

Zekry v Zekry

2011 NY Slip Op 31483(U)

June 2, 2011

Sup Ct, NY County

Docket Number: 102550/08

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAPLAN
HON. DEBORAH A. KAPLAN Justice

PART 20

ZERRY, NICOLE (AW)

INDEX NO. 102550/08

- v -

PINHAS ZERRY, ET AL.

MOTION DATE _____

MOTION SEQ. NO. 19

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION(S) AND CROSS-MOTION(S) DECIDED
IN ACCORDANCE WITH THE ANNEXED
DECISION/ORDER OF EVEN DATE.

FILED

JUN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/2/11

Deborah A. Kaplan
HON. DEBORAH A. KAPLAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 2nd day of June, 2011

PRESENT: HON. DEBORAH A. KAPLAN

-----X

NICOLE LAWI ZEKRY,

Plaintiff,

-against-

Decision and Order
Motion Seq.: 019 & 022
Index No.: 102550/08

PINHAS ZEKRY and
R. DAVID BEN BAROUCK CORP.,

Defendants.

-----X

FILED

JUN 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation as required by CPLR 2219 (a), of the papers considered in the review of plaintiff's motion to hold defendant in contempt, for an award of plaintiff's costs and attorney's fees in the amount of \$72,895.97, and defendants' cross-motion to compel plaintiff to provide discovery dates.

Papers	Numbered
Plaintiff's Order to Show Cause and Exhibits:	1-7
Defendant's Affidavit in Opposition and Exhibits:	1-3
Plaintiff's Motion and Exhibits:	1-8
Defendants' Cross Motion and Exhibits.:	1-14, 1-15
Plaintiff's Reply Affirmation and Exhibits.:	1-7

In this latest round of motion practice (Motion Sequence No. 19), plaintiff Nicole Lawi Zekry moves, pursuant to CPLR § 5104 and Judiciary Law § 753, for an order of contempt against defendant Pinhas Zekry for failure to comply with an order for prejudgment attachment. She also seeks (Motion Sequence No. 22) an order awarding her costs and attorneys' fees in the

amount of \$72,895.97. Defendant opposes and cross-moves to compel the plaintiff to provide a date for her deposition prior to a set discovery deadline of April 30, 2011. Motion Sequence numbers 19 and 22 are hereby consolidated for decision.

By Order dated July 2, 2010, the Court (Kaplan, J.) granted plaintiff's motion for an order of prejudgment attachment. On August 9, 2010, an Order was issued directing the Sheriff of the City of New York to levy upon "any interest of Mr. Zekry in personal or real property or any debt owed to Mr. Zekry situated in the state of New York" to satisfy a judgment in the amount of \$1.2 million. Subsequently, a Direction to Levy certain assets of Mr. Zekry's was served, which listed three apartments he owns located in Manhattan, as well as his interests in three New York corporations (Eliaho Corporation, Meme Rachel, Corp., and R. David B.B. Corp.). Mr. Zekry's interest in the apartments was successfully attached, but all attempts to levy against the corporations have been unsuccessful. Mr. Zekry has repeatedly refused to surrender his stock certificates as demanded by the Sheriff and required by the terms of the Order. Ms. Lawi details in her submissions the numerous attempts both her attorneys and the Sheriff's department made to arrange a surrender of the certificates in question from Mr. Zekry, via his counsel. When faced with notice of their intent to file the instant contempt motion, Mr. Zekry for the first time claimed he could not locate the certificates in question. Despite being able to easily issue replacement certificates pursuant to the New York Business Corporation Law, Mr. Zekry refused, and this motion was filed. Plaintiff now seeks an order of contempt, alleging that despite acknowledging his duty to do so, Mr. Zekry has willfully refused to comply with this Court's orders and has yet to surrender the stock certificates as required by the attachment order. She argues that these acts are just another example of Mr. Zekry's continued refusal to follow Court

directives to prevent resolution of the litigation.

Mr. Zekry opposes, claiming that the order of attachment does not require him to act in any way. He further argues that he believes the Sheriff has seized sufficient property to satisfy his obligations, as he claims the value of his real estate exceeds \$1.2 million. In support, he attaches an unsigned letter from a broker at Halstead Property, which offers estimated values for the apartments, were they placed on the market for sale. The plaintiff had provided she would not levy against any other assets were a proper real estate appraisal prepared which indicated the value of the apartments exceeded the \$1.2 million owed. However, the estimated sales price statement prepared by a broker is of no value. Notably, Mr. Zekry has yet to provide any appraisals.

Plaintiff's motion for counsel fees arises from allegations that Mr. Zekry has again refused to comply with existing discovery orders. In its January 7, 2011 decision the Court detailed the prior procedural history of this matter which is replete with examples of defendant's repeated failure to comply with disclosure obligations and documented attempts to frustrate Ms. Lawi's ability to conduct meaningful discovery. In fact Mr. Zekry's failures to comply with his disclosure obligations and his repeated attempts to frustrate resolution of this litigation are numerous. As discussed previously in a Decision and Order dated July 7, 2008, the Hon. Justice Silbermann, J.S.C., found that Mr. Zekry:

admitted during deposition, under oath, that he destroyed computers belonging to Barouck Corp. as well as the "dailies" and "weeklies" of the company. He also admitted that he destroyed books and records of Barouck Corp. despite his knowledge of pending discovery requests and a pending motion directing him to preserve Barouck's computers.

July 7, 2008 Decision and Order, at 2 (Motion Sequence 005). And, in a Decision and Order

dated December 15, 2008, the Hon. Justice Silberman, J.S.C., found that:

Pinhas Zekry has failed to produce relevant and necessary documents and information. Without that discovery, the party depositions cannot proceed in any useful fashion. Mr. Zekry either is in possession of highly relevant documents including daily and weekly income information relating to the parties' hair salon business, or he has destroyed them.

December 15, 2008 Decision and Order, at 1 (Motion Sequence 10). In Motion Sequence 18, this Court found defendants' continuing failure to fulfill its discovery obligations cannot be "explained away" by defendants' counsel's other professional and/or personal obligations. Plaintiff there met its burden of coming forward with a sufficient showing of wilfulness. *See Read v Dickson*, 150 AD2d 583, 584 (2d Dept 1989). When finally submitted to, defendants' responses to Discovery and Inspection requests were incomplete, disorganized, and failed to provide meaningful answers to many of the questions posed. Given defendant's continuing pattern and practice of noncompliance, they were precluded from offering any evidence regarding Mr. Zekry's initial investment in Barouck Corp. or Barouck Corp.'s revenues, except for Barouck Corp.'s 2003 tax return.

Plaintiff now seeks an award of counsel fees as a sanction for the aforementioned pattern of noncompliance with discovery, and for fees incurred in bringing the prior and instant applications. She provides that a total of \$72,895.97 in counsel fees is directly attributable to Mr. Zekry's intentional wrongful conduct. Defendant opposes, claiming that he has now provided all documentary discovery, and that the amount requested in attorney's fees is unreasonable. He also cross-moves seeking an order compelling plaintiff to provide a date for her deposition, before the discovery deadline of April 30, 2011 passes. In her reply, plaintiff states this request is moot, as she has been noticed for deposition on April 28, 2011. Plaintiff

also provides that the fee request is reasonable, and submits a detailed description of the work performed by her attorneys attributable to Mr. Zekry's wrongful conduct.

DECISION

Pursuant to CPLR § 5104, refusal to obey an order for prejudgment attachment is punishable by an order of contempt. In order to hold a party in civil contempt, there must be a "lawful judicial order expressing an unequivocal mandate . . . in effect and disobeyed," the party to be held in contempt must have had knowledge of the order, and there must be "prejudice to the rights of [the moving] party." *McCain v. Dinkins*, 84 NY2d 216 (1994). A hearing is only required upon an application for contempt where there is a factual dispute that cannot be resolved on the papers alone. *See Farkas v. Farkas*, 209 AD2d 316 (1st Dept. 1994).

Pursuant to 22 NYCRR 130-1.1, courts have the discretion to "award to any party . . . costs . . . and reasonable attorneys' fees, resulting from frivolous conduct." Conduct is considered frivolous if "the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false." *Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 (1st Dept. 1999); *see also* 22 NYCRR 130-1.1(c). Attorneys' fee awards are "retributive, in that they punish past conduct," yet they are also "goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large." *Levy v. Carol Mgmt. Corp.*, 260 AD2d 27 (1st Dept. 1999). "Ignoring discovery directives contained in . . . prior court order[s]" is "frivolous conduct" that can warrant sanctions pursuant to 22 NYCRR 130-1.1. *Wesche v. Wesche*, 51 AD3d 909, 911 (2d Dept. 2008).

The Order of Attachment from August 9, 2011 provided in clear, unambiguous terms the

property that was to be levied against and the amount to be secured. *See Bayanmon Steel Processors, Inc. v. Platt*, 191 AD2d 249 (1st Dept. 1993). Here, the defendants clearly had knowledge of the terms of the order, as evidenced by Mr. Zekry's bald claims that sufficient property has been already attached to satisfy the order. In light of the foregoing, Pinhas Zekry is directed to turn over the stock certificates for the three New York corporations previously levied against (Eliaho Corporation, Meme Rachel, Corp., and R. David B.B. Corp.) within fifteen (15) days of the service of this Order with Notice of Entry. He is also, within this same time period, to provide a formal real estate appraisal, indicating that the appraised value of the three apartments he owns, which have already been attached. Failure to provide these documents will result in the immediate scheduling of a hearing, to determine what sanctions, if appropriate, shall be levied for the continued failure to comply with Court directives.

Plaintiff also seeks an award of \$72,895.97 in counsel fees for defendant's repeated noncompliance with discovery orders. Defendant's non-compliance with discovery has been well documented in numerous Court Orders issued over the past years, set forth in this Court's Order of preclusion dated January 7, 2011. As detailed in the January 7, 2011 order, plaintiff met her burden of coming forward with a sufficient showing of willfulness in defendants' failure to comply. Despite repeated orders this has continued. The Court in January declined to award attorney's fees but cautioned that non-compliance may result in just such an award. Mr. Zekry is directed to pay the sum of \$30,000 as and for counsel fees directly to plaintiff's counsel in three equal installments within thirty (30), sixty (60), and ninety (90) days of this order.

Defendant's cross-motion to compel plaintiff to provide discovery dates for the depositions of the parties pursuant to this Court's February 16, 2011 order is denied as moot.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for an award of counsel fees and costs is granted to the extent that Mr. Zekry is directed to pay the sum of \$30,000 as and for counsel fees directly to plaintiff's counsel in three equal installments within thirty (30), sixty (60) days, and ninety (90) of this order, and it is further

ORDERED that plaintiff's motion for an order of contempt against defendant is granted to the extent detailed above, and it is further

ORDERED that defendant's cross-motion to compel plaintiff to provide discovery dates for plaintiff's deposition pursuant is denied as moot, and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon counsel for defendant, within ten (10) days of entry.

This constitutes the Decision and Order of this Court.

E N T E R


DEBORAH A. KAPLAN
HON. DEBORAH A. KAPLAN J.S.C.
J.S.C.

FILED

JUN 06 2011

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