

Weissberg v Adami
2016 NY Slip Op 32990(U)
June 17, 2016
Supreme Court, Kings County
Docket Number: 501310/12
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**
-----X

WESLEY WEISSBERG and DAVID GOLDBERG,

Plaintiffs,

-against-

MARC ADAMI and STEVEN JOHNSON,

Defendants.
-----X

DECISION & ORDER

Index No. 501310/12

Cal No. 49

Submitted 6/2/16

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion to compel compliance with two subpoenas.

Papers	Numbered
Notice of Motion, Affidavits and Exhibits Annexed	1-10
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits	_____
Reply Affidavits	_____
Other: _____	_____

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Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiffs have moved for an order compelling defendant-judgment debtor Marc Adami, and non-party Teresa Baiardi his wife, for failing to appear for oral depositions to enforce the Judgment entered by this court dated July 10, 2015, pursuant to a duly served Subpoenas (though improperly denoted as subpoenas duces tecum) as is provided for in CPLR §5224.

The motion is denied as defective.

In support of the motion, plaintiffs have submitted a “Notice of Motion to Compel” dated April 20, 2016; the affirmation of Martin I. Gold, Esq. affirmed on April 20, 2016, with attached exhibits; the Judgment, dated July 2, 2015, the Subpoena of Marc Adami, dated September 18, 2015 and the Affidavit of Service of that Subpoena, dated September 23, 2015, the Subpoena of Teresa Baiardi dated September 18, 2015 and the Affidavit of Service of that Subpoena, dated September 23, 2015, along with an Affidavit of Service of the Order to Show Cause, as well as other evidence. No opposition has been submitted and the motion was submitted on default on June 2, 2016.

Upon the foregoing papers, it appears that defendant-judgment debtor Marc Adami was subpoenaed to appear for an oral deposition on October 30, 2015 at 11:30 A.M. at the office of plaintiffs’ counsel, Martin I. Gold, 550 Fifth Avenue, 14th Floor, New York, NY, and that defendant failed to appear at that time and place. It also appears that non-party Teresa Baiardi was subpoenaed to appear for an oral deposition on October 30, 2015 at 9:30 A.M. at the office of plaintiff’s counsel, and that she failed to appear at that time and place.

Nonetheless, the moving papers are defective. The proper remedy for disobedience of a subpoena is a contempt motion brought under CPLR § 5251:

§ 5251. Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale

Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

Further, an application to punish for contempt must follow the procedures set out

in Judiciary Law § 756:

§ 756. Application to punish for contempt; procedure

An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty of the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

**WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT.**

The applicable statute makes it clear that the papers for bringing on a contempt motion must be served on the party, and not merely on the party's assumed attorney. See, Judiciary Law § 761. In the instant matter, service of this motion on both parties was effectuated by service upon Salvatore Compoccia, the attorney who responded to the subpoenas by a letter and who represented Mr. Adami in the now concluded case, pre-judgment, a case which Ms. Baiardi was not a party to. While it is clear from the exhibits that Mr. Compoccia does indeed represent Mr. Adami and his wife, this is not the appropriate method of service for a motion of this type.

Further, if the alleged contemnor is a non-party, as is the case with Teresa

Baiardi, the application to punish for contempt must take the form of a special proceeding. See, *Long Island Trust Co. v Rosenberg*, 82 AD2d 563 [2d Dept 1981].

For all of the foregoing reasons, plaintiffs' motion is denied

The foregoing constitutes the decision and order of this court.

Dated: Brooklyn, New York
June 17, 2016

ds

Debra Silber, J.S.C.

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