

Port Auth. of N.Y. & N.J. v Yeshiva
2017 NY Slip Op 31099(U)
May 18, 2017
Supreme Court, New York County
Docket Number: 450950/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,

Plaintiff,

DECISION/ORDER
Index No. 450950/2014

-against-

A.E.T YESHIVA, ALL WAY EAST TRANS., ALL WAYS EAST,
ALL YOURS LIMOUSINE SERVICE, LTD., ALLWAY EAST,
ALLWAYS EAST, ALL-WAYS EAST, ALLWAYS EAST TRANSP.,
ALL-WAYS EAST TRANSPORTATION, ALLWAYS YOURS,
ALLWAYS YOURS TRANSPORTATION, INC., ALWAYS YOURS,
MARLAINA KOLLER, JOHN DOE,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Port Authority of New York & New Jersey commenced the instant action seeking to recover fees and tolls it is owed associated with vehicles owned and driven by defendants. Plaintiff now moves for an Order pursuant to CPLR § 5229 compelling an examination of defendant Marlaina Koller (“Koller”) concerning the nature, extent and location of any of Koller’s assets and restraining Koller from suffering any sale, assignment, transfer or interference with property in which she has an interest. Defendant Koller cross-moves for an Order removing her from the instant action, or, in the alternative, vacating an underlying stipulation of settlement. For the reasons set forth below, plaintiff’s motion is granted and Koller’s cross-motion is denied.

The relevant facts are as follows. Plaintiff owns, operates, maintains and controls certain bridges and tunnels throughout the tristate area. No vehicular traffic is permitted to use plaintiff’s bridges and tunnels without the payment of such tolls and other charges as may be from time to time prescribed by plaintiff. Among the methods provided for the payment of tolls by motorists is electronic payment known and referred to as E-ZPass. Exclusive E-ZPass lanes are clearly signed to inform motorists that the lanes are

not for the use of those who pay their tolls in cash. The E-ZPass lanes are provided for use by those who have made prior arrangements to pay the toll through the use of valid E-ZPass equipment and have an agreement by which they agree to use their assigned E-ZPass transponder device only when their account is in good standing and when their account has sufficient funds needed to pay the tolls as and when charged.

Plaintiff employs a toll collection monitoring system that identifies motorists improperly using exclusive E-ZPass lanes wherein a toll due is not paid. The owner of a vehicle identified as improperly using exclusive E-ZPass lanes is provided with a written citation identifying the violation or violations with specificity including the amount of toll due, the time and place of the violation and other details sufficient to identify the vehicle and such citation is sent to the owner at the address provide on the offending vehicle's motor vehicle registration.

Plaintiff commenced the instant action against the defendants seeking to recover the tolls and administrative fees associated with 5,651 occasions between June 1, 2008 and May 31, 2014 on which defendants' vehicles traveled through E-ZPass lanes at various bridges and tunnels under the dominion and control of the plaintiff without paying the tolls associated with the E-ZPass lanes. On or about January 20, 2015, the parties entered into a stipulation of settlement and personal guarantee (the "Stipulation of Settlement") signed by plaintiff, defendants' lawyer and non-party Judith Koller, who allegedly owns the defendant entities. The Stipulation of Settlement gave defendants three payment options and provided that should defendants default on the terms of the Stipulation of Settlement, plaintiff would be entitled to enter judgment for \$425,000.00 minus any payments made. Plaintiff asserts that defendants have failed to comply with the terms of the Stipulation of Settlement. Specifically, plaintiff asserts that the defendants did not make any of the required payments for the months of June 2015, July 2015, August 2015, October 2015, November 2015, December 2015, January 2016 or February 2016.

Thereafter, plaintiff moved for a default judgment based on defendants' failure to comply with the terms of the Stipulation of Settlement. In a decision dated November 17, 2016, this court granted plaintiff's motion for a default judgment against defendants A.E.T Yeshiva, All Way East Trans., All Ways East, All Yours Limousine Service, Ltd., Allway East, Allways East, All-Ways East, Allways Your, Allways Your

Transportation, Inc., Always Yours and Marlaina Koller, upon information and belief also known as Judith Koller, in the amount of \$377,000.00, with interest thereon at the statutory rate from June 1, 2015 plus costs and disbursements and severed the portion of the action that sought the recovery of attorney's fees which was sent to a special referee.

Plaintiff now moves for an Order pursuant to CPLR § 5229 compelling an examination of defendant Koller and restraining Koller from selling, assigning, transferring or interfering with property in which she has an interest. Defendant Koller cross-moves for an Order removing her from the instant action, or, in the alternative, vacating the Stipulation of Settlement.

Pursuant to CPLR § 5229, "[i]n any court, before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment." "The only statutory requirement is that the application for 5229 relief be made by the prevailing party." *Gallegos v. Elite Model Management Corp.*, 1 Misc.3d 200, 202 (Sup. Ct. N.Y. County 2003). "It is in the trial court's discretion whether to grant the injunctive relief in light of the purpose of the statute: to prevent an adverse party from disposing of assets in order to avoid judgment." *Id.* It is well-settled the moving party need not submit evidence that assets are definitively being disposed of or diverted as a prerequisite to obtaining CPLR § 5229 relief. *See id.* at 207.

Here, plaintiff's motion for an Order compelling an examination of defendant Koller concerning the nature, extent and location of any of Koller's assets is granted as plaintiff has demonstrated that it has received a favorable decision granting it judgment in its favor against the defendant Koller.

Koller's cross-motion for an Order removing her from the action, or, in the alternative, vacating the Stipulation of Settlement is denied as she has failed to provide a basis for such relief. To the extent she asserts that she is not a valid defendant in this action because she does not own any of the defendant entities and that she never signed the Stipulation of Settlement, such assertion is without merit. Initially, this court has already granted plaintiff a default judgment against Koller on the basis that she failed to comply with the Stipulation of Settlement. Koller is a named defendant in the action and has not been dismissed from

the action. Further, counsel for defendants, Stephen A. Cerrato, signed the Stipulation of Settlement on behalf of the defendants and Koller has failed to demonstrate that Mr. Cerrato did not sign the Stipulation of Settlement on her behalf. To the extent Koller seeks to substitute her mother, Judith Koller, as the proper individual defendant in the action or to vacate the judgment entered against her, she must move for such relief.

Accordingly, plaintiff's motion is granted and defendant Koller's cross-motion is denied. It is hereby

ORDERED that Koller shall appear for an examination within thirty (30) days on a date and time specified by plaintiff and such examination shall be limited to the nature, extent and location of any of Koller's assets; and it is further

ORDERED that Koller is restrained from suffering any sale, assignment, transfer or interference with property in which she has an interest. This constitutes the decision and order of the court.

DATE:

5/18/17

CK
KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.