

Ehrenhalt v Kinder

2012 NY Slip Op 32949(U)

December 12, 2012

Sup Ct, New York County

Docket Number: 106347/09

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

AMARANTH EHRENHART

INDEX NO. 106347/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 14

SCOTT KINDER, ET AL.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for contempt

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause — Affidavits — Exhibits <u>A-E</u>	<u>1</u>
Answering Affidavits — Exhibits	<u>2</u>
Replying Affidavits <u>- Exhibits 1-2</u>	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
DEC 14 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Dec. 13, 2012

MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

AMARANTH ROSLYN EHRENHALT
Plaintiff,

-against-

SCOTT KINDER, et al,
Defendants.

FILED
DEC 14 2012
COUNTY CLERKS OFFICE
NEW YORK

Index No: 106347/09

Decision & Order

HON. MARTIN SHULMAN, J.S.C.:

Plaintiff judgment creditor Amaranth Roslyn Ehrenhalt ("plaintiff") moves to hold defendant Maxcine Holder ("Holder"), in her capacity as a garnishee, in contempt of this court's order dated March 8, 2012 (the "3/8/12 order") which granted plaintiff's prior motion to compel Holder to produce various documents relevant to plaintiff's enforcement of the judgment in the amount of \$156,274.64 which she obtained in this action on March 9, 2011 against co-defendants Scott Kinder ("Kinder") and Max Management LLC ("Max") (collectively the "judgment debtors"). Ehrenhalt's contempt motion also seeks \$100 per day for each day Holder's default continues and entry of judgment therefor.

The 3/8/12 order required Holder's compliance on or before April 13, 2012. She ultimately served a purported response dated April 9, 2012 on July 26, 2012 (see Holder Aff. at ¶1).¹ In a bare bones affidavit submitted in opposition to this contempt motion Holder avers *inter alia* that:

¹ At a subsequent court conference plaintiff's counsel represented that Holder's written response was inadequate. Holder's counsel responded by stating that she either had no responsive documents or was attempting to locate them. At this court's suggestion, Holder submitted her opposing affidavit herein, discussed *infra*. There is no copy of the written response in the motion papers.

- She does not maintain any records for Harlem Properties Restoration Group, LLC (“Harlem Properties”) (*id.* at ¶12);
- Although she does the bookkeeping for Harlem Bed and Breakfast (“HBB”), she is not in possession or control of HBB’s books and records (*id.* at ¶13);
- She is unable to locate any records relating to her purchase and/or sale of condominium apartment Units 1D, 1E, 1F and 2G at 309 East 108th St., New York, New York (*id.* at ¶14);² and
- Her brother and HBB pay the utilities for Unit 1F at 309 East 108th St. (“Unit 1F”) and she is not in possession of records regarding the payment of utilities for this unit “because they are in the control and/or possession of others.” (*id.* at ¶15).

In reply, plaintiff’s counsel cites Holder’s November 18, 2011 deposition testimony (Rapaport Reply Aff. at Exh. 2) wherein, contrary to her affidavit, she states that she has possession of the computer on which HBB’s business records are kept. Similarly, plaintiff’s counsel notes that Holder’s claim that she does not pay utilities for Unit 1F³ or have records thereof is belied by Kinder’s claim that she does⁴ and her ownership of this apartment.

To grant a motion for civil contempt, the court must expressly find that the person’s actions were calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of a party to a civil proceeding. *Clinton Corner H.D.F.C. v LaVergne*, 279 AD2d 339, 341 (1st Dept 2001). The burden of proof is on the party

² Holder explains that she lacks records pertaining to Unit 1B at 308 East 108th St. because she “never purchased or sold it.” (*id.* at ¶14).

³ Holder apparently owns Unit 1F but it is occupied by judgment debtor Kinder and Holder’s brother, who do not pay for their occupancy of these premises.

⁴ This statement attributed to Kinder is not in the instant record.

seeking the contempt adjudication, and the facts constituting the basis of the contempt must be proved by clear and convincing evidence. *Collins v Telcoa Intl. Corp.*, 86 AD3d 549 (2d Dept 2011).

On the present record, this court must conclude that contempt against Holder is unwarranted at this time with regard to two (2) categories of documents, to wit, the books and records of Harlem Properties and HBB. With respect to documents pertaining to Harlem Properties, plaintiff does not contest Holder's statement that she does not maintain such records.

As to documentation concerning HBB, although Holder may be in possession of a computer containing HBB's books and records, this court's 3/8/12 order only directs the production of canceled checks from HBB made payable to the judgment debtors. It is not lost on this court that Ehrenhalt sought documentary evidence regarding HBB because, despite the fact that Holder has an employee/employer type relationship with HBB, she claimed to be unable to answer many of the questions posed to her during her deposition.⁵ Still, at this juncture, while Holder may have access to any canceled checks from HBB to the judgment debtors, it is not clear that she is authorized to turn them over. On this point, Ehrenhalt does not establish by clear and convincing evidence that her rights or remedies have been defeated, impaired, impeded or prejudiced.

⁵ It is unclear if Holder has a membership interest in HBB, is merely an employee or contractor or holds some other interest. Plaintiff has attempted to obtain this information from Holder's mother, who has an interest in HBB. However, at the last scheduled court date plaintiff's counsel reported that Holder's mother was in default of the October 11, 2012 stipulation resolving plaintiff's motion to compel her compliance with a subpoena.

Finally, as to the condominium units she presently owns or previously owned at 309 East 108th St., Holder's affidavit is insufficient. She admittedly has or has had some ownership interest in all but Unit 1B, yet she fails to indicate what efforts she made to locate the requested documentation pertaining to her purchase and/or sale of these properties (i.e., where she performed her search, whether she attempted to obtain any information from her tax returns or her accountant, etc.). As to utility records for Unit 1F, while Holder owns this apartment there is no indication she is the account holder for its various utility accounts.

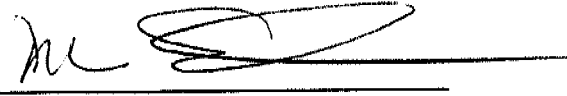
Accordingly, within thirty (30) days of service of a copy of this decision and order with notice of entry, Holder shall provide a detailed, sworn statement of her efforts to locate records of her purchases and sales of Units 1D, 1E, 1F and 2G at 309 East 108th St. (as set forth in this court's 3/8/12 order) and shall indicate whether she is the account holder for any utility servicing Unit 1F. Upon Holder's failure to comply with the foregoing, plaintiff's counsel shall submit an affirmation to chambers detailing the default and the legal fees Ehrenhalt incurred in bringing the instant motion, together with a proposed order holding Holder in contempt of court and directing entry of a judgment against her representing plaintiff's legal fees incurred in connection with this contempt motion.

For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion to hold defendant Maxcine Holder in contempt and for related relief is granted solely to the extent that Holder is directed to comply with the terms of this decision and order within thirty (30) days of service of notice of entry thereof, and is otherwise denied.

This constitutes this court's decision and order. Courtesy copies of same have been provided to counsel for plaintiff and Holder.

Dated: New York, New York
December 12, 2012



HON. MARTIN SHULMAN, J.S.C.

FILED
DEC 14 2012
COUNTY CLERKS OFFICE
NEW YORK