

**Dime Community Bank v Westhampton Rest. Group
LLC**

2024 NY Slip Op 35138(U)

November 15, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 621122/2023

Judge: James Hudson

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This opinion is uncorrected and not selected for official publication.

INDEX NO.: 621122/2023

**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVJ
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE: 6/26/24
SUBMIT DATE: 11/04/24
Mot. Seq. #: **004 - MotD**

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DIME COMMUNITY BANK, SUCCESSOR BY
MERGER TO BNB BANK,

MORITT HOCK & HAMROFF, LLP
Attorneys for the Plaintiff
400 Garden City Plaza
Garden City, NY 11530

Plaintiff,

-against-

MICHAEL A. TAMA, P.C.
Attorney for Defendants Westhampton
Restaurant and Salvatore Biundo
220 Old Country Road
Mineola, NY 11501

WESTHAMPTON RESTAURANT GROUP LLC;
SALVATORE BIUNDO; and SALVATORE
BIUNDO AS EXECUTOR OF THE ESTATE OF
MARIANO BIUNDO a/k/a MARIO BIUNDO,

EGAN & GOLDEN, LLP
Attorneys for Landlord John Tortorella and
Miajax LLC
96 South Ocean Avenue
Patchogue, NY 11772

Defendants.
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Dime Community Bank, successor by merger to BNB Bank (“Dime”, “BNB”), requests an order: 1) pursuant to **CPLR 3215**, granting it default judgment against Westhampton Restaurant Group LLC (“Westhampton”), Salvatore Biundo and Salvatore Biundo as Executor of the Estate of Mariano Biundo a/k/a Mario Biundo, deceased (“Estate”), (collectively “Defendants”); 2) pursuant to the March 19th, 2019 Security Agreement, awarding it attorneys’ fees and costs incurred in the prosecution of this action; 3) pursuant to **Judiciary Law 753, 756** and **CPLR 5104**, holding Westhampton, Mr.

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Biundo and the Estate in contempt for failing to comply with the April 5th, 2024 Order and Judgment.

This is an action alleging breach of a commercial loan made by BNB, its successors and assigns, to Westhampton (“Loan”). That loan was secured by a promissory note and security agreement of Westhampton and a simultaneous unconditional personal guarantee by Mariano Biundo, a/k/a Mario Biundo. The security agreement gave BNB/Dime a security interest in all tangible and intangible personal property at fixtures of Westhampton (“Collateral”). On March 21st, 2019, BNB filed a UCC Financing Statement as record of its interest in the collateral. On July 1st, 2022, Westhampton defaulted on its monthly loan payment, which default continues through the present. Westhampton, in violation of the security agreement, sold the collateral to RO&CO Hospitality Group, along with all right, title and interest in “Salvatore’s” restaurant, 149 West Montauk Highway, Hampton Bays, NY. Westhampton refuses to satisfy the loan or turnover to Dime the proceeds received from its sale of the collateral. On May 21st, 2023 Mariano Biundo died. On January 25th, 2024, his son, Salvatore Biundo was named Executor of his Estate. On October 31st, 2023, by Stipulation, Dime discontinued its action against RO&CO Hospitality Group, LLC (NYSDEF Doc No. 39).

On April 5th, 2024, the Court ordered default judgment as against defendants Westhampton and Mr. Biundo for their failure to appear at the August 30th, 2023 Court conference (NYSCEF Doc No. 71). The order also denied the cross-motion by Westhampton and Mr. Biundo to vacate their default; and granted the motion by Dime to join the Estate as a defendant and file its supplemental summons and amended verified

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complaint. On April 19th, 2024, counsel for Westhampton served the order with notice of entry (NYSCEF Doc Nos. 76, 77).

Westhampton and Mr. Biundo, personally and as executor of the Estate, have not answered the verified amended complaint. The time to answer has expired. The defendants are in default. Neither defendant has moved to vacate that default (*HSBC Bank USA, Nat. Ass'n v. Lafazan*, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]). A party in default cannot move for affirmative relief without first moving to vacate its default (*Oteri v. Oteri-Harkins*, 183 AD3d 902, 122 NYS3d 915 [2d Dept 2020]).

Mr. Biundo has filed an affidavit in opposition to Dime's request for a finding of civil contempt (NYSCEF Doc No. 103). He makes no argument against the requested default judgment. Westhampton has not filed any opposition.

The defaulting defendants are deemed to have admitted all the allegations in the amended verified complaint (*HSBC Bank Natl Association v. Simms*, 163 AD3d 930, 91 NYS3d 517 [2d Dept 2018]).

The unopposed request by Dime for a default judgment against Westhampton and Mr. Biundo will be granted.

The Court will next consider the request for attorneys' fees in the amount of \$62,102.20 and reimbursement of \$1,723.07 for costs incurred.

Dime argues that it is entitled to the full amount of legal fees requested pursuant to the terms of the promissory note, the security agreement, the personal guarantee of Mariano Biundo, and the personal guarantee of Salvatore Biundo. In the event of default, paragraph 6B provides that the borrower pay the lender's reasonable attorneys' fees and costs

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(NYSCEF Doc No. 92, P. 3). Counsel has filed an affirmation which details the requested legal fees, costs and expenses (NYSCEF Doc No. 82).

As no opposition has been filed, the requested payment will be granted as unopposed.

Lastly, the Court will consider the request that the defendants be held in contempt for failing to comply with the April 5th, 2024 order.

The remedy of civil contempt serves as a vindication for parties who have been harmed by a contemnor's failure to obey a court order (**Judiciary Law 753; *Dep't of Housing Preservation and Dev. of City of New York v. Deka Realty Corp.***, 208 AD2d 37, 42, 620 NYS2d 837 [2d Dept 1995]). A motion to punish a party for civil contempt is addressed to the sound discretion of the court (***Chambers v. Old Stone Hill Road Associates***, 66 AD3d 944, 946, 889 NYS3d 598 [2d Dept 2009]). The purpose of a civil contempt penalty is "not to punish but rather, to compensate the injured private party or to coerce compliance with the court's mandate" (***Dep't of Housing Preservation v. Deka Realty Corp.***, *supra*, at 42).

Four (4) elements must be established to support a finding of civil contempt. First, it must be determined that a lawful order of the Court, clearly expressing an unequivocal mandate, is in effect (***El-Dehdan v. El-Dehdan***, 26 NY3d 19, 28, 19 NYS3d 475, 41 NE3d 340 [2015]). Second, it must appear, with reasonable certainty, that the order has been disobeyed (***Id.***, at 30). Third, the party to be held in contempt must have had knowledge of the Court's order. It is not necessary that the order has actually been served upon the party (***Id.***). Fourth, prejudice to the right of a party to the litigation must be demonstrated

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(*Id.*). Dime must make its case upon the presentation of clear and convincing evidence (*Town of Southampton v. R.K.B. Realty, LLC*, 91 AD3d 628, 629, 936 NYS2d 228 [2d Dept 2012]).

Counsel for Dime argues that Westhampton and Mr. Biundo were served the order on April 19th, 2024 with notice of entry (NYSCEF Doc No. 76). Counsel states that on April 23rd, 2024, correspondence was addressed via e-mail and regular mail to defendants' counsel. That letter referenced the order and reiterated the demand for the turnover of collateral and documents ("Letter", NYSCEF Doc No. 90). Counsel asserts that Westhampton and Mr. Biundo have failed to respond or comply.

In opposition, Mr. Biundo argues that he, and Westhampton should not be held in contempt due to impossibility to comply with the order. He states that neither he nor Westhampton, of which he is the sole member, had control over the collateral on April 5th, 2024 (NYSCEF Doc No. 103). He alleges that his former counsel, Vincent Acona, misappropriated the \$175,000 escrow which was provided to restructure the loan with Dime. He alleges that Attorney Acona refused to speak with him and advise him that former defendant RO&CO Hospitality Group, LLC had agreed to sell the collateral to Dime.

Mr. Biundo does not oppose the allegation that he has failed to respond to the letter; nor provide any reason for his not having sought relief from the Court. The failure of Mr. Biundo to offer a reasonable excuse for noncompliance gives rise to an inference of contumacious conduct (*Figiel v. Met Food*, 48 AD3d 330, 851 NYS2d 524 [1st Dept 2008]). It is not relevant whether or not the violation was willful (*Board of Managers of*

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Brightwater Towers Condominium v. M. Marin Restoration, Inc., 206 AD3d 605, 169 NYS3d 136 [2d Dept 2022]). Mr. Biundo does not sufficiently explain his failure to comply with the order. The mutual non-compliance of himself and his former counsel does not serve as a meritorious excuse (*Sager Spuck Statewide Supply Co., Inc. v. Meyer*, 282 AD2d 971, 973, 723 NYS2d 732 [3d Dept 2001]). The lack of compliance evidences a lack of respect for judicial orders (*Madigan v. Berkeley Capital, LLC*, 205 AD3d 900, 907, 169 NYS3d 326 [2d Dept 2022]). “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v. Pfeffer*, 94 NY2d 118, 123, 700 NYS2d 87, 722 NE2d 55 [1999]).

The Court will grant the request for civil contempt to the extent that a contempt hearing will be scheduled.

Accordingly, it is

ORDERED, that the motion (seq. no. 004) by plaintiff Dime Community Bank, successor by merger to BNB Bank, which requests, pursuant to **CPLR 3215**, default judgment against defendants Westhampton Restaurant Group, LLC, Salvatore Biundo, and Salvatore Biundo as Executor of the Estate of Mariano Biundo a/k/a Mario Biundo, deceased, is granted; and it is further

ORDERED, that the request, pursuant to the March 19th, 2019 Security Agreement, for an award of \$62,102.20 in attorneys’ fees, and an additional \$1,723.07 for costs incurred, is granted; and it is further

ORDERED, that a hearing, pursuant to **Judiciary Law 753, 756** and **CPLR 5104**, for civil contempt against Westhampton Restaurant Group, LLC and Salvatore Biundo,

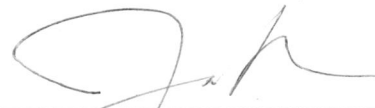
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and Salvatore Biundo as Executor of the Estate of Mariano Biundo a/k/a Mario Biundo, is granted to the extent that a **contempt hearing will be held on January 9th, 2025 at 10:30 a.m., Suffolk County Supreme Court, Part XLVI, at the Courthouse, 1 Court Street, Riverhead, NY 11901.**

This memorandum also constitutes the Order of the Court.

Dated: November 15th, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court