

Grand Pac. Fin. Corp. v 97-11 Hale, LLC

2015 NY Slip Op 30013(U)

January 8, 2015

Supreme Court, New York County

Docket Number: 601164/09

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
GRAND PACIFIC FINANCE CORP.,

Index No. 601164/09

Plaintiff,

Mot. seq. no. 012

- against -

DECISION AND ORDER

97-11 HALE, LLC, 100-114 HALE, LLC, HALE CLUB,
LLC, ELI BOBKER, BEN BOBKER and JOE BOBKER,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:

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Herrick, Feinstein LLP
2 Park Ave.
New York, NY 10016
212-592-1400

For Bobker defendants:

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Ben Bobker, self-represented
Joe Bobker, self-represented
11 East 36th St., Ste. 100-B
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212-213-2210

Plaintiff moves pursuant to CPLR 5226 for an order directing that the individual Bobker defendants (defendants) pay plaintiff in installments. Defendants oppose.

I. BACKGROUND

A. Pertinent procedural background

Plaintiff commenced this action in April 2009, alleging that defendants and three of their related entities, 97-11 Hale, LLC, 100-114 Hale, LLC, and Hale Club, LLC, breached promissory notes and guarantees in connection with certain real estate ventures. The justice previously presiding in this part granted summary judgment in favor of plaintiff, and on or about May 23, 2011, entered judgment against Eli, Ben, 97-111 Hale and 100-114 Hale, jointly and severally, for \$11,258,597.32, and against Joe and Hale Club for \$2,451,526.82, jointly and severally.

(NYSCEF 162).

What occurred thereafter is discussed at length in prior orders. For purposes of this motion, suffice it to say that defendants did not pay plaintiff, and that they, their spouses, and their office manager ignored postjudgment subpoenas and other disclosure devices, thereby requiring plaintiff repeatedly to move for orders compelling them to comply and holding them in contempt. (NYSCEF 163, 164, 165, 166, 167, 168). Contempt orders against defendants' spouses and office manager issued on September 20, 2012 and January 10, 2013. (NYSCEF 164, 165), and an order directing their incarceration issued on April 30, 2013, which was stayed until May 15 to permit them a final opportunity to comply with the orders. (NYSCEF 167). Having appeared for depositions, defendants' spouses and office manager were not incarcerated. Defendants also appeared for depositions.

Plaintiff had also moved pursuant to Limited Liability Company Law § 607(a), for an order charging defendants' membership interests in nine of their limited liability companies with the entire unsatisfied amount, plus interest. Defendants opposed and represented, among other things, that Ben's and Eli's only source of income was two entities known as Checkmate Holdings, LLC, and Bluebell Assets, LLC. (NYSCEF 210). By decision and order dated September 29, 2012, the prior justice granted plaintiff's motion and issued a charging order. (NYSCEF 171).

Defendants have never forwarded any distributions, proceeds or other sums from the charged entities pursuant to the order, nor have they tendered any other form of payment to plaintiff. (NYSCEF 160, 172).

On June 17, 2014, plaintiff served defendants by federal express overnight delivery addressed to their residences and care of their counsel at the time with the notice of motion and supporting papers, and duly e-filed them the same day. (NYSCEF 237).

On October 29, 2014, defendants failed to appear for oral argument on the motion, instead sending counsel who represented them in another matter and who was not retained in this action. I denied counsel's request for an adjournment (NYSCEF 302), and despite their failure to appear deemed the motion fully submitted.

B. General factual background

Joe, a real estate developer for over 30 years, has worked on hundreds of domestic and international development projects. In 2001 and in 2005, respectively, Ben and Eli joined their father in the real estate business. (NYSCEF 160). Together, they operated "the Bobker Group," which they describe as "a family owned group of companies and partnerships [that] has bought, sold and developed in excess of several billion dollars of residential and commercial real estate." (NYSCEF 179). The Bobker Group acquired and syndicated multi-family apartment buildings through its affiliate firm, Morgan Investment Fund, LLC (MIF) the website of which identifies Joe as its chairman, and Ben and Eli as co-directors. (NYSCEF 175). Defendants also own interests in limited-purpose limited liability companies, through which they manage real estate assets. (NYSCEF 182, 183).

In or about 2002, the Bobker Family Trust was formed, naming Eli, Ben, and their two brothers Dov and Avi as beneficiaries, with Eli and Ben also serving as trustees. (NYSCEF 184). The trust holds a membership interest in many of the limited-purpose LLCs, including 97-111 Hale and 100-114 Hale. Another trust, the Bobker Brothers Family Trust 2000, owns a

residential property in Lawrence, New York, where Joe and his family live. (NYSCEF 180).

C. Eli

Eli lives with his family in Lawrence, New York. Of his seven children, five attend private schools. (NYSCEF 218, 219). Eli's spouse is a full-time licensed speech therapist, who, according to a 2010 tax return, earned approximately \$30,000. (NYSCEF 215). Eli was admitted to the New York State bar in 2000, and before joining the Bobker Group, practiced law at Cadwalader, Wickersham & Taft, LLP. (NYSCEF 178).

Eli approximates his assets as of August 1, 2007 at \$13,297,000, and his liabilities at \$310,000, yielding a net worth of \$12,987,000. Of the \$13,297,000 in assets, \$8,225,000 represented his 25 percent interest in Bobker Family Trust properties, \$1,487,000 represented his 25 percent interest in Bobker Family Trust cash, and \$575,000 represented his 25 percent interest in the Bobker Brothers Family Trust 2000. He valued his residence at \$1,950,000. (NYSCEF 187). According to Checkmate's 2008 tax return, Eli owns a 99 percent membership interest in it. (NYSCEF 181).

From December 2011 through July 2012, Eli and his spouse maintained balances in their joint checking account of at most \$2,000. (NYSCEF 214). In 2008, they paid \$15,319 in mortgage interest and \$15,270 in real estate taxes (NYSCEF 217); in 2009, \$70,208 in mortgage interest and \$33,779 in real estate taxes (NYSCEF 216); and in 2010, \$114,000 in mortgage interest and \$47,639 in real estate taxes. (NYSCEF 215).

At a deposition held on October 5, 2011, Eli testified that he and Ben scout properties and develop and manage real estate projects for the Bobker Group, and that recently, he spends much of his time on litigation involving his entities, using Checkmate to manage his daily real estate

operations. Although MIF received management fees for their services, Eli denied that either he or Ben received compensation from it. (NYSCEF 178).

In or around August 2012, Eli disclosed a 25 percent interest in the Bobker Family Trust, admitting that since 2009, he received \$30,000 in draws and capital repayments from Checkmate, while denying that he owned income-producing assets. (NYSCEF 185).

At a deposition held on May 6, 2013, Eli's spouse denied knowing how the mortgage or real estate taxes, household expenses, utilities, or insurance premiums were paid or the sources of Eli's income, and denied receiving any bills, claiming that Eli takes them to work. She also denied knowing how they maintained their home and paid \$120,000 a year in interest and taxation on her \$30,000 salary, although she allowed that her parents provided some assistance. (NYSCEF 212).

At a deposition held on July 8, 2013, Eli testified that he manages a property known as Cornwall Park, and also distributes proceeds to investors in it whom he is unable to identify. He denies drawing an income or salary from any source. He stated that Checkmate, which has no employees, was formed to conduct real estate deals, and that it acts as a management vehicle for other real estate ventures. Eli attested to using a Checkmate credit card for business expenses, and that its line of credit is decimated, at approximately \$40,000 plus interest. (NYSCEF 180).

On April 4, 2014, Eli, identifying himself as manager of Hancock Park, LLC, which he represented as the sole member of MIF, affirmed that MIF paid \$15,000 in retainer fees for counsel to represent its affiliates Bay Condos, LLC, 11 East 36th, LLC, and Morgan Lofts, LLC, debtors in bankruptcy proceedings in the Southern District of New York. On June 11, 2014, Eli affirmed that an additional \$2,500 was paid. (NYSCEF 271).

D. Ben

Ben also lives with his family in Lawrence where his five children attend private schools. By letter dated January 6, 2014, one of the school directors estimates that annual tuition ranges from \$18,000 to \$27,000, and that in light of the family's alleged financial difficulties, the school has allowed Ben to pay \$640 per month for the 2012 to 2013 school year, and \$830 per month for the current year. (NYSCEF 225). Ben's spouse is employed as an occupational therapist, who reported on the family's 2011 tax return an annual salary of \$23,089. (NYSCEF 222). Court records reflect that Ben was admitted to the New York State bar in 2002, and that his license to practice law was suspended in 2006, although there is no indication as to whether or when he can seek reinstatement.

Ben valued his assets as of September 1, 2006 at \$12,845,250, and his liabilities at \$310,000, yielding a net worth of \$12,535,250, and he valued his residence at \$1,400,000 and his investments in closely held-companies at \$11,320,250 as of the same date. (NYSCEF 220). Ben owns a 99 percent membership interest in Bluebell, as reflected in its 2008 tax return (NYSCEF 183), stated that he held a 25 percent interest in both family trusts, and approximated the fair market value of Bluebell and the trusts as minimal due to losses in the real estate market, foreclosure actions, and ongoing litigation, and he denied owning any income-producing assets (NYSCEF 186).

From December 2011 through August 2013, Ben and his spouse maintained a joint checking account reflecting balances never exceeding \$2,000. (NYSCEF 221). In 2009, they paid \$18,653 in mortgage interest, and \$11,765 in real estate taxes, and reported a total income of \$18,767. (NYSCEF 224). In 2011, they paid \$19,863 in mortgage interest, and \$15,862 in real

estate taxes. (NYSCEF 222). During 2009, 2010 and 2011, they reported a total income of \$18,787, \$11,961, and \$12,585, respectively. (NYSCEF 222-224).

At a deposition held on October 24, 2011, Ben testified that he sets up individual LLCs for each real estate project for which Bluebell serves as the LLC managing member. He recalls receiving a salary from Bluebell within the last three years, but could not state when, and denied receiving any compensation, distribution, or salary. He could not recall the last time he was paid.

At a deposition held on May 16, 2013, Ben's spouse denied knowing whether Ben drew any salary despite admitting that he goes to work every day, explaining that she does not speak to him about his business and that he handles all finances and pays all bills. Thus, she has no idea how Ben pays their expenses or the source of their money. (NYSCEF 211).

At a deposition held on July 15, 2013, Ben testified that most of his personal expenses are paid by him through two of his corporate entities, Morgan Lofts and 11 East 36th, each of which filed for bankruptcy protection in May 2013. He confirmed that he and Eli regularly work in the Bobker Group office. (NYSCEF 177, 227, 228).

On January 20, 2014, Ben, identifying himself as the managing member of MIF, affirmed that it paid \$15,000 in retainer fees for counsel to represent 11 East 36th and Morgan Lofts in connection with their bankruptcy proceedings. (NYSCEF 271).

On or about August 11, 2014, 11 East 36th and Bluebell obtained financing of \$18.3 million to extinguish prior mortgages encumbering the assets of 11 East 36th. The loan commitment letter requires Ben's personal guarantee. (NYSCEF 273).

E. Joe

In 2007, Eli valued Joe's residence at \$3.7 million. (NYSCEF 187).

At a deposition held on October 5, 2011, Eli testified that Joe is involved in all aspects of the business, including consulting and advising the group, meeting potential investors, architects and builders, and negotiating contracts. (NYSCEF 178).

At a deposition held on October 27, 2011, Joe testified that he works for his children, mostly from home but that he goes to the Bobker Group office at least two days a week. He alleges that his children compensate him annually between \$100,000 and \$150,000 for his services by paying his family living expenses from family trusts but was not sure from which entity as his spouse, Miriam, keeps all the books and records. (NYSCEF 173).

In a petition dated December 22, 2011, affirmed by Joe in the course of a bankruptcy proceeding, Joe identified himself as a member of the debtor, Hancock Park. In January 2012, he submitted a declaration in the bankruptcy court affirming that he is the managing member of Bay Condos. (NYSCEF 275, 276).

In 2012 and 2013, Joe denied any income-generating assets, personal bank accounts, monies in trust, mutual funds, IRA accounts, securities, and to his knowledge, he was not a beneficiary of a trust or will or life insurance policy. (NYSCEF213, 230). At depositions held on February 26 and February 28, 2013, Joe testified that, except for the expenses paid by his children through their entities, he has no income; Miriam provides him with cash when he needs it as she handles their household finances. He denies knowing the source of Miriam's funds which she uses to buy food and clothing, or which household bills are paid by the family trusts. He denied belonging or having any interest in any entities, including Bay Condos or Hancock Park and when shown a schedule K-1 tax return reflecting that he and Miriam each own 50 percent of Cond Co., LLC, and \$5,201 in ordinary business income, Joe professed ignorance of

it, stating that he had only recently learned of that entity's existence which he believed was set up solely for "health insurance purposes." He also disclaimed an understanding of tax returns.

When asked about his relationship to MIF, the following colloquy ensued:

Q. Are you the chairman of the Morgan Investment Fund?

A. I can be if you want me to be. I'm the ambassador of good will. I am the chairman. I am the don. Is that the word for it? I am what they used to call the gray in business. Bring in the gray. I am the eldest statesman. I'm the foreign minister. I'm the — so, yes. I don't have a business card that says I'm the chairman. I don't have a letterhead that says I'm the chairman. And the Bobker Group is not a legal entity, so it's not like I'm listed anywhere as chairman, but on the website, which you know is a marketing tool, if chairman sounds good, yep, I'm the chairman.

Q. Were you aware that you were listed as a chairman on the Morgan Investment Fund's website?

A. I have not looked at this for probably five years from whenever it was formed. When it was done, yeah, I read it and I, obviously, had no problems with it.

Q. And do you introduce yourself in any capacity as chairman of the Morgan Investment Fund?

A. I have never in my life introduced myself as chairman of the Morgan Investment Fund.

Q. Do you hold any offices on behalf of the Morgan Investment Fund?

A. Offices? Do you mean a physical space.

Q. No. Let me try it again. Are you an officer of the Morgan Investment Fund?

A. Who knows?

Q. Does the Morgan Investment Fund have a board?

A. Not that I'm aware of.

Q. Do you receive any moneys directly or indirectly as a result of your, as you said ambassadorship or chairmanship of the Morgan Investment Fund?

A. I don't know how to answer that. This falls under the same category that I gave you on Tuesday, where I perform services for my sons in their real estate activities under the various real estate entities that they have. If any of the compensations that I get from my services comes directly or indirectly from Morgan Investment Fund, I have no way of knowing.

(NYSCEF 209, 213, 282).

Although Joe testified that he filed tax returns for all but the past two years, he has produced none.

At a deposition held on May 3, 2013, Miriam testified that Joe occasionally worked, and

that although he had a credit card in his name, he did not pay those bills and had no access to their checking accounts. She claimed that she has credit cards in her name that Ben paid, that Ben had primary responsibility for paying their household expenses, that whoever has money at a given time pays, and she denied knowing the source of the funds. (NYSCEF 231, 283).

Ben testified at his deposition on July 15, 2013 that since 11 East 36th filed for bankruptcy in early 2013, he could no longer pay his parents' expenses. (NYSCEF 177).

At a deposition held on December 11, 2013, Dov testified that his father's home is filled with 50 to 100 paintings and that it was substantially renovated over the past several years. (NYSCEF 236).

II. CONTENTIONS

Plaintiff alleges that defendants are attempting to impede its collection efforts by rendering services without compensation while maintaining an affluent lifestyle and despite their claims of little to no income. It observes that Ben and Eli claim less than \$100,000 in compensation over the past three to five years, Joe, nothing, and that, for the recent years, Ben's mortgage interest and real estate tax payments alone greatly exceed his family's taxable income. Moreover, Morgan Lofts and 11 East 36th, which had paid Ben's personal expenses, have been in bankruptcy since early 2013.

Plaintiff claims that its efforts to unearth defendants' current financial situation have been fruitless given defendants' failure to produce current financial documents, and that their obstinacy raises the inference that they receive funds from undisclosed sources. (NYSCEF 160, 161).

Plaintiff submits a report from an accounting expert who states that, based on materials

given to him by plaintiff's counsel, it is "apparent" that defendants receive money from one or more undisclosed sources and render real estate services without "receiving acknowledged compensation." He estimates that the reasonable value of services rendered by defendants as \$2,400,000 per year; \$500,000 for Joe, and \$950,000 each for Eli and Ben. (NYSCEF 232). Plaintiff thus seeks an order directing that defendants make periodic payments totaling \$600,000 annually, or 25 percent of the value of their alleged services: \$125,000 from Joe and \$237,000 from Ben and Eli. (NYSCEF 159).

In opposition, defendants argue that service of the motion was defective as it was mailed by federal express, and on a lawyer that does not represent them.

Otherwise, relying on the market crash of 2008, defendants maintain that the Bobker Group has not been profitable, and they deny involvement in any new development projects since 2009, focusing instead on litigation and bankruptcy matters involving their entities in order to reduce legal expenses, and working "to keep afloat certain prior investments." (NYSCEF 267). Ben and Eli each claim to expend, on average, no less than 30 hours, and sometimes as many as 60 hours a week on legal work, consisting of reviewing pleadings, motions, discovery demands, and other legal documents, compiling and organizing discovery responses, digesting depositions, consulting with their counsel and apprising it of court deadlines, and attending court conferences. Ben and Eli attest to having revised and edited "all documents our attorneys have submitted" and Eli claims to have reviewed "every pleading" in connection with the litigation. (NYSCEF 239, 256).

Defendants contend that substantially all of the value of Eli's \$13 million net worth in 2007 was from three projects, one of which is now in bankruptcy, one which was lost in

foreclosure, and the other concerns properties in the midst of foreclosure proceedings. They also deny that any of their other properties produce income or have value sufficient to support the payment plaintiff seeks or that they are paid salaries claiming that the investments they manage have no cash and disburse no funds. (NYSCEF 239, 256, 265, 267). They characterize their lifestyles as modest, and claim that their income, less necessities, leaves no cash for any monthly installment payments. They deny undisclosed income, underpaying themselves, or using their businesses to pay their personal expenses. (*Id.*)

Eli and Ben, who both support large families, claim that they work full-time representing themselves in litigations, that they have lived off their spouses' monthly incomes of respectively, \$2,500 and \$2,700, depleted savings, credit card debt and lines of credit, and that they are in arrears with their children's tuition. They deny receiving business income since 2009, or having paid the mortgage, real estate taxes, or insurance on their homes. They claim monthly expenses of respectively, \$8,500 and \$6,000. Eli claims \$40,000 in credit card debt and in excess of \$145,000 in lines of credit. (NYSCEF 239, 256).

Defendants now submit Eli's and Ben's previously withheld 2012 federal income tax filings. Eli's reflects \$5,291 in wages and salaries, and \$20,000 in "rental real estate, royalties, partnerships, S corporations, trusts, etc." (NYSCEF 247). The corresponding amounts for Ben's are \$16,973 and \$27,783. (NYSCEF 260).

Joe claims to be semi-retired due to health concerns, only working approximately 20 hours per week on his own litigation matters, and that his home is in foreclosure, with the bank making payments to maintain its interest in the house. He denies any investments or income producing assets, or having provided any compensable real estate services to his sons'

businesses. He denies having consulted on any real estate deals since approximately 2009. (NYSCEF 265).

By affidavit dated August 18, 2014, Miriam states that she is unemployed, that she and Joe live off a small inheritance, and that she budgets approximately \$7,000 per month for personal and family expenses. (NYSCEF 266).

In defendants' view, plaintiff fails to sustain its burden of offering evidence of their current or future income, or that they are attempting to defraud it by providing services to themselves. They claim that plaintiff's expert's report is irrelevant, as it is based on the services they rendered before 2008, whereas they claim that they have performed no real estate work since then. They maintain that their business depends on each project, that their family expenses should not be considered in determining installment payments, and that value cannot be imputed from past services or alleged income. They also assert that penalizing them for exercising their constitutional right to represent themselves in their legal matters is akin to reinstating slavery or debtors' prisons. Alternatively, defendants contend their evidence is sufficient to warrant a trial on the issue of their reasonable requirements, or reference to a referee. (NYSCEF 267).

In reply, plaintiff urges that any irregularities in its manner of service should be disregarded absent any prejudice to defendants. It observes that the evidence on which it relies is the product of defendants' refusal to produce recent documentation concerning the financial status of their entities, and that an adverse inference should be drawn that more recent documentation would show that defendants are able to pay. Plaintiff argues that at any rate, the documentation produced does not undermine its expert's opinion, which is based on the current reasonable value of defendants' services, which defendants fail to rebut with their own expert. It

also seeks a hearing or trial if warranted. (NYSCEF 269, 270).

Plaintiff asserts that defendants' denials that they own valuable or income-producing assets are conclusory and self-serving, as is their contention that they are no longer involved in real estate development, which also contradicts their and their spouses' prior deposition testimony, including Eli's testimony that he is not compensated for managing Morgan properties, as well as MIF's website identifying defendants as directors and describing its current projects. It claims that Joe's characterization of himself as semi-retired is incredible given a judicial finding in 2005 that his claims of poor health and an inability to work were unfounded and misleading. (*Lowy v Bobker*, 383 F Supp 2d 606, 614 [SD NY 2005]).

Plaintiff also maintains that the statute authorizing installment payments is intended to assign value to defendants' uncompensated services, and that it is not obliged to prove defendants' fraudulent intent. It claims that defendants, who have extensive real estate experience, and in Eli's and Ben's cases, law degrees, are highly employable, but instead of obtaining employment elsewhere, which would create an identifiable source of income, they continue to work on behalf of entities they portray as destitute and hopeless, raising the inference they are impeding its collection efforts. (NYSCEF 269).

Plaintiff argues that Eli's and Ben's allegation that they support themselves on credit card debt and their spouses' income contradicts their spouses' deposition testimony that their expenses are paid by Eli and Ben from unknown sources, and that Miriam's claim that she and Joe rely on an inheritance contradicts her prior testimony that her sons pay their expenses. In plaintiff's view, Ben's use of funds from Morgan Lofts or 11 East 36th to pay personal expenses, defendants' noncompliance with discovery, Ben and Eli's recent disclosure of their tax returns

which show unexplained real estate income, all raise the inference that there exist other entities from which defendants siphon funds to pay for personal expenses. Plaintiff also argues that Ben's recent loan guarantee proves that he has sufficient equity to secure the loan, otherwise such a large loan would have not been made. (*Id.*).

Plaintiff contends it is defendants' burden to establish their reasonable requirements, which they have not established with their unsupported and conclusory allegations concerning their monthly expenses, particularly given their continued refusal to disclose documentation of their actual expenses, such as credit card and utility statements and insurance policy information. (*Id.*).

III. ANALYSIS

A. Service

The notice of motion for an installment payment order "shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." (CPLR 5226). A mistake or defect in service may be disregarded in the absence of prejudice of a substantial right. (CPLR 2001).

Here, defendants do not dispute that they timely received the notice of motion. Absent any allegation of prejudice, and in the circumstances presented here, service of the notice by federal express is overlooked. (*See Jones v Lefrance Leasing L.P.*, 81 AD3d 900, 902-903 [2d Dept 2011] [service of cross motion via media mail, as opposed to first-class mail was mere irregularity which did not substantially prejudice opponent, who opposed motion on merits]; *M Entertainment, Inc. v Leydier*, 71 AD3d 517, 518 [1st Dept 2010] [pursuant to CPLR 2001, Appellate Division, in its discretion, disregarded irregularity in service of notice of appeal in

absence of prejudice]; *Horvath v Progressive Cas. Ins. Co.*, 24 Misc 3d 194, 202 [Dist Ct, Nassau County 2009] [service by regular, rather than certified mail is technical, non-prejudicial defect under CPLR 2001]).

As defendants are self-represented, plaintiff's service on their alleged former counsel is of no consequence.

B. Installment payment order

Pursuant to CPLR 5226,

where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor

.....

In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents . . . the amount due on the judgment . . . or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

The purpose of an installment payment order is to compel the payment of judgments by those able to do so. (*Allstar Capital, Inc. v Curry*, 28 Misc 3d 513, 515 [Sup Ct, New York County 2010], citing *Bergman v Buechler*, 249 AD 553 [1st Dept 1937]).

Installment payment orders allow a creditor to thwart "payment-avoidance schemes."

(Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.08):

A frequently employed scheme finds the judgment debtor and his wife, or some other relative, in control of a corporation or other business enterprise. The judgment debtor claims that the business belongs to his relative and that he is merely an employee at a salary of a few dollars a week. The courts have either rejected such allegations as preposterous or shown, by simple mathematics or extrinsic facts, that the salary paid was not a measure of the debtor's compensation.

(*Id.*).

The burden rests on the judgment creditor to establish that the judgment debtor receives or will receive money that is not exempt from installments papers, or that the judgment debtor is rendering services without adequate compensation. (*Id.* ¶ 5226.11). “[W]hen it is not possible to determine what the debtor’s services are worth, a showing that the debtor is getting enough money from some source to be enjoying the standard of living equivalent of a person earning a higher sum should suffice to enable the court to require the debtor make periodic payments out of the assumed sum.” (*Couture Brand Holdings, LLC v Falchi*, 2009 NY Slip Op 30742[U] [Sup Ct, New York County 2009], *citing* Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C53226:3]).

It is the judgment debtor’s burden to prove his reasonable requirements. (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.11; *Lowy*, 383 F Supp 2d at 615, *citing Camphill Special Schools, Inc v Prentice*, 126 Misc 2d 707, 708 [Sup Ct, Onondaga County 1984] and *Dickens v Director of Fin.*, 45 Misc 2d 882, [Sup Ct, New York County 1965]; *Adirondack Furniture Corp. v Crannell*, 167 Misc 599 [Cty Ct, Saratoga County 1938]). Issues of fact concerning the debtor’s earnings or reasonable requirements may be tried by the court pursuant to CPLR 2218, or heard by a referee, pursuant to CPLR 4001. (Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5226.11, and cases cited therein). “The test is what the judgment debtor can reasonably afford to pay, taking into consideration his needs, those of his dependents, and other inroads on his income from other obligations.” (*Kaufman v Kaufman*, 29 AD2d 922 [1st Dept 1968]).

The installment payment statute is constitutional (*see* Weinstein-Korn-Miller, NY Civ

Prac CPLR ¶ 5226.05; *Reeves v Crownshield*, 274 NY 74 [1937]; *F.E. Compton & Co v Williams*, 248 AD 545 [4th Dept 1936]), and defendants cite no authority for the proposition that I am constitutionally compelled to disregard the free legal services they render to their entities. Rather, authority is to the contrary.

In *Matter of Brown*, the court issued an installment order against a debtor who rendered free pastoral services to various entities. (179 Misc 221 [Sup Ct, New York County 1942], *affd* 265 AD 802 [1st Dept 1942], *lv denied* 289 NY 852 [1943]). That the pastor had a constitutional right to practice his religion did not prevent the court from assigning a value to his religious services. Notwithstanding that one is free to offer legal services without compensation, one may not do so at the expense of creditors. (*Id.* [debtor may not render free services at creditor's expense]; *cf. Joseph M. v Lauren J.*, 45 Misc 3d 1211[A], 2014 NY Slip Op 51536[U] [Sup Ct, New York County 2014] [while wife free to offer health and nutrition services without compensation pursuant to religious obligation, having “purposefully reduced her ability to be self-supporting,” downward deviation in maintenance warranted]).

In a case that predates the installment payment statute, the Court held that a creditor had no claim to a debtor's gratuitous services to a spouse (*Abbey v Deyo*, 44 NY 343 [1871]), and in *Crenshaw v McKinley*, 116 F2d 877 (2d Cir 1941), gratuitous services to a spouse were held not to constitute fraudulent transfers under the Bankruptcy Act. They are inapposite.

Defendants also cite no authority indicating that a creditor seeking installment payments must demonstrate fraudulent intent.

Based on the parties' submissions, I find as follows:

Ben and Eli demonstrate that they have large families to support and expensive residences

to maintain, and their most recently disclosed federal income tax filings reflect that they cannot afford to pay any installment payments. Plaintiff, however, demonstrates through defendants' testimony, as well as their more recent admissions, that they work on their investments, that they still manage certain entities and properties, and that they are engaged in the real estate business. Eli's and Ben's contention that they work on their investments solely to the extent of keeping them afloat is too vague and conclusory to prove that they are not or could not be compensated for that work, and their most recently disclosed tax returns reflect that they have derived income from their real estate services in 2011. Additionally, the August 2014 offer to extend a \$18.3 million loan based on Ben's personal guarantee, demonstrates not only that Ben is working in the real estate business, but that he has resources sufficient to warrant the extension of a large loan. And, absent any support, documentary or otherwise, for Ben's and Eli's assertion that they perform legal services to their entities to reduce their legal fees, they prove only that they are employable as lawyers, and highly paid supervisory lawyers at that, unjustifiably performing these services without compensation.

Joe's equivocations concerning his relationship with the Bobker Group and MIF, and his family's testimony that he works for his sons warrant the conclusion that he too, is involved in the real estate business. In any event, Joe admitted that his sons, through their trusts, compensate him for his services, notwithstanding his more recent claim that he has not consulted on any real estate venture since 2009. (*See City of Albany Indus Dev Agency v Garg*, 268 AD2d 784, 786 [3d Dept 2000] [proper for court to consider non-money transfers, non-arms-length transactions, gifts to and from children as income under CPLR 5226]). The claims advanced by Joe and the findings based thereon in the 2005 federal litigation are not considered.

Moreover, defendants' lack of forthrightness and failure to comply with discovery and the charging order, particularly Joe's willful blindness concerning his own finances, and his failure to produce recent financial documents, including those as rudimentary and easy to disclose as tax returns, warrant the reasonable inference that had they complied, the material disclosed would show that they receive funds from undisclosed sources. (*Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.*, 18 AD3d 286, 287 [1st Dept 2005] [adverse inference may be drawn from party's failure to produce documents in its control]). Under these circumstances, defendants' disingenuous complaint that plaintiff's expert relied on dated evidence is not considered.

For all of these reasons, defendants' own testimony and the few documents that they have produced, as well as plaintiff's expert's conclusions regarding defendants' current activities, satisfy plaintiff's burden of proving that defendants render services without receiving adequate compensation (*see Nutmeg Fin. Services, Inc. v Richstone*, 186 AD2d 58, 58-59 [1st Dept 1992] [rejecting debtor's contention that he earns only \$1,000 a week as physician in affluent part of city; finding he rendered services without adequate compensation to impede recovery of judgment]; *Couture Brand Holdings, LLC, supra* [ordering installment payment; defendant's profession and standard of living incompatible with alleged annual salary]), and that defendants' past, and present employment, for apparently little to no pay, evinces an intent to frustrate plaintiff's attempt to collect on its judgment absent court intervention.

IV. CONCLUSION

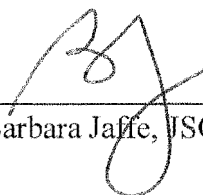
Accordingly, I refer this matter to a referee, empowered to make credibility findings, to hear and determine the reasonable value of defendants' services and requirements (*see Edelman v Edelman*, 83 AD2d 622 [2d Dept 1981] [ordering hearing to determine reasonable

requirements]; *Chem. Bank v Sylvester Builders, Inc.*, 124 Misc 2d 148, 149 [Sup Ct, New York County 1983] [ordering hearing and report on fair and reasonable value of service rendered]), and thus it is hereby

ORDERED and ADJUDGED, that plaintiff's motion for an installment payment order against defendants Ben Bobker, Eli Bobker, and Joe Bobker is granted; and it is further

ORDERED, that the matter is referred to a special referee to hear and determine the reasonable value of defendants' services and requirements.

ENTER:



Barbara Jaffe, JSC

DATED: January 8, 2014
New York, New York