

**Calderon v Holland**

2021 NY Slip Op 32603(U)

November 10, 2021

County Court, Suffolk County

Docket Number: Index No. 622474/2019

Judge: James F. Matthews

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

Present:

HON. JAMES F. MATTHEWS  
Acting County Court Judge  
\_\_\_\_\_X

MOTION DATE: September 14, 2021

JUAN C. CALDERON,  
  
Plaintiff,

-against-

CHRISTINA S. HOLLAND,  
  
Defendant,  
\_\_\_\_\_X

Upon the following papers numbered 1 to 5 and on this motion by counsel for defendant for an Order issuing a Warrant directing the Sheriff of Suffolk County to bring DIANA BRANCH for a deposition at the Law Offices of Brian J. McGovern, LLC. and an Order directing DIANA BRANCH to pay the damages and costs for the within motion to defendant by application and Affirmation in Support with supporting papers 1-5; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers; Replying Affidavits and supporting papers; Filed papers; Other (and after hearing counsel in support of and opposed to the motion); and

The above entitled action having been removed from the Supreme Court, County of Suffolk, State of New York, and assigned to the County Court, County of Suffolk, State of New York, pursuant to CPLR 325(d), §19(a) of Article VI of the New York State Constitution, and §202.13(c) of the Uniform Rules for the New York State Trial Courts, for determination and conference, by Order dated 08/05/2021 (Luft, Martha L., A.J.S.C.); and

All pending motions having been adjourned by Acting Judge of the County Court (Matthews, J.), to September 14, 2021, and due deliberation having been had therein; therefore now, it is

**ORDERED** that the unopposed motion by counsel for defendant seeking an order pursuant to CPLR 2308, issuing a warrant directing the Sheriff to bring non-party Diana Branch before the Law Offices of Brian J. McGovern, LLC., for a deposition pursuant to the Subpoena Ad Testificandum of defendant Christina S.

Holland dated 05/01/2021 and personally served on 05/04/2021, which required the appearance of Diana Branch at a deposition on May 31, 2021, at which she failed to appear, is denied; and it is further

**ORDERED** that the unopposed motion by counsel for defendant seeking an order directing non-party Diana Branch to pay defendant Christina S. Holland for the damages and costs to file the instant motion, is denied.

A subpoena captioned Subpoena Ad Testificandum issued on behalf of defendant Christina S. Holland dated 05/01/2021 and personally served on non-party Diana Branch on 05/04/2021 at 26 Ronek Drive, Amityville, NY 11701, was duly issued by defendant's attorney of record pursuant to CPLR 2302(a), for the witness Diana Branch, to appear and attend a deposition at Deitz Lexitas Court Reporting, located at 1757 Veterans Hwy., Suite 28, Islandia, NY 11749, or via Zoom video conferencing, on the 31<sup>st</sup> day of May, 2021, at 10:00 AM (see Affidavit of Alan Feldman dated 05/04/2021), a time not less than seven days before the return date of the subpoena. The non-party witness, Diana Branch, failed to attend pursuant to the said subpoena, and did not seek an adjournment for another date and time for the taking of said deposition (see Affirmation of Michael J. Liloia, Esq., dated 06/02/2021).

Thereafter, by motion dated June 2, 2021, counsel for defendant, seeks an order for a warrant pursuant to CPLR 2308(b), directing the Sheriff to bring Diana Branch before the Law Offices of Brian J. McGovern, LLC., for a deposition pursuant to the Subpoena Ad Testificandum personally served on Diana Branch on 05/04/2021, and also moved for an order directing Diana Branch to pay to defendant Christina S. Holland, damages for an unknown amount, including counsel fees, and costs not to exceed \$50.00, for bringing the instant compliance motion, pursuant to CPLR 2308(b).

Under CPLR 2308(a), a judicial subpoena is a subpoena issued by a judge, a clerk, or an officer of the court, which includes an attorney representing a party to a pending action, as in the instant matter<sup>1</sup> (see Douglas Elliman, LLC. v TWP Real Estate, LLC., 189 AD3d 614 [1<sup>st</sup> Dept 2020]; Moore v Sunshine, 126 Misc2d 284 [Sup Ct, New York Cty 1984]). The subpoena can be issued at any stage of a judicial proceeding, and includes a subpoena for

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<sup>1</sup> A non-judicial subpoena, in contrast, is one which is not returnable in a court (such as an administrative proceeding or an arbitration [see CPLR 2302]), and its compliance may be compelled in the Supreme Court, which may also impose costs and a penalty not exceeding fifty dollars, each, and damages sustained by the failure to comply (see CPLR 2308(b)).

an appearance at a deposition (see Banker's Trust Co. v Braten, 194 AD2d 378 [1<sup>st</sup> Dept 1993]). "CPLR 2308(a) sets forth the penalties applicable to the disobedience of a judicial subpoena" (see Cadierock Joint Venture, L.P. v Forde, 152 AD3d 483 [2<sup>nd</sup> Dept 2017]). Disobedience of a subpoena issued by an attorney in a judicial proceeding is punishable as a contempt of court (see CPLR 2308[a]), and permits recovery of attorney fees from the offending party by a party aggrieved by the contemptuous conduct (see Judiciary Law §773; see also Schwartz v Schwartz, 79 AD3d 1006, 1010 [2<sup>nd</sup> Dept 2010]).

"While disobedience of a judicial subpoena may be punished as a contempt, disobedience of a non-judicial subpoena may not" (see Lyon Financial Services, Inc. v Pinto Trading Co., 24 Misc3d 1237[A][Sup Ct, Kings Cty, City of New York 2009]). "In such instance, the party seeking enforcement must first seek a court order to compel compliance with a non-judicial subpoena" (*Id.* at \*3). "A person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until the court has issued an order compelling compliance, which order has been disobeyed" (*Id.* at \*3; see also Dias v Con. Edison, 116 AD2d 453, 454 [1<sup>st</sup> Dept 1986]).

A Court of record, in pertinent part to the instant case, "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 special proceeding, pending in the Court, may be defeated, impaired, impeded, or prejudiced, in any of the following cases (see Judiciary Law §753[A]):

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness." (see Judiciary Law §753[5]).

Moreover, "in a case specified in section 753...that a Court of record, or a judge thereof...has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or a special proceeding pending in the Court, or before the judge...may be defeated, impaired, impeded, or prejudiced thereby, the offense **must** (emphasis added) be punished as prescribed in the following sections of this article" (see Judiciary Law §754).

"Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their losses" (see State of New York v Unique Ideas, 44 NY2d 345 [1978]). "...plaintiff must show that it suffered an actual loss to recover compensation in a contempt proceeding" (see

Ortega v City of New York, 11 Misc3d 848 (Sup Ct, Kings Cty, City of New York 2006); see also In the Matter of Barclay's Bank v Hughes, 306 AD2d 406 [2<sup>nd</sup> Dept 2003]). Legal fees and disbursements are also recoverable (*Id.* at 407).

The statutory procedure to punish for civil contempt, includes Judiciary Law §756, which requires that "an application to punish for a contempt punishable civilly, may be commenced by notice of motion." The application, *inter alia*, shall also contain on its face "a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law, together with the following legend printed or type written in a size equal to at least eight point bold type: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT**" (see Judiciary Law §756).

It is well settled that "an application to punish for contempt that does not contain the warnings required by Judiciary Law §756, is jurisdictionally defective and should not be entertained by the Court" (see Ortega v City of New York, *supra* at 864). Where "none of these safeguards were followed, the Court [is] without jurisdiction to punish the [witness] for contempt" (see Cappello v Cappello, 274 AD2d 538 [2<sup>nd</sup> Dept 2000]).

Here, the Court finds that the factual circumstances of this matter spell out a classic case of the disobedience of a judicial subpoena which was issued by an attorney as an officer of the Court, which must be punished under the Judiciary Law with a contempt of court finding (see Judiciary Law §754), for the failure of the non-party Diana Branch to obey a subpoena duly issued by defendant's attorney of record, as an officer of the court, for a pending court matter (see CPLR 2308 [a]).

However, the Court notes the motion by defendant to compel the non-party's compliance with its subpoena was brought under the incorrect section of CPLR 2308. This is shown by the relief sought by defendant of the issuance of a warrant directing the Sheriff to bring Diana Branch before the Law Offices of Brian J. McGovern, LLC., for a deposition pursuant to a Subpoena Ad Testificandum previously served on May 4, 2021, which required the appearance of Diana Branch at a deposition on May 31, 2021, at which she failed to appear.

"Because the subpoena [here] was issued by an officer of the Court-namely [defendant's] counsel- it was a judicial subpoena, and therefore CPLR 2308(b)(1), which applies only to non-judicial subpoenas, was inapplicable" (see Douglas Elliman, LLC. v TWP Real Estate, LLC., *supra* at 614]). The motion should have been brought under CPLR 2308(a), which relief would have sought punishment as a contempt of court which must be punished under

the statutory provisions of the Judiciary Law.

As a result, there is no compliance with the procedure set forth in Judiciary Law, Chapter 30, Article 19, sections 753 through 778, which includes the statutory safeguards and warnings required to be printed by Judiciary Law §756. There is no language printed on the face of the Notice of Motion which states that: The purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law, together with the following legend printed or type written in a size equal to at least eight point bold type: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.**

Therefore, the Court determines that defendant has failed to follow the motion mandates seeking an application to punish for contempt of the Judiciary Law, Chapter 30, Article 19, sections 750 through 781, et. seq., and the Court lacks jurisdiction to hear the instant motion as a consequence.

Accordingly,, the defendant's motion is denied in its totality.

The foregoing constitutes the decision and order of the Court.

Dated: November 10, 2021

  
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A.J.C.C.