SHORT FORM ORDER

INDEX NO. 5035/2016

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DAVID MCMAHON,

Plaintiff,

-against-

TAMMY DECICCO,

Defendant.

ORIG. RETURN DATE: JUNE 15, 2016
FINAL SUBMISSION DATE: MARCH 2, 2017
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: DECEMBER 15, 2016
FINAL SUBMISSION DATE: MARCH 2, 2017
MTN. SEQ. #: 002
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
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DEFT'S/RESP ATTORNEY:
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Upon the following papers numbered 1 to 10 read on these motions FOR AN ORDER OF ATTACHMENT AND DISMISSAL.
Order to Show Cause and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Affirmation in Opposition and supporting papers 7, 8; Reply Affirmation and supporting papers 9, 10; it is,

ORDERED that this motion by plaintiff DAVID MCMAHON for an Order of Attachment, pursuant to CPLR 6201 and 6210:

(1) directing the Sheriff of Suffolk County or the Sheriff of any county of the State of New York, to levy within his or her jurisdiction upon such property in which the defendant TAMMY DECICCO has an interest and upon such debts owing to the defendant as will satisfy $61,000, the amount of plaintiff's demand, together with probable interest, costs, and Sheriff's fees and expenses;

(2) attaching defendant's assets on the grounds that defendant, with intent to defraud plaintiff, has disposed of, damaged, encumbered, or secreted

property, or removed it from the state or is about to do any of these acts; that a cause of action for breach of contract exists in favor of plaintiff and against defendant; that it is likely that plaintiff will succeed on the merits of its breach of contract claim against defendant and will recover judgment in an amount exceeding $61,000; and that plaintiff is entitled to recover this amount over and above all counterclaims know to him;

(3) fixing the amount to be secured by the prejudgment attachment, inclusive of probable interest, costs and Sheriff's fees and expenses, at $61,000;

(4) fixing plaintiff's undertaking of not more than $25,000 on the condition that plaintiff shall pay to defendant an amount not exceeding $5,000 for any legal costs and/or damages which may be sustained by reason of the attachment, and up to and not exceeding $1,500 to the Sheriff for allowable fees, if defendant recovers judgment or if it is decided that plaintiff is not entitled to an attachment of defendant's property; and

(5) permitting plaintiff to conduct expedited discovery to determine the location of defendant's assets and bank accounts, as well as the debts owed to defendant,

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

ORDERED that this motion by defendant TAMMY DECICCO for an Order:

(1) pursuant to CPLR 3212 (a), granting defendant's motion for summary judgment dismissing plaintiff's complaint;

(2) pursuant to CPLR 3211 (a) (8), dismissing plaintiff's complaint for lack of personal jurisdiction;

(3) pursuant to CPLR 308, dismissing plaintiff's complaint for defective service of process; and, pursuant to CPLR 3211 (a) (2), dismissing plaintiff's complaint because this Court lacks subject matter jurisdiction;

(4) pursuant to CPLR 327 (a), dismissing plaintiff's complaint for inconvenient forum; or, in the alternative

(5) pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint for failure to state a cause of action,

is hereby **GRANTED** solely to the extent set forth hereinafter.

On May 18, 2016, plaintiff commenced this action against defendant by Order to Show Cause, Summons and Verified Complaint. On even date, the Court (Martin, J.) issued the following temporary restraining Order ("TRO"):

> **ORDERED** that, pending the determination of this Order to Show Cause, and given that significant prejudice would result if Plaintiff notified Defendant of the Temporary Restraining Order application, Defendant and all persons acting in concert with Defendant and its garnishees be and hereby are temporarily restrained and prohibited from transferring or paying any assets of Defendant or any personal or real property in which Defendant has an interest, or any debt owed to Defendant to the extent of $61,000 and it is further;
>
> **ORDERED** that, pending the return date of this Order to Show Cause Defendant is restrained from removing the 2015 Ford Explorer, bearing VIN 1FM5K8F81FGB81567 and the engagement ring described herein from the County of Suffolk, State of New York.

By Order of this Court dated June 23, 2016, the TRO was amended to extend the restraint of the property in question pending a decision on the motion.

Plaintiff asserts one cause of action herein, to wit: for the return of an engagement ring worth $13,700 and other payments made by plaintiff allegedly in contemplation of a marriage to defendant that did not occur. Plaintiff claims that he made numerous payments on behalf of defendant in contemplation of marriage, including $15,000 for a downpayment on a 2015 Ford Explorer, as well as co-signing a loan for the vehicle in the amount of $33,000; $12,000 for veterinary bills for defendant's dog; $1,200 for an engine for defendant's son; $2,150 for defendant's dentistry; $3,000 for furniture; and at least $30,900 "for other expenses of the Defendant and her family." Plaintiff contends that he has given defendant a total of $61,326.59 in contemplation of marriage.

Plaintiff's motion seeks an Order of Attachment and other relief as described hereinabove. Initially, the Court notes that defendant was personally served with the Order to Show Cause on August 17, 2016, in Charlottesville, Virginia, well beyond the deadline of June 9, 2016, imposed by the service provision of the Order to Show Cause. In any event, in the interest of judicial economy, the Court will reach the merits of plaintiff's application.

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 Flemingdon 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*, 118 AD2d 769; *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*, 105 AD2d 167).

Here, the Court finds the allegation that defendant "is no longer residing in New York, and has removed some or all of the property at issue out of state frustrating enforcement" does 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 (*Mineola Ford Sales*, 242 AD2d 371; *Societe Generale Alsacienne De Banque, Zurich*, 118 AD2d 769). In opposition, defendant avers that she moved to Virginia to work full-time in November 2015, prior to the commencement of this action. Notably, plaintiff's own complaint recites that defendant resides in Barboursville, Virginia. With respect to the merits, as will be discussed more fully below, defendant has raised questions of fact as to whether the subject ring and other payments were given in contemplation of marriage or merely as gifts.

Therefore, plaintiff's motion for an Order of Attachment 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 TRO, relative to the engagement ring, shall remain in full force and effect pending further Order of the Court, but is otherwise hereby vacated.

With respect to defendant's motion for dismissal and/or summary judgment, the Court finds that personal jurisdiction was obtained over defendant by personal service of process upon her on August 17, 2016, in Charlottesville, Virginia (*see* CPLR 306-b; 308 [1]; 313). Further, the Court finds that defendant is subject to the jurisdiction of this Court concerning the engagement ring, as it is undisputed that the ring was given by plaintiff to defendant in Sag Harbor, New York (*see Dreznick v Lechner*, 41 AD3d 769 [2007]).

Plaintiff's cause of action is based upon Civil Rights Law § 80-b, which addresses gifts in contemplation of marriage. Pursuant to Civil Rights Law § 80-b, an individual may recover property or other gifts where the sole motivation for the transfer was a contemplated marriage which never occurred (*see Gaden v Gaden*, 29 NY2d 80 [1971]; *Von Bing v Mangione*, 309 AD2d 1038 [2003]; *Clapper v Kohls*, 169 AD2d 860 [1991]).

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The Court finds that plaintiff has sufficiently pleaded a cause of action pursuant to Civil Rights Law § 80-b to recover the alleged monetary conditional gifts, as well as the return of the engagement ring. Therefore, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff has stated a cause of action under Civil Rights Law § 80-b (*see* CPLR 3211 [a] [7]).

Regarding that branch of defendant's motion for summary judgment, on such a motion the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the

nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman*, 49 NY2d 557; *Blake v Guardino*, 35 AD2d 1022 [1970]).

In the case at bar, the Court finds that defendant has made an initial *prima facie* showing of entitlement to judgment as a matter of law dismissing the claims for the other conditional gifts allegedly made by plaintiff, as defendant has demonstrated that those payments and transactions were made outside of the State of New York (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre*, 35 NY2d 361; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Therefore, the Court does not have jurisdiction over those claims (*cf.* CPLR 302). Thus, the burden shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial with respect to these claims (*Alvarez*, 68 NY2d 320). Plaintiff failed to do so. Plaintiff has not refuted defendant's allegations that these claims arise from dealings of the parties without the state (*cf. Dreznick*, 41 AD3d 769).

However, the Court finds that it has jurisdiction over the claim for return of the engagement ring, as the marriage proposal was made in New York. Notwithstanding the foregoing, defendant has raised questions of fact as to whether the ring was a gift given solely in contemplation of marriage, or rather as a Christmas present (*see Poupis v Brown*, 90 AD3d 881 [2011]; *Lipschutz v Kiderman*, 76 AD3d 178 [2010]; *Northern Trust, N.A. v Delley*, 60 AD3d 1345 [2009]).

Accordingly, defendant's motion is **GRANTED** solely to the extent that plaintiff's claims against defendant for $15,000 for a downpayment on a 2015 Ford Explorer, $12,000 for veterinary bills, $1,200 for an engine, $2,150 for dentistry, $3,000 for furniture, and $30,900 for other expenses of defendant and her family are hereby dismissed.

Finally, defendant's request, pursuant to CPLR 327 (a), that this matter be dismissed due to New York being an inconvenient forum, is **DENIED**. On a motion pursuant to CPLR 327 to dismiss the complaint on the ground of *forum non conveniens*, the burden is on the movant to demonstrate the relevant private or public interest factors that militate against a New York court's acceptance of the litigation (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984]; *Stravalle v Land Cargo, Inc.*, 39 AD3d 735 [2007]). "Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the actionable events, and the burden which will be imposed upon the New York courts, with no one single factor controlling" (*Kefalas v Kontogiannis*, 44 AD3d 624, 625 [2007]).

Upon weighing the relevant factors, the Court finds that defendant has failed to meet her burden for dismissal. The claims arising from the dealings of the parties outside of New York have now been dismissed, plaintiff resides in New York, and the alleged engagement which gives rise to this action took place in New York. Moreover, defendant has failed to show that the hardship to her or her potential witnesses is so great as to warrant dismissal of the action in New York (*see Kefalas*, 44 AD3d 624). The Court notes that defendant has retained local counsel in New York to defend her interests herein.

The foregoing constitutes the decision and Order of the Court.

Dated: July 18, 2018

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**