

Bank of Am., N.A. v Sigo Mfr. L.L.C.

2011 NY Slip Op 33538(U)

January 12, 2011

Supreme Court, Albany County

Docket Number: 7002/10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

BANK OF AMERICA, N.A.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7002-10
RJI NO. 01-11-104515

SIGO MANUFACTURING L.L.C.
and ISRAEL TREITEL,

Defendants.

Supreme Court Albany County All Purpose Term, December 15, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff entered a default judgment against both Defendants on November 30, 2010. Plaintiff now moves for an order finding Defendants in contempt of court for their failure to comply with certain enforcement subpoenas Plaintiff allegedly served upon them. Defendants oppose the motion. Because Plaintiff established Israel Treitel's (hereinafter "Treitel") contempt, its motion is granted in part.

“Refusal or willful neglect of any person to obey a subpoena... issued pursuant to [CPLR §5224]... shall... be punishable as a contempt of court.” (CPLR §5251). “Pursuant to Judiciary Law § 753(A)(3), a court may punish a party for civil contempt for any ... disobedience to a lawful mandate of the court when it is accompanied by prejudice.” (State v. Rosse, 18 AD3d 982 [3d Dept. 2005][internal quotation marks omitted]). The contempt remedy in this action, however, further requires proper service of the subpoena. (Carl v. Moyer, 63 Misc2d 1052 [Sup Ct, Onondaga County 1970]; Jack Mailman & Leonard Flug DDS, PC, v. Belvecchio, 195 Misc2d 275 [App. Term 2nd Dept. 2002]). Both a subpoena and subpoena duces tecum, CPLR §§5224(a)(1) and (2), must be served in the same manner as a summons (CPLR §2303[a]), but a CPLR §§5224(a)(3) information subpoena may be served in accord with its own terms.

Here, Plaintiff demonstrated that it duly served Treitel with a subpoena / subpoena duces tecum and that he prejudiced Plaintiff’s rights by failing to comply with it. Plaintiff attached to its motion the subpoena / subpoena duces tecum it served on Treitel, along with an affidavit of service. The affidavit of service alleges that Treitel was properly served in accord with CPLR §308(2), which constitutes “prima facia evidence of proper service.” (US Bank National Association v. Vanvliet, 24 AD3d 906, 908 [3d Dept. 2005]; Kurlander v. Willie, 45 AD3d 1006 [3d Dept. 2007]; Engel v Lichterman, 62 NY2d 943 [1984]). In opposition, Treitel neither alleged compliance with the subpoena / subpoena duces tecum nor rebutted the affidavit of service’s presumption of regularity. He alleges, incredibly “upon information and belief,” that he did not “become aware of the documents notifying me of the scheduled deposition until after September 6, 2011.” Even accepting this statement as true, the subpoena did not schedule the “deposition” portion of the subpoena / subpoena duces tecum until September 13, 2011. Nor

did he explain how he “did not have enough time to respond.” In sum, Treitel wholly failed to provide a “detailed and specific contradiction of the allegations in the process server’s affidavit.” (US Bank National Association v. Vanvliet, supra at 908, quoting Bankers Trust Co. of Cal. v. Tsoukas, 303 AD2d 343, 344 [2d Dept. 2003]). Although Treitel alleged that he lost certain business documents in a January 2011 fire, he failed to establish how such loss would have prevented his attendance at the “deposition” or that the fire affected the personal documents sought by the subpoena duces tecum. As such, on this record Plaintiff sufficiently established their prejudice and thereby Treitel’s contempt.

Plaintiff failed to establish, however, Sigo Manufacturing L.L.C.’s (hereinafter “Sigo”) contempt for its failure to respond to the subpoena / subpoena duces tecum. The affidavit of service Plaintiff submitted alleged that Sigo was served with the subpoena / subpoena duces tecum by its delivery to a relative of Treitel and a subsequent mailing to Treitel’s residence. Importantly, the relative was not alleged to be member, manager, agent for process or designee of Sigo. While the affidavit of service alleges proper CPLR §308(2) service on Treitel, because it wholly failed to establish that Sigo was served properly in accord with either CPLR §311-a or Limited Liability Company Law §303 such service failed to comply with CPLR §2303(a) and was a nullity. (Supple v. Brockbilt Homes LLC, 2007 WL 4857221 [Sup Ct, New York 2007]; Lakeside Concrete Corp. V. Pine Hollow Bldg. Corp., 104 AD2d 551 [2d Dept.1984], aff’d 65 NY2d 865 [1985]). Accordingly, Plaintiff failed to establish Sigo’s contempt for its failure to comply with the subpoena / subpoena duces tecum.

Turning to Plaintiff’s motion to hold Defendants in contempt for their failure to answer two CPLR §5224(a)(3) information subpoenas, again Plaintiff failed to establish their entitlement

to such relief. Plaintiff submitted two information subpoenas, dated December 20, 2010 and March 14, 2011, but failed to attach their accompanying questionnaires. Nor did Plaintiff allege that the two information subpoenas were “accompanied by a copy and original of written questions and a prepaid, addressed return envelope.” (CPLR §5224[a][3]). Moreover, no affidavit of service was submitted for either information subpoena. Despite Plaintiff’s attaching a copy of two signed “return receipt” cards, on this record Plaintiff failed to establish its compliance with CPLR §5224(a)(3). Thus, Plaintiff failed to demonstrate Defendants’ contempt for their failure to comply with either information subpoena.

Accordingly, Plaintiff’s motion to hold Treitel in contempt is granted. Treitel is hereby fined \$250.00 plus Plaintiff’s costs in bringing this motion. Said fine must be paid to Plaintiff, through this Court pursuant to §773 of the Judiciary Law. Treitel may purge this finding of contempt, and the fine will be waived, if he fully complies with Plaintiff’s subpoena / subpoena duces tecum within thirty days of the date this Decision and Order is served upon him. To the extent not specifically granted, Plaintiff’s motion is otherwise denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 12, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated October 17, 2011; Affirmation of Michael Ferdman, dated October 6, 2011, with attached Exhibits A-D.
2. Affirmation of Jason Shanbaum, dated December 12, 2011; Affidavit of Israel Treitel, dated December 12, 2011, with attached Exhibit A.