

**Lynch v Johnson**

2016 NY Slip Op 32488(U)

December 9, 2016

Supreme Court, New York County

Docket Number: 107019/10

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

-----X  
PATRICK LYNCH, as President of the PATROLMEN'S  
BENEVOLENT ASSOCIATION OF THE CITY OF  
NEW YORK, INC. on behalf of the Police Officers Who  
Have Been or May in The Future Be Aggrieved, et al.,

Index No. 107019/10

Motion seq. no. 001

Petitioners,  
-against-

**DECISION & ORDER**

ROBERT W. JOHNSON,

Respondent.

-----X  
BARBARA JAFFE, JSC:

**For petitioners:**  
John F. Queenan, Esq.  
Iseman Cunningham *et al.*  
9 Thurlow Terrace  
Albany, NY 12203

**For respondent:**  
Patrick W. Johnson, Esq.  
Patrick W. Johnson, P.C.  
9118 Third Ave.  
Brooklyn, NY 11209

By amended order to show cause and petition, petitioners seek an order holding respondent in contempt for failing to obey a subpoena, directing respondent to pay petitioner's costs and attorney fees incurred as a result of respondent's refusal to obey, and directing respondent to obey the subpoena at the earliest date possible. Respondent opposes.

I. BACKGROUND

This proceeding arises from an underlying proceeding between petitioners and Shea Communications, LLC, pending in this court under Index No. 652761/05, wherein petitioners sue Shea for various breaches, and seek respondent's deposition and production of documents in his possession related thereto.

Respondent, an attorney, lists as his place of business on the attorney registration he filed with the New York State Unified Court System Office of Court Administration the address of

Patrick W. Johnson, PC, at 9118 Third Avenue, Brooklyn, NY 11209. On the website for Patrick W. Johnson, P.C., respondent is listed as “of counsel” to the PC; Kathy Johnson is listed as the office manager. (NYSCEF 2).

On May 3, 2016, I so-ordered a copy of a subpoena submitted by petitioners requiring respondent’s appearance at a deposition on May 16, 2016. The subpoena provides that respondent is commanded to appear and attend a deposition on May 16, 2016 “and at any recessed or adjourned date.” (*Id.*). On May 9, 2016, petitioners’ process server served the subpoena at the PC’s office by delivering a copy of it to Kathy Johnson, and by subsequent mailing on May 18, 2016. (*Id.*).

Respondent failed to appear on May 16, 2016. By letter dated May 16, 2016, Patrick W. Johnson advised petitioners that service on respondent at the PC’s office was improper as the office never consented to accept service on respondent’s behalf. (*Id.*).

On May 17, 2016, Patrick again advised petitioners that service on respondent had not been effected properly. By letter dated May 19, 2016 and addressed to respondent and Patrick, petitioners notified them that respondent’s deposition had been adjourned to May 24, 2016. (*Id.*).

By letter dated May 23, 2016, petitioners cancelled the May 24 deposition on the ground that they had been advised by Patrick that respondent would not appear. (*Id.*).

Thereafter, on June 8, 2016, petitioners served respondent with the same May 3, 2016 subpoena by personal delivery to respondent at his home address, along with a letter dated June 2, 2016, in which petitioners advised respondent that the May 16, 2016 deposition was adjourned to June 13, 2016. (*Id.*).

By letter dated June 10, 2016, Patrick advised petitioners that respondent would not

appear on June 13, 2016 as the subpoena was stale and improperly served. (*Id.*).

## II. CONTENTIONS

Petitioners assert that they properly served the May 3 subpoena on May 18, 2016 and again on June 8, 2016, that the subpoena is a lawful court order, and that as respondent had knowledge of the subpoena's terms, his refusal to obey it constitutes contempt of court. (NYSCEF 3).

Respondent denies that he was properly served at the PC's office as he does not maintain his actual place of business there, that in any event service was defective as it was not complete until two days after the return date of the subpoena, and that the June 8 service was also improper as petitioners served a stale subpoena. Respondent also denies that petitioners properly served the petition and order to show cause on them. (Aff. Of Patrick W. Johnson, Esq., dated Aug. 12, 2016).

## III. ANALYSIS

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]).

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 [1<sup>st</sup> Dept 1991] [proof or standard is “reasonable certainty”]. The failure to comply with a so-ordered subpoena may constitute contempt. (CPLR 2308[a]).

Pursuant to CPLR 3106, a subpoena may be issued to compel the deposition or the appearance with requested documents of a non-party to an action. Unless the court orders otherwise, such a subpoena must be served at least 20 days before the scheduled deposition. (CPLR 3106[b]). Pursuant to CPLR 2305(a), a subpoena may provide that the person subpoenaed must appear on the date stated and any recessed or adjourned date of the trial, hearing, or examination. If the witness is given “reasonable notice” of such recess or adjournment, no further process may be required to compel his attendance on the adjourned date.

The subpoena must be served in the same manner as a summons, and where service is made pursuant to section two or four of CPLR 308, the filing of proof of service is not required and service is deemed complete upon the later of its delivering or mailing if service is made pursuant to CPLR 308(2), or its affixing or mailing if service is made pursuant to CPLR 308(4). (CPLR 2303[a]).

#### A. Timeliness of service

Petitioners served respondent with the May 3 subpoena by delivery and mail service pursuant to CPLR 308(2). As the mailing was not made until May 18, 2016 and was thus not deemed complete until then (CPLR 2303[a]), petitioners not only failed to serve it at least 20 days before the scheduled deposition date of May 16, 2016 as required by CPLR 3106(b), but also served it two days after the scheduled date. Petitioners cite no authority for holding respondent in contempt for failing or refusing to appear on a date two days before the date on

which service on him of the subpoena was complete.

To the extent that petitioners' May 19, 2016 letter may be deemed "service of a subpoena," it was also served less than 20 days before the next deposition date of May 24, 2016.

Petitioner's June 8, 2016 service of the May 3 subpoena by personal delivery was also served less than 20 days before the next date of June 13, 2016.

Thus, as all of petitioners' attempts to serve the subpoena provided respondent with less than 20 days before the scheduled deposition dates, petitioners may not base their contempt application on respondent's failure to obey it. (*See* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3106:4 [party who gives subpoenaed witness fewer than 20 days before scheduled examination "will find itself without a remedy if the witness fails to appear;" contempt "will not be imposed against a witness who has been accorded less than what is provided under the law."]).

#### B. Staleness of subpoena

Even if the subpoena had been timely served, by the time of petitioners' service attempts in May and June 2016, the date specified in the May 3 subpoena as the date of respondent's deposition, May 16, had already passed. Petitioners cite no authority for the proposition that a witness may be required to appear for a deposition on a date following that set forth in the subpoena, for a deposition date that had passed by the time the subpoena was served and when the witness had not yet appeared for the deposition. Petitioners' reliance on *Maritime Fish Products, Inc. v World-Wide Fish Products, Inc.*, is misplaced as there, the subpoena required the witness's appearance at trial rather than at a deposition, and by the time the witness was served with the subpoena, the trial had already commenced and was adjourned. (100 AD2d 81 [1<sup>st</sup> Dept

1984], *app dismissed* 63 NY2d 675).

Even if the changed deposition dates may be deemed “adjourned” dates, petitioners have not shown that providing respondent with five-days’ notice before each new deposition date, by letter of May 19 adjourning the deposition to May 24, and by letter of June 8 adjourning the deposition to June 13, constitutes “reasonable notice” as required by CPLR 2305. (*See e.g. YSL v Shal*, 10 Misc 3d 554 [Sup Ct, Nassau County 2005] [as plaintiff did not notify defendant of inquest date until four days before inquest, no reasonable notice provided pursuant to CPLR 2305]).

#### C. Improper service

As respondent does not demonstrate that the office at which he lists his address for his attorney registration and where he is employed as “of counsel” is not his actual place of business, he has not demonstrated that the subpoena was improperly served on him there.

#### IV. CONCLUSION

Petitioner have thus failed to establish that they properly served non-stale subpoenas on respondent for which his failure to obey may be punished as a contempt. Accordingly, it is hereby

ORDERED, that petitioners’ application for an order holding respondent in contempt is denied.

ENTER:

  
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 Barbara Jaffe, JSC

DATED: December 9, 2016  
 New York, New York