

**Cayne v Lebenthal**

2019 NY Slip Op 30042(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 650776/2017

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 43

-----X  
JAMES E. CAYNE,

Plaintiff,

-against-

Index No. 650776/2017

ALEXANDRA LEBENTHAL,

Defendant.

-----X  
**ROBERT R. REED, J.:**

This is a motion brought on by Order To Show Cause, pursuant to CPLR 5240, filed by non-party Jeremy Diamond (Diamond), seeking to modify a restraint on a brokerage account established in the names of Diamond and his wife, defendant Alexandra Lebenthal (Lebenthal), and seeking an order sealing the court records regarding Diamond's financial information.

This action involves a \$1,000,000 loan made by plaintiff James E. Cayne (Cayne) to Lebenthal in March 2008. Lebenthal apparently made some payments on the loan, but after she ceased making payments, in February 2017, Cayne filed this action for breach of contract, resulting in a judgment against Lebenthal entered on November 17, 2017, in the amount of \$438,680.69, plus pre-judgment interest of \$1,947.02, for a total amount of \$440,627.71.

Pursuant to an agreement dated December 21, 2017, Cayne agreed to release a restraining order placed on a separate joint account, not the subject of this motion, held at JP Morgan Chase

in the names of Lebenthal and Diamond, on condition that the bank issue a bank check in the amount of \$49,089.04 payable from that account.

On or about May 10, 2018, however, Cayne served a restraining notice on a JP Morgan Securities Account (the Account) in the names of Lebenthal and Diamond for \$440,627.71, the full amount of the judgment.

On July 9, 2018, after being notified by Lebenthal that a payment of \$49,089.04 had been made from a separate joint account, Cayne sent an Amended Restraining Notice to JP Morgan Securities stating that \$395,124.04 remained due on the judgment.

In his affidavit in support of the Order to Show Cause, Diamond asks to have the restraint on the Account vacated, and also asks to have the financial documents, annexed to his affidavit as exhibit A, sealed by the court.

According to Diamond, the Account, which was established at JP Morgan in August 2017, includes a securities account (Securities Account) used for investments, and a margin account (Margin Account), described as a credit line to borrow against securities in the Securities Account, used for children's tuition, payments for real property belonging to Diamond, and other expenses. Both accounts have the same account number. Diamond contends that he originally opened a brokerage account (the Brokerage Account) in or around 1992 when he and Lebenthal

decided to start a family. He states that the original Brokerage Account, which was later transferred to different institutions, was funded with stocks purchased by him from his personal checking account. Diamond contends that, although the Account is maintained in both his and Lebenthal's name, it is actually his account. According to Diamond, he opened the Account in both names to enable his wife and children to avoid probate if anything should happen to him. According to Diamond, "[i]n each subsequent brokerage account ... I chose to keep my wife as a signatory for rights of survivorship and because it is less burdensome when transferring to keep account names the same, rather than to remove her name from the account." Diamond aff, ¶ 7. Immediately prior to transferring the Account to JP Morgan, the account resided in his wife's company, until Lebenthal & Co. was in the process of closing.

Diamond states "[a]t all times, I managed the securities in the Brokerage Account and made all decisions regarding the investments held in the Brokerage Account." Diamond aff, ¶ 8. He further indicates that he has "always used the margin account associated with my brokerage account for such things as my children's tuition, payments on real property that belongs solely to me, or other expenses that relate to other tangible or real property." *Id.*, ¶ 9.

In her affidavit in support of Diamond's motion, Lebenthal

states that, since the Account was opened, she has made no deposits, contributed no securities and made no withdrawals from the Securities Account, and further states that "It is my understanding that while I have been a signatory on Diamond's brokerage and margin accounts since we were married, it has only been for convenience based on rights of survivorship and to avoid the delays in probate." Lebenthal aff, ¶ 7. In her deposition, however, when asked "Who made the investment decisions on this joint account?," Lebenthal answered, "Both of us. My husband and me." Lebenthal tr at 108, lines 23-25.

There is no dispute here regarding the law that governs Diamond's motion. Under Banking Law § 675, "the opening of an account in the names of two people in facial form 'to be paid or delivered to either, or the survivor of them' evinces an intention to create a 'joint tenancy.'" *Matter of Kleinberg v Heller*, 38 NY2d 836, 840 (1976) [quoting Banking Law § 675 (b)]; see also *Matter of Hamburg*, 151 Misc 2d 1034, 1039 (Sur Ct, Bronx County 1991) ("If the accounts did not create a joint tenancy with right of survivorship, they created a tenancy in common entitling Howard to one half of the sum on deposit"). "Banking Law § 675 (b) states that the making of a deposit in the name of a depositor ... 'shall ... be prima facie evidence ... of the intention of both depositors . . . to create a joint tenancy and to vest title to such deposit'." *Steffan v Wilensky*, 150 AD3d

419, 419 (1<sup>st</sup> Dept 2017). The party seeking to overcome the presumption that a joint tenancy was intended, must show by "clear and convincing evidence that the account was opened only as a matter of convenience." *Id.* (internal quotation marks and citations omitted); see also *Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 (2d Dept 2009) ("The presumption created by Banking Law § 675 can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only" [internal quotation marks and citations omitted]). Diamond contends that he has presented such circumstantial evidence. Yet, the evidence on which his motion depends is solely his and Lebenthal's statements. Diamond claims that he paid for the securities in the Account and that, as the Brokerage Account was transferred from one institution to the next over a period of more than 20 years, he kept the account in both his and Lebenthal's names "because it is less burdensome" than to remove her name from the account. Diamond aff, ¶ 7.

Diamond cites *Pinasco v Del Pilar Ara* (219 AD2d 540 [1<sup>st</sup> Dept 1995]) for the proposition that joint tenancy has been rebutted where all monies in the account on its creation were made by one signatory, and that one signatory made all the investment decisions and withdrawals from the account. However, no documentary evidence has been provided by Diamond even to

establish that the securities in the Account were purchased solely by him. Furthermore, although Diamond has stated that he made all the investment decisions, Lebenthal has testified that both she and Diamond made the investment decisions in connection with the Account. Diamond contends that he and Lebenthal "have had separate financial lives" (Diamond tr at 20, lines 22-23), and the family finances are managed separately -- noting, for example, that he is the owner of the family's coop apartment in New York City and the weekend vacation house in Bellport, Long Island. Lebenthal, however, testified that she co-signed for the \$5,000,000 mortgage on the Bellport property. See Lebenthal tr at 49, lines 4-12. Lebenthal has also testified that, when her business needed substantial loans, she and Diamond together took out a personal bank loan on her credit to lend \$2.3 million to her business, Lebenthal Holdings. *Id.* at 56, lines 2-14.<sup>1</sup> In addition, according to Diamond, he and Lebenthal have maintained

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<sup>1</sup> See also joint Mastercard held by Diamond and Lebenthal (Lebenthal tr at 16, lines 10-12); Pershing Bank Visa card (clearing agent for Lebenthal & Co.) held by Diamond and Lebenthal (*id.* at 25-26); \$4.3 million home equity line of credit (HELOC) from JP Morgan given to Diamond and Lebenthal on the mortgage for coop apartment units 9A & 9B at 17 East 96<sup>th</sup> St. (*id.* at 30-31; see also Diamond tr at 11, lines 14-23); Sterling Bank loan given to Diamond and Lebenthal with a balance of \$300,000 for which Diamond and Lebenthal are responsible (Lebenthal tr at 57, lines 3-13); Small Business Administration loan for which Diamond and Lebenthal are listed as debtors with security interest in all of the debtors' right title and interest in the coop (apartments 9A & 9B) although Lebenthal is not an owner of the apartments (*id.* at 83 lines 6-21).

joint checking and savings accounts. Diamond tr at 20, lines 14-18.

The court also notes that Diamond and Lebenthal together maintained an additional account with JP Morgan Chase from which the \$49,089.04 payment was made. Despite Diamond's claim that he and Lebenthal kept their finances, including their real estate purchases, separate, it appears that their finances were considerably comingled.

Thus, the court is left with little but Diamond's and Lebenthal's self-serving statements that he paid for the securities, and conflicting statements by Diamond and Lebenthal that he makes the sole decisions regarding those securities. The court, therefore, concludes that Diamond has failed to meet the heavy burden of overcoming the presumption of joint tenancy of the Account.

With respect to Diamond's contention that Cayne restrained more funds than he was entitled to in an effort to harass him, counsel for plaintiff has stated that, when the partial payment of the judgment was brought to his attention, he served an Amended Restraining Notice reflecting an adjustment of the original amount sought to be restrained. See affirmation of Bernard D'Orazio, exhibit M (Restraining Notice [Amended] and FAX cover sheet to Court Orders & Levies Department JP Morgan Securities LL/JP Morgan Chase Bank, N.A., dated July 9, 2018).

There is no evidence that the amount contained in plaintiff's initial retraining notice was anything other than a simple error.

As a result, Diamond's motion to vacate the execution on the joint account is denied.

Diamond also seeks an order sealing the financial records annexed to his affidavit as exhibit A from access to the public. Although Diamond has failed to establish that the Account containing the records in exhibit A is solely his account, he is not a party to this action, there is no public interest in the specified records, and plaintiff has not opposed the motion to seal those documents. Thus, there is good cause for sealing the records contained in exhibit A, and that portion of Diamond's motion seeking the sealing of those records is granted.

Accordingly, it is hereby

ORDERED that the branch of the motion of non-party Jeremy Diamond to vacate the execution on the JP Morgan Securities Account in the names of Jeremy Diamond and Alexandra Lebenthal is denied; and, as explained in the accompanying memorandum opinion, the court having determined, in accordance with Part 216 of the Uniform Rules for the Trial Courts, that good cause exists for the sealing in part of the file in this action and the grounds therefor having been specified, it is further

ORDERED that branch of the motion of non-party Jeremy Diamond to place the documents annexed to his affidavit as

exhibit A under seal with respect to the public is granted as unopposed; and it is now

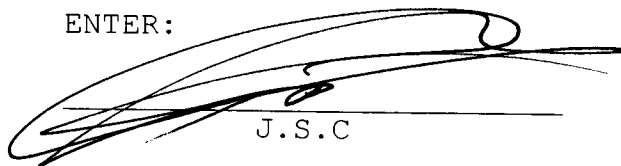
ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of the financial records contained in exhibit A to the affidavit of Jeremy Diamond, sworn to June 22, 2018, submitted in support of the motion to vacate the execution on the JP Morgan Securities Account in the names of Lebenthal and Diamond (Doc. No. 53 in the docket of the New York State Courts Electronic Filing System), to separate these papers and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

Dated: January 4, 2019

ENTER:



J.S.C.