

**Martinez v Johnson**

2023 NY Slip Op 32994(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 518048/2017

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of August, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ANGELA MARTINEZ,

Index No.: 518048/2017

Plaintiff,

-against-

**DECISION AND ORDER**

ERVIN J. JOHNSON, JR.,

Defendant.

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The following e-filed papers considered herein:

NYSCEF Doc. Nos.

Order to Show Cause/Affirmation/Exhibits Annexed..... 75-97

Plaintiff Angela Martinez (“Plaintiff”) moves by order to show cause<sup>1</sup> for an order (a) issuing a temporary restraining order against Defendant Ervin J. Johnson, Jr. (“Defendant”) to prevent him from further concealing, transferring or disposing of his assets and property; (b) directing pre-judgment attachment against Defendant, his assets and any interests he maintains in limited liability companies; (c) ordering Defendant to set forth his assets; (d) amending the summons and complaint to add six more defendants: E & J Macon, LLC, 346 East, LLC, 401 Macon Johnson LLC, 401 Macon Street 11233 LLC, 2836 West 19 USA LLC and 2836 West Realty, LLC; and (d) for such other and further relief (Mot. Seq. No. 5). Since Defendant failed to oppose this motion, the Court will only consider whether Plaintiff has met her prima facie burden demonstrating entitlement to the relief sought.

<sup>1</sup> Pursuant to the signed order to show cause, Plaintiff was to serve a copy upon Defendant by overnight mail and personal service on or before September 2, 2021. Plaintiff submitted an affidavit of service reflecting that on September 2, 2021, service was effectuated upon a person of suitable age and discretion at Defendant’s dwelling. The affidavit also reflects that a copy was mailed to Defendant on that same date. In addition, Plaintiff submitted a screenshot with a tracking number for USPS reflecting that a package was delivered at Defendant’s address on August 28, 2021. Therefore, proper service is presumed (*see Machovec v Svoboda*, 120 AD3d 772, 773 [2d Dept 2014]).

In this negligence action commenced on or about September 19, 2017, Plaintiff alleges that on November 27, 2014, she sustained injuries when she tripped and fell at the Defendant's premises located at 346 East 9<sup>th</sup> Street in Brooklyn, New York (the "Premises"). Though the summons and complaint were not filed until 2017, Plaintiff produced a letter, dated February 2, 2016, sent by Plaintiff's prior counsel alerting Defendant that a claim was being asserted. Defendant did not have liability insurance for the Premises at the time of the accident.<sup>2</sup> Thus, Plaintiff asserts that Defendant will be personally liable for any judgment. As a result, Plaintiff argues that Defendant has engaged in certain conduct to conceal and dispose of his assets to avoid paying any judgment to Plaintiff, which necessitates an order of attachment. Moreover, Plaintiff seeks to amend the summons and complaint to add certain entities allegedly associated with Defendant. Though Plaintiff requests a temporary restraining order in her order to show cause and in her attorney's affirmation, there is no argument or legal analysis in the papers as to such relief.<sup>3</sup> Thus, the Court will only address the portions of the motion seeking an order of attachment and leave to file an amended summons and complaint.

To prevail on a motion for an order of attachment, the plaintiff must demonstrate, either by affidavit or other written evidence, that (1) there is a cause of action; (2) it is probable that plaintiff will succeed on the merits; (3) one or more grounds for attachment in CPLR 6201 exists; and (4) the amount demanded from defendant exceeds all counterclaims known to plaintiff (CPLR 6212 [a]). Pursuant to CPLR 6201 (3), an order of attachment may be granted when, "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" (CPLR 6201 [3]). Thus, the burden rests with plaintiff to establish that (a) defendant has concealed or will conceal his assets in a manner set forth in CPLR 6201 (3) and (b) in doing so, defendant intended to defraud creditors or frustrate the enforcement of a judgment (*Societe Generale Alsacienne De Banque, Zurich v Flemington Dev. Corp.*, 118 AD2d 769, 772 [2d Dept 1986]). A mere suspicion of an intent to defraud is insufficient (*id.* at 773), as is the mere transfer of property (*Corsi v Vroman*, 37 AD3d

<sup>2</sup> NY St Cts Elec Filing [NYSCEF] Doc No. 77.

<sup>3</sup> Courts have either denied motions or not addressed portions of motions where no argument or legal authority is provided for the relief requested (*see Sinsheimer v Park & 66th Corp.*, 212 AD3d 446, 447 [1st Dept 2023]; *Gargiso v 9519 Third Ave. Rest. Corp.*, 43 Misc 3d 1205[A] [Sup Ct, Kings County 2014]; *Mountz v Glob. Vision Prod., Inc.*, 3 Misc 3d 171, 176 [Sup Ct, New York County 2003]).

397, 397 [2d Dept 2007] [internal citations omitted]). Ultimately, the decision to grant a motion for an order of attachment is within the court's discretion (*Maitrejean v Levon Properties Corp.*, 45 AD2d 1020, 1021 [2d Dept 1974]).

Plaintiff avers that through her summons and complaint<sup>4</sup> and affidavit of merit, she has established a cause of action and probable chance of success on the merits. In her affidavit, Plaintiff merely claims that she sustained injuries at the Premises due to Defendant's negligence. Her attorney's affirmation includes unsubstantiated claims that Defendant created the condition – portions of the Premises allegedly left in disrepair by Defendant. It is unclear from the papers submitted how Plaintiff's accident occurred or how Defendant's negligence caused her injuries. Due to her failure to establish a probability of success on the merits, Plaintiff is not entitled to an order of attachment (*Am. BankNote Corp. v Daniele*, 45 AD3d 338, 341 [1st Dept 2007] [order of attachment is not justified where plaintiff did not provide sufficient evidentiary facts to demonstrate probability of success on the merits]). As a result, Plaintiff's request that the Court order Defendant to set forth his assets is rendered moot.

The Court next addresses Plaintiff's request to amend the summons and complaint to include additional defendants. After the statute of limitations has expired, a plaintiff seeking to add new defendants must establish that: "(1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well" (*Bumpus v New York City Transit Auth.*, 66 AD3d 26, 35 [2d Dept 2009], citing *Buran v Coupal*, 87 NY2d 173 [1995]).

The only arguments made here by Plaintiff are that (1) E & J Macon, LLC, 346 East, LLC, 401 Macon Johnson LLC, 401 Macon Street 11233 LLC, 2836 West 19 USA LLC, and 2836 West Realty, LLC (collectively, the "LLCs") are united in interest because Defendant is the sole owner of the LLCs and Defendant used the LLCs to conceal, dispose of or transfer his assets to avoid any

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<sup>4</sup> The Court takes judicial notice of the summons and complaint, which were not attached as exhibits to the instant motion (see *Bennett v Gordon*, 99 AD3d 539, 539 [1st Dept 2012] [rejecting argument that appeal was defective because it relied upon the complaint that was not submitted on the motion]; see also *Jean-Louis v 345 Riverside Drive Apartment Corp.*, 259 AD2d 402, 402 [1st Dept 1999]; *Metcalf v Progressive Ins.*, 29 Misc. 3d 1225[A] [Sup Ct, Kings County 2010]).

possible judgment; and (2) Plaintiff mistakenly failed to add the LLCs due to Defendants' fraudulent and deceptive conduct. Under the second prong of the test, the original defendant and additional defendants are united in interest "when their interests in the subject matter is such that they will stand or fall together with respect to the plaintiff's claim" (*Xavier v RY Mgmt. Co.*, 45 AD3d 677, 679 [2d Dept 2007]). The mere fact that Defendant is the owner of the LLCs is insufficient to establish that they are united in interest (*see Montalvo v Madjek, Inc.*, 131 AD3d 678, 680 [2d Dept 2015]). At a minimum, Plaintiff argues that E & J and 346 East LLC must be added as defendants because they were involved in the sale of the Premises. However, defendants are not united in interest where, as here, defendants can assert different defenses (*Desiderio v Rubin*, 234 AD2d 581, 583 [2d Dept 1996] [finding that two corporations are not united in interest where they are separate entities with different defenses, even though they are owned by the same parties]). Since Plaintiff failed to meet at least one of the requirements, she is not entitled to amend her summons and complaint.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion is DENIED.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



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HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**