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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REENA LEVIN, et al.

No. C-11-04783 DMR

Plaintiff(s),

v.

DEBORAH SELLERS, et al.

Defendant(s).

**ORDER DENYING PLAINTIFFS’
MOTION FOR CONTEMPT [DOCKET
NO. 233], MOTION TO STRIKE
[DOCKET NO. 241], MOTION TO
DISMISS THIRD PARTY CLAIM
[DOCKET NO. 273], AND
APPLICATION FOR JUDGMENT
DEBTOR EXAMINATION [DOCKET
NO. 286]**

Before the court are several requests by Plaintiffs Steven E. Schwarz and Reena Levin: (1) a motion for an order holding Defendant Sellers Markets, Inc. in contempt pursuant to Federal Rule of Civil Procedure 70(e) [Docket No. 233], (2) a motion to strike a letter submitted by Deborah Sellers [Docket No. 241], (3) a motion to dismiss third party claims [Docket No. 273], and (4) an application for a judgment debtor examination of APMEX LLC. [Docket No. 286.]

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs originally brought this action against James Sellers, Deborah Sellers, Sellers Markets, and other defendants in the Northern District of Illinois. *See* Docket No. 99. Plaintiffs alleged that they invested \$40,000.00 in Sellers Markets securities; that they exercised their contractual redemption rights; and that their redemption demand was not honored. *See* Docket No. 165. On September 27, 2011, Judge Feinerman transferred the case to the Northern District of California. [Docket No. 99.]

1 On February 9, 2012, default was entered as to several defendants, including Defendants
2 James Sellers, Deborah Sellers, and Sellers Markets. [Docket No. 155.] On April 4, 2012, the
3 parties, including the defaulted defendants, filed a Joint Stipulation of Dismissal wherein Plaintiffs
4 dismissed their complaint with prejudice, and the parties stipulated that this court “retains
5 jurisdiction over any claims or actions in law or in equity necessary to enforce the terms of the
6 Parties’ Settlement Agreement executed as of March 10, 2012.” [Docket No. 180.] On April 10,
7 2012, the court issued an order dismissing the case with prejudice, and stating that the court “shall
8 retain jurisdiction for the limited purpose of resolving disputes arising out of the parties’ March 10,
9 2012 settlement agreement. [See Docket No. 180.]” [Docket No. 183, brackets in original.]

10 On March 14, 2012, all parties entered into the Settlement Agreement. Sellers Markets
11 subsequently defaulted on its obligations under the Settlement Agreement. On July 9, 2013, this
12 court granted Plaintiffs’ motion for enforcement of the Settlement Agreement and ordered Sellers
13 Markets to immediately pay Plaintiffs the sum of \$32,000. [Docket No. 224.]

14 II. MOTION TO STRIKE

15 Plaintiffs move to strike a letter filed by Deborah Sellers, the corporate secretary of Sellers
16 Markets, on October 22, 2013. [Docket No. 240.] Plaintiffs contend that because Sellers Markets is
17 not represented by counsel, and corporations may not appear *pro se* in federal court, Ms. Sellers’
18 letter amounts to an authorized practice of law. Plaintiffs request this court strike the letter and not
19 consider its content or exhibits. The court does not rely on this document for the determination of
20 any currently pending motion. Therefore Plaintiffs’ motion to strike is **denied as moot**.

21 III. MOTION FOR ORDER HOLDING SELLERS MARKETS IN CONTEMPT

22 Plaintiffs urge this court to hold Sellers Markets in civil contempt for its failure to abide by
23 the court order directing Sellers Markets to pay Plaintiffs the amount of the judgment.

24 “[C]ourts have inherent power to enforce compliance with their lawful orders through civil
25 contempt.” *Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 1535 (1966). The federal
26 rules also permits a court to find a disobedient party in contempt. Fed. R. Civ. P. 70(a) and (e) (“If a
27 judgment requires a party to . . . perform any specific act and the party fails to comply within the
28 time specified, the court may . . . hold the disobedient party in contempt.”). “The standard for

1 finding a party in civil contempt is well settled.” *Distributors Association Warehousemen's Pension*
2 *Trust Fund v. Foreign Trade Zone 3, Inc.*, No. 05-CV-1161-SBA, 2009 WL 975786 at * 1 (N.D.
3 Cal. April 9, 2009). The moving party has the burden of showing by clear and convincing evidence
4 that the contemnors violated a specific and definite order of the court. *In Re Bennett*, 298 F.3d 1059,
5 1069 (9th Cir. 2002). Generally, a violation is shown by the party's “failure to take all reasonable
6 steps within the party’s power to comply.” *Reno Air Racing Ass'n ., Inc. v. McCord*, 452 F.3d 1126,
7 1130 (9th Cir. 2006). Willfulness is not an element of contempt. *Id.* The burden then shifts to the
8 contemnor to demonstrate why it was unable to comply. A present inability to comply is a complete
9 defense to civil contempt. *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir.1996) (“Ability to
10 comply is the crucial inquiry, and a court should weigh all the evidence properly before it
11 determines whether or not there is actually a present ability to obey.”) (citations omitted). Should a
12 court find a party in contempt, it has discretion in deciding whether to impose sanctions. “Sanctions
13 for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party
14 pursuing the contempt action for injuries resulting from the contemptuous behavior, or both.”
15 *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). “Compensatory
16 awards are limited to actual losses sustained as a result of the contumacy.” *Id.* (citation omitted).

17 Plaintiffs have failed to meet their burden of demonstrating that Sellers Markets violated any
18 order of this court. As discussed above, it appears that Sellers Markets is no longer operating and is
19 in the process of winding down its business. It is not known whether Sellers Markets was insolvent
20 and therefore unable to comply with the court’s July 9, 2013 order. Plaintiffs’ motion for an order
21 holding Sellers Markets in contempt is **denied**.

22 IV. MOTION TO DISMISS

23 On November 5, 2013, Defendants James Sellers and Deborah Sellers filed a “Third-Party
24 Claim of Prior Security Interest.” [Docket No. 250.] The document states that “James Sellers and
25 Deborah Sellers hold a duly-perfected senior security interest in substantially all of the assets of
26 [Sellers Markets], securing the sum of \$1,040,048.76.” *Id.* Plaintiffs move to “dismiss or quash”
27 this document pursuant to Federal Rule of Civil Procedure 12(b)(5), on the basis that it was
28 improperly served. [Docket No. 273.]

1 The document filed by James and Deborah Sellers in this court appears to be premature and
2 procedurally deficient. A third party may file a (1) claim of ownership or the right to possession of
3 real or personal property or (2) a claim of security interest in or lien on personal property that has
4 been levied on in an action by a creditor. *See* Cal. Code Civ. Proc. §§ 720.110, 720.210. Here, the
5 third party claim asserts a senior security interest in “substantially all of the assets” of Sellers
6 Markets, but there is no indication from any of the parties that Sellers Markets’ property has been
7 levied by Plaintiffs. Furthermore, the third party claim must be filed with the levying officer. Cal.
8 Code Civ. Proc. § 720.210. Here, the claim was filed with the court. Moreover, as discussed below,
9 even if the claim properly were filed in court, this court would not decide it, as it would be well
10 outside the limited jurisdiction retained in this case. At any rate, it is not clear what effect, if any,
11 the third party claim filed by James and Deborah Sellers has on the enforcement of the judgment in
12 this case. Accordingly, Plaintiffs’ motion to strike or quash the third party claim is **denied as moot**.

13 V. JUDGMENT DEBTOR EXAMINATION

14 Plaintiffs believe that an entity called APMEX LLC owes a cash debt to Sellers Markets.
15 *See* Docket No. 272 at 3. Previously, Plaintiff requested from this court an order directing APMEX
16 LLC to appear for a judgment debtor exam. The court denied that application, finding that Plaintiffs
17 failed “to provide credible, non-speculative evidence that APMEX LLC has possession or control of
18 property in which Sellers Markets retains any interest, or that APMEX LLC is indebted to Sellers
19 Markets in any amount.” *Id.* at 4. The court also noted that on November 4, 2013, Plaintiff served
20 on APMEX LLC a third party levy and writ of execution.

21 At the time of that order, Plaintiffs were still awaiting a response to the levy on APMEX
22 LLC. APMEX LLC has since responded. *See* Docket No. 286-1. In its garnishee’s memorandum,
23 APMEX LLC states that it “holds neither any property nor any obligations in favor of the judgment
24 debtor.” However, the memorandum also includes somewhat contradictory information: in response
25 to an instruction to “[d]escribe any claims and rights of other persons to the property or obligation
26 levied upon that are known to you,” APMEX LLC attached a list of creditors and amounts claimed
27 that includes James and Deborah Sellers in the amount of \$1,040,048.76. The list does not describe
28 what property or obligation the enumerated claimants claim interest in, and does not indicate that

1 APMEX LLC possesses or controls that property or obligation. Thus, while this list of creditors
2 creates confusion, it does not persuade the court that APMEX LLC has possession or control of
3 property in which Sellers Markets has an interest or indebted to Sellers Markets. *See* Cal. Civ. Proc.
4 Code § 708.120(a) (applicant for judgment debtor examination of third party must offer “proof by . .
5 . affidavit or otherwise to the satisfaction of the proper court that a third person has possession or
6 control of property in which the judgment debtor has an interest or is indebted to the judgment
7 debtor”).

8 Accordingly, Plaintiffs’ request for an order directing APMEX LLC to appear for a judgment
9 debtor examination [Docket No. 286] is **denied**.¹

10 The court is concerned that Plaintiffs, through their continuous stream of motions, have
11 attempted to expand the scope of the court’s limited jurisdiction. The court maintained jurisdiction
12 for the limited purpose of resolving disputes arising out of the parties’ March 10, 2012 settlement
13 agreement. This does not include overseeing all potential collection activities. “Federal courts are
14 courts of limited jurisdiction It is to be presumed that a cause lies outside this limited
15 jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”
16 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). Furthermore, “[a] district
17 court’s decision whether to exercise [supplemental] jurisdiction after dismissing every claim over
18 which it had original jurisdiction is purely discretionary.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556
19 U.S. 635, 639 (2009). The court therefore will not consider any future motions that do not fall
20 within the strict confines of the limited purpose for which it maintained jurisdiction.

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27 ¹ Plaintiffs filed two requests for orders directing APMEX LLC to appear for a judgment debtor
28 examination. *See* Docket Nos. 281, 286. It appears that the second filing was intended to correct an
error in the first and supercede it. This order terminates both applications.

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Immediately upon receipt of this Order, Plaintiffs shall serve Sellers Markets with a copy of this Order and file a proof of service with the court.

IT IS SO ORDERED.

Dated: January 14, 2014

