

Beslow v Winford

2022 NY Slip Op 31721(U)

May 26, 2022

Supreme Court, New York County

Docket Number: Index No. 653202/2021

Judge: Debra James

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

WILLIAM BESLOW,

Plaintiff,

- v -

LACEY WINFORD,

Defendant.

-----X

INDEX NO. 653202/2021MOTION DATE 05/26/2022MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 37, 38, 41, 42, 43

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

ORDER

Upon the foregoing documents, it is

ORDERED that the plaintiff's motion for an order of attachment is denied, and the temporary restraining order dated April 6, 2022 is hereby vacated; and it is further

ORDERED that the defendant's cross motion to recover from plaintiff legal fees incurred as a result of the temporary restraining order issued by this court (motion sequence number 001) is granted; and it is further

ORDERED that the issue of the amount of legal fees incurred to be assessed against plaintiff William Beslow is hereby severed, and referred for determination pursuant to CPLR § 3215

(b) to a Special Referee and that within sixty (60) days from the date of this Order the defendant shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317 (b); and it is further

ORDERED and ADJUDGED that pursuant to CPLR § 3215 (b) the Clerk is directed to enter judgment in favor of defendant and against plaintiff, in accordance with the report of the aforementioned Special Referee without any further application; and it is further

ORDERED that the defendant's motion for a protective order in order to prevent unreasonable annoyance, disadvantage, or prejudice to any non-party and/or to defendant, and to quash the Subpoenas Ad Testificandum and Notices of Depositions dated March 22, 2022, issued by plaintiff upon non-parties Elyssa Greenblatt, Esq. and Deborah Malkoff-Cohen is granted, and neither of such non-parties are compelled to appear for an examination before trial; and it is further

ORDERED that counsel shall transmit to SFC-Part59@nycourts.gov and to SFC-Part59-Clerk@nycourts.gov and post on NYSCEF a proposed status conference order or competing proposed status conference order(s), each of which must state that the

deposition of plaintiff has been commenced and completed, at least two days before July 12, 2022, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

Plaintiff seeks an order of attachment with respect to an escrow account comprised of equitable distribution funds deposited for defendant's benefit in connection with a divorce proceeding. He seeks an attachment pursuant to CPLR 6201(3), which states:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

3. 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."

Further,

"Subparagraph (3) of CPLR 6201 helps the plaintiff secure defendant's property before defendant has secreted it, dissipated it or withdrawn it from the state of New York with the intent of thwarting plaintiff's collection efforts. The defendant who has begun manipulating his New York property in such ways is an obvious security risk. The requirements of this provision are twofold. Plaintiff must show: (1) that the defendant has hidden or transferred his assets in one of the ways described in the statute or is about to do so, and (2) that defendant's intent in so acting is to defraud his creditors or frustrate the enforcement of a judgment in plaintiff's favor. The necessary showing must be made with factual details in the plaintiff's moving affidavits. Eaton Factors Co. v. Double Eagle

Corp., 1962, 17 A.D.2d 135, 136, 232 N.Y.S.2d 901, 903 (1st Dep't).

The most difficult part of plaintiff's burden is showing the defendant's state of mind. Courts have made it clear that a mere "suspicion" of the intent to defraud is not enough; there must be a showing that the intent "really existed in the mind of the defendant," and is not merely a matter of speculation. Eaton Factors Co. v. Double Eagle Corp., supra, 17 A.D.2d at 136, 232 N.Y.S.2d at 903. It would be the rare case in which proof of the necessary intent could be proven with direct evidence. In most cases, plaintiff must rely on circumstantial evidence. Arzu v. Arzu, 1993, 190 A.D.2d 87, 92, 597 N.Y.S.2d 322, 325 (1st Dep't). But circumstantial evidence sufficient to raise the necessary inferences may be hard to come by. The defendant's liquidation or transfer of assets, standing alone, is not enough to raise an inference of fraud. Computer Strategies, Inc. v. Commodore Business Machines, Inc., 1984, 105 A.D.2d 167, 173, 483 N.Y.S.2d 716, 721 (2d Dep't). Potential additional factors include the timing of transfers in proximity to litigation threats made known to the defendant, the extent of such transfers and defendant's financial status thereafter, the relationship between the defendant and transferees, misrepresentations and misleading statements made by the defendant about his assets and intentions, and other furtive conduct, such as refusing to respond to phone or mail inquiries."

CPLR § 6201, C601:3, McKinney's Practice Commentaries by Vincent Alexander.

Plaintiff wholly fails to meet his burden and merely references defendant's intent to transfer the escrow funds to her parents, which intent he refers from defendant's silence in the face of his question about her intentions for such funds at a deposition. In his affidavit, plaintiff has not established defendant's financial status after such transfer or any

misleading statements about her assets and intentions made by defendant.

Nor has plaintiff met his burden of establishing a likelihood or probability of success on the merits of his action for legal fees. In his Reply to defendant's counterclaims, plaintiff admits that at least in once instance, he failed to rendered an invoice to defendant at least once every sixty days in compliance with 22 NYCRR § 1400.3. This court will not consider his statement that the time charges in such invoice represents a minimal portion of the overall fees, which assertion he makes for the first time in his reply in further support of his motion for an attachment. As any failure to substantially comply with 22 NYCRR § 1400.3 will preclude plaintiff from recovery of unpaid legal fees (Julien v Machson, 245 AD2d 122 [1st Dept 1997]), he has failed to establish a probability of success on the merits. See Zenith Bathing Pavilion, Inc. v Fair Oaks S.S. Corp., 204 NY 307 (1925).

Upon further deliberation following oral argument herein, the court vacates its verbal ruling denying defendant an award of attorneys, and determines that as interpreted by decisional law, CPLR 6313 provides that defendant is entitled to attorneys' fees that she incurred in obtaining the vacatur of the temporary restraining order issued on April 6, 2022. See Shu You Louie v

David & Chiu Place Restaurant, Inc., 261 AD2d 150, 151-152 (1st Dept 1999).

With respect to the subpoenas that plaintiff served on the non-parties, he has not satisfied the threshold requirement that the testimony of the nutritionist or the guardian is "material and necessary" to his prosecution of his action to recovery unpaid legal fees. Plaintiff has failed to demonstrate that either non-party has any "material and necessary" knowledge with respect to his hourly time charges, the services for which he billed defendant, or the amount of time he spent rendering such services. Therefore, each such subpoena must be quashed and a protective order issued. See Humphry v Kulbaski, 78 AD3d 786, 787-788 (1st Dept 2010).


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<u>5/26/2022</u> DATE					<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input checked="" type="checkbox"/>	REFERENCE