

**Yellow Book Sales & Distrib. Co., Inc. v Shamrock  
Carpet Serv., Inc.**

2020 NY Slip Op 32099(U)

May 27, 2020

Supreme Court, Suffolk County

Docket Number: 019524/2010

Judge: James Hudson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip  
Op 30001(U), are republished from various New York  
State and local government sources, including the New  
York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official  
publication.

Supreme Court of the County of Suffolk  
State of New York - Part XLVI  
Memorandum Decision

**ORIGINAL**

**PRESENT:**  
**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*

x-----x  
YELLOW BOOK SALES AND DISTRIBUTION  
COMPANY, INC.

**INDEX NO.:019524/2010**

**MOT. SEQ. NO.:002-Mot D**

Plaintiff,  
-against-

SMITH, CARROAD, LEVY, WAN &  
PARIKH, P.C.  
Attorneys for the Plaintiff  
5036 Jericho Turnpike, Suite 201  
Commack, NY 11725

SHAMROCK CARPET SERVICE, INC.; JAMES  
MCQUILLAN,

Defendants.

x-----x

DAVID MORAN, ESQ.  
Attorney for the Defendants  
96 South Ocean Avenue  
Patchogue, NY 11772

JAMES McQUILLAN  
2 Canterbury Drive  
Coram, NY 11727

The Plaintiff/Judgment Creditor, Yellow Book Sales and Distribution Company, Inc. ("Plaintiff") has filed a post-judgment motion (seq. no.:002) which requests an order punishing the individual Defendant/Judgment Debtor James McQuillan ("Defendant") for contempt, pursuant to **CPLR §5251**, due to Defendant's failure and refusal to obey Plaintiff's Subpoena *Duces Tecum* and *ad testificandum*; or, in the alternative, compelling Defendant to comply with that Subpoena and directing the Defendant to appear at a time and place designated by the Court for a deposition pursuant to that Subpoena.

On September 6<sup>th</sup>, 2012, a Judgment was entered in favor of the Plaintiff and against

INDEX No.:019254/2010

the Defendants in the amount of one-hundred thirty five thousand, eight hundred ninety one dollars (\$135,891.19) and nineteen cents. ("Judgment"). The Plaintiff contends that the entire amount of that Judgment remains unpaid, together with interest thereon from September 6<sup>th</sup>, 2012.

On September 24<sup>th</sup>, 2018, the Plaintiff served a Subpoena *Duces Tecum* and *Ad Testificandum* upon the Individual Defendant (James McQuillan) at his Coram residence, in compliance with **CPLR §5224**. Plaintiff's Counsel avers, without contradiction, that the Mr. McQuillan has not complied with that Subpoena. Thereafter, the Plaintiff filed this instant unopposed motion (seq .no.:002).

The Court will consider whether the Plaintiff has proved the necessary elements of contempt in response to Mr. McQuillan's failure to honor its Subpoena.

**CPLR §5251. Disobedience of subpoena, restraining notice or order; false swearing; destroying notice of sale provides, in pertinent part:**

"Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title...shall each be punishable as a contempt of court."  
(McKinney's CPLR §5251 [2020]).

**CPLR Rule 5224. Subpoena; procedure Effective: September 2, 2011 provides, in pertinent part:**

(a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served:

1.A subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein;  
or

INDEX NO.:019254/2010

2. A subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or..."

"The devices of [CPLR] Article 52 that are backed up by the contempt punishment are the subpoenas (CPLR 5224)... The procedure for the contempt punishment is not supplied by the CPLR, but by the *Judiciary Law* (§§705 et seq.)... see *Siegel, New York Practice, 5<sup>th</sup> Ed.*, §§481-4." (*Richard C. Reilly, Practice Commentaries, McKinney's, C5251:1* [2019]).

**N.Y. Judiciary Law §753. Power of courts to punish for civil contempt**, provides, in pertinent part:

"A court of record has [the] 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 proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court." (*McKinney's N.Y. Judiciary Law §753* [2020]).

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (*El-Dehdan v. El-Dehdan*, 114 AD3d 4, 10, 978 NYS2d 239, 245 [2d Dept 2013], *affirmed* 26 NY3d 19, 19 NYS3d 475, 41 NE3d 340 [2015]; see also *Louzoun v. Montalto*, 162 AD3d 1004, 1005, 80 NYS3d 154 [2d Dept 2018]).

"In order to hold a party in civil contempt, the moving party

INDEX No.:019254/2010

must establish the following elements by clear and convincing evidence: First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; Second, it 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...; and Fourth, prejudice to the right of a party to the litigation must be demonstrated" (*Matter of Behan*, 180 AD3d 671, 677, 119 NYS3d 222 [2d Dept 2020]; quoting *Cover v. Cover*, 173 AD3d 970, 971, 104 NYS3d 669 [2d Dept 2019]; see *Cook v. Cook*, 142 AD3d 530, 535, 36 NYS3d 222, 227-228 [2d Dept 2016]; *Trabanco v. City of New York*, 81 AD3d 490, 492, 916 NYS2d 90, 92 [1<sup>st</sup> Dept 2011]).

In order to sustain a finding of civil contempt, it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights of a party (*Doors v. Greenberg*, 151 AD2d 550, 542 NYS2d 324, 325 [2d Dept 1989]). "A party is obligated to comply with a court order, however incorrect the party may consider that order to be, until that order is set aside, either by appeal or otherwise, as long as the court issuing the order had jurisdiction to issue it" (*Astrada v. Archer*, 71 AD3d 803, 807, 898 NYS2d 149, 152 [2d Dept 2010]). "The aim of civil contempt is to vindicate a party's right to the benefits of a judicial mandate or to compensate that party for the interference by the contemnor" (*Matter of Ferrante v. Stanford*, 172 AD3d 31, 36, 100 NYS3d 44 [2d Dept 2019]; quoting *Matter of Banks v. Stanford*, 159 AD3d 134, 140, 71 NYS3d 515 [2d Dept 2018]). "Once the movant makes the required showing, the burden shifts to the alleged contemnor to refute that showing, or to offer evidence of a defense such as an inability to comply with the order" (*Matter of Ferrante* at 36; quoting *Matter of Mendoza-Pautrat v. Razdan*, 160 AD3d 963, 964, 74 NYS3d 626 [2d Dept 2018]).

"It is well to note, however, that where a party alleges an excuse for disobedience to a judgment or order of a court or alleges matters in mitigation, the burden of proof is upon


him to establish the same. Such burden must be met with a factual showing” (*In re Hildreth*, 28 AD2d 290, 294, 284 NYS2d 755, 760 [1<sup>st</sup> Dept 1967]; see *21 Carmody Wait*, New York Practice §123, p. 273; *Clark v. Bininger*, 75 NY 344 [1878]). “The fines that may be imposed for a civil contempt are found in Judiciary Law §773. The statute provides for two types of awards: one where actual damage has resulted from the contemptuous act in which case an award sufficient to indemnify the aggrieved party is imposed, and one where the complainant’s rights have been prejudiced but an actual award or injury is incapable of being established” (*Matter of Department of Hous. Presev. & Dev. of City of N.Y. v. Deka Realty Corp.*, 208 AD2d 37, 43, 620 NYS2d 837 [2d Dept 1995]). “An application to adjudicate a party in contempt is treated in the same fashion as a motion and a hearing must be held if issues of fact are raised” (*Gomes v. Gomes*, 106 AD3d 868, 869, 965 NYS2d 187, 189 [2d Dept 2013]; quoting *Quantum Heating Servs. v. Austern*, 100 AD2d 843, 844, 474 NYS2d 81 [2d Dept 1984]).

In the case at bar, it is improvident for the Court to grant the civil contempt request made by the Plaintiff without a hearing. Accordingly, it is

**ORDERED**, that the motion (seq. no.:002) of the Plaintiff which seeks a finding of civil contempt against Defendant James McQuillan is granted to the extent that a contempt hearing will be held at the New York State Supreme Court of Suffolk County, Part XLVI on **Tuesday, August 4<sup>th</sup>, 2020 at 10:00 am.**

This Memorandum also constitutes the Order of the Court.

**DATED: MAY 27<sup>th</sup>, 2020**  
**RIVERHEAD, NY**

  
**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*