

Donnelly v Deiacco

2024 NY Slip Op 33236(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 651737/2023

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DANIEL DONNELLY,	INDEX NO.	<u>651737/2023</u>
Plaintiff,	MOTION DATE	<u>08/20/2024</u>
- v -	MOTION SEQ. NO.	<u>005</u>
GISELLE DEIACO, ROBERT DEIACO, KOGV, LLC		
Defendant.	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74, 75, 76, 77, 78, 79

were read on this motion for CONTEMPT AND ORDER OF IMPRISONMENT.

Plaintiff Daniel Donnelly’s (“Plaintiff”) third motion pursuant to Jud. Law §753 or contempt against Defendants Giselle Deiacco and Robert Deiacco (the “Deiacos”) is **granted** to the extent that, should the Deiacos not purge their contempt as directed herein below, a warrant for their imprisonment shall issue.

A. Background

By order dated October 6, 2023, the Court granted Plaintiff’s motion for a default judgment and directed the Deiacos to produce the books and records of Defendant KOGV, LLC (“KOGV”), (NYSCEF 21). The Deiacos did not produce KOGV’s records and Plaintiff moved for contempt.

The Deiacos did not respond to the Court’s Order to Show Cause and, by order dated January 12, 2024, the Court granted the motion for contempt (NYSCEF 34 [“Contempt Order”], 36 [Transcript]). However, the Court afforded the Deiacos a week to purge their contempt before daily fines of \$1,000 would begin to accrue. Although the order was served on the Deiacos, they did not comply with the Court’s directives or appear in this action.

On March 29, 2024, Plaintiff moved to modify the Contempt Order by increasing the daily penalties. Again, the Deiacos did not respond to the motion, and, on July 15, 2024, the Court granted the motion and held that “[s]hould the Deiacos not comply with the Court's order directing the production of KOGV's records within seven (7) days of service, the daily fine shall increase to five thousand dollars (\$5,000). **Additionally, Plaintiff may move for an order seeking imprisonment of the Deiacos until their contempt is purged pursuant to Jud. Law § 753**” (*Donnelly v Deiaco*, 2024 N.Y. Slip Op. 32507[U], 3 [N.Y. Sup Ct, New York County 2024] [“Second Contempt Order”]).

Plaintiff served the Second Contempt Order on the Deiacos as well as two law firms that have represented KOGV in other cases (NYSCEF 78). However, despite the Court’s stern warning, the Deiacos have neither complied with the Court’s directives nor appeared in this action. Clearly, additional, and more robust relief is required.

B. A Conditional Order of Imprisonment is Granted

Judiciary Law § 753(A)(1) provides that the Court may “punish, by fine and imprisonment, or either” the Deiacos’ “disobedience to a lawful mandate of the court. . .” The Court has expressly found in connection with the Contempt Order and Second Contempt Order, and finds again here based on clear and convincing evidence, that (1) a lawful order of the Court unequivocally requiring the Deiacos to provide access to KOGV’s books and records is in effect; (2) that the order has been disobeyed; (3) that the Deiacos have knowledge of the Court’s orders; and (4) Plaintiff has been prejudiced by the Deiacos’ violations of the Court’s orders warranting a finding of contempt (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015] [collecting cases]). Upon a finding of contempt, “[a]ny penalty imposed [must be] designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or

both” (*Matter of Dept. of Envtl. Protection of City of New York v Dept. of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987]).

The Deiacos have not abided by multiple clear and unequivocal orders of this Court to provide access to KOGV’s records or interpose any defense to their conduct. The Court is mindful of the First Department’s directive that “wholly punitive sanctions for civil contempt should be exercised only very cautiously and where the necessity is clear” (*N.A. Dev. Co. Ltd. v Jones*, 99 AD2d 238, 242 [1st Dept 1984]). Accordingly, a final opportunity for compliance will be provided.

The Court grants Plaintiff’s motion on the conditions set forth below.

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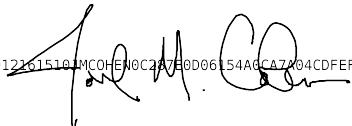
Accordingly, it is

ORDERED that Plaintiff’s motion for contempt is **GRANTED**; it is further

ORDERED that Plaintiff shall serve a copy of this order on the Deiacos via personal service; via Certified Mail to the Deiacos’ last known business and home addresses; and via email to the Deiacos and any of their or KOGV’s attorneys in other cases, and file proof of service; it is further

ORDERED that the Deiacos may purge their contempt sufficiently to avoid imprisonment by providing access to KOGV’s books and records within seven (7) days of personal service of this order with notice of its entry. **Should the Deiacos not purge their contempt, Plaintiff shall inform the Court by letter filed on NYSCEF and with a copy to sfc-part3@nycourts.gov in which case a warrant shall issue for the arrest and imprisonment of the Deiacos for a period of ten (10) days or until their contempt is purged by providing access to KOGV’s books and records or agreeing to do so within two (2) days.**

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

9/12/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: