

Cordova v Bank of Am.

2009 NY Slip Op 31682(U)

July 13, 2009

Supreme Court, Suffolk County

Docket Number: 35432-2008

Judge: Sandra L. Sgroi

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002MotD
003MotD

Present:

Hon. SANDRA L. SGROI

Adj. Date: 7-2-09
Return Date: 5-21-09

BERTA Y. CORDOVA,

Plaintiff,

-against-

BANK OF AMERICA and JUAN A. CORDOVA,

Defendants.

YOUNG & YOUNG, LLP.
Attorneys for Plaintiff
863 Islip Avenue
Central Islip, New York 11722

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER,
LLP.
Attorneys for Defendant Bank of America
3 Gannett Drive
White Plains, New York 10604-3407

Upon the following papers numbered 1 to 64 read on these Motions: Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers 21-40; Affirmation and Affidavit in opposition and supporting papers 43-60; Reply Affirmation and supporting papers 63-64; Memorandum of Law 41-42; 61-62; it is,

ORDERED that the order to show cause of the Plaintiff for various relief is granted only to the extent the monies presently held by the Defendant Bank of America in an account or accounts in the name of the Defendant Judgment Debtor Juan A. Cordova and subject to the restraining notices served by the attorney for the Plaintiff are directed to be turned over to Young & Young, LLP. as Escrow agent of Plaintiff forthwith; and it is further

ORDERED that all other requests for relief by the Plaintiff are denied, and it is further

ORDERED that the cross motion of the Defendant Bank of America for dismissal of the Plaintiff's summons and complaint is denied; and it is further

ORDERED that this order does not, by its terms, vacate any valid restraining notices served by the Plaintiff; and it is further

ORDERED that this order does not reinstate any restraining notice that has expired due to the passing of the time period for the effectiveness of that restraining notice.

The Plaintiff has moved herein for an order directing that the Bank of America pay to the law firm of Young & Young, LLP., as an escrow agent for the Plaintiff, the sum of \$38,831.29, the amount presently on deposit with the Bank of America, together with the additional sum of \$15,771.35 plus interest, costs and disbursements, that the Bank of America provide an accounting to the Plaintiff of the exact amount of funds on deposit and that Plaintiffs be granted a default judgment against Juan Cordova. In response to this order to show cause, the Bank of America has provided the attorney for the Plaintiff with information concerning the bank accounts of Juan Cordova.

On or about October 14, 2004, the Plaintiff Berta Cordova commenced a divorce action against the Defendant Juan Cordova. Eventually, a money judgment in the amount of \$144,679.00 was entered by the Suffolk County Clerk against Juan Cordova on March 28, 2008. According to the affirmation from Patrick Young, Esq., the attorney for the Plaintiff in both the matrimonial action and the subsequent actions commenced to enforce the monetary judgment obtained in the matrimonial action, "a 'restraining notice to garnishee' ***was served by personal delivery upon BANK OF AMERICA ***on June 3, 2008****" and, on or about July 7, 2008, "an information subpoena was served upon BANK OF AMERICA via the mail." The attorney for the Plaintiff alleges that Bank of America has improperly released funds to Juan Cordova in violation of the restraining notice and that the Plaintiff has been damaged by that release of funds.

First, the motion of the Plaintiff for a default judgment against the Defendant Juan A. Cordova is granted only to the extent that the funds of the Judgment Debtor Juan Cordova remaining in bank accounts with Bank of America shall be paid over to the attorney for the Plaintiff Young & Young, LLP. as Escrow agent of Plaintiff. In order to obtain money from a third person, as is the situation herein, the Plaintiff must commence a special proceeding. That has been done and the Court has no opposition from any party herein against the turnover of the monies presently in Bank of America's possession (see, *CPLR* § 103).

The Supreme Court previously granted the request for a money judgment against Juan Cordova in a matrimonial action. An affidavit of service for the summons and complaint in this action indicates that Juan Cordova has been properly served in this action and that this Court has jurisdiction. That affidavit of service is attached to the order to show cause (#002). In addition to the service of the summons and complaint upon Cordova in this action, this order to show cause was delivered by personal delivery to the judgment debtor on March 17, 2009, and that affidavit of service also is attached to the order to show cause (#002). Cordova has not opposed the turnover of funds and the motion of the Plaintiff for a turnover of monies is granted to the extent that the Bank of America holds funds that have been restrained pursuant to the notice served by the Plaintiff's attorney in the name of Juan A. Cordova.

The Bank of America has opposed the relief requested in this order to show cause of the Plaintiff for a

judgment against it in the amount of \$15,771.35(#002) and the Bank has cross moved to dismiss the action of the Plaintiff to the extent that the Plaintiff seeks a judgment against it (#003). While the Bank of America admits that a restraining notice prepared by the office of Plaintiff's attorney was served upon the Islip branch of Bank of America on June 3, 2008, it alleges that this restraining notice did not have any identifying information regarding the judgment debtor other than providing his name. According to the Bank of America, the restraining notice did not contain a social security number, an address or an account number for Juan Cordova.

The Bank of America alleges that on or about June 4, 2008, it returned the restraining notice to the attorney for Berta Cordova with a form requesting additional information that would enable the Defendant Bank to properly identify the correct judgment debtor and restrain the proper bank accounts. The attorney for the Bank alleges that the attorney for Berta Cordova did not respond to this request for additional information immediately and that the information necessary to restrict withdrawals was received by the Bank of America on June 26, 2008 and June 27, 2008. According to the Bank, that delay in providing this information which was required to identify the correct depositor, is the direct cause of the failure to freeze Juan Cordova's bank accounts and that any funds that were withdrawn from the bank accounts of Juan Cordova is traceable to and caused by that delay.

On October 16, 2008, the Plaintiff moved by Order to Show Cause (#001) for an order requesting almost the same relief requested in this application. The Court denied that prior application by order dated November 19, 2008. The reply that the attorney for the Plaintiff attempted to submit on that application was untimely, it was received in chambers after a decision had been issued and it was not considered when the Court issued that decision. Therefore, on the previous application, this Court had an affidavit from the Bank alleging that the restraining notice did not contain identifying information for Juan Cordova and it had no affirmation or affidavit disputing that allegation.

While the Court mentioned the problem with the information in the June 4, 2008 restraining notice served on the Bank, that order to show cause (#001) was denied because it was not properly served pursuant to its terms. According to the treatise *Carmody-Wait 2d*, (2 *Carmody-Wait 2d* § 8:55), "(o)rders to show cause require strict compliance with their terms, and thus, the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with" (see generally, *Hennessey v. DiCarlo*, 21 A.D.3d 505, 800 N.Y.S.2d 576, leave to appeal denied, 5 N.Y.3d 706, 801 N.Y.S.2d 799, 835 N.E.2d 659).

A copy of the decision on motion sequence #001 was served by the attorneys for the Bank of America on the attorney for the Plaintiff on or about December 5, 2008. The attorney for the Plaintiff did not reargue that decision and has not sought to reargue that decision in this order to show cause although the same relief is requested by this application. The order to show cause now before this Court for consideration was submitted by the attorney for the Plaintiff to this Court for signature and this order to show cause was signed on February 26, 2009, with an initial return date scheduled for March 21, 2009. When the Plaintiff was unable to affect service within the time directed in the order to show cause, it was re-dated and the service date in the order to show cause was changed to April 2, 2009. The Plaintiff's attorney did not object to the new return date of May 21, 2009.

On this application, the Plaintiff once again requests that the monies that the Bank released to the judgment

debt or improperly be paid by the Bank to the attorney for the Plaintiff. According to the Bank of America's attorney, the account central data base of the Bank of America listed numerous individuals with the same or a similar name as the judgment debtor Juan Cordova. As a result, the attorney for the Bank alleges that personnel of the Bank could not ascertain the particular bank account that should be restrained from the limited information in the first restraining notice received from Berta Cordova's attorney.

The Bank of America's papers contain an affidavit from Kathleen Arcuri, a Vice President and Operations Manager-Garnishments of Defendant, Bank of America, N.A. According to her affidavits, submitted both on this application (#002) and the previous order to show cause (#001), the subject restraining notice prepared by the office of Plaintiff's attorney was served upon the Islip branch of Bank of America on June 3, 2008, and that restraining notice, in accordance with Bank of America's policy, was immediately forwarded to the division of the Bank involved with reviewing restraining notices. Arcuri alleges that the Plaintiff's restraining notice was reviewed on June 4, 2008, and that the Bank of America could not act upon the restraining notice because it was lacking an address and social security number for Juan Cordova.

The attorney for the Plaintiff, in his reply affirmation, alleges that the restraining notice served by in hand delivery to the Bank of America did contain Juan Cordova's social security number, address and date of birth and that "through sheer negligence, defendant sent out a form letter requesting additional information which had already been provided in the restraining notice." (Affirmation of Patrick Young, Esq.).

While the Court in its previous decision did discuss the facts of this case, the relief requested by the Plaintiff in the previous order to show cause was denied because of improper service of that order to show cause. The remaining discussion was dicta that resulted from an improper request to dismiss the Plaintiff's action that was contained in the answering papers submitted by Bank of America. Therefore, the Court will address both the request to turn over the funds presently in the possession of Bank of America and the failure of Bank of America to restrain certain funds between the approximately three week time period when the Bank of America received the restraining notice that it alleges was defective and when it obtained the additional information from Plaintiff's attorney office fully identifying Juan Cordova, the judgment debtor.

The disobedience of a restraining notice may be a contempt of court and may be punished as such (see, *CPLR* 5251). However, civil contempt sanctions are not warranted unless a person has wilfully violated a clear and unequivocal mandate (see, *Moore v. Davidson*, 57 A.D.3d 862, 869 N.Y.S.2d 612; *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 579, 439 N.Y.S.2d 316, 421 N.E.2d 808; see also *Nardone v. Long Is. Trust Co.*, 40 A.D.2d 697, 336 N.Y.S.2d 325). Here, it is not alleged that the actions of the employees of Bank of America were wilful and contempt is not sought.

Contempt is not the exclusive remedy for the judgment creditor when a restraining notice is disobeyed and an action may be commenced for whatever money damages were sustained through the disobedience of the restraining notice (see, *Nardone v. Long Is. Trust Co.* supra; *Mazzuka v. Bank of North America*, 53 Misc.2d 1053, 280 N.Y.S.2d 495). The Plaintiff has commenced such an action herein.

While it may be actionable for a Bank to fail to restrain a debtor's account pursuant to a properly prepared restraining notice (see, *Accounts Receivable Solutions, Inc. v. Tompkins Trustco, Inc.*, 45 A.D.3d 612, 846 N.Y.S.2d 272), the failure to specify the debtor's account in the restraining notice frees the Bank both of

Cordova v. Bank of America and Cordova

Index No.35432-2008

Page 5

contempt charges and other possible civil liability (see, *Tri-Global etc. v. Richardson*, 25 A.D.3d 600, 807 N.Y.S.2d 638; see also, *Tri-Global Management Corp. v. Citibank, N.A.*, 39 A.D.3d 627, 833 N.Y.S.2d 233, 234; 179 Siegel's Practice Review 3, FAILURE OF CREDITOR P TO IDENTIFY ACCOUNT OF D AT BANK INSULATES BANK FROM CONTEMPT CHARGE FOR NOT FREEZING ACCOUNT, 2006).

Here, the Bank immediately contacted the attorney for the Plaintiff when it ascertained, properly or improperly, that it could not process the restraining notice. This is not a situation where the Bank's representatives misled the Plaintiff with regard to the effectiveness of the restraining notice dated June 4, 2008 (see, *River Seafoods, Inc. v. JP Morgan Chase Bank*, 19 A.D.3d 120, 796 N.Y.S.2d 71, appeal withdrawn 6 N.Y.3d 751, 810 N.Y.S.2d 419, 843 N.E.2d 1159). Under the facts, as alleged in these papers, the Court previously stated in dicta that there was no showing that the Defendant failed to act in commercially reasonable manner in releasing funds in the account. If the restraining notice contained the social security number and address of Juan Cordova, the Bank would have had a method of determining which accounts to restrain. In the papers before this Court now, the attorney for the Plaintiff alleges that his office served a properly prepared restraining notice on the Bank containing Juan Cordova's social security number and other identifying information on June 3, 2008.

Generally, the Bank is not liable for releasing funds between the time that it received the restraining notice and the time that it took the attorney for the Plaintiff to provide the additional information necessary for the Bank of America to identify the accounts of the judgment debtor, Juan A. Cordova (see, *Zemo Leasing Corp. v. Bank of New York*, 158 Misc.2d 991, 602 N.Y.S.2d 503). However, if the Bank did not restrain Juan Cordova's accounts when it had the requisite information, it could be civilly liable to the Plaintiff for the monies released from those accounts.

On these papers the Court is presented with a clear issue of fact. The Bank of America alleges that the restraining notice served by the attorney for the Plaintiff did not contain the information necessary to restrain the accounts of Juan Cordova and that the restraining notice attached to the papers was not the one received by the Bank. The attorney for the Plaintiff alleges that the restraining notice served was proper.

This litigation was commenced by a summons and complaint, and if the Plaintiff's attorney wishes to pursue this action for money damages against the Bank, he is directed to schedule this matter for a disclosure conference at which time the parties will schedule discovery.

Dated:

7/13/09


SANDRA L. SCROI, J. S. C.