

SHORT FORM ORDER

SCAN

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

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PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/TAS PART 9

ANTHONY CARNIVAL and ROBERT CARNIVAL,

Action No. 1

Petitioners,

INDEX NO.: 021087/08
MOTION DATE: 5/7/09
MOTION SEQUENCE:

-against-

A & S WINDOW PRODUCTS LLC, f/k/a CUSTOM
METALCRAFTERS & ERECTORS LLC, STEPHEN
ROSNER, CUSTOM METALCRAFTERS, INC.,
CUMETCO CORP., and JOHN DOE # 1 — 10, being
those parties presently unknown but believed to be
acting in concert with possession of business books
and records,

Respondents.

In the Matter of the Application of
STEPHEN ROSNER, Holder of 50% of all the
membership interests in A & S WINDOW PRODUCTS
LLC, f/k/a CUSTOM METALCRAFTERS &
ERECTORS, LLC, for the judicial dissolution of
A & S WINDOW PRODUCTS LLC f/k/a
CUSTOM METALCRAFTERS & ERECTORS, LLC,

Action No. 2

INDEX NO.: 022427/08
MOTION DATE: 5/7/09
MOTION SEQUENCE: 3, 4

Petitioner,

- against -

ANTHONY CARNIVAL, ROBERT CARNIVAL,
JESSE CARNIVAL and JOSHUA CARNIVAL,

Respondents.

The following papers read on this motion:

Order to Show Cause to Hold Robert Carnival in Contempt	1
Cross-Motion to Compel Production and Modify Orders	2
Reply Affirmation in Further Support of Order to Show Cause	3
Reply Affirmation in Further Support of Cross-Motion	4
Revised Exh. "11" to Motion	5
Reply to Revised Exh. "11"	6

PRELIMINARY STATEMENT

By Order to Show Cause, Stephen Rosner seeks an Order holding Anthony Carnival in Contempt of Court for violations of Orders of this Court dated December 17, 2008, December 22, 2008, So-ordered Stipulation dated December 24, 2008, and Order dated December 29, 2008.

Anthony Carnivale cross-moves for an Order

- directing Stephen Rosner, A & S Window Products, LLC, f/k/a Custom Metalcrafters & Erectors, LLC, Custom Metalcrafters, Inc. ("CMI"), and Cumetco Corp. to turn over relevant information concerning projects on which they submitted bids, obtained proposals, entered into contracts and/or performed work from inception of A & S Window Products LLC, f/k/a Custom Metalcrafters & Erectors LLC ("LLC") to the date of court-ordered dissolution;
- directing Stephen Rosner and his affiliates to turn over all books and records relating to the salaries and wages Stephen Rosner and his affiliates pay to persons for whom he seeks reimbursement by the Receiver and/or for whom he has already received payment from the LLC;
- modifying existing orders which prohibit Robert Carnival or his agents from contacting the LLC's vendors and subcontractors, and obtaining

discovery from such persons to allow appropriate inquiries of such vendors and subcontractors by subpoena or otherwise;

- determining that the application by Stephen Rosner for sanctions against Anthony Carnival are frivolous;
- directing reimbursement of Robert Carnival for his legal fees and expenses in connection with Stephen Rosner's application.

DISCUSSION

The Orders

The Court has issued Orders with respect to Anthony Carnival's contacts with CMI and Cumetco. In speaking of those companies on December 22, 2008, the Court stated that the only discovery that would be permitted of these companies is with respect to contracts that they have with the LLC.¹

By Order of December 17, 2008² the Court prohibited Anthony Carnival, Robert Carnival, Jesse Carnival and Joshua Carnival from communicating internal operations of A & S Windows to third parties and from interfering with the Company's performance of its contractual obligations with third parties, including and specifically, David Haller of D. Haller, Inc. and his representatives involved in the project located at 350 West Broadway, New York, New York.

At a hearing on January 16, 2009, the Court reiterated its prior orders and refused to modify them.³ Evidence of contacts in claimed violation of the Courts orders were also

¹ Exh. "1" to Motion.

² Exh. "2" to Motion.

³ Exh. "4" to Motion at p. 327.

produced.⁴

Alleged Violations Since January 16, 2009

Steven R. Miller, Esq., counsel for Carnival, issued a subpoena dated March 2, 2009 upon McGowan Builders, Inc., with whom CMI has a contract to perform work at the Dream Hotel, 346 W. 17th Street, New York, New York. As an alleged consequence of this subpoena and related comments, CMI has been required to provide affidavits from suppliers with respect to CMI's record of payment.

Movants claim that this conduct was further exacerbated by the failure of counsel to consult with the Court-appointed Receiver, with respect to discovery issues, as they directed by the Court on December 29, 2008⁵, and as they agreed to do.⁶

Despite having withdrawn the subpoena after contact from movant's counsel, there are claims that on March 20, March 21, and March 25, 2009 Carnival third-parties e-mails detailing the conflict between the parties to David Haller with respect to the LLC's West Broadway project.

Cross-motion by Robert Carnival

Carnival moves for an Order directing Rosner and his affiliates, A & S Window Products, LLC ("A & S"), f/k/a Custom Metalcrafters & Erectors, LLC ("CME"), Custom Metalcrafters, Inc. ("CMI"), and Cumetco Corp. to turn over all relevant information concerning projects on which they submitted bids, obtained proposals, entered into contracts or performed work from the inception of A & S to the date of the court-ordered dissolution;

directing Rosner and his affiliates to turn over all books and records relating to salaries and wages paid to persons for whom he seeks, or has already received

⁴ Exh. "3" to Motion.

⁵ Exh. "8" to Motion.

⁶ Exh. "4" at pp. 322 — 330.

reimbursement;

modifying Court orders to the extent that they prohibit Carnival or his agents, including counsel, from obtaining discovery from vendors of the LLC and subcontractors, so as to allow appropriate inquiries by subpoena or otherwise;

determining that Rosner's motion for sanctions is frivolous; and,

awarding Carnival counsel fees in connection with Rosner's application.

Rosner's Opposition and Reply

Rosner reiterates a series of actions in violation of the prior Orders of the Court and labels the cross-motion as a further attempt to obtain relief previously denied by the Court. The efforts to expand discovery to all proposals, bids and contracts of companies against whom discovery has been prohibited constitutes a fishing expedition for future claims that Carnival may wish to interpose against Rosner.

Carnival's Reply

The emails contained in Exh. "11" are innocuous efforts by Carnival to obtain information to which he was entitled and which had been wrongfully withheld. They are requests that the previously forwarded attachment be in a format which he can open, that he be provided with another attachment that was not included in mail to him, deals with a dispute with a Robert Brot, seemingly having nothing to do with the matters in this action, and a writing pointing out the inadequacy of a report based upon Rosner mislabels a product as a CME Curtain Wall System, when it was in fact a product of an Italian manufacturer.

As a 50% owner of the LLC, Carnival has the right to communicate with LLC customers and be kept apprised of all material events.

DISCUSSION

The matter filed under Index Number 21087/08 has been rendered moot by prior decisions of this Court. It is hereby removed from the caption, and the caption shall now read as follows:

In the Matter of the Application of
STEPHEN ROSNER, Holder of 50% of all the
membership interests in A & S WINDOW PRODUCTS
LLC, f/k/a CUSTOM METALCRAFTERS &
ERECTORS, LLC, for the judicial dissolution of
A & S WINDOW PRODUCTS LLC f/k/a
CUSTOM METALCRAFTERS & ERECTORS, LLC,

INDEX NO.: 022427/08

Petitioner,

- against -

ANTHONY CARNIVAL, ROBERT CARNIVAL,
JESSE CARNIVAL and JOSHUA CARNIVAL,

Respondents.

One who disobeys a lawful mandate of the Court, resulting in prejudice to the rights of a party to the litigation constitutes contempt.⁷ The actions complained of must be shown to have been calculated to defeat, impair, impede or prejudice the rights of a party.⁸ Simple disobedience, even without establishing willfulness is sufficient.⁹

The Courts statements on the subject of discovery against CMI and Cumetco could not have been more clear. The only information that was relevant related to contracts between those companies and the LLC. The subpoena issued to McGowan Construction violated that directive, and counsel for Carnival is admonished that this conduct is not tolerable. Since it was not Carnival who issued the subpoena, it would not be appropriate to sanction him for such an action, and the Court declines to do so.

This is particularly so where the Court has appointed a Special Referee to supervise discovery. It appears that no effort was made to coordinate a document request with Mr.

⁷ N.Y. Judiciary Law § 753 (A)(3).

⁸ *Ryan v. Caputo*, 222 A.D.2d 438 (2d Dept. 1995).

⁹ *Torah v. Keshner Intern. Trading Corp.*, 246 A.D.2d 538 (2d Dept. 1998).

Millus, and, in fact, his existence seems to have been completely ignored, despite counsel's representation that he would work with him on such matters.

The first email in question is dated March 20, 2009, and is from Robert Carnival to Arlene at MCI, in which, in a denigrating term, he castigates her for sending an attachment in a format he is unable to open, and about which he is not surprised. The second mailing, on March 25, 2009, again complains about the lack of an attachment, and requests Haller to send documents directly to him. The third, later the same morning, relates to a mechanics lien on a CMI job, and seems to denigrate CMI.

The Court explicitly precluded Carnival from communicating with third parties, specifically Haller, with respect to the construction project at 350 W. Broadway. This is exactly what Carnival did in his March 20 and March 25, 2009 emails, in which he alerted Haller to continued friction within the LLC. This is a clear violation of the directive of the Court of December 17, 2008.

The Court hereby finds Mr. Robert Carnival, the author of the emails, in contempt of the Court's order, and imposes a fine in the amount of \$250.00 payable The Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210. Payment is to be made withing ten (10) days of receipt of a copy of this Order with Notice of Entry. Additionally, the court imposes attorney costs in the amount of \$750, payable to counsel for Stephen Rosner within 20 days of the date of this Decision and Order.

Cross Motion

The first two aspects of the cross-motion seek additional discovery. The applications for production of documents denied without prejudice to requests in compliance with Rule 14 of the Rules of the Commercial Division. The application for a reconsideration of the past Orders of this Court to permit direct contact with venders and subcontractors of the LLC is denied. To the extent it is a motion to reargue or renew, it is not identified as such, fails to indicate in what manner the Court misconstrued an issue of fact or law, and does not raise any newly acquired factual material requiring the Court's

consideration. The application to have the Court declare the Motion frivolous is denied, as it does not constitute frivolous conduct as defined in 22 NYCRR § 130-1.1 (c).

This constitutes the Decision and Order of the Court.

Dated: July 6, 2009


J.S.C.

ENTERED
JUL 10 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE