

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T:

HON. FELICE J. MURACA, A.J.S.C.

IAS/TRIAL PART 41

CLOUDFUND, LLC,

Plaintiff,

DECISION & ORDER

Index No. 612768/2022

Motion Seq. 001

-against-

XXX

**C & J ELECTRICAL
CONSTRUCTION INC.,
AND CHARLES WAYNE HENNIG JR.**

Defendants.

The e-filed documents numbered 12-29 were reviewed in preparing this Decision and Order.

Defendants move by Order to Show Cause pursuant to CPLR § 5240 seeking an Order granting restitution from a garnishment of funds from Defendants' out-of-state bank accounts. Plaintiff submitted opposition.

Plaintiff commenced this action on September 26, 2022, alleging Defendant defaulted on a merchant cash advance agreement. Defendants signed a Stipulation of Settlement, and a judgment was entered on January 4, 2023, for approximately \$245,000 dollars.

Defendants contend that Plaintiff violated the separate entity rule, by garnishing funds from Defendants' bank accounts, Wells Fargo and Chase. Defendants contend that both accounts were opened in Katy, Texas, and therefore the New York City Marshal, Stephen W. Biegel (Marshall Biegel), cannot levy the funds without violating the separate entity rule. Defendants proffer the Contract, the Stipulation of Settlement, the Judgment and two bank statements, (1) Chase bank account (#7507), (2) Wells Fargo bank account (#3485), and within the Attorney Affidavit, two additional "screenshots" of a synopsis of the Chase bank and Wells Fargo accounts. Defendants contend Marshal Biegel garnished a total of \$193,594.21 dollars from the two accounts.

Plaintiff contends the Defendants' motion is defective based on its failure to attach judgment devices and admissible evidence supporting their claims. Plaintiff argues that Defendants claims are meritless since 1) the Judgment Debtors lack standing to raise personal jurisdiction objections like the separate entity rule for a non-party garnishee bank; 2) the non-party banks waived any separate entity rule objections; 3) the separate entity rule is a waivable objection; 4) Defendants have failed to demonstrate that they filed their motion in the requisite "reasonable time" as required by the Court of Appeals; and 5) Defendants' restitution requests are legally meritless.

“CPLR Article 52 sets forth procedures for the enforcement of money judgments in New York, which may include the imposition of a restraining notice against a judgment debtor's bank account to secure funds for later transfer to the judgment creditor through a sheriff's execution or turnover proceeding.” (*Capital Advance Services, LLC v Zomongo.Tv USA Inc.*, 2022 N.Y. Slip Op. 31486[U], 3 [N.Y. Sup Ct, Kings County 2022] (quoting, *Cruz v TD Bank, N.A.*, 22 NY3d 61, 66 [2013]). The Court may “on its own initiative or upon motion...make an order denying, limiting,... [or] regulating...the use of any enforcement procedure.” CPLR § 5240. “Even after the assets have been transferred to the judgment creditor...the court could reverse the transfer by issuing an order “denying” the execution and directing restitution by the judgment creditor.” (*Cruz* at 76).

The separate entity rule established that while a bank garnishee “is subject to personal jurisdiction, its other branches are to be treated as separate entities” with respect to Article 52 post-judgment restraining notices. (*See Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149, 161 [2014]). Therefore, a post-judgment restraining notice in a foreign jurisdiction is ineffective. (*Id.*)

For the reasons discussed below, the Court grants Defendants' request prohibiting Plaintiff from garnishing wages from Defendants' out-of-state bank accounts in the future. (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts, Inc.*, 269 AD2d 101, 101 [1st Dept 2000]). First and foremost, Plaintiff concedes that they garnished \$30,758.46 dollars from Defendants, in February of 2023 through post-judgment enforcement. Plaintiff also concedes they are actively attempting to garnish another \$60,977.69. Plaintiff intentionally avoids providing *any* evidence that the money was garnished appropriately through legal enforcement procedures.

Instead, Plaintiff avers that Defendants' lack of evidence requires denial of the motion in its entirety. While Plaintiff is correct that Defendants' lack of evidence prohibits this Court from awarding restitution, Plaintiff's reliance on inaccurate legal principles must be addressed. Defendants are an interested party and therefore do not lack standing to raise personal jurisdiction objections like the separate entity rule for a non-party garnishee bank. (*Capital Advance Services, LLC v Zomongo.Tv USA Inc.*, 2022 N.Y. Slip Op. 31486[U], 5 [N.Y. Sup Ct, Kings County 2022]; *Cruz v TD Bank, N.A.*, 22 NY3d 61, 68 [2013]). Plaintiff "does not point to any binding legal authority that stands for the proposition that the separate entity rule is a waivable affirmative defense that precludes the court from considering it." (*Capital Advance Services*, at 5.)

Lastly, Plaintiff's claim Defendants are required to prove that the time of their motion was reasonable under the circumstance. There is no authority requiring them to do so, as CPLR § 5240 can be upon the Court's own motion. CPLR § 5240 relief must be sought in "a timely manner." (*Cruz* at 76.) The Judgment was entered on January 4, 2023. Plaintiff has admitted to garnishing funds in the two-month time period before Defendants brought this Order to Show Cause. The Court finds this CPLR § 5240 application is timely.

Defendants' application, while exigent, was made without supporting evidence to order restitution. There is no proof of when or where the banks accounts were open, other than the self-serving Affidavit. The bank statements were one-page documents that did not reflect withdrawal transactions based on a date or by whom. The Chase statement is a one-page document which showed twenty (20) electronic withdrawals, but no proof that \$169,920.73 dollars were garnished by the NYC Marshal. Defendants impermissibly submitted partial bank documents as screenshot throughout the Affidavit. The Wells Fargo screenshot did not reflect an account number or an account holder. Therefore, there is insufficient evidence to order restitution of the alleged improperly garnished funds.

Accordingly, it is hereby

ORDERED, that Defendants' motion is GRANTED in part to the extent that Plaintiffs are prohibited from garnishing funds from out-of-state bank accounts under the separate entity rule; and it is further


ORDERED, that Defendants' application for restitution is DENIED.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this Court. Submit Judgment on notice.

Dated: September 19, 2023
Mineola, NY

ENTER:


Hon. Felice J. Muraca, A. J. S. C.