UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

John Wiley & Sons, Inc.,

Plaintiff,

-v.-

Supap Kirtsaeng d/b/a BlueChristine99, *et al.*,

Defendants.

Civil Action No. 08 Civ. 7834 (DCP)

MEMORANDUM & ORDER

This Order denies Plaintiff's motion to hold Defendant in contempt of a prior court order. The motion, brought by John Wiley & Sons, Inc. ("Wiley" or "Plaintiff"), alleges that Supap Kirtsaeng ("Kirtsaeng" or "Defendant") acted in contempt of an Order to Show Cause for Preliminary Injunction and Prejudgment Attachment and Order of Attachment ("Attachment Order" or "Order").[1] Specifically, Wiley alleges that, despite being served with notice of the Attachment Order, and in violation of that Order, Kirtsaeng withdrew $6,400 from his bank account, leaving that account with essentially no balance, thereby frustrating the purpose of the

[1] The Attachment Order acts as a Temporary Restraining Order.

Order. Wiley seeks a finding of civil contempt, the turnover of $6,400 into an escrow account, and the imposition of an appropriate fine.

After an evidentiary hearing, the court finds that Plaintiff has failed to meet its burden to show, by clear and convincing evidence, that Kirtsaeng violated the Attachment Order.

I. Background

The Attachment Order at issue was entered on April 27, 2009 at 2:00 p.m. John Wiley & Sons, Inc. v. Kirtsaeng, No. 08 Civ. 7834 (GEL) (S.D.N.Y. Apr. 27, 2009) (prejudgment order of attachment). In that Order, the court determined that attachment "is necessary to ensure that any judgment Wiley obtains in this action is satisfied." Id. 3. Accordingly, the court ordered that

> pursuant to the Rules 64 and 65 of the Federal Rules of Civil Procedure and New York CPLR §§ 6201 and 6210, pending the hearing on Wiley's application for an order of prejudgment attachment, . . . the funds of Kirtsaeng at PayPal, Inc., Bank of America and M&T Bank be, and hereby are, attached and Kirtsaeng, his agents, servants, employees, and attorneys and all persons in active concert or participation with them who receive actual notice of this order, be, and hereby are, enjoined from transferring or withdrawing any funds from those accounts pending further order of the Court.

Id.

Plaintiff's attorney's affidavit avers that on April 27 at 4:22 pm Eastern Standard Time ("EST"), his associate "served a copy of the [Attachment Order] on Mr. Sam Israel, counsel for Kirtsaeng, by e-mail." (Decl. of William Dunnegan in Supp. of Pl.'s Mot. to

Adjudge Def. & Bank of America ("BOA") in Contempt of the April 27, 2009 Temporary Order of Attach.[2] ("Dunnegan Decl.") ¶ 5 & Ex. C.) Nonetheless, as Plaintiff's attorney alleges, on April 28, at 12:23 p.m. PST, Kirtsaeng "withdrew $6,400 in U.S. Currency from his [BOA] account." (Dunnegan Decl. ¶ 6 & Ex. D.)[3] Kirtsaeng withdrew these monies from BOA's branch in Culver Center, Culver City, California. (See Dunnegan Decl. Ex. D.)

II. Evidentiary Hearing

During the court's evidentiary hearing on Plaintiff's motion, the parties provided evidence including testimony from Kirtsaeng, affidavits from Kirtsaeng and Kirtsaeng attorney, discovery responses, and various PayPal,[4] bank, e-mail, and telephone records.

In substance, Defendant's testimony was as follows. Kirtsaeng, a Thai student at the University of Southern California, kept money in his BOA account in order to demonstrate to U.S.

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[2] The court previously denied the motion with regard to BOA.

[3] Plaintiff's attorney also represents to the court that, by letter dated April 29, BOA informed Plaintiff that $1.05 was attached as a result of the Attachment Order but did not disclose the $6,400 transaction. (Dunnegan Decl. ¶ 7.) Based on this letter, Plaintiff withdrew its application for attachment of the account on May 7. (Id. ¶ 8; Stipulated Prelim. Inj. & Order Vacating Temporary Order of Attach. 2.)

[4] PayPal is an electronic commerce company that allows a user to make or receive payments over the internet; it functions as an alternative to traditional payment methods, such as checks and/or money orders, particularly for transactions involving internet purchases.

immigration authorities on his IAP-66 form that he had sufficient financial assets to stay and study in the U.S. (See also Pl.'s Ex. 86.) On April 28, 2009, he played his weekly golf game from approximately 6:00 a.m. to approximately 11:00 a.m. Pacific Standard Time ("PST"). Thereafter, Kirtsaeng returned home, checked his e-mail, and proceeded to BOA to withdraw $6,400[5] sometime between 12:00 pm and 1:00 pm PST,[6] although he is not entirely sure whether he checked his e-mail or went to BOA first. He lives ten minutes drive from his BOA branch in Culver City. After spending around twenty minutes at BOA, he drove back home.

Sometime before 1:00 pm PST, Kirtsaeng opened an e-mail from PayPal which stated that, because of a "TRO," his assets in that account were currently unavailable to him.[7] The e-mail did not

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[5] Kirtsaeng agrees that his withdrawal of $6,400 is an "extraordinary event." However, he explains that he took the money out because, among other things, his father was coming to the U.S. from Thailand two weeks later. During this time period, Kirtseang spent money in order to travel to and stay in a hotel in San Francisco, visit museums in Los Angeles, and pay living expenses. Further, he spent $1,000 on car repairs and $4,000 to repay a loan from his girlfriend.

[6] Kirtsaeng's bank records presented at trial reflect that Kirtsaeng's withdrawal took place at 12:23 p.m. PST. (Pl.'s Ex. 71.)

[7] A PayPal record shows that the e-mail from PayPal was dispatched at 7:35 am -- the record does not state whether this was EST or PST -- on April 28. The e-mail read:

> PayPal recently received a TRO from Laura Scileppi with Dunnegan, LLC, that affects your account(s). The TRO requires that your account(s) remain limited until released by [] Dunnegan, LLC, and that PayPal turn over

provide further information as to the TRO and did not mention his BOA account. Kirtsaeng did not understand the meaning of "TRO" and, in any event, he did not understand that the TRO on the PayPal account had any effect on his other assets. He does not recall exactly when he opened this e-mail.

As of the time he took money from his account on April 28, 2009, Kirtsaeng was not aware of the April 27 Attachment Order on his BOA account; he first learned of the Attachment Order when speaking with his attorney by telephone,[8] after receiving an e-mail, at around 1:00 p.m. PST, from his attorney and after withdrawing his money from BOA.[9]

In lieu of providing live testimony, Kirtsaeng's attorney submitted an affidavit. According to Kirtsaeng's attorney, at some time in the afternoon or evening of April 27, Wiley's attorney e-mailed him a copy of the Attachment Order. (Decl. of Sam P. Israel

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> any monies in its possession to [] Dunnegan, LLC, to satisfy an outstanding debt.

(Pl.'s Ex. 84.)

[8] Kirtsaeng's telephone records place this phone call at 1:02 p.m. PST on April 28. (Pl.'s Ex. 74.)

[9] Kirstaeng previously testified in his deposition that he also logged onto PACER at this time. However, according to his PACER records, he did not log into PACER on April 28; Kirtsaeng explains this discrepancy as resulting from faulty memory of the events. His memory of his PACER activity changed once he consulted his records. At some point, however, Kirtsaeng accessed PACER and obtained a copy of the Attachment Order. He never received a copy of the Order from his attorney.

in Opp. to Mot. for Contempt ("Israel Decl.") ¶ 4; see also Dunnegan Decl. ¶ 5 & Ex. C.) He believes that he attempted to reach Kirtsaeng by telephone and sent Kirtsaeng an e-mail with the Attachment Order attached, although he is not sure of the exact time of the phone call or e-mail. (Israel Decl. ¶¶ 5, 8.) He was unable to reach Kirtsaeng, however, and, due to computer software problems of which he was at the time unaware, his e-mail to Kirtsaeng was significantly delayed. (Id. ¶ 8.) In the morning of April 28, Kirtsaeng's attorney further tried to reach his client despite traveling to and appearing for a preliminary injunction hearing in New York Supreme Court and thereafter directly flying to Miami Florida for an SEC matter. (Id. ¶ 7.)

III. Discussion

"[T]he party seeking to hold another in civil contempt bears the burden of proof." Levin v. Timber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002). Although a plaintiff need not prove that the defendant's conduct was willful, a plaintiff must at least establish that the defendant "has not been reasonably diligent and energetic in attempting to comply." Chao v. Gotham Registry, Inc., 514 F.3d 280, 291 (2d Cir. 2008).

In order to hold Kirtsaeng in contempt of the Attachment Order, Plaintiff must prove that Kirtsaeng had actual notice of the order prior to his BOA withdrawal. This is because, in accordance with Federal Rule 65(d), persons bound by the Attachment Order

include "only the following who receive actual notice of it by personal service or otherwise":

> (A) the parties;
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> (B) the parties' officers, agents, servants, employees, and attorneys; and
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> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(emphasis added). "Actual notice" is "[n]otice given directly to, or received personally by, a party." Black's Law Dictionary 1164 (9th ed. 2009). See also 66 C.J.S. Notice § 4 ("notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it."); 58 Am. Jur. 2d, Notice § 4 ("The words 'actual notice' do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain the ultimate facts. Notice is regarded as actual where the person charged with notice either knows the particular facts in question or is conscious of having the means to know them, even though such means have not been used. . . . Actual notice embraces those things that reasonably diligent inquiry and exercise of the means of information at hand would disclose." (footnotes omitted)). The Supreme Court has equated "actual notice" with "receipt of notice." Dusenbery v. United States, 534

U.S. 161, 169 n.5 (2002).

In addition, because a civil contempt order is a severe sanction, a movant must prove its case with "clear and convincing evidence." See Chao, 514 F.3d at 291; City of New York v. Local 28, Sheet Metal Workers' Int'l Ass'n, 170 F.3d 279, 282 (2d Cir. 1999). The Supreme Court has described the clear and convincing burden of proof as requiring the movant to "place in the ultimate factfinder an abiding conviction that the truth of its factional contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (citation and internal quotation marks omitted). Specifically, "[i]n the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred." Levin, 277 F.3d at 250 (citation and internal quotation marks omitted).

Applying this standard, the court finds that Plaintiff has failed to meet its burden, because it has failed to demonstrate that it is highly probable or reasonably certain that Kirtsaeng, prior to his withdrawal of his BOA funds, had notice of the Attachment Order.

None of the various bank, e-mail, or telephone records that Wiley presents provide evidence, by themselves, of Kirtsaeng's receipt of notice of the Attachment Order prior to his withdrawal of his BOA funds. Moreover, the remaining evidence, i.e.,

Kirtsaeng's testimony elicited by Wiley at the hearing and Kirtsaeng's attorney's affidavit, also does not provide clear and convincing evidence of such notice.

While it is possible to conclude that there are certain questions of fact remaining from and possible inconsistencies in Kirtsaeng's testimony, Plaintiff has not clearly demonstrated to the court that these questions or inconsistencies result from anything other than lack of memory. As a consequence, the court cannot conclude, under the heightened, clear-and-convincing standard of proof applicable to contempt proceedings, that Plaintiff has met its burden to establish that Kirtsaeng is in contempt.

IV. Conclusion

Plaintiff has failed to present the court with clear and convincing evidence supporting a finding of civil contempt and an institution of a fine against Defendant. For this reason, Plaintiff's motion is DENIED.

It is SO ORDERED.

Donald C. Pogue, Judge[10]

Dated: November 09, 2009
New York, New York

[10] Judge Donald C. Pogue of the United States Court of International Trade, sitting by designation.