

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

WILLIAM F. O'SHEA III,

Plaintiff(s),

-against-

DOMINICK PERSICO,
Defendant(s).

_____x

TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 603516/18

Motion Seq. No.: 003
Motion Submitted: 2/25/2019

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X

Plaintiff, William F. O'Shea III, moves this court for an order: 1) Holding Defendant, Dominick Persico (Persico) in contempt of court pursuant to CPLR §§5223, 5224(a)(1) and (2) and 5251, as well as Judiciary Law §§753 and 773, including a fine and/or imprisonment, counsel fees, costs and disbursements, for failing to comply with a Subpoena *Duces Tecum* and *Ad Testificandum*, 2) awarding costs, sanctions and attorney's fees pursuant to 22 NYCRR 130-1.1 and 130-1.2, 3) holding Persico's counsel Bradley Schnur, Esq. in contempt pursuant to CPLR §§5224(a)(3) and 2308(b) and

Judiciary Law §§753 and 773 and sanctioning Mr. Schnur pursuant to 22 NYCRR 130-1.1 and 130-1.2, 3) holding 17 Roselle Realty Holding Corp., 14 Roselle Street Realty, Inc., HY-Tone Auto Sales, Inc. and HY-Tone Auto Body Repairs, all entities owned by Persico, in contempt and to sanction them for failing to comply with subpoenas, and 5) compelling 17 Roselle Realty Holding Corp., 14 Roselle Street Realty, Inc., HY-Tone Auto Sales, Inc. and HY-Tone Auto Body Repairs to comply with subpoenas. There is no opposition.

One who fails to comply with a subpoena may be held in contempt. CPLR §2308(a). To be found in contempt, it must be established by clear and convincing evidence that the alleged contemnor's actions were calculated to, or actually did, defeat, impair, impede or prejudice the subpoenaing party's rights. (*Thompson v. Pollack*, 59 AD3d 525 [2d Dept 209]). O'Shea alleges his rights have been impeded by not getting access to the information.

CPLR §5223 allows a creditor "...a broad range of inquiry through...any third party with knowledge of the debtor's property." (*ICD Group. v. Israel Foreign Trade Co (USA)*., 224 AD2d 293, 294 [1st Dept 1996])(cites omitted). Third parties may be questioned as to whether the debtor has concealed or transferred assets in an attempt to defraud the creditor "...or improperly prevented the collection of the underlying judgment." (*George v. Victor Albi, Inc.*, 148 AD3d 1119 [2d Dept 2017]).

"To sustain a finding of civil contempt, a court must find that the alleged

contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced” (*Alderman v Alderman*, 78 AD3d 620 [2nd Dept 2010], quoting *Incorporated Vil. of Plandome Manor v Ioannou*, 54 AD3d 365, 366 [2nd Dept 2008]; see Judiciary Law § 753[A][3]; *McCain v Dinkins*, 84 NY2d 216 [1994]; *Astrada v Archer*, 71 AD3d 803, 806 [2nd Dept 2010], *lv to appeal dismissed in part, denied in part*, 14 NY3d 922 [2010]; *Town of Huntington v Reuschenberg*, 70 AD3d 814, 185 [2nd Dept 2010]; *Casavecchia v Mizrahi*, 57 AD3d 702, 703 [2nd Dept 2008], *lv to appeal dismissed in part, denied in part by* 12 NY3d 896 [2009]; *Miller v Miller*, 61 AD3d 651 [2nd Dept 2009]).

“[I]t 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” (*Incorporated Vil. of Plandome Manor v Ioannou*, *supra*, quoting *Hinkson v Daughtry-Hinkson*, 31 AD3d 608, 609 [2nd Dept 2006], quoting *Jim Walter Doors v Greenberg*, 151 AD2d 550, 551 [2nd Dept 1989]; *Great Neck Pennysaver, Inc. v Central Nassau Publications, Inc.*, 65 AD2d 616 [2nd Dept 1978]; *Yalkowsky v Yalkowsky*, 93 AD2d 834 [2nd Dept 1985]). “The contempt must be proven by clear and convincing evidence” (*Rienzi v Rienzi*, 23 AD3d 447 [2nd Dept 2005]; *Vujovic v Vujovic*, 16 AD3d 490 [2nd Dept 2005]).

“A hearing is not mandated ‘in every instance where contempt is sought; it need

only be conducted if a factual dispute exists which cannot be resolved on the papers alone.’ ” (*Automated Waste Disposal v Mid-Hudson Waste, Inc.*, 50 AD3d 1073 [2nd Dept 2008], quoting *Jaffe v Jaffe*, 44 AD3d 825, 826 [2nd Dept 2007]). However, a “hearing must be held if issues of fact are raised” (*Automated Waste Disposal v Mid-Hudson, Waste, Inc.*, *supra*, quoting *Quantum Heating Servs. v Austern*, 100 AD2d 843, 844 [2nd Dept 1984], *appeal after remand* 121 AD2d 437 [2nd Dept 1986]). It has been held that the imposition of a fine which includes reasonable legal fees as part of statutorily recoverable costs and expenses is proper in the absence of actual damages. See Judiciary Law 773. See also *Quantum Heating Service, Inc. v Austern*.

Herein the history of this matter is relevant. By short form order dated July 3, 2018, this court granted O’Shea’s motion for leave to file a judgment on default. The court further directed a hearing to occur to determine damages, counsel fees and costs. On July 5, 2018, this court received a letter from Persico’s counsel, Mr. Schnur, asserting that the default order had been issued in error. O’Shea’s counsel wrote to the court on July 6, 2018, challenging Mr. Schnur’s assertion and arguing that the default order was proper. After speaking with the attorneys, the court agreed to give Mr. Schnur some time before signing the judgment to establish the default order was issued in error. Mr. Schnur never provided the court or his adversary with any information, and on August 8, 2018, the court signed the judgment and awarded O’Shea \$56,396.58.

On October 16, 2018, O’Shea filed an order to show, cause nearly identical to the

one herein, seeking to hold Persico, Mr. Schnur and the four entities in contempt. However, O'Shea then withdrew the order to show cause, without prejudice, by letter dated October 24, 2018. The parties had entered into a stipulation resolving all issues. The stipulation required Persico to pay O'Shea \$94,150.71, representing the judgment, interest, counsel fees and other fees. Persico was to pay off the balance with a \$3,500.00 upon execution of the stipulation, \$6,500.00 on November 1, 2018, and then \$10,000.00 per month thereafter until the balance was paid off. Should Persico default, O'Shea could enter another judgment for \$45,000.00 minus any payments made pursuant to the stipulation. O'Shea claims that Persico made the \$3,500.00 payment and the \$6,500.00 payment, but the \$6,500.00 payment was returned for insufficient funds. Persico made one more \$10,000.00 payment, but never made a payment after that. O'Shea filed a Clerk's Judgment for \$35,000.00 which was entered on December 20, 2018.

On December 12, 2018, O'Shea served Persico with a Subpoena *Ad Testificandum* and Subpoena *Duces Tecum*. The subpoena directed Persico to appear to be deposed at O'Shea's counsel's office on January 18, 2019 and to produce certain documents on January 25, 2019. Persico did not comply. On December 21, 2018, O'Shea served Persico with a Restraining Notice to Garnishee and Information Subpoena. Persico did not comply. On December 21, 2018, O'Shea served HY-Tone Auto Body Repairs Inc. with a Restraining Notice to Garnishee and Information Subpoena. HY-Tone Auto Body Repairs Inc. did not comply. On December 21, 2018, O'Shea served HY-Tone Auto

Sales Inc. with a Restraining Notice to Garnishee and Information Subpoena. HY-Tone Auto Sales Inc. did not comply. On December 21, 2018, O'Shea served Mr. Schnur with a Restraining Notice to Garnishee and Information Subpoena. Mr. Schnur did not comply. On December 21, 2018, O'Shea served 17 Roselle Realty Holding Corp. with a Restraining Notice to Garnishee and Information Subpoena. 17 Roselle Realty Holding Corp. did not comply. On December 21, 2018, O'Shea served 14 Roselle Street Realty Inc. with a Restraining Notice to Garnishee and Information Subpoena. 14 Roselle Street Realty Inc. did not comply.

Based upon O'Shea's submissions, the court finds Persico, Mr. Schnur, HY-Tone Auto Body Repairs Inc., HY-Tone Auto Sales Inc., 17 Roselle Realty Holding Corp. and 14 Roselle Street Realty Inc, are in contempt. Persico may purge his contempt by appearing for a deposition, and by bringing the documents demanded, within 10 days of being served with notice of entry of this order. Mr. Schnur, HY-Tone Auto Body Repairs Inc., HY-Tone Auto Sales Inc., 17 Roselle Realty Holding Corp. and 14 Roselle Street Realty Inc. can purge their contempt by fully complying with the Restraining Notice to Garnishee and Information Subpoena within 10 days of being served with notice of entry of this order. O'Shea is entitled to a hearing to determine sanctions, counsel fees, costs and other fees. Should any or all of the Defendants not purge their contempt, the hearing will also address damages for contempt, including fines and incarceration.

Accordingly, it is hereby

ORDERED, that O'Shea's Order to Show Cause to hold Persico, Mr. Schnur, HY-Tone Auto Body Repairs Inc., HY-Tone Auto Sales Inc., 17 Roselle Realty Holding Corp. and 14 Roselle Street Realty Inc, in contempt is GRANTED; and it is further

ORDERED, that Persico, Mr. Schnur, HY-Tone Auto Body Repairs Inc., HY-Tone Auto Sales Inc., 17 Roselle Realty Holding Corp. and 14 Roselle Street Realty Inc, may purge their contempt consistent with the terms of this order; and it is further

ORDERED, that O'Shea is entitled to a hearing to determine sanctions, counsel fees, costs and other fees, even if Defendants purge their contempt; and it is further

ORDERED, that should Defendants not purge their contempt, the hearing will also address damages for contempt, including fines and incarceration; and it is further

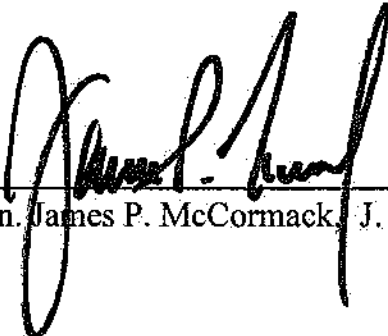
ORDERED, that this matter be referred to the Calendar Control Part (CCP) for a hearing on the issue of sanctions, counsel fees, costs, other fees and potentially damages to be held June 13, 2019, 9:30 a.m. Plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within thirty days of the date of this order.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the rights giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems

appropriate.

This constitutes the Decision and Order of the Court.

Dated: April 9, 2019
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.