

Lvovsky v Breeznan

2016 NY Slip Op 30225(U)

February 9, 2016

Supreme Court, New York County

Docket Number: 162940/2015

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

LEONID LVOVSKY and LYUBOV LVOVSKY,

INDEX NO. 162940/2015

Plaintiffs,

MOTION DATE 1-13-2015

-against-

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

ANNA BREEZAN a/k/a/ ANNA LVOVSKY,

Defendant.

The following papers, numbered 1 to 7 were read on this motion by Order to Show Cause for turnover of funds.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1 - 4,

Answering Affidavits — Exhibits _____

5 - 7

Replying Affidavits _____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion by Order to Show Cause seeking to restrain and enjoin certain funds held in defendants' bank account is denied.

Gennady Lvovsky (herein "Husband") and Anna Breeznan (herein "wife") are married and currently have multiple actions pending. There is a pending criminal action in New York County Criminal Court (herein "Criminal Action") wherein Wife alleges that Husband battered and assaulted her. The second action is a civil action pending in the Queens County Supreme Court (see Index No. 706107/2013) (herein "Queens Civil Action") wherein Husband asserts that Wife took \$1,000,000.00 from their joint bank account and he seeks the return of said funds. Justice Duane A. Hart presides over the Queens Civil Action. The Note of Issue and Certificate of Readiness in the Queens Civil Action was filed on June 5, 2015 (see Index No. 706107/2013, NYSCEF Doc. No. 89). The third action is a contested matrimonial action pending in New York County Supreme Court (see Index No. 300055/2014) (herein "Matrimonial Action"). Justice Tandra L. Dawson presides over the Matrimonial Action.

After the Matrimonial Action was commenced, certain funds held in an E-Trader Securities account were frozen and Husband was prohibited from removing said funds. The Fourth action was commenced by Husband against E-Trade Securities (see Index No. 650876/2014) wherein he asserts that E-Trader Securities improperly froze the trading accounts. By Order dated April 29, 2014, Husband's action involving E-Trader Securities was transferred to Justice Dawson (see Index No. 650876/2014, NYSCEF Doc. No. 36).

During the pendency of these multiple actions, Husband commenced a family offense proceeding in Queens County Family Court (see File Number 155726, Docket Number 0-14742/15) and obtained a temporary order of protection against Wife. Upon learning of Husband's family offense proceeding, Justice Dawson transferred the proceeding to herself and vacated the temporary order of protection. Justice Dawson

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

stated that Husband "knows that I [Justice Dawson] transferred matters from other counties here on the matrimonial [action], that I've had discussions, I have written decisions with respect to this forum shopping issue. So, this is clear forum shopping, going to another court that is not familiar with the history and giving a recitation regarding the issues that were discussed in the Court. I am appalled. This is abuse. This is abusive (see Index No. 162940/2015, Opposition Papers, NYSCEF Doc. No. 31, Pg. 94).

Plaintiffs in this action are Husband's parents (herein "Parents"), who bring a Fifth action wherein they assert ownership of the funds Wife allegedly converted from the couple's joint bank account. In their Complaint in this action, the Parents assert causes of action against Wife for unjust enrichment, imposition of a constructive trust, fraudulent conveyance, conversion, tortious interference with a contract, and declaratory relief. The Parents claim that the \$639,508.99 were proceeds from the sale of real property they owned in Florida and that Husband managed said funds (see Index No. 162940/2015, NYSCEF Doc. No. 1, PP. 20-28). However, the Parents submitted an affidavit in the Queens Civil Action wherein they stated that they sold real property located in Florida and that the \$638,600.00 in proceeds from the Florida property sale were transferred to Husband because he previously paid for the purchase of the Florida property (see Index No. 706107/2013, NYSCEF Doc. No. 34).

A default judgment was taken against Wife in the Queens Civil Action and her bank accounts were ordered restrained. Justice Hart later vacated the default judgment and restraining order, and directed that the previously restrained funds be released to Wife (see Index No. 706107/2013, NYSCEF Doc. No. 209).

After commencing this action, the Parents now move by Order to Show Cause seeking injunctive relief enjoining Wife from withdrawing, taking, transferring, conveying or encumbering the sum of \$638,508.99 in her personal account pending a final determination in this action.

Wife answered the Parents' Complaint and asserts counterclaims for frivolous conduct, and seeks an award of costs and attorneys' fees in this action, and sanctions pursuant to 22 NYCRR §130-1. Wife does not cross-move to dismiss this action based upon the documentary evidence presented to the Court, that this action is collaterally estopped based upon the Queens Civil Action and Justice Hart's determinations, or for summary judgment on its counter-claims.

Wife opposes the instant motion arguing that the Parents, in conjunction with Husband, are forum shopping; that this action is frivolous; and that the Parents violated § 2217(b) of the CPLR in failing to inform this Court that the funds in controversy in this action are the same funds at issue in the Queens Civil Action.

CPLR § 2217(b) requires a moving party on an ex parte motion to annex "an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown." This statute prohibits forum shopping.

The Parents' ex parte motion by Order to Show Cause is accompanied by three affidavits attesting to the facts in this matter. Andrei A. Popescu, the Parents' attorney in this action, and Of Counsel to Husband's attorney in the Queens Civil Action, submits

an affirmation in support wherein he purports to state the basis for the relief sought in the OSC. Popescu informs the Court of the pending Matrimonial Action and Queens Civil Action. However, Popescu does not inform the Court of the Parents' affidavits stating that the proceeds of the sale of their Florida property were the sole property of Husband because he paid for the initial purchase of the Florida property.

Popescu also fails to inform the Court that Husband moved for the exact relief before Justice Hart in the Queens Civil Action that the Parents now seek in this action and in this motion. That Justice Hart, on default, granted Husband's relief enjoining Wife from accessing the funds at issue. That at a hearing held on September 2, 2015, Justice Hart vacated the default judgment on the record, and Ordered that the funds at issue be released to Wife (see Index No. 706107/2013, NYSCEF Doc. No. 209, Pg. 5 6). That Popescu argued before Justice Hart that the funds should not be unfrozen, should not be released to Wife, and that the funds were the "sole property of my client [Husband]" (Id., Pg. 8).

The Parents state in their affidavits in support of their OSC in this action that the funds at issue here are their retirement funds, and as such, their property. They also state that they have "attempted to resolve the issue of the return of [the Parents'] retirement [p]roceeds with [Wife] individually and through [their] son, in the context of [Husband's] pending Court actions with [Wife]" (see Index No. 162940/2015, NYSCEF Doc. No. 4 and 5, PP. 13). Neither of the Parents inform the Court that they previously submitted sworn statements in the Queens Supreme Action that directly contradict their claims to the funds at issue in this action.

This information was required by CPLR § 2217(b) in order to avoid inconsistent judgments and avoid forum shopping. The Parents' instant motion to enjoin the funds at issue and direct Wife to turnover said funds is denied.

The funds at issue in this action are the same funds subject to Justice Hart's previous decisions, which were affirmed by the Appellate Division, Second Department (see *Gennady Lvovsky, appellant, v. Anna Breznan, respondent*, 2015 WL 6244737, 2015 N.Y. Slip Op. 88212(U) [2nd Dept., 2015]). The Parents affirmed that the funds at issue in this action and the Queens Civil Action were Husband's property. Now, two years after the commencement of the Queens Civil Action, the Parents claim that they are the rightful owners of the funds in controversy.

"22 NYCRR 130-1.1 allows us to exercise our discretion to impose costs and sanctions on an errant party under circumstances particularly applicable here. The relief may include, inter alia, sanctions against the offending party or its attorney (22 NYCRR 130-1.1[a]) in an amount to be determined by us, which we would make payable to the Client Security Fund. Whether we exercise our discretion depends on whether the proceeding results from 'frivolous conduct.' For these purposes, frivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false" (*Levy v. Carol Mgt. Corp.*, 260 A.D.2d 27, 33-34, 698 N.Y.S.2d 226 [1st Dept., 1999]; 22 NYCRR 130-1.1[c]; 22 NYCRR 130-1.3).

At the September 2, 2015 hearing in the Queens Civil Action wherein Justice Hart vacated Wife's default and ordered the release of the funds at issue to Wife, Husband was represented by Popescu. Popescu was present at the hearing in his capacity as of counsel to Husband's attorney in the Queens Civil Action - Yonatan S. Levoritz. Popescu now represents the Parents in this action (see Index No. 706107/2013, NYSCEF Doc. No. 205, Pg. 1-2). The Parents' assertion in this action is directly contradicted by their sworn statements in the Queens Civil Action and give rise to material factual statements that are contradictory and appear to be false. Further, this is Husband and Parents' fourth attempt in as many actions to have the subject funds enjoined and/or turned over to Husband or another neutral party, in direct contravention of Justice Hart's orders in the Queens Civil Action.

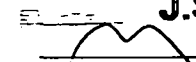
The claims here appear to be without legal merit. Husband, Parents, and Popescu are attempting to delay or prolong the Queens Civil Action and the Matrimonial Action and to harass Wife. However, Wife does not cross-move for dismissal of this action, and the Court cannot sua sponte dismiss an action without providing the non-moving party an opportunity to oppose dismissal (see Purvi Enters., LLC v. City of New York, 62 A.D.3d 508, 509, 879 N.Y.S.2d 410 [1st Dept., 2009]).

22 NYCRR § 130-1.1(d) limits an award of costs and the imposition of sanctions upon a reasonable opportunity to be heard, or upon motion. In opposition to the instant motion, Wife does not cross-move for an award of costs and sanctions, and the Parents and Popescu have not been given the opportunity to be heard on this issue. However, the Parents' and Popescu's motion appears to be frivolous, and their actions sanctionable. The Parents appear to have perjured themselves by submitting affidavits in this action that directly contradict their sworn statements made in the Queens Civil Action. These apparently perjured statements go to the central issue of this action, which is ownership of the funds at issue, which is currently pending before Justice Hart in the Queens Civil Action.

Accordingly, it is ORDERED that plaintiffs' motion by Order to Show Cause for an Order restraining and enjoining certain funds held by the defendant is denied, and it is further,

ORDERED, that this action is respectfully referred to Justice Tandra Dawson located at 100 Centre Street, Room 1604, 16th Floor, New York, N.Y. in the Supreme Court, Matrimonial Division, IDV Part, and it is further,

ORDERED, that the Clerk of this Court is directed to transfer this action to Justice Tandra Dawson, upon service of a copy of this order with notice of entry.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: February 9, 2016

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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