

Threadstone Advisors, LLC v Success Apparel Inc.
2017 NY Slip Op 30212(U)
January 31, 2017
Supreme Court, New York County
Docket Number: 654320/13
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
THREADSTONE ADVISORS, LLC,

Plaintiff,

Index No.
654320/13

-against-

SUCCESS APPAREL INC.,

**DECISION
and ORDER**
Mot. Seq. 002 &
003 & 004 & 005

Defendants,

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Threadstone Advisors LLC (“Plaintiff”) provides advisory services to companies to assist them with mergers and sales of their businesses. Threadstone provided such services to Success Apparel (“Defendant”) in connection with non-party Americo Group, Inc’s (“Americo”) purchase of Defendant. The purchase occurred on August 31, 2013 in the amount of \$2.24 million cash. In connection with this purchase, Defendant owed Plaintiff a fee of \$250,000. In an earlier action before the Honorable Shirley Werner Kornreich, Plaintiff moved for summary judgement against Defendant, alleging that it was not paid this fee. On June 12, 2015, Justice Kornreich granted Plaintiff’s motion against Defendant in the amount of \$250,000 plus 9% interest from September 1, 2013.

Justice Kornreich also directed Defendant to deliver to Plaintiff post closing quarterly reports regarding all earn-out payments and additional post closing amounts due and owing from the buyer.

Interest has been accruing at the statutory rate and the amount currently due under the Judgment is \$320,440.46. However Defendant claims to be unable to pay any part of the judgment despite the fact that Defendant received \$2.25 million in cash from Americo. Plaintiff claims that Defendant, wholly controlled by Gila Goodman ("Goodman"), has also liquidated millions of other assets.

Plaintiff claims that Defendant has been able to fully pay all of its professionals involved in the purchase. Defendant has also payed Goodman a salary of at least \$1 million during 2013 and 2014. In addition, Defendant's tax returns indicate that Defendant disposed of over \$3 million of inventory in a bulk sale for which no accounting has been provided either by Defendant or its CPA, Hecht & Co.

On July 9, 2015, Plaintiff served a Restraining Notice on Defendant pursuant to CPLR § 5222. On July 13, 2015, Plaintiff served a subpoena duces tecum and ad testificandum on Defendant pursuant to CPLR § 5244. The subpoena called for the production of Defendant's financial and accounting statements and tax returns, and Defendant's financial dealings with its owner, Goodman. The subpoena also noticed the deposition of Goodman for August 6, 2015. The deposition was stopped and adjourned after two hours because Defendant failed to bring the requested documents. Defendant has since failed and refused to provide all relevant financial records, accounting records and other documents requested.

Defendant's attorneys have stated in writing on June 24, 2016, that the Defendant's accounting records and documents relating to the disposition of over \$3 million worth of inventory in 2014 by Defendant are for unexplained reasons now inaccessible on the Defendant's servers. Also allegedly inaccessible on the Debtor's servers are accounting records relating to over \$225,000 of alleged "travel & entertainment costs." Exhibit G.

For these reasons, Plaintiff requests that this court compel Defendant's compliance with the subpoenas pursuant to CPLR § 5223 and 5224 specifically for the following;

- (a) The complete general ledger of the Defendant for the period January 1, 2013 to present.
- (b) The complete profit and loss ledger of the Defendant for the period January 1, 2013 to present

- (c) The complete balance sheet ledger of the Defendant for the period January 1, 2013 to present.
- (d) Complete cash flow statements for the Defendant for the period January 1, 2013 to present.
- (e) All documents evidencing all transactions between Gila Goodman and/or Gila Dweck and the Judgment Debtor for the period of January 1, 2013 to present date, including, without limitation, documents reflecting all loans, capital contributions, loan repayments, returns of capital, distributions, guaranties, between the Defendant and either of Gila Goodman and/or Gila Dweck.
- (f) All documents evidencing all compensation, wages, salary and bonuses for the period January 1, 2013 to present paid by the Defendant to Gila Goodman and/or to Gila Dweck, and any expense reimbursements paid by the Judgment Debtor to Gila Goodman and/or Gila Dweck during said period.
- (g) All documents concerning or discussing the claimed capital contribution and/or loan of Gila Goodman and or Gila Dweck to the Judgment Debtor in the amount of \$2.7 million in or about June 2014.
- (h) All documents relating to the obligation of Defendant and Gila Goodman or Gila Dweck to pay or transfer \$2.7 million to Wachtel on or about July 3, 2014, including all supporting invoices, bills and statements establishing and such legal obligation.
- (i) All documents relating to the sale or bulk sale or other disposition of the Judgment Debtor's inventory in 2014, including all bills of sale, cancelled checks, and other documents showing to whom the inventory was sold, for how much and how all payments were applied.
- (j) All documents evidencing, establishing, discussing or relating to the alleged legal fees claimed on the Defendant's 2014 tax returns in the amount of \$2,833, 294 and in the amount of \$508,210 claimed on the Defendant's 2013 tax return.
- (k) All documents evidencing, establishing, discussing or relating to the alleged consulting fees claimed on the Defendant's 2014 tax returns in the amount of \$348,792.
- (l) All documents evidencing, establishing, discussing or relating to the alleged uncollectable advance claimed on the Defendant's 2014 tax returns in the amount of \$170,661.

- (m) All documents evidencing, establishing, discussing or relating to the alleged travel & entertainment expenses claimed on the Defendant's 2013 tax returns in the amount of \$189,000 and on the 2014 tax returns in the amount of \$41,000.
- (n) All documents evidencing all compensation, wages, salary and bonuses for the period January 1, 2013 to present paid by the Defendant to Maurice Dweck and/or to Naomi Dweck, and any expense reimbursements paid by the Defendant to Maurice Dweck and or Naomi Dweck during said period.
- (o) Copy of all complaints filed in the Nasser litigation and any judgment or dismissal entered and any settlement agreements reached by the Defendant in that litigation.
- (p) Provide unredacted copies of all Chase accounts statements previously supplied.
- (q) Provide remote electronic access through a password to Plaintiff's CPA Douglas Burach, so that Plaintiff's CPA may access Defendant's accounting system through the normal Quickbooks protocols.

Plaintiff claims there is spoliation of evidence and thus requests that an adverse inference be entered against Defendant that: (1) the corporate veil of Defendant should be pierced to permit Plaintiff to hold Goodman personally liable for the Judgment and (2) that the \$2.7 million payment by Goodman to Defendant's attorneys, Wachtel Missry LLP, on Defendant's behalf constituted a fraudulent conveyance to preclude Plaintiff from collecting on the judgment.

In support, Plaintiff submits; the affirmation of Michael E. Norton; the affirmation of attorney Marc Reiner; the declaration of Douglas Burack; Justice Kornreich's decision dated June 11, 2015; Plaintiff's Restraining Notice served on Defendant; Plaintiff's subpoena duces tecum and ad testificandum served on Defendant; Goodmans incomplete deposition; and various correspondence among other things.

Defendant contends that there has not been any spoliation of evidence because Defendant has not been in business since 2014. Defendant argues that its records were maintained on its computer server and they are now being stored by Gila Goodman. However, "Ms. Goodman lacks the technical capabilities or know-how to access the server to obtain documents in response to [Plaintiff's]

Subpoena” (Yeger Aff. ¶ 4). In addition, Defendant argues that it produced in excess of 1,800 pages of records in response to Plaintiff’s subpoena. Further, that Defendant only redacted financial account numbers on certain bank statements. However Defendant states that if Plaintiff is willing to confirm in writing that Plaintiff will not e-file the statements, Defendant will produce bank statements without redactions. Finally Defendant argues that Plaintiff’s request to provide Plaintiff’s CPA with remote electronic access to Plaintiff’s server is grossly overbroad.

In opposition, Defendant provides the affirmation of attorney David Yeger; a letter dated September 1, 2015 from Defendant to Plaintiff stating that a “CD containing documents Bates-stamped SA1-846 which are responsive to plaintiff’s Subpoena” are enclosed (Exhibit 1); an email dated September 2, 2015 from Defendant to Plaintiff stating “attached please find additional documents response to your subpoena” (Exhibit 1); a later dated October 22, 2015 from Plaintiff to Defendant requesting documents; and a letter dated November 20; 2015 from Defendant to Plaintiff stating what documents will be produced by Defendant among other things.

“At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as contempt of court.” CPLR § 5223.

CPLR § 5223 is a “generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor’s property.” (*ICG Group v. Israel Foreign Trade Co. (USA) Inc.*, 224 A.D.2d 293, 294 (1st Dep’t 1996).

A court has “broad discretion to provide . . . relief to the party deprived of the lost evidence.” *Minaya v. Duane Reade Intl., Inc.*, 66 A.D.3d 402, 402-403 (1st Dep’t 1998).

Since June 12, 2015, Defendant has owed Plaintiff a judgment in the amount of \$250,000 plus 9% interest from September 1, 2013. Defendant has failed to satisfy any amount of this judgment. Defendant has also failed to produce discovery that Plaintiff is entitled to under CPLR § 5223. Among the arguments that Defendant advances for this failure is, “Ms. Goodman lacks the technical capabilities or know-how to access the server to obtain documents in response to [Plaintiff’s] Subpoena.” This argument is unpersuasive and parties may be sanctioned for spoliation even when the evidence is in the possession of a non-party. (See *Amaris v. Sharp Electronics Corp.*, 304 A.D.2d 457, 457-58 (1st Dep’t. 2003) (“The spoliation was clearly the result of plaintiff’s negligence notwithstanding the fact that the television set was owned by plaintiff’s employer, a nonparty”).

Because there may yet be an opportunity to review the materials sought, the Court in its discretion will not sanction Defendants for spoliation at this juncture. Neither will the Court order Defendant to provide to Plaintiff remote unfettered access through a password. Although CPLR § 5223 provides a generous standard for disclosure, granting Plaintiff carte blanche access to Defendants accounting system appears to the Court to be an improvident act of discretion. However, the Court will grant Plaintiff’s expert Douglas Burack supervised access to Defendant’s accounting system through the normal Quickbooks protocols.

Plaintiffs bring motion sequence 3, for an Order pursuant to CPLR §§ 2301, 2302, 2305, 2308 and 5251 and Judiciary Law § 753 adjudging Americo Group Inc. in contempt of court for its failure to produce documents requested by Threadstone’s subpoena duces tecum and ad testificandum.

In addition to the \$2.25 million cash purchase price paid by Americo to Defendant, Americo agreed to pay an earn-out based on sales to Defendant on a quarterly basis from August 31, 2013 through the December 31, 2017. Under the Asset Purchase Agreement between Americo and Defendant, Americo is required to provide quarterly earn-out statements setting forth in detail the calculations relating to the earn-out due for each quarter.

On July 9, 2015, Plaintiff served a restraining notice to Americo as garnishee pursuant to CPLR § 5222(b) (Exhibit A). This restraining notice forbids Americo “to make or suffer any sale, assignment, or transfer of, or any interference with any property in which you have an interest.” (Exhibit A). The notice “covers all property in which [Plaintiff] has an interest hereafter coming into your possession or custody, and all debts hereafter coming due from you to the judgment debtor” (Id.)

On July 9, 2015, Plaintiff served the subpoena duces tecum and ad testificandum dated July 9, 2015 on Americo requiring the production by Americo of “all documents evidencing, calculating, and/or relating to any and all amounts paid and to be paid to [Defendant], including all bank accounts information.” (Exhibit B)

Plaintiff argues that Americo has not provided earn-out reports following the report for the period ending on December 31, 2015. The December 31, 2015 report shows that there were no amounts due to Defendant. However when Plaintiff requested that Americo provide documentation explaining why there were no amounts, Americo ignored the request.

In support, Plaintiff submits: the attorney affirmation of Michael Norton; the Restraining Notice to Garnishee dated July 8, 2015; the Subpoena Duces Tecum; a letter dated February 22, 2016 from Plaintiff to Americo requesting certain Earn-out reports; and among other things email correspondences.

In response, Defendant’s argue that Americo provided Plaintiff with documents related to the earn-out payments Americo had made to Defendant. This information included “(i) itemized reports, showing the number of items sold for each style and all sales through a certain license; and copies of checks showing the actual payments to [Defendant].” (Yeger Aff. ¶ 5). Defendant however does not provide the Court with any exhibits on this matter.

Defendant’s only submission besides the attorney affirmation of David Yeger is the affidavit in opposition of Eli Harari, Americo’s CEO. Harari avers that, “Americo provided [Plaintiff] with documents related to the earn-out payments Americo had made to [Defendant]. This information included (i) itemized reports, showing the number of items sold . . . as well as all sales made

through [a] license; and (ii) copies of checks showing the actual payments to Plaintiff.” (Harari Aff. ¶ 3) Harari further avers, “Americo did not provide any earn-out report for the period beginning January 1, 2016 because there were no sales made during this period that would have resulted in an earn-out payment to [Defendant].” (Harari Aff. ¶ 5).

“There are no further, and there will not be any further, earn-out payments to Success. And without any earn-out sales, there are no earn-out reports to prepare.” (Harari Aff. ¶ 6).

Civil contempt has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right. (*McCormick v. Axelrod*, 453 N.Y.2d 574, 582-83 (1983)). Criminal contempt, on the other hand, involves vindication of an offense against public justice and is utilized to protect the dignity of the judicial system and to compel respect for its mandates. (*Id.* at 583). Although the line between the two types of contempt may be difficult to draw in a given case, and the same act may be punishable as both a civil and a criminal contempt, the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out. (*Id.*) Where the record does not support a finding of the willfulness necessary to hold a party in criminal contempt, the court’s discussion is limited to the elements of civil contempt. (*Id.*)

To find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. (*Id.* at 512-13) It must appear, with reasonable certainty, that the order has been disobeyed. (*Id.* at 513). The party to be held in contempt must have had knowledge of the court’s order, although it is not necessary that the order actually have been served upon the party. (*Id.*) Finally, prejudice to the right of a party to the litigation must be demonstrated (*Id.*)

Here, the record does not support a finding of the willfulness necessary to hold a party in criminal contempt. In fact, the record does not support a finding of willfulness at all. Plaintiff alleges that Americo did not disclose certain earn-out payments to Defendant. However Defendant’s CEO, in his affidavit, states that Americo did not provide any earn-out report for the period beginning January 1,

2016 because there were no sales made during this period that would have resulted in an earn-out payment to [Defendant].” Harari further states that other earn-out payment documents were disclosed. Based on the exhibits provided, this Court does not find a level of willfulness necessary to hold Americo in criminal contempt.

This Court’s analysis is now limited to the elements of civil contempt. Although it is undisputed that Plaintiff served Americo with a Restraining Notice to Garnishee and a Subpoena Duces Tecum, for the reasons noted above, it does not appear with reasonable certainty that the order has been disobeyed.

Plaintiff brings motion sequence 004, for an Order pursuant to CPLR §§ 2301, 2302, 2305, 2308 and 5251 and Judiciary Law § 753 adjudging Wachtel Missry, LLP (“Wachtel”) in contempt of court for its failure to produce documents requested by Threadstone’s subpoena duces tecum and ad testificandum.

Wachtel Missry, LLP is the law firm that represents Defendant and Gila Goodman. Plaintiff’s avers that on July 3, 2014, a transfer was made from Defendant’s bank account to Wachtel in the amount of \$2,720,310. Plaintiff avers that other banking records indicate that \$2.72 million had been deposited just days earlier into Defendant’s account by Gila Goodman. In addition, Defendant’s 2014 tax schedules showed legal fees accrued and incurred in 2014 in this amount.

On March 21, 2016, Plaintiff served a subpoena duces tecum and ad testificandum dated March 21, 2015 on Wachtel related to the \$2.72 million.

In support, Plaintiff submits; the attorney affirmation of Michael E. Norton; the attorney affirmation of Marc S. Reiner; and the Subpoena Duces Tecum and Ad Testificandum.

Defendant argues that it produced its legal bills including all the bills sent to it by Wachtel Missry, LLP. It maintains that these documents were bates stamped SA001651-SA001848 and that the Court should deny Plaintiff’s motion.

In opposition; Defendant only provides the attorney affirmation of David Yeger.

As noted above in motion sequence 003, to find a party in contempt, it must appear with reasonable certainty that the order was disobeyed among other things. (see *McCormick supra* at 513). Here, Plaintiff references a transfer on July 3, 2014 from Defendant's bank account to Wachtel in the amount of \$2,720,310. Plaintiff however does not append any documents with respect to this transfer. Plaintiff further avers that other banking records indicate that \$2.72 million had been deposited just days earlier into Defendant's account by Gila Goodman. Plaintiff does not provide any documents with respect to this allegation either. Finally, Plaintiff asserts that Defendant's 2014 tax schedules showed legal fees accrued and incurred in 2014 in this amount. However Plaintiff provides no support for this claim either.

Defendant states that it provided all the requested documents but doesn't provide any exhibits.

Based on the evidence provided, this Court cannot find with reasonable certainty that the order in the form of a subpoena duces tecum and ad testificandum was disobeyed.

Plaintiff brings motion sequence 005, for an Order pursuant to CPLR §§ 2301, 2302, 2305, 2308 and 5251 and Judiciary Law § 753 adjudging Hecht and Company, P.C. in contempt of court for its failure to produce documents requested by Threadstone's subpoena duces tecum and ad testificandum.

Hecht and Company, P.C. ("Hecht") is the independent auditor and CPA firm for Defendant. Hecht has prepared and signed Defendants' federal and states tax returns since 2013. Hecht also does accounting with respect to all amounts of alleged compensation paid by Defendant to its owner, Goodman. Hecht also prepared and signed the 2014 tax return for Success which purported to show over \$2.7 million of legal fees to Wachtel Missry, LLP allegedly incurred and paid in 2014.

According to Plaintiff, the tax returns prepared by Hecht also showed the bulk sale of millions of dollars of Defendant's inventory and "\$225,000" of alleged "travel and entertainment" expenses, occurring during a period in which the Debtor was allegedly winding down its business.

On March 21, 2016, Plaintiff served a subpoena duces tecum and ad testificandum. The subpoena provides in relevant part, "PLEASE TAKE NOTICE that, pursuant to Articles 23 and 52 of the New York Civil Practice Law and Rules, you are commanded to appear on April 13, 2016 at 10:00 a.m. in the morning and on any recessed or adjourned date, at the offices of Norton & Associates, LLC, 8 West 40th Street, 12th Floor, New York." (Exhibit A). The Subpoena also provides, "pursuant to Articles 23 and 52 of the New York Civil Practice Law and Rules, you are hereby commanded to produce and permit inspection and copying of the documents described in Schedule A annexed hereto . . ." (*Id.*)

On April 13, 2016, Hecht failed to respond to the Subpoena, produce the documents or appear for a deposition.

On May 5, 2016, Plaintiff received a letter stating that Defendant's counsel Wachtel Missry LLP was now also representing Hecht in connection with the third party subpoena.

In support, Plaintiff submits; the attorney affirmation of Michael E. Norton and Marc S. Reiner; the Subpoena Duces Tecum and Ad Testificandum dated March 21, 2015; Hecht's Objections and Responses to the Supoena; a letter from Plaintiff to Defendant dated May 11, 2016 and other correspondences between the parties.

The letter from Plaintiff to Hecht dated May 11, 2016 provides in relevant part, "immediately produce with respect to the [Defendant's] 2013 and 2014 tax returns for all accountant's work papers, the general ledger of the [Defendant] for the tax returns prepared by Hecht & Co, and all financial records provided by the [Defendant] to Hecht & Co." (Exhibit C). It further provides, "immediately produce all documents evidencing transactions between Gila Goodman and/or Gila Dweck and the [Defendant] for the period January 1, 2013 to present date . . ." (Exhibit C).

Hecht argues that many of the documents requested had already been produced by Defendant. However Hecht still produced, Defendant's tax returns for 2013-14 including all schedules and work papers, and tax reconciliations; Defendant's agreement with Americo and other agreements; Defendant's financial reports including sales tax records, employee benefit records, W-2 forms, trial

balance, profits and loss statements, the balance sheet and income statement; Hecht's internal accountant work papers; and various other assorted documents that Defendant forwarded to Hecht.

On June 2, 2016, Hecht wrote an email to Plaintiff stating, "Please give me three proposed dates beginning June 15 (but not Fridays) for the Slomovic deposition and I will check in." (Exhibit 1) It also states, "You have asked for [Defendant's] general ledger for 2013 and 2014 and I thought I was clear that Hecht does not have these documents. Hecht has no further financial information from [Defendant] concerning Defendant's 2013-14 financials/taxes. (Exhibit 1). Finally, the email states, "Hecht has no further documents concerning transactions between Gila and [Defendant] for January 1, 2013 to date." (Exhibit 1).

In opposition; Hecht submits the attorney affirmation of David Yeger and various correspondences between the parties.

Here, as above, Plaintiff requests the court to adjudge a non-party in contempt of court for violating a subpoena duces tecum and ad testificandum. However, the Court cannot find a non-party in contempt unless it appears with reasonable certainty, that the order has been disobeyed. (*see McCormick supra* at 513). Hecht rebuts Plaintiff's claims by arguing that it has turned over all documents in its possession that Plaintiff requested and it has attempted to schedule a deposition with Plaintiff to no avail. Without more, the Court cannot find with a reasonable certainty that Hecht disobeyed the subpoena duces tecum and ad testificandum.

Wherefore it is hereby,

ORDERED that Plaintiff's motion to compel Defendant's compliance with the subpoenas pursuant to CPLR § 5223 and 5224 is granted; and it is further

ORDERED that Plaintiff's request that Defendant provide a password for remote access to be used by Plaintiff's CPA Douglas Burack is denied however Mr. Burack is permitted supervised access to Defendant's accounting system through the normal Quickbooks protocols to be arranged within the next 30 days; and it is further

ORDERED that Plaintiff's motion to sanction Defendant for spoliation is denied without prejudice; and it is further

ORDERED that Plaintiff's motion sequence 3 to adjudge Americo in contempt of court pursuant to Judiciary Law § 753 is denied; and it is further

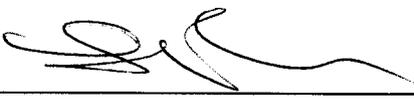
ORDERED that Plaintiff's motion sequence 4 to adjudge Wachtel Missry LLP in contempt of court pursuant to Judiciary Law § 753 is denied; and it is further

ORDERED that Plaintiff's motion sequence 5 to adjudge Hecht and Company, P.C. in contempt of court pursuant to Judiciary Law § 753 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: January 31, 2017

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EILEEN A. RAKOWER, J.S.C.