

<b>Kelly v New York Network Mgt., LLC</b>
2020 NY Slip Op 31647(U)
May 29, 2020
Supreme Court, Kings County
Docket Number: 522255/16
Judge: Wavny Toussaint
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At an IAS Term, Part 70, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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KEVIN KELLY and EDEL KELLY,  
  
Plaintiffs,

Index No. 522255/16

-against-

**DECISION AND ORDER**

NEW YORK NETWORK MANAGEMENT, L.L.C. and  
ELIZABETH KELLY,

Defendants.

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<u>The following e-filed papers read herein:</u>	<u>NYCEF Doc. Numbers</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations).....	<u>204-217 234-247</u>
Opposing Affidavits (Affirmations).....	<u>235-247</u>
Reply Affidavits (Affirmations).....	_____

Upon the foregoing papers, plaintiffs Kevin Kelly (Kevin) and Edel Kelly (Edel), move (in Mot. Seq. 9) for an order: (1) granting a warrant for the arrest of defendant Elizabeth Kelly (Elizabeth) and her imprisonment pending compliance with this court's April 20, 2018 order of contempt, pursuant to Judicial Law § 753 (A)(3); (2) striking Elizabeth's answer with counterclaims and granting them a default judgment against Elizabeth, pursuant to CPLR 3126; and (3) imposing sanctions against Elizabeth and

awarding them legal fees and costs for the filing of this motion, pursuant to 22 NYCRR 130-1.1 (Part 130). Elizabeth cross-moves (in Mot. Seq. 10) for an order, pursuant to CPLR 2201 and/or 5519 (c), staying any order of contempt pending the resolution of the (stayed) appeal from the court's October 2017 order.

### ***Background***

Pending before this court are two related actions involving overlapping parties: (1) *New York Network Management v Kevin Kelly*, index No. 522203/16 (Action 1), and (2) the instant action (Action 2). Action 1 and Action 2 both arise from the sale of New York Network Management (NYNM) to NYNM Acquisition Corp. NYNM is a medical service organization, which owned and operated numerous Independent Practice Associations in conjunction with insurers. Elizabeth was the managing member of NYNM. Kevin and Edel are Elizabeth's son and daughter, who claim an interest in NYNM.

On December 14, 2016, NYNM commenced Action 1 against Kevin seeking damages for alleged tortious interference with business relations, defamation and injunctive relief. That same day, Kevin commenced Action 2 against NYNM and Elizabeth for monetary damages based on alleged forgery of documents, failure to pay K-1 distributions, wages and overtime and misrepresentation of income taxes on K-1s. Kevin subsequently amended the complaint in Action 2 to add Edel as a plaintiff and assert additional claims for breach of contract, conversion, breach of fiduciary duty, breach of duty of good faith and fair dealing, quantum meruit, dissolution of NYNM and

injunctive relief. Essentially, the amended complaint in Action 2 alleges that NYNM and Elizabeth attempted to deprive Kevin and Edel of the proceeds of the sale of NYNM.

On December 15, 2016, NYNM moved in Action 1, by order to show cause, for an order: (1) enjoining and restraining Kevin, or anyone on his behalf, from contacting and/or communicating in any manner with any person or entity which has been a client, account, or business relation of NYNM, including but not limited to Fidelis Insurance (Fidelis) and Constellation, and (2) enjoining and restraining Kevin, or anyone on his behalf, either directly or indirectly, from using any of NYNM's confidential information and/or proprietary information, including but not limited to contract negotiations, documents and materials provided to Constellation. Pending the determination of NYNM's motion, the court granted NYNM a temporary restraining order (TRO), staying all transfers, sales and exchange of money between NYNM and Constellation.

On January 3, 2017, the court issued an interim order, modifying the TRO to allow the sale of NYNM to proceed "upon the condition that five (5%) percent of the net proceeds<sup>1</sup> received at the closing are held in escrow by the firm of Holland and Knight." The January 3, 2017 order further provided that Kevin's attorney be provided with "a final sale document showing the amount paid to [NYNM] at the closing." Notably, Elizabeth was neither a party to Action 1, nor referenced in the relevant orders.

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<sup>1</sup>

"Net proceeds" was not defined within the January 2017 order. While the order appears facially to have been limited to funds "received at the closing," the parties have correctly interpreted it as including the proceeds of the sale even if tendered later (as appears to have been the case).

On or about February 15, 2017, Kevin and Edel cross-moved in Action 1 for an order: (1) consolidating Action 1 and Action 2, pursuant to CPLR 602, and (2) granting a preliminary injunction enjoining NYNM and Elizabeth from selling NYNM or its assets or making any distribution of profit to its members without retaining five percent of any net sales proceeds or profit distributions in an escrow account for the benefit of Kevin, and an additional five percent in escrow for the benefit of Edel, pending a final judgment or settlement of the litigation, pursuant to CPLR 6301.

On March 10, 2017, while Kevin and Edel's cross motion for an injunction was pending, NYNM was sold, in accordance with the court's January 3, 2017 order.

In an order dated October 20, 2017, the court determined that the December, 2016 and January, 2017 decisions were law of the case and that the stays and injunctive relief issued therein were binding and should continue. As Edel had been added to Action 2 following the January, 2017 order, the court directed that an additional five percent of the proceeds of the sale of NYNM (for a total of 10% of the net proceeds) should be held in escrow to protect Edel's interest. The court determined that such relief was warranted because Kevin and Edel had demonstrated a likelihood of success on the merits and that there would be significant prejudice if Elizabeth were allowed to dispose of or secrete the proceeds of the sale. Importantly, the court further ordered that Actions 1 and 2 be jointly tried, but specifically denied consolidation.

Meanwhile, NYNM moved in Action 1 for miscellaneous relief against Kevin, and Kevin and Edel cross-moved for a protective order and to compel compliance with the

January 3, 2017 Order. By a March 28, 2018 order, the court noted that the prior orders had directed that Kevin's attorney must be provided with a final sale document showing the amount paid to NYNM at the closing, inclusive of the money paid and received, and that the October, 2017 order directed the sale to proceed on the condition that 10% of the net proceeds be held in escrow by NYNM's transactional attorney pending further court order. Noting that the sale had already closed, NYNM was ordered to provide Kevin and Adel with a closing statement within 30 days of service upon NYNM of a copy of the March, 2018 order with notice of entry.

On or about November 8, 2018, NYNM and Elizabeth moved in Action 1 for leave to reargue the October, 2017 order and filed a notice of appeal relative to that order. Thereafter, Kevin and Edel moved for an order holding NYNM and/or Elizabeth in contempt of court for failing to comply with the court's prior orders. Specifically, Kevin and Edel argued that NYNM and Elizabeth failed to provide any closing documents or demonstrate that any funds were being held in escrow, contending that such failure prejudiced them in that discovery has been hindered and their interests left unprotected.

By an April 17, 2018 order, the Court denied reargument and rejected NYNM's and Elizabeth's contention that a confidentiality agreement was necessary prior to the production of the requested documents, finding that the prior orders required that the closing documents be proffered without condition and that sufficient confidentiality provisions were already in place. For that reason, the court adjudged NYNM and Elizabeth to be in contempt. Similarly, the court found them in contempt for their failure

to escrow the additional 5% of the net proceeds of the sale as required by the October 2017 order.<sup>2</sup> Though the sale pre-dated the October 2017 order, NYNM and Elizabeth were on notice that Kevin and Edel had moved for increased escrow and did not apprise the Court that the sale had closed.

On May 9, 2018, Kevin and Edel moved in Action 1, by order to show cause, for an order: (1) granting a warrant for the arrest of Elizabeth and imprisonment pending her compliance with the April 20, 2018 order of contempt, pursuant to Judicial Law § 753 (A)(3); (2) striking NYNM's and Elizabeth's pleadings, and granting them a default judgment against Elizabeth and NYNM, pursuant to CPLR 3126; and (3) imposing sanctions and awarding them legal fees and costs for the filing of the motion, pursuant to Part 130.

By a May 23, 2018 letter, Elizabeth and NYNM's then-counsel, advised that he only learned about the April 2018 contempt order that morning, that he had not previously brought it to his client's attention, that neither he nor his client would be so callous as to disregard the April 2018 contempt order and that he needed until the

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<sup>2</sup>

The Court recognizes that the January 2017 order which created the initial escrow requirement was issued only in Action 1 to which Elizabeth was not (and is not) a party and did not put any onus for the deposit upon her. Likewise, the October 2017 order directed NYNM's attorney, rather than Elizabeth, to escrow a portion of the proceeds of the sale. As such, the Court acknowledges that the April 2018 order's characterization of the October 2017 order as "unequivocally" directing NYNM and/or Elizabeth to hold an additional five percent of the proceeds of the sale in escrow is questionable. The resultant holding that Elizabeth was in contempt of court for failing to do so and requiring her to deposit ten percent of the proceeds of the sale in escrow within ten days of service of a copy of that order with a notice of entry was, consequently, flawed.

following week to meet with his client. Based on this response letter, Kevin and Edel's order to show cause was not processed.

On July 6, 2018, Kevin and Edel filed another motion in Action 1, seeking the same relief as their May 2018 motion, as well as summary judgment dismissing the complaint as against Kevin (Edel is not a party to Action 1). However, NYNM filed for bankruptcy protection the previous day. Accordingly, both Action 1 and Action 2 were stayed; Kevin and Edel subsequently withdrew their motion.

On September 14, 2018, Kevin and Edel removed both Action 1 and Action 2 to the United States Bankruptcy Court for the Eastern District of New York. By stipulation between Elizabeth, Kevin and Edel, the Bankruptcy Court issued a June 30, 2019 order remanding the claims between those parties (the claims against Elizabeth in Action 2) back to this court. In contrast, the claims by or against NYNM in Action 2 were not remanded.

In light of the limited remand, Kevin and Edel filed the instant motion in Action 2 (all previous relevant motion practice occurring within Action 1), seeking a subset of the relief already sought in Kevin and Edel's withdrawn motion within Action 1. Elizabeth, through new counsel, cross-moved for a stay pending the resolution of her appeal from the October 2017 order.



## *Discussion*

### *Kevin and Edel's Motion*

This court need not reach the merits of that branch of Kevin and Edel's motion that seeks a warrant for Elizabeth's arrest and imprisonment pending her compliance with this court's April 20, 2018 order of contempt. While there has been much cross-over between Action 1 and Action 2, this court previously denied consolidation of those Actions. Thus, it remains true that neither Edel nor Elizabeth is a party to Action 1, and all motion practice relevant to the October 2017 and April 2018 orders took place in Action 1. In fact, Kevin and Edel previously sought the instant relief against NYNM and Elizabeth in Action 1, but were thwarted by NYNM's bankruptcy filing and the resultant bankruptcy stay. Thereafter, Kevin and Edel removed both Action 1 and Action 2 to Bankruptcy Court and withdrew their motion for contempt and discovery sanctions in Action 1. Although the claims against Elizabeth in Action 2 were remanded to this court, all of the relevant orders stem from Action 1, which remains before the Bankruptcy Court. This Court will not countenance Kevin and Edel's attempt to circumvent the bankruptcy stay by refiling their prior motion against NYNM and Elizabeth in Action 1 against Elizabeth in Action 2.

In any event, the January 3, 2017 order was directed against NYNM only, the October 20, 2017 order lacked a clear directive requiring Elizabeth to personally escrow funds, and the April 17, 2018 order was premised upon the prior orders. For the

foregoing reasons, that branch of Kevin and Edel's motion seeking to penalize Elizabeth for contempt is denied.

Kevin and Edel similarly seek an order striking Elizabeth's answer with counterclaims and granting them a default judgment against Elizabeth, pursuant to CPLR 3126, because she allegedly failed to comply with the orders issued in Action 1 directing the production of the closing file from the sale of NYNM. The January 3, 2017 order, issued prior to the sale, provided that Kevin's "Attorney must be provided with a final sale document showing the amount paid to the plaintiff [NYNM] at the closing inclusive of the monies paid and received." Likewise, the March 28, 2018 order reiterated that "since it is alleged that the sale has closed, NYNM is ordered to provide Kevin and Adel with a closing statement as required by the" January 3, 2017 order. The April 17, 2018 order rejected NYNM and Elizabeth's explanation as to why they had not previously produced such documents and ordered them "to turn over all financial information regarding the Sale." As all of the relevant orders were issued in Action 1, this court finds Kevin and Edel's motion for discovery sanctions against Elizabeth in Action 2 to be improper.

Even if the were court to address the merits of Kevin's and Edel's contentions, it appears undisputed that Elizabeth's counsel produced a copy of the required documents in October, 2019, if not before. Consequently, that branch of Kevin and Edel's motion seeking discovery sanctions against Elizabeth is denied.<sup>3</sup>

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<sup>3</sup> In light of the Court's findings, that branch of Kevin and Edel's motion seeking the imposition of Part 130 sanctions against Elizabeth also fails.

### *Elizabeth's Cross Motion*

“Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just” (CPLR 2221). “A court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, duplication of proof, and the potential waste of judicial resources” (*Felix v Law Offices of Thomas F. Liotti*, 129 AD3d 773 [2015]).

Elizabeth cross-moves for an order staying “any order of contempt” pending the contempt pending the determination of her and NYNM’s appeal from the October 2017 order. That appeal, however, is itself stayed by NYNM’s bankruptcy and there is no time frame for its resolution. Furthermore, in light of this court’s unwillingness to consider a motion for contempt of an order issued in Action 1, there is no risk of inconsistent adjudications, duplication of proof, or waste of judicial resources. As such, Elizabeth’s cross motion for a stay is unwarranted.

However, Kevin and Edel’s claims against Elizabeth cannot reasonably proceed without NYNM’s participation in Action 2. Kevin and Edel’s claims in Action 2 stem from actions taken under the aegis of NYNM and arise from the sale of NYNM. Elizabeth, the managing member of NYNM, and NYNM are largely inseparable, and their actions are significantly overlapping and intertwined. As the claims against NYNM are now before the Bankruptcy Court, it is not appropriate to separately adjudicate Elizabeth’s role and potential liability in the Supreme Court. Although Kevin, Edel and

Elizabeth have stipulated to sever and remand the claims against Elizabeth in Action 2 back to this court, proceeding with Kevin and Edel’s claims against Elizabeth in the absence of NYNM could lead to inconsistent judgments, duplication of proof and a waste of judicial resources. Thus, this court stays the instant action pending the completion of NYNM’s bankruptcy proceedings. Accordingly, it is

**ORDERED** that Kevin and Edel’s motion (in Mot. Seq. 9) is denied; and it is further

**ORDERED** that Elizabeth’s cross motion (in Mot. Seq. 10) is denied; and it further

**ORDERED**, that the instant Action 2 is stayed in its entirety, pending resolution of NYNM’s pending bankruptcy proceeding.

This constitutes the decision and order of the Court.

ENTER:



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J. S. C.