

Axman v Axman

2006 NY Slip Op 30713(U)

June 16, 2006

Supreme Court, New York County

Docket Number: 103917/06

Judge: Faviola A. Soto

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

7.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

STEVEN AXMAN,
Plaintiff,

Index No. 103917/06

-against-

LESLIE AXMAN,
Defendant.

DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

Defendant moves for an order of attachment; plaintiff opposes and requests that the temporary restraining order granted in the order to show cause and continued at oral argument on May 25, 2006 be lifted. The court notes that this action and motion were randomly reassigned to this non-commercial IAS Part pursuant to the order of Justice Bernard J. Fried, the court accepted in the exercise of its discretion the reply submitted at oral argument, and in reaching this decision, the court has not considered the arguments set forth in plaintiff's letter of June 2, 2006 or the affidavit that accompanies the letter.

In this action, by summons and verified complaint dated March 22, 2006, plaintiff asserts two causes of action against defendant, his sister. He alleges that she wrongfully and without authority opened his sealed box and converted and refused to return to him its contents, valuable memorabilia and other items, with a value in excess of \$100,000, and that she owes him \$85,860 with interest as a result of loans, advances and other financial accommodations he made to her.

FILED
JUN 23 2006
COUNTY CLERK'S OFFICE
NEW YORK

By verified answer and counterclaims (amended) dated May 1, 2006, defendant denies the allegations and asserts three counterclaims. Two are for breach of contract for monies due

and owing to her from plaintiff on promissory notes, one for \$800,000, of which \$710,000 with interest remains due and owing despite demand, less \$79,500 paid to date, and one for \$150,000.00, plus interest.

She moves by order to show cause for a prejudgment attachment of all real and personal property, including a house and an insurance policy, in which plaintiff has an interest, and to restrain all property transfers and any removal of funds to secure repayment of \$860,000 that she loaned to plaintiff, her brother.

She asserts that plaintiff executed two written loan re-payment agreements, induced her to loan him \$860,000, made only minor re-payments totaling \$79,500 and failed and refused to re-pay her the large remaining balance despite his written promise to do so and due demand. She further asserts that plaintiff instituted this frivolous action for the return of minor monies only to intimidate her following her demand for repayment, and that plaintiff is seeking to defraud his wife or other creditor(s).

She asserts the attachment is necessary to prevent dissipation of plaintiff's assets that are needed to repay the loans, pointing to his upcoming transfer of his interest in a valuable house to his wife (as advised by the attorneys representing him in the divorce) and that plaintiff advised her in writing he took the loan monies and placed them in his life insurance policy.

Plaintiff opposes, arguing that the motion is based on defendant's wholly unsupported untrue allegations and therefore defendant failed to meet her burden for an order of attachment. Additionally, he argues that defendant has failed to show entitlement to the temporary restraining order, which he requests be vacated.

He contests defendant's portrayal of the facts and the underlying agreements, and asserts

his version, including that it is defendant, not he, who is in the wrong. He asserts that he is not seeking to defraud his wife or any other creditor. He argues that as the monies sought by his sister are not yet due, and therefore there is no basis for the counterclaims. As to the specific requests, plaintiff argues that he is not trying to secrete the assets of the house in Quogue, and that the life insurance policy defendant seeks to attach was purchased over twenty years ago, he is the insured, and his ex-wife is the sole beneficiary and the life insurance policy is therefore beyond the reach of plaintiff's creditors and not subject to attachment.

Defendant replies by way of her affidavit and that of her and plaintiff's father, and argues that she has demonstrated a need for the attachment.

Defendant asserts: her parents refused to lend plaintiff money due to his history of disregard for their money and for his family and the slim amount of equity in the homes plaintiff offered as collateral did not equal the money he wanted to borrow; plaintiff makes unfounded and false accusations against her; plaintiff fails to assert that he has sufficient unencumbered assets to pay a judgment and he fails to tell the court that the house in Quogue is encumbered by two mortgages, including a second mortgage for \$200,000 taken out a few months ago which according to what plaintiff told her wiped out the remaining equity in the house.

Defendant further asserts that: plaintiff failed to specifically deny certain of her assertions or to submit corroborating documents for his claims; his claims of her misconduct are wrong; plaintiff submitted substitute promissory notes; the precariousness of plaintiff's financial status is demonstrated by his own statements to her; plaintiff is quickly liquidating assets to support himself and his business; her seeking to attach the proceeds under the life insurance policy has nothing to do with any death benefit to any beneficiaries but because when plaintiff borrowed

\$860,000 from her he placed the money in the investment portion of the policy and reduced his loan therefrom, although has plaintiff failed to provide the court with a copy of the policy there is no way to ascertain whether the amount of the investment account would even affect the death benefit.

For an order of attachment, defendant must demonstrate that plaintiff, “with intent to defraud creditors or frustrate the enforcement of a judgment that might be rendered” in defendant’s favor, “has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts”. CPLR Section 6201 (3). Attachment is “a harsh remedy and the statute is strictly construed in favor of those against whom it may be applied”. P.T. Wanderer Associates, Inc. v. Talcott Communications, Corp. 111 A.D.2d 55, 56; Glazer v. Nahman, 234 A.D.2d 105. Even if the statutory grounds are met, the granting of a prejudgment attachment is discretionary. Sylmark Holdings Limited v. Silicone Zone International Limited, 5 Misc.3d 285, 301.

“[R]emoval, assignment or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits (citation omitted)”. Abacus Federal Savings Bank v. Lim, 8 A.D.3d 12, 13. Allegations raising a suspicion of fraudulent intent are not enough, it must appear that fraudulent intent really existed in plaintiff’s mind. Eaton Factors Co. v. Double Eagle Corp., 17 A.D.2d 135, 136.

“Fraud is not lightly inferred, and the moving papers must contain evidentiary facts-- as opposed to conclusions-- proving the fraud”. McLaughlin, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 6201:4. Fraud is “never presumed by a mere showing of

the liquidation or disposal by a debtor of its business asserts" Rosenthal v. Rochester Button Company, Inc., 148 A.D.2d 375, 376.

Defendant has failed to meet this burden. First, defendant has not demonstrated by evidentiary facts that plaintiff is assigning, disposing, encumbering or secreting property, or is about to do so. And, even were the court to find that defendant has so demonstrated, and the court does not so found, defendant has failed to prove fraudulent intent. The court also vacates the temporary restraining order, defendant having failed to demonstrate entitlement to this relief.

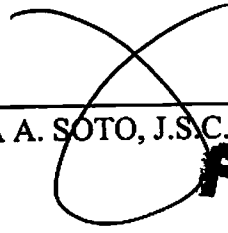
Accordingly, it is

ORDERED that defendant's motion for an order of attachment is denied; and it is further

ORDERED that the temporary restraining order preventing plaintiff from selling, transferring or alienating any interest he has in any real property or personal property including a life insurance policy is vacated; and it is further

ORDERED that a preliminary conference is scheduled for June 29, 2006, promptly at 9:30 a.m.; only counsel who are familiar with the action and fully authorized shall appear.

Dated: New York, New York
June 16, 2006



FAVIOLA A. SOTO, J.S.C.
FILED
JUN 23 2006
COUNTY CLERK'S OFFICE
NEW YORK

Copies mailed