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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE MCGRAW HILL COMPANIES, INC.,
PEARSON EDUCATION INC., JOHN
WILEY & SONS, INC., CENGAGE
LEARNING INC.,

Plaintiffs,

v.

07 CV 7890 (PKC)

MATTHEW STIRLING, doing business as
THETEXTBOOKGUY.COM,
JOHN DOES NOS. 1-5,

Defendants.

-----x

New York, N.Y.
June 20, 2008
2:00 p.m.

Before:

HON. P. KEVIN CASTEL

District Judge

APPEARANCES

DUNNEGAN LLC
Attorneys for Plaintiffs
BY: WILLIAM DUNNEGAN

AMIGONE, SANCHEZ, MATTREY & MARSHALL, LLP
Attorneys for Defendant Matthew Stirling
BY: CHRIST GAETANOS

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1 THE DEPUTY CLERK: Your Honor, this matter is the
2 McGraw Hill Companies, Inc., et al., v. Matthew Stirling, doing
3 business as Thetextbookguy.com.

4 Is counsel for the plaintiff ready?

5 MR. DUNNEGAN: Your Honor, I am Bill Dunnegan. I
6 represent each of the four plaintiffs, and we are ready.

7 MR. GAETANOS: Your Honor, my name is Christ Gaetanos,
8 and I represent the defendant Thetextbookguy, LLC.

9 I should also clarify that I am also representing
10 another defendant, Mr. Stirling.

11 THE COURT: Mr. Gaetanos, let me start with you.

12 Did you personally receive a copy of the final
13 judgment and permanent injunction by consent in this action?

14 MR. GAETANOS: Honestly, I don't remember. I received
15 a notice that it was filed. And when it was, I pulled a copy
16 from Pacer. That much I know, but whether I received a hard
17 copy from any other source, I do not know.

18 THE COURT: Let me ask you, did you personally sign
19 the consent to entry, sir?

20 MR. GAETANOS: I believe I did.

21 THE COURT: Does that refresh your recollection of
22 your awareness of the injunction in this case?

23 MR. GAETANOS: Yes. I am sorry. I misunderstood your
24 earlier question. I thought you meant, did I receive a copy of
25 the one signed by the Court from someplace other than Pacer.

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1 That, I don't know, but I did receive it the day that it was
2 signed and filed.

3 THE COURT: So you are aware of the court order in
4 this case?

5 MR. GAETANOS: Yes.

6 THE COURT: After the date of the Court's order, did
7 you, Mr. Gaetanos, receive funds belonging to the defendant?

8 MR. GAETANOS: I received a check from the insurance
9 company that was initially made payable to Thetextbookguy, LLC
10 and to Mr. Galbo who was his coverage counsel. That check was
11 signed over to me.

12 THE COURT: Thetextbookguy is the defendant in this
13 action?

14 MR. GAETANOS: One of the defendants.

15 THE COURT: One of the defendants and one of the
16 parties bound by my final judgment and permanent injunction
17 notice?

18 MR. GAETANOS: Yes.

19 THE COURT: The check was made payable to
20 Thetextbookguy and Galbo?

21 MR. GAETANOS: Yes.

22 THE COURT: It was in the amount of?

23 MR. GAETANOS: \$35,000.

24 THE COURT: What did you do with it?

25 MR. GAETANOS: On the basis of the instruction in the

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1 letter from the Hartford Insurance Company which accompanied
2 it, it said that it was for defense costs, I deposited it in my
3 operating account.

4 THE COURT: How could you deposit it if it was not
5 payable to you?

6 MR. GAETANOS: It was signed over to me.

7 THE COURT: That's what I am asking you, sir.

8 MR. GAETANOS: It was signed over to me.

9 THE COURT: By whom?

10 MR. GAETANOS: By Thetextbookguy.

11 THE COURT: Did you present the check to the defendant
12 for signature over to you?

13 MR. GAETANOS: Yes, I did.

14 THE COURT: And this took place after the final
15 judgment and permanent injunction in this case?

16 MR. GAETANOS: Yes, sir.

17 THE COURT: As a person with knowledge of the Court's
18 order, notice of knowledge of the Court's order who thereafter
19 received moneys covered by the order, why have you not
20 committed the crime of obstruction of justice?

21 And if you don't wish to answer and you wish to get
22 counsel, you are welcome to do so.

23 MR. GAETANOS: Well, your Honor, I am not a criminal
24 lawyer and I do not know what the elements of obstruction of
25 justice are so I cannot answer your question. But I can tell

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1 you this. When I dealt with Hartford -- actually, I never
2 dealt with Hartford. When I dealt with Mr. Galbo, Mr.
3 Stirling's coverage counselor, from the time I began it was
4 made clear to me that there were two awards -- one for defense
5 costs and one for indemnity fees.

6 Given the amount of indemnity and given the analysis
7 that I presented in my papers that the 35 to 38,000 dollars
8 that was dedicated by Hartford to the purpose of indemnity,
9 that we were to offer that amount of money to the plaintiffs,
10 that that was in fact, basically, 100 percent of the present
11 value of what was owed under your order, and if that was not
12 accepted, that we would use that money to pay the amounts
13 ordered as they were due, which was a \$15,000 payment in April
14 and subsequent monthly payments.

15 THE COURT: Who is "we"?

16 MR. GAETANOS: "We" being TBG, my client. I always
17 understood that my client would use that money to satisfy the
18 TBG debt, one way or another. His instructions to me was to
19 see if I could negotiate something that would alleviate what he
20 considered to be the burden of dealing with this for the next
21 10 years.

22 May I continue?

23 THE COURT: Yes.

24 MR. GAETANOS: Well, I thought a 10-year stream of
25 income has a present value, so I computed a present value and I

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1 presented that to Mr. Dunnegan.

2 THE COURT: And it was not acceptable to them?

3 MR. GAETANOS: Not acceptable to them.

4 THE COURT: You knew it was not acceptable?

5 MR. GAETANOS: I knew it was not acceptable.

6 THE COURT: And you knew there was a court order?

7 MR. GAETANOS: I knew there was a court order.

8 THE COURT: So you deposited the money in your
9 account.

10 Let me ask you, the fact that the Hartford measured
11 the amounts that it owed its insured in terms of indemnity,
12 attorney's fees, costs, other expenses, what does that have to
13 do with this matter?

14 MR. GAETANOS: May I ask you to repeat that question,
15 your Honor? I don't understand it.

16 THE COURT: A corporation might put a claim into its
17 insurance carrier for various losses that are covered by a
18 policy of insurance. Depending on the nature of the policy, it
19 could be out-of-pocket property damage, lost profits,
20 attorney's fees it has incurred -- any number of categories of
21 expense. That is a claim belonging to the insured that it has
22 asserted against its insurer.

23 The fact that the attorney might have a claim against
24 its client for payment would appear to be of no moment with
25 regard to the obligation of the insurer to pay its insured.

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1 And here, that's even clearer because the insurer understood
2 that and didn't pay the money to you, nor should it have paid
3 the money to you but paid it to its insured.

4 After it paid it to its insured, you secured your
5 client's -- the insured, the party who is bound by this Court's
6 injunction -- signature on a check paying it over to you?

7 MR. GAETANOS: Yes.

8 THE COURT: Why shouldn't I find that you, sir, have
9 personally aided and abetted, nay, committed as a principal, a
10 violation of my order, interfered with the lawful enforcement
11 of that order?

12 MR. GAETANOS: Well, as I said earlier, I don't
13 believe that I interfered. There is money in TBG's account
14 that we believe, in one fashion or another, affords the
15 defendant, TBG, to pay the debt as it is ordered in your
16 order -- either direct, which the plaintiffs have not accepted,
17 that is, direct in a lump sum in satisfaction of the
18 obligations or \$13,000 in April, etc.

19 THE COURT: First of all, there is no issue of
20 offering to pay, sir. It is compliance with an order as to
21 which the party is out of compliance. As you stand here now,
22 is your client in compliance with my order?

23 MR. GAETANOS: No, sir.

24 THE COURT: Why shouldn't I hold your client in
25 contempt today and continue this proceeding to determine

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1 whether you, sir, should also be held in contempt of this
2 Court's order?

3 MR. GAETANOS: Insofar as my client is concerned, he
4 did not make the April 1 payment because he didn't have the
5 money. I know that because he told me and from the financial
6 statement that he supplied to me. I know it from his tax
7 returns. I know it from general discussions I have had with
8 his current bankruptcy counsel.

9 THE COURT: Under the Court's order, what is the
10 consequence of a payment not being made?

11 MR. GAETANOS: Then it would be a violation of the
12 court order but --

13 THE COURT: Is there not an acceleration provision?

14 MR. GAETANOS: There is an acceleration provision. We
15 argue in our papers that, while it appears that the
16 acceleration was valid against Mr. Stirling, it does not appear
17 to me that it was valid against TBG.

18 THE COURT: Explain that one to me.

19 MR. GAETANOS: Well, in brief, I guess I do it this
20 way. First, this action started out against Mr. Stirling
21 alone, d/b/a Thetextbookguy.com. As I stand here before you
22 today, I don't know who owns the dot-com address. I don't
23 know. I asked and I don't think I ever learned.

24 Towards the end of the negotiations that led to your
25 judgment, I asked Mr. Dunnegan if he would add TBG as a party.

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1 Up until then the action was strictly against Mr. Stirling. He
2 consented to that and to several other requests that I made.
3 And those requests, quite candidly, were intended to enhance
4 the likelihood that I am sure that TBG's insurer would afford
5 coverage.

6 That was one of the things that Mr. Galbo and I felt
7 was a little weak in our insurance claim, so we asked for that
8 change. That change did not occur until March 5 when the Court
9 signed the judgment.

10 In April when the defendant TBG missed the April 1
11 payment, Mr. Dunnegan sent a letter informing us of the
12 default. And I believe on April 16 he accelerated the
13 payments, as he was permitted to do under the order. We still
14 didn't have any money at that point. When I say "we," I mean
15 TBG. I don't know that personally but I was in touch --

16 THE COURT: What about the check you received?

17 MR. GAETANOS: We didn't have that either.

18 THE COURT: Had not received it yet?

19 MR. GAETANOS: No.

20 THE COURT: So TBG, because of an inability to pay,
21 defaulted. So why wasn't the sum due and owing by TBG
22 accelerated?

23 MR. GAETANOS: When, in later April, Mr. Dunnegan
24 commenced a contempt proceeding but only against Mr. Stirling,
25 even the order itself said it was a joint and several

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1 obligation. It only commenced the proceeding against
2 Mr. Stirling. That is very clear from his papers.

3 THE COURT: What does that have to do with the
4 acceleration? What does the order to show cause and the
5 request for enforcement have to do with the acceleration?

6 MR. GAETANOS: May I explain?

7 THE COURT: Yes.

8 MR. GAETANOS: Since he started the contempt
9 proceeding against Mr. Stirling, I wondered whether he had
10 forgotten that TBG had been made a party. So I took the view
11 that only Mr. Stirling had received the acceleration notice and
12 not TBG. When the Court signed the Stirling order to show
13 cause, paragraph 2 or B of it asks for an injunction -- excuse
14 me -- asks for a contempt with respect only to the \$15,000
15 payment.

16 Now, if there had been a valid acceleration against
17 either party -- not dealing with Stirling -- assuming that
18 there was a valid acceleration against Mr. Stirling,
19 presumably, Mr. Dunnegan would have asked for a contempt with
20 respect to the full amount.

21 THE COURT: But it is up to me to decide whether the
22 terms of the order are clear, unambiguous and whether they have
23 been complied with.

24 MR. GAETANOS: Agreed. However, the Court did sign
25 the order in April on the Stirling contempt and signed

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1 virtually the same order in June seeking contempt of court only
2 on the 15.

3 THE COURT: You are not suggesting that the order to
4 show cause modified the final judgment and permanent injunction
5 by contempt in this case?

6 MR. GAETANOS: Not at all. I am suggesting, however,
7 that TBG did not get notice of the acceleration and, therefore,
8 its primary obligation under the order, given the timing and
9 the terms of the order, was to pay the \$15,000.

10 THE COURT: Have a seat for a second.

11 What evidence do you have that TBG received notice of
12 the acceleration, and was it required to receive notice of the
13 acceleration for the acceleration to occur?

14 MR. DUNNEGAN: To answer your first question, your
15 Honor, Exhibit B to my declaration in support of the initial
16 order to show cause is a letter of mine dated April 16
17 addressed to, at the top, Mr. Matthew Stirling, Thetextbookguy
18 LLC, and it does say, "Dear Mr. Stirling."

19 THE COURT: With a copy to Mr. Gaetanos?

20 MR. DUNNEGAN: Yes.

21 THE COURT: You can answer my second question also.

22 MR. DUNNEGAN: I am going to make sure that I get it
23 absolutely right by looking at the provision of the order, your
24 Honor.

25 THE COURT: I think it is on page 4, and I think there

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1 is a notice requirement, the last paragraph on page 4 under
2 "Judgment."

3 MR. DUNNEGAN: The answer to your question would be
4 no. We gave them a default on April 2. We said, you are in
5 default. That is an exhibit to my earlier declaration in
6 support of a different order to show cause. This one is also
7 attached as Exhibit 5 to Mr. Gaetanos' declaration. It is a
8 letter dated April 2, addressed again to Mr. Matthew Stirling,
9 Thetextbookguy LLC, and then there is an address. It says:
10 "We are writing to advise you that you are in default in making
11 a \$15,000" --

12 THE COURT: OK.

13 MR. GAETANOS: I think that is all the notice that one
14 needs that a payment was made. I don't think that we needed to
15 send another letter and say, We have now accelerated because 10
16 calendar days have run.

17 THE COURT: Isn't that the letter of April 16th, in
18 any event, that the grace period for making the payment has
19 expired and they hereby exercise their right to accelerate the
20 remaining?

21 MR. DUNNEGAN: I think so. Between the two of them,
22 it seems to be fairly clear that we have acceleration.

23 THE COURT: Stop.

24 Mr. Gaetanos, I have in front of me a letter addressed
25 to Mr. Matthew Stirling, Thetextbookguy LLC, dated April 2,

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1 2008, placing Thetextbookguy on notice of the default and a
2 second letter to Mr. Matthew Stirling, Thetextbookguy LLC,
3 dated April 16, 2008, advising of the acceleration.

4 Did your client receive the two letters?

5 MR. GAETANOS: To the best of my knowledge, he did.

6 THE COURT: Then I don't understand your argument that
7 your client did not receive notice of default or acceleration.

8 MR. GAETANOS: Again, from the orders to show cause
9 which seek to hold my client in contempt for \$15,000, I could
10 not explain for myself and still cannot why if, say, as of
11 April 16, the date of the acceleration letter, the amount due
12 is \$51,000 and yet the contempt was only for 15 -- I still
13 don't understand that distinction.

14 THE COURT: Of what moment does that have to me at
15 this juncture? If Thetextbookguy received a notice of default
16 and a notice of acceleration, of what moment does the content
17 of the order to show cause have at this juncture?

18 MR. GAETANOS: Given the nature of our discussions
19 from the beginning, my discussions with Mr. Dunnegan from the
20 beginning of this lawsuit through around June 3rd when we
21 stopped speaking, I believe that he thought that only Stirling
22 was the defendant. And at some point it occurred to him that
23 someone else was the defendant, too -- I don't mean to question
24 the Court's order. I am not trying to change it or address the
25 merits. That's all that I thought.

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1 THE COURT: Maybe you have, in your view, a lazy,
2 stupid adversary -- and maybe you do. I have no reason to
3 believe that, but let me humor that prospect for a moment. Of
4 what moment is that with regard to your client's obedience to
5 the Court's order and your obedience to the Court's order and
6 your obligation not to interfere with a lawful court order?

7 MR. GAETANOS: As to the second point, your Honor, as
8 I said before, it is my view that there is a sufficient sum to
9 pay the amount of money due under the court order, absent the
10 acceleration issue. As to the acceleration issue --

11 THE COURT: But it has been accelerated, and that
12 money is not due under some contract; it is due under my order.

13 MR. GAETANOS: The defendant TBG, as I understand it
14 from the documents I have read and discussions I have had with
15 my client and bankruptcy counsel, he does not have that money.

16 If the Court decides that he owes that money
17 immediately and he doesn't have it --

18 THE COURT: No. He owes it immediately.

19 The question is whether you are in compliance with the
20 court order. You have acknowledged your client's receipt of
21 the notice of default, the nonpayment on the record here today
22 and the acceleration. So he owes the money.

23 What is your argument for him not owing the money,
24 sir? I don't understand it.

25 MR. GAETANOS: As I said in my papers and earlier

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1 today, given the nature of the notice and the tenor of this
2 action from the very beginning, we had a question that only
3 Mr. Stirling received the notice. It still strikes us as odd
4 that a contempt proceeding was filed only against --

5 THE COURT: It may strike you odd, sir. What is your
6 argument? I have the correspondence which is clearly addressed
7 to Thetextbookguy LLC. What, sir, can you present as a
8 nonfrivolous argument for your client's belief that a default
9 had not been declared and acceleration occurred?

10 MR. GAETANOS: Your Honor, I apologize for not being
11 able to convince you. I have said to you what I believe to be
12 the case and why, given related transactions -- I do not mean
13 to question the Court's order; I never did, and I don't now.
14 What I mean to do is to say that I just found it odd that a
15 joint and several obligation directed towards Mr. Stirling
16 results in an acceleration of an obligation that TBG is
17 obligated on as well.

18 THE COURT: Your observation of it being odd is noted
19 for the record, but that is not the purpose for us being here
20 today, for you to make such observations. I would be delighted
21 to hear such evidence that you have as to why your client
22 should not be found in contempt and why this Court should not
23 sua sponte issue an order to show cause with regard to your own
24 interference with a lawful court order.

25 MR. GAETANOS: May I address that point?

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1 THE COURT: You may.

2 MR. GAETANOS: The authorities on the point list three
3 items that a movant in a contempt proceeding has to prove --
4 noncompliance, no ambiguity in the court order, and that the
5 alleged contemnor has acted diligently and earnestly.

6 According to the Chao case, which I did not cite in my papers
7 because I did not find it in time, cited in January 2008 by the
8 Second Circuit. It is the movant that has these obligations.

9 It is our view that the movant not only has the burden
10 of proof but the burden of persuasion and the burden of going
11 forward as well. Having said that, TBG has come forward --

12 THE COURT: You are not suggesting that the burden of
13 proof is on the plaintiff to show your client's inability to
14 pay, are you?

15 MR. GAETANOS: I am quoting from the Chao case.

16 THE COURT: Are you? I think that is a fair question.
17 I have read the Second Circuit's learning in Huber v.
18 Marine Midland, 51 F.3d 5 in which the court made it very clear
19 as to where the burden of proof lies.

20 MR. GAETANOS: Yes, sir.

21 As of the three cases that I focused on, Danforth,
22 Chao and Allied Vision, all three of them say that the movant
23 must establish, and then it lists those three elements. They
24 state very clearly, and they are more recent than the Huber
25 decision.

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1 THE COURT: I am sorry. Did they overrule or modify
2 Huber?

3 MR. GAETANOS: I don't know that they modified Huber.
4 Chao was decided January 24, 2008.

5 THE COURT: Let me take a look at it.

6 MR. GAETANOS: I have turned to headnote 10.

7 THE COURT: I find nothing in Chao which flips the
8 burden of proof on inability to comply, "though the movant must
9 establish, as they did previously, that the order was clear and
10 unambiguous, the court needs to find by clear and convincing
11 evidence that the order was not complied with and that the
12 alleged contemnor has not clearly established his inability to
13 comply with the terms of the order, and that the movant must
14 demonstrate that the alleged contemnor has not been reasonably
15 diligent and energetic in attempting to comply."

16 In this case, the movant has come forward with
17 evidence that Thetextbookguy and one Christ Gaetanos signed
18 over a check made payable to Thetextbookguy and its insurance
19 counsel to Mr. Gaetanos. Why doesn't that more than amply
20 satisfy any requirement that the plaintiff demonstrate that the
21 alleged contemnor was other than diligent? Why doesn't that
22 satisfy their burden?

23 MR. GAETANOS: From the time of the order, March 5,
24 2008, TBG was on its way out of business. Despite the fact
25 that it was on its way out of business, I was instructed to

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1 pursue not only a claim for defense costs, but a claim for
2 indemnity and so was Mr. Galbo, as far as I know -- I assume he
3 was because he continued to work on it. We continued to work
4 on it. That is diligence.

5 I don't believe that anything in the court order
6 mandated TBG to stay in business or to pursue any of its claims
7 against anyone, to produce any money for any purpose.

8 Nonetheless, although it went out of business, it instructed me
9 and instructed Mr. Galbo to pursue that claim extensively. We
10 pursued that claim extensively.

11 We got an award in what Mr. Galbo described as an
12 exceedingly difficult proceeding. And when we got it, we
13 didn't hide it. Before we got it, we were notified somewhere
14 around May 6, 2008 that we were going to get this award.

15 Somewhere around that time, I got word from Mr. Galbo.
16 Once I had that word. I contacted Mr. Dunnegan and gave him my
17 proposal.

18 THE COURT: Your proposal was not paying the moneys
19 that were coming to Thetextbookguy, correct?

20 MR. GAETANOS: I'm sorry? I didn't understand the
21 question.

22 THE COURT: Your proposal was not to pay over the
23 moneys that were coming to your client in full. Your proposal
24 was to renegotiate the terms of the final judgment. Am I
25 wrong?

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1 MR. GAETANOS: No. You are not wrong, however, if I
2 can address that.

3 THE COURT: Not if you want to entertain in front of
4 me how reasonable your position was that the order of this
5 Court should have been modified because, if that was your
6 position, your application should have been made to this Court
7 and not a negotiating table. It matters not at this stage
8 because your efforts were unsuccessful. There was an order.
9 The question is not whether you were reasonably diligent in
10 trying to get the order that a party has not complied with
11 modified; the question is whether you were reasonably diligent
12 in complying.

13 MR. GAETANOS: I have explained why I believe that was
14 the case. In terms of modifying the court order, the Court is
15 absolutely correct. I could have made a motion at some point
16 between May 5th and March 5th -- subsequent to March 5th to
17 seek a modification from the court order.

18 THE COURT: And you didn't?

19 MR. GAETANOS: I did make a decision that I thought
20 that my chances of modifying this court order would be greater
21 if I could achieve some level of agreement with the plaintiffs.

22 THE COURT: You are not urging your efforts to get the
23 plaintiffs to modify the order as evidence of diligence in
24 complying with the order, are you?

25 MR. GAETANOS: No. I am urging it as an attempt on my

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1 part to deal with this extra-judicially first. And if there
2 was an agreement, then we would need to come back to the Court
3 to have the Court modify its order. There was no question
4 about that, and I was never trying to evade the Court's order
5 in that respect.

6 THE COURT: But as we stand here today, the Court's
7 order is neither modified nor complied with and you hold moneys
8 that were payable to your client -- personally, you hold those
9 moneys, correct, unless you have spent them?

10 MR. GAETANOS: No, I have not spent them. I don't
11 know what to say, your Honor. While it is true I could file a
12 motion for everything -- and I am not a trial lawyer, in
13 general -- but it has been my practice in dealing with the
14 courts, most judges I know want to know at some point, has
15 there been any discussion about what I have been asked to rule
16 on and that was my aim in contacting Mr. Dunnegan, period.

17 THE COURT: That is just wonderful, but I ask you a
18 question that was directed towards such evidence as there may
19 be in this record as to reasonable diligence in complying and I
20 have heard a story about reasonable diligence maybe in seeking
21 a private party to join you in endeavoring a modification of
22 the court order, which strikes me as somewhat different.

23 MR. GAETANOS: From the beginning, October 2007,
24 before there was any discussion about a settlement, we
25 disclosed the financial condition of TBG and, I believe,

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1 Mr. Stirling. So the parties knew this almost from the
2 beginning, that we had parties that were seriously in debt.

3 We kept the discussion going, to the extent that we
4 even arranged a telephone conversation with Mr. Stirling's
5 bankruptcy counsel and the plaintiffs' attorney, Mr. Dunnegan.
6 We were always concerned about the same problem, and that is
7 whether the defendant could afford the obligation.

8 Now, when it came time for March 5 and the order to be
9 signed, TBG had in excess -- it is in Exhibit 2 of my papers --
10 the financial statement as of March 1 shows in excess of
11 \$50,000 -- either just above or just below 50,000. Most of it,
12 in fact, almost all of it consisted of books, some of which we
13 agreed as part of this order to turn over to Mr. Dunnegan. To
14 my knowledge, those books were turned over.

15 Once that happened, TBG had less assets, fewer assets,
16 but it did have an insurance claim and it had, in the judgment
17 of Mr. Galbo, a chance to get a substantial amount of money
18 from it. And although I am not an insurance lawyer, I did
19 review his work and I had the same conclusion. So I myself
20 told Mr. Stirling, let's go for it. It looks pretty good.
21 And, we were correct.

22 THE COURT: It doesn't do these people any good
23 because you put the money in your pocket.

24 MR. GAETANOS: I did not put the money in my pocket.
25 I put money in my account that I believe I had a lien to and

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1 that the insurance company directly allocated for me.

2 THE COURT: What is your authority for an attorney's
3 lien in the absence of your not having commenced an action?

4 MR. GAETANOS: The retaining lien is a possessory
5 lien. And in all honesty, I have examined that and I cannot
6 find any authority. Perhaps my research is not careful, but I
7 have not found any authority dealing with the question of
8 priority between a judgment creditor and an attorney.

9 What I know on that issue is that a retaining lien can
10 only be determined in a plenary proceeding, which I suppose it
11 could be a brand new case or part of this proceeding. I am not
12 sure what a plenary proceeding is, but I imagine it is an
13 evidentiary proceeding.

14 If I was mistaken in my analysis, then I am, but the
15 fact is that I have not hid anything. In fact, we didn't hide
16 anything from the plaintiffs. We told them exactly what we
17 were doing. We got an award. We told them what we were going
18 to do with it. It is not a secret.

19 If I have to defend my retaining lien in a plenary
20 proceeding and if the Court orders that, then I will do that.

21 THE COURT: I will never order you to defend your lien
22 in a plenary proceeding. Why would I do that? Why would I
23 order you to defend your lien in a plenary proceeding?

24 MR. GAETANOS: As I understand New York statutes on
25 the subject, it can't be determined except in a plenary

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1 proceeding.

2 THE COURT: Therefore I should order you to have a
3 plenary proceeding? Where should I order you to have your
4 plenary proceeding, Mr. Gaetanos? I am curious.

5 MR. GAETANOS: I am not suggesting that the Court do
6 it.

7 THE COURT: You just said that, unless the Court
8 orders it be adjudicated in a plenary proceeding -- I thought I
9 heard you say that, but maybe I misheard.

10 MR. GAETANOS: I am relating to the Court my
11 understanding of the extent of a retaining lien.

12 THE COURT: But you are talking about what I might do
13 in this case as relief. That's the point I am addressing, sir.

14 MR. GAETANOS: OK. Maybe I spoke too loosely, and I
15 apologize for that. I wasn't suggesting it or seeking it. I
16 am simply saying that, if that is what I am confronted with, I
17 will go through it.

18 THE COURT: Do you have a plenary action pending
19 anywhere on earth to enforce the lien?

20 MR. GAETANOS: I do not have that action. It seems to
21 me from the cases that I have read and the two that I remember
22 are old New York Court of Appeals cases -- one is Robinson and
23 the other is Cooper -- that an attorney is not in a position to
24 enforce that retaining lien. I may misunderstand that. I am
25 certainly no expert in retaining liens, but I at least did the

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1 research.

2 THE COURT: You don't seem to be particularly mindful
3 or respectful of lien law. As I understand it, there couldn't
4 be any lien right now that you might have because you took the
5 money. You have the money. Your client doesn't have the
6 money. The judgment creditor doesn't have the money. You have
7 the money in a bank account to which -- is it an escrow
8 account, sir?

9 MR. GAETANOS: No, sir.

10 THE COURT: You have it in your operating account.

11 I assume you don't generally have liens on money in
12 your own operating account in your favor?

13 You have asserted title to the money. Am I wrong? Am
14 I being unfair to you, sir? Am I mischaracterizing or
15 misdescribing? You have no lien to assert. You have the
16 money.

17 MR. GAETANOS: As I said earlier, your Honor, it was
18 my understanding that there were sufficient assets to cover
19 this judgment, number 1; and, number 2, that I did not see that
20 this Court order affords any one creditor priority over any
21 other creditor.

22 For instance, if TBG had an electric bill or a credit
23 card bill on which it had a loan, it could easily pay those
24 bills as well --

25 THE COURT: Very interesting. Let's see now. The

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1 electric company has no notice of my order or injunction, and
2 the Thetextbookguy writes a check to the electric company and
3 they cash it. It would seem to me that there would be no
4 argument that the electric company is in contempt of my order
5 or has committed the crime of obstruction of justice. That
6 would seem to be wholly frivolous.

7 But you, Mr. Gaetanos, have signed the consent,
8 personally signed the consent to entry of this injunction on
9 behalf of your client. You, Mr. Gaetanos, have personal
10 knowledge of this Court's order. And you, Mr. Gaetanos, with
11 knowledge of that order, deposited the money in your operating
12 account.

13 It strikes me, sir, that you are not similarly
14 situated to your electric company, with all due respect.

15 MR. GAETANOS: And, your Honor, I had and have
16 absolutely no intention to obstruct justice or to violate this
17 Court's order or to instruct my client to do either of those
18 things.

19 THE COURT: Do you intend to comply with the Court's
20 order?

21 MR. GAETANOS: Me personally?

22 THE COURT: No. Why you? You are the person who has
23 the money?

24 MR. GAETANOS: No. I do not have all the money. I
25 have some of the money.

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1 THE COURT: What happened to the money?

2 MR. GAETANOS: The \$38,000, the last I understood is
3 in Mr. Galbo's trust account. I reread his affidavit. I am
4 confused. It seems to say that he took the 5 out and has 33
5 left. I understand from my conversations with him that it was
6 different than that. That's that money.

7 Secondly, if I have done something that the Court
8 finds is a violation, then I will cure that violation. I
9 certainly didn't sit down and think, how can I mess with the
10 plaintiffs or certainly not with the Court. That was never my
11 desire.

12 My desire was to have Mr. Stirling and TBG see the
13 back end of this case as soon as possible and I thought I had
14 come up with a plan to do it, and until June 2 we had no
15 resources with which to implement this plan. About a month
16 before then, as I said earlier, we were told from Hartford that
17 we would have money. And it was at that point, even before we
18 had it, that we attempted some resolution. Those were the
19 things that motivated me, not an effort to undermine this
20 Court's authority in any respect or certainly to advise my
21 client to do that.

22 THE COURT: Are you proposing anything at this
23 juncture today? Are you proposing to do something with regard
24 to getting you and your client in compliance with this Court's
25 order? If you are, I would like to hear what it is.

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1 MR. GAETANOS: Yes, sir. As I said. Mr. Galbo has
2 either 33,000 or 38,000 dollars in his trust account. I don't
3 know which number. I don't know --

4 THE COURT: Maybe the better way to do this is for me
5 to put this over and then you can tell me retrospectively what
6 you have done in the past tense because it sounds to me that
7 you don't plan and your client doesn't plan on paying.

8 MR. GAETANOS: No. That is not true at all. That is
9 not true at all.

10 THE COURT: What are you paying and when?

11 MR. GAETANOS: We will pay, starting with Mr. Galbo's
12 money --

13 THE COURT: No. What are you paying and when? Give
14 me a dollar and when -- a dollar amount and when are you
15 paying?

16 MR. GAETANOS: The authority I have for my client is
17 to offer the April 1 payment immediately.

18 THE COURT: To whom, to me?

19 MR. DUNNEGAN: No. To the plaintiffs.

20 THE COURT: I am talking about getting into compliance
21 with my order. Do you have a proposal to get in compliance
22 with my order?

23 MR. GAETANOS: Yes, sir. It is a multi-step thing,
24 and if I could have a moment.

25 THE COURT: Does it require modification of my order?

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1 MR. GAETANOS: It does not.

2 THE COURT: How quickly will you be in full compliance
3 with my order?

4 MR. GAETANOS: Based on the discussion that we had
5 earlier, as I understand it, it is your holding that the
6 defendant TBG owed \$51,000. As I said, I have taken a
7 different view but the Court has held at 51. This is what we
8 will do. We will pay \$51,000.

9 THE COURT: When is the money going to be paid?

10 MR. GAETANOS: I can pay --

11 THE COURT: When is the money going to be paid?

12 MR. GAETANOS: I cannot speak for Mr. Galbo, but I can
13 do this. By Tuesday, Mr. Dunnegan will have a check from me
14 for -- your Honor, I have to step back. I don't know.

15 May I ask this question? If the Court could give,
16 under the circumstances, until Wednesday, and if the Court says
17 that we need to pay \$51,000 immediately, then by Wednesday the
18 plaintiffs will have \$51,000.

19 THE COURT: What you are going to get out of me, the
20 best that you are going to get out of me, sir, is that I will
21 put this matter over and I will put the rearview mirror on the
22 adjourn date as to what happened and then assess what I should
23 do from there. That's what you are going to get.

24 Do you want me to kind of bargain with you on my
25 order, have a second order and see whether I do better with the

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1 second order from the Court than I did with the first order?
2 Is that what you are hoping I am going to do here?

3 MR. GAETANOS: No, sir.

4 THE COURT: I am going to put this over, and then I am
5 going to have you stand before me and tell me whether the
6 defendants are now in compliance with the Court's order. If
7 they are not, I will then proceed to adjudicate all other
8 issues.

9 Now, I will invite the parties to address whether the
10 attorney for a party is bound by the Court's order as a person
11 with knowledge of the Court's order, as would be the case with
12 an injunction under Rule 65 which is binding on other persons
13 who are in active concert or participation with a person who is
14 bound by the order -- and it only binds people with actual
15 notice of it. I will hear on that, and I will also hear on any
16 additional procedural protections that Mr. Gaetanos and Mr.
17 Galbo are entitled to.

18 MR. GAETANOS: May I ask a question, your Honor?

19 THE COURT: I am not sure that I can answer your
20 question, but you can say whatever you would like to say. You
21 can ask whatever you would like to ask, and I will let you know
22 whether it is appropriate for the Court to answer a question.

23 The reason I put this caveat on it is that, having
24 listened to you, it sounds to me that there is a predilection
25 on the part of the defendant to want to negotiate the terms of

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1 compliance with an already existing order.

2 What I am offering to you, sir, is putting this over
3 to a date and then asking you on that date, and asking the
4 plaintiffs on that date, whether the defendant is now in
5 compliance with the Court's order.

6 MR. GAETANOS: Understood, your Honor.

7 If on this new date the Court asks me whether I
8 believe we are in compliance with that order, I need to be able
9 to say yes or no. Therefore, I need to know precisely what,
10 under the present circumstances, the Court would consider to be
11 compliance -- at least insofar as the financial obligation.

12 THE COURT: No, you don't. You have a Court order.

13 If you have an argument that you would like to raise
14 today as to why this Court's order and final judgment are not
15 clear and unambiguous, I will entertain that. But the order is
16 the order of March 5, 2008 and I have not heard you advance an
17 argument that the order is not clear and unambiguous.

18 MR. GAETANOS: May I assume then that the Court has
19 ruled that the acceleration is valid against TBG? May I assume
20 that?

21 THE COURT: As I said, sir, I don't hondle with you.
22 I don't, not with you.

23 I can proceed today with this contempt proceeding,
24 bring it to conclusion and make findings of fact and
25 conclusions of law. There will then be an order issued by this

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1 Court, either by way of so ordering the transcript of this.
2 afternoon or my entering a separate order this afternoon, in
3 which event you will have an order. It will not be necessary
4 for you to come back then. The matter will have been
5 adjudicated.

6 The alternative to that, sir, which, with due respect,
7 I think is generous under the circumstances is, I am willing to
8 put this over. If I am looking in the rearview mirror at a
9 party that is now in compliance with the Court's order, the
10 matter may look quite different. Depending on what I hear from
11 plaintiffs, there may not be a need for further proceedings. I
12 won't reach that because I need not.

13 So basically, sir, what I am saying to you is that, we
14 continue with this proceeding. I will make findings of fact
15 and conclusions of law after hearing everybody fully today and
16 then we will be done, subject to if I find a basis for holding
17 somebody in contempt, I will look at the range of remedies for
18 civil contempt and I will decide what is appropriate under the
19 circumstances and we will be done; or I can put this over for a
20 reasonable period of time and we can come back, and if it is
21 necessary for me to make findings of fact at that juncture, I
22 will.

23 Do you want me to put this over?

24 MR. GAETANOS: Yes, sir.

25 THE DEPUTY CLERK: Wednesday, July 2 at 11:30 a.m.

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1 THE COURT: And if there is a need on the part of the
2 plaintiffs for a supplemental order to show cause directed to
3 nonparties, you will present me with one. If you feel there is
4 no need, you won't present me with one.

5 Is there anything further?

6 MR. GAETANOS: No, your Honor.

7 THE COURT: Thank you all.

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