

**Bronson v Grober**

2018 NY Slip Op 32421(U)

September 28, 2018

Supreme Court, New York County

Docket Number: 451652/2017

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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DAWN BRONSON, V2IP, INC.,

Plaintiff,

- v -

MARK GROBER, EVAN SOLOMON, MARANDA FRITZ,  
THOMPSON HINE LLP,

Defendants.

INDEX NO. 451652/2017

MOTION DATE 06/14/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

-----X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 67, 68 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this action to recover alleged damages sustained by reason of a restraining notice served pursuant to CPLR 5222, defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the complaint

In 2012, defendants Mark Grober (“Grober”) and Evan Solomon (“Solomon”) commenced an action in the Supreme Court, New York County against Edward Bronson (“Bronson”) entitled *Grober v Bronson*, index No. 651184/2012 (the “underlying action”), in which they sought to recover damages for Bronson’s alleged failure to pay compensation to them. The underlying action resulted in a judgment in favor of Grober and Solomon and against Bronson in the total sum of \$1,445,031.77.

In connection with Grober’s and Solomon’s attempt to enforce the judgment, the attorney representing them in the underlying action, defendant Maranda E. Fritz, Esq. (“Fritz”) of

defendant Thompson Hine LLP (“Thompson”), issued a restraining notice pursuant to CPLR 5222 to Alpine Securities (“Alpine”), a brokerage firm. The restraining notice, served on October 19, 2016, named Bronson as a judgment debtor and stated:

“WHEREAS, it appears that you . . . are in possession or in custody of property in which you know or have reason to believe the judgment debtor has an interest;

NOW TAKE NOTICE, that pursuant to CPLR 5222(b), a copy of which is set forth below, you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt except as therein provided.

TAKE FURTHER NOTICE, that this notice includes all property and accounts of which the judgment debtor, Dawn Bronson, Macallan Partners, LLC, and V2IP Inc., or those in which the judgment debtor has signing authority maintained at or for Alpine Securities, and all debts owed to the judgment debtor, and also covers all property in which the judgment debtor or Dawn Bronson has an interest hereinafter coming into your possession or custody, and all debts hereafter coming due from you to the judgment debtor or Dawn Bronson”

Plaintiff Dawn Bronson is married to Bronson and is the CEO and sole shareholder of plaintiff V2IP, Inc. (“V2IP”). Non-party Macallan Partners, LLC is a business entity controlled by Bronson.

In a letter, dated October 25, 2016, Alpine’s counsel responded to the restraining notice, stating: “We find the notice invalid and with not effect as to Alpine Securities . . . , for lack of jurisdiction.” Alpine’s counsel further maintained that “Alpine is not required to restrict any account absent a court issued restraining order” and that if Alpine did not receive such an order by the close of business day on October 27, 2016, “all transfer restrictions on affected accounts will be removed.”

By order to show cause, dated October 27, 2016, Grober and Solomon moved in the underlying action, for an order (1) directing Bronson to turn over any securities in which he had an interest sufficient to satisfy the judgment in the underlying action, (2) directing Alpine to

transfer to Grober and Solomon all property or securities currently held by it in accounts in the name of Bronson, Macallan Partners, and/or V2IP with an amount or value up to \$1.4 million, (3) directing Bronson and Dawn Bronson to execute the documents necessary to effectuate such transfers, and (4) directing Bronson and Dawn Bronson to respond to information requests previously served on them, on or before November 30, 2016, or be found to be in contempt of court. Grober and Solomon also sought a temporary restraining order pending determination of their motion.

This court (Singh, J.) granted a temporary restraining (“October 27, 2016 TRO”) which directed Alpine, pending the hearing of the order to show cause, to:

“restrain and hold, and to abstain from removing, transferring, dismantling, selling, pledging, or otherwise disposing of property or securities held in accounts in the name of Edward Bronson, Dawn Bronson, Macallan Partners, V2IP, or any other account directed or controlled by Edward or Dawn Bronson”

The next day, the parties appeared before the court to present arguments as to whether the TRO should be continued, after which the court ordered the October 27, 2016 TRO continued and set the motion down for oral argument on November 14, 2016. However, oral argument never occurred on the motion because on October 31, 2016, Bronson filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York.

By letter dated November 11, 2016, Fritz informed the Supreme Court of the bankruptcy filing. The court then issued an order, dated November 14, 2016, staying the underlying action.

On or about February 21, 2017, Dawn Bronson and V2IP commenced this action against Grober, Solomon, Fritz, and Thompson, seeking to recover damages pursuant to CPLR 5222(b). The one cause of action set forth in the amended complaint alleges that when Grober and Solomon, through their legal counsel Fritz and Thompson, prepared and served the restraining

notice and the October 27, 2016 TRO, V2IP was not named a defendant in the underlying action and owed no debt to Grober and Solomon.

Plaintiffs further allege that Grober and Solomon were also aware, or should have been aware, that V2IP's brokerage accounts and/or the funds contained therein, belonged solely to V2IP and that Bronson had no rights or interest in those accounts. The complaint alleges that the actions taken by Grober, Solomon, Fritz and Thompson "in issuing the subject restraining notices were reckless, wanton, and taken in bad faith, and upon information and belief, were taken solely for the improper purpose of harassing and publicly humiliating [V2IP's] CEO and sole shareholder Dawn Bronson, and/or for the purpose of coercing [Edward Bronson] to satisfy the [judgment in the underlying action], thereby constituting a violation and abuse of CPLR §5222's judgment enforcement provisions."

Finally, plaintiffs allege that, "as a direct and proximate cause of the bad faith actions taken by defendants in restraining V2IP's bank and brokerage account(s), plaintiff V2IP was rendered unable to conduct any business, unable to close certain stock and other financial transactions, and was caused to suffer financial losses in an amount exceeding one million dollars."

Defendants now move to dismiss the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and pursuant to CPLR 3211(a)(1) because the October 25, 2016 letter written by Alpine's counsel refutes plaintiffs' allegation that they suffered damages because of the restraining notice. In opposing the motion to dismiss, plaintiffs concede that the amended complaint does not state a cognizable claim on behalf Dawn Bronson (*see* Affirmation in Opposition to Defendants' Motion for Dismissal of Complaint, at ¶ 3). They assert, however,

that dismissal of the amended complaint is not warranted because it does contain a cognizable cause of action against defendants on behalf of V2IP.

### **Discussion**

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted pursuant to CPLR 3211(a)(1) “only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]).

### **Liability for Damages under CPLR 5222(b)**

“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]). A CPLR 5222 restraining notice may be issued by the attorney for the judgment creditor (*see* CPLR 5222 [a]), and may be served on the judgment debtor or a third-party garnishee, defined in the CPLR as “a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest” (CPLR 105 [i]; *see Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 579 [1981]). The party served with the restraining notice

is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest . . . except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated.

(CPLR 5222 [b]). “Thus, the restraining notice serves as a type of injunction prohibiting the transfer of the judgment debtor's property” (*Aspen Industries, Inc. v Marine Midland Bank*, 52 NY2d at 579).

Pursuant to CPLR 5222 (b):

A judgment creditor . . . which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained ***by reason of the restraint***”

(emphasis added). Solely for the purposes of determining defendants’ motion, I am required to accept plaintiffs’ allegations that defendants wrongfully included V2IP’s bank and brokerage accounts in the CPLR 5222 restraining notice. However, the October 25, 2016 letter written by Alpine’s counsel specifically states that Alpine did not treat the restraining notice as valid and that Alpine refused to restrain the accounts without a court order. The letter, which plaintiffs attach to their complaint and do not dispute is authentic, conclusively shows that they suffered no damages “by reason of [plaintiffs’] restraint” (CPLR 5222[b]).

Plaintiffs contend that they nevertheless suffered damages because of the court’s October 27, 2016 TRO and that defendants’ fail to cite any authority standing for the proposition that CPLR 5222(b) does not authorize a claim for damages resulting from the issuance of a court-ordered temporary restraint.

The text of CPLR 5222(b) unambiguously shows that the statute was intended to impose liability for damages sustained by reason of a restraining notice issued under CPLR 5222 (*see generally Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]) [“Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning”]. The court-ordered October 27, 2016 TRO was not issued pursuant to CPLR 5222, but under the court’s authority under Article 63 of the CPLR. CPLR

5222 (b) thus cannot serve as a predicate for damages allegedly sustained because of the October 27, 2016 TRO.

In accordance with the foregoing, it is hereby

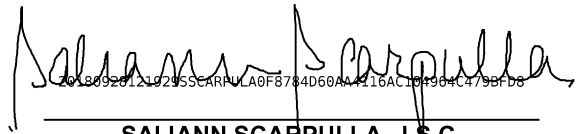
**ORDERED** that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

9/28/2018

DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: