

Mahne v Cell Source, Inc.

2023 NY Slip Op 30844(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 650291/2019

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42

Justice

-----X

CHRISTOPHER MAHNE

Plaintiff,

- v -

CELL SOURCE, INC.,

Defendant.

-----X

INDEX NO. 650291/2019

MOTION DATE 3-1-23

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for WITHDRAW FUNDS.

I. BACKGROUND

In this action to recover on a promissory note, the court, by an order dated September 11, 2019, granted a motion by the plaintiff creditor for summary judgment in lieu of a complaint (CPLR 3213) and directed judgment to be entered against the defendant debtor in the principal sum of \$250,000.00. Judgment was entered on October 7, 2019. The defendant has since failed to fully satisfy the judgment.

The plaintiff served an information subpoena on the defendant on November 9, 2020. The defendant failed to comply. By an order dated February 4, 2021, this court granted a motion by the plaintiff pursuant to CPLR 5223 to compel compliance and denied a purported cross-motion by the defendant to vacate the underlying judgment as procedurally improper and without merit (MOT SEQ 003). In that order the defendant was cautioned of the consequences of any failure to comply with an information subpoena, including the issuance of a warrant.

The defendant hired new counsel and moved for a second time to vacate the judgment pursuant to CPLR 5015(a) or, in the alternative, to reargue and/or renew the prior motion and purported cross-motion pursuant CPLR 2221. By an order dated April 15, 2021, the court denied the motion, noting that, while the defendant produced a witness in response to the

information subpoena and prior order, it did so belatedly and, according to the plaintiff, that witness gave “implausible” testimony. In the meantime, on March 29, 2021, the plaintiff levied \$99,587.67 from the defendant’s TD Bank account. On July 22, 2021, the defendant posted an undertaking in the Clerk’s Office in the sum of \$168,092.67, the remaining portion of the unpaid judgment.

By an order dated September 28, 2021, the court denied a motion by the defendant to vacate a restraining notice served upon a TD Bank account, the denial being granted in part due to laches. The funds were levied in March 2021 and the motion challenging a signature on the restraining notice not made until September 2021, with no excuse for the delay provided.

In the meantime, by an order dated March 3, 2022, the Appellate Division, First Department, denied the defendant’s appeal from this court’s orders dated February 4, 2021, and April 15, 2021, which denied his two motions to vacate the judgment. In affirming, the Appellate Division held, in part, that “[d]efendant’s defense, which arises from the parties’ alleged transactions concerning collateral for plaintiff’s loan, neither alters defendant’s unconditional, unambiguous promise to pay plaintiff, as memorialized in the promissory note.” The Court of Appeals denied the defendant’s motion for leave to appeal in September 2022. Notwithstanding the various court orders, the defendant has continued to refuse to release the funds or otherwise satisfy the judgment.

On January 23, 2023, the plaintiff moved (1) pursuant to CPLR 2606 and 2607 for an order directing the New York City Department of Finance to release the undertaking funds deposited with the court to the plaintiff, (2) pursuant to 22 NYCRR1301.1 for an order imposing sanctions against the defendant for frivolous conduct, and (3) for entry of an updated judgment. In its opposition, the defendant concedes that the funds should be released to the plaintiff but opposes the motion to the extent of arguing, without support, that there is some unidentified collateral that it is entitled to as an “offset”. The defendant also argues that sanctions are not warranted since it merely failed to pay a judgment and interest was running and awarded.

The plaintiff’s motion is granted, the funds shall be released, sanctions are imposed against the defendant in the form of attorney’s fees incurred since June 2, 2022, and an amended judgment shall be entered.

II. RELEASE OF FUNDS

As noted, the defendant posted the undertaking on July 22, 2021. Pursuant to CPLR 5519(e), there was a stay in effect until five days after the plaintiff served the defendant with the Appellate Division order with Notice of Entry, which he did on June 2, 2022. The stay would continue until the defendant's motion for leave was determined by the Court of Appeals, but only if the defendant moved for leave to appeal to the Court of Appeals within five days of June 2, 2022. That was not shown. In any event, the defendant now correctly concedes that the funds must be released pursuant to CPLR 2606 and 2607. Its argument concerning some unidentified collateral is still unavailing. The promissory note does not include any reference to collateral but only, as noted by the Appellate Division, memorializes the defendant's unconditional, unambiguous promise to pay plaintiff.

III. SANCTIONS

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct ... In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against ... a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c). Contrary to the defendants' contention, the plaintiff is not limited to seeking sanctions only for having to make the current motion. Rather, the court may take into account conduct over the course of the litigation. See Board of Managers of Legacy Condominium v Core Management NY, LLC, 182 AD3d 420 (1st Dept. 2020); Couri v Seibert, 147 AD3d 692 (1st Dept. 2017). Applying these guidelines, the court finds that the defendant shall be required to pay the attorney's fees incurred by the plaintiff since June 2, 2022. The plaintiff may submit proof of any fees attorney's fees incurred in seeking to enforce the judgment from June 2, 2022, the date the plaintiff served the defendant with the Appellate Division order with Notice of Entry, through the present.

IV. AMENDED JUDGMENT

In light of the credit of \$99,587.67 applied to the outstanding judgment, and the additional fees and interest that have accrued, the plaintiff is now entitled to a judgment against the defendant in the sum of \$230,776.14. This includes \$74,779.43 in statutory interest from January 3, 2019, marshal's collection fees of \$4,979.38 and court costs and disbursement of \$605.00. The defendant makes no cogent argument in opposition to entry of amended judgment, but merely reasserts that the plaintiff must account for some unidentified collateral. The amount of the amended judgment would be reduced by the funds now being held by the New York City Department of Finance when the funds are released to the plaintiff.

V. CONCLUSION

Accordingly, upon the foregoing documents and after oral argument, it is

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 2607 to release an undertaking is granted, and it is further,


ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Room 2200, New York, New York 10007, is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance on October 11, 2022, upon the deposit with the court of funds by the defendant Cell Source, Inc. having an address at 57 West 57th Street, Suite 400, N.Y., N.Y. 10019 and any other forms required by the Department (<http://www.nyc.gov>), to turn over to said plaintiff, Christopher Mahne, having an address at 70 South Orange Ave., No. 205, Livingston, N.J. 07039, the funds deposited with that Department constituting the funds deposited with the court by said defendant as reflected in the Certificate, less any fee of the Department; and it is further,

ORDERED that the branch of the plaintiff's motion which seeks sanctions for frivolous conduct pursuant to 22 NYCRR 130-1.1(a) is granted to the extent that the defendant shall pay to the plaintiff any counsel fees incurred in enforcing the subject judgment from June 2, 2022, through the present, and the plaintiff shall, within 30 days of the date of this order, submit to the court supplemental papers to establish the amount of fees so incurred and notify the Part 42 Clerk of any such filing, and it is further

ORDERED that the branch of the plaintiff's motion which seeks entry of an updated judgment is granted, and the Clerk shall enter an amended judgment in favor of the plaintiff and against the defendant in the sum of \$230,776.14, with statutory interest from January 23, 2023, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/14/2023

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: