SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 12

----------x

GRAND PACIFIC FINANCE CORP.,

Plaintiff,

- against -

97-111 HALE, LLC, 100-114 HALE, LLC, HALE CLUB, LLC, ELI BOBKER, BEN BOBKER, and JOE BOBKER,

Defendants.

----------x

Index No. 601164/09

Mot. seq. no. 015

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Paul H. Schafhauser, Esq.
Herrick, Feinstein LLP
2 Park Ave.
New York, NY 10016
212-592-1400

For Bobker defendants:
Jonathon D. Warner, Esq.
Warner & Scheuerman
6 W. 18th St., 10th Fl.
New York, NY 10011
212-924-7111

By notice of motion, plaintiff moves pursuant to CPLR 5251 and Judiciary Law 753 for an order holding defendants Joseph Bobker, Eli Bobker, and Ben Bobker (collectively, the Bobkers) in contempt for their failure to comply with an installment payment order dated October 20, 2015. Plaintiff also moves for an order directing the Bobkers to pay sanctions and a fine in the amount of plaintiff's attorney fees, costs, and expenses incurred in moving for contempt and otherwise attempting to obtain compliance with the order along with an additional fine of $250 pursuant to Judiciary Law 773, directing the Bobkers to comply with the order, and directing that if the Bobkers do not timely purge their contempt, they shall be incarcerated pursuant to Judiciary Law 770 until they comply.

The Bobkers oppose and, by notice of cross motion, move pursuant to CPLR 5240 for a protective order staying the enforcement of and modifying the order. Plaintiff opposes the cross

motion.

I. PERTINENT BACKGROUND

The facts underlying this action have been set forth extensively in other decisions. As pertinent here, in 2011, judgment was entered against Eli, Ben, and other defendants for approximately $11 million, and against Joe and defendant Hale Club for approximately $2.5 million. The Bobkers have not paid the judgment and they ignored numerous post-judgment disclosure devices, requiring plaintiff to bring multiple motions seeking their compliance and/or holding them in contempt. (NYSCEF 307).

By decision and order dated January 8, 2014, I granted plaintiff's motion for an installment payment order against the Bobkers, and referred the matter to a special referee to hear and determine the reasonable value of their services rendered to various entities and projects and their reasonable living requirements. (*Id.*).

On June 18, 2015, after hearings conducted in March and April 2015, the referee issued a report, wherein he imputed $370,000 in annual income to Joe and $830,000 to Eli and Ben each, and determined that Joe's reasonable living requirements are $296,000 a year, and Eli and Ben's are each $664,000. The referee therefore recommended that Joe make installment payments of $74,000 or $6,167 per month, and that Eli and Ben each pay $166,000 per year or $33,833 per month. (NYSCEF 328).

On or about July 1, 2015, plaintiff moved for an order confirming the referee's report. The Bobkers opposed and cross-moved for an order rejecting portions of the report and confirming the referee's finding as to their reasonable requirements. (Mot. seq. no. 14).

By amended decision and order dated October 20, 2015, I granted plaintiff's motion,

confirmed the report in its entirety, and directed that the Bobkers make the payments set forth in the report. (NYSCEF 347).

On October 27, 2015, plaintiff served the Bobkers with notice of entry of the order, and requested that they pay their first installment on or before November 1, 2015. To date, the Bobkers have failed to comply with the order and have made no payments.

II. APPLICABLE LAW

The purpose of civil contempt is to compel compliance with a court order or compensate a party injured by the disobedience of a court order. (*State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). "[T]o prevail on [such] a motion . . . the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing a right of another party to the litigation." (Judiciary Law § 753[A]; *Riverside Cap. Advisers, Inc. v First Secured Cap. Corp.*, 43 AD3d 1023, 1024 [2d Dept 2007]).

Generally, "the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party." (*Yalkowsky v Yalkowsky*, 93 AD2d 834, 835 [2d Dept 1983]). However, in cases involving responses to judgment enforcement devices, the party moving for contempt must show that the alleged contemnor engaged in wilful neglect or refusal. (CPLR 5251; *Gray v Giarrizzo,* 47 AD3d 765, 766 [2d Dept 2008]).

The party moving for contempt bears the burden of proving the contempt by clear and convincing evidence (*Riverside*, 43 AD3d at 1024), which "requires a finding of high probability" (*Matter of Eichner [Fox]*, 73 AD2d 431, 469 [2d Dept 1980], *mod on other grounds* 52 NY2d 363, *cert denied* 454 US 858 [1981]; *Usina Costa Pinto, S.A. v Sanco Sav. Co.,* 174

AD2d 487 [1st Dept 1991] [proof or standard is "reasonable certainty"]).

III. CONTENTIONS

Plaintiff asserts that the Bobkers's failure to make any payments pursuant to the order constitutes a violation of a clear and unequivocal mandate of the court, which prejudiced its right to enforce the judgments, and that their failure was wilful as evidenced by their years-long attempts to evade payment. Plaintiff maintains that the Bobkers's contemptuous behavior warrants the imposition of the requested sanctions, contending that a fine in the amount of $250 would be inadequate and ineffectual given the Bobkers's repeated failure to comply with court orders and refusal to pay any amount toward the judgment. For the same reasons, plaintiff argues that the Bobkers should be incarcerated until they comply. (NYSCEF 350).

The Bobkers argue that the basis for the issuance of the order, that they provided services without adequate compensation, is no longer relevant as Eli and Ben are now employed with annual salaries far below what the referee imputed to them and that all of their earnings are used to pay their expenses and debts, and that they have no money to pay. Joe contends that he has essentially retired from employment and currently receives income only from social security and pension payments and that he failed to pay because he cannot. (NYSCEF 368).

The Bobkers thus seek to modify the order to reflect their current income and a stay of enforcement, and deny that they are in contempt as their failure to pay arises out of their inability to do so. They also maintain that the instant application violates an order issued by the Bankruptcy Court in a bankruptcy proceeding commenced by defendants 97-111 Hale, LLC and 100-114 Hale, LLC, which enjoined and prohibited plaintiff from requesting, and the state court from issuing, any order or other relief related to plaintiff's action here or the order, which could

lead to or require the arrest, detention, or incarceration of the Bobkers, pending the conclusion of a trial in a foreclosure action scheduled to commence in Supreme Court, Westchester County on December 9, 2015. They assert that the foreclosure trial had not yet concluded as of May 2016, and that the contempt motion may not be heard or decided now. (*Id.*).

In reply, plaintiff argues that it has shown that the Bobkers are in contempt of the order, and observes that they waited more than six months after the Order issued and only after plaintiff filed its motion for contempt to allege that they are unable to pay. Plaintiff also observes that the documents provided by Eli and Ben are from 2015, and that they could have moved to modify the order in 2015. Plaintiff denies that the Bobkers are entitled to a protective order, and contends that the evidence submitted is self-serving and unauthenticated hearsay, much of which was rejected by the referee. Plaintiff also maintains that the Bobkers fail to show that they receive no income other than their alleged new salaries, noting that they are funding expensive lifestyles while claiming to receive little income, an indication that they receive income from other sources. Plaintiff argues that Joe's claim that his ill health renders him unable to work was raised before the referee and rejected, and that the Bobkers have also failed to demonstrate that their expenses remain the same. Plaintiff also maintains that the Bobkers's unclean hands warrant denial of their application for a protective order. It denies that it violated the bankruptcy court order and contends that the foreclosure trial ended in December 2015, whereas it filed the instant motion in February 2016, and adjourned the return date of this motion to a date after closing arguments were held in the trial in May 2016, and that in any event, the purpose of the stay was to ensure that the Bobkers would be available to testify in the foreclosure trial, a consideration that is moot as the trial has ended. (NYSCEF 177).

IV. ANALYSIS

It is undisputed that the Bobkers violated a clear and unequivocal mandate of the court by failing to comply with the order, and that their failure has prejudiced plaintiff's right to enforce its judgments and impeded its efforts to do so. (*See* CPLR 5251 [disobedience of order related to enforcement of money judgment punishable as contempt of court]; *see also McCain v Dinkins*, 84 NY2d 216 [1994] [affirming finding of civil contempt against defendant based on disobedience of court orders]; *Astrada v Archer*, 71 AD3d 803 [2d Dept 2010], *lv dismissed in part, denied in part* 14 NY3d 922 [defendant properly held in contempt for failing to comply with court order directing her to return down payment to plaintiff; plaintiff established violation of order which prejudiced her rights]).

Plaintiff also demonstrates that defendants' failure to pay is wilful, given their lengthy history of non-compliance with other orders (*see eg Feuer v Feuer*, 46 AD2d 892 [2d Dept 1974] [defendant's history of disingenuous behavior and noncompliance with provisions in judgment sufficient to hold him in contempt]), their failure to pay anything since entry of the order in October 2015 (*see Grasso v Saidel*, 150 AD2d 916 [3d Dept 1989] [failure to make required payment earned from wages during period of regular employment is evidence of wilfulness]), and their failure to seek to modify the order or seek a protective order until after plaintiff moved for contempt (*see Brand v Brand*, 236 AD2d 229 [1st Dept 1997] [evidence of wilfulness established by, among others, defendant's failure to move for modification of payment provisions of judgment]; *see also Congregation Yetev Lev D'Satmar, Inc. v Nachman Brach Inc.*, 22 Misc 3d 1109[A], 2009 NY Slip Op 50070[U] [Sup Ct, Kings County 2009] [attorney found in contempt for failure to pay court-ordered sanction upon determination that failure was wilful; court

observed that attorney neither sought stay of order nor filed notice of appeal of order]), along with their failure to show that they are unable to pay the judgment (*see infra*, ; *Sure Fire Fuel Corp. v Martinez*, 75 Misc 2d 714 [Civ Ct, New York County 1973] [debtor may be held in contempt for wilful failure to make payments under installment payment order; court should first determine debtor's financial status and ability to pay amount ordered]; *see also El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015] [upholding contempt finding as defendant submitted no evidence showing inability to pay due to insufficient funds, economic distress or financial hardship, and vague and conclusory allegations of inability to pay or perform unacceptable]; *Bomze v Bomze*, 54 AD2d 631 [1st Dept 1976] [as defendant was financially able to make required payments, failure to do so construed as wilful]; *Burchett v Burchett*, 43 AD2d 970 [2d Dept 1974] [issue of ability to pay is vital to issue of wilfulness]). Plaintiff thus meets its burden of establishing, by clear and convincing evidence, that the Bobkers are in contempt of the order.

The Bobkers's contention that they are unable to pay is based on self-serving hearsay statements, and there is no reason to credit it, given findings here and in other cases that they routinely obfuscate their true financial status. In granting the installment order, I observed that the Bobkers exhibited a lack of forthrightness, and that their failure to comply with discovery and other orders warranted the reasonable inference that the documentation that they failed to disclose would show that they received income from previously unidentified sources. (NYSCEF 309). The referee found that their testimony bordered "on the unbelievable" and that it was "very very very difficult" to believe it. (NYSCEF 328).

In federal case, the judge granted the plaintiff an installment payment order against Joe Bobker, finding that Joe's testimony about his finances was "evasive and incredible," and that he

had an "overall lack of candor" as well as a "general propensity to mislead and prevaricate." The judge also rejected Joe's claim that he could not perform significant work for the family business due to his physical ailments, observing that Joe produced no hospital or doctor's records to substantiate his claim. (*Lowy v Bobker*, 383 F Supp 2d 606 [SD NY 2005]).

Joe does not show that his medical condition has changed or worsened since the hearings before the referee in 2015, when the referee heard evidence concerning his condition and rejected it. He submits no medical evidence of his condition or proof of his social security or pension payments, including the amounts he allegedly receives therefrom. (*See Commissioner of Social Servs. v Rosen*, 289 AD2d 487 [2d Dept 2001] [respondent failed to show that he was unable to comply with order because of inability to pay; although he testified that he was retired, he also testified that he went to office and offered advice to employees without receiving compensation, and allegation that he was too old and ill to work was unsupported by credible evidence, including independent medical evidence]).

Eli offers letters from his employer that are neither notarized nor authenticated, and two of the statements contained therein contradict one another. In the letter dated August 27, 2015, the employer states that Eli earns $150,000, while the letter dated March 21, 2016 contains a breakdown of Eli's earnings which total approximately $80,000 per year without including bonuses. (NYSCEF 373). No explanation is offered as to this discrepancy.

A bankruptcy court order offered by Ben provides that he will collect an annual salary for $200,000 as manager of certain companies (NYSCEF 374), and he provides no evidence that he receives no income or salary from any other source. And, while the bankruptcy order was entered on June 30, 2015, the Bobkers made no mention of it or Ben's alleged new employment

and/or salary when they filed their opposition to plaintiff's motion to confirm the referee's report on July 24, 2015. (NYSCEF 338).

None of the Bobkers submits copies of their personal tax returns or W-2s, and while they claim that the "Bobker Group is now largely defunct," they submit no evidence showing its financial status or affairs. They have not filed for personal bankruptcy, despite alleging that they are unable to pay their personal debts, including credit cards and mortgages. In short, the Bobkers fail to demonstrate that they are unable to pay the installment payments. (*See e.g. In re Fitzgerald*, 2016 WL 6773954, 2016 NY Slip Op 07646 [2d Dept 2016] [respondent held in contempt for failing to comply with order directing him to pay surcharge to trust; he failed to raise factual issue as to defense of inability to pay as he provided vague and conclusory allegations and incomplete documentation]; *Dietrich v Michii*, 57 AD3d 1527 [4th Dept 2008] [defendant properly found in contempt as she failed to comply with prior order and failed to submit credible evidence that she was unable financially to comply with it]; *see also Quantum Heating Servs. Inc. v Austern*, 121 AD2d 437 [2d Dept 1986] [defendants who gave vague and evasive answers to information subpoena found guilty of contempt as their claims that they had no means or property or income "unworthy of belief"]; *Astrada v Archer*, 71 AD3d 803 [2d Dept 2010] [party obligated to comply with court order no matter how incorrect party considers order to be, until order is set aside, as long as issuing court had jurisdiction to issue it]).

For the same reasons, the Bobkers fail to establish a change in their circumstances that would warrant a protective order or a modification of the order. The sole inference to be drawn from the Bobkers's conduct, taking into account their history of impeding enforcement of these and other judgments against them, as well as their failure to make any payments or attempt to

modify the order or seek a protective order until after plaintiff filed the instant contempt application against them, is that this is another attempt to avoid payment of the judgments due plaintiff even if that means that they violate a court order in doing so. Eli and Ben also apparently made no attempt to obtain employment outside the family business, despite claiming for years that they were making little or no income from the family, until after I had issued an order requiring them to make installment payments and ordering a hearing as to whether income should be imputed to them.

Even if plaintiff violated the bankruptcy stay by filing the instant motion, there is no obstacle to my determining it now as closing arguments have been held in the foreclosure trial and it has thus presumably concluded. Moreover, the Bobkers may seek relief from the bankruptcy court for any alleged violation.

In light of the aforementioned history in this case, plaintiff also establishes that a fine in the form of plaintiff's attorney fees, costs, and expenses in making the contempt motion is warranted, as is the $250 fine. (*See Gottlieb v Gottlieb*, 137 AD3d 614 [1st Dept 2016] [attorney fees constituting actual loss or injury resulting from contempt routinely awarded as part of fine, including fees incurred in bringing contempt motion]; *Glanzman v Fischman*, 143 AD2d 880 [2d Dept 1988], *lv dismissed* 74 NY2d 792 [1989] [court properly awarded reasonable attorney fees incurred in connection with contempt application]).

For all of the same reasons, plaintiff shows that incarceration is warranted. (*See Astrada v Archer*, 71 AD3d 803 [2d Dept 2010] [defendant properly held in contempt for failing to comply with court order directing her to return down payment to plaintiff and directing her incarceration if she failed to return payment within specified time]; *Dietrich v Michii*, 57 AD3d 1527 [4th Dept

2008] [plaintiff established that defendant judgment debtor refused to obey prior order, and court providently exercised discretion in finding debtor in contempt and imposing term of intermittent incarceration]; *Riverside Cap. Advisers, Inc. v First Secured Cap. Corp.*, 57 AD3d 870 [2d Dept 2008], *lv dismissed* 12 NY3d 842 [2009] [affirming order of contempt against non-parties who controlled judgment debtor, imposition of fine in amount equal to plaintiff's unsatisfied judgment, and directive of non-parties' incarceration in event of failure to pay fine; non-parties transferred debtor's collateral and left it without most assets and refused to disclose information about assets' location]; *James Talcott Factors, Inc. v Larfred, Inc.*, 115 AD2d 397 [1st Dept 1985], *app dismissed* 67 NY2d 645 [1986] [defendant's corporate officers held in contempt of court for failure to comply with order requiring them to provide documents to plaintiff and incarcerated until they complied with order]; *see also Beacon Enlarged School Dist. v Tlumak*, 42 AD2d 701 [2d Dept 1973] [upholding finding of contempt and determination that defendants should be incarcerated therefor]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order holding defendants Eli Bobker, Ben Bobker, and Joe Bobker is granted and plaintiff is directed to file a proposed order of contempt; it is further

ORDERED, that plaintiff, along with a proposed contempt order, file an affidavit setting forth its request for reasonable attorney fees, costs, and expenses incurred in attempting to obtain defendants' compliance with the installment payment order, including the filing of the instant motion, and defendants may file opposition to the affidavit within 15 days of its filing; and it is

further

ORDERED, that Defendants' cross motion is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: December 2, 2016
New York, New York