

Hamilton Capital VII, LLC v Khorrami, LLP
2015 NY Slip Op 31986(U)
October 26, 2015
Supreme Court, New York County
Docket Number: 650791/2015
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

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 HAMILTON CAPITAL VII, LLC,

Index No.: 650791/2015

Plaintiff,

DECISION & ORDER

-against-

KHORRAMI, LLP (f/k/a KHORRAMI & BOUCHER, LLP;
 f/k/a KHORRAMI BOUCHER SUNER, SANGUINETTI,
 LLP; and f/k/a KHORRAMI, POLLARD, & ABIT, LLP)
 and SHAHIM KHORRAMI (a/k/a SHAWN KHORRAMI),

Defendants.

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 SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 006 and 008 are consolidated for disposition.

Plaintiff Hamilton Capital VII, LLC (Hamilton) moves by order to show cause, pursuant to Judiciary Law §§ 750 & 753, to hold defendants Khorrami, LLP (the Law Firm) and Shawn Khorrami (Khorrami) in civil and criminal contempt for willful disobedience of this court's orders. Seq. 006. Plaintiff also moves, pursuant to CPLR 3215, for a default judgment against defendants. Seq. 008. Defendants did not oppose either motion. Plaintiff's motions are granted, on default, for the reasons that follow.

I. Background

This action first came before the court on an order to show cause seeking the appointment of a receiver to oversee the finances of defendant Law Firm. The Law Firm specializes in tort litigation, particularly mass torts, and practices throughout the United States. Plaintiff had provided funds to the Law Firm through a multi-million dollar credit facility, which Khorrami had guaranteed. A UCC-1 statement was filed against the Law Firm. The credit facility was in default, and plaintiff was unable to obtain any information or records from defendants. The court repeatedly adjourned the motion upon agreement by Khorrami that documents would be turned

over to plaintiff regarding the Law Firm's finances and outstanding cases. The documents never were turned over. Ultimately, the court appointed a temporary receiver (the Receiver) on June 3, 2015, who was authorized to collect all debts owed the Law Firm, to receive and collect funds generated by the operation of the Law Firm, and to preserve the Law Firm's assets.

Additionally, defendants were ordered to "cooperate fully with the [Receiver] to locate and provide access to all books and records of account, all financial records and accounting records, balance sheets, income statements, bank records (...), title documents and other papers whether in paper or electronic form, including but not limited to insurance policies; office, vehicle and equipment leases, documentation regarding any and all indebtedness, employee benefit plans, employee and independent contractor lists, and vendor list (collectively referred to as the books and records) pertaining to Khorrami LLP now in possession, custody and/or control of Khorrami LLP and/or its partners, attorneys, employees, agents, or assigns." Defendants also were ordered to cooperate fully with the Receiver to collect, create, audit and monitor a complete list of current litigation, including fee-splitting matters, and to provide detailed information about its cases. Moreover, the defendants were to cooperate and provide any bank resolutions necessary and were to provide the Receiver with all computer passwords, keys and entry codes to gain access to the Law Firm's books and records and technology.

In an order dated August 17, 2015 (the MTD Decision), the court denied defendants' motion to dismiss. *See* Dkt. 213. The MTD Decision extensively sets forth Hamilton's allegations and the procedural history of this action, which will not be repeated here. In short, Hamilton alleges – and, indeed, there is no question of fact – that the Law Firm defaulted on a loan made to it by Hamilton under a Credit Agreement. There also is no question of fact that Khorrami has liability for such debt under a personal guaranty.

At the time of the MTD Decision, pursuant to a prior order dated August 12, 2015 (the August 12 Order), defendants were in the process of retaining new counsel. *See* Dkt. 197. The court did not stay the action but, instead, required original counsel to remain in the case for 30 days, during which period new counsel could be retained. *See id.*; *see also* Dkt. 207 (8/12/15 Tr. at 10). Should substitute counsel not be retained before a September 24, 2015 preliminary conference (the PC), the August 12 Order stated Khorrami would be deemed proceeding pro se and the Law Firm would be in default. *See* Dkt. 197.

On August 24, 2015, Hamilton filed the instant contempt motion. The court signed and entered Hamilton's order to show cause on August 25, set a September 3, 2015 deadline for the submission of opposition papers, and scheduled oral argument for September 8, 2015. *See* Dkt. 241. The grounds for contempt are straightforward: defendants' failure to provide Hamilton and the Receiver with the documents and information set forth in numerous written orders and on-the-record oral rulings.¹ There is no question that defendants have repeatedly failed to comply with these orders. Nevertheless, after defendants' counsel requested an adjournment of the contempt hearing, and over Hamilton's objection, the court adjourned the hearing to October 1, 2015.

¹ *See* Dkt. 221 (Affidavit of Steve J. Shore dated August 24, 2015, setting forth the specifics of such orders and defendants' non-compliance). In short, the court ordered defendants to produce documents on April 9 and April 24, 2015. Neither order was complied with. The Receiver was appointed on June 3, and the order required the defendants to cooperate with the Receiver in turning over requested documents, computer information, money and assets. The Receiver, therefore, made requests by letter and through defendants' counsel for information. To no avail. The court then ordered compliance on August 7, with an August 24 deadline. Although cautioned that the court would consider civil and criminal contempt if the order was not complied with, the order was not complied with. Further, defendants failed to appear for the PC on September 24.

II. Hearing

On October 1, Hamilton appeared for the hearing. Defendants did not. Shortly before the hearing, and as noted on the record, defendants made an *ex parte* written adjournment request. *See* Dkt. 335 (10/1/15 Tr. at 5). The court denied this request. At the hearing, the Receiver testified as to defendants' failure to provide the ordered documents and information.

The Receiver testified that defendants were furnished with the order appointing her as temporary receiver by mail and e-filing. *Id.* at 19. Nonetheless, defendants failed to abide by the June 3, 2015 order. *Id.* at 16-18. Specifically, defendants did not respond to her letter of June 14 requesting documents, books and records, computer passwords and credit cards. *Id.* at 20-21, 33. The Receiver then requested a conference call and a conference with defendants' lawyers. *Id.* at 21-22. The conference with the lawyers took place and she requesting the documents, but the lawyers informed her that they were having difficulty communicating with defendants. *Id.* at 22. The Receiver did not get the requested documents. *Id.* at 23. Instead, she received complaints from California attorneys and litigants. *Id.* at 24-25. As a result, the Receiver sent another letter on July 16, which had a great deal more detail in it and asked for more information. *Id.* Again, she received no response. *Id.* at 25-26.

On August 7, the court ordered that defendants comply with the Receiver's June 14 and July 16 requests for documents and information by August 21. *Id.* The order was e-filed and sent to defendants by their counsel. *Id.* Defendants failed to abide by the order. *Id.* at 27, 49. Instead, California counsel for Khorrami responded that defendants were asserting their Fifth Amendment rights, among other things. *Id.* The Receiver replied that the Law Firm could not assert a Fifth Amendment right, but received no response. *Id.* at 31.

The Receiver, however, did look at an affidavit filed by Khorrami on May 1, 2015, in which he listed outstanding cases and outstanding liens. *Id.* at 33. The Receiver began to investigate the truth of the affidavit. First, she learned of two judgments filed against Khorrami and a warrant issued in a civil matter by a California court against Khorrami for failure to appear. *Id.* at 34-35. Further, she learned that the Law Firm employed a computer system called ProLaw to keep track of its cases. *Id.* Her investigation showed that the May 1 affidavit was inaccurate as to the cases listed and the fees owed.

The Receiver learned that defendants had transferred a number of the Law Firm's cases to Ray Boucher, a lawyer who used to work for the Law Firm, and was sharing fees with Khorrami. *Id.* at 36-7. Further, Khorrami was owed fees on cases on which he said he was owed no fees. *Id.* Moreover, she found out that Khorrami had received approximately \$565,000 on mass tort cases – the Biomet cases – that he listed as still pending. *Id.* at 38.

The Receiver also learned the following. Lipitor cases in which Khorrami was involved were not listed on his affidavit. *Id.* Indeed, Khorrami offered to refer 240 of the Lipitor cases to another attorney **after** the Receiver was appointed. *Id.* at 39-41. Additionally, the Receiver found out that Khorrami, on July 20, had transferred mass tort cases to his wife, Bahar Dejbanto, to act as co-liaison counsel; cases were referred to Mark Ozello and David Markum, attorneys in California, from Ms. Dejban and/or Khorrami; and Khorrami had referred Granuflow cases to John Fiske, a California lawyer, and Michael Hugo, a Boston, Massachusetts lawyer. *Id.* at 42-47.

The list of creditors Khorrami supplied also was inaccurate. *Id.* at 47-48. One of his largest creditors was his father. In sum, the Receiver testified that defendants' actions have impeded her ability to perform the duties of temporary receiver. *Id.* at 49.

III. Discussion

A. Contempt

To establish civil contempt, a party must demonstrate, by clear and convincing evidence, a violation of a lawful, clear mandate of the court, of which the party against whom the contempt is sought had knowledge and that the violation prejudiced the rights of the movant. *El-Dehdan v El-Dehdan*, 2015 NY Slip Op 07579 (NY Ct App Oct. 20, 2015). Plaintiff met its burden.

Defendants were made aware of the court's order appointing the Receiver and its subsequent order directing them to cooperate with and respond to the Receiver's requests. These orders were explicit and, without doubt, understood by defendants, a law firm and lawyer who were represented by counsel. However, not only did defendants ignore the orders but Khorrami acted in a manner that contravened the orders by hiding assets and transferring litigation. Without question, defendants' conduct undermined the ability of the Receiver to do her job and prejudiced plaintiff.

"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, or prejudiced." Judiciary Law § 753(A); see *McCormick v Axelrod*, 59 NY2d 574, 583 (1983). Since there is no question that defendants knowingly and willfully violated the orders of this court, impeding and prejudicing plaintiff's rights, the court finds defendants in civil contempt. Hamilton's compensation for defendants' contempt should be tailored to the harm suffered by Hamilton, namely, the undue expense incurred in enforcing the court's orders. Since the court is, as explained below, referring Hamilton's attorneys' fees claim to a Special Referee to hear and report, the Referee shall also recommend the amount of the civil contempt sanction.

Additionally, Judiciary Law § 750(3) provides the court with the power to punish a person for criminal contempt for “[w]illful disobedience to its lawful mandate.” It is well settled that “the same act may be punishable as both a civil and a criminal contempt.” *McCain*, 84 NY2d at 226; see *Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 (2d Dept 2012). That said, “the aim in a criminal contempt proceeding is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory.” *Dep’t of Env’tl. Protection of the City of New York v Dep’t of Env’tl Conservation of the State of New York*, 70 NY2d 233, 234 (1987) (emphasis added). To hold a party in criminal contempt, a hearing must be held and willful disobedience of a court order must be proved beyond a reasonable doubt. *Muraca v Meyerowitz*, 49 AD3d 697, 698 (2d Dept 2008), citing *County of Rockland v Civil Serv. Empls. Ass’n*, 62 NY2d 11, 16 (1984).

Pursuant to Judiciary Law § 751, a party held in criminal contempt may be fined up to \$1,000 and can be jailed for up to 30 days. However, a party charged with criminal contempt must be afforded notice of the charge and be allowed a reasonable time and opportunity to present a defense. *Id.* Where, as here, these requirements have not only been met, but where defendants “have demonstrated a total disregard for the judicial system and its mandates”, defendants should be held in both civil and criminal contempt. *Bing v Sun Wei Ass’n, Inc.*, 205 A.D2d 355 (1st Dept 1994). Though “a contemnor, once adjudicated in criminal contempt, will often be allowed to purge the contempt by performance of the act required, there is no right, as such, to a ‘purge order’.” *People v Williamson*, 136 AD2d 497 (1st Dept 1988) (citations omitted).

Nonetheless, as ordering a civil litigant to jail is a harsh remedy, this court will not do so, even in the case of such an obstinate litigant as Khorrami, except as a last resort. Therefore,

Khorrami's criminal contempt will be purged, and he can avoid the issuance of a warrant in a second state, if two conditions are met: (1) he complies with each and every order this court has issued; and (2) he personally appears in this court on the date set forth below to attest to his compliance. If he intends on appearing, he must notify Hamilton, the Receiver, and the court at least 10 days beforehand so Hamilton does not waste its time appearing in court if Khorrami does not intend to show up.

B. Default

The court now turns its attention to Hamilton's motion for a default judgment, which it filed on September 10, 2015. The original basis for the motion was defendants' failure to timely file an answer, which was due on September 8, 2015, 20 days after the MTD Decision was entered. Prior to the motion's return date, on September 24, 2015, Hamilton's counsel appeared for the PC. Defendants did not attend, nor did they seek an adjournment. *See* Dkt. 323. As with the contempt motion, defendants did not file opposition to the default judgment motion.

Hamilton is entitled to a default judgment due to defendants' failure to timely file an answer and for failure to appear at the PC in contravention of the court's August 12 and August 17 orders. *See* CPLR 3215(a); *60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 (1st Dept 2013) (failure to appear at court ordered conference warrants default judgment). A default judgment also is warranted due to defendants' previously discussed refusal to comply with court orders. *See CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 (2014) ("[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."), quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999). Hamilton has established the merits of its claims and, as noted earlier and in the MTD Decision, there is no question of fact as to defendants' liability.

Regarding damages, Hamilton submits that, as of September 10, 2015, it is owed \$7,093,443.27 in outstanding principal and interest. Below, the court grants Hamilton a judgment in this amount, which is based on a computation of the amounts loaned to and repaid by the Law Firm set forth in the Affidavit of Jack Simony, a Portfolio Manager at Hamilton, dated September 10, 2015. *See* Dkt. 293. Since the amount owed varied over time, selecting a date for pre-judgment interest to run should be done, pursuant to CPLR 5001(b), by determining a “reasonable intermediate date.” *See Arany v Arany*, 282 AD2d 389, 390 (1st Dept 2001). As discussed in the MTD Decision, the original maturity date was June 12, 2012. The parties subsequently entered into numerous amendments and forbearance agreements, and, in August 2014, Khorrami executed a Confession of Judgment. Thus, it would be reasonable to set an intermediate date in mid-2013. The court selects August 1, 2013, the date of the Third Letter Agreement, as the date from which pre-judgment interest shall be computed.

Finally, as noted in the MTD Decision, defendants also are liable for Hamilton’s reasonable attorneys’ fees incurred in this action. *See id.* at 5, citing Credit Agreement § 8.4. The attorneys’ fees claim is severed and referred to a Special Referee to hear and report. Accordingly, it is

ORDERED that the motion by plaintiff Hamilton Capital VII, LLC to hold defendants Khorrami, LLP and Shawn Khorrami in civil and criminal contempt is granted to the extent set forth herein, and if defendants wish to purge the criminal contempt, Khorrami must comply with the conditions set forth herein and then personally appear before this court (60 Centre Street, Room 228) on November 19, 2015 at 11:00 am, and he must provide written notice to Hamilton, the Receiver, and the court of his intention to appear no later than November 9, 2015; and it is further

ORDERED that the motion by plaintiff Hamilton Capital VII, LLC for a default judgment against defendants Khorrami, LLP and Shawn Khorrami is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendants, jointly and severally, in the amount of \$7,093,443.27, plus 9% pre-judgment interest from August 1, 2013 to the date judgment is entered; and it is further

ORDERED that plaintiff's claim to recover its reasonable costs and attorneys' fees expended in this action is hereby severed and shall continue against defendants, and the calculation of such amounts and the sanction for civil contempt is referred to a Special Referee to hear and report; and it is further

ORDERED that within 10 days of the entry of this order on the NYSCEF system, plaintiff shall pay the appropriate fees and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, plaintiffs shall serve a copy of this order upon defendants in the same manner set forth in court's order dated September 1, 2015 (Dkt. 269) and the affidavit of service dated October 1, 2015 (Dkt. 334).

Dated: October 26, 2015

ENTER: 
SHIRLEY WERNER KORNEICH
J.S.C.