

Halpern v SESAC LLC
2021 NY Slip Op 30668(U)
March 5, 2021
Supreme Court, New York County
Docket Number: 150994/20
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

JOHN HALPERN

INDEX NO. 150994/20

- v -

MOT. DATE

SESAC LLC

MOT. SEQ. NO. 003

The following papers were read on this motion to/for VACATE

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

This is non-party and judgment debtor Matthew White's order to show cause to vacate this court's Decision/Order dated October 15, 2020 and Order & Judgment entered December 22, 2020. White further seeks leave to intervene and an order dismissing the petition. Petitioner opposes the motion. Respondent has not taken a position despite notice and an opportunity to respond. For the reasons that follow, the motion is denied.

White was entitled to notice of the turnover petition pursuant to CPLR § 5225[b], which provides in pertinent part: "[n]otice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested." White's default in failing to oppose the petition and/or move for leave to intervene is excusable provided he has a reasonable excuse for failing to file opposition or motion papers and a meritorious opposition to the petition itself (CPLR § 5015). Merely claiming law office failure vis-à-vis a "calendar mistake" without any further detail is insufficient to demonstrate a reasonable excuse for failing to oppose the motion (see i.e. Galaxy General Contracting Corp. v. 2201 7th Ave. Realty LLC, 95 AD3d 789 [1st Dept 1999]; see also CEO Business Brokers, Inc. v. Alqabili, 105 AD3d 989 [2d Dept 2013]).

The court will first consider whether White has a reasonable excuse for failing to oppose the petition and/or move for leave to intervene. By way of background, the court granted the petition in the 10/15/20 decision/order and directed the parties to settle order and judgment. Petitioner noticed for settlement a proposed judgment on November 9, 2020. Meanwhile, White's counsel, Kimberly Lecci, Esq., filed a notice of appearance on November 2, 2020. One day later, Attorney Lecci filed an order to show cause seeking to vacate the 10/15/20 Order, intervene and to dismiss. Notably, this order to show cause was filed before the court entered judgment. As this court explained in an order dated December 18, 2020:

Dated: 3/5/21

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

That order to show cause has not been sequenced despite being returned for correction and a notice from the filing clerk dated December 10, 2020 which provides in relevant part: "Affirmation of K. Lecci not efiled. Do you mean to request a TRO. OSC reads: 'Pending the hearing and determination of this Order to Show Cause...'? Please correct. Thank you." Only an affidavit from White has been submitted in support of the order to show cause, and therefore it has not been presented to the court for signature. White has taken no further action...

The court signed petitioner's proposed judgment on December 18, 2020, which was entered by the Clerk on 12/22/20. On December 21, 2020, Attorney Lecci then filed her affirmation in support of the order to show cause and the Clerk's Office sequenced same as motion sequence number 002. The court declined to sign that order to show cause because, *inter alia*, White would now have to move to vacate the judgment. The court further directed as follows:

Any renewal must address White's dilatory conduct in failing to file all necessary paperwork to have the instant order to show cause processed for the approximate six weeks between the 11/2/20 notice of appearance and the 12/18/20 order and 12/18/20 judgment.

Turning to the merits of White's instant motion, he claims in a sworn affidavit that he never received the petition and notice of petition. Specifically, he claims that his wife gave birth on February 2, 2020, the day before petitioner served the pleadings herein on him, and White then "temporarily moved in with [his] parents for the next several weeks, so that [his] parents could help with [their] newborn." When he returned to his apartment in Manhattan where the pleadings were served, White "found a pink USPS Certified Mail notification slip from [Attorney Borg] dated February 2, 2020, in [his] mailbox." White claims that he tried to retrieve the mail referenced in the slip but was told by USPS that "the item had been returned to sender because it had been more than two (2) weeks since the item was sent."

White claims that he then unsuccessfully tried to reach Attorney Borg via phone, then sent him an email "request[ing] that [Attorney] Borg contact [him] to advise what the mailing was about" and "send [White] a copy of the certified mail item electronically, via fax or email." Despite his requests, White claims that he "never received a copy of the certified mail item or any response from [Attorney] Borg." White has provided a copy of the email he allegedly sent to Attorney Borg dated February 27, 2020.

Petitioner then filed an Amended Notice of Petition and an Amended Petition, which were also served upon White via certified mail, return receipt requested, on February 27, 2020. Meanwhile, White further claims that "In or about March 2020, [he] again attempted to call [Attorney] Borg to inquire about the certified mailing that [he] did not receive in February. However, [Attorney] Borg's voicemail was full and [White] was unable to leave a message." White has provided a copy of another email he allegedly sent to Attorney Borg dated April 19, 2020, which states in pertinent part:

Hi Jonathon, I wrote to you back in feb about certified mail that I didn't receive. Would you please send me a copy through here? I realize the courts are closed. Does this have something to do with the appeal? I called you last month and just called you again but your voice mail was full.

White claims that "[d]uring this time, [he] became extremely ill with what would later be determined to be Covid-19 and was incapacitated while I struggled to survive and recover from my illness." White has provided a letter from his treating physician, Alyson Pidich, M.D., which confirms that White contracted Covid-19 in late July: "I instructed [White] to remain in bed for a 30 day period due to the severity of his symptoms ... his conditions were severe during that time."

White claims that he was unaware of the instant proceeding until he received note of entry of the 10/15/20 decision/order. White claims that he then "immediately took steps to retain counsel to move to vacate the Decision and Order and for leave to intervene."

Not only did White fail to timely file opposition or move to intervene in this proceeding before the petition was granted, he and his counsel, Attorney Lecci, failed to properly file a request for such relief before the court entered judgment in this proceeding. The declined order to show cause (sequence 2) suffered a number of technical defects. The order to show cause was not initially processed by the Clerk's Office as per a notification dated November 4, 2020 which indicates that the "Affirmation of Kim L has not been E-filed. Please correct." Attorney Lecci states: "the Affirmation did not successfully upload with the rest of the documents at the time of this initial filing, presumably as a result of technical issues or an inadvertent e-filing error by counsel." While conceding that the order to show cause listed her missing affirmation in support as being annexed thereto, Attorney Lecci argues:

Notwithstanding the aforementioned e-filing error, the Court should not have returned the prior Order to Show Cause for correction, or refused to process same, based upon the absence my Affirmation (sic). There is no requirement under the Part Rules or CPLR § 2214 that an attorney's affirmation must accompany an Order to Show Cause. Rather, the only requirements provided under the Part Rules or the CPLR are that a proposed Order to Show Cause be accompanied by an affidavit of a person with actual knowledge of the facts and circumstances asserted therein, which was timely filed at the outset of the motion

White and Attorney Lecci further claim that the delay with properly filing White's original affidavit was minimal, which was returned for correction by the Clerk's Office on November 4, 2020 because "Per CPLR 2309c, a document notarized by an out-of-state notary must include a certificate of conformity...." White found a New York notary to re-notarize his Affidavit and same was refiled with the Court on or about November 13, 2020. Attorney Lecci writes: "[t]his minor delay was an unintentional mistake by a layperson who promptly rectified the error the following week."

Attorney Lecci claims that she attempted to refile her affirmation in support of the first order to show cause on November 13, 2020 along with White's updated affidavit. She admits that approximately two days thereafter, she "was finally able to confirm that the prior Order to Show Cause and Affirmation had not posted to the docket." Nonetheless Attorney Lecci claims that she "was unavailable to immediately correct the foregoing e-filing errors and/or law office failure, as I was dealing with a serious personal family medical situation at the time." Attorney Lecci states that her father was diagnosed with a "serious, potentially life-threatening heart condition requiring immediate medical attention, hospitalization, and multiple medical procedures, including heart surgery..." Attorney Lecci further cites "Thanksgiving, Christmas, and New Year's holidays" which she claims "further impacted the expediency of [her] correction and resubmission of the prior Order to Show Cause." Attorney Lecci further cites Governor Cuomo's executive order tolling statutes of limitations, arguing that the 10/15/20 decision/order "was issue in violation" thereof.

At the outset, the court rejects Attorney Lecci's claim that the 10/15/20 decision/order violated Governor Cuomo's executive orders as meritless. Otherwise, the court finds that while Attorney Lecci has demonstrated a reasonable excuse for failing to properly file the instant order to show cause for nearly two months, White himself has failed provide a reasonable excuse for failing to oppose the petition or otherwise timely seek to intervene in this proceeding. A process server's affidavit of service constitutes *prima facie* evidence of proper service (*Scarano v. Scarano*, 63 AD3d 716 [2d Dept 2009]). All that White was required to receive was a copy of the petition and notice of petition as well as the amended petition and amended notice of petition in the same manner as a summons or by registered or certified mail, return receipt requested (CPLR § 5225[b]). Indeed, White admits to receiving mail at his apartment and otherwise fails to address the fact that the pleadings were mailed to him at 33 Bay View Drive West, Sag Harbor, NY 11963 as well. White's failure to forward his mail to where he was residing for a lengthy period of time cannot defeat petitioner's showing of proper service. Further, as petitioner's counsel correctly points out, White is a non-party in this proceeding, and although he is entitled to notice of the petition, such notice is not an *a fortiori* jurisdictional issue.

The emails White allegedly sent to Attorney Borg, and to a degree the unproven phone calls White claims he made, are a red herring. Attorney Borg was not required to respond to White's emails by any statute or other legal requirement. Further, Attorney Borg denies receiving the emails White has provided to the court, or any phone calls or voicemails from White during the relevant time period:

Your affirmant has no record of either of the emails White claims to have sent (this is so despite his email address being in your affirmant's contacts list, based on prior correspondence relating to settlement discussions in the SDNY Action, in which White is not represented by counsel, so it would not be blocked or go to a "junk" folder). The format/spacing of the emails White annexed to the Motion also appears to be strange, if not inconsistent with other emails he sent from that email address, and it is unclear why the email allegedly sent on April 19, 2020 was not sent as a "forward" of the email allegedly sent on February 27, 2020. (A copy of the last email string between your affirmant and White is annexed hereto as Exhibit "17".) Nor is there any explanation offered by White for why he waited almost two (2) full months before allegedly sending the second email, or why he failed to make any additional follow up efforts thereafter.

...

Your affirmant has no record of any voicemails from White (while the missed call function on your affirmant's phone does not go back that far, all deleted voicemails are retained on the phone and a search shows no deleted voicemail from White). ...

Moreover, although your affirmant and White also spoke by text message on multiple occasions (as recently as February 16, 2018), there appears to have been no effort by him to do so here.

Indeed, a review of the format of the two emails that White allegedly sent to Attorney Borg are inconsistent: notably, one email has a subject line and the other does not. White's claim that he assumed the papers mailed to him related to another action pending further lack credibility since White is represented by counsel in that other action. On this record, the court rejects White's claim that he did not receive requisite notice of this proceeding as incredible and not even warranting a hearing on the issue given the paltry proof before the court. Therefore, White has failed to demonstrate a reasonable excuse under CPLR § 5015(a)(1).

Assuming *arguendo* that White had demonstrated a reasonable excuse for failing to move to intervene or otherwise oppose the petition, White does not have a meritorious opposition to the relief obtained by petitioner. As the court has already stated, White's jurisdictional argument lacks merit, since White is a non-party to this proceeding. Rather, petitioner need only serve the petition and notice of petition on White in conformance with CPLR § 5225[b] in order to obtain relief thereunder. It is undisputed that petitioner complied with CPLR § 5225[b]. Similarly, White's public policy-based merits argument also fails.

White does not dispute the judgment nor that it remains unsatisfied. Rather, he argues that "the funds sought to be turned over by Petitioner are comprised of both subject and exempt income property. As such, Petitioner has no legal authority to restrain all funds, as it is income derived from royalties and must still be accepted as "income" and only subject to proportionate statutory turn-over and restraint percentages under CPLR §§5205(d)(2) and 5231(b)."

CPLR § 5205[d][2] provides as follows:

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

...

2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment;

Working in conjunction with the provision above, CPLR § 5231 provides in relevant part as follows:

[b] Where a judgment debtor is receiving or will receive money from any source, an income execution for installments therefrom of not more than ten percent thereof may be issued and delivered to the sheriff of the county in which the judgment debtor resides or, where the judgment debtor is a non-resident, the county in which he is employed. provided, however, that (i) no amount shall be withheld from the judgment debtor's earnings pursuant to an income execution for any week unless the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable; (ii) the amount withheld from the judgment debtor's earnings pursuant to an income execution for any week shall not exceed twenty-five percent of the disposable earnings of the judgment debtor for that week, or, the amount by which the disposable earnings of the judgment debtor for that week exceed the greater of thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938 or thirty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable, whichever is less; ...

(c) Definition of earnings and disposable earnings. (i) As used herein earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

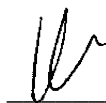
"Limitations on garnishment of wages do not immunize other assets" from other money judgment enforcement mechanisms (*Midlantic Nat. Bank/North v. Reif*, 732 FSupp 354 [US Dist Ct, E Dist NY 1990]). White bears the burden of proving that the funds at issue are exempt as earnings for personal services under CPLR § 5205[d][2] (*Swig v Properties Asset Mgt. Servs., LLC*, 85 AD3d 427 [1st Dept 2011]). White claims in conclusory fashion that "[a]ny future distribution income I might receive from [respondent] is compensation for my personal services as a self-employed entertainer." However, as petitioner's counsel again correctly points out: "White fails to set forth any details as to how royalties are earned or how they may arise out of "personal services" he performs". This simple turnover proceeding was commenced a year ago, and White has had ample time to marshal his proof and show that the funds which respondent is required to turnover are exempt. He has not and thus, has failed to demonstrate a meritorious opposition to the petition itself.

Accordingly, it is hereby **ORDERED** that the motion is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/5/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.