

Bellino v Bellino
2013 NY Slip Op 30902(U)
April 12, 2013
Sup Ct, Suffolk County
Docket Number: 304/2012
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 304/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

NANCI J. BELLINO,

Plaintiff,

-against-

STEVEN A. BELLINO,

Defendant.

ORIG. RETURN DATE: FEBRUARY 2, 2012
 FINAL SUBMISSION DATE: FEBRUARY 16, 2012
 MTN. SEQ. #: 001
 MOTION: MD

ORIG. RETURN DATE: FEBRUARY 2, 2012
 FINAL SUBMISSION DATE: FEBRUARY 16, 2012
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:
 SKLAR & PRUSINOWSKI, ESQS.
 64 HILTON AVENUE
 HEMPSTEAD, NEW YORK 11550
 516-307-1938

DEFT'S/RESP ATTORNEY:
 LAW OFFICES OF DIANNA LEMIEUX, P.C.
 400 GARDEN CITY PLAZA - SUITE 406
 GARDEN CITY, NEW YORK 11530
 516-747-4399

Upon the following papers numbered 1 to 11 read on this motion _____
FOR A RESTRAINING ORDER AND CROSS-MOTION TO IMPOSE SANCTIONS _____
 Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Reply Affidavit and in Opposition to Cross-motion and supporting papers 7, 8; Reply
 Affirmation in Further Support of Cross-motion and supporting papers 9, 10; Other So-
Ordered Stipulation dated February 7, 2012 - 11 _____; it is,

ORDERED that this motion by plaintiff, NANCI J. BELLINO, for an
 Order:

(1) restraining defendant, his agents, employees, representatives
 and attorneys from removing, withdrawing, selling, transferring, disposing of,
 encumbering or hypothecating all accounts and safe deposit boxes at the
 following institutions maintained by defendant, STEVEN A. BELLINO, and any
 other institutions not specifically named herein, individually or jointly with any
 other individual except for payment to plaintiff for Court-Ordered support, until
 further Order of the Court:



- (a) Citibank, including but not limited to two checking accounts and a savings account;
- (b) HSBC bank, including but not limited to two checking accounts and a certificate of deposit;
- (c) TD Ameritrade, in the United States, including but not limited to an online trading account, an investment account and a trust account;
- (d) Capital Securities Bank & Trust Ltd., Nassau, N.P., Bahamas, including but not limited to an investment trust account, a ROTH IRA account, a trust account, an online checking account, and two savings accounts;
- (e) TD Ameritrade in the Bahamas, including but not limited to a ROTH IRA, a certificate of deposit, an online trade account;
- (f) Capital Securities Bank & Trust Ltd., Nassau, N.P. Bahamas, including but not limited to an investment trust account, a ROTH IRA, a trust account, an online checking account, two savings accounts;
- (g) Bank of America, including but not limited to a checking account and two certificates of deposit; and
- (h) Bank of England, Threadneedle Street, London, England, including but not limited to a checking account, an online checking account, a retirement account, two certificates of deposit and a safe deposit box;

(2) pursuant to CPLR 3120, permitting plaintiff's attorneys, SKLAR & PRUSINOWSKI, ESQS., to inspect and make inventory of the contents of all safe deposit boxes in the name of the defendant, STEVEN A. BELLINO, individually or jointly with any other individual, maintained at any of the aforesaid banks in the presence of the parties' attorneys and a bank officer on a date certain; and

(3) directing that the aforesaid safe deposit boxes be and remain sealed except for one inventory to be conducted by SKLAR & PRUSINOWSKI, ESQS. and that all accounts remain restrained until further Order of this Court,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant, STEVEN A. BELLINO, for an Order, pursuant to 22 NYCRR § 130-1.1:

(1) granting defendant an award reflecting his actual costs incurred, including reasonable attorneys' fees, in defending against the motion-in-chief seeking restraining orders, which motion constitutes frivolous conduct in litigation in that it is completely without merit in law and fact in that it is premised upon a fraudulent investigator's report; and

(2) imposing sanctions on plaintiff's counsel for failure to engage in any due diligence respecting the purported investigator's report and refusal to withdraw the motion-in-chief (for restraining orders), despite being advised of the fraudulent nature of the purported investigator's report which is the sole basis for the requested restraining orders,

is hereby **DENIED** in its entirety. The Court does not find plaintiff's motion to be frivolous within the meaning of 22 NYCRR § 130-1.1 (c). It cannot be said that plaintiff's motion is completely without merit in law, or was filed solely to harass or maliciously injure defendant (see 22 NYCRR § 130-1.1 [c]).

By Order dated January 12, 2012 (Collins, J.), the Court issued the following temporary restraining Order:

ORDERED, that pending the hearing of the instant application and until further Order of this Court, the defendant, his employees, agents, representatives and attorneys be and they hereby are restrained and enjoined from selling, assigning, transferring, disposing of, encumbering, withdrawing monies or hypothecating all assets held in the name of the Defendant, STEVEN A. BELLINO, individually or jointly with another,

including but not limited to those accounts and safe deposit boxes listed above and included in **Exhibit "I"** attached hereto, wherever those assets may be located except for payment to Plaintiff of Court Ordered support; and it is further

ORDERED, that pending further order of this Court, Citibank, HSBC, TD Ameritrade, Capital Securities Bank & Trust Ltd., Nassau, N.P., Bahamas, in the United States, TD Ameritrade in the Bahamas, Capital Securities Bank & Trust Ltd., Nassau, N.P., Bahamas, Bank of America and Bank of England, Threadneedle Street, London, England, be and they hereby are restrained and enjoined from paying out or permitting defendant or his employees, representatives, attorneys and agents access to and from disposing of, selling, transferring, assigning, encumbering, or withdrawing from any accounts or safe deposit boxes maintained by Defendant, STEVEN A. BELLINO, in his name individually or jointly with others except for Defendant's payment to Plaintiff of Court Ordered support.

By Stipulation of the parties dated February 7, 2012 and So-Ordered by this Court on February 14, 2012, the aforementioned temporary restraining Order was vacated in its entirety and replaced with the following:

ORDERED that, pending the hearing or determination of the within application, or until further Order of this Court, Defendant, his employees, agents, representatives, and attorneys, be and they are hereby restrained and enjoined from selling, assigning, transferring, disposing of, encumbering, withdrawing monies, or hypothecating all assets held in Defendant's name, Steven A. Bellino, individually or jointly, and wherever such assets or accounts may be located, ***except for the payment of Defendant's ordinary and customary living expenses and obligations, including Defendant's***

Court-ordered support obligations to Plaintiff
(emphasis in original).

The Stipulation further provided that defendant's Citibank deposit accounts and Bank of America credit line account shall be exempt and excluded from any restraining Orders.

Plaintiff commenced this action on or about January 11, 2012, seeking to vacate the Stipulations of Settlement in the parties' underlying matrimonial action due to defendant's alleged material misrepresentation in that action regarding his assets. Plaintiff claims that based upon such misrepresentations, she settled the matrimonial action for "substantially less" than to what she was entitled. Specifically, the parties settled their matrimonial action by four Stipulations of Settlement, to wit: (1) Stipulation Respecting Custody and Parenting Time dated May 27, 2009; (2) Stipulation Resolving Child Support and Spousal Maintenance dated September 30, 2009; (3) So-Ordered Stipulation in open court dated October 1, 2009, resolving, among other things, equitable distribution issues; and (4) Stipulation Resolving Reimbursable Temporary Support Claims and Equitable Distribution of Marital Retirement Assets dated December 10, 2009 (collectively "Four Stipulations"). The parties were divorced by Judgment of Divorce granted on April 27, 2010 (Cohen, J.), which incorporated by reference the Four Stipulations but did not merge them into the judgment.

Plaintiff now alleges that the Four Stipulations resulted from "financial blackmail," "improper and inadequate discovery of assets," and "undue influence and attendant coercive control" exercised by defendant over plaintiff. In particular, plaintiff claims that she did not receive a fair distribution of defendant's undisclosed assets, which she alleges total in excess of \$3,274,751.00. In support of the foregoing, plaintiff has submitted a report of All-Source Investigation and Information Specialists dated December 21, 2011 ("Report"), which purportedly delineates defendant's accounts and monies that were not disclosed to plaintiff during the matrimonial action. The Report lists bank accounts and trading accounts with various financial institutions in the United States, as well as in England and the Bahamas. Based upon the Report, plaintiff argues that she should have also received liquid assets of at least \$1,635,000.00, which she unknowingly waived receipt of in the matrimonial action. As such, plaintiff argues that the Four Stipulations represent an unconscionable bargain that no honest or fair person would accept. Accordingly, plaintiff seeks a

restraining Order preventing defendant, his agents, and representatives from removing, withdrawing, selling, transferring, disposing of, encumbering or hypothecating all accounts and safe deposit boxes at the institutions described hereinabove, maintained by defendant, and any other institutions not specifically named herein. As noted, the parties stipulated to a restraining Order that enjoins defendant and his agents from selling, assigning, transferring, disposing of, encumbering, withdrawing monies, or hypothecating all assets held in defendant's name, individually or jointly, and wherever such assets or accounts may be located, except for the payment of defendant's ordinary and customary living expenses and obligations, including defendant's Court-Ordered support obligations to plaintiff.

In response hereto, defendant has filed the instant cross-motion seeking sanctions against plaintiff in the form of an award reflecting defendant's actual costs incurred in defending against plaintiff's motion-in-chief, arguing that it is completely without merit in law and fact as it is allegedly premised upon the fraudulent Report. Defendant contends that the Report is a "sham," in that he only has deposit accounts at Citibank and HSBC with balances less than shown on the Report; that he does not maintain deposit accounts at any other bank listed in the Report; that the Bank of England is incapable of maintaining personal accounts as it is the central bank of the United Kingdom; that TD Ameritrade-Bahamas does not exist; and that he has no deposit accounts with Bank of America but rather a credit card account. In sum, defendant alleges that he only has deposit accounts with Citibank and HSBC, a Bank of America MasterCard credit card account, and a TD Ameritrade account with \$.27 therein. Defendant takes no position on the other restraints sought, as he indicates he has no such other accounts or safe deposit boxes.

Moreover, defendant alleges that his yearly income since 2009 has averaged approximately 25% of what it had been for the previous five years before the "world wide freeze on credit." Defendant claims that he had to borrow from his IRAs and the equity in his residence, and cash out a whole life insurance policy to meet his financial responsibilities.

In reply, plaintiff has submitted an updated report from All-Source Investigation and Information Specialists dated February 8, 2012 ("Updated Report"). The Updated Report includes the last four digits of the account numbers, and corrects "some mistakes" from the Report, including the fact that the Bank of England should have been Barclays Bank PLC and that the TD

Ameritrade accounts were not in the Bahamas but in the United States. Therefore, plaintiff additionally seeks a restraining Order with respect to defendant's accounts allegedly held at Barclays Bank PLC.

The Court notes that plaintiff's instant application seeks a "restraining" Order as described hereinabove, which was granted on an interim basis. Although not expressly stated, plaintiff ultimately seeks either a preliminary injunction or an Order of attachment with respect to the subject accounts. The Court will address and analyze both forms of relief. As this is a plenary civil action and not a matrimonial action, plaintiff is not automatically entitled to such relief (*cf.* Domestic Relations Law §§ 234; 236 [B] [2] [b]; *Leibowits v Leibowits*, 93 AD2d 535 [1983]).

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (*see Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*see Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]).

The Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that an injunction is not warranted herein. The parties' submissions demonstrate that the underlying facts are in sharp dispute as to the existence of the accounts and the amounts of funds therein. The Court notes that numerous questions of fact exist with respect to the contents of the Report and the Updated Report, which form the basis for plaintiff's plenary action and instant application. The Court further notes that the "undisclosed" accounts listed on the Report and the Updated Report were not discovered by plaintiff or her three separate attorneys in the underlying matrimonial action, despite the fact that she hired an expert forensic accountant to review defendant's assets and

financial holdings. In addition, the Court finds that plaintiff has not demonstrated irreparable injury in the absence of an injunction, as she can be fully recompensed by a monetary award (see e.g. *Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613 [2008]). It is well-settled that if a plaintiff has an adequate remedy at law and may be fully compensated by monetary damages, a preliminary injunction will not be granted (see *Reade v Rockaway Crossing, LLC*, 18 AD3d 337 [2005]; *Singer v Riskin*, 304 AD2d 554 [2003]; *Duane Roushia v Harvey*, 260 AD2d 687 [1999]; *Dairy Barn Stores v Bill's Friendly Auto Serv.*, 236 AD2d 578 [1997]).

With respect to an Order of attachment, CPLR 6201 (3) provides that an Order of attachment may be granted in any 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 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]). The moving papers must contain evidentiary facts—as opposed to conclusions—proving the fraud (*Mineola Ford Sales v Rapp*, 242 AD2d 371 [1997]; *Societe Generale Alsacienne De Banque, Zurich v Flemington Dev. Corp.*, 118 AD2d 769 [1986]; see also *Rothman v Rogers*, 221 AD2d 330 [1995]; *Vita v Spina*, 15 Misc 3d 1137[A] [Sup Ct, Suffolk County 2007]). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action in order to obtain an Order of attachment (see CPLR 6212 [a]; *Societe Generale Alsacienne De Banque, Zurich v Flemington Dev. Corp.*, 118 AD2d 769, *supra*; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167 [1984]). However, the mere removal, assignment or other disposition of property is not grounds for attachment (*Corsi v Vroman*, 37 AD3d 397 [2007]; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167, *supra*).

Here, the Court notes that plaintiff seeks a judgment declaring the Four Stipulations to be void and unenforceable, not a money judgment against defendant. Notwithstanding the foregoing, plaintiff seeks restraints on these accounts in order to preserve the funds therein for herself in the event she is successful on the merits. However, plaintiff's allegations that "when defendant becomes aware that the Plaintiff knows of the existence of these accounts he will look to remove the money therefrom," and "a restraining order . . . will, at the very least preserve some of the funds for the Plaintiff to acquire when she successfully

demonstrates to this Honorable Court that she . . . deserves her fair share of the marital funds,” do not rise to the level of demonstrating an intent to defraud or frustrate enforcement of a judgment. Plaintiff’s moving papers do not contain any evidentiary facts proving fraudulent transfers to support an Order of attachment (*Mineola Ford Sales v Rapp*, 242 AD2d 371, *supra*; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, *supra*).

Therefore, plaintiff’s motion for a “restraining Order” is **DENIED**, with leave to renew in the event plaintiff can demonstrate actions undertaken by defendant designed to defraud plaintiff and/or frustrate enforcement of any money judgment. The temporary restraining Order contained in the Order to Show Cause dated January 12, 2012 (Collins, J.) and re-dated on January 18, 2012, as modified by the parties’ Stipulation dated February 7, 2012 and So-Ordered by this Court on February 14, 2012, is hereby vacated.

Finally, plaintiff’s request, pursuant to CPLR 3120, to permit plaintiff’s attorneys to inspect and make inventory of the contents of all safe deposit boxes in the name of defendant, individually or jointly with any other individual, maintained at any of the aforesaid banks, is **DENIED**. Plaintiff has not specified a safe deposit box in defendant’s name at any financial institution, and the Court notes that the Updated Report does not indicate any safe deposit boxes in defendant’s name.

The foregoing constitutes the decision and Order of the Court.

Dated: April 12, 2013


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION