

Matter of Asensio v Rosario

2018 NY Slip Op 30364(U)

February 27, 2018

Supreme Court, New York County

Docket Number: 158837/2017

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK · JAS PART 47

In the Matter of
MANUEL P. ASENSIO,

Index No.: 158837/2017
Mot. Seq.: 001& 002

Petitioner,

-against-

DECISION, ORDER
& JUDGMENT

MAGISTRATE SERENA ROSARIO,
EMILIE MARIE BOSAK, SUSAN MOSS,
and ALEXIS WOLF

Respondents.

PAUL A. GOETZ, J.

PROCEDURAL HISTORY

In this Article 78 prohibition proceeding, Petitioner seeks review of Support Magistrate Rosario’s March 1, 2016, order of disposition (violation of support order) by default (New York County Family Court File #: 12842; and Docket #: F-31461-14/14B; Exhibit 3 to the petition) wherein the Magistrate ordered, inter alia, Petitioner to pay Susan Melissa Moss, the attorney for Emilie Bosak, counsel fees in the amount of \$47,885.50 by June 1, 2016. Petitioner argues that Magistrate Rosario exceeded her authority by disregarding a contract between Petitioner and Ms. Bosak prohibiting them from seeking legal fees from each other.¹ After filing his petition and notice of petition Petitioner filed a motion for a default judgement (Mot. Seq. 002).

Magistrate Rosario cross moves to dismiss the petition pursuant to CPLR 3211 on the grounds that the court lacks personal jurisdiction over her; Petitioner’s claims are barred by the doctrines of res judicata and collateral estoppel; and this Article 78 proceeding is procedurally improper.

Respondents Susan Moss and Alexis Wolf cross move to dismiss the petition on the grounds that it is time barred; Petitioner failed to exhaust his available remedies at law; and the petition fails to state a clear legal right to the requested relief. Ms. Wolf also raises personal jurisdiction as a basis for dismissal. In addition, Ms. Moss and Ms. Wolf cross move for the imposition of attorney’s fees against Petitioner pursuant to 22 NYCRR 130-1.1 on the grounds

¹The purported agreement between Petitioner and Ms. Bosak is not annexed to the petition.

that the petition is frivolous.

ANALYSIS

In support of his petition, Petitioner correctly argues that Family Court is a court of limited jurisdiction (*Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008] [observing “Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute”]). Moreover, Supreme Court may, in the exercise of its discretion, invoke the extraordinary remedy of a writ of prohibition upon a showing that a Support Magistrate has acted without jurisdiction and in excess of authority (*Accord Johnson v Shelton*, 12 AD3d 203, 204 [1st Dept 2004] [holding that Supreme Court may issue a writ of prohibition against a Family Court judge]).

Writ of Prohibition

Under Article 78 a petition may assert that an “officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction . . .” (CPLR 7803 [2]); and in so asserting the petitioner is seeking the extraordinary remedy of a writ of prohibition that only lies “where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction” (*Rush v Mordue*, 68 NY2d 348, 352 [1986]).

Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings. Permitting liberal use of this extraordinary remedy so as to achieve, in effect, premature appellate review of issues properly reviewable in the regular appellate process would serve only to frustrate the speedy resolution of disputes and to undermine the statutory and constitutional schemes of ordinary appellate review.

(*Id.* at 353). “Prohibition may lie, however, where the claim is substantial, implicates a fundamental constitutional right, and where the harm caused by the arrogation of power could not be adequately redressed through the ordinary channels of appeal” such as “when a defendant is about to be prosecuted in violation of his constitutional right against double jeopardy . . .” (*Id.* at 354).

Support Magistrates’ Authority

Family Court Act 439 (a) details support magistrates’ authority and provides in pertinent part, that “support magistrates shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article” which includes determining whether a person is in violation of a support order (*Cortland Co. Dept. of Social Services v Perry*, 150 AD3d 1351 [3rd Dept 2017] [holding support magistrates have authority to adjudicate violations

of support orders)) and imposing attorney's fees pursuant to Family Court Act 438 (*Duff v Gregory*, 135 AD3d 754 [2nd Dept 2016] [holding Family Court erred in determining that the Support Magistrate did have authority to award attorney's fees]). Consequently, Magistrate Rosario did not act outside her jurisdictional authority nor exceed her statutory authority when she ordered Petitioner to pay attorney's fees in the January 27, 2016, order of disposition (violation of support order) by default. Moreover, Petitioner had a clear procedural avenue available to him to contest the imposition of attorney's fees in the default order which further militates against issuing a writ of prohibition (*Rush*, 68 NY2d at 354). The proper procedure in such instance is to move to vacate the January 27, 2016, default order (CPLR 5015 [a]; *Sacks v Abraham*, 114 AD3d 799 [2nd Dept 2014]) and if denied by the Support Magistrate then file a written objection to the denial to be decided by a Family Court judge (Fam Ct Act 439 [e]). If the Family Court judge denies the objection, then Petitioner's remedy is to appeal that denial to the Appellate Division (Fam Ct Act 1111; *Sacks*, 114 AD3d at 800). Indeed, the January 27, 2016, order advises Petitioner in footnote 1 that to challenge the order he may be limited to filing a motion to vacate.

Accordingly, by imposing counsel's fees in her January 27, 2016, order, Magistrate Rosario did not exceed her statutory authority under the Family Court Act and therefore, the cross motions to dismiss must be granted, the motion for a default judgment denied, and the petition denied and dismissed (*Cf Pinkins v City of New York*, 2009 NY Slip Op 30649 [U]; 2009 NY Misc LEXIS 4595 [SC NY Co 2009] [denying Article 78 petition seeking an order directing support magistrate to credit the petitioner with certain amounts]).

Sanctions pursuant to 22 NYCRR 130-1.1

Sanctions may be imposed against a party in a pending civil action when the party engages in frivolous conduct (22 NYCRR § 130-1.1). Conduct is frivolous if it is completely without merit in law, is undertaken to delay, harass or maliciously injure another or is asserts material factual statements that are false (*Id.*). Sanctions are often tied directly to "abuse of the judicial process" (*Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999]), for example where a party exhibits a "continuous pattern of conduct" (*Grayson v NYC Dept. Of Parks & Recreation*, 99 AD3d 418, 419 [1st Dept 2012]) despite prior court warnings to desist the offending conduct (*Levy*, 260 AD2d at 34).

While the court is aware that Petitioner initiated other Article 78 petitions against a Family Court judge (Index Nos. 155833/2017 & 156692/2017), since this petition is against the Support Magistrate and it pertains to different issues than the petitions against the Family Court judge, the court cannot conclude that Petitioner's unpersuasive arguments in this proceeding are not made in good-faith thereby warranting the imposition of sanctions (*Levy*, 260 AD2d at 35).

Accordingly, Ms. Moss's application for sanctions in the form of attorney's fees must be denied.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that Petitioner's motion for a default judgment (Mot. Seq. 002) is **DENIED**; and it is further,

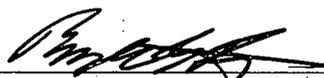
ORDERED that Respondents' cross motions to dismiss are **GRANTED**; and it is further

ADJUDGED that the petition (Mot. Seq. 001) is **DISMISSED**.

This constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York
February 27, 2018

ENTER:



Hon. Paul A. Goetz, JSC