

Schottenstein v Levine
2026 NY Slip Op 31355(U)
April 1, 2026
Supreme Court, New York County
Docket Number: Index No. 650572/2021
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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ARI SCHOTTENSTEIN,

Petitioner,

-against-

BARRY LEVINE,

Respondent.

-----X

**DECISION AND ORDER
AFTER HEARING**

INDEX NO.: 650572/2021
Motion Seq.: 002

Present:
Hon. Lynn R. Kotler, J.S.C.

Petitioner Ari Schottenstein moves by Order to Show Cause pursuant to Judiciary Law § 753, et seq., for an order: (a) holding respondent Barry Levine in contempt for his failure to obey the judgment signed by this Court on November 23, 2021, and entered by the Clerk of the Court of New York County on January 19, 2022 (the “Judgment”); (b) directing Levine to indemnify and hold harmless Schottenstein from all 2014 and 2015 tax liabilities (including interest and penalties) arising from Schottenstein’s involvement with, and participation in, the Entities (defined below); (c) assessing a fine against Levine for every day that he is found to have disobeyed the Judgment; and (e) directing Levine to reimburse Schottenstein for costs and expenses, including attorney’s fees, incurred in connection with this motion.¹

In an Interim Order dated January 6, 2025, the Court adjourned the motion to February 13, 2025, for an evidentiary hearing as to whether, as Schottenstein contends, Levine has failed to obey the Judgment. The hearing was adjourned to May 20, 2025, and then subsequently to June 17 and 24, 2025, due to scheduling conflicts. At the conclusion of the hearing the court

¹ Schottenstein’s initial motion papers also requested that the court permanently stay or dismiss a pending arbitration commenced by Levine in February 2022, approximately a month after entry of the Judgment, under AAA Case No. 01-22-0000-6810, which seeks a declaration that Levine has no obligation under the Agreement to indemnify Schottenstein for his 2014 tax liabilities. By Order to Show Cause dated May 2, 2023, the court granted Schottenstein’s request for a TRO restraining Levine and the American Arbitration Association from proceeding with the prosecution and administration of AAA Case No. 01-22-0000-6810 pending the hearing of this motion (NYSCEF Doc. No. 59). However, the request to stay or dismiss the subject arbitration was barely raised at the hearing on the present motion and is entirely absent from Schottenstein’s post-hearing memorandum. Therefore, the court deems this request for relief to be withdrawn.

directed the parties to submit post-hearing memorandums by August 8, 2025, which deadline was subsequently extended to September 17, 2025.

At the hearing, Schottenstein testified and took the testimony of his accountant, Warren Thefeld. Levine testified on his own behalf. Based upon the testimony and evidence introduced at the hearing, the court makes the following findings of fact and conclusions of law.

Facts

Schottenstein and Levine are sophisticated investors with a lengthy business history together. In 2011, the parties entered into a real estate investment in Orange County, California, referred to as “Project Sunshine,” which was held by three entities—Protilus Investors, LLC (“Protilus”), Ilus Investors, LP, and VDC at The Met, LLC (collectively, the “Entities”). With respect to Protilus, while Schottenstein was listed as a co-manager and thus defined as a tax matters partner in the Entity’s operating agreement, in practice, only Levine acted in that capacity. It was thus Levine alone who managed and controlled the Entity’s financial records, signed tax documents, and interacted with Neidich & Co. (“Neidich”), the Entities’ accounting firm, regarding the preparation of Entity-level tax returns and related documents.

In 2014, Project Sunshine was sold, producing a capital gain to Protilus, which was owned equally by the parties. As shown by Schottenstein’s 2014 Form 1040 and related tax documents, and as testified to by both Schottenstein and Thefeld, the significant capital gain to Protilus, half of which, in the approximate amount of \$1.435 million, was passed through to Schottenstein, resulted in a tax liability to Schottenstein of \$103,679.00, which Schottenstein has paid. Thefeld, who prepared the 2014 tax return using wage and income transcripts and a K-1 from Protilus, also calculated a net operating loss carryforward based on prior returns and carryback from 2015 losses.

Schottenstein credibly testified that, beginning in “at least ... 2015” and continuing through “2019 or 2020,” Levine failed to provide Schottenstein with accurate, complete and timely financial records including the Entity tax returns, K-1s, and expense records, which were in the control of Levine and Neidich. Indeed, Levine admitted that there were delays in providing K-1s to Schottenstein for several years. Schottenstein testified that, due to this delay, and the

resulting unavailability of accurate and complete K-1s and other financial records, his 2014 and 2015 tax returns were filed late.

In 2016, Schottenstein directed Neidich, which he was then relying upon to prepare his taxes alongside those of the Entities, to file his 2014 tax return based on the incomplete information available. Neidich never informed Schottenstein that the return had been rejected but, as Thefeld subsequently determined and testified to, the original 2014 return was not accepted by the IRS. Thefeld further determined that an amended 2014 return filed by Schottenstein in 2018 was also rejected by the IRS because the original return was never processed. As a result, Schottenstein's 2014 return, now prepared by Thefeld, was not filed until 2022. As confirmed by Thefeld, the late filing of Schottenstein's returns triggered the automatic assessment of penalties and interest, which remain due and owing. Indeed, penalties and interest for the 2014 tax year, which continue to accrue, are \$93,123.07, nearly doubling Schottenstein's original tax liability of \$103,679.00 (*see* NYSCEF Doc. No. 46).

Schottenstein further testified that the tax liability passed through to him from the capital gain to Protilus was not offset because Levine, who controlled Protilus's financial records, failed to properly allocate expenses. For example, Schottenstein explained that millions of dollars flowed into and out of Protilus in 2014, including a \$2.5 million outgoing wire transfer from Protilus to Levine's mother, which Levine attempted to characterize as an "expense reimbursement." However, this characterization was never supported by any documentation or allocation, absent which Schottenstein's 2014 tax liability was not offset.

In 2017, Schottenstein and Levine became aware of an audit of the Project Sunshine transaction being conducted by the California Franchise Tax Board ("CFTB"). On August 15, 2018, concerned about potential tax consequences arising from his delayed tax filings, Schottenstein entered into an Assignment and Assumption Agreement (the "Agreement") with Levine. Schottenstein agreed to assign and convey to Levine all of his interest in the Entities, and relinquish his rights to any and all proceeds which became payable to the Entities, in exchange for \$100,000.00 and an undertaking by Levine to indemnify and hold Schottenstein harmless from any and all liabilities arising from his involvement in the Entities, including, without limitation, any and all tax liabilities (*see* NYSCEF Doc. No. 145).

In May 2019, Schottenstein received notices from the CFTB assessing claims of \$51,995.80 and \$320,246.00 arising from its audit of Project Sunshine that were chargeable to Schottenstein. Schottenstein provided Levine with copies of the notices and made a demand for indemnification pursuant to the Agreement. Levine disclaimed an obligation to indemnify Schottenstein. Schottenstein then commenced an arbitration against Levine for indemnification of “any and all liabilities” arising from his involvement in the Entities, including “the amounts sought by the CFTB.”

On February 26, 2020, Arbitrator Gerald Harris issued an Award (the “2020 Award”) directing Levine to defend and indemnify Schottenstein from liabilities, costs, and expenses assessed by the CFTB. Arbitrator Harris determined that Levine “acting . . . as the [Entities] Tax Matters Partner . . . delegated the responsibility for preparing tax returns of such entities to the Neidich firm” but “failed adequately to oversee or direct [Neidich’s] work[,]” that Neidich “failed to timely prepare the required tax documents” for Schottenstein to file his tax returns, and that, “[a]s a consequence, [Schottenstein] has had asserted against him claims and assessments by [CFTB] for non-payment of taxes, or late filing of returns and failure to make required withholding, which claims include penalties and interest” (NYSCEF Doc. No. 146 at 3-4). As such, Arbitrator Harris decreed, in relevant part, that:

As to any of the Entities, whether named in the Agreement or for which [Levine] serves or served as a tax matters partner, [Levine] shall protect, indemnify, defend and hold harmless [Schottenstein] from and against any and all claims, damages, liens liabilities, losses, costs and expenses, including reasonable attorneys' fees and court costs, resulting from, arising out of or related to [Schottenstein's] actions, involvement or activities in connection with such Entities which have been or may hereafter be asserted against [Schottenstein].

(NYSCEF Doc. No. 146 at 5).

This Court confirmed the 2020 Award and signed the Judgment on November 23, 2021, which was entered by the County Clerk on January 19, 2022 (*see* NYSCEF Doc. No. 147). Thereafter, in February and April 2022, Schottenstein requested that Levine indemnify him for

tax years 2014 and 2015 with respect to tax liabilities arising from his involvement with, and participation in, the Entities (*see* NYSCEF Doc. Nos. 153 & 155). Levine again declined to indemnify Schottenstein pursuant to the Agreement.

Law

Judiciary Law § 753 provides, in relevant part, that “[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced,” including “any” disobedience to a lawful mandate of the court (Judiciary Law § 753[A][3]). The objective of civil contempt is not to punish the contemnor but, rather, “to compensate the injured private party or to coerce compliance with the court’s mandate or both” (*Dep’t of Env’t Prot. of City of New York v. Dep’t of Env’t Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987]).

A party must establish the following four elements to support a finding of civil contempt: (1) there was a lawful court order in effect clearly expressing an unequivocal mandate; (2) it must appear, with reasonable certainty, that the party to be held in contempt has disobeyed the order; (3) the party to be held in contempt had knowledge of the order, although it is not necessary that the party actually be served with the order; and (4) resulting prejudice to the rights of the moving party (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015], citing *McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994]).

Based on the testimony and credible evidence, the court finds that Schottenstein has established all four elements. The Judgment is a lawful court order that clearly expresses an unequivocal directive that Levine must indemnify and hold harmless Schottenstein from “any and all claims,” liabilities, etc., including, without limitation, tax liabilities, penalties, and interest, arising from Schottenstein’s involvement with, and participation in, the Entities. Levine was undisputably aware of the Judgment and has plainly violated its clear and unequivocal mandate by refusing Schottenstein’s requests for indemnification.

Levine disputes that he is responsible for indemnifying Schottenstein for delays and late filings of tax returns. Yet Levine admits there were delays of several years in providing K-1s to

Schottenstein. Further, Levine reluctantly concedes that “the tax liability arising from the capital gain [was] a consequence of Mr. Schottenstein’s membership in Protilus.” Given this concession, corroborated by documentary evidence and both Schottenstein’s and Thefeld’s testimony, Levine’s contention that he has not disobeyed the Judgment because Schottenstein seeks indemnification for his personal income taxes rather than for liabilities connected with the Entities, is baseless. Indeed, in light of the evidence and testimony in the record, the court finds it incredible that Levine, a sophisticated businessman, could contend that the tax claims for which Schottenstein seeks indemnification are unrelated to the Entities, or that he is not responsible for the delay in Schottenstein’s tax filings given that he managed and controlled the financial and tax matters for the Entities. As such, the court discredits Levine’s testimony in its entirety.

Finally, Schottenstein demonstrates that he has been, and continues to be, prejudiced by Levine’s failure to comply with the Judgment. Schottenstein has paid and/or continues to owe taxes, interest and penalties to the IRS and state tax authorities because of his involvement with, and participation in, the Entities, for which he is entitled to be indemnified under the Judgment. Further, Schottenstein has incurred additional legal fees in connection with bringing the present contempt motion

Based on the foregoing, Schottenstein has established that Levine’s disobedience of the Judgment has defeated, impaired, impeded or prejudiced his rights and that he has no alternative effective remedies available to him.

Therefore, Schottenstein’s motion to hold Levine in contempt is granted. Levine shall be given an opportunity to purge the contempt by indemnifying and holding harmless Schottenstein from all 2014 and 2015 tax liabilities arising from Schottenstein’s involvement with, and participation in, the Entities, including penalties, fines, and interest. Levine’s failure to purge his contempt by paying the amounts of the subject tax liabilities to Schottenstein on or before May 11, 2026, shall be punishable by a fine of \$1,000 per day against Levine, from May 12, 2026, forward until such payment is made and the contempt is purged (*see Pac. All. Asia Opportunity Fund L.P. v Wan*, 199 AD3d 423, 423 [1st Dept. 2021]; *Ruesch v Ruesch*, 106 AD3d 976, 977 [2nd Dept. 2013]). Additionally, Levine shall reimburse Schottenstein for the costs and expenses, including reasonable attorneys’ fees, incurred in connection with this motion (*see Gottlieb v*

Gottlieb, 137 AD3d 614, 618 [1st Dept. 2016]).

Accordingly, it is hereby

ORDERED that petitioner Ari Schottenstein's motion for an order holding respondent Barry Levine in civil contempt for his failure to obey the Judgment signed by the court on November 23, 2012, and entered by the Clerk of the Court of New York County on January 19, 2022, is granted; and it is further

ORDERED and **ADJUDGED** that respondent Barry Levine's disobedience of the court's Judgment has defeated, impaired, impeded or prejudiced the rights of petitioner Ari Schottenstein; and it is further

ORDERED that respondent Barry Levine is held in civil contempt and is directed to purge the contempt on or before May 11, 2026, by indemnifying and holding harmless petitioner Ari Schottenstein from all 2014 and 2015 tax liabilities arising from Schottenstein's involvement with, and participation in, the Entities, including penalties, fines, and interest to date; and it is further

ORDERED that the attorneys for petitioner and respondent shall meet and confer forthwith to determine the amount due and owing to date for all 2014 and 2015 tax liabilities subject to the Judgment, including penalties, interest, and fines; and it is further

ORDERED that, should respondent Barry Levine fail to comply with the court's directive above to purge his contempt by paying the amounts of the subject tax liabilities to petitioner Ari Schottenstein on or before May 11, 2026, a *per diem* fine shall be assessed against respondent Barry Levine in the amount of \$1000.00 per day, from May 12, 2026, forward until such time as respondent has purged the contempt and complied with the Judgment by making such payment; and it is further

ORDERED that petitioner Ari Schottenstein's application for fees and costs, including attorneys' fees, incurred in connection with this motion is granted, and the issue of the amount of the attorneys' fees and costs to be awarded to petitioner is hereby referred to a Special Referee or

JHO to hear and report; and it is further

ORDERED that petitioner Ari Schottenstein shall, within 60 days from entry of this decision and order, serve a copy of this order with notice of entry, together with a complete Information Sheet², upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part and/or assign this matter to a JHO for the earliest convenient date; and it is further

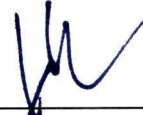
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that petitioner Ari Schottenstein is directed to personally serve a copy of this decision and order on respondent Barry Levine within ten (10) days from the date of the decision and order and to e-file a copy of the affidavit of service.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: New York, New York
April 1, 2026

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

² Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).