

Royal Bank of Can. v Solny
2020 NY Slip Op 31686(U)
May 29, 2020
Supreme Court, New York County
Docket Number: 655436/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

<p>ROYAL BANK OF CANADA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>MALKA ROSENBERG SOLNY a/k/a MALKA ERIKA ROSENBERG, SHANDELLE SOLNY, ROSE SOLNY, JUDAH SOLNY, ISAAC SOLNY, OWNERS GARDENS CORP., and FORTRIS MANAGEMENT CORP.,</p> <p style="text-align: center;">Defendants.</p>	X	<p>INDEX NO. <u>655436/2019</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>006</u></p>
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**DECISION + ORDER ON
MOTION**

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HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 006) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174 were read on this motion to/for ORDER OF ATTACHMENT.

Plaintiff Royal Bank of Canada (RBC) moves for an ex parte order of attachment, pursuant to CPLR 6201 (3), 6211, and 6212, directing the Sheriff of the City of New York to levy upon any bank or financial accounts of defendants Malka Rosenberg Solny (Malka), Shandelle Solny (Shandelle), Rose Solny (Rose), Judah Solny (Judah), Isaac Solny (Isaac), Owners Gardens Corp., (Owners), and Fortris Management Corp., (Fortris) in the amount of \$845,679.26, together with the Sheriff's fees and expenses.¹ (Proposed Ex Parte Order of Attachment at 3 [NYSCEF Doc No. 162].) These accounts include, but are not limited to, an account at JP Morgan Chase Bank, N.A. (JPMorgan) in the name of defendant Fortris with the

¹ The court refers to the defendants by their first names not out of disrespect, but in order to avoid confusion, as the defendants share the same last name.

account number ending in 6575. (Id.) RBC requests that no additional undertaking be ordered by the court in connection with the relief sought. (RBC Memo. at 2.)

Plaintiff initially brought this action alleging that defendants Malka, Shandelle, and Rose transferred \$845,679.26 (Subject Funds) from an RBC bank account in Canada in violation of seizure orders entered by the Superior Court of Quebec. (Verified Am. Complaint, at ¶¶ 2, 23-24 [NYSCEF Doc. No. 161]; July 4, 2019 Notice of Execution [NYSCEF Doc. No. 8].) The RBC account is jointly owned by Shandelle and Rose and also controlled by Malka through a power of attorney. (Verified Am. Complaint, at ¶ 2; see September 9, 2019 Wire Transfer [signed by Malka “POA”] [NYSCEF Doc. No. 11].) In violation of the Canadian court’s orders, on September 9, 2019, Malka and Rose initiated a wire transfer of the Subject Funds to an account at TD Bank in New Jersey that is jointly owned by them. (Verified Am. Complaint, at ¶¶ 39-42; September 9 Wire Transfer.)

On September 19, 2019 RBC initiated this action against Malka, Shandelle, and Rose to recover the Subject Funds and moved by order to show cause for a temporary restraining order enjoining further transfer or dissipation of the Subject Funds. (Verified Complaint [NYSCEF Doc. No. 2]; Proposed Order to Show Cause [NYSCEF Doc. No. 3].) This court granted the temporary restraining order on September 20, 2019. (Order to Show Cause and Temp. Restraining Order [NYSCEF Doc. No. 15].) The court granted the preliminary injunction on the record on November 14, 2019. (So Ordered Nov. 14, 2019 Tr., at 4-8 [NYSCEF Doc. No. 102].) This order states in relevant part:

It is hereby ORDERED that, other than complying with the judgment on the originating application for the issuance of a preliminary interlocutory and permanent injunction presented by Plaintiff ROYAL BANK OF CANADA by the Hon. Donald Bisson, dated September 19, 2019 in the action pending in the Superior Court of Quebec, Doc. No. 500-17-109612-195, the Defendants, MALKA ROSENBERG a/k/a MALKA ERIKA ROSENBERG, SHANDELLE

SOLNY and ROSE SOLNY, are enjoined and restrained from transferring, disposing or dissipating the US\$845,679.26 transferred on September 9, 2019 from the account at the Plaintiff ROYAL BANK OF CANADA ending in nos. 267 (the “Subject Funds”) and subject to the Seizure Orders entered by the Superior Court of Quebec, District of Montreal, in the case captioned In the Matter of the Estate of the Late Katy Mermelstein Rosenberg, No. 500-17-094077-164.

(Prelim. Inj. Order at 3 [NYSCEF Doc. No. 101].)

The court’s order granting RBC’s motion further required defendants to make specific disclosures to plaintiff concerning the location of the Subject Funds and the account(s) in which they are held. (Id.) Plaintiff moved by order to show cause, dated January 17, 2020, to hold defendants Malka, Shandelle, and Rose in contempt for “refus[ing] to comply with this Court’s Order dated December 23, 2019...” (Order to Show Cause [NYSCEF Doc. No. 112].) The contempt motion is currently “held in abeyance until the court is able to schedule an evidentiary hearing.” (Interim Order [NYSCEF Doc. No. 175].)

RBC filed an Amended Verified Complaint on May 20, 2020, the same date this motion was filed. The Amended Complaint adds defendants Judah, Isaac, Fortris, and Owners. The Amended Complaint alleges that Judah, Isaac, Fortris, and Owners assisted Malka, Rose, and Shandelle in the conversion of the funds and interference with plaintiff’s rights to possess the funds. (Verified Am. Complaint, at ¶¶ 86-94.) Shandelle, Rose, Judah, and Isaac are the children of Malka. (Verified Am. Complaint at ¶¶ 6-10.) Fortris and Owners are New York corporations formed on September 24, 2019, the day after Malka, Shandelle, and Rose were served with the Summons, Verified Complaint, and Temporary Restraining Order. (Id., at ¶ 54; RBC Memo., at 8; NY Dept. Of State Entity Information [NYSCEF Doc. Nos. 167-168]; Affidavits of Service [NYSCEF Doc. Nos. 16-18].) Plaintiff alleges that defendants Judah, Isaac, and Malka are officers and directors of Fortris and Owners. (Id., at ¶¶ 55-57.)

RBC contends that with the assistance of Judah, Isaac, Owners, and Fortris, defendants “have made a series of transfers of the Subject Funds in an effort to hide them from RBC and others.” (RBC Memo., at 1.) RBC represents that the Subject Funds “are currently on deposit in a JP Morgan bank account in the name of Fortris, one of two shell corporations formed by the Defendants the day after Malka, Shandelle and Rose were served with the Temporary Restraining Order and the original Summons and Verified Complaint in this action.” (Id.)

In support of its motion for an order of attachment, RBC submits JPMorgan bank account records obtained by RBC in March 2020 through discovery and investigation in this action. (RBC Memo., at 12-13; JPMorgan Account Records [NYSCEF Doc. No. 170].) The JPMorgan bank account records show that the Subject Funds were transferred by Malka in October 2019 to accounts in the names of Judah, Isaac, Owners, and Fortris. (Id.)² More specifically, the account records show that the Subject Funds were transferred, together with additional funds held at Sterling Bank totaling \$2,269,180, by bank checks signed by Malka and deposited into a JPMorgan account jointly in the names of Isaac and Judah with Malka as power of attorney on the account (account no. 0387). (Id., at 3, 13-16.) The records show that Malka subsequently executed withdrawal and deposit slips, respectively, transferring the balance of the funds in account no. 0387 in equal amounts to two separate accounts in the names of Fortris (account no. 6575) and Owners (account no. 3002). (Id., at 17-20.) Notably, all such accounts had balances of between 0 and 25 dollars prior to the transfers described. (Id.)

² In this decision, the court specifically discusses the transfers to and from the JPMorgan accounts beginning with the transfer from Sterling Bank. Plaintiff also submits evidence tracing the transfer of the Subject Funds from the RBC account to Sterling Bank—evidence which was also submitted by plaintiff in support of prior motions in this action. (See TD Bank and Sterling Bank records showing transfers of Subject Funds [NYSCEF Doc. Nos. 11, 145-151, 165-166].)

The evidence thus demonstrates that the transfers evidenced in the JPMorgan bank records occurred after Malka, Shandelle, and Rose were served with this court's Temporary Restraining Order. On May 5, 2020, RBC sent a letter to counsel of record for defendants in this action setting forth plaintiff's claims concerning the JPMorgan accounts and demanding a return of the Subject Funds held in the accounts. (RBC Aff. in Support, at 35 [NYSCEF Doc. No. 163]; Demand Letter [NYSCEF Doc. No. 173].) Defendants have refused to comply with the demand. (Id.) RBC now seeks an order of attachment against defendants' bank and financial accounts, including, but not limited to, the Fortris JPMorgan bank account.

Pursuant to CPLR 6211 (a), an order of attachment may be granted without notice "before or after service of summons and at any time prior to judgment. . . ." ³ CPLR 6212 requires that a plaintiff seeking an order of attachment establish "the probability of its success on the merits of its cause of action, that one or more grounds for attachment provided for in CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." (Reed Smith LLP v LEED HR, LLC, 156 AD3d 420, 420 [1st Dept 2017].) "An order of attachment is left to the discretion of the motion court." (Matter of Qwil PBC [v Landow], 180 AD3d 593, 593 [1st Dept 2020].)

This court previously determined on RBC's motion for a preliminary injunction that RBC has shown a probability of success on the merits in this action. (Nov. 14, 2019 Tr., at 5, 8.) In reaching this determination, the court reasoned in relevant part:

"In particular, with respect to the likelihood of success on the merits, the court points to the absence of any dispute that defendants knowingly removed funds from Royal Bank notwithstanding the Quebec Seizure Order of which they were aware."

³ CPLR 6211 (a) sets forth the requirements for the contents of the order of attachment. CPLR 6211 (b) sets forth a procedure for confirmation of an order of attachment granted without notice.

(Id., at 8: 3-8.) At the time of the decision of the motion for the preliminary injunction, the sole defendants were Malka, Shandelle, and Rose. Since that decision, Judah, Isaac, Owners, and Fortris have been added as defendants by the Amended Complaint. The evidence submitted in support of the motion for an order of attachment also demonstrates a likelihood of success on the merits against the additional defendants. Malka deposited the Subject Funds into JPMorgan accounts in the names of her sons and in the names of Fortris and Owners. It is beyond dispute that the transfers were knowingly completed by Malka after issuance and service of the Temporary Restraining Order. The evidence thus supports the finding that defendants Judah, Isaac, Owners, and Fortris aided and abetted the conversion of the Subject Funds by acceptance of the wrongful transfers. An order of attachment is warranted against all defendants. (See DLJ Mtge. Capital, Inc. v Kontogiannis, 110 AD3d 522, [1st Dept 2013].)

RBC seeks an order of attachment pursuant to CPLR 6201 (3), which authorizes an order of attachment where:

“the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.”

Fraudulent intent under CPLR 6201 (3) “is not lightly inferred.” (Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp., 118 AD2d 769, 772 [2d Dept 1986].) In order to support an order of attachment a plaintiff must submit “evidentiary facts—as opposed to conclusions—proving the fraud.” (Id.)

The CPLR 6201(3) ground for attachment is established not only by the evidence submitted on this motion, but also by the record of the prior proceedings in this action and the record of the underlying litigation in Canada. Defendants have knowingly and repeatedly

transferred the Subject Funds in violation of court orders issued by this court and the court in Quebec. The documentary evidence demonstrates a clear intent to frustrate RBC's recovery of the Subject Funds by repeated, blatant transfers of the Subject Funds to a series of bank accounts at various institutions held in the names of multiple family members and entities owned or controlled by them. As noted above, the evidence shows that the Owner and Fortris entities were created the day after service of the Temporary Restraining Order issued in this action, and the JPMorgan accounts for these entities had no balances. There is no reasonably ascertainable purpose for the transactions other than to frustrate RBC's efforts to recover the Subject Funds.

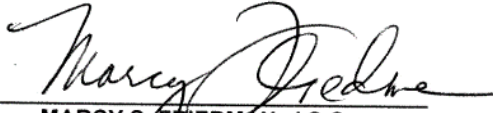
RBC also demonstrates that "the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." (CPLR 6212 [a]; RBC Memo., at p. 18.) It is noted that defendants Malka, Shandelle, and Rose filed a Verified Answer that did not assert any counterclaims. (See NYSCEF Doc. No. 153.)

RBC satisfies the requirements for the issuance of an order of attachment. CPLR 6212 (b) requires that, on a motion for an order of attachment, the plaintiff shall give an undertaking in an amount determined by the court "not less than five hundred dollars." RBC previously filed proof of an undertaking in the amount of \$25,000, as required by this court's Preliminary Injunction Order. (Oct. 1, 2019 Proof of Undertaking [NYSCEF Doc. No. 19].) RBC asks that it not be required to provide an additional undertaking. (Proposed Ex Parte Order of Attachment at 3.) The court holds that the existing undertaking shall also constitute the undertaking for the order of attachment, provided that such undertaking shall also be "conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of

the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees." (CPLR 6212(b).)

This constitutes the decision of the court. It is hereby ORDERED that the motion of plaintiff Royal Bank of Canada for an order of attachment is granted to the extent set forth in the Order of Attachment of the same date.

Dated: May 29, 2020
New York, New York



MARCY S. FRIEDMAN, J.S.C.