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Threshold Issues in Judgment Enforcement Proceedings When Prosecuting a Non-Party Witness for Contempt

Many judgment debtors ignore post-judgment subpoenas. Whatever the reason, when there is non-compliance the judgment creditor must be ready and willing to commence a contempt of court proceeding.

By **Bernard D'Orazio** | January 08, 2021 at 02:20 PM

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Discovery is a routine but critical part of judgment enforcement. In New York practice, post-judgment discovery is sought via subpoena, which may be served on the judgment debtor or any other person who may have relevant information, broadly defined by CPLR 5223, which is consistent with "New York's public policy 'to put no obstacle in the path of those seeking to enforce a judgment.'" *Alpert v. Alpert*, 151 A.D.3d 541, 542 (1st Dept. 2017) (quoting *U.S. Bank N.A. v. APP Intl. Fin. Co., B.V.*, 100 A.D.3d 179, 183 (1st Dept. 2012)). Counsel for the judgment creditor decides, based on the facts of the particular matter, whom to subpoena. There is nothing prescribing the sequence or manner in which any of the CPLR Article 52 judgment enforcement procedures, including subpoenas, may be used.

A party who fails or refuses to comply with a subpoena, CPLR 5224(a)(1), or subpoena duces tecum, CPLR 5224(a)(2), may be punished for contempt of court.**[1]** See CPLR 5251. Besides an order directing compliance with the subpoena, the relief awarded the movant is a statutory fine of $250 (Judiciary Law §773) and an award of the moving party's damages, including attorney fees, an amount which can be substantial.**[2]** Nonetheless, many judgment debtors ignore post-judgment subpoenas. They are reluctant to produce their personal financial records and tax returns and to answer questions under oath about their assets, income, and spending habits at a deposition. They may wager that non-cooperation will frustrate the judgment creditor and make the whole thing go away. They may decide to raise procedural or technical objections designed to thwart and delay their pursuer.

Whatever the reason, when there is non-compliance the judgment creditor must be ready and willing to commence a contempt of court proceeding. Contempt of court can be a difficult and time-consuming application to litigate. For this reason, the judgment creditor should consider whether he is willing to undertake a contempt proceeding before deciding to pursue a hostile judgment debtor's deposition. Sometimes it is wiser to seek discovery, at least in the first instance, from more cooperative targets such as banks, insurance companies, credit card companies, car leasing companies, and even the judgment debtor's own lawyer. But even the pursuit of non-party discovery by subpoena can be met with unresponsiveness and non-cooperation, particularly where the non-party witness is an affiliate or friendly with the judgment debtor. In such cases, you will face an important threshold issue: Can a motion to hold a non-party witness in contempt for failing to comply with a subpoena be made by a motion in the action in which the judgment was entered?

The correct answer is yes, per Judiciary Law §756, which provides that "[a]n application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense." See also A. Karger, Powers of the New York Court of Appeals §5.11, at 139 (3d rev. ed. 2005) ("The sections of the Judiciary Law governing the procedure in contempt proceedings do not differentiate between cases involving a party to the original action or proceeding and those in which the person charged with contempt was not previously a party thereto. Those sections, rather, provide a uniform procedure in all cases by motion in the original action or proceeding.").

If it is that clear, then why are there decisions denying contempt motions and requiring a judgment creditor to commence a separate action to punish a non-party for contempt, see, e.g., *Weissberg v. Adami*, 2016 NY Slip Op 32990[U] (Sup. Ct. Kings County 2016); *Krimendahl v. Hurley*, 2015 NY Slip Op 32482[U] (Sup. Ct., Suffolk County 2015), judges who refuse to sign proposed orders to show cause bringing on contempt motions against non-parties, and cases where contempt motions were denied on this basis by judges ruling sua sponte? See *Benson Park Associates v. Herman*, 93 A.D.3d 609 (1st Dept. 2012) (it was "error for the motion court to sua sponte deny the motion on the ground that plaintiff sought contempt … by way of a motion instead of a special proceeding").

Oddly enough, the confusion stems from an arcane rule concerning the subject matter jurisdiction of the New York Court of Appeals, which may only review final orders in civil actions. See N.Y. Const. Art. VI, §3; CPLR 5601; CPLR 5602. On appeals taken in contempt proceedings, the Court of Appeals has long "deemed" orders entered on applications to punish non-parties for civil contempt as entered in "separate special proceedings," which the court considers to be final orders subject to appellate review. See A. Karger, supra, at §5.11, at 139 & n.3. However, this is a principle only relevant to the jurisdiction of the Court of Appeals. It does not mean that a non-party's noncompliance with a subpoena must be punished by actually commencing a separate special proceeding under a new index number.

The real issue on contempt applications against non-parties, however they are made, is proper service on and jurisdiction over the non-party. This was the decisive issue in *Long Island Trust Company v. Rosenberg*, 82 A.D.2d 591 (2d Dept. 1981), a case often miscited as a precedent requiring a contempt application against a non-party be made in a separately filed special proceeding. The key fact in the *Long Island Trust* case was that the contempt motion was made by serving it *by ordinary mail* on the non-party witness, which plainly was inadequate to obtain jurisdiction. Had the contempt motion been made by Order to Show Cause directing the manner of service on the non-party, CPLR 2214(d), as in a special proceeding commenced in that manner, CPLR 403(d), or if the motion had been served personally in the same manner of a summons on the recalcitrant witness, jurisdiction would have attached and a separate special proceeding would be unnecessary.**[3]**

For sure, the court in *Long Island Trust* discussed contempt cases decided in the Court of Appeals that were "*viewed as* a separate special proceeding independent of the underlying action," see, e.g., *Rosenberg v. Rosenberg*, 259 N.Y. 338, 340-41 (1932) ("Although this motion was made by the receiver in the separation action, the Equitable Life Assurance Society not being a party to that action, the application takes the form of a special proceeding, and the order of the Special Term becomes a final order, giving this court jurisdiction over the appeal"), but it did not hold that a separate action need be commenced. Rather, it only held that "the nonparty witness who is not privy to that action and is about to be made a party to a proceeding which may result in fine and incarceration is entitled to the same level of notice required to institute any special proceeding against any new party." *Long Island Trust*, supra, 82 A.D.2d at 598. Subsequent cases have emphasized that proper service of a contempt motion on a non-party is the salient point and that commencement of a new action is not required. See, e.g., *State Farm Fire & Cas. v. Parking Sys. Valet Serv.*, 85 A.D.3d 761 (2d Dept. 2011); *John Sexton & Co., Div. of Beatrice Foods v. Law Foods*, 108 A.D.2d 785 (2d Dept. 1985), appeal dismissed, 65 N.Y.2d 1024 (1985).

We suggest counsel venturing down the contempt path against a non-party witness in post-judgment proceedings consider citing Judiciary Law §756 and summarizing these principles in your application. Do not wait for a reply, lest your motion be declared dead on arrival by a judge unaware of this statute and well-reasoned cases, without counsel having the opportunity to make a submission on the "separate special proceeding" issue. And however you choose to proceed, make sure you have proper service of the motion upon the non-party.

Endnotes:

[1] The remedy to be pursued when any party fails to comply with another type of subpoena, the Information Subpoena (CPLR 5224(a)(3)), which is a discovery device similar to interrogatories but unique to post-judgment proceedings, is in the first instance a motion to compel. See CPLR 5224(3)(iv); CPLR 2308(b).

[2] Attorney fees incurred proving the amount of the fees, known as "fees on fees," are also recoverable in contempt proceedings. See *Holskin v. 22 Prince Street Assoc.*, 178 A.D.2d 347, 400 (1st Dept. 1991).

[3] See *Alpert v. Alpert*, 2010 N.Y. Misc. LEXIS 1919 (Sup. Ct. N.Y. County 2010) (where alleged contemnor is a non-party to the action from which the judgment enforcement subpoena arises, the application to punish for contempt may be made

by motion; however, nonparty is entitled to the same type of notice that would be required in a special proceeding) (citing *Long Island Trust Co. v. Rosenberg*, supra).

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