

SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 16 NASSAU COUNTY

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

**Motion R/D: 12-15-05**

**Submission Date: 1-4-06**

**Motion Sequence No.: 001,002/ MOT D**

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**VOICE COMMUNICATIONS, INC.** x

**Plaintiff,**

**COUNSEL FOR PLAINTIFF**

**Eisenberg & Margolis, LLP**

**390 Old Country Road**

**Garden City, New York 11530**

**- against -**

**TONIANNE BELLO,**

**Defendant,**

**COUNSEL FOR DEFENDANT**

**Ardito & Ardito, LLP**

**659 Franklin Avenue**

**Franklin Square, New York 11010**

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x

**ORDER**

The following papers were read on Plaintiff's motion to confirm an order of attachment and Defendant's cross-motion to vacate the attachment:

Order to Show Cause dated November 30, 2005;  
Affirmation of Gerald Eisenberg, Esq. dated November 25, 2005;  
Notice of Cross-motion dated December 14, 2005;  
Affirmation of John A. Ardito, Esq. dated December 14, 2005;  
Affidavit of Tonianne Bello sworn to on December 14, 2005;  
Affidavit of Inderjeet Lamba sworn to on December 16, 2005;  
Letter of Gerald Eisenberg, Esq. dated December 15, 2005.

Plaintiff Voice Communications, Inc. ("Voice") moves pursuant to CPLR 6211(b) for an Order confirming the Order of Attachment entered November 3, 2005.

Defendant Tonianne Bello (“Bello”) cross-moves pursuant to CPLR 6223 for an Order vacating the Order of Attachment and pursuant to CPLR 6212(b), for an Order directing Plaintiff to pay all costs and damages, including reasonable attorneys’ fees, sustained by reason of the attachment.

BACKGROUND

In its complaint, Voice alleges that Bello, its former employee in the accounts management department, embezzled and converted its monies in the amount of approximately \$400,000.00. Voice sought and obtained an *ex parte* Order of Attachment granted on November 1, 2005, and entered November 3, 2005, wherein attachment of Bello’s real property at 307 Claflin Boulevard, Franklin Square, New York, was authorized.

In support of the attachment, the president of the Plaintiff corporation alleges that Bello had already spent a substantial portion of the monies on personal expenses, including payment of her mortgage, her automobile, insurance premiums, a catered party for her child and her tax obligations. In addition, Voice’s president alleges that Bello has spent large sums of money gambling in Atlantic City and that she is thereby attempting to secrete property to prevent Plaintiff from being able to collect a judgement for embezzlement.

The Nassau County Sheriff served the Order of Attachment on the Nassau County Clerk, on Monday, November 21, 2005. Plaintiff then submitted its order to show cause seeking confirmation of the Order of Attachment to this Court on Friday,

November 25, 2005. In response to a fax from the Supreme Court Clerk's Office, Plaintiff's attorney appeared at court on Monday, November 28, 2005, and hand-wrote "no prior application for the same or similar relief had been made" on his supporting affidavit. According to court records, Monday November 28, 2005 was listed as the resubmit date. Plaintiff's attorney learned later that the order to show cause was not actually "sent up" for signature until Tuesday, November 29, 2005, and was not granted until Wednesday, November 30, 2005.

#### DISCUSSION

Defendant cross-moves for vacatur of the Order of Attachment on two grounds; to wit: untimeliness and lack of standing. As to the latter, Plaintiff's president explains that Voice Solutions, Inc., the payor of the embezzled checks, ceased operations in August of 2004, and that all employees of Voice Solutions, Inc. thereafter became employees of the Plaintiff. In addition, all accounts, payable and receivable, of Voice Solutions Inc. became assets or liabilities of the Plaintiff. Under these circumstances, Bello's standing challenge must be rejected.

As to untimeliness, Bello correctly cites CPLR 6211(b) for the requirement that Plaintiff must "move" to confirm the *ex parte* Order of Attachment within five days after levy. Here, because the fifth day after levy was Saturday, November 26, 2005, Plaintiff was required to "move" by the next succeeding business day, Monday November 28, 2005 (General Construction Law §25-a).

While the CPLR contains no definition of the term “move,” it does expressly state that a motion on notice is made when a notice of the motion or an order to show cause is served. CPLR 2211. See, Cespedes v City of New York, 172 A.D. 2d 640 (2<sup>nd</sup> Dept. 1991); and Greenfield v Philles Records, Inc., 160 A.D. 2d 458 (1<sup>st</sup> Dept. 1990). Furthermore, in explaining the requirement of five days within which to “move” pursuant to CPLR 6211(b), Professor Siegel states “all the Plaintiff has to do is ‘move’ within the applicable period, ie., serve the motion papers as directed by the court.” Siegel, *New York Practice*, § 316, p. 506 (4<sup>th</sup> Ed.). See also, McLaughlin, *Practice Commentaries*, McKinney’s Cons. Laws of NY, Book 7B, CPLR C6211:4, 2006 Pocket Part, p. 37.

Delivery of an order to show cause to the courthouse for signature is not the equivalent of making a motion. Quality Ford of Mt. Vernon, Inc. v. Metro Auto Leasing, Inc., 172 Misc.2d 635, 639-40 (Sup. Ct., Westchester Co.1997). Service of the order to show cause establishes compliance with CPLR 6211(b), even if the order to show cause is later returned by the clerk of the court for procedural improprieties. Noto v. Holle, 160 A.D. 2d 918, 920 (2<sup>nd</sup> Dept. 1990). Certainly, had counsel conveyed the urgency of having its order to show cause signed and served by Monday, November 28, 2005, there is no doubt but that the Motion Clerk would have promptly accommodated Plaintiff. Quality Ford of Mt. Vernon v. Metro Auto Leasing, Inc., *supra* at 640. No such request was made.

Plaintiff did not serve the order to show cause herein by Monday, November 28, 2005. Plaintiff’s insistence that it took all possible steps to ensure a timely “filing” of the

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order to show cause does not suffice because “filing” is not the equivalent of “moving” for the purposes of CPLR 6211(b).

Failure to make a timely motion to confirm is fatal under CPLR 6211(b). Eisenberg v. Citation-Langley Corp., 92 A.D.2d 795 (1<sup>st</sup> Dept. 1983). The court has no discretion to increase the statutory maximum of five days. Thadford Realty Co. v. L.V. Income Properties Corp., 101 A.D. 2d 814 (2<sup>nd</sup> Dept. 1984). Thus, Court has no choice but to deny Plaintiff’s motion to confirm as untimely and grant Defendant’s cross-motion for an Order vacating the Order of Attachment.

Defendant further requests that the undertaking posted by Plaintiff be given to her pursuant to CPLR 6212(b) and the Order of Attachment granted by Hon. Robert Roberto on November 3, 2005. As a hearing is necessary to determine what damages, if any, were sustained by Bello as a result of the levy (see, Noto v. Holle supra), the Court refers the matter of Bello’s claim of damages arising from vacatur of the Order of Attachment to the trial of this action. See gen’lly, Sturgis v. Wolfe, 148 A.D. 2d 770 (3<sup>rd</sup> Dept. 1989). Pending the outcome of the trial, the escrow shall remain place.

Accordingly, it is,

**ORDERED**, that Plaintiff’s motion, pursuant to CPLR 6211(b), for an Order confirming the Order of Attachment entered November 3, 2005 is **denied**; and it is further,

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**ORDERED**, that Defendant's cross-motion, pursuant to CPLR 6223, for an Order vacating the Order of Attachment entered November 3, 2005, is **granted**, and it is further,

**ORDERED**, that Defendant's further request, pursuant to CPLR 6212(b), for an Order directing Plaintiff to pay all costs and damages, including reasonable attorneys' fees, sustained by Defendant by reason of the Order of Attachment, is **granted** to the extent that it is referred to the trial of this matter.

This constitutes the decision and Order of the Court.

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HON. LEONARD B. AUSTIN, J.S.C.

Dated: Mineola, N.Y.  
March 24, 2006