

Eagle Eye Collection Corp. v Odery
2022 NY Slip Op 32386(U)
July 19, 2022
Supreme Court, New York County
Docket Number: Index No. 656417/2016
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 656417/2016

EAGLE EYE COLLECTION CORP.,

Plaintiff,

MOTION SEQ. NO. 003

- v -

SUSAN ODERY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

Plaintiff Eagle Eye Collection Corp. moves for an order of contempt against nonparty Laurie E. Palma, who allegedly violated a restraining notice by making payments she characterizes as gifts to the judgment debtor-defendant Susan Odery. Additionally, plaintiff moves to extend, for an additional five years, an expired post-judgment restraining notice it served on Palma, *nunc pro tunc* to the date the restraining notice expired. Palma cross-moves for an order quashing or striking post-judgment discovery demands served on her by plaintiff, as well as for sanctions. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

On September 11, 2017, this Court entered a judgment, on default, in favor of plaintiff and against Odery in the amount of \$92,103.49 which, with interest, now totals approximately \$135,000. (DiResta Aff., ¶9, docket nos. 16, 26). Odery was a 50-50 partner in a small real estate business with Timothy DiResta. (Compl., ¶3, docket no. 1). Odery and DiResta co-guaranteed a loan for \$75,000 for furniture, fixtures and equipment for the business. (Id., ¶4). At

some point Mr. DiResta decided to end the partnership and Odery assumed the loan obligation and agreed to indemnify him. (Id., ¶5). When Odery could not meet her obligations she defaulted, the lender pursued DiResta, who paid the monies owed, and DiResta then made a claim against Odery for indemnification. (Id. ¶¶6-10). DiResta assigned his claim to the plaintiff, and then undertook to represent the plaintiff himself. (Id., ¶12).

In September 2020 DiResta served a restraining notice on Palma, who is Odery's sister. (DiResta Aff., exhibit 1, docket no. 19). Their mother, Norma Friedman had died, Palma was the executrix of Friedman's estate, and DiResta wished to prevent Palma from making payments to Odery using funds from the estate. (Palma Aff., ¶¶2-3, docket no. 37). However, it appears that DiResta did not realize that Friedman had cut her daughter Odery out of her estate. Prior to the events at issue here, Friedman and her husband loaned Odery \$180,000, which loan was never repaid. (Palma Aff., ¶5). As a result, Friedman's will provided that Palma was to receive a \$180,000 bequest (Id., ¶7), and left the balance of her residuary estate to her grandchildren, directly or in trust depending on age, thus bypassing her two daughters. (See Will, exhibit A to Palma Aff., docket no. 38). Although Friedman may have done this to ensure that her assets went to grandchildren and not to any creditors of Odery, she was entitled to make this determination, and plaintiff does not challenge the terms of the will. Article NINETEENTH of the will provides that:

"Except as set forth in article THIRD hereinabove [dealing with personal property], I have intentionally made no provision for my daughter SUSAN ODERY, under the terms and provisions of this, my Will, since I provided for her during my lifetime. This provision in no way reflex [sic] on my love and affection for my said daughter."

(Id.)

Correspondence between Arthur Schupbach, Esq., attorney for Palma, and DiResta reflects that the latter was persuaded that the items of personal property to be distributed to Palma and Odery pursuant to Article THIRD of the will were of sentimental value only, and DiResta abandoned any claim to them. (Palma Aff., ¶8 and exhibits D-E, docket nos. 41-42).

However, DiResta subsequently discovered that Palma made two payments, in the amounts of \$5000 and \$500, to Odery in November 2020 and August 2021. Palma represented that these were gifts made from her own funds. These payments, made while the restraining notice, served in September 2020, was in effect, give rise to the instant motions.

DiResta claims that the two payments by Palma violated the restraining notice he served on her. Consistent with CPLR 5222, the notice states:

“A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest....A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest.”

Here, it is evident that DiResta’s principal objective was to stop DePalma from making distributions to Odery from their mother’s estate. Indeed, DiResta specifically typed into the Blumberg form specific references to Friedman’s estate.

Palma’s argues that, because she made a gift to her sister from her own funds, she never held any property in which her sister had an interest as judgment debtor, at least until the gift was made to her sister, and it does not appear that DiResta ever served a restraining notice on Odery herself, or on the banks in which she might have deposited the gift. Palma also asserts that, since the monies were gifts, she was not an obligor to her sister. Palma further maintains that, at the time of the first and larger gift, there had been no distributions from her mother’s estate, so the

money must have been from personal funds. (Palma Aff., ¶9, docket no. 37). The estate's principal asset was a co-op apartment, which was sold in February 2021. (Id.). DiResta was ostensibly counting on this sale to satisfy his judgment. However, since Friedman cut Odery out of her will, Palma, as executrix of the estate, could not have come into possession of monies payable to Odery by bequest.

DiResta argues that the two gifts were intended to circumvent the judgment, and violate the restraining order in a fashion punishable by contempt. Although this argument may technically be meritorious, it would be far more persuasive if the gifts totaled a much more substantial amount, such as the amount of the judgment. However, they do not. The \$5500 gift barely covers a half year's interest on the judgment and, thus, DiResta's circumvention argument is rather weak. Additionally, DiResta offers no evidence of Palma's intent.

It is apparent that there are issues of fact precluding this Court from granting DiResta's motion. The denial of his motion is without prejudice to his right to renew it following additional discovery should he wish to pursue it in light of the amounts involved.

As the Court of Appeals has instructed, while willfulness or intent directly to disregard a court order may not be relevant to a civil contempt motion, what is required is the following. First, there must be a clear and unequivocal court order. Second, it must be clear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have known about the order. Fourth, there must be prejudice (*See El-Dehdan v. El-Dehdan*, 26 NY3d 19 [2015], citing *Matter of McCormick v. Axelrod*, 59 NY2d 574 [2014]).

DiResta may be able to demonstrate prejudice relating to the \$5500 gift, but he fails the other tests, at least on the evidence currently before this Court. The restraining notice did not clearly and unequivocally apply to what is alleged to have been a personal gift. Additionally, as

noted above, DiResta did not serve a restraining notice on Odery herself. Had he done so, he might have captured the gifts once they were made. For the same reasons, this Court is unable to conclude on the facts herein that there is clear and reasonable certainty that the restraining notice was in fact disobeyed. Further, although Palma knew about the restraining notice, it may not have been clear to her that the notice prohibited her from making the transfer assuming the transfer was in fact intended as a gift.

Given the limited facts before it, as well as the fact that there has been only limited document discovery, this Court cannot make a finding of contempt. There are sharply divergent views of what the facts reflect. DiResta claims that the two transfers for \$5500 in total were an attempt to avoid his judgment and were made in violation of the restraining notice. Palma asserts they were personal gifts made from personal funds over which Odery had no control until the gifts were made.

The parties have cited no cases, and this Court's research has revealed none, in which a contempt motion was granted due to an alleged violation of a restraining notice where the movant asserted that there were small (in relation to the size of the judgment), discrete, isolated transfers intended as gifts made to the judgment debtor. Indeed, most gift cases involve the opposite fact pattern, in which the judgment debtor is attempting to give away assets in a manner tantamount to a fraudulent conveyance.

The principal case relied on by DiResta is Justice Bransten's decision in *Briarpatch Ltd. LP v. Briarpatch Film Corp.*, 2013 Slip Op. 31263 (Sup. Ct. NY County 2013), which is easily distinguishable from the captioned action. *Briarpatch* involved a large number of transfers, large and small, which totaled a much larger portion of the judgment at issue. The sheer number and total size of the transfers easily permitted Justice Bransten to infer an intent to evade the

judgment and the restraining notice. In contrast, it is harder to conclude on the facts presented to this Court that the transfers were not intended as gifts.

Also distinguishable is *Ray v. Jama Productions, Inc.*, 74 AD2d 845 (2d Dep't 1980), *appeal denied*, 49 NY2d 709 (1980). In that case, the parties agreed on a contract price and, to evade a restraining notice served on the debtor, not a third party, the parties directed that the contract payment be made to a third party.¹

Without clearer factual support and legal authority to support DiResta's position, this Court is constrained to deny DiResta's motion seeking to hold Palma in contempt. In so holding, this Court notes that, although not every contempt motion requires an evidentiary hearing, this action may be a candidate for such a hearing if and when additional evidence exists regarding the transfers (*see Faina P. v. Alexander S.*, 2022 NY Misc LEXIS 1598, 2022 NY Slip Op 22128, 167 NYS2d 348 [Sup Ct Kings County 2022]), *see also Iacovacci v. Brevet Holdings*, 2021 N.Y. Misc LEXIS 3986, 2021 Slip Op 50657, 148 NYS3d 671 (Sup Ct NY County 2021) (civil contempt requires clear and convincing evidence). Thus, the motion is denied with leave to renew upon the completion of discovery.

Plaintiff also seeks leave to extend DiResta's original restraining notice, *nunc pro tunc*, for an additional five years, from September 15, 2021 through September 15, 2026. Restraining notices under CPLR 5222(b) ordinarily have a duration of one year, and under CPLR 5222 (c), "Leave of court is required to serve more than one restraining notice upon the same person with

¹ DiResta also cites *United States v. Coluccio*, 51 F3d 337 (2d Cir 1995), a criminal forfeiture case which is inapplicable. There the court faced a claim by the mother of a convict who posted a bond for her son for him to be able to contest the forfeiture and she sought the bond collateral back. The Second Circuit granted her standing to do so. The asset for which the government sought forfeiture was an airplane presumably used to traffic the drugs that the son was convicted of transporting. The amount of the bond that needed to be posted to challenge the forfeiture was only \$2500 by federal statute. There was no restraining order at issue in the case. Rather, the statute at issue was the Fair Debt Collection Practices Act.

respect to the same judgment or order." This Court grants DiResta's motion for leave to serve a new restraining notice for his still unsatisfied judgment to the extent that he may serve an additional restraining notice with a duration of one year. This Court denies DiResta's request to make the restraining notice effective *nunc pro tunc* to the date the initial restraining notice expired since a party may be prejudiced if it made any transactions and/or transfers in reliance on the expiration of the initial restraining notice.

Palma has cross-moved for a protective order quashing or striking all of the discovery requests that DiResta has served upon her. Since this Court is denying DiResta's contempt motion without prejudice to his right to renew it on a more fully developed record after discovery, Palma's cross motion to quash is denied. Despite the denial of this branch of the cross motion, Palma may object to specific discovery items, rather than the general approach she has taken in her cross motion to quash. If the parties are unable to amicably resolve any issues regarding the scope of the demands, they may schedule a conference with this Court to address the same or make an appropriate motion.

Palma also cross-moves for sanctions against DiResta. Although some of DiResta's rhetoric has been unnecessarily harsh, there were in fact \$5500 of transfers made; a judgment that, with interest, totals over \$100,000 remains entirely unsatisfied; and there are issues of fact as to whether or not the transfers were in fact intended as personal gifts. Under these circumstances this Court declines to find that DiResta's motion was brought entirely in bad faith so as to warrant sanctions and this branch of the cross motion is denied.

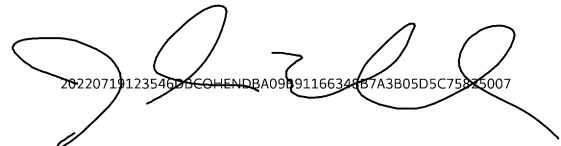
Accordingly, it is hereby:

ORDERED that the branch of the motion by plaintiff Eagle Eye Collection Corp. seeking to hold nonparty Laurie E. Palma in contempt is denied without prejudice to renew at the conclusion of discovery; and it is further

ORDERED that the branch of the motion by plaintiff Eagle Eye Collection Corp. seeking to extend the restraining order nonparty Timothy DiResta had against nonparty Laurie E. Palmer for an additional five years is granted only to the extent that DiResta may serve a new restraining order on Palmer with a duration of one year; and it is further

ORDERED that the branch of the cross motion by nonparty Laurie E. Palmer seeking to quash and/or strike the discovery demands served on her by DiResta is denied, and she is directed to respond to said demands, and such responses may include specific objections to any such demands; and it is further

ORDERED that the branch of the motion by nonparty Laurie E. Palmer seeking sanctions against DiResta is denied.



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DAVID B. COHEN, J.S.C.

7/19/2022

DATE

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