

**McGrail v 201 East 116th St. Realty Corp.**

2013 NY Slip Op 30569(U)

March 15, 2013

Sup Ct, New York County

Docket Number: 110421/2010

Judge: Kathryn E. Freed

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SCANNED ON 3/25/2013

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

**PRESENT:** HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT \_\_\_\_\_  
Justice

**PART** 5

Index Number : 110421/2010  
MCGRAIL, SHANE  
vs  
201 EAST 116TH ST.  
Sequence Number : 004  
PUNISH FOR CONTEMPT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

*CALL # 43*

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	<b>No(s).</b> _____
Answering Affidavits — Exhibits _____	<b>No(s).</b> _____
Replying Affidavits _____	<b>No(s).</b> _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

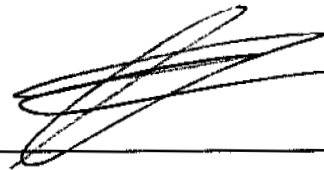
**FILED**

MAR 25 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

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

Dated: 3-15-13  
MAR 15 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

1. CHECK ONE: .....  CASE DISPOSED  **NON-FINAL DISPOSITION**
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
SHANE MCGRAIL,

Plaintiff,

-against-

201 EAST 116<sup>TH</sup> ST. REALTY CORP., SILVER  
STAR MANAGEMENT CORP., SILVER &  
SILVER PROPERTIES, LLC., SILVER & SILVER  
PROPERTIES, INC., BANK OF AMERICA  
CORPORATION AND THE CITY OF NEW YORK

Defendants.

DECISION/ORDER

Index No.: 110421/2010

Seq. No.: 004

PRESENT:

Hon. Kathryn E. Freed  
J.S.C.

**FILED**

MAR 25 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	..... 3-4.....
STIPULATIONS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR§ 3201 and Judiciary Law§ 753(A)(5),

holding plaintiff Maxine Bailey in contempt of court or compelling her compliance with a Non-Party

Witness Subpoena. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants the  
motion only to the extent that it will sign an order compelling Ms. Bailey's compliance with said

subpoena.

Factual and procedural background:

Plaintiff is suing for injuries he allegedly sustained on January 9, 2010, as a result of a trip and fall on an abandoned tree well in front of a building located at 201 East 115<sup>th</sup> Street (a/k/a 2125 Third Avenue), New York, New York. Subsequently, he commenced the instant action via a Summons and Complaint on July 28, 2010.

On January 14, 2011, defendants served a Verified Answer, wherein defendant Silver concedes that the building was owned by 201 East 116<sup>th</sup> Realty Corp. On August 27, 2010, the City served its Verified Answer. Additionally, Bank of America Corporation served its Verified Answer on November 10, 2010.

In plaintiff's Supplemental Response to Defendants' Demand for Witness Information, dated May 1, 2012, Maxine Bailey was disclosed as a witness. Consequently, defendants' counsel drafted a Non-Party Witness Subpoena, dated August 31, 2012, which was personally served on her on September 9, 2012. Said subpoena directed Ms. Baily to appear for a deposition scheduled for October 24, 2012. Moreover, on September 27, 2012, a Notice to Take Examination Before Trial of a Non-Party Witness was served on counsel for the other parties. Following the service of the subpoena on her, Ms. Baily telephoned defendants' counsel and stated that she was a witness to the accident, as well as the alleged condition. She further stated that she had received the subject subpoena and would be present on the designated deposition date. However, on that day, Ms. Baily failed to appear. A brief statement was placed on the record noting her absence.

Defendants Silver now assert that since Ms. Bailey failed to proffer an explanation for her absence, she should be held in contempt of court pursuant to CPLR§ 2308 and New York Judiciary

Law§ 753(A)(5). In the alternative, defendants Silver assert that she should be compelled to comply with the subpoena pursuant to CPLR§ 2308(b).

Conclusions of law:

It is well settled that “[c]ontempt is a drastic remedy which should not be granted absent a clear right to the relief” ( Pinto v. Pinto, 120 A.D.2d 337, 338 [1<sup>st</sup> Dept. 1986]; *see also* Benson Park Associates LLC v. Herman, 93 A.D.3d 609 [1<sup>st</sup> Dept. 2012] ). Additionally, to warrant such relief, the aggrieved party must show that the witness willfully failed to comply with the subpoena ( *see* The Board Of Managers Of the Atrium Condominium v. West 79<sup>th</sup> Street Corp., 17 A.D. 3d 108 [1<sup>st</sup> Dept. 2005] ).

Judiciary Law§ 753(A)(5) provides that a court has the power to punish, “[a] person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or the answer as a witness.”

In order to ascertain if contempt has occurred, several criteria must be met ( *see i.e.* Thompson v. Pollack, 59 A.D.3d 525 [2d Dept. 2009] ). First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; second, it must also appear, with reasonable certainty, that the order has been disobeyed; third, the party to be held in contempt must have had knowledge of the court’s order, although service of said order on the party is not necessary; and finally, it must be demonstrated that the party to the litigation has been prejudiced as stated in Judiciary Law§ 753 (A) ), ( *id.* at 527).

In the case at bar, the Court has reviewed the subpoena sent to Ms. Bailey, in addition to the affidavit of personal service, both annexed to the instant motion as exhibits. While it would seem that all of the aforementioned criteria have been met, the Court is still not convinced that Ms.

Bailey's actual failure to appear was willful or deliberate. Indeed, defendants have not proffered any evidence that her failure to appear was the result of deliberate non-compliance. It does not appear that following her failure to appear, defendants' counsel made any follow-up efforts to contact her, to determine the reason(s) for her absence. Thus, in consideration of this, the Court is not willing to hold a non-party witness, whose failure to appear has not been fully explained, in contempt of court.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants' motion to hold Maxine Bailey in contempt is granted only to the extent that the Court will sign an order compelling her compliance with a Non-Party Witness Subpoena; and it is further

ORDERED that included in said Non-Party Witness Subpoena is language that apprises Ms. Bailey that failure to appear may result in her arrest; and it is further

ORDERED that Ms. Bailey is to be served personally; and it is further

ORDERED that the remainder of the action shall continue; and it is further

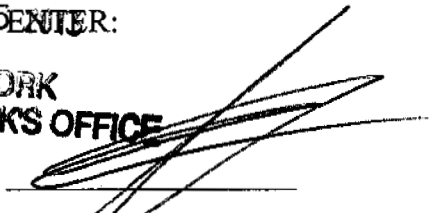
ORDERED that this constitutes the decision and order of the Court.

**FILED**

DATED: March 15, 2013

MAR 25 2013

NEW YORK  
COUNTY CLERKS OFFICE



Hon. Kathryn E. Freed

J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

MAR 15 2013