Goldenberg v Lax
2018 NY Slip Op 31076(U)
May 21, 2018
Supreme Court, Kings County
Docket Number: 500642/17
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of May, 2018.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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MICHAEL GOLDENBERG AND RACHEL GOLDENBERG,

Plaintiffs,

- against -

Index No. 500642/17

MOSHE LAX AND CHANA WEISZ,

Defendants.

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The following papers numbered 1 to 18 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-8, 9-10, 11-12
Opposing Affidavits (Affirmations)	13-14, 15, 16
Reply Affidavits (Affirmations)	
Other Papers so-ordered stipulation dated 7/7/19	17
Other Papers e-mails to court dated 9/19/2017	18

Upon the foregoing papers, plaintiffs (in Motion Sequence Number 2) move for an order: (1) pursuant to 22 NYCRR 130-1.1, for financial sanctions and an award of reasonable attorney's fees against defendants Moshe Lax and Chana Weisz, as a result of their violation of this Court's March 8, 2017 order and for their frivolous conduct; (2) pursuant to CPLR 5225, directing, inter alia, that defendants deliver to New York City Marshal Frank Siracusa all of defendants' interest in SL Holdings I,

LLC, SL Holdings, II, LLC, and SL Holdings IV, LLC, (collectively referred to as SL Holdings), for the purpose of sale of the membership interest in these entities; or alternatively (3) charging defendant's membership interests in SL Holdings with payment of the unsatisfied judgment; (4) directing defendants to pay poundage fees owed to the Marshal; and (5) directing defendants to pay all costs and reasonable attorneys fees incurred by plaintiffs in seeking to collect on the February 26, 2016 promissory note (Seq. 2)

By way of two additional motions, plaintiffs move for an order: (1) pursuant to CPLR 5251 and Judiciary Law § 753, holding defendants in contempt for their failure to obey an order of this court dated March 8, 2017 (Motion Sequence 3); and (2) pursuant to CPLR 2308, 5210, and 5251, and Judiciary Law § 753, holding defendants in contempt for failing to comply with subpoenas duces tecum, requiring them to produce documents relevant to the satisfaction of the judgment against them (Seq. 6).

Defendants cross-move for an order: (1) staying this action pending determination of a motion to consolidate this action with New York County action, Index Number 151093/17; (2) compelling plaintiffs and their counsel to provide copies of responses to subpoenas served upon non-parties; and (3) permitting counsel for defendants to be present at any depositions of non-parties held in response to subpoenas issued by plaintiffs (Seq. 4).

BACKGROUND

This action arises out of defendants' default in repaying a loan made by the plaintiffs, pursuant to the terms of a promissory note, dated February 26, 2016. All unpaid principal and accrued interest were due and payable "on the earlier of the date Maker delivers a deed to the Property, or April 26, 2016 (the "Maturity Date")." Additionally, pursuant to the note, defendants were to pay all costs of collection of the note, including attorneys fees.

On February 26, 2016, defendants each signed an affidavit of confession of judgment, authorizing the entry of judgment in New York County. A judgment was entered against the defendants by the Kings County Clerk on January 12, 2017. On January 18, 2017, New York City Marshal Frank Siracusa served notices of levy, exemption claim forms and executions upon Diamond Dynamics, LLC, Madison Avenue Diamonds, LLC, SL Holdings I, LLC, SL Holdings II, LLC, SL Holdings III, LLC and SL Holdings IV, LLC. On February 27, 2017, Marshal Siracusa served the defendants with notices of levy, exemption claim forms, executions with notice to garnishee for these same limited liability companies. In his affidavit dated March 21, 2017, Marshal Siracusa asserted that, pursuant to CPLR 8012 (a), he was entitled to total poundage and fees of $30,379.61 and expenses in the amount of $916.71, for a total due of $31,296.32.

Defendants thereafter moved via order to show cause for an order: (1) pursuant to CPLR 5020, compelling plaintiffs to accept payment in full of their

judgment with accrued interest and for plaintiffs to contemporaneously provide a recordable satisfaction of judgment; (2) awarding defendants costs and attorneys fees in making the application; (3) staying and consolidating the action with another pending action between the same parties in New York County; and (4) quashing subpoenas served upon non-parties for post-judgment discovery. In an affidavit submitted in support of the motion, defendant Moshe Lax stated that he had contacted plaintiffs' counsel, and told him that he was ready to pay the judgment and interest due in full, but that plaintiffs' counsel told him that he would not accept such payment unless defendants paid counsel's legal fees, as well as the Marshall's fees and poundage.

In an order dated March 8, 2017, the Court granted defendants' order to show cause, to the extent that it directed defendants to pay the judgment amount of $605,927.38 plus interest from January 12, 2017 to March 8, 2017 in the amount of $8,482.88 within 10 days of the order. The Order directed that such payment be made by certified check to plaintiffs' counsel, and that plaintiffs were to file a satisfaction of judgment within 10 days after such payment.

Defendants did not make such payment pursuant to the terms of the Order and plaintiffs by way of motion dated April 6, 2017, moved to hold the defendants in contempt. (Seq. 3). Defendants cross-moved to consolidate (Motion Sequence Number 4). Oral argument on these matters was scheduled for June 6, 2017.

On May 1, 2017, plaintiffs served subpoenas duces tecum, requesting production of documents, including but not limited to defendants direct/indirect ownership interest in real and personal property, bank records, tax returns, investment and retirement accounts. Through email correspondence dated May 16, 2017, counsel for defendant advised that the documents at issue were in the possession of defendants' accountant, and that they would be provided once they were obtained. Having not received the requested documents, plaintiffs moved to hold defendants in contempt (Motion Sequence Number 6).

On June 7, 2017, the court stayed determination of the motions, based on the parties' representations that they had, or were going to, enter into a stipulation that might resolve the issues. The so-ordered stipulation dated July 7, 2017, provided that defendants would deliver payment of the full amount of the judgment, along with interest, Marshal's fees and poundage fees on or before September 19, 2017 at 5:00 p.m. Thereafter, plaintiffs would file a satisfaction of judgment or an assignment of the judgment within 10 days. The stipulation and order stayed the action until September 19, 2017.

On September 19, 2017, the court received an e-mail from defendants' counsel, indicating that defendants were unable to pay the judgment at that time. Counsel made no representations regarding defendants having made any effort to comply with the pending subpoenas; plaintiffs' counsel does not report having received any documents in response to the subpoenas.

DISCUSSION

Motion Sequence 2:

"CPLR 5225(b) provides for an expedited special proceeding by a judgment creditor to recover 'money or other personal property' belonging to a judgment debtor 'against a person in possession or custody of money or other personal property in which the judgment debtor has an interest' in order to satisfy a judgment" (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept 2009], citing *Starbare II Partners v Sloan*, 216 AD2d 238 [1st Dept 1995]). "A judgment creditor must first establish that the judgment debtor has an interest in the property held by the third party, and then must demonstrate either that the judgment debtor is entitled to possess the property or that the judgment creditor has a right to the property superior to that of the party who possesses it" (*Miraglia v Essex Ins. Co.*, 96 AD3d 945 [2d Dept 2012]).

Limited Liability Company Law § 607 (a) provides, in part:

> "On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest."

Limited Liability Company Law § 603 (a) (3) states that except as provided in the LLC's operating agreement, "the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions

and allocations of profits and losses to which the assignor would be entitled." Limited Liability Law §§ 607 (a) and 603 (a) (3) articulate that a judgment creditor of a member can only obtain rights, as an assignee, to the debtor/member's receipt of profits pursuant to his or her allocated membership interest

Plaintiffs have demonstrated that Chana Weisz has a membership interest in SL Holdings based on her responses to an information subpoena issued in another proceeding. However, other than stating, upon information and belief, that Moshe Lax is a manager of SL Holdings, plaintiffs have failed to identify a basis for finding that he has an interest in SL Holdings. As an interest in a limited liability company is property for purposes of Article 52, and defendants have not specifically opposed plaintiffs' request for turnover, plaintiff's motion is granted, with respect to Chana Weisz's interest in SL Holdings (*see Matter of Sirotkin v Jordan, LLC*, 141 AD3d 670, 671-672 [2d Dept 2016]; CPLR 5225 [b]).

"A court, 'in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct'" (*Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 550 [2d Dept 2014], quoting 22 NYCRR 130-1.1 [a]). Pursuant to 22 NYCRR 130-1.1, conduct is frivolous if

> (c)(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Here, plaintiffs assert that they are entitled to sanctions, as defendants' order to show cause seeking to compel plaintiffs to accept payment of the judgment, was based on the false premise that defendants intended to pay the judgment. They argue that Moshe Lax's affidavit in which he stated that he was ready and willing to pay the judgment was clearly false. However, the standard for showing frivolity is high. The court finds that plaintiffs have failed to meet their initial burden of demonstrating that defendants' prior motion was frivolous for purposes of 22 NYCRR 130-1.1, as they failed to demonstrate that the defendants' motion was without merit and was undertaken "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure." (*West Hempstead Water Dist. v Buckeye Pipeline Co., L.P.*, 152 AD3d 558, 558-559 [2d Dept 2017]). Accordingly, that portion of plaintiffs' motion which seeks sanctions, must be denied despite the absence of opposition papers from defendants.

CPLR § 8012 (b)(1) provides that:

> A sheriff is entitled, for collecting money by virtue of an execution, an order of attachment, or an attachment for the payment of money in an action, or a warrant for the collection of money issued by the comptroller or by a county treasurer or by any agency of the state or a political subdivision thereof, or for collecting a fine by virtue of a commitment for civil contempt, to poundage of, in the counties within the city of New York, five per cent of the sum collected and in all other counties, five per cent upon the first two hundred fifty thousand dollars collected, and three per cent upon the residue of the sum collected.

It is undisputed that the Marshall failed to collect any monies pursuant to his levy. Therefore, in order to be entitled to poundage, Marshall Siracusa must show facts that fall within one of two statutory exceptions the record. These exceptions are set forth in CPLR § 8012 (b)(2), which reads as follows:

> Where a settlement is made after a levy by virtue of service of an execution, the sheriff is entitled to poundage upon the judgment or settlement amount, whichever is less. Where an execution is vacated or set aside after levy, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the execution, and the court may order the party liable therefor to pay the same to the sheriff.

There was no settlement in this matter, or a vacatur, setting aside the execution. A third, judicially created exception applies, when there has been "affirmative interference with the collection process." (*Solow Management Corp., v Tanger, et al*, 10 NY3d 326 [2008]). Here, it cannot be said that the defendants affirmatively interfered with the Marshall's collection process. Therefore, that portion of plaintiff's order to show cause seeking payment of poundage fees is denied.

Plaintiffs' request for attorney's fees based on the promissory note is also denied. Although the defendants agreed to pay costs, including reasonable attorney's fees, in the underlying promissory note, they did not specifically address the payment of such costs or attorneys fees in their affidavits of confession of judgment. As the judgment here is based solely on the confession of judgment, plaintiffs' relief in this proceeding is limited to the terms of those confession of judgment affidavits, and thus cannot include costs or attorney's fees (*see Irons v Roberts*, 206 AD2d 683,

684-685 [3d Dept 1994]; *Rae v Kestenberg*, 23 AD2d 565, 566 [2d Dept 1965], *affd* 16 NY2d 1023 [1965]; CPLR 3218).[1]

Motion Sequence Numbers 3 and 6

In Motion Sequence Number 3, plaintiffs assert that they are entitled to a finding of civil contempt based on defendants' disobedience of the March 8, 2017 order directing them to pay the judgment and interest within 10 days. Judiciary Law § 753 (A) (3) permits a court to punish a party for civil contempt "for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum." As a matter of statutory construction, courts have found that the language of section 753 (A) (3) thus bars punishing a party for civil contempt for violating an order directing the payment of money where execution can be awarded (*see Liang v Yi Jing Tan*, 155 AD3d 1023, 1024 [2d Dept 2017]; *4504 New Utrecht Ave. Corp. v Pita Parlor*, 143 AD2d 171, 172 [2d Dept 1988]). "[A]bsent certain exceptions not applicable here, civil contempt is not appropriate for the enforcement of a monetary judgment, which can be secured under the provisions of article 52 of the CPLR" (*Cantalupo Constr. Corp. v 2319 Richmond Terrace Corp.*, 141 AD3d 626, 627 [2d Dept 2016]). As the judgment and interest that the court directed defendants to pay here may be

[1] In so deciding, this court makes no determination with respect to whether plaintiffs may still seek such costs and attorneys fees in a plenary action based on the promissory note (*see Creative Culinary Concepts, LLC v Sam Greco Constr., Inc.*, 134 AD3d 1294, 1296 [2d Dept 2015]).

enforced by execution, the remedy of contempt is unavailable (*see Liang*, 155 AD3d at 1024; *4504 New Utrecht Ave. Corp.*, 143 AD2d at 172).

In Motion Sequence Number 6, plaintiffs seek to have the defendants held in contempt for failure to produce documents requested in the subpoenas duces tecum served upon them, or in the alternative, inter alia, to compel compliance with the subpoenas. CPLR 5251 provides, in relevant part, that "[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title . . . shall each be punishable as a contempt of court" (*see Matter of Bobby D. Assoc. v Park*, 97 AD3d 815, 816 [2d Dept 2012]; *see also see Matter of Claydon*, 103 AD3d 1051, 1052-1053 [3d Dept 2013]; *Matter of Barclays Bank v Hughes*, 306 AD2d 406, 407 [2d Dept 2003]).

Defendants do not challenge plaintiffs' proof showing that the subpoenas were properly served or challenge plaintiffs' right to obtain the documents requested. Rather, defendants' counsel asserts that plaintiffs have failed to demonstrate that defendants' non-compliance with the subpoenas was willful. Counsel asserts in his affirmation that the failure to provide the documents was not willful, as the documents at issue were in the possession of defendants' accountant. Defendants had contacted the accountant to compile the documents, and defendants agreed that they would ultimately produce the documents. Accordingly, plaintiffs motion is granted, to the extent that the defendants are directed to produce all documents

requested in the subpoenas duces tecum, dated April 27, 2017, within thirty (30) days of the date of this Order.

Motion Sequence Number 4:

That portion of defendants' cross motion requesting a stay of the action, pending determination of the consolidation motion in the New York County proceeding (Index Number 151093/2017) is denied as moot, as the court in the New York County action denied the consolidation request by order dated April 25, 2017.

In the context of their enforcement efforts under CPLR article 52, plaintiffs are not required to provide defendants with the responses to subpoenas served on non-parties and defendants are not entitled to be present at depositions of non-parties, the remainder of defendants' motion is likewise denied (*see Encalada v Cps1 Realty LP*, 2014 NY Slip Op 31475, *2-3 [U] [Sup Ct, New York County 2014]; *ITT Commercial Fin. Corp. v Bailey*, 166 Misc 2d 24, 26-27 [Sup Ct, Chautauqua County 1995]).

Accordingly, it is hereby

ORDERED, that plaintiff's order to show cause (Sequence 2) is granted to the extent that petitioners are hereby issued a charging order against Chana Weisz' membership interest in SL Holdings Entities and is otherwise denied; and it is further

ORDERED, that plaintiff's motion for contempt (Sequence 3) is denied, in its entirety; and it is further

ORDERED, that plaintiff's motion for contempt (Sequence 6) is granted, to the extent that defendants are to produce all documents requested in the subpoenas duces tecum, dated April 27, 2017, within thirty (30) days of the date of this Order. The motion is otherwise denied; and it is further

ORDERED, that defendant's cross motion (Sequence 4) is denied, in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.