

**Williams v Clubhouse, Inc.**

2017 NY Slip Op 33149(U)

August 4, 2017

Supreme Court, Dutchess County

Docket Number: 50045/2017

Judge: James D. Pagonis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
SANDRA WILLIAMS,

Plaintiff,

-against-

THE CLUBHOUSE, INC. and PAUL ANTONELL,

Defendants.

-----X

**DECISION AND ORDER**

Index No. 50045/2017

**PAGONES, J D., A.J.S.C.**

Defendants move for an order: (1) pursuant to CPLR §6223, vacating the Court's order of attachment dated February 6, 2017; and, (2) pursuant to CPLR §6225, directing the Sheriff to return the defendants' property.

The following papers were considered:	
Order to Show Cause-Affidavit-Exhibits A-C-Exhibits 1-3-Exhibits D-G-Affirmation	1-13
Affirmation in Opposition-Affidavit in Opposition-Exhibits 1-3	14-18
Affidavit in Further Support-Affirmation Further Support	19-2

By way of background, plaintiff alleges that on or about January 1, 2001, she and defendant Paul Antonell entered into a lease with the defendant The Clubhouse, Inc. for a term of fifteen (15) years. By its terms, the lease required The Clubhouse, Inc., when it began to operate, to make monthly payments of One Thousand Four Hundred Twenty Dollars (\$1,420.00)

on the first day of each calender month. During the term of the lease, defendant Antonell with other shareholders of The Clubhouse, Inc. operated a music and recording studio on the leased premises. The plaintiff alleges that at no time during the lease term did The Clubhouse, Inc. pay rent. By notice of petition and petition filed in the Town of Rhinebeck Justice Court on or about December 12, 2016, petitioner, plaintiff herein, commenced a summary proceeding to remove The Clubhouse, Inc. from the premises described in the lease. On the return date of that petition, December 21, 2016, plaintiff alleges that as a result of the ongoing dissolution of the corporate entity, the transfer of personal property to defendant Antonell and its vacatur of the premises, the Justice Court was deprived of jurisdiction to hear the claim for back rent and use and occupancy associated with the holdover proceeding. Plaintiff alleges that the admitted transfer by The Clubhouse, Inc. to Mr. Antonell of its personal property constitutes a fraudulent conveyance under the Debtor and Creditor Law. The current summons and complaint asserts three causes of action: (1) use and occupancy due under the lease in the sum of Two Hundred Fifty-Five Thousand Five Hundred Forty Dollars (\$255,540.00) together with legal fees, costs and disbursements; (2) pursuant to CPLR Article 62 an order of attachment; and, (3) legal fees incurred, pursuant to Debtor and Creditor Law §276-a.

In support of their motion, defendants allege that the order

of attachment should be vacated as defendants' former counsel failed to oppose the order to show cause seeking the attachment, the need for attachment has been rendered academic by the settlement of a separate matter entitled *James D. Krissel v. The Clubhouse, Inc.*, Index No. 2015-51509 and the attachment was not used for its proper function, i.e. it was used to stimulate or force a settlement.

CPLR §6223 states in relevant part:

"(a)...[p]rior to the application of property or debt to the satisfaction of a judgment, the defendant...may move...for an order vacating or modifying the order of attachment...[i]f, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment.

(b)...[u]pon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits."

The court has broad discretion in considering an application to vacate an attachment (*see Rothman v. Rogers*, 221 AD2d 330 [2<sup>nd</sup> Dept 1995]). In opposition to the defendants' motion, plaintiff's counsel, in an attempt to establish the continuing need for the levy, states that "[plaintiff] did not want to be in a position of having no recourse to the assets fraudulently conveyed by the Clubhouse to Mr. Antonell who sought to control those assets and indeed dispose them for his own benefit to her detriment." The Court notes mere removal or assignment or other disposition of property is not grounds for attachment (*see Laco*

*X-Ray Systems, Inc. v. Fingerhut*, 88 AD2d 425 [2<sup>nd</sup> Dept 1982] appeal dismissed by 58 NY2d 826 and appeal dismissed by 58 NY2d 606 and appeal dismissed by 58 NY2d 970). Fraud cannot be inferred, it must be proved (*id.*). Here, the plaintiff fails to sustain her burden in proving that The Clubhouse, Inc. fraudulently transferred its assets to defendant Antonell. Moreover, plaintiff fails to meet the statutory burden of showing that the levy of the order of attachment is necessary for security purposes (see CPLR §6223[a]). There has been no showing that the defendants are attempting to liquidate or secrete assets in attempt to avoid any potential monetary damage associated with the current lawsuit.

Accordingly, the order of attachment dated February 6, 2017 is hereby vacated. The Sheriff of Dutchess County is directed to return to the defendants the property seized pursuant to the order of attachment dated February 6, 2017. Defendants have voluntarily agreed, that they are prohibited from encumbering the property returned, until further order of this Court.

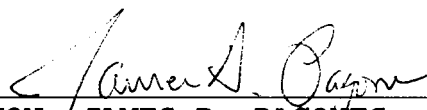
Counsel are reminded that a Compliance Conference is scheduled for November 17, 2017 at 9:30 a.m. In addition the Note of Issue deadline is January 17, 2018. Adjournments are only granted with leave of the Court.

This constitutes the decision and order of this Court. This

decision and order has been filed electronically.

Dated: August 4, 2017  
Poughkeepsie, New York

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