

Ardent Harmony Fund Inc. v Barrick

2019 NY Slip Op 34007(U)

December 3, 2019

Supreme Court, Nassau County

Docket Number: 602372/17

Judge: Stephen A. Bucaria

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SHORT FORM ORDER SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ARDENT HARMONY FUND INC. and
ARGYLE FUNDS SPC INC.,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 602372/17

MOTION DATE: 09/18/19
Motion Sequence 006

-against-

DONALD BARRICK,

Defendant.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion brought by Order to Show Cause by plaintiff Ardent Harmony Fund Inc. and Argyle Funds SPC, Inc. (hereafter collectively as "plaintiffs") which seeks an Order pursuant to CPLR §§3126, 5251 and New York Judiciary Law §§753 and 773, holding the defendant-judgment debtor, Donald Barrick, in civil and criminal contempt, is determined as follows.

On June 26, 2017 this Court awarded judgment against defendant, Donald Barrick, in favor of plaintiff Argyle Funds SPC, Inc. in the amount of \$46,416,876.21 and in favor of plaintiff, Ardent Harmony Fund Inc. in the amount of \$29,190,736.04. Said judgment was filed and recorded with the Clerk of Nassau County, New York on June 28, 2017.

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On June 30, 2017, the plaintiffs also served defendant with a restraining notice pursuant to CPLR §5222(b) prohibiting defendant from making or suffering the sale, assignment or transfer of, or any interference with any property in which the defendant has an interest, except as provided therein.

Finally, plaintiff's sought judicial intervention to compel compliance with various Subpoenas served upon defendant and the turnover of assets in defendant's possession. On June 21, 2019, this Court granted plaintiff's motions and ordered the defendant to appear for a deposition, to comply with the Subpoena Duces Tecum previously served upon him and directed that defendant turn over all non-exempt personal property to plaintiffs.

Based upon the defendant's alleged failure to comply with said Orders, the plaintiffs move for civil and criminal contempt of Court.

"Under Judiciary Law § 753, '[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced' In *Matter of McCormick v Axelrod* (59 NY2d 574, 453 NE2d 508, 466 NYS2d 279 [1983]), this Court described the elements necessary to support a finding of civil contempt. First, 'it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect'. Second, '[i]t must 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 it is not necessary that the order actually have been served upon the party'. Fourth, 'prejudice to the right of a party to the litigation must be demonstrated'" (*El-Dehdan v El-Dehdan*, 26 N.Y.3d 19 [2015]) (*internal citations omitted*)

Here, based upon the submissions before the Court, it appears that defendant submitted a response to plaintiff's information subpoena and the defendant did appear for a deposition in accordance with this Court's order. However, based upon a review of the defendant's responses they are wholly inadequate and it appears that defendant did not give any significant answer to the questions posed at the deposition as defendant invoked the Fifth Amendment right against self-incrimination throughout the majority of the deposition.

"The Fifth Amendment of the United States Constitution provides that '[n]o person shall be . . . compelled in any criminal case to be a witness against himself.'

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However, the right against self-incrimination does not automatically insulate a party to a civil action from potential liability. Both the United States Supreme Court, in *Baxter v Palmigiano* (425 US 308, 318, 96 S Ct 1551, 47 L Ed 2d 810 [1976]), and this Court, in *Marine Midland Bank v Russo Produce Co.* (50 NY2d 31, 42, 405 NE2d 205, 427 NYS2d 961 [1980]), have held that a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination.” (*id at 38*)

The defendant argues that the nature of the action being one for fraud and the allegations that defendant stole money are enough to subject the defendant to criminal penalties. However, the defendant failed to comply with the simplest questions regarding the ownership of his own property and assets. The defendant, in opposition, seeks to supplement his deposition testimony with an affidavit submitting various answers to certain questions that were posed to him at the deposition. Clearly then, there are questions that were posed at the deposition that the defendant could have answered but chose not to and instead invoked the Fifth Amendment.

The defendant also did not obey this Court’s previous order of June 21, 2019, mandating him to turnover the non-exempt assets in his possession to plaintiffs. Finally, defendant admitted in his deposition of being aware of this Court’s previous orders. Based on defendant’s failure to comply with this Court’s mandates, the rights of the plaintiffs in attempting to enforce their judgment of over 75 million dollars have certainly been prejudiced.

Accordingly, the plaintiff’s motion for civil contempt is **granted** to the following extent:

This Court will allow defendant to purge himself of his contempt by (1) producing all documents responsive to the Subpoena Duces Tecum, dated March 8, 2019 within twenty (20) days of the date of this Order; (2) to appear for a deposition and providing responses to questions, including questions about the defendant’s assets within thirty (30) days of the date of this Order; (3) turning over all non-exempt personal to plaintiffs as required by this Court’s prior Orders within thirty (30) days of this date of this Order; and (4) to comply with the Restraining Notice dated June 30, 2017.

Should the defendant fail to comply with this Order, upon the submission of an Affirmation of Non-Compliance by counsel for plaintiffs, on notice, the defendant, Donald Barrick, shall be fined in the amount of \$25,000 per day until compliance, plus Plaintiff’s costs and expenses, including attorney’s fees, and a warrant of commitment

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will be issued. (*Judiciary Law §753*)

This constitutes the Decision and Order of this Court. Any relief requested not expressly granted herein is denied.

So ordered.

Dated: DEC 03 2019

Stephen A. Bucaria

J.S.C.

ENTERED

DEC 04 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE