



## Local 807 Labor Management Pension Fund v. CEMD Elevator Corp.

2021 | Cited 0 times | E.D. New York | September 17, 2021

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

-----X LOCAL 807 LABOR MANAGEMENT  
PENSION FUND, Plaintiff, R E P O R T & RECOMMENDATION - against - 19 CV 4688 (ENV)  
(CLP) CITY ELEVATOR CORP., Defendant.

-----X Currently before the Court is plaintiff's letter Motion asking the Court to find Mitchell Hellman, officer and principal of defendant City Elevator, in civil contempt based on his failure to comply with a duly issued information subpoena and to Show Cause dated April 19, 2021. The Court certifies the relevant facts and, for the reasons stated herein, respectfully recommends that the Honorable Judge Eric N. Vitaliano order Mr. Hellman to appear on a date certain to show cause why he should not be found in contempt.

DISCUSSION I. Civil Contempt Legal Standard It is well-settled that federal courts have inherent power to punish contempt. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (quoting *Ex parte Robinson*, 86 U.S. 505, 510 (1991); see also *Abrams v. Terry*, 45 F.3d 17, 23 (2d Cir. 1995). Under Section 401 of Title 18 of the

ience or resistance to its lawful writ, process, order, rule, to ob Fed. R. Civ. P. 45(g). Federal Rule 70 provides that a district court may hold a party in contempt for failing to comply with a court order to perform a certain act. Fed. R. Civ. P. 70. The Rules further prov see also *Hunter TBA, Inc. v. Triple V Sales*, 250 F.R.D. 116, 117 (E.D.N.Y. 2008) (citing *PaineWebber Inc. v. Acstar Ins. Co.*, 211 F.R.D.

. . *Chambers v. NASCO, Inc.*, 501 U.S. at 44 (quoting *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 798 (1987)). An individual may be subject to both civil and criminal penalties for failing to obey a valid order of the court. See *United States v. Petito*, 671 F.2d 68, 72 (2d Cir.), cert denied, 459 U.S. 824 (1982) (citing *Yates v. United States*, 355 U.S. 66, 74 (1957)). The main difference between civil and criminal contempt is the cour punish the contemnor, deter future offenses, or vindicate the authority of the court, civil

party for losse See *Nye v. United States*, 313 U.S. 33, 42-43 (1941); *Hess v. N.J. Transit Rail Operations, Inc.*, 846 F.2d 114, 115 (2d Cir. 1988); *In re Grand Jury Witness*, 835 F.2d 437, 440-41 (2d Cir. 1987), cert denied, 485 U.S. 1039 (1988); *In re Weiss*, 703 F.2d 653, 661 (2d Cir. 1983); *v. Terry*, 697 F. Supp. 1324, 1329 (S.D.N.Y. 1988). enforce compliance with an order of the court or to compensate for losses or *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)), cert. denied, 454 U.S. 832 (1981). This inherent power



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unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not N Terry, 888 F.2d 1339, 1351 (2d Cir. 1989) (internal citations omitted). Finally, in determining whether civil contempt sanctions should be imposed, the Supreme Court has set forth several factors for courts to consider: harm threatened by continued contempt, (2) the probable effectiveness of the proposed sanction, In re Grand Jury Witness, 835 F.2d at 443 (citing United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947); Perfect Fit Indus., Inc. v. Acme Quilting Co., 673 F.2d 53, 57 (2d Cir.), cert. denied,

coercive remedy . . . based on the nature of the harm and the probable effect of alternative

E.E.O.C. v. Local 28 of Sheet Metal Workers Intern. Ass'n, 247 F.3d 333, 336 (2d Cir. 2001) (quoting N.A. Sales Co. v. Chapman Indus. Corp., 736 F.2d 854, 857 (2d Cir. 1984)).

II. Under the Federal Magistrates Act, 28 U.S.C. § 636(e), federal magistrate judges are authorized to exercise contempt authority in certain limited circumstances. These include summary criminal contempt authority, which may be imposed by the magistrate judge for 28 U.S.C. § 636(e)(2), as well as criminal contempt and civil contempt authority in misdemeanor

cases and cases where the magistrate judge presides with the consent of the parties. 28 U.S.C. §§ 636(e)(3), (4). In all other instances where a person has committed an act constituting contempt in a proceeding before the magistrate judge, the Act sets forth a certification procedure whereby:

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge. 28 U.S.C. § 636(e)(6)(B)(iii). and not to issue an order of contempt. Church v. Steller, Church v. Steller, 35 F. Supp. 2d 215,

217 (N.D.N.Y. 1999) (citing Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984)); see also Stein Indus., Inc. v. Jarco Indus., Inc., 33 F. Supp. 2d 163, 165-66 (E.D.N.Y. 1999); , No. 94 CV 4452, 1996 WL 723082, at

Church v. Steller, 35 F. Supp. 2d at 217 (citing , 830 F.2d 514, 521 (4th Cir. 1987)); Hunter TBA, Inc. v. Triple V Sales, 250 F.R.D. at 118. s a lesser included power under Section 636(e), a magistrate judge can conduct a hearing to determine

whether certification is appropriate In re Kitterman, 696 F. Supp. 1366, 1372 (D. Nev. 1988); see also Church v. Steller, 35 F. Supp. 2d at 217; S.A., No. 90 CV 2370, 2001 WL 958975, at \*7 (S.D.N.Y. Aug. 22,



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2001).

The district court, upon certification of the facts supporting a finding of contempt, is then required to conduct a de novo hearing at which issues of fact and credibility determinations are to be made. See *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 907-08 (3d Cir. 1992) (holding that it was error for the district court not to conduct a de novo hearing after the magistrate judge issued a certification of contempt). Where, however, the magistrate judge declines to certify court may not proceed further on a motion for contempt where the conduct at issue occurred *Church v. Steller*, 35 F. Supp. 2d at 217 (citing *In re Nova Biomedical Corp. v. i-STAT Corp.*, 182 F.R.D. 419, 423-24 (S.D.N.Y. 1998)); see also *In re Kitterman*, 696 F. Supp. at

CERTIFIED FACTS 1) On August 14, 2019, plaintiffs Trustees of Local 807 Labor Management Pension Fund (the - commenced this action against defendant City Elevator pursuant to

Sections 4201 through 4225 and 4301 of the Employee Retirement Income Security Act of 1974 -1405, and 1451.

2) On August 15, 2019, plaintiffs filed an Amended Complaint, alleging that defendant City Elevator, ceased all

covered work and ceased to have an obligation to make contributions to the Fund, causing a complete withdrawal from participation in the Fund within the meaning of Section 4203(a) of ERISA, 29 U.S.C. § 1383(a).

3) st

to \$365,772.00. (Compl. ¶¶ 9, 10; Casanova Aff. ¶¶ 10, 12, 14; Ex. C, Art. IV, § 6).

4) Despite proper service on the defendant on August 16, 2019, defendant failed to answer or otherwise respond to the Complaint.

5) On September 24, 2019, plaintiffs requested entry of a certificate of default, and on September 27, 2019, the Clerk of Court entered a certificate of default.

6) On October 16, 2019, plaintiffs moved for a default judgment, and on October 24, 2019, the Honorable Eric N. Vitaliano referred the motion to this Court to determine liability and damages and to issue a Report and Recommendation.

7) On July 13, 2020, the undersigned issued a recommendation that a default judgment enter in the amount of \$500,381.47 against defendant, representing damages for withdrawal liability, prejudgment interest, liquidated damages,



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8) On August 3, 2020, the district court adopted the Clerk of Court entered judgment in favor of the plaintiffs in the amount of \$500,381.47.

9) On September 14, 2020, plaintiffs served a post-judgment information subpoena on Mitchell Hellman, who is alleged to be an officer and principal of City Elevator. (Compl. ¶ 16).

10) On September 30, 2020, when Mr. Hellman failed to respond, plaintiffs sought an Order from this Court compelling Mr. Hellman, as principal of City Elevator, to respond to the subpoena.

11) On April 19, 2021, the Court issued an Order requiring either City Elevator or Mr. Hellman to a b) show cause by May 17, 2021 why the Court should not enforce the subpoena. (Order dated April 19, 2021 at 1-2). The Court warned that failure to submit a written response by May 17, 2021 would result in an Order granting the motion to enforce the information subpoena that would possibly include (Id. at 3-4)

By letter dated May 21, 2021, plaintiffs now move for an Order holding Mr. Hellman in

III. Analysis Turning to the first element that must be established before an Order of Contempt may be issued, the Court finds that the April 19, 2021 Order, requiring that Mr. Hellman to respond (b) show cause by May 17, 2021 why this Court should

1-2) See , 888 F.2d at 1351 (internal citations omitted). The April 19 Order also explicitly warned of possible failed to submit a written response by May 17, 2021. (See id. at 2). Accordingly, plaintiffs have established the first element required to certify a finding of civil contempt. Turning to the second and third elements, the Court finds that the evidence that plaintiffs supplied provides noncompliance with this See N.Y. State Nat , 888 F.2d at 1351 (internal citations omitted). Additionally, plaintiffs have furnished affidavits of service of their letters April 19 Order on Mr. Hellman. (See ECF Nos. 14, 16, 18). Not only has Mr. Hellman been given numerous opportunities to comply with , but this Court has received no response from Mr. Hellman, even though Court on May 21, 2021 and personally served on Mr. Hellman that same day. ( ECF No. 19). Accordingly, the Court finds that plaintiff has established the second and third elements necessary to certify the conduct to the district court for a determination as to whether Mr. Hellman is in contempt.

CONCLUSION The undersigned certifies the foregoing facts and respectfully recommends that, in adherence to the procedures articulated in 28 U.S.C. § 636(e), the Honorable Judge Eric N. Vitaliano convene a hearing upon a day certain to show cause why Michell Hellman should not be adjudged in contempt by reason of the certified facts.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); see also Fed. R. Civ. P. 6(a), (e) (providing the method for computing time). Failure to file objections See, e.g., Caidor v. Onondaga



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Cty., 517 F.3d 601, 604 (2d Cir. 2008) (explai . . . report [and recommendation] operates as a waiver of any further judicial review of the

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED. Dated: Brooklyn, New York

September 17, 2021

/s/ Cheryl L. Pollak Cheryl L. Pollak Chief United States Magistrate Judge Eastern District of New York

