

Erensel v Abitbol

2020 NY Slip Op 31587(U)

May 29, 2020

Supreme Court, New York County

Docket Number: 151529/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

INDEX NO. 151529/2020

BRENT ERENSEL,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

YAIR ABITBOL, ZURICH FUNDING NA INC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for ORDER OF ATTACHMENT.

The motion by plaintiff, brought by order to show cause, for an order of attachment is denied and the order to show cause granting plaintiff temporary relief (NYSCEF Doc. No. 7) is vacated.

Background

The instant dispute concerns the business relationship between plaintiff and defendants. Plaintiff alleges that Abitbol ran a fraudulent scheme to induce plaintiff into investing in defendant Zurich Funding NA Inc. ("Zurich"). Zurich purportedly provided microloans to small businesses. Plaintiff insists he was convinced to initially deposit \$25,000 to Zurich and later acquired an ownership interest in Zurich by investing another \$50,000. Plaintiff contends that Zurich was a fraudulent company and that Abitbol deliberately chose the name and the company logo to mimic the venerable Zurich Insurance Company. Plaintiff asserts that Zurich had few assets and that the address provided for the business was fake.

Plaintiff acknowledges that he received a little over \$16,000 arising from his partnership interest and believes he is owed at least \$73,541.73. Plaintiff successfully obtained an order restraining defendants from transferring any assets to the extent of \$73,541.73, including a specific bank account at TD Bank and any other bank account in either defendants' name at TD Bank (NYSCEF Doc. No. 7).

In opposition, defendants characterize the instant dispute as merely a disagreement over plaintiff's desire to extricate himself from the partnership agreement. Defendants deny that there was any fraud and point out that plaintiff received payments. Defendants insist that plaintiff wanted defendants to do all the work and still give plaintiff a ten percent distribution. Defendants argue that Abitbol and plaintiff met to discuss a buyout in February 2019 and that plaintiff wanted one hundred percent of his investment back. Defendants believed they were entitled to deduct certain expenses for the work they performed. Defendants maintain that the settlement negotiations fell through and this lawsuit was commenced.

Defendants argue that service was not properly effectuated nor did plaintiff file an undertaking as directed in the order to show cause. Defendants also stress that the Court should not permit plaintiff to effectively pierce the corporate veil by restraining Abitbol's bank account.

Discussion

"A preliminary injunction requires a showing of probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in the plaintiff's favor. Attachment further requires a demonstration that the defendant has concealed or is about to conceal property with the intent to defraud creditors or to frustrate the enforcement of a judgment. However, removal, assignment or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the

facts relied upon to prove it must be fully set forth in the moving affidavits” (*Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12, 13, 778 NYS2d 145 [1st Dept 2004]). “Attachment is considered a harsh remedy and the statute is strictly construed in favor of those against whom it may be employed” (*Glazer & Gottlieb v Nachman*, 234 AD2d 105, 105, 650 NYS2d 717[1st Dept 1996]).

Setting aside whether plaintiff properly served the order to show cause or filed the undertaking, the fact is that plaintiff has not met his burden for an order of attachment. Critically, plaintiff admits that he received monthly payments from Zurich from November 2017 through May 2018 before the payments ceased. While these payments do not *prove* the absence of fraud, they severely undercut the high burden a plaintiff must meet in order to get an attachment.

An attachment restraining a defendant’s bank account is a drastic provisional remedy. Its purpose is not merely to ensure a plaintiff can recover the amount sought if he or she prevails in a case. Otherwise, a plaintiff would be entitled to an attachment in nearly every case. As stated above, there must be evidence that a defendant has concealed or is about to conceal assets in order to evade the recovery of a judgment. That has not been shown to be the case here. Rather, defendants have appeared and offer a very different account of what took place. This is not a situation where plaintiff has proof that defendants transferred money from its accounts, attempted to shut down the business or have disappeared.

Put another way, an attachment is not appropriate where two parties disagree over the terms of an investor’s departure from a partnership. It may be that plaintiff is in fact entitled to the over \$70,000 he seeks. But plaintiff’s eventual recovery is not a reason to grant the provisional remedy sought here, where plaintiff has made no showing that defendants have taken

any steps to be “judgment proof.” This Court declines to grant an attachment under these circumstances.

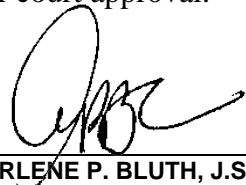
Accordingly, it is hereby

ORDERED that the motion for an order of attachment is denied and the order to show cause previously signed on February 20, 2020 (NYSCEF Doc. No. 7) is hereby vacated and any restraints imposed on defendants or their accounts are hereby lifted and vacated; TD Bank and any other institution, upon presentation of this Order, shall release all restraints immediately. For this purpose, the appearance of this order in the NYSCEF filing system shall suffice as proof of this Order; due to COVID-19, the clerks who normally certify or otherwise make this order look “official” are not in the courthouse.

Conference: July 28, 2020. The parties are advised to check the docket prior to the conference for a potential adjournment or instructions about a remote conference due to the ongoing pandemic. The parties may, of course, fill out a preliminary conference order at any time and upload it (with signatures from all parties) to NYSCEF for court approval.

05/29/2020

DATE



ARLENE P. BLUTH, 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