

J. Remora Maintenance LLC v Efromovich
2019 NY Slip Op 33072(U)
October 16, 2019
Supreme Court, New York County
Docket Number: 650943/2011
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 650943/2011

J. REMORA MAINTENANCE LLC, and REMORA
MAINTENANCE LLC,

MOTION DATE 04/02/2019

Plaintiffs,

MOTION SEQ. NO. 006 007

- v -

**DECISION + ORDER ON
MOTION**

GERMAN EFROMOVICH,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226

were read on this motion to/for CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs' motion is denied with respect to their claim that Efromovich is in contempt for not providing information regarding his Itau/Helm Bank account in his response to their information subpoena, and it is further

ORDERED that Efromovich's cross motion to dismiss is denied; and it is further

ORDERED that the remaining issues in plaintiffs' motion is referred to a Special Referee to hear and report at the time of

trial; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) Efromovich's interest, if any, in the \$ 3.1 million transferred out of his personal Citibank account, and whether those transfers violated the restraining notice;

(2) Efromovich's ownership interest in the assets held in the Itau/Helm Bank account;

(3) Efromovich's role in numerous entities with which he may be affiliated (as listed in the January 14, 2019 Perrelle affirmation, paragraphs 4, 5, 6, 7 and 8), and whether he wholly owns or controls those entities for the purpose of piercing the corporate veil;

(4) what compensation, in any form, does Efromovich receive from Avianca Holdings, S.A; and

(5) the referee is authorized to order the production of documents that are required to resolve the aforementioned issues.

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall

assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with

the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website); and it further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

DECISION

On their judgment enforcement application, plaintiffs seek an order from this the court holding defendant in contempt, alleging

that he violated a valid restraining notice and failed to provide them with complete information regarding his assets in his response to their information subpoena. Plaintiffs also seek an order directing defendant to turn over all his assets held in two bank accounts, and to turn over the compensation he receives from serving on the board of directors of Avianca Holdings, S.A. Defendant cross-moves to dismiss the application.

Factual and Procedural Background¹

This action arises out of the breach of a personal guarantee. Plaintiffs J. Remora Maintenance LLC and Remora Maintenance LLC (together Remora) seek to enforce a judgment, entered on January 30, 2014, in their favor and against defendant German Efromovich (Efromovich), in the amount of approximately \$12.7 million (the Judgment).

On June 10, 2014, Remora served a restraining notice and information subpoena upon Efromovich. By notice of motion dated June 17, 2014, Efromovich moved to vacate or quash the restraining notice and information subpoena. By decision on the record, dated November 13, 2014, and so ordered on March 23, 2105, the court (Marcy Friedman, J.), upheld the restraining notice but vacated the information subpoena without prejudice to reservice of a more

¹ Portions of this factual recitation are taken from the court's decision and order dated October 12, 2018 (Marcy Friedman, J.).

appropriately limited information subpoena.

On or about December 8, 2014, Remora served Efromovich with a revised information subpoena. Efromovich served a sworn response dated January 13, 2105. For more than three years, no further enforcement proceedings were taken in this action.

On February 22, 2018, plaintiffs moved, in the Commercial Division before Justice Marcy Friedman, for an order, pursuant to CPLR 5251, holding Efromovich in contempt for allegedly violating the restraining notice and allegedly falsely answering the information subpoena; an order, pursuant to CPLR 5225, directing Efromovich to turnover assets in a bank account at Itau (Panama), S.A. formerly known as Helm Bank (Itau/Helm Bank); and an order, pursuant to CPLR 5226, directing payment to Remora of compensation to be received by Efromovich as a director of Avianca Holdings, S.A. (Avianca Holdings). Efromovich cross-moved to dismiss the proceeding and to strike the information subpoena.

On October 12, 2018, Justice Friedman issued an order holding that the matter was to be transferred from the Commercial Division because the Commercial Division Rules provide that proceedings to enforce a judgment cannot be heard in the Commercial Division. Such court also noted that the issues raised by Remora, that Efromovich violated the restraining notice by transferring over \$3 million in assets from his personal bank account to third parties, and that Efromovich made false statements in his response to the

information subpoena by failing to disclose assets, bank accounts, ownership interests, and transfers², were more appropriately addressed in a special proceeding. The court noted that:

"Efromovich's roles in numerous entities with which he may be affiliated are therefore at issue in the both the contempt and turnover motions. The court assumes without deciding, for purposes of this motion, that Remora may ultimately be able to meet the legal threshold required to reach assets with which Efromovich is affiliated - e.g.. to make a showing sufficient to pierce the corporate veil. Such a showing would, however, likely require a factually intensive inquiry that is more appropriately undertaken in a special proceeding . . . The factual issues on the 5226 claim also overlap with the factual issues on the contempt and 5225 claims regarding Efromovich's roles in the affiliated entities"

The court then converted the motions into a special proceeding and referred the matter to the trial support office for reassignment.

On February 21, 2019, the motions were orally argued before the undersigned.

In their motion for contempt, plaintiffs argue that Efromovich should be held in contempt because he violated the restraining notice by transferring over \$3 million of his personal assets to third parties without satisfying the Judgment, and because he falsely swore in his response to the information subpoena by omitting the full extent of his personal assets, the

²In moving for contempt and turnover, Remora asserts that Efromovich failed to identify all entities wholly owned and/or controlled by him and that he omitted 84 companies that plaintiffs claim Efromovich controls.

names and assets of the entities he wholly owns and/or controls, and certain unlawful transfers he made. Plaintiffs allege that Efromovich is a director and executive officer of Synergy Group Corporation (Synergy Group), and that it is owned through a trust established for the benefit of Efromovich and his brother Jose Efromovich. Plaintiffs claim that Synergy Group is a Panamanian holding company that owns and controls over 80 companies across the aerospace, oil, gas and shipping sectors. Plaintiffs contend that Efromovich indirectly owns and controls Synergy Group and all of its affiliates, and that these assets are available to satisfy the Judgment. Plaintiffs also seek an order directing Efromovich to turn over all assets held by him in accounts at Itau/Helm Bank, and any other bank, wherever located until the Judgment is satisfied. Plaintiffs also seek an order directing Efromovich to turnover any and all payments he receives for serving on the board of directors for Avianca Holdings.

Efromovich opposes this motion on several grounds. Efromovich argues that pursuant to the court's October 15, 2018 order, these motions were converted into a special proceeding, yet plaintiffs have not taken any steps to convert the motions to a special proceeding. Further, Efromovich argues that plaintiffs waited three years to bring this contempt application challenging his responses to the information subpoena. Thus, Efromovich argues that this misconduct should preclude them from being awarded

interest on the judgment which accrued because of plaintiffs', not his, delay. In other words, the doctrine of laches should preclude plaintiffs' claims for interest on the judgment.

Efromovich argues further that since plaintiffs' application seeking to hold him in contempt was not personally served on him, the contempt portion of the motion should be stricken.

Efromovich also argues that plaintiffs' motion should be dismissed for failure to join necessary parties. Efromovich argues that plaintiffs seek turnover of assets held at the Itua/Helm Bank and his Avianca Holdings directorship fees, yet plaintiffs have not joined those parties to this action. Efromovich argues that Itau/Helm Bank and Avianca Holdings may be "inequitably affected" by any judgment of this court if they are not joined in this action.

Efromovich argues that plaintiffs cannot seek a contempt order based upon his alleged failure to comply with a non-judicial information subpoena; contempt is only available for a violation of a judicial subpoena. Rather, the remedy for failure to comply with a non-judicial is to seek a judicial order compelling compliance with the information subpoena. But in any event, Efromovich argues that he has complied with the information subpoena and provided extensive answers to plaintiffs' questions. Further, plaintiffs' contention that Efromovich has other assets including over 80 entities which he controls, simply raises an

issue of fact to be resolved at an evidentiary hearing.

With respect to plaintiffs' claim that, in his response to the information subpoena, he should have listed his Itau/Helm Bank account as an asset, Efromovich notes that that account was opened in March 2015, after he provided his response to the information subpoena. Therefore, since that account did not exist at the time the information subpoena was served, he cannot be in contempt.

With respect to various entities plaintiffs allege he controls, Efromovich argues that the Synergy Group and its subsidiaries are not controlled, owned, or possessed by him. In fact, Synergy Group is owned by a trust, Synergy Trust. The Synergy Trust was established in Guernsey, Channel Islands in 1998. Efromovich notes that while he and his brother are discretionary beneficiaries of the Synergy Trust, the trust is controlled by the trustees. Accordingly, those entities are not his for the purposes of satisfying the Judgment. Efromovich argues that to the extent the information subpoena seeks information on the assets of the Synergy Group, it is overbroad and should be stricken.

With respect to plaintiffs' claims that the transfers in and out of his Citibank account violated the restraining notice, Efromovich contends that the \$1.6 million transferred from his account to Synergy Shipyard was part of a loan from one of the Synergy Group entities to Synergy Shipyard. However, since that entity did not have a bank account, the loan was facilitated

through his Citibank account.

With respect to the Avianca Holdings directorship fees, Efromovich contends that CPLR 5226 provides that 90% of those fees are exempt from judgment enforcement. Further, the director fees are only paid to Efromovich if he attends the board of director's meetings; thus, they are contingent fees. Therefore, contrary to plaintiffs' claims, these fees are not available for judgment enforcement.

Discussion

Efromovich's Cross Motion to Dismiss

At the outset the court notes that on October 12, 2018, Justice Friedman converted this matter into a special proceeding and referred it an IAS Part. In the opinion of this court, this matter has already been converted into a special proceeding and requires no further action by plaintiffs.

Efromovich's claim that plaintiffs failed to join necessary parties is without merit. To the extent plaintiffs seek to hold Efromovich in contempt no other parties are necessary. Further, plaintiffs' CPLR 5225 claim for the turnover of assets held by Efromovich in his Citibank and Itau/Helm accounts, a court may direct a judgment debtor to turnover assets in his possession (see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V., 41 AD3d 25, 36 [1st Dept 2007]; Miller v Doniger, 28 AD3d 405, 405 [1st Dept 2006]; see also Weinstein-Korn-Miller, NY Civ Prac ¶ 5225.21 ["The court

. . . may use CPLR 5225 (c) to order the debtor to execute and deliver a withdrawal slip so that his bank account in this or in another state may be reached"). Since the funds that are held in these bank accounts are in Efromovich's control and possession there are no other necessary parties. With respect to plaintiffs' CPLR 5226 claim for the turnover of Efromovich's Avianca compensation, the court has the power to direct Efromovich to turnover that compensation should it be found to be available to satisfy the Judgment.

Moreover, contrary to Efromovich's arguments, to the extent plaintiffs' order to show cause seeks an order of contempt service upon Efromovich's attorney was proper. NYS Judiciary Law § 761 provides "[a]n application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge" (see Judiciary Law § 761). An order to show cause why a party to a special proceeding should not be punished for contempt for disobedience of an order made in such proceeding does not institute a new proceeding, but is an order in such special proceeding, and can be properly served upon the attorneys therein of the party proceeded against (see Matter of Shapiro, 64 Misc 476 [Sup Ct, NY County 1909]; See also Pitt v Davison, 37 NY 235 [1876]; Hudson Str. Owner Equities, LLC v Escoffier, 36 Misc 3d 127[A] [App Term, 1st Dept 2012]).

Efromovich's contention that plaintiffs' contempt application must be denied based on the doctrine of laches, is unavailing. To satisfy the elements of the doctrine of laches, Efromovich must demonstrate an unreasonable and inexcusable delay by plaintiffs which resulted in prejudice to him (see Dante v 310 Associates, 121 Ad2d 332, 334 [1st Dept 1986]). However, a delay in enforcing a judgment, resulting in accruing interest, does not constitute prejudice to a defendant (see C.T. Holdings, Ltd. v Schreiber Family Charitable Found., Inc., 154 AD3d 433 [1st Dept 2017]). Efromovich could have paid the judgment and avoided the accumulation of interest.

Efromovich's argument that plaintiffs' motion must be dismissed because of their failure satisfy 22 NYCRR § 202.7(a), is without merit because this rule only applies to a "motion relating to disclosure or to a bill of particulars" (see 22 NYCRR § 202.7[a]). Plaintiffs' motion seeks an order of contempt and turnover of assets, it is not a discovery motion. Likewise, Efromovich's argument that contempt is not a remedy available under the CPLR for non-compliance with an information subpoena is not correct (see In re Estate of Lupoli, 275 AD2d 44 [2d Dept 2000]; Idaho Potato Packers Corp. v. Hunts Point Indus. Park, Inc., 58 AD2d 547 [1st Dept 1977]).

Efromovich's argument that the information subpoena is overbroad because it asks for information regarding the assets of

Synergy Group is also without merit. Should plaintiffs succeed in their application to pierce the corporate veil and establish that Synergy Group and its affiliates are assets of Efromovich, they will be entitled to information regarding those assets.

Whether Efromovich violated the restraining notice by transfers in and out of his Itau/Helm Bank and Citibank accounts, and whether plaintiffs are entitled to Efromovich's board of director's fees from Avianca Holdings, are issues of fact (see *infra*). Thus, Efromovich is not entitled to dismissal of those claims.

Plaintiffs' Motion for Contempt and Turnover of Assets

Plaintiffs' application for contempt due to Efromovich's failure to provide them with information, in response to the information subpoena, regarding his Itau/Helm Bank account is denied. Since that account was not opened until March 2015, Efromovich did not fail to report it to plaintiffs.

With respect to the remaining issues raised in plaintiffs' application, as noted by Justice Friedman the questions of Efromovich's roles in numerous entities with which he may be affiliated are issues in both plaintiffs' contempt and turnover motions and are factually intensive. Likewise, the issues whether Efromovich is entitled to a board of director's fee and the turnover of such a fee overlap with the issues of contempt and plaintiffs' CPLR § 5225 claims regarding Efromovich's roles in the

affiliated entities. Therefore, these issues shall be referred to a Judicial Hearing Officer or Special Referee who shall hear and report their findings on these factual issues.

<u>10/16/2019</u> DATE					<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE