

Gaulsh v Diefenbach PLLC
2020 NY Slip Op 31440(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 654346/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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SUNE GAULSH,

Plaintiff,

- v -

DIEFENBACH PLLC,

Defendant.

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INDEX NO. 654346/2015
MOTION DATE
MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 175-182, 197, 198 were read on this motion for injunction/restraining order.

By order to show cause, defendant seeks an order restraining plaintiff from communicating with a nonparty bank with respect to defendant's bank records, and related relief. (NYSCEF 197).

I. PERTINENT PROCEDURAL BACKGROUND

On January 31, 2020, defendant moved by notice of motion, pursuant to CPLR 3103 seeking that plaintiff be ordered, inter alia, "to desist from the use of subpoena powers to obtain [defendant's] IOLA account as it is wholly irrelevant to this case." (NYSCEF 133). The motion pends as it has not yet been argued. On February 3, 2020, plaintiff efiled a subpoena, to be so-ordered, addressed to J.P. Morgan Chase Bank (Chase) seeking the production of "[a]ny and all account statements and anything that can be construed as an account statement for the specific account number: *****, held by [defendant]," along with "[a]ny and all Electronic Documents, Document, Communication or Copy relating to the activity of any account held by [defendant]." (NYSCEF 140). The subpoena was not so-ordered. On March 10, he again sought

subpoenas for the same information from Chase, plus the personal accounts of defendant's principal. (NYSCEF 161, 162). Neither was so-ordered.

Plaintiff also on March 10, 2020, filed an order to show cause which was granted except to the extent that that plaintiff's request for an order requiring that Chase and any other financial institution preserve any and all of defendant's account records. (NYSCEF 165, 166). It is undisputed that on March 14, 2020, plaintiff sent Chase, by facsimile transmission, a "Litigation Hold Notice," along with a blank copy of his March 10 order to show cause, and a blank subpoena seeking the production of such documents. (NYSCEF 177).

The instant order to show cause was signed on May 11, 2020, by which, pending the hearing and determination of the motion, plaintiff was temporarily

enjoined from serving, faxing, writing, communicating, telephoning to, or communicating in any way, with [Chase] related to his notice to Chase dated March 14, 2020 without an Order of the Court; from sending or serving to any third-parties (1) a non-judicial subpoena as he is not an attorney; from serving, sending by mail or emailing, or faxing to any third party a Litigation Hold Notice or a copy of a subpoena, in whatever form, unless the document to be sent to a third party is first approved by the Court; [and] must provide copies of any discovery demands he has served upon third parties, together with responses, if any, to opposing counsel via email to: Gordon@new-york-divorce-attorney.com on or before a date determined on May 13, 2020.

(NYSCEF 197). As oral argument by Skype video conference was therein scheduled for two days later, plaintiff was not required to file opposition until a schedule could be set at the conference. (*Id.*). Nonetheless, on May 12, plaintiff efiled an affidavit in opposition. (NYCSEF 198).

At oral argument, plaintiff denied having served any discovery demands on any other third parties, and after both parties had been heard on the motion, plaintiff stated that he had no more to say and was relying on his written opposition. Consequently, there is no need to address defendant's request for copies of any discovery demands served on third parties, etc., nor was

there a need for additional papers. Then, without any notice, plaintiff signed off from the conference before it had ended, and thus, was not present when I extended the temporary relief provided for in the order to show cause. Defense counsel was directed to advise plaintiff accordingly.

II. DEFENDANT'S CONTENTIONS

In his affidavit in support of the motion, defendant's principal states that defendant seeks an order striking the Litigation Hold Notice arguing, *inter alia*, that its earlier motion pursuant to CPLR 3103 for a protective order stays all discovery related to the bank account targeted by plaintiff. He recounts a conversation he had with "Chase" wherein he learned that the bank intended to send plaintiff the records, apparently in reliance on the subpoena and blank order to show cause accompanying the notice. As the blank show cause order plaintiff sent to Chase contains no indication that plaintiff's request for an order requiring Chase to preserve defendant's bank records had been declined, defendant asserts that plaintiff thereby attempted to mislead the bank and persuade it to send him the records, an inference, it maintains, is supported by plaintiff's failure to inform Chase that his subpoena for the records had not been signed.

It is also argued by defendant that as the bank records sought by plaintiff are not relevant, there is no basis for preserving them, and that pursuant to the retainer agreement signed by plaintiff, the retainer fees are defendant's property. It seeks costs in bringing the instant motion.

III. PLAINTIFF'S CONTENTIONS

In opposition, plaintiff denies any attempt to commit a fraud on Chase, having neither demanded nor intended to demand documents, and having obtained no disclosure from it. He nonetheless argues that that he is entitled to disclosure from it as it may reveal that defendant commingled funds in its operating account with those of other clients and that it improperly

failed to place the funds in escrow. Plaintiff observes that defendant shows no prejudice and that it had an affirmative duty to serve Chase with a litigation hold notice.

Plaintiff complains of defendant's inclusion of hearsay, irrelevant, and scandalous information in its motion, and asks that all such material be stricken from it. He too, however, asserts that he called "Chase" which denied having made the statements attributed to it by defendant and stated that it had classified plaintiff's notice as a "preservation letter" to which it applied its "preservation procedures."

According to plaintiff, a preservation letter is not subject to CPLR 3103, as it discloses nothing, reasoning that defendant's contrary position could render a court "complicit" in the spoliation of evidence, and that there is no requirement that the opposing party be served with a copy.

III. ANALYSIS

"Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant.'" (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Grp., LLC*, 177 AD3d 924, 926 [2d Dept 2019]). The court, in exercising her discretion in determining whether such relief should be granted, must determine whether the movant has established: "(1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." (*Id.*, at 927).

In order to determine whether defendant is entitled to this relief, plaintiff's conduct must be analyzed in the context of the governing law.

Pursuant to CPLR 3102, which lists methods of obtaining disclosure, in subdivision (c), it is provided that “[b]efore an action is commenced, disclosure . . . to preserve information . . . may be obtained, but only by court order. . . .” Here, plaintiff does not demonstrate that he had obtained a court order for permission to notify Chase to preserve the account records, nor did he seek such an order before commencing this action. Moreover, as observed in the practice commentaries to CPLR 3102, “the preservation of testimony before commencement of an action is still one of disclosure’s uses and CPLR 3102(c) continues it.” Such a use is subject to the automatic stay provision of CPLR 3103(c).

To the extent that plaintiff’s notice to Chase constitutes a notice to preserve evidence and is therefore a disclosure device, it was improperly served during the stay imposed by defendant’s motion for a protective order. Even if the notice to preserve or litigation hold notice is not subject to the stay set forth in CPLR 3103(c), defendant satisfies its burden in demonstrating that the records sought to be preserved, including of course, the principal’s personal bank records, are irrelevant to the prospective inquest, the sole purpose of which is to determine plaintiff’s damages; plaintiff does not demonstrate otherwise. Thus, whether defendant had improperly commingled plaintiff’s retainer funds with those of other clients in its operating account bears no relevance to damages here, and it is apparently not disputed that the funds were not placed in escrow. Nor has plaintiff offered a reason to believe that defendant is unable to pay a judgment or that he has unsuccessfully sought information, by legitimate means, concerning defendant’s ability to pay a judgment.

Defendant also sufficiently demonstrates that plaintiff had no legitimate reason for transmitting, along with the notice to Chase, the blank subpoena and blank order to show cause. That plaintiff disclaims an intent to mislead does not disprove the impropriety of having done so,

and his claim that he intended to clarify what was to be preserved is rejected as incredible absent any indication that he could have otherwise communicated to Chase any other required information. In addition, as neither party offers admissible evidence as to how the documents accompanying plaintiff's notice were interpreted by Chase, their unnecessary transmission permits a reasonable inference that they were used with an intent to deceive. That the subpoena was made returnable to the part does not render the inference unreasonable.

Defendant thus demonstrates that absent a restraint on plaintiff, it and its principal are exposed to ongoing and irreparable harm in the form of a potential disclosure of irrelevant evidence containing information, some of which pertains to others not involved here, and that absent the relevance of such information, the balance of equities are in its favor. Given the retainer agreement, defendant sufficiently demonstrates a likelihood of success on the merit.

Defendant's other requests for relief are denied, and I decline to impose sanctions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that upon defendant's service of this order with notice of entry, plaintiff is enjoined

(1) from serving, faxing, writing, communicating, telephoning to, or communicating in any way, with J.P Morgan Chase Bank, NA related to his notice dated March 14, 2020 without an Order of the Court;

(2) from sending or serving to any third-parties a non-judicial subpoena as he is not an attorney; and

(3) from serving, sending by mail or emailing, or faxing to any third party a Litigation Hold Notice or a copy of a subpoena, in whatever form, unless the document to be sent to

a third party is first approved by the Court.

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5/14/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE