

<b>Transperfect Document Mgt., Inc. v Collard</b>
2012 NY Slip Op 30183(U)
January 25, 2012
Sup Ct, NY County
Docket Number: 116290/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN  
*Justice*

PART 11

*TRANSPORT DOCUMENT*  
*- v - Mount*  
*PETER COLLARD JR*

INDEX NO. 116290/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 3  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

**FILED**  
JAN 26 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 25, 2012

*[Signature]*  
\_\_\_\_\_  
J.S.C.  
**HON. JOAN A. MADDEN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
TRANSPERFECT DOCUMENT MANAGEMENT, INC.,

Plaintiff,

INDEX NO. 116290/10

-against-

PETER M. COLLARD, JR.,

**FILED**

Defendant.

-----X

JAN 26 2012

JOAN A. MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff TransPerfect Document Management, Inc. ("TransPerfect") moves for an order:

1) pursuant to Judiciary Law §753(A)(3) and CPLR 5104, holding defendant Peter M. Collard, Jr. and non-party Modus, LLC ("Modus") in civil contempt for "willful violation" of the Stipulation and Order of Settlement so-ordered by this court on March 29, 2011 (the "Order" or the "so-ordered stipulation"); 2) pursuant to Judiciary Law §773 imposing damages against Collard and Modus "for their contempt of the Order," including the maximum statutory fine of \$250.00, and plaintiff's costs and expenses in connection with this motion, including reasonable attorney's fees; 3) extending the non-solicitation period for an additional two months; 4) requiring Collard and Modus to submit to depositions and document discovery concerning the extent to which they have allegedly violated the Order; and 5) providing that any further violations of the Order shall be punishable by imprisonment.

Defendant Collard and non-party Modus oppose the motion, and Modus cross-moves for an order pursuant to Rule 130.1 imposing sanctions against plaintiff for frivolous conduct. By a separate notice of cross-motion, Modus seeks an "order vacating the court's February 9, 2011

preliminary injunction order and dismissing this action for failure to state a claim upon which relief can be granted,” and alternatively, an order “modifying” the court’s February 9, 2011 order “so as to identify those specific customers to which it applies upon agreement of the parties and Modus or submission of proof by clear and convincing evidence by Plaintiff.” Collard submits a Notice of Joinder stating that he joins in the cross-motion by Modus to vacate or modify the court’s February 8, 2011 preliminary injunction order.

Defendant Collard was employed by plaintiff TransPerfect from July 2008 through December 6, 2010. On December 16, 2010, TransPerfect commenced the instant action for injunctive relief and damages, asserting claims for breach of contract, misappropriation of confidential information, breach of fiduciary duty and duty of loyalty, and unfair competition. By a decision and order dated February 15, 2011, this court granted TransPerfect’s motion for a preliminary injunction. On March 16, 2011, the parties executed a Stipulation and Order of Settlement, which this court so-ordered on March 29, 2011; the parties also executed a Stipulation of Discontinuance with Prejudice.

On or about June 20, 2011, TransPerfect made the instant motion by order to show cause, pursuant to Judiciary Law § 753(A)(3) and CPLR 5104, seeking to hold Collard and his current employer, Modus, in civil contempt for willful violation of the stipulation of settlement. TransPerfect alleges that Collard on behalf of Modus improperly solicited Covington & Burling LLP (“Covington”), a TransPerfect customer that Collard had serviced during the last year of his employment at TransPerfect, in “clear violation” of the following provision<sup>1</sup> in the so-ordered

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<sup>1</sup>This provision originally appeared in the court’s February 9, 2011 order, which granted TransPerfect’s motion for a preliminary injunction. The parties’ Stipulation and Order of Settlement states that the “Preliminary Injunction Order shall become a permanent injunction that

stipulation:

[D]efendant Peter M. Collard, Jr. (“Collard”) is enjoined directly or indirectly, alone or in concert with others, including his new employer Modus, from soliciting any customers of TransPerfect for whom or to whom Collard provided TransPerfect services, products, or to whom Collard provided a quotation, estimate or proposal for the sale of TransPerfect products after active solicitation by Collard during the last year of his employment with TransPerfect; however, Collard is not enjoined from soliciting TransPerfect clients with whom he had a preexisting relationship with and who came to TransPerfect solely to avail themselves of Collard’s services and only as a result of his own, independent recruitment efforts, which TransPerfect neither subsidized nor financially supported in other than a de minimis way as part of client development . . .

In support of the motion, TransPerfect submits an affidavit from A. Brooke Christian, Senior Vice President of Global Sales for TransPerfect Translations International, Inc. and its “affiliated family of companies.” Mr. Christian explains that following Collard’s “departure, TransPerfect arranged to have emails sent to Mr. Collard’s work email account auto-forwarded to other TransPerfect employees in order to ensure that client requests did not go unanswered.” According to Christian, on “June 10, 2011 at 8:26 a.m., an email was sent from Covington & Burling (“Covington”), a TransPerfect customer, to Mr. Collard’s TransPerfect email account, indicating that Mr. Collard would be meeting with that customer,” and later that day at 1:04 p.m., Collard sent an email to Christopher Cantwell of Covington, entitled “Modus Cube Lunch Presentation,” which stated in its entirety, as follows:

Hi Chris, thanks again for taking the time to catch-up! We would like to request the opportunity to do a Modus Cube demo for the LLS team during your weekly

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will remain binding and *in effect through and including December 6, 2011*; provided, however, that Mr. Collard’s obligations not to directly or indirectly, alone or in concert with others, including his new employer Modus, use in any way or disclose to any person TransPerfect’s confidential, proprietary or trade secret information shall continue to remain in effect following December 6, 2011, so long as such information remains confidential” (emphasis added).

Wednesday lunch at the next available time. Thanks in advance for consideration.  
Have a good weekend! Thanks, Pete

Cantwell replied to Collard by copying him on an email addressed to Elizabeth Garnette, stating: “Hi Liz, Could you please check the LSS meeting calendar and let Pete [Collard] know when he can come to demo Modus’s Cube? Thanks, Chris.”

Relying on Collard’s email to Cantwell, TransPerfect asserts that Collard “improperly” and “affirmatively solicited” Covington, a TransPerfect client, for business on behalf of Modus, his new employer, which has “clearly prejudiced TransPerfect’s rights.” TransPerfect also asserts that Covington does not fall within the “exception” to the order, as quoted above, because Covington was a client of TransPerfect “for several years” prior to the commencement of Collard’s employment, and “could not possibly have come to TransPerfect solely to avail itself of Mr. Collard’s services.” Based on the foregoing, TransPerfect asserts that Collard and Modus should be held in civil contempt of court for violating the so-ordered stipulation.

Contempt is a drastic remedy, which should not issue absent a clear right to such relief. See Coronet Capital Co. v Spodek, 202 AD2d 20 (1<sup>st</sup> Dept 1994); Usina Costa Pinto, S.A. v Sanco Sav Co. Ltd., 174 AD2d 487 (1<sup>st</sup> Dept 1991). “A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court.” Chambers v. Old Stone Hill Road Associates, 66 AD3d 944, 946 (2<sup>nd</sup> Dept 2009), app. dismissed 14 NY3d 747 (2010). To sustain a finding of civil contempt based on an alleged violation of a court order, the moving party has the burden to establish, by clear and convincing evidence, that a lawful order of the court expressing a clear and unequivocal mandate was in effect, and that the order was disobeyed to a reasonable degree of certainty. See Matter of Department of Environmental Protection of City

of N.Y. v. Department of Environmental Conservation of State of N.Y., 70 NY2d 233 (1987); McCormick v Axelrod, 59 NY2d 574, amended 60 NY2d 652 (1983); Gryphon Domestic VI, LLC v. APP International Finance Co, 58 AD3d 498, 499 (1<sup>st</sup> Dept 2009). The party to be held in contempt must be shown to have had knowledge of the order, and the disobedience must have prejudiced the moving party's rights. See McCain v Dinkins, 84 NY2d 216 (1994); McCormick v Axelrod, supra; Garcia v Great Atlantic & Pacific Tea Co, Inc, 231 AD2d 401 (1<sup>st</sup> Dept 1996). Moreover, the penalty imposed for civil contempt is not designed to punish, but rather to compensate the injured party or to coerce compliance with the court's mandate, or both. See Matter of Department of Environmental Protection of City of N.Y. v. Department of Environmental Conservation of State of N.Y., supra at 239.

Applying the foregoing standards, the court concludes that TransPerfect has failed to meet its burden so as to warrant holding either defendant Collard or non-party Modus in civil contempt. While the stipulation states that the "Parties and Modus agree that any violation of the terms of this order shall be punishable by contempt, among other remedies available to the Court and the non-breaching party," as the party seeking contempt, TransPerfect is still required to satisfy the evidentiary burden necessary to support such relief. Non-party Modus is not subject to the remedy of civil contempt, since the stipulation does not direct Modus to take or refrain from taking any particular action. Even though Modus signed the stipulation of settlement, it did so as a non-party and only to the limited extent of exchanging mutual releases of liability with TransPerfect.

Collard alone is bound by the restrictive covenant quoted above, which enjoined him from soliciting any TransPerfect customers for whom he provided TransPerfect services during

the last year of his employment. Within the contextual framework of the circumstances here, by its terms, the restrictive covenant does not express a clear and unequivocal mandate, since the language excluding TransPerfect clients with whom Collard had “preexisting relationship” and “who came to TransPerfect solely to avail themselves of Collard’s services,” is vague and ambiguous. See e.g. Trabanco v. City of New York, 81 AD3d 490, 492 (1<sup>st</sup> Dept 2011) (“order is insufficient because it leaves the interpretation of the phrase ‘appropriate material’ open to debate”); Chung v. Maxam Properties, LLC, 52 AD3d 423 (1<sup>st</sup> Dept 2008) (injunction that was “at best” ambiguous, “was not clear and unequivocal enough to warrant a contempt finding”); Quick v. ABS Realty Corp., 13 AD3d 1021 (3<sup>rd</sup> Dept 2004) (quoting Upper Saranac Lake Assn v. New York State Department of Environmental Conservation, 263 AD2d 916, 917 [3<sup>rd</sup> Dept 1999]) (“When the order ‘contains ambiguous and vague language, a finding of civil contempt is not tenable.’”).

The conclusion that the stipulation is equivocal in the circumstances at issue is amply demonstrated by the parties’ varying interpretations of the exclusionary language. TransPerfect asserts that Collard’s e-mail to an employee at Covington cannot possibly fall within the exclusion since TransPerfect had a preexisting relationship with Covington, as evidenced by the submission of more than 800 invoices indicating the work TransPerfect performed for Covington from 2001 through 2011. Collard, on the other hand, submits an affidavit identifying three Covington employees with whom he claims he had a long-standing and pre-existing “customer” or “business relationship,” which from February 2009 to December 2010 “resulted in bringing work” to TransPerfect from Covington. Collard also states that in January and February 2010, his “business relationship” with one of those individuals, Jessica Giglio, “resulted” in



TransPerfect “handling an exhibit processing and blowback project for Covington in London, England,” which “ultimately brought approximately \$250,000 of revenue” to TransPerfect.<sup>2</sup>

Under these circumstances, where the so-ordered stipulation leaves the interpretation of the exclusionary language “open to debate,” the stipulation is ambiguous and vague, and as such, fails to express a clear and unequivocal mandate for which the remedy of civil contempt is available. Trabanco v. City of New York, *supra* at 492; *see also* Chung v. Maxam Properties, LLC, *supra*; Quick v. ABS Realty Corp., *supra*.

The court also concludes that Collard’s June 10, 2011 email to an employee at Covington, does not constitute clear and convincing evidence establishing that Collard violated the so-ordered stipulation with reasonable certainty. See Matter of Department of Environmental Protection of City of N.Y. v. Department of Environmental Conservation of State of N.Y., *supra* at 239. Moreover, TransPerfect has failed to make a sufficient showing that it has been prejudiced by the alleged violation. TransPerfect provides no factual basis to support its bare and conclusory allegation of prejudice. TransPerfect seeks attorney’s fees and a fine in the maximum statutory amount of \$250.00, but does not allege that has suffered any compensable damages, which suggests that it has not sustained any actual economic loss as a result of Collard’s June 10, 2011 e-mail. See Chambers v. Old Stone Hill Road Association, *supra* at 946.

Based upon the foregoing, plaintiff has not established a “clear right” to an order punishing defendant Collard or non-party Modus for civil contempt, and the motion is denied. See Coronet Capital Co. v Spodek, *supra*; Usina Costa Pinto, S.A. v. Sanco Sav. Co. Ltd., *supra*.

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<sup>2</sup>After oral argument and the submission of the motion, defendant Collard submitted an affidavit from Jessica Giglio, to which plaintiff objected. In light of its untimely submission, the court has not considered Ms. Giglio’s affidavit in determining the instant motion.

The cross-motion for sanctions and other relief, is denied.<sup>3</sup> The portion of the cross-motion seeking to vacate or modify the court's February 9, 2011 preliminary injunction order, has been rendered moot, since as noted above, the parties' Stipulation and Order of Settlement provided that the "Preliminary Injunction Order shall become a permanent injunction that will remain binding and in effect through and including December 6, 2011."

Accordingly, it is

ORDERED that plaintiff's motion for civil contempt is denied; and it is further

ORDERED that the cross-motion is denied in its entirety.

DATED: January 25, 2012

ENTER:

**FILED**

**JAN 26 2012**

NEW YORK  
CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.

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<sup>3</sup>To the extent Collard opposed this motion on the grounds that TransPerfect's counsel should be disqualified, that issue is moot, in view of the court's decision and order dated January 17, 2012, denying Collard's motion for disqualification (motion seq. no. 005).