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

PRESENT : DONNA M. MILLS **PART 58**

Justice

RICHARD WARE LEVITT, d/b/a LEVITT & KRAMER, Attorneys at Law, a New York Partnership,

Plaintiff,

-v-

JEFFREY BROOKS,

Defendant.

INDEX NO. 116338/10

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion ____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3, 4
Replying Affidavits	

CROSS-MOTION: ✓ YES ____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION.

Dated: 1/16/13

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

570

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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RICHARD WARE LEVITT, d/b/a
LEVITT & KAIZER, Attorneys at Law,
a New York Partnership,

Plaintiff,

-against- Index No. 116338/10

JEFFREY BROOKS,

Defendant.

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MILLS, J:

On November 3, 2011, judgment was entered against defendant Jeffrey Brooks (Brooks) in the amount of $243,216.59 (Judgment), of which plaintiff Richard Ware Levitt (Levitt) claims that $25,801.22 has been satisfied. Solomon Aff., ¶ 3 and Ex. 1. On November 7, 2011, plaintiff issued a Restraining Notice and Information Subpoena to Brooks, seeking identification of all bank and brokerage accounts in Brooks' name, directed by Brooks, and used to make payments on Brooks' behalf since July 2010 (11/7/11 Subpoena or Restraining Notice). *Id.*, Ex. 4, at 3.

Brooks responded to the 11/7/11 Subpoena on November 30, 2011, identifying two bank accounts held at Sovereign Bank, and otherwise objecting to the 11/7/11 Subpoena on the ground that the items requested were "not reasonably calculated to assist the creditor in collecting the judgment." *Id.*, Ex. 5, at 3. On December 6, 2011, Levitt issued an Information Subpoena to Sovereign Bank, requesting identification of all accounts held by Brooks. Sovereign Bank's response identified two additional accounts: a Sovereign Bank checking account held jointly with Brooks' mother, under account number 1431102954 (Joint Account); and a money market account of Bulletproof Enterprises, Inc. (BEI), under account number 3583671627 (BEI

Account). *Id.*, Ex. 6.

In January of 2012, Brooks amended his response to the 11/7/11 Subpoena, adding the two additional accounts identified by Sovereign Bank, and also adding the notation: "i/n/o Anna Brooks & Jeffrey Brooks." Solomon Aff., Ex. 5, at 3. Brooks claims that this notation "was done by accident." Brooks Aff., ¶ 6. According to Brooks, one of the newly-identified accounts was a joint account held with his mother, which Brooks allegedly "forgot to disclose." *Id.*, ¶ 5. Brooks maintains that the other newly-identified account is in the name of his company, BEI, and is not an account that he holds individually or jointly. *Id.*, ¶ 6. Brooks claims that financial information relating to BEI is irrelevant to this action, because Brooks is the only defendant and the only debtor liable for the Judgment. *Id.*, ¶¶ 5-6.

On March 12, 2012, Levitt issued a Subpoena Duces Tecum to Brooks, seeking all documents regarding bank or other financial accounts over which Brooks has signatory authority or control, from January 2010 to present (3/12/12 Subpoena). Solomon Aff., Ex. 8. According to Levitt, Brooks responded to the 3/12/12 Subpoena by producing monthly account statements for the two accounts initially identified in the 11/7/11 Subpoena, but not for the Joint or BEI Accounts. *Id.*, ¶ 11. Brooks objected to the production of monthly account statements over which he had "'signatory authority and/or such other control'" as "not reasonably calculated to lead to the discovery of admissible evidence relevant to the satisfaction of the Judgment." *Id.*, Ex. 9.

Levitt claims that Brooks provided false responses to questions in the 11/7/11 Subpoena concerning stocks and securities. Specifically, question 4 asked Brooks to identify corporations in which he owned stock any time after July 2010 and the status of that ownership interest.

Solomon Aff., Ex. 5, at 4. Brooks responded that he "presently owns shares of Bulletproof Enterprises, Inc., JB Partners, LP, Jeffrey Brooks Inc. and Lakota Nylon Products Inc. Physical location of the shares presently unknown." *Id.* Levitt avers that he could obtain no information about JP Partners, LP, and that Jeffrey Brooks Inc. and Lakota Nylon Products Inc. are inactive Florida entities. *Id.*, ¶ 50. Levitt maintains that, subsequently, he learned of another company owned by, and with the same address as, Brooks: Bullet Proof Enterprises, LLC (BPE). On April 12, 2012, Levitt issued a Restraining Notice and Information Subpoena to BPE, seeking the identity of all BPE shareholders (4/12/12 Subpoena). Solomon Aff., Ex. 11, at 1. In response, Brooks identified himself as the sole shareholder. *Id.*, Ex. 12, at 1. Brooks objected to Levitt's request for bank and brokerage accounts directed by Brooks, or used to make payments for Brooks' benefit, as "not reasonably calculated to assist the creditor in collecting the judgment." *Id.* at 1-10.

Levitt now moves for an order of contempt against Brooks, for willful disobedience of the Restraining Notice, and willful disobedience and false swearing in response to the 11/7/11, 3/12/12, and 4/12/12 Subpoenas. Levitt also seeks an order directing Brooks to satisfy the Judgment. Alternatively, Levitt requests an order directing Brooks to fully respond to the 11/7/11 Subpoena. Brooks cross-moves for a protective order, forbidding discovery relating to, and any restraint of, the assets of businesses in which Brooks holds an interest.

Analysis

Levitt argues that, in January 2012, Brooks transferred $15,500 out of his checking account in violation of the Restraining Notice. Brooks counters that this transfer was a "mistake" and an "administrative oversight," and that the funds were exempt from the Judgment. Brooks

Aff., ¶ 16.

CPLR 5222 (b) provides that "[a] judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (i) of this section." CPLR 5222 (h) states that "[i]f the account contains an amount equal to or less than two thousand five hundred dollars, the account shall not be restrained and the restraining notice shall be deemed void." Under CPLR 5205 (c) (2), money from a qualified IRA "shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor."

Ordinarily, "civil contempt is not appropriate for the enforcement of monetary judgments which can be secured under the provisions of article 52 of the CPLR." *Moore v Davidson*, 57 AD3d 862, 863 (2d Dept 2008). However, under CPLR 5251:

> Refusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title; false swearing upon an examination or in answering written questions; and willful defacing or removal of a posted notice of sale before the time fixed for the sale, shall each be punishable as a contempt of court.

Here, Brooks admits that, after the Restraining Notice was in effect, he transferred $15,500 out of his checking account (Brooks Aff., ¶ 16), and Levitt submits Brooks' checking account statement, showing that this amount was removed from Brooks' account on January 27, 2012. Solomon Aff., Ex. 10, at JB=00002. Brooks fails to cite any legal authority excusing this transfer as a mistake. Nor is the court persuaded by Brooks' argument that the transfer did not harm Levitt, because the funds came from Brooks' IRA and would have been exempt from the

Judgment if he had not "channeled it through [his] checking account." *Id.* Brooks concedes that he *did* channel the funds through his checking account, and Levitt makes a prima facie showing that he would have been entitled to recover these funds had Brooks not transferred them out of the restrained account. *Oppenheimer v Oscar Shoes*, 111 AD2d 28, 29 (1st Dept 1985) ("[i]n a case of civil contempt, the court must expressly find that the person's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding").

Brooks argues that his IRA funds are exempt from execution by judgment creditors, and remained exempt from Levitt's Restraining Notice even after being transferred, because Brooks was the beneficiary of those IRA funds. Brooks claims that, therefore, he should not be "punished for this trivial mistake" of transferring $15,500 from the restrained account. Brooks Aff., ¶ 16. The only case cited by Brooks in support of this assertion is *Board of Educ. of City of N.Y. v Treyball* (86 AD2d 639 [2d Dept 1982]). There, the defendant received $8,000 in pension benefits. Intending to defraud his creditors, he placed $5,800 of these funds in bank accounts in the names of his two teenage sons. The defendant argued that these funds were exempt from attachment, because they came from retirement contributions. The Court reasoned that "[t]he exemption only applies to the funds while in the possession of the trustees of the fund or, at most, while in the possession of the beneficiary," concluding that "the rule exempting the funds from attachment cannot be read to apply to the funds once they have been transferred to third parties." *Id.* at 639.

Here, Brooks does not claim that he remained in possession of the funds. Nor does he claim that the IRA funds were "rolled over" into another exempt account. *See Bayerische*

Hypo-und Vereinsbank AG v DeGiorgio, 74 AD3d 492, 493 (1st Dept 2010) ("CPLR 5205 [c] [2] exempts from enforcement of money judgments retirement assets 'created as a result of rollovers' from other exempt retirement assets"). Rather, Brooks admits that he transferred the funds from his IRA into his checking account, and then withdrew the funds. Brooks Aff., ¶ 16. Therefore, the dicta in *Board of Educ. of City of N.Y.*, which suggests the possibility that qualified pension funds "in the possession of the beneficiary" may be exempt from attachment, does not apply in the instant action. 86 AD2d at 639.

For the foregoing reasons, Levitt has demonstrated that Brooks refused to obey or willfully neglected the Restraining Notice. *Kanbar v Quad Cinema Corp.*, 195 AD2d 412, 414 (1st Dept 1993) ("under CPLR 5251, a finding of contempt may be entered for the '[r]efusal or willful neglect' to obey a subpoena or a restraining order issued pursuant to the provisions of CPLR article 52 providing for the enforcement of money judgments").

As a "contempt sanction," Levitt requests an order directing Brooks to pay the wrongfully transferred $15,500. Solomon Aff., ¶ 17. This proposed sanction is excessive, and, in any event, these funds are already built into the Judgment. Having not shown "an actual loss or injury has been caused," Levitt is entitled to a fine in "the amount of [his] costs and expenses," plus $250.00. Judiciary Law § 773. Nothing contained in this decision shall preclude Levitt from obtaining the improperly transferred $15,500 by other post-judgment relief, or from seeking to impose appropriate penalties, including fines and imprisonment, against Brooks. Judiciary Law § 753 (A).

Levitt next argues that Brooks falsely swore in his response to the 11/7/11 Subpoena, by failing to identify BPE as a company in which he owns stock. In support of his argument, Levitt

submits Brooks' response to the 4/12/12 Subpoena. Brooks does not dispute that he signed this response, in which Brooks identified himself as the sole shareholder of BPE. Solomon Aff., Ex. 12, at 3. In his affidavit, however, Brooks represents that he "never formed or held shares in" BPE, and that he believed that the 4/12/12 Subpoena mistakenly named BPE instead of BEI, because BEI had not been served with any separate subpoenas or restraining notices. Brooks Aff., ¶¶ 8-10. Brooks represents to the court that he does "not hold shares in any company called 'Bullet Proof Enterprises LLC,'" and that he is not "aware of any company by that name." *Id.* Although it is not clear to the court why Brooks never questioned the purported misnaming of BEI as BPE, or why Brooks signed the response to the 4/12/12 Subpoena on behalf of an admittedly "non-existent entity" (Seymour Aff., ¶¶ 4, 5, 16), Levitt fails to show that Brooks falsely swore in his response to the 11/7/11 Subpoena, in failing to identify BPE as a corporation in which he owned shares. Moreover, as Brooks represents that he never formed or held shares in BPE, the objections contained in the 4/12/12 Subpoena do not support Levitt's motion for contempt.

Levitt next argues that Brooks should be held in contempt based upon his objection to, and refusal to answer, the 4/12/12 and 11/7/11 Subpoenas. Brooks' objections to the 4/12/12 Subpoena are moot because Brooks did not form or own BPE. The 11/7/11 Subpoena asked Brooks to identify all bank and brokerage accounts "in the name of another person or entity . . . the contents of which have been used . . . to make payments on [Brooks'] behalf," or "the disposition of which [Brooks] may direct." Solomon Aff., Ex. 4, at 3. Brooks objected to this request as "not reasonably calculated to assist the creditor in collecting the judgment." *Id.*, Ex. 5, at 3. At this juncture, Levitt has not established that Brooks' objections were "calculated to or

actually did defeat, impair, impede, or prejudice [Levitt's] rights or remedies," to support a finding of contempt. *Oppenheimer*, 111 AD2d at 29.

However, as alternative relief, Levitt seeks to compel Brooks to respond to the 11/7/11 Subpoena. Under CPLR 5224 (a) (3) (iv), Brooks' failure to comply with the 11/7/11 Subpoena is governed CPLR 2308 (b). CPLR 2308 (b), in turn, entitled Levitt to "move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars." Moreover, the 3/12/12 and 4/12/12 Subpoenas subjected Brooks "to the full disclosure prescribed by [CPLR 5223]." CPLR 5224 (a-1). CPLR 5223 entitles Levitt to "compel disclosure of all matter relevant to the satisfaction of the judgment."

Here, the information requested in the 11/7/11 Subpoena is relevant to satisfaction of the Judgment. Levitt submits Brooks' Sovereign Bank account statements produced in response to the 3/12/12 Subpoena. These statements include the months of February 2011 through April 2012. Solomon Aff., Ex. 10. The statements demonstrate that hundreds of thousands of dollars were transferred in and out of Brooks' account, on a monthly basis, up to the time when Levitt issued the Restraining Notice, after which the transfers tapered off. While this activity, alone, does not rise to the level of contempt, together with Brooks' failure to fully respond to the Subpoenas, it raises questions about Brooks' finances after Levitt issued the Restraining Notice and the 11/7/11 Subpoena.

Brooks claims that the deposits flowing into his account in the months preceding the Restraining Notice came "almost entirely from [Brooks'] own accounts – primarily from his [IRA]," and that Brooks "simply ran out of money." Seymour Aff., ¶ 7; Brooks Aff., ¶¶ 12-15.

Brooks refers to the account statements submitted by Levitt for the months of August, September and October of 2011. Solomon Aff., Ex. 10. The August statement identifies deposits and credits in the amount of $117,370.64 (*id.* at JP=00070), of which Brooks claims that $86,000 came from his own accounts. Of this $86,000, Brooks claims that $57,800 came from his IRA. Brooks Aff., ¶ 13. However, even assuming the accuracy of Brooks' accounting, that leaves $31,370.64 unaccounted for in the month of August alone.

The account statement for September identifies deposits and credits in the amount of $319,227.99. Solomon Aff., Ex. 10, at JB=00022. Brooks claims that, of these funds, $310,000 came from his IRA (Brooks Aff., ¶ 14), but he fails to explain what happened to the remaining $9,227.99.

The account statement for October identifies deposits and credits in the amount of $59,349.37 (Solomon Aff., Ex. 10, at JB=00078), of which Brooks claims that $34,000 came from his IRA. Brooks Aff., ¶ 14. Brooks fails to explain what happened to the remaining $25,349.37.

Thus, Brooks fails to account for $65,948 in the three months preceding the Restraining Notice alone. Brooks makes no attempt to explain how his bank accounts were funded in the earlier months of 2011. Accordingly, while Levitt has not demonstrated contempt as a result of Brooks' objections to the subpoenas, Levitt has shown entitlement to the alternative relief of an order compelling Brooks to respond to the 11/7/11 Subpoena.

Levitt also seeks an order holding Brooks in contempt for failure to disclose the Joint Account and the BEI Account. Brooks claims that his failure to disclose the Joint Account was an "oversight" that was "inconsequential," because the account balance was too low to have been

frozen. Brooks Aff., ¶ 7. With his opposition papers, Brooks submits certain account statements from the Joint Account. Several of the account statements submitted to the court demonstrate that this account exceeded the $2,500 maximum of CPLR 5222 (h) in August, September, October, and early November of 2011 (prior to Levitt issuing the Restraining Notice), and in February and April of 2012. Brooks Aff., Ex. B. However, Brooks supplemented his response to the 11/7/11 Subpoena in January 2012, disclosing the Joint Account. The account statements submitted by Brooks demonstrate that, between the date of the 11/7/11 Restraining Notice and Subpoena, and Brooks' disclosure of the Joint Account, the Joint Account never exceeded the $2,500 statutory maximum for exemption.[1] Therefore, Brooks' failure to disclose the Joint Account in his initial response to the 11/7/11 Subpoena did not "defeat, impair, impede, or prejudice [Levitt's] rights or remedies." *Oppenheimer*, 111 AD2d at 29. Accordingly, Levitt's motion for contempt on this ground is denied.

In opposition to Levitt's motion, and in support of his cross motion for a protective order, Brooks claims that he disclosed the BEI Account inadvertently, and that financial information relating to any of Brooks' companies is not relevant to this action. Seymour Aff., ¶ 12; Brooks Aff., ¶ 6. Brooks claims that his companies cannot be held liable under the Judgment, because Levitt fails to establish that they are alter egos of Brooks, entitling Levitt to pierce the corporate veil. Seymour Aff., ¶¶ 3, 9-11; Brooks Aff., ¶ 6.

As discussed above, CPLR 5223 entitles Levitt to "compel disclosure of all matter relevant to the satisfaction of the judgment." Moreover, CPLR 5201 (b) entitles Levitt to enforce

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[1] The November account statement shows a balance of $2,517.97 on November 4, 2011, but the balance was $2,337.70 by November 7, 2011, when the Restraining Notice was issued.

the Judgment "against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment."

Thus, discovery concerning Brooks' companies is relevant because, as is argued by Levitt, "Brooks' equity interest in these businesses are assets and Plaintiff is entitled to discovery regarding the value of these assets before he seeks an order requiring that they be attached and sold to satisfy the outstanding judgment." Solomon Reply Aff., ¶ 50; CPLR 5223, 5201 (b). At this juncture, Levitt is attempting to hold Brooks (not his companies) liable under the Judgment. It is possible that, once Levitt obtains financial information concerning the activities of Brooks' companies, he will seek to impose alter ego liability, but this contingency has not yet occurred. Therefore, Brooks' argument that Levitt fails to demonstrate alter ego liability is premature. Accordingly, Brooks' reliance upon *Matter of Morris v New York State Dept. of Taxation & Fin.* (82 NY2d 135 [1993]) and *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.* (67 AD3d 511 [1st Dept 2009]), for the legal standards for piercing the corporate veil and alter ego liability, are not relevant at this juncture in the litigation.

The remaining two cases cited by Brooks on this issue are distinguishable on their facts. In *Fernbach, LLC v Calleo* (92 AD3d 831 [2d Dept 2012]), the plaintiff had previously obtained a judgment against nonparty Calleo Construction Corp. (CCC) in a separate action. When the plaintiff's enforcement efforts proved unsuccessful, it commenced the action against CCC's sole shareholder, Gino Calleo, among others, to set aside certain transfers of CCC as fraudulent under the Debtor and Creditor Law, and to pierce CCC's corporate veil. All of the parties moved for summary judgment. The Court held that one of the Calleo defendants was entitled to summary

judgment dismissal, based upon that defendant's lack of control or dominion, but denied the remaining motions for failure to make a prima facie showing eliminating all factual issues.

In *Matter of Town of Southampton v Chiodi* (75 AD3d 604 [2d Dept 2010]), also cited by Brooks, the plaintiff had previously obtained a judgment against the defendant contractor, ADC Contracting and Construction, Inc. (ADC). The plaintiff then commenced a turnover proceeding against ADC's sole shareholder and president, Anthony Chiodi, to compel him to pay the judgment. Even though Chiodi was not the judgment debtor, the plaintiff alleged that Chiodi exercised complete dominion and control over ADC and prevented the plaintiff from enforcing its judgment, thereby entitling the plaintiff to pierce the corporate veil. The plaintiff sought leave to amend its pleading to add Chiodi's wife as a respondent and a claim to set aside fraudulent conveyances of assets under the Debtor and Creditor Law. The Court held that the conveyances were not fraudulent, because they were used to satisfy an antecedent debt. Because the plaintiff failed to establish fraud, there was no basis to pierce the corporate veil.

Here, as discussed above, the issue of alter ego liability is premature until such time as Levitt has had an opportunity to investigate the extent to which Brooks used his companies as alter egos, if at all. In other words, only after discovery will Levitt be able to determine whether to pursue claims for veil-piercing and/or fraudulent conveyance under the Debtor and Creditor Law. Significantly, in *Fernbach, LLC*, the parties moved for summary judgment, presumably after the parties conducted discovery, whereas in the instant action, Levitt is at the preliminary stage of seeking to obtain discovery that will assist him in satisfying the Judgment. Moreover, unlike in *Matter of Town of Southampton*, here, the court cannot, at this juncture, determine whether Brooks "committed a fraud or wrong against [Levitt]" that would justify piercing the

corporate veil. 75 AD3d at 606.

As discussed above, Brooks' failure to comply with the 11/7/11 Subpoena entitled Levitt to "move in the supreme court to compel compliance." CPLR 2308 (b). For the foregoing reasons, Levitt's motion for an order compelling Brooks to respond to the 11/7/11 Subpoena is granted, and Brooks' cross motion for a protective order is denied.

Levitt requests costs and attorneys' fees in bringing this motion. "Judiciary Law § 773 permits recovery of attorney's fees from the offending party by a party aggrieved by the contemptuous conduct." *Zanani v Schvimmer*, 36 Misc 3d 144(A), 2012 NY Slip Op 51552(U), *1-2 (App Term, 1st Dept 2012) (internal quotation marks and citations omitted). Here, however, Levitt fails to submit evidence of the costs and attorneys' fees incurred in bringing the instant motion, thereby preventing the court from ordering the specific relief requested. Upon submission of costs and attorneys' fees that are "documented and directly related to contemptuous conduct," Levitt shall be entitled to recovery. *Vider v Vider*, 85 AD3d 906, 908 (2d Dept 2011) (internal quotation marks and citations omitted).

Conclusions

Levitt's motion for contempt is granted to the extent that Brooks shall be held in contempt for violating the Restraining Notice issued by Levitt on November 7, 2011, as a result of diverting $15,500 from Brooks' Sovereign Bank checking account (account number 1261788877) on January 27, 2012, and the motion for contempt is otherwise denied. Pursuant to Judiciary Law § 773, a fine shall be imposed against Brooks in the amount of $250. Levitt shall also be entitled to costs and expenses, including attorneys' fees, in bringing this motion.

Levitt's motion to compel is granted and Brooks shall: (1) respond to Questions 1-4, 6-7,

9, and 11-12 of the Information Subpoena issued by Levitt on November 7, 2011; and (2) update his answers to these questions within 24 hours after any additional information becomes available.

Brooks' cross motion for a protective order is denied.

The parties are directed to settle an order consistent with this decision, accompanied by an explanation of costs and attorneys' fees requested by Levitt.

Dated: 1/16/12

ENTER:

J.S.C.

DONNA M. MILLER, J.S.C.