Wimbledon Fin. Master Fund, Ltd. v Bergstein
2018 NY Slip Op 30868(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 150584/2016
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WIMBLEDON FINANCING MASTER FUND, LTD.,

Petitioner,

-against-

DAVID BERGSTEIN, GRAYBOX LLC, ISKRA ENTERPRISES LLC, WESTON CAPITAL ASSET MANAGEMENT, LLC, ASIA CAPITAL MARKETS LIMITED LLC, GEROVA MANAGEMENT INC., K JAM MEDIA, INC., HENRY N. JANNOL, SPILLANE WEINGARTEN LLP, and VENABLE, LLP,

Respondents.

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Index No: 150584/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

I. Introduction

The court assumes familiarity with this special proceeding, the related actions before this court, and the numerous decisions in those actions. On July 17, 2017, the court issued a decision granting the petition of Wimbledon Financing Master Fund, Ltd. (Wimbledon), *see* Dkt. 766,[1] and judgment was entered against respondents on July 21, 2017. *See* Dkt. 776 (the Judgment).[2] On February 5, 2018, Wimbledon moved by order to show cause to: (1) hold respondents David Bergstein and Graybox LLC (Graybox) (collectively, the Bergstein Parties), along with their *pro hac vice* admitted co-counsel, Steven Katzman and his firm, Bienert Miller & Katzman PLC (BMK) (collectively, the BMK Parties), in civil contempt pursuant to Judiciary Law § 753 for

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

[2] The Judgment against Bergstein totals approximately $8.5 million, while the Judgment against Graybox totals approximately $770,000. The Appellate Division denied the Bergstein Parties' motion for a stay of enforcement of the Judgment pending appeal. *See* Dkt. 874.

their violation of restraining notices; (2) compel the Bergstein Parties' former counsel, Sills Cummis & Gross P.C. (SCG), to comply with Wimbledon's information subpoena and subpoena *duces tecum*; (3) obtain an order directing the Bergstein Parties and their counsel to obey the subject restraining notices; (4) permit Wimbledon to obtain expedited discovery from the BMK Parties; and (5) obtain additional sundry relief from the Bergstein Parties. The Bergstein Parties, the BMK Parties, and SCG separately filed opposition to the motion. The court reserved decision after oral argument. *See* Dkt. 933 (4/4/18 Tr.).

Subsequently, by interim order dated April 20, 2018, the court directed the parties to make further submissions, including affidavits from SCG and Katzman indicating whether the BMK Parties were aware of the subject restraining notices at the time of the alleged violation. *See* Dkt. 941. The court rejected respondents' contention that such information is privileged.[3] Respondents filed those supplemental submissions on May 1, 2018, and Wimbledon responded on May 4, 2018. For the reasons that follow, Wimbledon's motion is granted in part and denied in part.

II. The Bergstein Parties' Contempt

On July 25, 2017, four days after the Judgment was entered, the Bergstein Parties were served with virtually identical restraining notices forbidding them from "mak[ing] or suffer[ing] any sale, assignment, transfer, or interference with ***any property in which You have an interest***."

[3] By interim order dated April 26, 2018, respondents were granted additional time to make these submissions to allow them to seek an emergency stay from the Appellate Division based on their privilege arguments. Dkt. 949 (collectively, with the April 20 order, the Interim Orders); *see* Dkt. 945 (proffering arguments and citing authority rejected by the court). The Appellate Division denied their stay application on April 27, 2018. *See* Dkt. 956 at 1.

See Dkts. 868 & 869 at 2 (the Restraining Notices) (emphasis added).[4] The Bergstein Parties do not dispute that they were duly served with the Restraining Notices. The Restraining Notices also were served on SCG. *See* Dkt. 872. Indeed, prior to formally serving the Bergstein Parties, on July 21, 2017, at 6:03 pm, Wimbledon's counsel emailed the Restraining Notices to SCG. *See* Dkt. 965. *Six minutes later*, at 6:09 pm, SCG forward the email to Bergstein. *Four minutes later*, at 6:13 pm, SCG forwarded the email (including the full chain indicating it had been forward to Bergstein) to Katzman and another attorney at BMK. *See id.* Katzman admits that he was made aware of the Restraining Notices through this email. *See* Dkt. 958 at 8.

There is no question of fact that the Bergstein Parties knowingly and willfully violated the Restraining Notices. As discussed in this court's August 19, 2016 decision in this action, Bergstein and his entities have been embroiled in litigation across the county, including, as relevant here, in the United States District Court for the Central District of California. *The Wimbledon Fund, SPC (Class TT) v Graybox LLC*, 15-cv-6633 (CD Cal) (the California Action); *see* Dkt. 283 (the August 2016 Decision) at 14. BMK represented the Bergstein Parties in the California Action, in which one of various Wimbledon funds (Class TT) sued the Bergstein Parties and obtained a pre-judgment attachment of their funds. *See* August 2016 Decision at 14-15.[5] The attached funds were maintained in a client trust account of BMK. They remained frozen in January 2017, at which time the California Action was stayed pending Bergstein's

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[4] To the extent respondents and their counsel challenge the breadth of the Restraining Notices, that argument is without merit. *See Doubet LLC v Trustees of Columbia Univ.*, 99 AD3d 433, 435 (1st Dept 2012) ("Service of the restraining notices upon respondent restrained all 'property' that was the subject of the notices.").

[5] The district court's attachment order was affirmed by the Ninth Circuit and informed this court's decision attaching other of the Bergstein Parties' assets. *See* August 2016 Decision at 14-15, *aff'd*, *Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 147 AD3d 644 (1st Dept 2017).

criminal trial in New York.[6] While the stay was in effect, on August 16, 2017, BMK filed a stipulation in the California Action to lift the stay and modify the attachment order to permit BMK to distribute the attached funds, which totaled $2,412,000, to Class TT as part of a settlement. *See* Dkt. 878. The California court approved the stipulation on August 17, 2017. *See* Dkt. 879.

It turns out, however, that Class TT and the Bergstein Parties did not enter into a formal settlement agreement until three months later, on November 16, 2017. *See* Dkt. 934 at 6 (the Settlement Agreement).[7] The Settlement Agreement provides for $9,412,000 to be paid to Class TT, which was partially funded by the $2,412,000 that had been attached. *See id.* at 9. Section A.1 provides that this money was to come from Graybox, an LLC that is (as discussed in prior decisions) owned and controlled by Bergstein. *See id.* In consideration for the payments, Bergstein received a *personal* release. *See id.* at 12.[8] Moreover, in a recent submission to the

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[6] This court stayed the related plenary action in December 2017 pending the conclusion of the criminal trial. The stay was lifted after Bergstein was convicted. *See* Index No. 653468/2015, Dkt. 1299. Bergstein has been remanded pending sentencing, which is scheduled for June 12, 2018. *See* Index No. 653468/2015, Dkt. 1304.

[7] Until this court ordered a copy of the Settlement Agreement to be produced at oral argument, neither Wimbledon nor the court had seen it. According to Katzman, settlement discussions began in early July 2017, and eventually resulted in a term sheet dated August 10, 2017 (i.e., after this court's Judgment was entered and the Restraining Notices were served), in which the parties agreed to enter into a formal settlement agreement with terms specified therein. *See* Dkt. 960. As noted above, that occurred three months later, on November 16, 2017.

[8] *See also* Dkt. 968 at 7 n.3 ("Katzman and BMK claim that Graybox transferred the Frozen Funds in satisfaction of Class TT's fraudulent conveyance claims against Graybox. But this argument ignores the Settlement Agreement, which provides that the transfer of the Frozen Funds to Class TT was part of the consideration for Class TT's release of claims against both Graybox *and* Bergstein. It also ignores that the Frozen Funds belonged to Bergstein, and that he merely directed those funds to be placed in Graybox's name as part of his settlement in the Aramid bankruptcy.") (emphasis in original; citations omitted).

federal court (Castel, J.) overseeing his sentencing and forfeiture, Bergstein admits the $2,412,000 was paid for his benefit, and sought a reduction of his forfeiture based on this payment. *See id.* at 25, 32.[9] Hence, there is no question that the $2,412,000 paid by Graybox is property in which Bergstein had an interest. Consequently, the Bergstein Parties violated the Restraining Notices when they transferred this money to Class TT. That the California court lifted the attachment to permit the transfer is of no moment, as the Bergstein Parties defrauded the California court by seeking permission to make the transfers without disclosing that the subject funds were encumbered by the Restraining Notices. *See Webb v Torrington Indus., Inc.*, 28 AD3d 1216 (4th Dept 2006) ("We further conclude that the court properly found defendant in contempt of court for willfully deceiving the court in a manner injurious to plaintiffs' rights as judgment creditors.").

The Bergstein Parties' opposition does not articulate any valid excuse for this clear violation of the law. For instance, they argue that "[b]y the time the restraining notices were served on [the Bergstein Parties], the Frozen Funds had been under restraint for nearly two years, and ***neither Bergstein nor Graybox had control or possession of the Frozen Funds***"; and that "[i]t is certainly reasonable that it would not occur to [the Bergstein Parties] that the restraining notices impacted the release of the Frozen Funds, which had been held pursuant to an earlier court order for the benefit of [Class TT] for almost two years." *See* Dkt. 929 at 6 (emphasis

[9] Bergstein contends that his arguments regarding the appropriate amount of forfeiture in the criminal case is not an admission that he benefited from the settlement payments. *See* Dkt. 955 at 1. While this argument is unconvincing, the court notes that Bergstein's ownership of Graybox and the personal release he procured are, in any event, sufficient to establish that Bergstein had a beneficial interest in the settlement payment made by Graybox. Moreover, since Graybox is subject to the Restraining Notices, and since Bergstein controls Graybox, his causing Graybox to violate the Restraining Notices is an independent ground for contempt.

added). These arguments are disingenuous. The Frozen Funds were held by BMK – ***which represented the Bergstein Parties in both this action and the California Action***. That two years had gone by is of no moment, as it was the Restraining Notices that were violated, not the attachment order. The Restraining Notices were served at the end of July 2017 – ***less than one month before the Bergstein Parties asked the California court to release the funds***. Nonetheless, in violation of the Restraining Notices, Bergstein paid off other unsecured[10] creditors in consideration for a personal release.[11]

The circumstances here are governed by Article 52 of the CPLR, which details the mechanisms for enforcement of money judgments in New York. Those mechanisms "may include the imposition of a restraining notice against a judgment [debtor's assets] to secure funds for later transfer to the judgment creditor through a sheriff's execution or turnover proceeding." *Cruz v TD Bank, N.A.*, 22 NY3d 61, 66 (2013). "A party seeking to enforce a judgment may seek to restrain or prohibit the transfer of a judgment debtor's property in the hands of a third party pursuant to CPLR 5222(b)." *Verizon New England, Inc. v Transcom Enhanced Servs., Inc.*, 21 NY3d 66, 70 (2013). Moreover, "under CPLR 5251, a finding of contempt may be entered for the '***refusal or willful neglect***' to obey a subpoena or a restraining order issued pursuant to the provisions of article 52 of the CPLR." *Kanbar v Quad Cinema Corp.*, 195 AD2d

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[10] As discussed herein, the Bergstein Parties' contention that Class TT had priority under California law is erroneous.

[11] This is very much in keeping with the deceptive manner in which Bergstein handles his money. *See* Dkt. 910 at 4 (Judge Castel noting that "the evidence at trial showed that Bergstein's finances are, to use a polite term, opaque"; that "[h]e regularly operated through shell companies"; and remanded him pending sentencing because, *inter alia*, "there is a danger that Bergstein will commit further financial crimes if free to conduct business and thus is a danger to the community.").

412, 414 (1st Dept 1993) (emphasis added); *see Cruz*, 22 NY3d at 76 ("Whether issued by a court ***or an attorney acting as an officer of the court***, a restraining notice is an injunction and 'disobedience is punishable as a contempt of court.'") (emphasis added), quoting CPLR 5222(a). "One may not circumvent the mandates of a restraining notice by claiming that the judgment debtor has no interest in the money ***merely because he will not acquire physical possession of such money***. The fact that a judgment debtor ***will directly benefit from the payment of this sum*** is sufficient to require the party served with the restraining notice to comply with the provisions or be subject to the appropriate legal sanctions." *Ray v Jama Prods., Inc.*, 74 AD2d 845, 845-46 (2d Dept 1980) (emphasis added). Thus, even where funds are not nominally held in the name of the judgment debtor, a restraining notice is violated if such funds are used for the benefit of the judgment debtor. *See Bingham v Zolt*, 231 AD2d 479 (1st Dept 1996), citing *ERA Mgmt., Inc. v Morrison Cohen Singer & Weinstein*, 199 AD2d 179 (1st Dept 1993)

There simply is no question of fact that the Bergstein Parties knowingly and willfully violated the Restraining Notices. It is undisputed that the Bergstein Parties were validly served with the Restraining Notices, but nonetheless used restrained funds to pay other creditors. The court, therefore, holds them in civil contempt. The appropriate remedies are addressed further herein. Going forward, the Bergstein Parties must obey the Restraining Notices or risk further contempt proceedings.

III. The BMK Parties' Contempt

"[A]n attorney whose refusal or ***willful neglect*** of [a restraining notice] is responsible for his or her client's disobedience may also be held in contempt." *Kanbar*, 195 AD2d at 414. A party ***with actual knowledge*** of prohibited conduct who nonetheless engages is such conduct may be held in civil contempt. *El-Dehdan v El-Dehdan*, 26 NY3d 19, 22 (2015) ("plaintiff met

her burden in support of her motion for civil contempt by establishing that defendant violated a lawful, clear mandate of the court, ***of which he had knowledge***, and that such violation resulted in prejudice to her rights.") (emphasis added). This is true even if the party was never served. *Tishman Constr. Corp. v United Hispanic Constr. Workers, Inc.*, 158 AD3d 436, 437 (1st Dept 2018) ("Although Rodriguez was not personally served in the action, it is undisputed that he was involved in the negotiation of the stipulation, and was knowledgeable of the conditions set forth therein."), citing *1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co.*, 57 AD3d 340, 341 (1st Dept 2008).

Relying on this authority, Wimbledon argues that the BMK Parties may be held in contempt so long as they had actual knowledge of the Restraining Notices, whether or not they were formally served.[12] The BMK Parties disagree, arguing that while service is not required to be held in contempt for violating a court order, service is required to be held in contempt for violating a restraining notice. The BMK Parties do not cite any authority in support of this proposition. Rather, they rely on the language of CPLR 5222(b) covering service on someone other than the judgment debtor, which provides, in pertinent part: "A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, ***at the time of service***, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest." (emphasis added). This argument misses the mark. The BMK Parties are not alleged to have violated a restraining notice served upon someone other than the

[12] As noted earlier, Katzman admits he became aware of the Restraining Notices when he received SCG's email on July 21, 2017. Thus, Katzman's knowledge of the Restraining Notices is undisputed.

judgement debtor. Valid service of the Restraining Notices on the parties whose assets were restrained (the Bergstein Parties) is uncontested. Rather, the BMK Parties are alleged to have, through willful neglect, caused restraining notices duly served upon the judgment debtor to have been violated.

Neither CPLR 5222(b) nor any case cited by the BMK Parties (and none found by this court) indicates that counsel of record in an action with actual knowledge of a restraining notice having been served upon its client is free to act as its client agent and cause that restraining notice to be violated. The case law, in fact, is to the contrary. *See Ivor B. Clark Co. v Hogan*, 296 FSupp 407, 412 (SDNY 1969) ("Talcott's claim that it did not receive a restraining notice but rather a notice that restraining orders had been served upon the judgment debtors herein is of no particular significance in that a person not served with a restraining notice can be punished for contempt if he, ***with knowledge of the existence and the terms of a restraining notice served on another***, willfully participates in a violation thereof.") (emphasis added), citing *Kramer v Skiatron of Am., Inc.*, 32 Misc2d 1022, 1025 (Sup Ct, NY County 1961), *aff'd*, 18 AD2d 968 (1st Dept 1963); *see also Accounts Receivable Sols., Inc. v Tompkins Trustco, Inc.*, 45 AD3d 612, 613 (2d Dept 2007) ("The plaintiff demonstrated its entitlement to judgment as a matter of law against [defendant] based on its ***negligent violation*** of a restraining notice.") (emphasis added).

Here, the BMK Parties, for the Bergstein Parties' benefit, transferred funds belonging to Graybox to Class TT, thereby expressly violating the Restraining Notices. Following the logic of the authority cited above, and in keeping with the holdings of *El-Dehdan*, *Tishman*, and *1319 Third Ave.*, the court concludes that the BMK Parties, who acted with awareness of the Restraining Notices and took action which effectively aided and abetted the Bergstein Parties' violation of such Restraining Notices, can be held in civil contempt. *See Sec. Tr. Co. of*

Rochester v Magar Homes, 92 AD2d 714, 715 (4th Dept 1983) ("In order to satisfy due process requirements, a sanction for violation of CPLR 5222 may be imposed only after ***proof of knowledge, actual or constructive, of the restraining notice***.") (emphasis added), accord *CSX Transportation, Inc. v Emjay Envtl. Recycling, LTD.*, 2016 WL 755630, at *5 (EDNY 2016) ("It bears emphasizing that 'there is no willfulness requirement for imposition of money damages, [but] there must at least be a showing of negligence in failing to comply with the restraining notice.'"), *aff'd sub nom. CSX Transportation, Inc. v Island Rail Terminal, Inc.*, 879 F3d 462 (2d Cir 2018), *aff'd*, 879 F3d 462 (2d Cir 2018), quoting *Doubet, LLC v Trustees of Columbia Univ.*, 32 Misc3d 1209(A), at *18 (Sup Ct, NY County 2011), *aff'd*, 99 AD3d 433 (1st Dept 2012). There simply is no ambiguity here. No reasonable attorney should expect that helping a client violate a restraining notice is acceptable. Nor is it acceptable for that attorney to ask another court to unfreeze assets to effectuate a transfer when, unbeknownst to that other court, such a transfer would be violative of a restraining notice.

That said, in his affidavit, a very contrite Katzman seeks sympathy by proffering two supposedly mitigating factors. *First*, he recounts what appears to be a prolific 30-year legal career without being sanctioned or held in contempt. *See* Dkt. 958 at 2-3. While a clean record and 15 years of government service are commendable, the court is unaware of any authority for the proposition that generally ethical attorney should be held immune if he eventually commits a serious violation. There is no contempt mulligan.[13] *Second*, Katzman pleads ignorance of New York law. *See id.* at 8 ("To the best of my recollection, I had never seen a restraining notice

[13] *People v Williamson*, 136 AD2d 497 (1st Dept 1988) (contemnor has no right to an opportunity to purge contempt); *see Davidson v Visitacion-Lewis*, 131 AD3d 888, 889 (1st Dept 2015) (apology does not purge contempt). There is no way to purge in this instance, as the attached funds were paid out in the settlement with Class TT.

before. California, where I have spent the bulk of my career, does not have an equivalent judgment enforcement mechanism ***and I was unfamiliar with the nature of the document***.") (emphasis added). Katzman further contends that he did not give the Restraining Notices much thought because they were forwarded to him as part of an email chain. *See id.*; *see also id.* at 9 ("When I received the [July 21 email from SCG] it did not cause me to think about the Graybox Enjoined Settlement Proceeds, or that the Restraining Notice emailed to [SCG] might have any relationship to those funds.").

These excuses are unavailing. On December 12, 2016, SCG moved to admit Katzman, who is not licensed to practice law in New York, *pro hac vice*. *See* Dkt. 484. In support of that motion, Katzman submitted an affidavit in which he attested that he was "familiar with the standards of professional conduct imposed upon members of the New York Bar and relevant statutes, rules and procedures ***and will abide by them***." *See* Dkt. 486 at 1 (emphasis added). He also agreed to submit to this court's jurisdiction regarding all acts within the scope of his participation in this case. *See id.* at 2. Based on these representations, the court admitted him *pro hac vice* by order dated January 6, 2017. *See* Dkt. 576. His admission was expressly conditioned on being bound by the same rules and laws applicable to New York attorneys. *See id.* at 2. In other words, he cannot seek special treatment or rely on ignorance of New York law. He must be treated like any other New York attorney with respect to his conduct in connection with the Restraining Notices.

Hence, after having been sent the Restraining Notices by his co-counsel, SCG, it was incumbent upon him to read and understand them and, if he was unfamiliar with their implications as a California attorney, he should have sought guidance from SCG. The very purpose of having to associate with a New York attorney is to ensure the *pro hac vice* admitted

counsel is fully aware of applicable New York law.[14] SCG clearly felt it necessary to inform Katzman of the Restraining Notices (perhaps given Katzman's involvement in negotiating a settlement of the California Action). Katzman, however, admits he ignored them based on his assumption that they simply did not affect anything going on in California (including, as discussed herein, based on his erroneous understanding of California lien law). In other words, he knew of the Restraining Notices because SCG determined they were important enough to be sent to him, but rather than understand why he received them or how they affected his client, he decided to not think about it.

Willful ignorance of the law is willful neglect, especially for an attorney. *See Cordius Trust v Kummerfeld Assocs., Inc.*, 658 FSupp2d 512, 520 (SDNY 2009) ("The Kummerfelds do not dispute that they received the restraining notice and were aware of its restrictions, yet, they deliberately engaged in activities ***which they should have known would violate the terms of the notice***.") (emphasis added). Indeed, if an attorney was immune from contempt because he chose not to read or try to understand the meaning and import of a restraining notice, then no sensible attorney seeking to zealously represent a judgment debtor would ever read a restraining notice. He could put it aside and plead ignorance, and thus be immune from contempt. That is the implication of Katzman's argument, which the court rejects as absurd. Simply put, Katzman made a deliberate decision to disregard the Restraining Notices, and now must account for his willful neglect.

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[14] Nothing herein should be construed as the court opining on or admonishing SCG for its oversight of Katzman. Wimbledon has made clear that *this* motion does not concern SCG's conduct. *See* Dkt. 900 at 23 n.12.

The court rejects the BMK Parties' attempt to shift the blame to Wimbledon by contending Wimbledon should have attached the funds in California just as it did with the other funds previously attached in this action. Leaving aside the fact that the funds in California were already attached, Wimbledon acted diligently by serving the Bergstein Parties with the Restraining Notices ***while those funds were still frozen***. *See* Dkt. 968 at 8 ("Regardless of when [] settlement discussions [in the California Action] commenced, Katzman effectuated the transfer of the Frozen Funds after receiving the Restraining Notices but three months before the parties reached a definitive settlement agreement."). Once the Restraining Notices were served, the Bergstein Parties and their counsel had no right to alienate those funds. Doing so is contempt of court.

Finally, the BMK Parties also seek to excuse their contempt by relying on the settlement funds supposedly being subject to a superior lien under California law.[15] This argument is equally erroneous. Under California law, an attachment[16] creates a lien with priory over subsequent liens. *In re Aquarius Disk Servs., Inc.*, 254 BR 253, 256 (Bankr ND Cal 2000).

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[15] While this argument is baseless for the reasons addressed herein, the court notes that the BMK Parties cite no authority for the proposition that one is free to violate a restraining notice because the funds are subject to a superior claim. On the contrary, rather than willfully disregard the restraining notices, one should file a motion seeking to vacate or narrow their scope. CPLR 5240; *see Pan Am. World Airways, Inc. v Chem. Bank*, 78 AD2d 844 (1st Dept 1980); *see also Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149, 170 (2014) ("As for jurisdictions where a [party] is faced with potential liabilities for complying with a restraining notice, CPLR 5240 gives a court discretion to deny, limit, condition or modify the use of any enforcement procedure.").

[16] Wimbledon argues that "Class TT obtained a preliminary injunction, not an attachment, and therefore [the California] statute does not apply." *See* Dkt. 968 at 8. Regardless, the BMK Parties contend, and the court assumes *arguendo*, that "the California Court's preliminary injunction order freezing the funds was substantively indistinguishable from an attachment." *See* Dkt. 931 at 32.

However, "[p]erfection of an attachment lien occurs ***when the creditor obtains a judgment in the underlying action***." *Id.* (emphasis added). Prior to the entry of judgment, an attachment is merely an *unperfected* security interest. *In re Robbins*, 310 BR 626, 629 (BAP 9th Cir 2004) ("it must be perfected in order to be enforced."). To be sure, California law permits relation back of a prejudgment attachment lien *if* a judgment is subsequently entered [*see In re Jenson*, 980 F2d 1254, 1258-59 (9th Cir 1992)]; as a result, an attachment will maintain priority even if a subsequent lien issues prior to the entry of judgment. *Aquarius*, 254 BR at 256-57; *see* Dkt. 968 at 8 ("under Cal. Civ. Pro. Code §§ 485 & 488, a litigant obtains priority as of the date of its writ of attachment only if it secures a sheriff's levy pursuant to that writ ***and then obtains a judgment***.") (emphasis added). However, where, as here, no judgment is ever entered, the attachment lacks the force of a perfected security interest, i.e., it is merely "a contingent, inchoate, or potential right." *See Aquarius*, 254 BR at 256.[17]

The BMK Parties do not cite any authority for the proposition that attached funds have priority over a subsequently issued restraining notice if there is a settlement in the action, but no judgment. Ergo, the BMK Parties have no basis to contend that California law grants priority to the $2,412,000 paid under the Settlement Agreement.

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[17] The BMK Parties' explanation of California law is misleading, as it omits the settled law that entry of judgment is required for perfection. *See* Dkt. 931 at 32 ("California law provides that where there is an attachment … the priority of the attachment … relates back to the date the prejudgment relief was obtained."). While this error on the part of the BMK Parties' extremely competent New York counsel is excusable since they are not California lawyers, the same cannot be said of Katzman, who proffers the same erroneous statement of the law. *See* Dkt. 958 ("My understanding that [Class TT] had a perfected priority interest in the Graybox Enjoined Settlement Proceeds was further supported by my understanding of [California law]."). It should be noted that this is not the first time in *this* action that California lawyers proffered erroneous legal arguments based on California lien law. *See* Dkt. 766 at 20-22.

Consequently, in addition to the remedies addressed below, for the next five years, in any motion seeking *pro hac vice* admission to any state or federal court in New York, Katzman must attach a copy of this decision to such motion. He shall also promptly send a copy of this decision to the judge that presided over the California Action.[18]

IV. Remedies for Contempt

Judiciary Law § 773 provides that a party held in civil contempt may be obligated to pay damages or a fine "sufficient to indemnify the aggrieved party" or, if actual losses are not established, "a fine may be imposed, not exceeding the amount of the complainant's costs and expenses." *See Gottlieb v Gottlieb*, 137 AD3d 614 (1st Dept 2016) ("Legal fees that constitute actual loss or injury as a result of a contempt are routinely awarded as part of the fine. These may include the legal fees incurred in bringing the contempt motion") (internal citations omitted). Here, Wimbledon shall recover the reasonable attorneys' fees expended in connection with the instant motion, which will be calculated by a Special Referee. *See Gem Holdco, LLC v Changing World Techs., L.P.*, 159 AD3d 483 (1st Dept 2018).

As for actual damages, Wimbledon correctly argues that a party held in contempt for violating a restraining notice may be ordered "to pay [the] full amount of money that would have

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[18] The court denies Katzman's request for a hearing because there is no question of fact regarding his willful neglect of the Restraining Notices. *Yonamine v New York City Police Dep't*, 121 AD3d 598 (1st Dept 2014), citing *Cashman v Rosenthal*, 261 AD2d 287 (1st Dept 1999) ("Supreme Court properly held defendant in civil contempt without holding a hearing, since it was clear from the papers submitted to the court that there was no issue of fact to be resolved"); *see Simens v Darwish*, 104 AD3d 465, 466 (1st Dept 2013) (affirming finding of civil contempt, without hearing, where contempt was based on admissions and clear and convincing documentary evidence). Likewise, there is no question that Katzman's actions "actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding", since the attached funds could have been used to satisfy the Judgment. *See Clinton Corner H.D.F.C. v Lavergne*, 279 AD2d 339, 341 (1st Dept 2001).

been available to satisfy [the] judgment but for its contempt." *See* Dkt. 900 at 18, citing *In re Two Sams Associates, LLC*, 2006 WL 8209668, at *2-3 (Sup Ct, NY County 2006), citing *Sumitomo Shoji N.Y., Inc. v Chem. Bank N.Y. Tr. Co.*, 47 Misc2d 741, 746 (Sup Ct, NY County 1965) ("If such person does make payment or transfer in disregard of the restraining notice, he takes the risk of liability for damages and contempt if the judgment creditor can establish that the debt was owed to the judgment debtor or that he had an interest in such property."), *aff'd*, 25 AD2d 499 (1st Dept 1966); *see also Aspen Indus., Inc. v Marine Midland Bank*, 52 NY2d 575, 581 (1981) ("a judgment creditor, in order to recover, must establish that it sustained damages as a result of the garnishee's disobedience of the notice. It is necessary, therefore, for the judgment creditor to demonstrate that property of the judgment debtor was available to satisfy the judgment at the time the restraining notice was in effect."). Obtaining such relief from Bergstein is pointless, as he already owes this money to Wimbledon. Indeed, the threat of imprisonment is not even useful here, as Bergstein is already incarcerated.

Although Katzman could be held liable in the full amount of $2,412,000, the court deems such a result far too harsh. While the court rejects the notion that Katzman is insufficiently culpable to be held in contempt, unless he has perjured himself (and the court does not believe that to be the case),[19] Katzman is arguably yet another victim of Bergstein. In time, especially given the forfeiture and restitution in the criminal action (in addition to Wimbledon's other enforcement efforts), Wimbledon hopefully will be able to be made whole. Under these

[19] The court is assuming that Katzman's attorney-client communications with Bergstein would not reveal that he actually understands how New York law operates in this area and conspired with Bergstein to prejudice Wimbledon's rights (which, if true, could vitiate privilege). "The court takes him at his word, since there is no reason to believe that [he] would risk his reputation or license by lying." *GEM Holdco, LLC v Changing World Techs., L.P.*, 46 Misc3d 1207(A), at *6 n.10 (Sup Ct, NY County 2015), *aff'd*, 130 AD3d 506 (1st Dept 2015).

circumstances, it is hard to justify tagging Katzman with a multi-million-dollar liability for his poor judgment. This public admonishment, placing restrictions on his future *pro hac vice* applications, and compelling him to pay Wimbledon's attorneys' fees, is punishment enough.

V. Subpoenas to SCG

SCG must provide amended responses to the subpoenas served on it by Wimbledon. *See* Dkt. 886. All of SCG's relevance objections are overruled, as such information and documents are clearly relevant to Wimbledon's enforcement efforts. *See* Dkt. 887. The questions suggest possible enforcement actions against SCG and Class TT (though nothing herein should be construed as opining on the merits of any such actions). *See* Dkt. 900 at 22; *but see id.* at 23 n.12 (noting that Wimbledon must first seek permission from a Cayman court due to an order entered in a Cayman insolvency proceedings). To the extent any (i.e., most) of the responses invoke the attorney-client privilege [*see id.*], SCG must serve Wimbledon with an itemized privilege log. *See Gottwald v Sebert*, 58 Misc3d 625, 626 (Sup Ct, NY County 2017) ("[Defendant's] assertion of privilege is premature. The proper course is for the parties to craft an ESI protocol, review documents for responsiveness to the subpoena, and log those that are purportedly privileged."). This shall be completed within two weeks. That said, SCG shall not claim privilege in a manner inconsistent with the Interim Orders.

VI. Discovery from the BMK Parties

In light of the foregoing, Wimbledon may seek Article 52 discovery from the BMK Parties. Wimbledon should follow normal protocol, and first serve them with subpoenas. The court will only intervene after responses or a motion has been filed. The BMK Parties, however, are cautioned against refusing to respond on the grounds of relevance or privilege in light of this decision and the Interim Orders.

VII. Remaining Issues

The balance of the relief sought by Wimbledon is denied. Specifically, while the instant action is a turnover proceeding, this order to show cause seeks contempt and discovery, not a turnover order or an attachment. *See* Dkt. 901. That Wimbledon may be able to make a compelling case that one of Bergstein's entities, Cyrano, should be compelled to turn over assets to satisfy the Judgment or be treated as his alter ego, is not a substitute for filing an appropriate motion with notice to Cyrano. Cyrano, to be sure, may be Graybox's successor or alter ego. *See* Index No. 653468/2015, Dkt. 1069 at 54 n.39. However, that fact is not a sufficient basis to seek turnover relief from Cyrano as part of this contempt motion. Accordingly, it is

ORDERED that Wimbledon's motion to hold Bergstein, Graybox, Katzman, and BMK in civil contempt for willful neglect of the Restraining Notices is granted, and they are jointly and severally liable to pay the reasonable attorney's fees incurred by Wimbledon in connection with the instant motion; and it is further

ORDERED that the court refers the calculation of such fees to a Special Referee to hear and report; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, Wimbledon shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is respectfully directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that for the next five years, in any motion seeking *pro hac vice* admission to any state or federal court in New York, Katzman must attach a copy of this decision to such

motion, and he shall also promptly send a copy of this decision to the judge that presided over the California Action; and it is further

ORDERED that the Bergstein Parties and any of their attorneys or agents must obey the Restraining Notices; and it is further

ORDERED that within two weeks of the entry this order on NYSCEF, SCG shall provide amended responses to the subpoenas served on it by Wimbledon (Dkt. 886); and it is further

ORDERED that Wimbledon's motion to compel discovery from the BMK Parties is denied without prejudice to Wimbledon serving a formal Article 52 subpoena on them; and it is further

ORDERED that all other relief sought by Wimbledon is denied without prejudice.

Dated: May 10, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C