

**Kurland v Agresti**

2019 NY Slip Op 30313(U)

January 11, 2019

Supreme Court, New York County

Docket Number: 114095/2011

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM**

*Justice*

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**INDEX NO. 114095/2011**

SAMANTHA KURLAND,

**MOTION DATE 10/03/2018**

Plaintiff,

**MOTION SEQ. NO. 004**

- v -

PAUL AGRESTI, BOARD OF DIRECTORS OF CAST IRON  
CORP., and CAST IRON CORP.

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 186, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

This is an action to recover damages for common-law nuisance, in which the plaintiff obtained a money judgment against the defendant, Paul Agresti, and thereafter served restraining notices upon him and the defendants Board of Directors of Cast Iron Corp. and Cast Iron Corp. (together "the Cast Iron defendants"). The plaintiff now moves, pursuant to CPLR 5222 and 6301, to preliminarily and permanently enjoin Agresti from transferring his assets. She also moves to preliminarily and permanently enjoin the Cast Iron defendants from transferring, to Agresti, any sums, property, or debts owned or owed by them. The Cast Iron defendants oppose the motion. The motion is denied as unnecessary.

By so-ordered stipulation dated December 7, 2015, the plaintiff discontinued the action against the Cast Iron defendants. By order dated May 19, 2016 (Braun, J.), the Cast Iron Corp. was awarded summary judgment dismissing the first cross-claim asserted against it by Agresti. Agresti and the Cast Iron defendants thereafter settled the remaining cross claims. On May 23, 2018, the court entered a \$510,377.46 judgment in favor of the plaintiff and against Agresti,

upon a jury verdict. The plaintiff thereafter served restraining notices upon Agresti and the Cast Iron defendants in accordance with CPLR 5222, forbidding Agresti from selling, assigning, transferring, or interfering with any property in which he had an interest that could be levied upon to satisfy the judgment debt, and forbidding the Cast Iron defendants from selling, assigning, transferring, or interfering with any of their property to the extent that they owed a debt to Agresti. The plaintiff alleges that the Cast Iron defendants nonetheless transferred \$102,250 to Agresti sometime between June and September 2018.

The plaintiff moves to preliminarily and permanently enjoin the defendants from making any further transfers. The October 23, 2018, order to show cause initiating this motion requested only that the court grant such injunctive relief. The supporting attorney's affirmation, however, also requests that judgment be entered against the Cast Iron defendants for \$102,250.00 to compensate the plaintiff for transferring money to Agresti in violation of CPLR 5222 and the terms of the restraining notice.

The Cast Iron defendants oppose the motion, arguing that the disputed sum was paid by the Cast Iron defendants to Agresti pursuant to a settlement agreement between them that disposed of all remaining cross-claims in this action, and that adjustments were made for an award of attorneys' fees made in favor of the Cast Iron defendants and against Agresti in a Housing Court proceeding. In reply, the plaintiff counters that a settlement agreement cannot supersede the Cast Iron defendants' statutory obligation to abide by a restraining notice.

In its relevant part, CPLR 5222(b) provides that "a judgment debtor or obligor served with a 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 . . . until the judgment or order is satisfied or vacated." It further provides that a restraining notice may be served upon a person "other than the judgment debtor or obligor," and that person is also forbidden to make or suffer any sale, assignment, transfer or interference with property in which the debtor has an interest. A notice served upon such a third party becomes effective "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." The notice is also effective "if the judgment creditor . . . has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served" (CPLR 5222[b]). A notice served upon a person other than the judgment debtor is effective for one year (*see id.*). Thus, a CPLR 5222 (b) restraining notice "may be served on either the judgment debtor himself or . . . upon a third-party 'garnishee'--a person who owes a debt to the judgment debtor or who is in possession of property in which the judgment debtor has an interest" (*Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 579 [1981]; *see Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 89 AD3d 425, 426 [1st Dept 2011]). The funds held by the Cast Iron defendants were therefore automatically frozen when the restraining notices were served upon them and Agresti (*see Palestine Monetary Auth. v Strachman*, 63 AD3d 213, 226 [1st Dept 2009]). "Stated differently, the restraining notice serves as an injunction prohibiting the transfer of the judgment debtor's property" (*Distressed Holdings, LLC v Ehrler*, 113 AD3d 111, 116 [2d Dept 2013]).

A person or entity subject to a restraining notice violates CPLR 5222 when he or she improperly transfers funds or assets covered by the notice (*see Webb v Torrington Indus., Inc.*, 28 AD3d 1216 [4th Dept 2006]; *Security Trust Co. v Magar Homes, Div. of R. John Magar & Son Dev. Corp.*, 92 AD2d 714 [4th Dept 1983]). "Refusal or willful neglect of any person to obey a . . . restraining notice . . . shall . . . be punishable as a contempt of court" (CPLR 5251; *see Security Trust Co. v Magar Homes, Div. of R. John Magar & Son Dev. Corp.*, 92 AD2d 714 [4th Dept 1983]). Similarly, the remedy for a violation of a preliminary injunction that prohibits the transfer of funds or assets is to hold the violator in civil contempt (*see Richardson v Gray*, 272 AD2d 142 [1st Dept 2000]).

The plaintiff's motion for injunctive relief is thus denied as unnecessary, since, by virtue of the service of the restraining notices, the defendants already are enjoined from making the transfers that the plaintiff seeks to prevent. Moreover, they are already subject to punishment for civil contempt if they do make such transfers. The court notes that the plaintiff, in her order to show cause, does not seek to hold the defendants in contempt.

In addition to the penalty of contempt, however, violation of CPLR 5222 also "subjects the garnishee to personal liability *in a separate plenary action or a special proceeding under CPLR article 52 brought by the aggrieved judgment creditor*" (*Aspen Inds. v Marine Midland Bank*, 52 NY2d at 580 [emphasis added]; see *Accounts Receivable Solutions, Inc. v Tompkins Trustco, Inc.*, 45 AD3d 612 [2d Dept 2007]; *Tri-Global Mgt. Corp. v Citibank, N.A.*, 39 AD3d 627 [2d Dept 2007]; *Security Trust Co. v Magar Homes, Div. of R. John Magar & Son Dev. Corp.*, 92 AD2d at 715, *Nardone v Long Is. Trust Co.*, 40 AD2d 697 [2d Dept 1972]; *Matter of Sumitomo Shoji N. Y. v Chemical Bank N. Y. Trust Co.*, 47 Misc 2d 741 [Sup Ct, N.Y. County 1965], *affd* 25 AD2d 499 [1st Dept 1966]). However, the plaintiff did not commence a plenary action or special proceeding against the Cast Iron defendants, who were dismissed from this action prior to the service of the restraining notices. Instead, she requests an award of damages in her motion papers.

In the first instance, the order to show cause initiating the motion did not seek the award of damages and the entry of a money judgment against the Cast Iron defendants for violation of the restraining orders, but only injunctive relief. Where specific relief is not demanded in the order to show cause or notice of motion, denial of that relief is proper (see *Arriaga v Michael Laub Co.*, 233 AD2d 244 [1st Dept 1996]; CPLR 2214[a]). Although a court may grant relief that is warranted pursuant to a general prayer contained in the notice of motion or order to show cause, it may only do so "if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]; *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774,

774-775 [2d Dept 1991]). An award of damages is dramatically unlike the injunctive relief that was specifically sought. In addition, regardless of whether the proof supports such an award, the Cast Iron defendants would be prejudiced if the court considered the plaintiff's request because they may only be held liable for such damages in a plenary action or proceeding against them. In fact, upon their dismissal from this action, the court was deprived of personal jurisdiction to enter a money judgment against the Cast Iron defendants. The plaintiff has cited, and research has revealed, no authority for the proposition that an award of damages for violation of a restraining order may be sought by motion in the underlying action in which the subject judgment was entered.

The denial of the plaintiff's motion is without prejudice to her prosecution of the cause of action to recover damages against the Cast Iron defendants in the appropriate manner or a properly initiated motion to hold them in civil contempt that conforms with the requirements of Judiciary Law § 756. The court notes that, even if the Cast Iron defendants ultimately prevail on their argument that UCC 9-322(h)(1) gives them priority over all other security interests in Agresti's unit, including the plaintiff's judgment lien, it does not necessarily follow that this UCC provision excuses them from compliance with the restraining notice served upon them. They effectively argue that they may unilaterally determine whether or not they may disburse otherwise restrained funds in their possession that belong to Agresti and, thus, need not secure court approval to modify the terms of the restraining notice to effectuate the claimed priorities articulated in the UCC. Generally, a garnishee cannot make unilateral determinations, based on its interpretation of the law or attendant facts, as to whether or not it can disburse restrained funds to anyone other than the judgment creditor (*see Ray v Jama Productions, Inc.*, 74 AD2d 845, 846 [2d Dept 1980] ["The fact that a judgment debtor will directly benefit from the [garnishee's] payment of this sum [to the judgment creditor] is sufficient to require the party served with the restraining notice to comply with the provisions or be subject to the appropriate legal sanctions."]). Because the court is denying the plaintiff's motion, it need not determine this

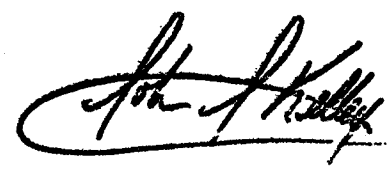
issue at this juncture. Nonetheless, that issue is likely to arise in any subsequent contempt motion or plenary action or proceeding initiated by the plaintiff.

Finally, inasmuch as the order to show cause initiating the motion contained a temporary restraining order that was to remain in effect until the hearing of the motion, the temporary restraining order is vacated and dissolved.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

1/11/2019  
DATE



JOHN J. KELLEY, J.S.C.  
HON. JOHN J. KELLEY  
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE