

Bailey v Frantz Diamond & Jewelry, Inc.
2025 NY Slip Op 35535(U)
January 10, 2025
Supreme Court, Albany County
Docket Number: Index No. 911061-23
Judge: James H. Ferreira
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SUSAN BAILEY,

Plaintiff,

v.

DECISION AND ORDER

Index No.: 911061-23

FRANTZ DIAMOND & JEWELRY, INC.,
SHERRY B. FRANTZ, and AMANDA C.
MILLER,

Defendants.

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Joseph C. Amoroso, Esq.
Ryan E. Gallagher, Esq.
Franklin Barbosa, Jr., Esq.
Schenck, Price, Smith & King, LLP
*Attorneys for Movants, Frantz Diamond & Jewelry, Inc., Sherry B. Frantz,
and Amanda C. Miller*
220 Park Place
Florham Park, New Jersey 07932

Michael M. Munoz, Esq.
Golenbock, Eiseman, Assor, Bell, & Peskoe, LLP
Attorneys for Non-party International Gemological Institute, Inc.
711 Third Avenue
New York, New York 10017

HON. JAMES H. FERREIRA, Acting Justice:

Movants, Frantz Diamond & Jewelry, Inc., Sherry B. Frantz, and Amanda C. Miller (movants), are defendants in a civil action pending in the Commonwealth of Virginia bearing the caption above. The trial of the Virginia action was scheduled to commence in August 2024. Movants commenced this application by Order to Show Cause, dated November 29, 2023, seeking to enforce a subpoena duces tecum, dated September 26, 2023, issued pursuant to the Uniform Interstate Depositions and Discovery Act (see CPLR 3119) on non-party International

Gemological Institute, Inc. (IGI). Movants, through counsel, served the subject subpoena duces tecum upon IGI with a compliance date of October 31, 2023, seeking

“[a]ny and all documents, correspondence, reports, things, photographs, records, invoices, receipts of payment, and material regarding a laboratory grown diamond, number LG 310836092, including, but not limited to each document reflecting by whom the stone was submitted to an IGI entity, to who the stone was sent by IGI, when the stone entered and departed IGI custody, and any subsequent inquire to IGI regarding the stone, whether in paper format or electronic format”

(NYSCEF No. 3).

By Order dated April 17, 2024 (Enforcement Order), this Court granted movants’ motion for an order enforcing the subpoena duces tecum, and directed that IGI respond to the subpoena duces tecum by April 30, 2024 (see NYSCEF No. 11). After IGI failed to respond to this Court’s April 17, 2024 Enforcement Order, movants moved, via Order to Show Cause, dated May 22, 2024, seeking contempt against IGI based on its failure to respond to the subpoena duces tecum and the April 17, 2024 Enforcement Order. By correspondence dated June 28, 2024, IGI’s counsel advised that

“IGI Inc. has produced to the movant the one document in IGI Inc.’s possession that is responsive to the underlying subpoena (and which previously was provided to movant’s adversary in the Virginia litigation). Presently, we are working with movant’s counsel to provide requested follow-up information”

(NYSCEF No. 26).

By Order dated August 2, 2024 (Contempt Order), this Court found that movants established, by clear and convincing evidence, that IGI did not diligently attempt to comply with the subpoena duces tecum and April 17, 2024 Enforcement Order, and that IGI was guilty of contempt (see NYSCEF No. 30). The Court, among other things, imposed a fine of \$250.00, and permitted IGI to purge itself of the contempt by complying with the subpoena duces tecum within

ten days of the date of the Contempt Order. The Court also ordered that movants' application for attorney's fees be filed within fourteen days of the date of the Contempt Order. By affidavit dated August 16, 2024, a representative of IGI attested that it provided the only responsive document in IGI New York's possession, and that further documents were in IGI Dubai's possession (see NYSCEF No. 32). By affidavit dated August 28, 2024, the same representative of IGI provided movants with a document responsive to the subpoena duces tecum which IGI obtained from IGI Dubai (see NYSCEF No. 34). Movants now seek attorney's fees and costs incurred in connection with this action from November 9, 2023 through the present.

In support of their motion, movants present the affidavit of counsel together with billing records indicating that movants have incurred attorney's fees in the amount of \$15,628.50 and costs and disbursements in the amount of \$1,970.88 (see NYSCEF No. 36). Movants assert that Joseph C. Amoroso, Esq., a partner with movants' firm, spent 29.3 billable hours on this matter at an hourly rate of \$325.00. Ryan E. Gallagher, Esq., Franklin Barbosa, Jr., Esq., and Matthew C. Morales, Esq., each being an associate attorney with movants' firm, spent 10 billable hours, 9.2 billable hours, and 2.6 billable hours, respectively, on this matter, each at an hourly rate of \$215.00. Finally, counsel asserts that paralegals in movants' firm spent 12.9 billable hours on this matter at an hourly rate of \$110.00. Costs and disbursements expended by movants in the amount of \$1,970.88 include technology costs, delivery services, subpoena fees and filing fees.

In opposition to movants' motion, IGI argues that there is no basis for sanctions since it produced, in the Virginia action, the one document in its possession prior to movants even issuing the subpoena duces tecum. IGI also contends that sanctions are unwarranted because movants refused to extend the time for IGI to respond with a sworn statement that it had no other document,

and because IGI underwent a change of leadership, which caused a delay. IGI contends that the document it obtained from IGI Dubai was done so notwithstanding that IGI does not manage or control that entity. Accordingly, IGI concludes that because it voluntarily obtained information from IGI Dubai, an entity it did not control, any work performed by movants' counsel should not include any work performed after the August 2, 2024 Contempt Order. IGI argues that it could have declined to seek documents from IGI Dubai. Finally, IGI argues that the fees sought are excessive and, in many cases, duplicative. IGI asserts that work performed by Attorney Amoroso could have been performed by associates at a lower rate.

A court of record has the power to punish a party to an action, by fine and imprisonment, or either, for civil contempt, including "for any deceit or abuse of a mandate or proceeding of the court" (Judiciary Law § 753 [A] [2]), or for "disobedience to a lawful mandate of the court" (Judiciary Law § 753 [A] [3]). "To sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect. It must also appear with reasonable certainty that the order has been disobeyed [and] the party charged must have had knowledge of the court's order" (Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y., 70 NY2d 233, 240 [1987]; see Town of Copake v 13 Lackawanna Props., LLC, 73 AD3d 1308, 1309 [3d Dept 2010]).

The Court has previously found that movants have established by clear and convincing evidence that IGI disobeyed a clear mandate of the Court and, because movants required that information to defend the then pending Virginia Court matter, that the rights of the movants were prejudiced by IGI's failure to comply with both the subpoena duces tecum and the April 17, 2024

Enforcement Order (compare Matter of Justice v Fischer, 126 AD3d 1266, 1266 [3d Dept 2015]; Matter of Platten v New York State Div. of Parole, 85 AD3d 1281, 1281-1282 [3d Dept 2011]). And, while IGI was provided with the opportunity to purge its contempt of Court, it failed to do so within the clear timeframe set forth in the August 2, 2024 Contempt Order (see NYSCEF No. 30). The Court is unpersuaded that IGI, which ultimately and belatedly produced a document that was located with IGI Dubai, had no control over IGI Dubai. IGI's remaining excuses as to why it did not comply with either the subpoena duces tecum, the Enforcement Order, or the Contempt Order, are also unpersuasive.

"Counsel fees, which are 'incidents of litigation, cannot be awarded unless authorized by statute, court rule, or agreement between the parties'" (Xiaokang Xu v Xiaoling Shirley He, 147 AD3d 1223, 1226 [3d Dept 2017], quoting Matter of Ernestine R., 61 AD3d 874, 876 [2d Dept 2009]). "Judiciary Law § 773 permits an aggrieved party to recover from the offending party costs and expenses that are directly related to the contemptuous conduct []. Thus, counsel fees incurred . . . directly connected to the contempt, as well as the reasonable counsel fees and disbursements incurred with respect to the fee application itself, are recoverable" (Hamilton v Murphy, 100 AD3d 1235, 1236 [3d Dept 2012]; see Bell v White, 144 AD3d 1235, 1236 [3d Dept 2016], lv dismissed 29 NY3d 961 [2017], rearg denied 29 NY3d 1047 [2017]). Accordingly, the Court finds that movants are entitled to reasonable attorney's fees, costs, and disbursements related to IGI's contemptuous conduct.

However, because IGI, in response to movant's application, challenges the reasonableness of the fees charged, the Court directs that a hearing be held on the issue of reasonable counsel fees (see Bell v White, 77 AD3d 1241, 1245 [3d Dept 2010], lv dismissed 16 NY3d 888 [2011]; Matter of DeRosa v Gong, 219 AD3d 830, 832 [2d Dept 2023]). Accordingly, a hearing is scheduled for

February 10, 2025 at 1:00 PM. The hearing will be conducted via Microsoft Teams teleconferencing technology, and the Court will email counsel a link to the meeting. Any exhibits should be submitted to the Court and opposing counsel at least two days in advance of the hearing in .pdf form.

Based upon the foregoing, it is hereby

ORDERED that movants are entitled to costs, disbursements, and reasonable attorney's fees based on IGI's contemptuous conduct; and it is further

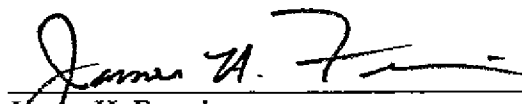
ORDERED that a hearing on the issue of reasonable counsel fees has been scheduled for February 10, 2025 at 1:00 PM via Microsoft Teams teleconferencing technology.

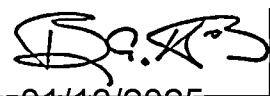
This constitutes the Decision and Order of the Court, which will be uploaded to the New York State Court's Electronic Filing System (NYSCEF). Counsel is advised of 22 NYCRR 202.5-b (h) (2) relating to notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
January 10, 2025


James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered: NYSCEF Documents No. 1-43.  01/13/2025