Mosley v Brittain
2017 NY Slip Op 32447(U)
November 17, 2017
Supreme Court, New York County
Docket Number: 152020/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH *Justice* **PART 29**

RACHEL MOSLEY,

Plaintiff,

- v -

BENJAMIN BRITTAIN,

Defendant.

INDEX NO. 152020/2017

MOTION DATE 11/16/17

MOTION SEQ. NO. 004

The following papers, numbered 58-80, were read on this motion for a preliminary injunction.

Notice of Motion—Affirmation—Exhibits 1-6	No(s). 58-65
Affirmation in Opposition—Exhibits A-I	No(s). 68-78
Supplemental Affirmation—Exhibit 1—Affidavit of Service	No(s). 78-80

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

Motion by Plaintiff Rachel Mosley, pursuant to CPLR 6301, for a preliminary injunction "freezing the Defendant's assets" is denied.

BACKGROUND

I. The Underlying Events

Plaintiff alleges, in sum and substance, that on October 15, 2016, she was working as a server at the Le Bain Nightclub in the Standard Hotel. Plaintiff alleges that as she was walking to her work station, Defendant physically attacked her by kneeing her in the groin and vagina repeatedly while calling her "bitch."

During Plaintiff's deposition, Plaintiff described the alleged battery as follows:

Q. Describe what incident occurred in front of this workstation. What happened to you … in front of this workstation?

A. I was viciously attacked and kneed several times in the groin and vagina, and it felt like it was happening forever and, yeah, that's what happened. I was just attacked by a tall man I have never met in my life.

Q. You never met this person before --

A. No.

Q. -- that incident?

A. No.

Q. Did you serve this person any drinks, if you remember?

A. No, I did not.

Q. Prior to this attack, did you pass by this person prior to the incident?

A. No.

Q. And this was the first time you were passing by when this happened?

A. I was actually going to my workstation and he attacked me. He grabbed me and called me a bitch three times, several times just -- and he kneed me and kicked me in the vagina.

(Merson Affirm., Ex. 1 [Mosley EBT] at 93:07-94:11.)

At Defendant's deposition, Defendant described the alleged incident as follows:

Q. Did you speak any words to Ms. Mosley, or did she speak any words to you?

A. Yeah. Ms. Mosley was yelling.

Q. Ms. Mosley was yelling?

A. Yes.

Q. What was Ms. Mosley yelling?

A. She started shouting, like, "You kneed me, you kneed me, you kneed my vagina," and I was really confused. I had no idea what was going on.

Q. She said, ''You kneed my vagina''?

A. Yes.

Q. Did you know what she was talking about?

A. No.

Q. She just came up to you and said, "You kneed my vagina"?

A. No.

Q. So how did that happen?

A. I was dancing on the dance floor, and I had no idea what was going on. I felt like something or someone pushed me from behind, so I turned around to make sure everything was okay. I didn't see anything, so I kept dancing. And next thing I know, maybe two seconds, there was this girl in front of me who was yelling, "You kneed me, you kneed me," and she was kind of jabbing her finger in my direction and looked livid. And then the next thing I know, the two guys next to her were, like - - one of them was, like, "Dude, what did you do?" And the other one was, like, "You need to watch out." And I was, like, I have no idea what's going on, and I turned back to, like, ask her what had happened, because I had no idea what was going on, and she was gone.

(Defendant EBT at 122:11-123:25.)

It is further alleged that, sometime after the alleged incident, Defendant was detained by club security. Plaintiff further alleges that the police subsequently

arrived on scene, reviewed surveillance footage[1] of the alleged incident, and arrested Defendant.

Plaintiff further alleges that Defendant was subsequently charged with Assault in the Third Degree and Second Degree Harassment. Plaintiff further alleges that Defendant subsequently pleaded guilty to a violation of Penal Law § 240.20 (Disorderly Conduct).[2]

II. The Instant Motion

Plaintiff now moves for a preliminary injunction to "freez[e] defendant's assets" and effectively restrain Defendant from spending any monies in his savings account until after Plaintiff has collected on a potential judgment in her favor.[3] Plaintiff argues that "[e]very cent in Mr. Brittain's current possession will be needed as he tries to satisfy the damages to Ms. Mosley, and garnishment of wages will likely be necessary, as well." (Merson Affirm. ¶ 4.) Plaintiff further estimates that her "damages to date are in the range of many hundreds of thousands of dollars if not in excess of one million dollars." (*Id.* ¶ 3.)

Plaintiff contends that the requested freezing of assets is necessary because she believes that Defendant is attempting to reorganize and / or dissipate his assets in order to make himself judgment-proof. This belief by Plaintiff appears to originate from a response by Defendant to a request for discovery and inspection. Plaintiff states that, upon review of Defendant's response, she learned that among the "minimal physical assets" owned by Defendant, Defendant has "two bank accounts—one with $20,898.92 and another with $21,657.39." In particular, Plaintiff alleges:

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[1] On a separate motion for summary judgment, the parties submitted this surveillance footage that the parties state appears to capture the moment of the incident. This footage was reviewed during a conference with the Court on this motion on November 16, 2017, during which counsel identified Plaintiff and Defendant among the many patrons in the nightclub. As the Court will further discuss, the Court deliberately avoids making any findings of fact on this motion as to the underlying alleged incident. As such, the Court will not further describe what the Court believes the surveillance footage shows.

[2] Neither party presents any record of Plaintiff's plea allocution.

[3] Apparently, Plaintiff initially sought a broader order which would have effectively prevented Defendant from, among other things: encumbering any of his security interests in any way; opening safe deposit boxes titled in his name; using a credit or debit card; incurring liens on real property that he owned; or cashing checks. (*See* Merson Affirm. ¶ 20.) However, in Plaintiff's supplemental papers, Plaintiff appears to roll back her requested relief and now "respectfully requests that this Court issue an Order freezing defendant's savings bank account or directing him to place a sum certain into escrow." (Merson Supp. Affirm. ¶¶ 10-11.)

> "There is a Wells Fargo bank account where more than $9,000 was withdrawn in January of 2017, leaving a balance of $1,550. Another account with $40, 561.26 with $12,250 in deposits and $8,000 in withdrawals in January of 2017. $4,000.00 was withdrawn from this account in February of 2017, with additional withdrawals of $5,667.46 and $7,079, leaving a total value on May 18, 2017 of $22,331.21."

(*Id.* ¶ 19, Ex. 6 [Bank Account Statements].) Plaintiff contends that "[t]his one account demonstrates a concerning pattern of excessive withdrawals that warrant freezing this and defendant's other accounts to avert the nefarious appearance of a judgement-proof defendant." (*Id.* ¶ 19.)

Defendant responds that there was nothing nefarious about the subject withdrawals, which he notes predate the filing of the summons and complaint on March 1, 2017. (Lee Opp. Affirm. ¶ 19.) In addition, Defendant contends that the fact that he was also making deposits of $12,250 at the subject time is contradictory of an intent to make himself judgment proof. (*Id.* ¶ 20.) Moreover, Defendant contends that he is a young engineer, currently in a job with an annual salary of $73,500.00, and that he has strong prospects of increased future earnings. (*Id.* ¶ 21.) As such, Defendant contends that Plaintiff's fears that she will be unable able to collect on a judgment are unfounded, as she will potentially be able to garnish his wages for twenty years.

DISCUSSION

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

(CPLR 6301 [emphasis added].)

In order to obtain a preliminary injunction, movant must show: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable

injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005].)

I. Pre-Judgement Freezing of Assets to Preserve Sources for Post-Judgment Collection is Not a Basis for a Preliminary Injunction under CPLR 6301.

However, before this Court will analyze the aforesaid factors, this Court must examine whether Plaintiff's fear that Defendant will make himself judgment proof provides a legal basis for granting a preliminary injunction. In *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 (2000), the Court of Appeals noted that, in this state, "courts have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment." In that case, the plaintiffs were purchasers of debentures from the defendant, a Russian banking institution. Apparently, due to a Russian economic crisis, the defendant defaulted on its payment due under the debentures, and the plaintiffs sued to recover the principal and interest due. The plaintiffs also moved for a preliminary injunction "to protect their expected money judgment." (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 544 [2000].) The Court of Appeals ruled that the plaintiffs were not entitled to said preliminary injunction, holding that "the mere danger of asset-stripping is not a sufficient basis to make an exception to the general rule .... [that] a general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor *prior to obtaining judgment*." (*Id.* at 548-49 [emphasis added].)

Here, Plaintiff appears to seek the exact same relief that the Court of Appeals denied the plaintiffs in *Credit Agricole Indosuez*: Plaintiff wants this Court to "freez[e] defendant's assets" so that she might able to collect on a potential judgment. This Court does not see any reason why the rule established by the Court of Appeals in *Credit Agricole Indosuez* does not apply to the instant case.

Indeed, this Court is unaware of any circumstance where a personal injury plaintiff has requested such relief—let alone been so awarded. The cases that Plaintiff cites in support of her motion are inapposite to the instant case. For

example, Plaintiff cites *Sau Thi Ma v. Lien*, 198 A.D.2d 186 (1st Dept 1993).[4] In that case, the plaintiff sought a preliminary injunction "escrowing the payments of a winning $8 million lottery ticket," pending a resolution of her claims to entitlement to the winnings.[5] (*Id.* at 186.) At the time of the plaintiff's request, only the first installment of the winnings had been paid to the defendant, and the defendant had indicated his intent to share the winnings with his family. The Appellate Division, First Department, thus found that it was appropriate to "maintain the status quo" by escrowing payments of the winnings, pending a resolution of the merits, as this would protect the plaintiff's rights respecting the subject of the action.

Sau Thi Ma involved monies that were apparently not yet in the defendant's possession—except for payment of the first installment—and were the subject of the action. Here, there is no separate fund of monies that are the subject of the action. Rather, Plaintiff argues that she will be entitled to monetary damages from Defendant after a potential judgment in her favor. The monies Plaintiff seeks to freeze are already in Defendant's possession, and did not come into Defendant's possession from a source that Plaintiff claims she was originally entitled to receive the monies from. Moreover, freezing Defendant's savings account in the instant case would upset the status quo rather than maintain it.

Many of the other cases that Plaintiff cites similarly do not stand for the proposition that a personal injury plaintiff can freeze a defendant's assets to preserve them for a potential award of money damages. (*See e.g. State v City of New York*, 275 AD2d 740, 741 [2d Dept 2000] [enjoining defendants from selling or altering certain community gardens]; *Morgenthau v. DiNapoli*, 2010 N.Y. Slip Op. 30683(U) [Sup Ct, NY County 2010] [preliminary injunction and order of attachment—moved for by district attorney—in forfeiture action, pursuant to Article 13, to recover proceeds of crimes from organized crime defendants]; *360 W. 11th LLC v ACG Credit Co. II, LLC*, 46 AD3d 367 [1st Dept 2007] [preliminary injunction directing the defendant's counsel to place certain proceeds in escrow following closing, to maintain status quo, in action arising out of out of a

[4] During oral argument, the Court asked Plaintiff's counsel to pick one of the cases he cited and to explain why it supported the Court granting the instant relief. Plaintiff's counsel referred the Court to *Sau Thi Ma v. Lien*, 198 A.D.2d 186 (1st Dept 1993).

[5] On the motion in *Sau Thi Ma v. Lien*, the plaintiff presented testimony from the lottery ticket agent that "corroborated plaintiff's testimony regarding her purchase of the winning tickets" as well as "the uncontested fact that the source of both six number sequences contained on the winning ticket as well as a third sequence on a second prize ticket was plaintiff's deceased mother's medicaid card." (198 AD2d at 187.)

mortgage-secured loan from defendant]; *Schlosser v United Presbyt. Home at Syosset, Inc.*, 56 AD2d 615, 615 [2d Dept 1977] [affirming preliminary injunction preventing defendant from increasing rental charges on the basis that "[m]any of the plaintiffs, all of whom are senior citizens, cannot afford the scheduled rent increase and have no alternative residence to avail themselves of during the pendency of the action"].)

Indeed, at least one of the cases that Plaintiff relies on appears to militate against the relief she seeks. Plaintiff cites *Winter v. Mangini*, 2013 WL 5925663 (Sup Ct, Westchester County 2013). (Merson Affirm. ¶ 16.) In that case, the plaintiff entered judgment in the sum of $673,876.10 against the defendants, and then sought a preliminary injunction enjoining the defendants from "exercising any dominion or control over, committing any act, effectuating any conveyance, transfer, assignment or other disposition of any funds, income or other payments received or hereafter to be received by the Defendants." (*Id.* at *1.) The court there denied the motion for preliminary injunction and reasoned:

> "Plaintiff seeks an injunction which would, in effect, enjoin defendants from disposing of any and all income or other assets that may come into their dominion or control. Such an overbroad injunction would freeze funds that are unrelated to any allegations in the complaint concerning fraudulent transfers, and thus unnecessary to protect plaintiff's interest in collecting his judgment."

(*Id.*) Thus, even in a post-judgment motion for collection, the court was unwilling to freeze assets unrelated to the subject complaint concerning fraudulent transfer. Here, Plaintiff seeks to freeze Defendant's assets prejudgment solely to preserve them as a source of recovery on a potential money damages award.

Moreover, if this Court were to grant Plaintiff's request to freeze Defendant's assets prior to judgment, the Court would be effectively ignoring that the post-judgment collection laws in this state place restrictions on the types and amounts of assets that a judgment creditor can seize in satisfaction of her judgment. (*See generally* CPLR 5205 [listing assets exempt from application to the satisfaction of a money judgment].) That the law places myriad restrictions on plaintiffs collecting on judgments <u>after winning an award</u> at least raises questions about how these restrictions would apply to a preliminary injunction placing pre-judgment restraints on a defendant's assets.

II. Plaintiff's Request for a Preliminary Injunction Also Fails to Satisfy the Tripartite Test.

As previously mentioned, to obtain a preliminary injunction, movant must show: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005].)

Even if the court were inclined to create a new precedent—whereby by a personal injury plaintiff is entitled to a preliminary injunction freezing a defendant's assets in preservation for a potential award of money damages—this Court would still deny the instant motion for preliminary injunction pursuant to the above three-factor test.

Moreover, in conducting the analysis pursuant to CPLR 6301, the Court will assume arguendo that Plaintiff has a likelihood of success on the merits. The Court makes this assumption because Plaintiff and Defendant have each submitted motions for summary judgment. As such, the Court wants to avoid making any findings that would hamstring its analysis of the pending motions for summary judgment. For example, were this Court to find that Plaintiff has not shown a likelihood of success on the merits, this Court would most likely have to find that there were material issues of fact precluding an award of summary judgment to Plaintiff.

Even giving Plaintiff the assumption that she has a likelihood of success on the merits, the lack of an irreparable injury and the balancing of the equities militate in favor of denial. Regarding the issue of irreparable injury, the longstanding rule is that there is no irreparable injury where the movant's injury can be remedied with monetary damages. (*Roushia v Harvey*, 260 AD2d 687, 688 [3d Dept 1999] ["Notwithstanding the tripartite test, if the plaintiff has an adequate remedy at law and may be fully compensated by monetary damages, a preliminary injunction will not be granted."].) Plaintiff of course brings this motion out of fear that Defendant will have no money to satisfy her damages when she obtains a judgment. However, as the Court detailed exhaustively, this potential harm is not cognizable under longstanding precedent in this state. (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000].)

Even if this Court were willing to disregard that longstanding rule and recognize Plaintiff's concern as a cognizable harm, the Court would still find that Plaintiff has failed to show an irreparable injury.

In order to seize a defendant's assets on the grounds that he is attempting to make himself judgment proof, a plaintiff must show: (1) that the defendant has hidden or transferred his assets in one of the ways described in the statute or is about to do so, and (2) that defendant's intent in so acting is to defraud his creditors or frustrate the enforcement of a judgment in plaintiff's favor. (*See Factors Co. v Double Eagle Corp.*, 17 AD2d 135, 136 [1st Dept 1962].)[6] "[A]llegations raising a mere suspicion of an intent to defraud are insufficient. It must appear that such fraudulent intent really existed in the defendant's mind." (*Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, 773 [2d Dept 1986].)

Plaintiff's accusation that Defendant is attempting to make himself judgment proof is largely based on Plaintiff's analysis of Defendant's bank records. In particular, Plaintiff alleges:

> "There is a Wells Fargo bank account where more than $9,000 was withdrawn in January of 2017, leaving a balance of $1,550. Another account with $40, 561.26 with $12,250 in deposits and $8,000 in withdrawals in January of 2017. $4,000.00 was withdrawn from this account in February of 2017, with additional withdrawals of $5,667.46 and $7,079, leaving a total value on May 18, 2017 of $22,331.21."

(*Id.* ¶ 19, Ex. 6 [Bank Account Statements].)

However, as Defendant notes, these withdrawals largely predate the filing of the summons and complaint on March 1, 2017.[7] In addition, Defendant deposited

[6] The analysis here of whether Defendant has removed assets with the intent to frustrate a judgment is conducted under CPLR 6201, which contemplates grounds for attachment—not CPLR 6301, the grounds for a preliminary injunction. This is because—as discussed exhaustively—a preliminary injunction, under CPLR 6301, is not an available remedy where a plaintiff believes that a defendant is attempting to secret away assets with the intent of frustrating a judgment. An order of attachment under CPLR 6201, however, is such an available remedy. However, as will be discussed, the evidence on this motion does not support the granting of an order of attachment.

[7] At oral argument, Plaintiff's counsel countered that he had begun negotiations to settle the case with Defendant prior to filing the summons and complaint, but it is unclear exactly when said negotiations began and no reference to the negotiations was made in Plaintiff's papers.

$12,250 in his savings account in January 2017, which would appear to be contradictory to an intent to secret away assets. Moreover, many of amounts deducted from Defendant's savings account appear to have then been deposited in his checking account. In addition, many of the deductions from both the checking and savings accounts are in very precise non-round numbers (e.g. $5,667.46 and $7,079), which would appear to be very random amounts to withdraw if one was simply attempting to secret away assets. Overall, there is nothing in Defendant's banking activity to suggest that said activity indicates an intent to secret away assets rather than something innocuous (e.g. paying bills and making purchases).

Defendant has also asserted that he has "secured employment at TEMBOO as an Engineer with an annual salary of $73,500.00." (Lee Opp. Affirm. ¶ 21.) In addition, Defendant asserts that he is a New York state resident and a "recent graduate from Columbia University with a bright future." (*Id.* ¶ 27.) As such, Defendant contends that, in the event of a judgment in Plaintiff's favor, Plaintiff will be able to garnish Defendant's income for twenty years from the date of the final judgment. (*Id.*)

Plaintiff does not contest these asserted facts, but rather conclusorily asserts that "[b]y refusing to freeze this savings account, this Court would be sentencing [Plaintiff] to a lifetime of waiting to satisfy a judgment if ever." (Merson Supp. Affirm. ¶ 10.) As discussed, that Plaintiff may not have a potential judgment immediately satisfied—and might have to collect said judgment over a number of years as contemplated by CPLR Article 52—does not provide a basis for a preliminary injunction.

In addition to a lack of irreparable harm, the equities strongly balance against freezing Defendant's bank account. To say that a plaintiff moving for a preliminary injunction must show that the balance of the equities weigh in his favor means that a plaintiff must show that "that the irreparable injury to be sustained is more burdensome to him than the harm that would be caused to the defendant through the imposition of the injunction." (*Lombard v Sta. Sq. Inn Apartments Corp.*, 94 AD3d 717, 721–22 [2d Dept 2012].)

Here, the irreparable injury to Defendant would be much greater than any supposed injury to Plaintiff: a preliminary injunction <u>will</u> prevent Defendant from using monies currently <u>in his possession</u>; denial of the preliminary injunction <u>may</u> prevent Plaintiff obtaining <u>immediate</u> satisfaction of a potential money damages

award and may potentially require her to garnish Defendant's wages and / or pursue other means of post-judgment collection pursuant to CPLR article 52.

In addition, as pointed out by Defendant's counsel at oral argument, freezing Defendant's savings account could prejudice his ability to defend his rights in the instant action because he will be unable to pay his lawyer. With a potential trial looming, it is reasonable to expect that Plaintiff's legal expenses may significantly increase. Indeed, even if this Court does grant Plaintiff summary judgment, there may still be a trial on damages extending over several days with testimony from Defendant's experts—all of whom will have to be paid in addition to Defendant's counsel.

As such, Plaintiff fails to satisfy the tripartite test for preliminary injunction, pursuant to CPLR 6301.

III. This Court Will Not Sua Sponte Grant Plaintiff an Order of Attachment.

As this Court previously mentioned, Plaintiff has failed to present evidence to support a finding that Defendant is removing or secreting away assets with the intent of frustrating the enforcement of a judgment that might be rendered in Plaintiff's favor. As such, there is no evidence on this motion to support the Court ordering the attachment of Defendant's savings account, even if it had been requested.[8]

Further, Plaintiff has not shown compliance with the various technical requirements of an order for attachment, and neither has Plaintiff offered to post an undertaking.

For all these reasons, the Court will not sua sponte issue an order of attachment on Defendant's savings account.

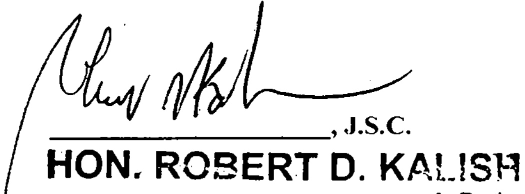
[8] Plaintiff's counsel stated at oral argument that he is not seeking an order of attachment and that an analysis under CPLR 6201 is not appropriate.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Plaintiff Rachel Mosley, pursuant to CPLR 6301, for a preliminary injunction "freezing the Defendant's assets" is denied.

This constitutes the decision and order of the Court.



Dated: November 17, 2017
New York, New York

_______________, J.S.C.
HON. ROBERT D. KALISH

1. Check one:................................ ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:........ MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:...................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE