

49,149

SHORT ORDER FORM
To commence the statutory
time period for appeals as
of right (CPLR 5513 [2]), you
are advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. NICHOLAS COLABELLA
J.S.C.

FILED
AND
ENTERED
ON 12/14/92
WESTCHESTER
COUNTY CLERK

THE PEOPLE OF THE STATE OF NEW YORK,
by ROBERT ABRAMS, Attorney General,

Petitioner(s)

- against -

INTERSTATE AUTOMOBILE MANAGEMENT,
ROGER E. COSTILOE, MARVIN DEUTSCH,
MARK GREENE, ANDREW HICKS AGENCY and
ANDREW HICKS,

Respondent(s)

RECEIVED
JAN 25 1994
NATIONAL CLEARING HOUSE
FOR JUDICIAL DECISIONS

DECISION/ORDER

INDEX NO.
04062/92

HEARING DATE
8/17/92

(2 Motions)

TRC/H

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(8pp.)

The following papers numbered 1-12 and 1-11 were read on
two motions by petitioners consolidated herewith for
determination.

	Papers Numbered
Notice of Motion/Order to Show Cause-Affidavits	1-3/1-5
Notice of Cross Motion - Affidavits - Exhibits	
Answering Affidavits	4-5, 6-7/6
Replying Affidavits	8-9/7
Sur-Reply Affidavits	10, 11/8, 9, 10
Filed Papers	
Memoranda(um) of Law	/11
Pleadings-Exhibits-Stipulations-Minutes	12/

Petitioners move for relief pursuant to General Business
Law §§349 and 350 and Extension Law §63(12) for an Order and
Judgment permanently enjoining respondents from engaging in
fraudulent, illegal and deceptive business practices, restitution
to aggrieved consumers, requiring a performance bond to engage in
any consumer transaction in the State, awarding costs and imposing
statutory penalties.

Petition is granted to the extent that respondents
Interstate Automobile Management, Inc ("Interstate"), Costiloe,
Deutsch, Greene, Andrew Hicks Agency and Andrew Hicks are
permanently enjoined from:

- (a) from engaging in fraudulent, deceptive and illegal
acts and practices alleged in the verified petition;
- (b) from soliciting and arranging

sublet/subleasing/purchase agreements in the State of New York without the prior written approval of the security interest holder, lessor or other lienholder, and from collecting brokers' fees or any other fees for such services unless the prior written approval of the security interest holder, lessor or other lienholder has been obtained;

(c) from insuring or arranging, brokering, procuring or obtaining automobile insurance for vehicles which are the subject of sublet/subleasing/purchase agreements in the State of New York without disclosing in the insurance application the existence of the sublease agreement, the identity of the sublessee and the exclusive use and control of the vehicle by the sublessee;

(d) from issuing or arranging such insurance unless the bona fide signature of the named applicant for the insurance has been obtained.

Petitioners have clearly and convincingly demonstrated a need for permanent injunctive relief with respect to the following acts:

- a. soliciting and arranging sublease agreements prohibited by the consumer's lease, conditional sales contract or security agreement;
- b. failing to disclose and/or intentionally concealing that the lease or security agreement to which the sublessor's vehicles are subject prohibit the sale, lease, sublease or transfer of any interest in the vehicle without the prior written approval of the security interest holder, lessor other lienholder;
- c. failing to disclose that the sublease agreements that were to be arranged and managed were legally invalid without the prior written approval of the security interest holder, lessor or other lienholder.
- d. misrepresenting that the sublease agreements are legal in the State of New York;
- e. misrepresenting that the sublease agreements would lead to ownership of the vehicle;
- f. misrepresenting that the sublease agreement is only temporary and incidental to the purchase of the vehicle;
- g. misrepresenting that Interstate would be responsible for any financial loss resulting from the sublease agreements arranged, and for any payments missed by the sublessee;
- h. misrepresenting to sublessors that bank or lease payments had been made when in fact such payments had not been

made.

i. causing automobile insurance to be issued in the name of the sublessor, notwithstanding that the sublessor is not aware that insurance is not being obtained in his or her name, that the sublessor has signed no documents or applications requesting insurance, and that the sublessee has exclusive use and control of the vehicle.

j. failing to list the sublessee as an operator of the vehicle in the application for insurance, and to disclose therein the fact that the vehicle is being subleased.

k. utilizing fictitious addresses for sublessors in the insurance applications, including addresses controlled by Interstate.

Such acts constitute deceptive business practices prohibited by General Business Law §349. Respondents Interstate, Costiloe and Greene, defaulting in responding to the petition, are deemed to have admitted the allegations therein that they have, in fact, engaged in such acts and thereby committed persistent and repeated fraud and illegality in violation of General Business Law §349 and Executive Law §63(12). In addition, by defaulting, they have conceded they engaged in false advertising prohibited by General Business Law §350 in order to solicit consumers to enter into sublease agreements that are legally invalid by advertisements promising that consumers could take immediate delivery of vehicles regardless of credit worthiness and take over payments when, in fact, the sublease agreements arranged by Interstate were not approved by the creditor and gave the consumer no right to the vehicles. Such advertising constituted repeated fraud and illegality in violation of Executive Law §63(12).

Respondents Deutsch, Andrew Hicks Agency and Andrew Hicks, who have answered, also do not provide any viable legal basis to engage in the activities described above. The Court credits their defense only to the extent they raise issues of fact as to the degree to which they knowingly participated in the scheme and should be held responsible. Since the conduct alleged in the petition is of a type that respondents have shown neither need nor right to engage in and pose a substantial risk of damage to consumers if unrestrained, permanent injunctive relief against all respondents is appropriate.

As a consequence of such deceptive practices, respondents Interstate, Costiloe and Greene shall:

(a) make full restitution to all aggrieved consumers whether or not identified at the time of this Order;

(b) each pay \$2000 in costs pursuant to CPLR section

8303(a)(6);

(c) each pay statutory penalties in the amount of \$500 per violation pursuant to GBL §350-d.

Interstate, Costiloe and Greene are permanently enjoined from further engaging in any business that deals with New York Consumers until such time as respondents shall execute and file with the Attorney General a performance bond in the amount of \$1,000,000. The amount of restitution to be paid by respondents Interstate, Costiloe and Greene in restitution, costs and penalties shall be determined upon settlement of an Order and Judgment by petitioners herein supported by affirmation, affidavit or other documentary evidence as appropriate establishing the amount sought. Settle Order and Judgment on notice.

That part of the petition as seeks to have respondents Deutsch, Andrew Hicks Agency and Andrew Hicks make restitution, post a performance bond and pay costs and statutory penalties is severed. The requested relief is referred to the Trial Court to determine the scope of the parties' respective participation in the scheme outlined in the petition, their relative culpability therefor, and the extent of restitution to be made by them, if any.

Counsel shall appear for a Trial Readiness Conference at the Courthouse on January 28, 1993 at 9:30 a.m. If petitioners wish to await the final outcome of the contempt proceeding, discussed below, in order that respondents be compelled to submit to discovery, they may apply for an adjournment of the trial readiness conference. If petitioners wish to forgo discovery, they may request an earlier Trial Readiness Conference. Petitioners may apply to the Trial Assignment Part for an immediate trial pursuant to CPLR §410.

Petitioners separately move for an Order adjudicating respondents Interstate, Costiloe, Deutsch and Greene in civil and criminal contempt of Orders of this Court dated March 10 and 27, 1992, and imposing penalties. Motion is granted as to Deutsch to the extent counsel shall appear in the Trial Assignment Part, Courtroom 800 at 9:30 a.m. on December 21, 1992 for scheduling of a contempt hearing. Petitioners shall forthwith file a copy of this Order with the Clerk of the Trial Assignment Part (Virginia Dachenhausen).

The element of wilfulness is the distinguishing factor between civil and criminal contempt (Matter of McCormick v. Axelrod, 59 NY2d 574, 583). The concept of wilfulness requires a determination beyond a reasonable doubt rather than to a reasonable certainty (N.A. Dev. Co. v. Jones, 99 AD2d 238, 240-241). Where a defense has been raised in a criminal contempt proceeding placing in issue wilfulness a trial is required (Dept.

of Housing Preservation v. Gottlieb, 136 Misc2d 370, 375-376). Whether Deutsch acted wilfully in violation of the March 10 and 27, 1992, Orders in continuing to consummate sublease transactions and collect fees, and in appearing on the date scheduled for examination by petitioners without the corporate records of Interstate so as to constitute criminal contempt should be determined at a hearing with due process of law at which he can confront the witnesses against him (Dept. of Housing Preservation, supra, 374-376).

With civil contempt, by contrast, a contemnor need not have acted wilfully in violation of the Court's mandate. It is sufficient for a finding of civil contempt that the contemnor's conduct, even if not calculated, nonetheless did actually defeat, impair, impede or prejudice the rights or remedies of a party.

In this case, Deutsch concedes certain of the acts alleged by petitioners' counsel, to wit, that he continued to engage in subleasing activities and attempted collection of fees without consent of the security holder after issuance of the injunction, but argues that the injunction was ambiguous and could, and was, reasonably interpreted as allowing consummation of subleasing deals and collection of brokerage fees for such services if the solicitation and arranging of the subleases occurred prior to the injunction. Whether the injunction was ambiguous as claimed presents an issue of law. The Court finds no such ambiguity.

The March 10, 1992, Order temporarily restrained respondents from: (1) soliciting or arranging automobile sublet/sublease/purchase agreements in the State of New York without the prior written approval of the security interest holder, lessor or other lienholder; (2) collecting brokers' fees in connection with such agreements unless the prior written approval was obtained; and (3) disposing of any corporate records of Interstate. As used in the Order, the term "arranging" clearly included acts involved in consummation of a sublease and the collection of brokerage fees for services connected to such subleases was unequivocally proscribed.

The March 10, 1992, Order also directed respondents not to dispose of records of Interstate and to advise the Court of the location of the records. The March 27, 1992, Order further directed respondents to disclose the whereabouts of the corporate records and to appear at the office of petitioners' counsel on April 1, 1992 with various documents. Deutsch appeared on April 1, 1992 and denied having any of the records or knowledge of their whereabouts. It is controverted, however, that thereafter numerous records of Interstate were found in Deutsch's home by law enforcement authorities. Under the circumstances, it appears Deutsch violated the March 10 and 27, 1992, Orders to disclose Interstate's records.

The full extent of defendant's allegedly contumacious acts and the severity of the punishment to be imposed, however, is unclear on the present record. Other allegations in the contempt application, which assert that respondent Deutsch in essence acted in concert with others and are disputed by Deutsch, raise issues of fact as to the degree of Deutsch's involvement. It is also unclear on the present record the extent to which Deutsch can still comply with the Court's directions so as to purge his contempt. Resolution of these issues impact on determining the appropriate punishment. As with the request for criminal contempt, therefore, the final determination of the application for civil contempt should be deferred pending a hearing.

Motion as against respondents Interstate, Costiloe and Greene is granted without opposition.

It is uncontroverted Interstate has provided no information as to its corporate records in violation of the March 10, 1992, Order. Interstate, Costiloe and Greene have failed to comply with the March 27, 1992, Order directing their appearance for examination by petitioners and to produce specified corporate records and lists of consumer information. Respondents have also defaulted in responding to the instant motion, and, according to petitioners' counsel, have absconded from the State. Interstate, Costiloe and Greene, therefore, are adjudicated in civil and criminal contempt based on their failure to comply with the Court's directions. The Court deems their conduct in violating the Court's directions to be wilful and calculated to defeat, impair, impede and prejudice the rights and remedies of petitioners.

The Court assesses a fine of \$1000 against each of these respondents and sentences Costiloe and Greene to thirty days incarceration for criminal contempt pursuant to Judiciary Law §751(1). The Court further directs, as a punishment for civil contempt that respondents Costiloe and Greene be incarcerated thereafter pursuant to Judiciary Law §774 until such time as they shall comply with the Court's direction to submit to examination by petitioners and produce the records of Interstate as directed in the March 10 and 27, 1992, Order, or demonstrate to the Court that compliance with the Court's original directions are no longer within their power. In the latter event, petitioners may renew their application for a punitive prison sentence for civil contempt.

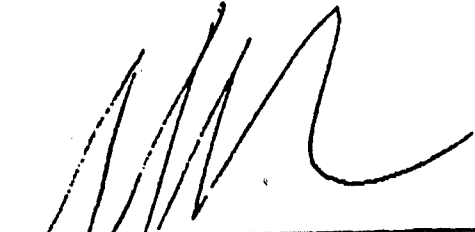
Submit Warrant of arrest and Order of commitment for respondents Costiloe and Greene.

In addition to service in the manner prescribed in the Order to Show Cause petitioners shall, within five days of receipt of this Order, serve a copy of this Order by regular and certified

mail on respondent Costiloe at 8220 Honeysuckle Lane,
Jacksonville, Fla. 32244 and on respondent Greene at 7230 Hallock
St., Jacksonville, Fla 32211.

Dated: White Plains, New York
November 11, 1992

Nicholas



NICHOLAS COLABELLA
Supreme Court Justice

ROBERT ABRAMS,
Attorney General
Attorney for Petitioners
202 Mamaroneck Avenue
White Plains, New York 10601

DROTZER & DROTZER, ESQS.
Attorneys for Respondent Deutsch
111 No. Central Park Avenue
Hartsdale, New York 10530

ECKER, LOEHR & ECKER, ESQS.
Attorneys for Respondent Hicks
20 South Broadway
Yonkers, New York 10701

NOTE

1. The additional Florida addresses were recited in paragraph 8 of the April 23, 1992, reply affirmation of petitioners' counsel. The affirmation in support of the Order to Show Cause dated April 23, 1992, however, indicated that the actual whereabouts of Costiloe and Greene were then unknown. The November 25, 1992, supplemental affirmation of petitioners' counsel explains the apparent discrepancy on the basis that petitioners were unable to verify the information as to the Florida addresses and were advised by New Jersey law enforcement officials, also investigating these respondents, that respondent Costiloe was believed to be somewhere in Louisiana and that respondent Greene's whereabouts were unknown.

W. J. Blumenthal
Attorney at Law

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