

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
JAYATRI PRASHAD,

Plaintiff,

DECISION & ORDER

Index No. 52298/2021

– against –

Motion Seq. 3

MONTEFIORE MEDICAL CENTER,

Defendant.

----- X

The following papers were read on the motion by defendant for an order pursuant to Judiciary Law 756 finding nonparties Zanders D. Corp. (hereinafter Zanders) and Daylight Construction LLC (hereinafter Daylight) in civil contempt for failing to comply with this Court’s decision and order dated May 1, 2024 and for failing to comply with the so ordered subpoenas dated May 7, 2024, which were served pursuant to the order. In the alternative, defendant seeks an order directing Zanders and Daylight to purge their contempt by (i) serving full and complete documentary response to the so ordered subpoenas within seven days, and (ii) appearing for a deposition within thirty days after serving such documentary responses; precluding plaintiff from offering into evidence or otherwise supporting her claims or opposing defendant’s counterclaim with documents received from plaintiff’s contractors relating to the alleged costs incurred by plaintiff to restore the premises located at 3311 Bainbridge Avenue, Bronx, New York to the condition it existed prior to defendant’s tenancy; pursuant to CPLR 3126(2), precluding plaintiff from offering into evidence or otherwise supporting her claims or opposing defendant’s counterclaim with any documentation related to the categories of documents sought by defendant in the so ordered subpoenas and in defendant’s post deposition demands dated December 12, 2023

and not produced during discovery; granting defendant costs and attorneys' fees related to this motion; and for such other and further relief as this Court may deem just and proper.

PAPERSNUMBERED

Order to Show Cause / Affirmation in Support / Exhibits / Affidavits of Service	1-22
Affirmation in Opposition / Exhibits / Additional Affirmation in Opposition	23-35
Affirmation in Reply	36

Plaintiff seeks to recover damages alleging breach of a lease related to premises located at 3311 Bainbridge Avenue, Bronx, New York. Plaintiff alleges, in relevant part, that defendant tenant violated the lease by making renovations or alterations to the premises without written approval of the plaintiff landlord. It is alleged that defendant vacated the premises on or about August 12, 2019. Plaintiff alleges that prior to vacating, defendant did not undertake to restore the premises to its previously existing condition as a residential premises with two apartments. Plaintiff seeks to recover damages for rent not paid, lost rental income during a period of restoration, and the cost of restoration (NYSCEF doc 1, p. 5-7, 10).

Defendant filed a prior motion seeking an order holding nonparties Zanders and Daylight in contempt for failing to comply with an attorney subpoena. By order dated May 1, 2024, defendant's motion was granted to the extent that defendant was directed to file to NYSCEF subpoenas directed to Zanders and Daylight to be so ordered, serve each so ordered subpoena together with a copy of the order by service on the New York Secretary of State and by regular mail to the address on file with the Department of State. It was further ordered that Zanders and Daylight were to provide all documents responsive to the subpoena and produce the principal or other knowledgeable witness for a virtual deposition to provide limited testimony as to the documents provided (Defendant's Exhibit M). Defendant argues that the nonparties must be held in contempt, as they failed to comply with the Court's order and ignored the so ordered subpoenas (Defendant's Exhibits N, O).

Pursuant to Judiciary Law 753(A), the court has power under certain circumstances to punish for civil contempt, by fine and/or imprisonment, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action pending in the court may be defeated, impaired, impeded, or prejudiced. The court may hold a party to the action in civil contempt "for the non-payment of a sum of money, ordered or adjudged by the court to be paid... or for any other disobedience to a lawful mandate of the court (Judiciary Law § 753[A][3])." The

court may hold a person in civil contempt in an action “for refusing or neglecting to obey [a] subpoena, or to attend... or to answer as a witness” (Judiciary Law § 753[A][5]).

A party seeking an order of civil contempt bears the burden of proof. To prevail on a motion to punish for civil contempt, the movant must establish by clear and convincing evidence that a lawful order of the court clearly expressing an unequivocal mandate was in effect, that the party against whom contempt is sought disobeyed the order, that the party who disobeyed the order had knowledge of the order, and the movant was prejudiced by the offending conduct (*Madigan v Berkeley Capital, LLC*, 205 AD3d 900 [2d Dept 2022]). The mere act of disobedience, regardless of the motive, is sufficient to sustain a finding of civil contempt where such disobedience defeats, impairs, impedes or prejudices the rights of a party (*Ryan v Caputo*, 218 AD2d 806 [2d Dept 1995]; *Campanella v Campanella*, 152 AD2d 190 [2d Dept 1989]). Once the movant satisfies its burden, the burden shifts to the alleged contemnor to refute the showing or offer evidence of a defense, such as its inability to comply with the order (*Matter of Mendoza-Pautrat v Razdan*, 160 AD3d 963 [2d Dept 2018]). A hearing need not be held on a contempt motion if an issue of fact is not raised (*Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 455 [2d Dept 2006]).

The purpose of civil contempt is to vindicate the rights of a private party to the litigation. “[A]ny penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court’s mandate or both” (*Madigan v Berkeley Capital, LLC*, 205 AD3d 900 [2d Dept 2022], citing *Department of Environmental Protection v Department of Environmental Conservation*, 70 NY2d 233 [1987]). The question of whether to grant a motion for civil contempt and the fixing of an appropriate remedy is addressed to the sound discretion of the motion court based on the facts and circumstances (*Matter of Banks v Stanford*, 159 AD3d 134 [2d Dept 2018]).

Pursuant to CPLR 2308(a), if a person fails to comply with a subpoena issued by a judge, clerk or officer of the court, it is punishable as a contempt of court. A subpoenaed person shall be liable to the person on whose behalf the subpoena was issued for a penalty not to exceed one hundred fifty dollars and damages sustained by reason of the failure to comply. Here, the Court finds that the so ordered subpoenas were properly served on Zanders and Daylight. The subpoenas are not generally overbroad, unduly burdensome, and do not appear to have been served for an improper purpose.

Defendant met its burden of proving to a reasonable degree of certainty that Zanders and Daylight had knowledge of the Court's May 1, 2024 order, the nonparties by their inaction violated a lawful and unequivocal court mandate, and in doing so impeded, impaired, or prejudiced defendant's rights (*see* Judiciary Law 753[A]; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 455 [2d Dept 2006]). Despite proper service of the order to show cause on the present motion and notice of entry of the May 1, 2024 order of this Court, answering papers were not filed by Zanders or Daylight. As it appears that Zanders and Daylight have willfully ignored the Court's May 1, 2024 order and the so ordered subpoenas, a contempt order against these nonparty entities is warranted.

Following the deposition of the plaintiff, defendant served a post deposition demand dated December 12, 2023 (Defendant's Exhibit J). Defendant argues that plaintiff has failed to provide responses. In opposition, plaintiff submits a July 25, 2024 cover letter and response to the post deposition demands, showing plaintiff provided at least a partial discovery response. However several of the responses state the documents are not in possession of plaintiff "at this time," or indicate certain documents will be provided when obtained (Plaintiff's Exhibit I, p. 4-5). As to defendant's demand for a video taken by plaintiff of the property, the response states plaintiff is attempting to duplicate the video (*Id.* at 5). It is unclear on this motion whether the video has been exchanged, as the parties provide conflicting accounts. Plaintiff shall be precluded from offering into evidence at trial or otherwise any documentation, videos or photographs sought in defendant's post deposition demand dated December 12, 2023 and not exchanged prior to the filing of a note of issue (CPLR § 3126[2]).

Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent that Zanders and Daylight are determined to be in contempt; and it is further

ORDERED that Zanders and Daylight may purge themselves of the contempt within twenty (20) days after service of a copy of this order with notice of entry by providing all documents responsive to the respective so ordered subpoena, and producing its principal or another witness with knowledge for a virtual deposition, and paying to defendant the statutory fee of \$150.00 plus damages in the amount of \$250.00 for costs incurred in connection with this motion pursuant to CPLR 2308(a); and it is further

ORDERED that should Zanders or Daylight fail to provide documents and appear for a deposition within the twenty day period as directed herein, plaintiff shall be precluded from

offering testimony from a witness from the respective nonparty entity at trial or otherwise, and plaintiff shall be precluded from offering into evidence documents from that entity which have not been exchanged prior to the filing of a note of issue; and it is further

ORDERED that plaintiff is precluded from offering into evidence at trial or otherwise any documentation, videos or photographs sought in defendant's post deposition demand dated December 12, 2023 and not exchanged prior to the filing of a note of issue; and it is further

ORDERED that insofar as defendant argues that certain records exchanged are not admissible, this issue may be raised on dispositive motions or at the time of trial; and it is further

ORDERED that as it appears all other discovery has been completed or waived, the Court will issue a trial readiness order; and it is further

ORDERED that defendant shall serve a copy of this decision and order with notice of entry upon all parties, and upon Zanders and Daylight by first class mail to the address on file with the Department of State, Division of Corporations, and file proof of service on NYSCEF within ten days.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 17, 2024



HON. WILLIAM J. GIACOMO, J.S.C.