

**Patrick Ryan's Modern Press v Bowler**

2009 NY Slip Op 31658(U)

July 25, 2009

Supreme Court, Albany County

Docket Number: 3066/04

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

PATRICK RYAN'S MODERN PRESS,

Plaintiff,

**DECISION and ORDER**

**RJI NO.:01-05-81217**

**INDEX NO.: 3066-04**

-against-

DWIGHT BOWLER,

Defendant.

Supreme Court Albany County All Purpose Term, July 8, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

McNamee, Lochner, Titus & Williams, PC  
Kenneth L. Gellhaus, Esq.  
*Attorneys for Plaintiff*  
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Joshua A. Sabo, Esq.  
*Attorney for Defendant*  
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**TERESI, J.:**

On June 21, 2006, this action was tried before this court, resulting in a judgment against Defendant in favor of Plaintiff for Fifteen Thousand Three Hundred and Thirty Nine dollars 51/100 (\$15,339.51), with interest, costs and disbursements. Plaintiff has engaged in post judgment enforcement proceedings, which previously resulted in this Court's finding Defendant in contempt, with the ability to purge such finding. Defendant now moves for an order modifying three restraining notices served by Plaintiff on non-parties and an order purging this Court's finding of contempt. Plaintiff opposes the motion and seeks a finding that the Defendant

did not purge his contempt. Plaintiff also moves for a turn over order pursuant to CPLR §5225 and an installment payment order pursuant to CPLR §5226. Defendant opposes plaintiff's motion. Because Plaintiff failed to properly serve its motion, it is denied. Additionally, because two of plaintiff's restraining notices are not authorized under the CPLR they are vacated, the third restraining notice is modified, and Defendant's motion to purge his contempt is denied.

Considering Plaintiff's motion first, CPLR §§5225 and 5226 use identical language in setting forth their respective "additional service" requirements. Both state that "[n]otice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." (CPLR §§5225[a] and 5226). Plaintiff's affidavit of service for its motion alleges only that it was mailed to Defendant's counsel. Plaintiff makes no allegation that the "additional service" requirements were complied with. Moreover, Defendant denies receiving the motion papers in accord with the "additional service" procedures.

Accordingly, Plaintiff's motion for orders pursuant to CPLR §§5225 and 5226, is denied.

Turning to Defendant's motion to modify the restraining notices served by Plaintiff, a "restraining notice... may be served upon any person, except the employer of a judgment debtor... where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor." (CPLR §5222). Not one of the terms "employer... wages or salary" are further defined or restricted in this subsection of the CPLR. However, reading Article 52 of the CPLR as a whole, as we must (Staruch v. New York Telephone Co., 277 AD2d 830 [3d Dept. 2000]), CPLR §5231 and 5205(d)(2) provide guidance as to the meaning of CPLR §5222's "employer... wages [and] salary" terms.

Like the above CPLR §5222 provision at issue, CPLR §5205(d)(2) also focuses upon the

protection of a judgment debtor's earned income for work performed. Relatedly, while CPLR §5205 protects a judgment debtor's income, CPLR §5231 sets forth a simplified procedure for a judgment creditor to levy 10% of that judgment debtor's income without leave of court. Read as a whole CPLR §§ 5205, 5222 and 5231, all focus on the earned income of a judgment debtor, and demonstrate that "employer... wages [and] salary" are to be accorded a broad interpretation.

CPLR 5205(d)(2) provides, in relevant part, that "ninety per cent of the earnings of the judgment debtor for his personal services rendered..." is "exempt from application to the satisfaction of a money judgment". Additionally, CPLR §5231(b) provides, in relevant part, that "[w]here a judgment debtor is receiving or will receive money from any source, an income execution for installments therefrom of not more than ten percent thereof may be issued." CPLR §5231(c) defines earnings as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise". These closely related CPLR sections, 5231 and 5205, broadly define a debtor's income, as money received from "any source", whether "denominated as wages, salary... or otherwise". (CPLR §§5231[c] and 5205[d][2]). Nor is their application restricted to only W2 employees, rather their scope expands to income earned for "personal services rendered" by the debtor. (CPLR §§5231[b]).

Considering CPLR Article 52 as a whole, this same expansive view of a debtor's employer and wages applies equally to CPLR §5222. With no specific statutory restriction on who is considered a CPLR §5222 "employer" or what constitutes "wages or salary", its exception applies to money the debtor receives from "any source" for "personal services rendered".

Here, two of the three restraining notices served by plaintiff, were on entities the Defendant provides with "personal services". First, Plaintiff served Rowland Street Associates,

LLC (hereinafter “Rowland Street”) with a restraining notice. Plaintiff served Rowland Street by personally serving Defendant, as its duly authorized agent. Plaintiff knew, by Defendant’s deposition testimony, that Defendant manages an apartment complex for Rowland Street and is compensated by payment of a percentage of the apartment complex’s gross rents. The restraining notice itself alleges the existence of a “contract for personal services”. As such, pursuant to CPLR §5222, the restraining notice Plaintiff served on Rowland Street has no binding effect.

Similarly, Plaintiff also served Stillwater Hydro Associates, LLC (hereinafter “Stillwater”) with a restraining notice, by serving Defendant as its duly authorized agent. Again, Plaintiff knew that Defendant’s compensation from Stillwater was due to Defendant’s management of Stillwater’s hydroelectric plant. Plaintiff demonstrates such knowledge by alleging, in the restraining notice itself, the existence of a “contract for personal services”. Because Stillwater compensates Defendant for these “personal services”, pursuant to CPLR §5222, the restraining notice served on Stillwater is not binding.

Contrary to Plaintiff’s arguments, the protections and procedures of CPLR §§5231 and 5205, are not limited to W2 employees. Nor are the “self employed” exempt from the protections and procedures of CPLR §5222. Accordingly, because “CPLR §5222 prohibits a judgment creditor from serving a restraining notice upon the judgment debtor’s employer where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor” the restraining notices served on Rowland Street and Stillwater have no “binding effect” and are vacated. (Balanoff v. Niosi, 16 AD3d 53, 62-63 [2d Dept. 2005]).

Defendant has demonstrated, however, his entitlement to modifying the third restraining notice at issue. This third restraining notice was again served by Plaintiff on Double M

Properties, LLC (hereinafter “Double M”) by delivering it to Defendant, its agent. Unlike the above two entities, Double M is not Defendant’s employer. It is uncontested on this record that Defendant funnels the money he earns from Rowland Street, Stillwater and other management income into a bank account owned by Double M. As Defendant testified at his deposition, Double M’s purpose is to “collect monies that [he] receive[s] for managing various assets.” The Double M account therefore contains, Defendant’s exempt “earnings”. (CPLR §5205[d][2]). As such, while CPLR §5222(a)’s prohibition of restraining an “employer” is not applicable, CPLR §5205(d)(2) makes 90% of the Defendant’s earnings held by Double M “exempt from application to the satisfaction of a money judgment”. Accordingly, the restraining notice Plaintiff served upon Double M is vacated and modified to restrain only 10% of the monies held by Double M.

Lastly, Defendant failed to demonstrate his entitlement to purge this Court’s contempt finding. On February 24, 2009, this Court’s Decision and Order found Defendant in contempt but provided him with an opportunity to purge the contempt if he “fully complie[d] with plaintiff’s three subpoenas”. Defendant failed to demonstrate full compliance. First, although Defendant was subpoenaed to provide his 2008 tax returns, and admits that he filed them in April 2009, he has still not provided same to Plaintiff. Moreover, although Defendant did appear for questioning pursuant to Plaintiff’s subpoena, he failed to add to the deposition testimony items he had agreed to provide at his deposition. Such behavior constitutes less than full compliance, and Defendant’s contempt is not purged.

Accordingly, the fine previously set, of \$250.00 plus Plaintiff’s costs and expenses of its bringing this motion, shall now be due and payable. Said fine will be paid to Plaintiff, through

this Court pursuant to §773 of the Judiciary Law. Plaintiff shall submit to this Court an affidavit demonstrating its costs and expenses (including attorney's fees) in obtaining Defendant's compliance herein, on notice to Defendant. (Ahmad v. Naviwala, 14 AD3d 819 [3d Dept. 2005]). The Defendant will then have ten (10) days, from the date of such submission's service on him, to submit opposition papers thereto. Upon submission of the above papers, the full fine imposed must be paid by Defendant within thirty (30) days of the date of the Decision and Order that sets the full fine amount.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 25, 2009  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated June 3, 2009; Affirmation of Joshua Sabo, dated June 3, 2009, with attached Exhibits "A" - "F", Affidavit of Dwight Bowler, dated May 19, 2009 .
2. Notice of Cross-Motion, dated July 1, 2009; Affirmation of Kenneth Gellhaus, dated July 1, 2009, with attached Exhibits "A" - "L".
3. Affirmation of Joshua Sabo, dated July 7, 2009, Affidavit of Dwight Bowler, dated July 7, 2009, with attached Exhibit "A".
4. Affirmation of Kenneth Gellhaus, dated July 15, 2009.