

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - November 12, 2025

COLLEEN D. DUFFY, J.P.
DEBORAH A. DOWLING
BARRY E. WARHIT
SUSAN QUIRK, JJ.

2021-07659
2022-00446

DECISION & ORDER

Ronald A. Nimkoff, appellant-respondent,
v Nancy Waldbaum, etc., respondents-appellants;
Stempel, Catterson, LoFrumento, Carlson &
Biondo, LLP, nonparty-respondent.

(Index No. 636/19)

Ronald A. Nimkoff, Syosset, NY, appellant-respondent pro se.

Katsky Korins LLP, New York, NY (Adrienne B. Koch, David L. Katsky, and Benjamin Cohen of counsel), for respondent-appellant Nancy Waldbaum.

Jaspan Schlesinger LLP, Garden City, NY (Steven R. Schlesinger and Rachel L. Patrick of counsel), for respondent-appellant Ilana Joy Waldbaum, sued herein as Ilana Joy Nimkoff.

In an action, inter alia, to recover damages for malicious prosecution and defamation, the plaintiff appeals, the defendant Nancy Waldbaum cross-appeals, and the defendant Ilana Joy Waldbaum, sued herein as Ilana Joy Nimkoff, separately cross-appeals from (1) an order of the Supreme Court, Nassau County (James P. McCormack, J.), entered August 30, 2021, and (2) an order of the same court entered November 29, 2021. The order entered August 30, 2021, insofar as appealed from, sua sponte, directed that the plaintiff would be precluded at trial from arguing that he lacked the requisite intent to violate Judiciary Law § 487 due to his reliance on advice from nonparty Stempel, Catterson, LoFrumento, Carlson & Biondo, LLP. The order entered August 30, 2021, insofar as cross-appealed from, granted the motion of nonparty Stempel, Catterson, LoFrumento, Carlson & Biondo, LLP, joined by the plaintiff, pursuant to CPLR 3013 for a protective order and pursuant to CPLR 2304 to quash certain subpoenas. The order entered November 29,

2021, insofar as appealed from, granted the defendants' cross-motion pursuant to CPLR 3126 to strike the complaint and denied, as academic, the plaintiff's motion to modify two orders of the same court (Sharon M.J. Gianelli, J.), both entered September 4, 2020. The order entered November 29, 2021, insofar as cross-appealed from by the defendant Nancy Waldbaum, granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss the counterclaim of that defendant and denied, as academic, those branches of the defendants' cross-motion which were to strike certain portions of the plaintiff's motion to modify two orders of the same court (Sharon M.J. Gianelli, J.), both entered September 4, 2020, and to prohibit the plaintiff from attaching, quoting, or making any reference to material that was subject to Domestic Relations Law § 235 or to any sealing order without leave of the court. The order entered November 29, 2021, insofar as cross-appealed from by the defendant Ilana Joy Waldbaum, sued herein as Ilana Joy Nimkoff, granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss the counterclaims of that defendant and denied, as academic, those branches of the defendants' cross-motion which were to strike certain portions of the plaintiff's motion to modify two orders of the same court (Sharon M.J. Gianelli, J.), both entered September 4, 2020, and to prohibit the plaintiff from attaching, quoting, or making any reference to material that was subject to Domestic Relations Law § 235 or to any sealing order without leave of the court.

ORDERED that the appeal from so much of the order entered August 30, 2021, as, sua sponte, directed that the plaintiff would be precluded at trial from arguing that he lacked the requisite intent to violate Judiciary Law § 487 due to his reliance on advice from nonparty Stempel, Catterson, LoFrumento, Carlson, Biondo, LLP, is dismissed, as no appeal lies as of right from a portion of an order that does not decide a motion made on notice (*see* CPLR 5701[a]), and leave to appeal has not been granted; and it is further,

ORDERED that the cross-appeals from the order entered August 30, 2021, are dismissed as academic in light of our determination on the appeal and cross-appeals from the order entered November 29, 2021; and it is further,

ORDERED that the order entered November 29, 2021, is modified, on the law, by deleting the provision thereof denying, as academic, those branches of the defendants' cross-motion which were to strike certain portions of the plaintiff's motion to modify the orders entered September 4, 2020, and to prohibit the plaintiff from attaching, quoting, or making any reference to material that was subject to Domestic Relations Law § 235 or to any sealing order without leave of the court, and substituting therefor a provision granting those branches of the cross-motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendant Nancy Waldbaum and the defendant Ilana Joy Waldbaum, sued herein as Ilana Joy Nimkoff, payable by the plaintiff.

In June 2019, the plaintiff commenced this action against his former wife, the defendant Nancy Waldbaum, and their daughter, the defendant Ilana Joy Waldbaum, sued herein as Ilana Joy Nimkoff (hereinafter Ilana Waldbaum). The plaintiff commenced this action by filing a summons with notice. The plaintiff served the summons with notice upon the defendants in January 2020 and served the complaint in March 2020. He asserted causes of action, inter alia, to recover

damages for malicious prosecution and defamation, alleging that the defendants filed a false police report against him. The defendants each interposed an answer and each asserted a counterclaim to recover damages for a violation of Judiciary Law § 487, alleging that the plaintiff, an attorney, engaged in a deceitful act by using therapy sessions with the defendants to gain information to use in this action without informing the defendants that he had commenced this action. Ilana Waldbaum also asserted a counterclaim for an award of counsel fees as child support.

On August 25, 2020, the Supreme Court issued a discovery order (hereinafter the August 2020 discovery order) directing the plaintiff to act diligently to convert this action to an electronically filed action no later than 30 days from the date of the order. The court further directed that the plaintiff would have 30 days from the date this action was converted to move for a protective order with respect to the outstanding discovery demands and, should the plaintiff fail to timely move for a protective order, the plaintiff's full and complete responses, in proper form, must be served upon each defendant within 45 days of the conversion.

In November 2020, the plaintiff moved, among other things, pursuant to CPLR 3211(a) to dismiss the counterclaims. The defendants separately opposed. The plaintiff then also moved to modify the August 2020 discovery order and an additional order dated August 25, 2020, which were both issued, sua sponte, by the court and entered September 4, 2020. The defendants opposed and cross-moved, inter alia, to strike material that was subject to Domestic Relations Law § 235 or to any sealing order, including a portion of a confidential report and a portion of a hearing transcript, that were attached as exhibits to the plaintiff's motion to modify the orders entered September 4, 2020, and to prohibit the plaintiff from attaching, quoting, or making any reference to material that was subject to Domestic Relations Law § 235 or to any sealing order in future submissions without leave of the court. The plaintiff opposed.

In June 2021, the defendants cross-moved pursuant to CPLR 3126 to strike the complaint as a sanction for the plaintiff's failure to comply with the August 2020 discovery order. The plaintiff opposed.

In July 2021, nonparty Stempel, Catterson, LoFrumento, Carlson & Biondo, LLP, former counsel to the plaintiff, moved pursuant to CPLR 3103 for a protective order and pursuant to CPLR 2304 to quash subpoenas served by Ilana Waldbaum. The plaintiff joined the motion, and the defendants opposed.

In an order entered August 30, 2021, the Supreme Court, among other things, granted the motion of the plaintiff's former counsel. Thereafter, in an order entered November 29, 2021, the court granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss the defendants' counterclaims and granted the defendants' cross-motion pursuant to CPLR 3126 to strike the complaint. The court also denied, as academic, the plaintiff's motion to modify the August 2020 discovery order and the other order entered September 4, 2020, and the defendants' cross-motion, inter alia, to strike certain portions of the plaintiff's motion to modify those two orders. The plaintiff appeals, and the defendants separately cross-appeal.

The Supreme Court did not improvidently exercise its discretion in granting the

defendants' cross-motion pursuant to CPLR 3126 to strike the complaint as a sanction for the plaintiff's failure to obey the August 2020 discovery order. The plaintiff failed to convert this case to an electronically filed action, as directed by that order, failed to timely move for a protective order, and failed to serve full and complete responses to the defendants' outstanding discovery demands. The willful or contumacious character of the plaintiff's conduct can be inferred from his ongoing failure to comply with the court's directives, coupled with his lack of an adequate excuse (*see Youkelsone v Pannagl*, 238 AD3d 1199, 1200). Contrary to the plaintiff's contention, the record reflects that he was aware of the court's directives in the August 2020 discovery order. Moreover, an affirmation of good faith of counsel for Nancy Waldbaum was sufficient to satisfy the requirements of 22 NYCRR 202.7(c), as it set forth the time, place, and nature of the consultations and the issues discussed and any resolutions (*see Adler v Oxford Health Plans [NY], Inc.*, 216 AD3d 710, 711-712).

Contrary to the plaintiff's contention, the discovery deadlines were not tolled by the COVID-related executive orders issued by the former Governor of the State of New York. Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 202.8), as extended by subsequent executive orders, tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state . . . or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof" from March 20, 2020, until November 3, 2020. Executive Order 202.8 is inapplicable here (*see Little v Steelcase, Inc.*, 206 AD3d 1597, 1600).

Further, under the applicable part rules, the filing of the plaintiff's motion, among other things, pursuant to CPLR 3211(a) to dismiss the counterclaims did not toll the plaintiff's obligations under the August 2020 discovery order.

The Supreme Court properly granted that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss the defendants' counterclaims to recover damages for a violation of Judiciary Law § 487. While Judiciary Law § 487 may apply to an attorney acting pro se (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457), the statute applies only to actions taken by that party acting in their capacity as an attorney (*see Altman v DiPreta*, 204 AD3d 965, 969; *Pinkesz Mut. Holdings, LLC v Pinkesz*, 198 AD3d 693, 698). Here, the plaintiff was not acting as an attorney in connection with the therapy sessions at which the deceitful conduct allegedly occurred, and that conduct is therefore not subject to Judiciary Law § 487.

The Supreme Court did not err in granting that branch of the plaintiff's motion which was pursuant to CPLR 3211(a) to dismiss Ilana Waldbaum's counterclaim for counsel fees as child support. That counterclaim failed to state a cause of action for child support as defined in Domestic Relations Law § 236(B)(1)(f).

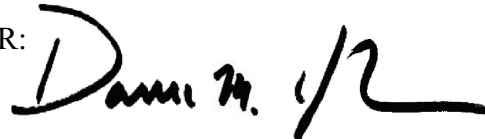
The Supreme Court should have granted those branches of the defendants' cross-motion which were to prohibit the plaintiff from attaching, quoting, or making any reference to material that was subject to Domestic Relations Law § 235 or to any sealing order, including but not limited to, the portion of the confidential report and the portion of the hearing transcript that were attached as exhibits to the plaintiff's motion to modify the August 2020 discovery order and the other

order entered September 4, 2020, and to strike those exhibits. Because the documents submitted by the plaintiff on his motion to modify the August 2020 discovery order and the other order entered September 4, 2020, remain on the public docket, despite the denial of the plaintiff's motion, and because the parties might engage in additional motion practice in this action, those branches of the defendants' cross-motion are not academic (*see Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 578). 22 NYCRR 202.5(e)(1) provides that, except in a matrimonial action, or a proceeding in Surrogate's Court, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information includes any of the documents or testimony in a matrimonial action protected by Domestic Relations Law § 235 or evidence sealed by the court in such an action that are attached as exhibits or referenced in the papers filed in any other civil action. The exhibits to the plaintiff's motion to modify the August 2020 discovery order and the other order entered September 4, 2020, containing the portion of the confidential report and the portion of the hearing transcript, constitute confidential personal information within the meaning of 22 NYCRR 202.5(e)(1)(v).

The plaintiff's remaining contentions either are without merit or need not be addressed in light of our determination.

DUFFY, J.P., DOWLING, WARHIT and QUIRK, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a large, stylized flourish or checkmark.

Darrell M. Joseph
Clerk of the Court