Navarro v Samuel Hampton LLC
2024 NY Slip Op 35284(U)
March 4, 2024
Supreme Court, Nassau County
Docket Number: Index No. 612027/2021
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

NEHEMIAS ORELLANA NAVARRO,

Plaintiff,

-against-

SAMUEL HAMPTON LLC,

Defendant.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 612027/2021
Motion Seq. Nos.: 03, 05
Motion Dates: 10/17/2023
10/17/2023
XXX

The following papers have been read on these motions:

	Papers Numbered
Order to Show Cause (Seq. No. 03), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 05), Affirmation and Exhibits, Affidavit	2
Affirmation in Opposition to Cross-Motion (Seq. No. 05) and in Reply to Order to Show Cause (Seq. No. 03) and Exhibit, Memorandum of Law	3
Reply Affirmation to Cross-Motion (Seq. No. 05)	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 03), pursuant to Judiciary Law §753(a)(2), for an order holding defendant, by its principal Samuel Habibian ("Habibian"), in contempt of Court for the deceit and abuse of this Court's proceeding wherein this Court stayed the Sherriff of Nassau County's execution against defendant's property, located at 25 W. Sunrise Highway, Freeport, New York, in reliance upon a false affidavit submitted by Habibian, dated November 11, 2022; and moves for an order requiring defendant, by its principal Habibian to appear before this Court, to answer to the Court regarding his false statements made in his affidavit, and his transfer of assets, specifically a property located at 25 W. Sunrise Highway, Freeport, New York, made prior to, or during the pendency of its Order to Show Cause, which transfer of assets was intentionally concealed from this Court; and moves, pursuant to Judiciary Law §753(a)(8), for an order directing defendant, by its principal Habibian, to pay to plaintiff, in accordance with the Judgment, dated July 7, 2022, the sum of $250,000.00, together with nine percent (9%) interest, within five (5) business days of the date of service upon him of a copy of this order, or, in the alternative, be imprisoned until payment of same, and be further ordered to pay reasonable attorney's fees, costs and disbursements incurred by plaintiff in connection with this application, which are a direct result of defendant's conduct (and that he be fined and imprisoned if he fails to pay); and moves, pursuant to 22 NYCRR § 130-1.1, for an order sanctioning defendant, and its principal Habibian, and awarding to plaintiff, significant attorney fees' and costs, and imposing financial sanctions on defendant and Habibian.

Defendant opposes the Order to Show Cause (Seq. No. 03) and cross-moves (Seq. No. 05), pursuant to 22 NYCRR § 130-1.1, for an order imposing costs and sanctions upon counsel for plaintiff, Lawrence Wertheimer, Esq. ("Wertheimer"), for making a frivolous motion for, amongst other things, contempt, damages, costs, sanctions, and civil arrest, predicated on his intent to deceive the Court by falsely affirming that defendant conveyed the property, whereas Wertheimer knew the transfer was actually a tax deed from the Freeport Treasurer; and cross-moves for an order quashing a CPLR § 5224 subpoena served on defendant's prior counsel upon the ground that it is predicated on the false facts asserted by Wertheimer, and there is no misconduct as to the tax deed as a matter of law; and cross-moves, pursuant to RPC § 1.7, for an order disqualifying Wertheimer because he has a non-waivable adverse financial interest. Plaintiff opposes the cross-motion (Seq. No. 05).

In support of plaintiff's Order to Show Cause (Seq. No. 03), counsel for plaintiff asserts, in pertinent part, that, "[i]n short, the basis for Plaintiff's motion is that on November 11, 2022, Habibian submitted a false affidavit … to this Court in support of defendant Hampton's Order to Show Cause … seeking, *inter alia*, a TRO to stop the sheriff's sale of Hampton's purported sole asset located at 25 W. Sunrise Highway, Freeport, New York (the 'Premises') to satisfy the judgment … that this Court awarded to Plaintiff on July 7, 2022 (entered July 13, 2022). Habibian falsely asserted that sale of the Premises would irreparably harm defendant and strip defendant of the 'sole asset' that it owned…. Habibian's assertions were indisputably false as Hampton caused the Premises to be transferred to Lane Garden Property Management, LLC ('Lane Management') on September 28, 2022, over a month prior to Habibian's affidavit asserting that the Premises was Hampton's 'sole asset'…. On November 15, 2022, this Court, in reliance on this affidavit, signed the OTSC … delaying execution of the sale of the Premises, pending determining (*sic*) of the OTSC (which was to vacate the Judgment). The clear mandate from the Court was to retain the status quo with relation to the Premises pending a decision on defendant's OTSC. On May 16, 2023, this Court denied defendant's frivolous OTSC seeking to stop the sale of the Premises …, and Plaintiff thereafter sought to execute a sale of the Premises to satisfy the Judgment. At this time, Plaintiff discovered through the Sheriff that the Premises had been transferred to Lane Management on September 28, 2022 notwithstanding that Plaintiff had obtained the Judgment against defendant several months prior…. I notified the Court on June 27, 2023 that defendant had likely fraudulently transferred the Premises after Judgment was entered, leaving Plaintiff with no asset upon which to execute the judgment and requested a conference with this Court. A conference was held by this Court on July 29, 2023 with the parties' counsel, at which time this Court determined at a minimum, that Habibian had likely submitted a perjured affidavit and committed a fraud on this Court and Plaintiff. This Court advised that it was retaining jurisdiction of this matter and would consider a contempt/sanctions motion against defendant and Habibian if Plaintiff moved for same. Defendant's counsel Laurel Row Kreitzing, Esq., asserted at this conference that she was not aware of the transfer of the Premises. Notwithstanding her assertion, my firm has retained outside counsel, and is separately investigating defendant's counsel's role in same, and will update the Court accordingly, and may seek the Court's permission to (1) hold Kretzing and defendant's counsel's firm in contempt as well, and (2) seek appropriate sanctions, and (3) to initiate disciplinary proceedings if wrongdoing is found. The fraudulent actions of the defendant in transferring the property eight days after the service of the Property Execution, and prior to its filing of its Order to Show Cause, which relied upon Habibian's false affidavit falsely claiming ownership of the Premises that had been transferred to another entity six weeks earlier, is a clear deceit and abuse of this Court's proceeding and should be punished severely. Plaintiff has been materially prejudiced due on (*sic*) the above conduct and his right to execute on the Judgment has been delayed and materially interfered with warranting the punishment requested." *See* Plaintiff's Affirmation in Support of Order to Show Cause (Seq. No. 03) Exhibits A-C; NYSCEF Document Nos. 14, 19, 20, 32 and 39.

In opposition to plaintiff's Order to Show Cause (Seq. No. 03) and in support of defendant's cross-motion (Seq. No. 05), counsel for defendant asserts, in pertinent part, that, "Mr. Wertheimer affirmed under penalty of perjury as follows: ... 3. . . . . Habibian falsely asserted that sale of the Premises would irreparably harm defendant and strip defendant of the 'sole asset' that it owned.... Habibian's assertions were indisputably false as Hampton caused the Premises to be transferred to Lane Garden Property Management, LLC ('Lane Management') on September 28, 2022, over a month prior to Habibian's affidavit asserting that the Premises was Hampton's 'sole asset'.... 11. The fraudulent actions of the defendant in transferring the property eight days after the service of the Property Execution, and prior to its filing of its Order to Show Cause, which relied upon Habibian's false affidavit falsely claiming ownership of the Premises that had been transferred to another entity six weeks earlier, is a clear deceit and abuse of this Court's proceeding and should be punished severely. The 'property search' in Wertheimer's Exhibit A ... is not a search of County records; rather it is an unofficial and inadmissible report from 'HomeInfoMax,' a non-governmental service,... HomeInfoMax advertises that it provides its users with access to the actual instruments but Mr. Wertheimer did not show any such instrument. In actuality, the conveyance was not a deed out of Defendant to a Lane Garden -- as disingenuously sworn by Mr. Wertheimer over and over, but rather a tax deed from the Treasurer of Freeport Village to a tax lien holder: ... Mr. Wertheimer based his assertion on an informal, inadmissible report on HomeInfoMax rather than the deed, which an attorney surely knows is best evidence. This shows scienter (intent to defraud), rather than mere gross incompetence. There is also clear and convincing evidence that Mr. Wertheim was advised before filing the instant motion that the transfer was a tax deed, which testimony must await a hearing to which Defendant can subpoena a witness not under its control. Moreover, each and every part of the motion is illogical and wholly devoid of merit. In particular, Mr. Wertheimer shows no damages that resulted from the short stay of sale granted. The sale could not have gone forward in any event because the judgment debtor no longer had title after the tax deed issued. Pursuant to CPLR 5237 a sale made where there is a failure of title is a nullity and must be unwound. Moreover, if Samual Habibian had known of the tax deed, he would not have wasted time and money on a motion to stay the sale, because it was not necessary. That Habibian was not aware of the tax deed when he signed his affidavit is credible, especially in light of his administrative failures that resulted in a default judgment in the first place. Lastly, even if the conveyance had been voluntary -- which it was not -- and Habibian intended to deceive the court -- which he did not -- Plaintiff nevertheless would have suffered no injury because its judgment lien and priority would have followed the property." *See* Defendant's Affirmation in Opposition to Order to Show Cause (Seq. No. 03) and in Support of Cross-Motion (Seq. No. 05) Exhibit B; Plaintiff's Affirmation in Support of Order to Show Cause (Seq. No. 03) Exhibit A.

Counsel for defendant further contends, in pertinent part, that, "Plaintiff's motion is pervaded by fraud and is irrational in every detail. It is wholly devoid of merit. Costs (trebled) and a sanction of $10,000 payable to the Lawyers' Fund for Client Protection should be imposed on Mr. Wertheimer, not Defendant and its former counsel as disingenuously demanded by Mr. Wertheimer. What is sauce for the goose is sauce for the gander. Moreover, Mr. Wertheimer deserves even more sauce because his misrepresentation was material, whereas Defendant's was not material. Mr. Wertheimer has run afoul of the following statutes and rules:...
Mr. Wertheimer has given material false testimony with intent to deceive on a motion that is also otherwise devoid of merit, and refused to withdraw it when given the opportunity.
He has imposed on the Court and wasted its time. He has contravened 22 NYCRR § 130-1.1 and Jud. Law § 487. Costs and the maximum $10,000 sanction should be awarded."

Counsel for defendant adds, in pertinent part, that, "Guadagnoli & Associates, P.C., as counsel for Wertheimer and Navarro, has served a CPLR 5224 subpoena duces tecum under the instant index number on both the Jaspan Schlesinger firm and Laurel Kretzing, Esq.... First, it is improper for Navarro to have two counsels of record, without court approval. 'There is no authority for a party to be represented by more than one attorney of record.' [citation omitted]. Second, the subpoena should be quashed because it is patently abusive and improper. The subpoena by its terms seeks documents relevant to the transfer of the property. Inasmuch as the property was transferred by the Freeport Treasurer pursuant to former RPTL 1464 (adopted by Freeport Village), neither Defendant nor its former counsel have any relevant documents concerning the transfer. Because there is no conceivable state of facts that makes a judgment debtor liable to a judgment creditor for failure to pay taxes or failure to redeem after due notice to redeem, the disclosure sought will not 'relevant to the satisfaction of the judgment.' [citation omitted]. Movant has not shown one authority — which is its burden -- under N.Y. Debtor and Creditor Law Art. 10 (Uniform Voidable Transactions Act) that makes inaction or failure to pay taxes or failure to redeem from a tax lien actionable. That Plaintiff itself could have redeemed from the tax lien at any time makes the instant motion and subpoena particularly frivolous. Moreover, because the only fraud/crime committed in this action was committed by Mr. Wertheimer, the subpoena is overbroad and impermissibly seeks attorney-client communications, which are privileged. Defendant does not waive attorney-client privilege. I spent 13.5 hours reading and responding to the instant motion. My billing rate for this client is $325 per hour, which is at or below the prevailing rate in Nassau County for real property litigation. Costs of $4,387.50 should be awarded to Defendant. If trebled, the award is $13,162.50.

Plaintiff's judgment lien was extinguished because Mr. Wertheimer did not take any of the aforementioned reasonable and practicable steps to prevent a tax deed. Because he is liable for this neglect, he and plaintiff Navarro have adverse financial interests….
Disqualifying Mr. Wertheimer will not cause prejudice to Plaintiff or delay the proceedings because Plaintiff already has another attorney who has appeared and acted herein, namely Mr. Guadagnoli." *See* Defendant's Affirmation in Opposition to Order to Show Cause (Seq. No. 03) and in Support of Cross-Motion (Seq. No. 05) Exhibit A.

In opposition to defendant's cross-motion (Seq. No. 05) and in further support of plaintiff's Order to Show Cause (Seq. No. 03), counsel for plaintiff asserts, in pertinent part, that, "[i]n short, Plaintiff has attempted to execute on his $250,000 judgment issued by this Court for well over a year, to no avail, based upon *inter alia*, and what we believe is Habibian's (*sic*) allowing the Premises to be transferred to Lane thereby leaving Samuel Hampton, LLC completely underfunded such that Plaintiff has little to no ability to obtain compensation for his injuries affirmant's efforts, as Plaintiff's counsel, have been directed towards obtaining compensation for Plaintiff. Defendant's cross motion is simply a blunt force attempt to intimidate affirmant and more importantly, to prevent Plaintiff from being able to recover the compensation awarded by this Court in his lawsuit. Defendant's cross motion is based on numerous factual distortions as herein set forth. Moreover, the following undisputed facts are unequivocal indicia/badges of defendant's fraudulent conduct: i. Mr. Habibian submitted an affidavit .. on November 11, 2022 in support of Hampton's OTSC seeking a stay (delay) of execution of Plaintiff's judgment. In this affidavit Mr. Habibian falsely stated that defendant Hampton owned the Premises, and that Plaintiff's execution of its judgment by the Sheriff of Nassau County against this Premises would cause material harm to defendant as it would lose its 'sole asset'; and ii. In fact, ownership of the Premises, on the date of Mr. Habibian's sworn statement had been deeded to Lane Garden Property Management, LLC ('Lane') almost two months earlier on September 28, 2022. Lane is owned by Harvey Weisman; and iii. Harvey Weisman has a business relationship with Mr. Habibian, and further in 2022 it cannot be disputed that Mr. Weisman was a creditor of Mr. Habibian and/or one or more of Mr. Habibian's entities, as shown by the 'Petition in Bankruptcy' submitted in in support of Plaintiff's moving papers with respect to another Samuel Habibian owned entity - Freeport Gate, LLC ...; and iv. The fact that the Premises was transferred to an entity, whose principal, Weissman, is a creditor of defendant's principal, Habibian, or one or more of Habibian's entities is an indisputable indicia/badge of fraud; and v. The assertion in Mr[.] Habibian's current affidavit ...in support of Defendant's cross motion that Mr. Habibian did not know of the transfer of the Premises is not credible. It must be noted that the Premises is a commercial property containing an automotive service station which tenant pays rent to the owner of the property. Subpoenas have been served seeking information regarding the identity of the entity to which the tenant paid rent on the date of Mr. Habibian's affidavit; and vi. When Lane purchased a tax lien on the Premises in 2015, Lane was required by law to provide notice of this tax lien purchase directly to Hampton. In addition, this notice required the purchaser of a tax lien, Lane, to give notice to the owner of the property, Hampton, of the two-year period of its right to redeem pursuant to former New York Property Tax Law ("RPTL") Chapter 14, Section 1464 (which is applicable to tax lien sales in incorporated villages such as Freeport): Moreover, the tax deed ... sets forth explicitly that Lane (1) served notice to Hampton pursuant to RPTL 1464, and that (2) proof of service of such notice was duly filed. Thus, the assertion that Habibian/Hampton did not know his property was transferred or that he did not know he had either lost, or was going to lose his property valued in excess of $1million over an $11,000 tax lien held by a direct creditor when he submitted his false affidavit, defies credulity; and vii. The timing of the conveyance of the Premises to Lane, only two and half months after Plaintiff obtained judgment against defendant is further indicia of fraud. The reason being that the tax deed submitted by defendant … shows that Lane acquired the Tax Deed on December 15, 2015, some seven years prior to the actual conveyance of the Premises by tax deed to Lane. Under former New York Property Tax Law ('RPTL') Chapter 14, Lane was required to provide notice directly to Hampton of the two-year period of redemption. This period appears to have expired in December of 2017, and as such, it is beyond comprehension why the tax deed was not issued until September of 2022, some five years later and conveniently just over two months after Plaintiff obtained judgment against Hampton. This suggests strongly that Hampton had a role in causing the Premises to be conveyed at this particular time and is clearly a further indicia of fraud or other impropriety when considered among the totality of facts surrounding the transfer of the Premises; and viii. An additional indicia of fraud is the fact that it defies common sense that defendant's principal Habibian, who, upon information and belief, is a sophisticated real estate investor with means, would let the Premises's (*sic*) property taxes remain unpaid resulting in the loss of a commercial property that is conservatively valued at over one million dollars, over a non-payment of taxes that is approximately $11,000.00. Such a scheme can only be devised to benefit Mr. Habibian in avoiding the payment of judgments; and ix. The undisputed fact that the Premises, a property valued at over one million dollars was allowed to be transferred for deminimus consideration, approximately $11,000.00, the amount of the tax lien, is another indisputable indicia of fraud;

and x. Further, it is noteworthy that a review of public records reveals that Mr[.] Habibian, has established a pattern of retaining multiple law firms as in this case (wherein Laurel Kretzing, a partner at Jaspan Schlesinger, states in her affirmation … that her law firm has an outstanding invoice to Mr. Habibian of $60,000 and had sought to be relieved before she was substituted by Mr. Cooperstein on consent). The conduct described therein, allows Mr. Habibian to stall and contest any attempt to enforce judgments against him and/or against entities in which he is a member or shareholder. In view of the above overwhelming direct and indirect evidence, and multiple indicia/badges of fraud by defendant and its principal, Plaintiff respectfully requests that this Court deny, with prejudice, defendant's meritless cross motion which is simply intended to intimidate and prevent the Plaintiff from obtaining payment on his judgment." *See* NYSCEF Document Nos. 20, 47, 50, 71 and 73.

Counsel for plaintiff further argues, in pertinent part, that, "Defendant's counsel's assertion that Plaintiff's motion for contempt and sanctions is permeated by fraud and/or that my affirmation is perjurious is both false, and frivolous. It is obvious that defendant's motion is intended as a complete smokescreen to deflect this Court's attention from the egregious misconduct and likely fraudulent conduct of Defendant and its principal. Whether the Premises was conveyed by the operation of a tax deed, or directly by Hampton to Lane is immaterial and does not change the central facts that: (1) Mr. Habibian's affidavit … is false; and (2) that Mr. Habibian knew (at the time he made his affidavit) that the Premises had been transferred to a direct creditor, and an entity with which he has a relationship, based on (i) the notice requirements of RPTL 1464, (ii) the tax deed showing that he was served with notice of redemption, and (iii) the timing of the conveyance some seven years after Lane acquired the tax lien, and approximately 2 months after Plaintiff obtained judgment against

Hampton. The totality of these undisputed facts provide clear and convincing evidence that Mr. Habibian's affidavit was intentionally false, and designed to prevent Plaintiff from taking action on his judgment against Samuel Hampton, LLC by directing the Sheriff to execute upon the property. To the extent affirmant relied upon an internet search to ascertain the history of the ownership of the Premises, this is a legitimate source of obtaining information …, Affirmant utilized this report to show that Habibian's statement that Hampton owned the Premises was false. Neither Defendant … nor Cooperstein … disputes (*sic*) the fact that on the date of Mr. Habibian's sworn affidavit Mr. Habibian falsely asserted that he owned the Premises. Based on the above, as well as the other indicia of fraud outlined in this affirmation, Plaintiff's assertion as to Mr. Habibian's false statement is fully supported. The facts indicate overwhelmingly that Defendant knew of, facilitated, caused, or contributed to the conveyance of the Premises after plaintiff obtained a default judgment on July 7, 2022, and thereafter hedging his bets, and in furtherance of his fraudulent scheme, filed a false affidavit that defendant owned the Premises, which resulted in defendant obtaining a stay of the enforcement of Plaintiff's judgment from November 15, 2022 until May 17, 2023. Defendant's counsel's assertion that it would make no sense for Mr[.] Habibian to oppose the Sheriff's sale if he knew he didn't own the Premises, raises further questions with regard to Mr. Habibian's scheme. A search of the Court's docket reveals a lawsuit which was pending at the time of the Sheriff's attempts to serve its Notice of Execution upon the Premises captioned *Jacob Post v Samuel Hampton, LLC*, index # 08090/2020 (County of Nassau) in which Jacob Post was challenging Samuel Habibian's ownership of the property. Considering this, and the totality of the known facts, it is apparent that in order to evade judgement (*sic*) and keep the Premises owned by a related entity with whom Mr. Habibian has a relationship, preventing the Sheriff's sale would be of paramount importance to Mr. Habibian."

See NYSCEF Document Nos. 20, 44, 70 and 71.

Counsel for plaintiff also argues, in pertinent part, that, "Cooperstein asserts falsely at paragraph 22 of his affirmation … that Plaintiff Orellana is represented by two counsel. Guadagnoli & Associates, PC was retained by my office as outside counsel to assist me in investigating whether there was a fraudulent conveyance in this action or other fraud that would help me obtain payment on the judgment so that Plaintiff can actually be made whole. His office has not executed a retainer with Plaintiff and thus I am the only counsel of record for Plaintiff. Moreover, I, as a solo personal injury practitioner, in my almost 40 years of practice I have never been involved in this type of post judgment litigation. Therefore, I felt it necessary to retain counsel more familiar with the enforcement of judgements, fraudulent conveyances, and the other issues herein, in order to assist me in obtaining compensation for my client. Further, even assuming there was a dual representation here, notwithstanding Cooperstein's false assertion, there is absolutely no prohibition on two counsel representing a plaintiff which is within the sound discretion of the trial court. [citations omitted]. Mr. Cooperstein's assertion that I, or Plaintiff were essentially required to pay the taxes owed on the Premises out of pocket in order to preserve Plaintiff's interest as a judgment creditor in the Premises is so utterly frivolous and devoid of merit, that he should be severely sanctioned for such an assertion. Mr. Cooperstein offers no citation to any authority whatsoever that a personal injury firm is required to make out of pocket payments on behalf of a judgment debtor to pay such debtor's debts in order to preserve a Plaintiff's ability to execute on a judgment. Not only is there no authority requiring same, there is absolutely no ethical obligation requiring same. Mr. Cooperstein's meritless attempt to try and manufacture a conflict between me and my client is beyond egregious and his assertions make little sense especially in light of the fact that he implies or asserts that the tax lien ripened many years before Plaintiff obtained judgment against Hampton indicating that no matter what Plaintiff did such would not have changed the conveyance to Lane. All of my efforts in this matter are and have been tailored only towards obtaining compensation for my client, and there is no conflict whatsoever between me and my client. Based on this, and the utter lack of support for Mr. Cooperstein's meritless assertion, defendant's motion to disqualify should be dismissed outright."

With respect to plaintiff's Order to Show Cause (Seq. No. 03), "[i]n order to prevail on a motion to hold a party in contempt, the moving party must demonstrate that the party charged with contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the moving party's rights." *See Gomes v. Gomes*, 106 A.D.3d 868, 965 N.Y.S.2d 187 (2d Dept. 2013); Judiciary Law § 753; *Smith v. De Paz*, 105 A.D.3d 750, 962 N.Y.S.2d 631 (2d Dept. 2013); *Matter of Hughes v. Kameneva*, 96 A.D.3d 845, 946 N.Y.S.2d 211 (2d Dept. 2012); *GMCK Realty, LLC v. Mihalatos*, 95 A.D.3d 947, 944 N.Y.S.2d 220 (2d Dept. 2012). *See also Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 519 N.Y.S.2d 539 (1987); *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 439 N.Y.S.2d 316 (1981); CPLR §§ 5222(a), 5251 and 2308(a).

Notably, "[a] motion to punish a party for civil contempt is addressed to the sound discretion of the court." *Hughes v. Kameneva, supra* at 846; *Collins v. Telcoa Intl. Corp.*, 86 A.D.3d 549, 927 N.Y.S.2d 151 (2d Dept. 2011); *Chambers v. Old Stone Hill Road Associates*, 66 A.D.3d 944, 889 N.Y.S.2d (2d Dept. 2009), *appeal dismissed* 14 N.Y.3d 747, 898 N.Y.S.2d 80 (2010). The burden of proof is on the proponent of the contempt motion and the contempt must be established by clear and convincing evidence. *See Gomes v. Gomes*, *supra*; *GMCK Realty, LLC v. Mihalatos*, *supra* at 849; *Town of Riverhead v. TS Haulers Inc.*, 68 A.D.3d 1103, 890 N.Y.S.2d 332 (2d Dept. 2009). *See generally McCain v. Dinkins*, 84 N.Y.2d 216, 616 N.Y.S.2d 335 (1994). To prevail on a motion for a finding of civil contempt it is necessary to establish that (1) a lawful court order clearly expressing an unequivocal mandate is in effect; (2) actual knowledge of the order by the person alleged to have violated the order; and (3) the violation has defeated, impaired, impeded or prejudiced the rights of a party. *See Vider v. Vider*, 85 A.D.3d 906, 925 N.Y.S.2d 189 (2d Dept. 2011). *See also* Judiciary Law §753.

The Court finds that the motion papers before it have raised a number of factual issues, as well as issues of credibility, concerning the allegations of contempt raised by counsel for plaintiff in the Order to Show Cause (Seq. No. 03). Accordingly, a hearing must be held on the allegations of contempt.

Therefore, plaintiff's Order to Show Cause (Seq. No. 03), pursuant to Judiciary Law §753(a)(2), for an order holding defendant, by its principal Habibian, in contempt of Court for the deceit and abuse of this Court's proceeding wherein this Court stayed the Sherriff of Nassau County's execution against defendant's property, located at 25 W. Sunrise Highway, Freeport, New York, in reliance upon a false affidavit submitted by Habibian, dated November 11, 2022; and for an order requiring defendant, by its principal Habibian to appear before this Court, to answer to the Court regarding his false statements made in his affidavit, and his transfer of assets, specifically a property located at 25 W. Sunrise Highway, Freeport, New York, made prior to, or during the pendency of its Order to Show Cause, which transfer of assets was intentionally concealed from this Court;

and, pursuant to Judiciary Law §753(a)(8), for an order directing defendant, by its principal Habibian, to pay to plaintiff, in accordance with the Judgment, dated July 7, 2022, the sum of $250,000.00, together with nine percent (9%) interest, within five (5) business days of the date of service upon him of a copy of this order, or, in the alternative, be imprisoned until payment of same, and be further ordered to pay reasonable attorney's fees, costs and disbursements incurred by plaintiff in connection with this application, which are a direct result of defendant's conduct (and that he be fined and imprisoned if he fails to pay); and, pursuant to 22 NYCRR § 130-1.1, for an order sanctioning defendant, and its principal Habibian and awarding to plaintiff, significant attorney fees' and costs, and imposing financial sanctions on defendant and Habibian, are hereby **GRANTED to the limited extent that a hearing will be held to decide the relief requested**.

The matter is, therefore, set down for a Hearing to be held before this Court, IAS Part 30, at 9:30 a.m. on the 3rd day of April, 2024. Samuel Habibian must be made available to testify at said Hearing, along with any other witnesses the Court may deem necessary.

With respect to defendant's cross-motion (Seq. No. 05), 22 NYCRR 130-1.1 deals with Costs and Sanctions. It reads, in pertinent part,

> "(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart....
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a

> party to the litigation or against both....
> (c) For purposes of this Part, conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, Including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

"Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct." *Keyspan Generation, LLC v. Nassau County*, 118 A.D.3d 949, 991 N.Y.S.2d 46 (2d Dept. 2014). "Conduct during litigation, ... is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false." *Id. quoting Mascia v. Maresco*, 39 A.D.3d 504, 833 N.Y.S.2d 207 (2d Dept. 2007). "The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion." *Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 (2d Dept. 2013). The Court has carefully reviewed the record before it and guided by the foregoing precepts hereby declines to award costs and sanctions against plaintiff. *See id.*

Therefore, based upon the above, the branch of defendant's cross-motion (Seq. No. 05), pursuant to 22 NYCRR § 130-1.1, for an order imposing costs and sanctions upon counsel for plaintiff, Lawrence Wertheimer, Esq., for making a frivolous motion for, amongst other things, contempt, damages, costs, sanctions, and civil arrest, predicated on his intent to deceive the Court by falsely affirming that defendant conveyed the property, whereas Wertheimer knew the transfer was actually a tax deed from the Freeport Treasurer, is hereby **DENIED.**

In general, to succeed on a motion to quash a subpoena, the movant bears the burden of establishing that the requested information is "utterly irrelevant to any proper inquiry." *Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 888 N.Y.S.2d 665 (3d Dept. 2009); *Gertz v. Richards*, 233 A.D.2d 366, 650 N.Y.S.2d 584 (2d Dept. 1996). *See also Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988); *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 845 N.Y.S.2d 357 (2d Dept. 2007); *Liberty Company v. Rogene Industries, Inc.*, 272 A.D.2d 382, 707 N.Y.S.2d 911 (2d Dept. 2000).

CPLR § 3101(a)(4) provides that the parties to an action are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action" from non-parties "upon notice stating the circumstances or reasons such disclosure is sought or required." *See American Heritage Realty LLC v. Strathmore Ins. Co.*, 101 A.D.3d 1522, 957 N.Y.S.2d 495 (3d Dept. 2013).

As stated, the standard for subpoenaed materials from a non-party is material and necessary. *See Matter of Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559 (2014). "An application to quash a subpoena should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious'... or where the information sought 'in utterly irrelevant to any proper inquiry.'" *Matter of Kapon v. Koch*, *supra* at 38 *quoting* *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988). *See also Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 888 N.Y.S.2d 665 (3d Dept. 2009); *Gertz v. Richards*, 233 A.D.2d 366, 650 N.Y.S.2d 584 (2d Dept. 1996); *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 845 N.Y.S.2d 357 (2d Dept. 2007); *Liberty Company v. Rogene Industries, Inc.*, 272 A.D.2d 382, 707 N.Y.S.2d 911 (2d Dept. 2000). The words 'material and necessary' as used in the Civil Practice Law provision governing 'disclosure of all matter material and necessary in the prosecution or defense of an action' must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *See Matter of Kapon v. Koch, supra.*

It is well settled that trial courts have broad discretion in supervising disclosure. *See Alberto v. Jackson,* 118 A.D.3d 733, 987 N.Y.S.2d 218 (2d Dept. 2014); *Caro v. Marsh USA, Inc.*, 101 A.D.3d 1068, 956 N.Y.S.2d 575 (2d Dept. 2012).

Based upon the arguments detailed above, and the applicable law, the branch of defendant's cross-motion (Seq. No. 05), for an order quashing a CPLR § 5224 subpoena served on defendant's prior counsel upon the ground that it is predicated on the false facts asserted by Wertheimer, and there is no misconduct as to the tax deed as a matter of law, is hereby **DENIED.**

The branch of defendant's cross-motion, pursuant to RPC § 1.7, for an order disqualifying Wertheimer because he has a non-waivable adverse financial interest, is hereby **DENIED** as the Court finds no merit to the arguments in support of same.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
March 4, 2024

ENTERED
Mar 06 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE