

Fisher v Hauman

2022 NY Slip Op 31467(U)

April 29, 2022

Supreme Court, New York County

Docket Number: Index No. 654717/2021

Judge: Laurence Love

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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. LAURENCE LOVE PART 63M

Justice

-----X

MIASHA FISHER,

Plaintiff,

- v -

CONSTANCE HAUMAN, CHANNEL CREATIONS LLC DBA
ISOTOPIA RECORDS.

Defendants.

-----X

INDEX NO. 654717/2021

MOTION DATE 01/21/2022,
04/20/2022,
04/20/2022

MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 168, 169

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 163, 164, 165, 166, 167

were read on this motion to/for CONTEMPT.

Upon the foregoing documents, it is

The following read on I) Defendants’ Order to Show Cause, motion sequence number 004, per CPLR 2304, CPLR 3103, CPLR 3120, to quash the *subpoena duces tecum* served upon Citibank, N.A., and issuing a protective order barring the production of documents and records sought thereby;

II) Defendants’ Order to Show Cause, motion sequence number 005, per CPLR 6301, to “direct[] plaintiff’s counsel to vacate a restraint which they caused to be placed by Citibank, N.A. on defendants’ accounts;” and

III) Plaintiff's Order to Show Cause (see NYSCEF Doc. No. 153), per CPLR 5251, and Judiciary Law 753(A)(3), to hold Defendants – Constance Haumann, and Isotopia Records, in contempt of court for a violation of, and for failing to comply with the Temporary Restraining Order (see NYSCEF Doc. No. 36), and to Compel Defendants to produce i) all records of the Citibank account from the date in September 2020, and ii) all documents concerning Defendants' use, marketing and promotion of the names, the "Blue Wolf Experience" and "Miss Velvet & The Blue Wolf" since the date the Temporary Restraining Order was entered.

An Order to Show Cause, motion sequence number 001, sought a Temporary Restraining Order and a Preliminary Injunction. A Virtual Microsoft Teams Appearance was held on November 24, 2021 where both sides were present.

This Court's Decision and Order, dated November 24, 2021 (see NYSCEF Doc. No. 109), restrained defendants 1) from dissipating, using, expending, consuming, transferring, or conveying all assets, including monies, held in defendants' possession or custody, belonging to plaintiff or to her band, "Miss Velvet & The Blue Wolf", and in particular, the bank account held by defendants at Citibank, N.A. in the name of Channel Creations LLC, account number 4115, containing moneys received from plaintiff or from activities of the band; and 2) from continuing to advertise, promote, market, or benefit from or otherwise use in interstate or intrastate commerce the trade name "Miss Velvet & The Blue Wolf," or the "Blue Wolf Experience" or any other name confusingly similar to "Miss Velvet & The Blue Wolf;" and 3) from taking any steps to prosecute defendant Hauman's pending application filed with the United States Patent and Trademark Office to register a trademark in the name "Miss Velvet and The Blue Wolf," Serial No. 90863383.

An appeal was made to the Supreme Court of the State of New York Appellate Division, First Judicial Department where

“Order, Supreme Court, New York County (Laurence Love, J.), entered on or about November 16, 2021, which denied defendants’ motion to disqualify plaintiff’s counsel, unanimously affirmed, without costs. Orders, same court and Justice, entered November 8, 2021 and November 29, 2021, which continued a temporary restraining order (TRO) that had previously been entered by the court, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about November 16, 2021, where the court declined to sign an order to show cause seeking an undertaking with respect to the TRO, unanimously dismissed, without costs, as taken from a nonappealable order. ‘The court did not improvidently exercise its discretion in granting and extending the TRO here, where defendants were utilizing and filed a trademark application for the band’s name, and where defendants refused to return the band’s money that plaintiff had entrusted to them’ (see NYSCEF Doc. No 170).”

TO SQUASH SUBPOENA DUCES TECUM

A Virtual Microsoft Teams Appearance, to quash the *subpoena duces tecum*, motion sequence number 004, was held on January 21, 2022 at 12:30 pm, where both sides appeared.

This Court made an Interim Order, dated January 21, 2022, where it was “ORDERED that the Temporary Restraining Order (“TRO”) is to remain in effect until further Orders by this Court, and Defendants are restrained from doing any of the acts set forth in (1), (2), and (3), above. This Court will submit a decision a[nd] final decision as to defendants’ application to quash the *subpoena duces tecum* upon Citibank, N.A.” (see NYSCEF Doc. No. 126).

The affidavit of Peter Occolowitz, accountant for plaintiff Miasha Fisher affirms,

“I am charged with tracking Fisher’s bank accounts in connection with her music career, and when funds get wired into or out of Fisher’s account I administer those payments. There is a Chase bank account held in the name MAF Music LLC, which is Fisher’s entity that is used, among other things, to manage the funds and expenses relating to Fisher’s music career. I have been asked by Fisher many times to wire funds from the MAF Music LLC Chase bank account

to a Citibank account held by Channel Creations LLC in order to fund Band expenses. The routing number for the Citibank Account held by Channel Creations ends with 0089. The account number for the Citibank Account ends with 4115. I was the person who gave the wire transfer orders to fulfill Ms. Fisher's requests. As the exhibits show, from 2015 to 2021 MAF Music, LLC wired \$7,513,619.77 to the Citibank Account held by Channel Creations LLC" (see NYSCEF Doc. No. 155 Pars. 2 – 4).

Plaintiff submits Chase Account Statements from 2015 to 2021 (see NYSCEF Doc. Nos. 156 – 162).

The *subpoena duces tecum* seeks "complete and accurate copy ... account statements for and cancelled checks drawn on Citibank account number 39474115, believed to be held in the name or names of Constance Hauman or Channel Creations LLC or Isotopia Records, for the period from January 1, 2017 to present" (see NYSCEF 115).

"On December 6, 2021, Counsel for Plaintiff served Plaintiff's Subpoena Duces Tecum upon Citibank, N.A. Defendants' counsel was emailed a copy of it the same day" (see NYSCEF Doc. No. 119).

Plaintiff's Memorandum of Law states, "[p]laintiff is entitled to take discovery into what happened to Plaintiff's money that she sent to the Citibank account. Defendants themselves challenged Plaintiff to do so. Defendants certainly have supplied no information about the account despite pre – litigation requests and a document request here, simply denying that they have any money from Plaintiff – in the face of an email dated September 17, 2020, admitting possession of \$467,398 of money from Plaintiff" (see NYSCEF Doc. No. 124).

The standard for a motion to quash a subpoena duces tecum is whether the requested information is utterly irrelevant to any proper inquiry (CPLR 2304, *Matter of Application of Home Box Off., Inc.*, 64 Misc. 3d 566, 568 (Sup. Ct. N.Y. Co. 2019). A motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to

any proper inquiry” (see *New Hampshire Ins. Co. v. Varda, Inc.*, 261 A.D.2d 135 [1st Dept. 1999]).

As an affidavit attests to placing more than seven – million dollars in a bank account and an email showing more than four – hundred thousand dollars still remain in said account there remains large sums of money at issue. Further inquiry is warranted to determine how the money was spent and moved through the various transfers and payments and hence the *subpoena duces tecum* is not “utterly irrelevant.” It is clear that the Citibank account information is relevant to this matter.

Another Order to Show Cause, motion sequence number 005, sought “an order ... pursuant to CPLR 6301 ... directing plaintiff’s counsel to vacate a restraint which they caused to be placed by Citibank, N.A. on defendants’ accounts” (see NYSCEF Doc. No. 152).

Plaintiff’s Memorandum of Law states, “the Appellate Division upheld this Court’s Orders extending the TRO pending determination of Plaintiff’s pending motion for a preliminary injunction. It is now law of the case that the TRO may properly remain in effect pending determination of that motion” (see NYSCEF Doc. No. 154).

The issue of whether a restraint has been correctly placed on the Citibank account has been addressed in the prior Order to Show Cause, motion sequence number 004.

CONTEMPT

To prevail on a motion to hold a party in civil contempt, the movant must prove, “(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct” (see *Cassarino v. Cassarino*, 149 A.D.3d 689, 690 [2d Dep’t 2017]).

POSSIBLE CONTEMPT FOR VIOLATION OF CITIBANK RESTRAINT

Plaintiff's Memorandum of Law in Support states, "[t]he evidence submitted by Plaintiff shows that as of September 2020, Defendants acknowledged holding \$467,398 of Plaintiff's money. NYSCEF No. 15. Defendants have neither accounted for that money, which they conceded holding, nor produced records relating to the Account showing what happened to Plaintiff's money. They have likewise not accounted for the \$947,095 wired to the Account since then" (see NYSCEF Doc. No. 151 P. 9).

POSSIBLE CONTEMPT FOR VIOLATION OF TRADEMARK RESTRAINT

The affidavit of Plaintiff – Miasha Fisher affirms, "at some point between October 2021 and November 2021, Hauman began playing music with members of my Band, but now they began referring to themselves as the 'Blu Eye Extinction.' Despite this supposed rebranding, I have recently learned that the band members and Haumann have continued to, at times, refer to this new band as 'The Blue Wolf Experience' or 'Miss Velvet & The Blue Wolf.' Indeed, based on a review of various online and social media platforms, it is clear to me that Defendants continue to use these 'Blue Wolf' words" (see NYSCEF Doc. No. 151 P. 10).

Plaintiff submits what looks like Instagram photos with the term "@thebluewolfexperience (see NYSCEF Doc. No. 135), post for "Blu Eye Extinction" (see NYSCEF Doc. No. 137), a happy birthday Instagram with the term "Blue Wolf Instinction (aka @blueeyextinction) (see NYSCEF Doc. No. 138), an advertisement for "George Clinton & Parliament Funkadelic with special guest Blu Eye Extinction" (see NYSCEF Doc. No. 139), an Instagram message from "henryott" stating "Blue Wolf/Blu Eye family" (see NYSCEF Doc. No. 140), a Spotify page that states "Miss Velvet and the Blue Wolf" with a message stating "On tour May 22 George Clinton with Craig Charles and Miss Velvet and the Blue Wolf, Rock City

Nottingham” (see NYSCEF Doc. No. 141), an advertisement on songkick.com stating “Sun 22 May 2022 George Clinton with Craig Charles, Miss Velvet and the Blue Wolf, Nottingham UK Rock City” (see NYSCEF Doc. No. 142), a facebook post from “Miss Velvet and The Blue Wolf” (see NYSCEF Doc. No. 143) stating

“It’s important to let our fans know that the band broke up in June 2021 when Miss Velvet abruptly quit and decided to sue her music director who not only has the trademark to the band name, created the band, but most important, produced the BAD GET SOME (the debut album) by having the intuition to take Miss Velvet and The Blue Wolf band to Detroit to United Sound Studio, home to Parliament Funkadelic. [...]. Miss Velvet quit the band and moved from NYC for personal life reasons, but rather than own up to those choices decided to sue everyone because the band played on June 27th for the opening of Central Park’s Summerstage as a 15 mins instrumental opener to their friend and mentor George Clinton. The band had been engaged to do a full set for the opening of Summerstage, however Miss Velvet decided to take an unannounced hiatus starting in May 2021 until 2023 which resulted in the canceling of the 3rd album’s release which was not only ‘in the can’ but was tee’d up on radio stations thru out the country. Upon threat of being sue’d Isotopia Records pulled the 3rd album but Miss Velvet decided to sue the label her music director and her band and songwriters anyway the reasoning being that they dared to play a 15 mins instrumental jam as an opener for George Clinton and Parliament Funkadelic and they played for free on June 27th 2021 after 18 mos of Covid lockdown but of not seeing, playing or engaging w/their supposed front woman.”

Plaintiff’s Memorandum of Law states, “[d]espite the rebranding, Hauman continued to refer to the new band as the ‘Blue Wolf Experience’ or ‘Miss Velvet & The Blue Wolf’ when promoting, advertising or utilizing the band. There are various examples of band members referring to the new band as having performed using the ‘Blue Wolf’ name. Further, Hauman has recently booked the new band under the name ‘Miss Velvet & The Blue Wolf’ to perform with George Clinton in Nottingham, United Kingdom, and used Spotify and other media in the

United States to promote and advertise the upcoming performance” (see NYSCEF Doc. No. 151 P. 10).

Defendant’s Memorandum of Law in Opposition states, “[p]laintiff further objects to the defendants’ use of the name ‘Blu Eye Extinction.’ The implication is thus that ‘Blu Eye Extinction’ is ‘confusingly similar’ to ‘Miss Velvet and the Blue Wolf’ or ‘The Blue Wolf Experience.’ It is not, and the issue cannot be determined here. First, ‘Blu’ is not ‘Blue’ and the words ‘Miss Velvet and/or Experience’ do not appear” (see NYSCEF Doc. No. 163).

The affidavit from named defendant – Constance Haumann affirms, “neither I nor anyone under my control, nor any of my or Isotopia’s ‘officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them’ are using the trade name ‘Miss Velvet & The Blue Wolf,’ or the “Blue Wolf Experience’ or any other name confusingly similar to ‘Miss Velvet & The Blue Wolf.’ The phrase ‘Blu Eye Extinction,’ which we have used. Although I told all of the band members that they could not post publicly about Miss Velvet and the Blue Wolf, they were not my employees, agents, or otherwise under my direction or control. They are not named in the TRO, and I cannot control what they say or do. Nor can I control what any fan or critic who wonders what is happening may say about this situation in social media” (see NYSCEF Doc. No. 164 Par. 7, 14).

Constance Haumann’s affidavit continues, “in May 2020, Miss Velvet and the Blue Wolf was engaged to do ten shows in the United Kingdom with George Clinton and Parliament Funkadelic. These concerts were canceled because of the COVID pandemic but were rescheduled for May 2022. [T]he company Songkick has an algorithmic relationship with Spotify, and Spotify automatically picked up the rescheduled concert date, which the UK venue had not corrected by removing the name Miss Velvet and The Blue Wolf. When I caught it

myself on Feb 23, 2022, I wrote our former booker Nick Szatmari asking him to look into how to take this down” (see NYSCEF Doc. No. 164 Par. 24, 25). Defendant exhibits said message (see NYSCEF Doc. No. 166).

Defendant has submitted an affidavit attesting to the good faith efforts to comply with this Court’s Order. The court recognizes that the process to dismantle or unwind a music band name and activities and the logistics to organize and move a musical band, organize airplay, collaborate with various artists is very involved and time consuming. The reality of the impact of COVID plus how much of the activities occur via online activities and involve people and entities outside the control of named defendant cannot be ignored. Based on the above the activity sighted does not rise to the level of contempt at this time. However, this is an ongoing matter and Defendant must remain vigilant in following the Orders of this Court.

After oral argument and submission of documents and papers it is now,

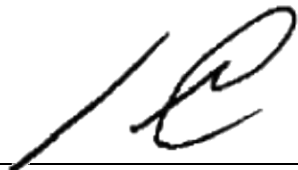
ORDERED that I) Defendants’ Order to Show Cause, motion sequence number 004, per CPLR 2304, CPLR 3103, CPLR 3120, to quash the *subpoena duces tecum* served upon Citibank, N.A., and issuing a protective order barring the production of documents and records sought thereby is DENIED; and it is further

ORDERED that II) Defendants’ Order to Show Cause, motion sequence number 005, per CPLR 6301, to “direct[] plaintiff’s counsel to vacate a restraint which they caused to be placed by Citibank, N.A. on defendants’ accounts” is DENIED; and it is further

ORDERED that III) Plaintiff’s Order to Show Cause, motion sequence number 006, per CPLR 5251, and Judiciary Law 753(A)(3), to hold Defendants – Constance Haumann, and Isotopia Records, in contempt of court for a violation of, and for failing to comply with the Temporary Restraining Order (see NYSCEF Doc. No. 36), and to Compel Defendants to produce

i) all records of the Citibank account from the date in September 2020, and ii) all documents concerning Defendants’ use, marketing and promotion of the names, the “Blue Wolf Experience” and “Miss Velvet & The Blue Wolf” since the date the Temporary Restraining Order was entered is DENIED.

4/29/2022
DATE


LAURENCE LOVE, 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