging any contempt. Therefore, no contempt can be imposed upon them and consequently the motion seeking attorney fees and costs must be denied.

So ordered.

ENTER:

DATED: August 6, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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