

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

THE NEW YORK AND PRESBYTERIAN HOSPITAL
a/a/o LYNETTE ROOPNARINE; MARY IMMACULATE
HOSPITAL, a/a/o DYLAN MCSWEEN; WHITE PLAINS
HOSPITAL CENTER, a/a/o THERESA A. KUNZELMAN,
BEATRICE KATZ,

Plaintiff(s),

- against -

ALLSTATE INSURANCE COMPANY,

Defendant(s).

TRIAL/IAS PART 13

INDEX NO. 1843/04

MOTION SEQUENCE
NO. 3

MOTION SUBMISSION
DATE: November 15, 2005

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by plaintiffs for an Order to renew the plaintiff's underlying motion to Punish for Contempt pursuant to §756 of the Judiciary Law and §5251 of the CPLR for the failure of the defendant to obey an Information Subpoena duly served upon the defendant on September 29, 2004, pursuant to Rule 5224 of the CPLR, and for an Order of Contempt, with sanctions and attorney fees, is determined as hereinafter provided:

By prior application, the plaintiffs sought an Order to contempt based upon the defendant's alleged failure to respond to an Information Subpoena. The Court in its Order dated April 1, 2005 stated:

"Upon the foregoing papers, the motion by the plaintiff for an Order pursuant to §756 of the Judiciary Law and §5251 of the CPLR, to punish the defendant for a Contempt of Court, for the failure of the defendant to obey an Information Subpoena duly served upon the defendant on September 29, 2004, pursuant to Rule 5224 of the CPLR, is determined as hereinafter provided:

In opposition to the requested relief, the defendant has not offered any proof that the defendant responded to the Information Subpoena dated September

29, 2004.

Based upon the foregoing, the plaintiff's application for an Order pursuant to §756 of the Judiciary Law and §5251 of the CPLR, to punish the defendant for a Contempt of Court, for the failure of the defendant to obey an Information Subpoena duly served upon the defendant on September 29, 2004, pursuant to Rule 5224 of the CPLR, is **granted**. On **May 3, 2005 at 9:30 a.m. in Part 15, Nassau County Supreme Court**, the Court will conduct a hearing to determine the nature of the sanction to be imposed upon the defendant. The defendant may purge itself of this finding of contempt by responding to the Information Subpoena dated September 29, 2004 on or before the hearing scheduled for May 3, 2005."

In its Decision After Hearing dated May 5, 2005, the Court stated:

By Order dated April 1, 2005, the defendant was found to be in contempt for failure to obey an information subpoena duly served upon the defendant on September 29, 2004, pursuant to CPLR 5224. The defendant was permitted to purge itself of the contempt by responding to the information subpoena on or before the hearing scheduled for May 3, 2005, to determined appropriate sanctions for the contempt. On May 3, 2005, the parties appeared before the Court to conduct the aforementioned hearing.

Plaintiffs offered into evidence copies of court orders from other cases holding the defendant on contempt for similar acts of non-compliance with duly served information subpoenas (*see Plaintiff's #1 in Evidence*). Finding that responsive affidavits were insufficient because they were not completed by an officer or employee of the defendant corporation, plaintiffs' urged the Court to impose a sanction for attorney's fees, and a fine commensurate with plaintiffs' claimed pattern of repeatedly wilful contempt. In support of the application, plaintiffs' offered into evidence an affirmation of services from plaintiffs' counsel (*see Plaintiff's #3 in Evidence*).

The defendant countered that a proper response was served upon plaintiffs' counsel prior to the hearing of May 3, 2005, and introduced into evidence an affidavit purporting to respond to the information subpoena and an affidavit of service showing service by Federal Express overnight delivery on May 2, 2005. Plaintiffs' counsel stated he received the affidavit on May 3, 2005, the date of the hearing (*see Defendants A in Evidence*).

After reviewing the plaintiffs' information subpoena, and the defendant's response thereto, the Court finds that the defendant timely served a proper response to the plaintiffs' information subpoena served upon the defendant. Accordingly, after hearing, the Court finds that the defendant has purged itself of the contempt of Court found by its Order dated April 1, 2005. (*see Plaintiff's #3 Defendants A Evidence*).

Plaintiffs' application for a fine and attorney's fees is, therefore, denied.

This constitutes the decision and Order of the Court."

The defendant in its Response to Information Subpoena dated May 2, 2005 set forth:

"A. The defendant Allstate Insurance Company has an account with the Bank of America. The Bank of America has branches located at 55 Railroad Ave. Greenwich, CT, 40 E. 52nd St. New York, NY, 2444 Highway 34, Manasquan, NJ, 153 E. 53rd St., New York, NY, 335 Madison Ave #5, New York, NY. The starting serial number for the banking institution is 22206062. The routing transit number for the account, is 061112788. In the past Allstate has issued checks to the plaintiff through bank account number 329-994-0744."

Based upon said Response, the plaintiffs issued an execution to the Sheriff of New York County. In response, the Sheriff advised that there were no accounts at the Bank of America.

In opposition to the instant application, the defendant submits an affidavit from Wayne Pritchard, which states:

"1. I am a manager with the Legal Order Processing Department of Bank of America located at 5701 Horatio Street, Utica, New York. I have reviewed Bank of America's records pertaining to Allstate Insurance Company's account at Bank of America and submit this affidavit on personal knowledge of said records.

2. Allstate Insurance Company does have an account with Bank of America, number 329-994-0744. The account is located in Georgia, outside the State of New York. Despite the fact that Allstate Insurance Company does have a Bank of America account, once my bank received a Sheriff's Execution with Notice to Garnishee on the above-captioned matter, this bank issued a correspondence stating "No Accounts." The Execution with Notice to Garnishee was returned unsatisfied because the New York State Bank of America could not reach across state lines to garnish Allstate Insurance Company's account in Georgia."

Based upon all of the foregoing, the issue of contempt is still before the Court and will be determined by a hearing to be held on **February 27, 2006 at 9:30 a.m. in Part 13, Nassau County Supreme Court.**

SO ORDERED.

DATED:

1/26/2006

Ray S. W. [Signature]
.....
J.S.C.

ENTERED

JAN 31 2006

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**