SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Part 10

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Bam Bam Entertainment LLC
Calendar no. 5 & 6

Plaintiff(s) **Index no. 513005/2017**

-against-

DECISION/ORDER

Richard J. Pagnotta

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment and cross motion for summary judgment

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Answering Affidavits	
Replying Affidavits	
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion and cross motion is as follows:

Andrew Borrok, J.

Bam Bam Entertainment LLC, a Florida limited liability company (the **Plaintiff**) moves for (i) summary judgment on its claim for $10,668.25, and (ii) continuance and severance on its claim for punitive damages, arguing that New York City Marshal Richard J. Pagnotta (the **Marshal**) should be liable for levying on Plaintiff's bank account located outside the City of New York to partially satisfy a debt which Plaintiff does not dispute it owes. The Marshal cross-moves for summary judgment requesting dismissal.

At issue is whether a New York City Marshal can be liable for levying on Plaintiff's bank account located outside of New York City to satisfy a valid confession of judgment entered into against Plaintiff. We find that it can not. Accordingly, the Plaintiff's motion is denied in its entirety, the Marshal's motion is granted and the action is dismissed.

THE RELEVANT FACTS AND CIRCUMSTANCES

The relevant facts before the Court are straightforward and not in dispute.

In consideration of a debt in the principal amount of $22,350.00 plus interest owed by Plaintiff dba CYN Night Club and personally guaranteed by Louis Nassif Atallah (the **Judgment Debtor**) to Unique Funding Solutions LLC (the **Judgment Creditor**) per a certain merchant agreement, the Judgment Debtor signed an Affidavit of Confession of Judgment, dated January 10, 2017 (the **Confession of Judgment**) both personally and on behalf of the Plaintiff. A Judgment was entered on January 31, 2017 (the **Judgment**) in favor of the Judgment Creditor in the amount of $25,679.15 in the Supreme Court of the State of New York, Erie County.

Pursuant to the Judgment, on February 1, 2017, the Marshal sent a levy to Fifth Third Bank, Attn: Custodian of Records, 1MOC2Q5050 Kingley Drive, Cincinnati OH (the **Bank**). On February 6, 2017, the Bank honored the levy and issued a check in the amount of $10,668.25 (i.e., approximately 50% of the amount of the Confession of Judgment) to the Marshal.

Significantly, in the matter before this Court, the Plaintiff does not dispute the validity of the debt. Rather, the Plaintiff argues that the Marshal should be personally liable for executing on property located outside of New York to satisfy the Plaintiff's valid debt because the Plaintiff asserts that the Marshal's levy authority is limited to New York City.

DISCUSSION

I. Plaintiff's Motion of Summary Judgment

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima

facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Tessier by Tessier v. New York City Health and Hosp. Corp.*, 177 A.D.2d 626 [2d Dept 1991] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Failure to make such a primary facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] *citing Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]. Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]. In this action, the Plaintiff argues that he is entitled to summary judgment because the Marshal did not have authority to levy on the Plaintiff's bank account located outside of New York City to satisfy the Plaintiff's otherwise valid debt.

Relying on *Silberstein v. Presbyterian Hospital in New York*, 96 A.D.2d 1096 91983), the Plaintiff argues that the Marshal should be personally liable for wrongful execution. The Plaintiff's reliance on *Silberstein* is however misplaced.

In Silberstein, the court held that a law firm and hospital can be held liable where the hospital knew or should have known that execution on a default judgment based on its own otherwise unverified account receivable was improper. In that case, Presbyterian Hospital (the **Hospital**) obtained a default judgment in the amount of $2,005.00 against Stanley Silberstein and served an execution on Mr. Silberstein's bank account. Thereafter, Mr. Silberstein had the default judgment vacated for lack of personal jurisdiction and the money was returned. Nonetheless, Mr. Silberstein sued for wrongful execution arguing that the Hospital and its law firm knew or should have known that the default judgment was void and that as a result he suffered embarrassment and financial hardship. The Hospital and the law firm failed to timely answer because, they indicated, that notwithstanding the fact that they had executed on the default judgment they had obtained in respect of Mr. Silberstein's "debt" (i.e., their own account receivable), they needed to check their own records in order to file an answer and counterclaim. The court denied Mr. Silberstein's motion for default judgment against the Hospital based on the alleged law office failure and did not dismiss the case because the Hospital and defendant law firm could be liable for the irregular process (re: lack of jurisdiction) which occasioned loss to Mr. Silberstein.

This is simply not that case. The case at bar does not involve a private entity or its law firm. It involves a New York City Marshal, and, unlike in *Silberstein*, there is simply no factual basis to find that the Marshal knew or should have known that the debt owed by the Judgment Debtor and the Plaintiff is invalid.[1] In fact, in this case, the Judgment Debtor and Plaintiff executed the Confession of Judgment in favor of a third party: to wit, the Judgment Creditor. Although the Judgment Debtor and Plaintiff may have suffered embarrassment and financial hardship as a result of the execution, it is occasioned solely by their own failure to pay their bill rather than by an improper execution by the Marshal. In other words, the claim in the case at *nisi prius*, is that the Marshal lacked the *authority* to perform this execution, not that execution pursuant to the Judgment itself is improper (i.e., a wrongful execution) or that the Judgment Debtor and the Plaintiff do not in fact owe the monies levied. Put another way, in a blatant attempt to avoid having to pay its bill (i.e., having the Marshal pay the money that Plaintiff owes the Judgment Creditor) and under the transparent guise of this action against the Marshal (which would in effect amount to a sanction of the Marshal[2]), Plaintiff conflates an action for wrongful execution, which this is not,[3] with a complaint that the Marshal did not faithfully execute the duties of his office by exceeding the reach of his levy authority.

For the avoidance of doubt, wrongful execution has long been recognized as a cause of action where the underlying debt was either discharged or was otherwise invalid. This is even the case if the debt appears valid at the time of the levy if later the debt is discharged or invalidated as the debt is deemed void *ab initio*. *See, E.g., Era Realty Co. V. RBS Properties*, 185 A.D.2d 871, 586 N.Y.S.2d 831 [2d Dept. 1992]. The rationale being that when a party levies on a debt, the party levying, levies at the risk that the debt is not a proper debt.

In the seminal case of *Ruckman v. Cowell*, 1 N.Y. 505, 1 Comst. 505 [1848], the court held that following discharge of a debt in bankruptcy in respect of a judgment entered on two promissory notes, the judgment creditor who levied on

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[1] Putting aside that this case involves the Confession of Judgment signed by the Plaintiff and the Judgment Debtor (i.e., and not an alleged account receivable of the party levying for its own unverified account), there simply is no statutory or other authority for the proposition that marshals are required to evaluate the validity of a judgment. Moreover, to hold otherwise, would be to create an expensive and unmanageable burden not intended or otherwise codified by the legislature and one not recognized in over 170 years of established jurisprudence. *See Ruckman v. Cowell*, 1 NY 505, 1 Comst 505 (1848).

[2] As discussed in full below, pursuant to the NY City Civil Court Act of 1963, as amended (the **NY City Civil Court Act**), the legislature vested the power to sanction a New York City Marshal in the Appellate Divisions.

[3] It is not disputed that Plaintiff and the Judgment Debtor owe the monies levied upon pursuant to the Confession of Judgment.

certain goods owed by the judgment debtor was liable in conversion, but the officer who made the levy could not be held liable:

> As the execution was regular upon its face, and issued from a court of competent jurisdiction, it was a protection to the officer who made the levy; but it could not justify the party at whose instance it was issued. He acted at his peril. It is true that he may have been ignorant of the discharge, but it was his misfortune. Having seized the goods without authority, it was a trespass for which must answer; however innocent he may have been of any intention to do an illegal act.

The fundamental principle of *Caveat Creditor* has been reaffirmed in the Second Department. For example, in *Era Realty Co. v. RBS Properties*, 185 A.D.2d 871, 586 N.Y.S.2d 831 [2d Dept. 1992], the court held that the judgment creditor (RBS Properties (**RBS**)) could be held liable for levying on the judgment debtor's bank account. *Era* involved an assignment of a lease from *Era Realty Co.* (**ERA**) to RBS. The owner-landlord brought a summary proceeding against both RBS and ERA and RBS cross-claimed against ERA. A default judgment was obtained in the amount of $50,000.00 in favor of RBS on its cross-claim against ERA, and RBS levied on ERA's bank account. Subsequently, ERA successfully moved to vacate the default judgment and sued RBS for improper conversion. RBS moved to dismiss and the lower court granted the motion. The Second Department reversed holding that RBS could be liable for executing judgment on the judgment debtor's bank account as the judgment was void *ab initio*. *See Era*, at Pg. 873.

New York City Marshals are neutral government officers free of any conflict of interests. They act under the direction of the court and may rely on the presumption of regularity that attaches to a court order. *See Korinsky v. Rose*, 120 A.D.3d 1307, 130, 3 N.YS.2d 2 [2d Dept. 2014] *citing Cla-Mil E. Holding Corp. V. Medallion Funding Corp.*, 6 N.Y.3d 35, 38-39, 813 N.YS.2d 1, 846 N.E.2d 431; see also New York City Civil Court Act §§ 1601, 1601-a. *See also Ruckman v. Cowell, infra.*

Indeed, Article 16 of the New York City Civil Court Act, provides for and governs New York City Marshals. Notably, Section 1604(a) requires that no Marshal shall be permitted to enter into the duties of her office until she has given a bond in accordance with the statute which, among other things, requires two sureties who shall be residence of the City of New York and each of whom shall be the owner of real estate with double the value of the penalty of the bond and for such bond to be approved by the court. The bond shall provide that the Marshal and the sureties shall jointly and severally answer to the City of New York and any persons that may complain, for the true and faithful execution by such Marshal of the duties of

her office (e.g., failing to comply with the terms of the regulations, exceeding the Marshal's authority to levy, etc.).[4]

The Appellate Division may reprimand, censure, temporarily suspend or permanently remove any Marshal for cause provided that certain due process requirements are met. N.Y. City Civil Court Act § 1610. Section 1612 of the N.Y. City Civil Court Act provides that the Appellate Division may delegate its authority except its authority to permanently remove a Marshal.

In Joint Administrative Order 453, dated November 12, 1975 (**Order 453**) and Joint Administrative Order 456, dated February 27, 1976 (**Order 456**), the Appellate Division of the Supreme Court First Judicial Department and the Appellate Division of the Supreme Court, Second Judicial Department, established detailed procedures for the oversight and discipline of New York City Marshals for failure to comply with the mandate of their office.

Order 453 provides that the Department of Investigations or its designees, may take complaints, make inquiries, conduct investigations and hearings in all aspects of the Marshal's activities and may promulgate regulations subject to the approval of the Appellate Divisions.[5] Order 453 further provides that the Commissioner of Investigations may refer charges and evidence to the Appellate Division for disciplinary action or removal proceedings. Order 456 provides, among other things, that charges brought by the Commissioner of Investigations shall be in writing and filed with both Appellate Divisions in accordance with Section 1610 of the Civil Court Act.

To be clear, a Marshal may be held liable for damages caused by negligently executing a valid order of seizure or warrant of eviction. *See Korinsky v. Rose*, 120 A.D.3d 1307, 130, 3 N.YS.2d 2 [2d Dept. 2014]; *Marcado v. Weinheim*, 108 Misc.2d 81, 43 N.Y.S.2d 973 (Bronx. Civ. Ct. 1981); *Sleepoy v. Kliger*, 26 Misc.3d 126(A), 906 N.Y.S2d 783, 2009WL4932725. To establish a cause of action for negligence, however, the plaintiff must establish the existence of a duty

[4] The Plaintiff argues without specificity that this is not an isolated incident where the Marshal has levied on property outside of New York City and that, in fact, the Marshal demonstrates a complete disregard of the regulations as it relates to the scope of the Marshal's authority. For the avoidance of doubt, the only matter before this Court is the matter involving the levy on the Plaintiff's account described in the complaint in this matter. The court expresses no opinion as to whether inquiry or investigation should be made by the Department of Investigations regarding the Marshal.

[5] Pursuant to this authority, the Department of Investigations promulgated a handbook of regulations which was approved on February 10, 1978, and has been amended since. The current handbook has an effective date of April 24, 2013.

on defendant's part to plaintiff, breach of duty and damages. *Korinsky v. Rose*, 120 A.D.3d 1307, 130, 3 N.YS.2d 2 [2d Dept. 2014]. In this case, among other deficiencies in the Plaintiff's pleadings, the Plaintiff can not establish any damages as there simply is no dispute that the Judgment Debtor and the Plaintiff owe the money that was levied upon to pay the monies owed the Judgment Creditor.[6]

In other words, the legislature enacted the NY City Civil Court Act vesting authority in the Appellate Divisions for the oversight and appropriate sanction and removal of New York City Marshals. Pursuant to NY City Civil Court Act § 1604, Marshals are required to furnish certain security (i.e., a court approved bond with two sureties) for the faithful performance of the Marshal's duties. Although a Marshal may be held liable for negligence where a prima facie case for negligence can be established by the Plaintiff, there can be no basis for any such action where there are no damages. Holding the Marshal liable in an action where, as here, the Plaintiff was not damaged by a levy which pays a portion of its debt would amount to (i) with respect to the Plaintiff, having the Marshal pay the Plantiff's debt and (ii) with respect to the Marshal, amount to a sanction of the Marshal. Both are inappropriate. It is simply not for this Court to create a private remedy where one was never intended by the legislature, where both a forum and a mechanism for addressing alleged abuse of authority already exists and certainly not in a case where the Marshal has executed on a facially valid confession of judgment.

Accordingly, the Plaintiff's motion for summary judgment is denied.

II. Plaintiff's Motion For Severance and Continuance and Punitive Damages

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[6] The Marshal argues that the Plaintiff is a foreign limited liability company that is not registered to do business in New York. This is however wholly irrelevant. In New York, domestic limited liability companies (i.e., limited liability companies formed in New York) are required satisfy the publication requirement set forth in Section 206(a) of the New York Limited Liability Company Act of 1994, as amended. If the publication requirement of Section 206 is not completed within 120 days of formation, the limited liability company is precluded from maintaining an action or special proceeding in any New York court until the publication requirement is satisfied. *Barklee Realty Co. V. Pataki*, 309 A.D.2d 310 (2003). In order for a foreign limited liability company (i.e., a limited liability company formed outside of New York) to obtain a Certificate of Authority to Do Business in New York, the foreign limited liability company must also satisfy the publication requirement. N.Y.Ltd. Liab. Co. Law § 802(b). Failure to satisfy the publication requirement precludes the foreign limited liability company to maintain an action or special proceeding in any New York court until the publication requirement is satisfied. N.Y.Ltd. Liab. Co. Law § 808(a). However, there is no publication requirement of a foreign limited liability company which does not do business in New York. Section 803(a)(1) of the New York Limited Liability Company Law makes clear merely maintaining or defending an action does not constitute doing business. Inasmuch as, the Marshal does not contend that the Plaintiff is "doing business in New York", it is without significance that Plaintiff is a Florida limited liability company.

Because we find that the Plaintiff is not entitled to summary judgment as to its claim for actual damages, the branch of Plaintiff's motion requesting severance and continuance on its claim for punitive damages is moot.

III. Defendant's Cross Motion For Summary Judgment

Inasmuch as the Plaintiff's claim is without merit for the reasons set forth above, the Marshal's cross-motion for summary judgment is granted. CPLR § 3212(b).[7]

IV. Conclusion

For the reasons set forth above, the Plaintiff's motion for summary judgment is denied in its entirety and the Marshal's cross-motion for summary judgment is granted. Accordingly, the case is dismissed.

Dated: April 11, 2018

Hon. Andrew Borrok
Justice of the Supreme Court

[7] Punitive damages are an element of a single total claim for damages and a demand for punitive damages does not amount to a separate cause of action. *Peter A. Brandenberg v. Blue Cross and Blue Shield of Greater New York*, 78 A.D.2d 534 [2d Dept. 1980], *Nancy Fiesel v. Nanuet Properties Corporation*, 125 A.D.2d 292 [2d Dept. 1986], *Paul Sanfilippo v. Metropolitan Life Insurance Co.*, 74 A.D.2d 600 [2d Dept. 1980], *Louise Yates v. Chrysler Corporation and Chrysler Credit Corporation*, 79 A.D.2d 656 [2d Dept. 1980].