State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 1, 2021 531116

EDWARD HALSE, as Administrator of the Estate of AMANDA HALSE, Deceased,
Respondent,
v

SHAHED HUSSAIN, Also Known as MALIK SHAHID HUSSAIN, MALIK SHAHID SHAKIR HUSSAIN, MALIK HUSSAIN, MALIK RIAZ HUSSAIN, MIKE HUSSAIN and MIKE BEGUM, Individually and Doing Business as PRESTIGE LIMOUSINE AND CHAUFFEUR SERVICES, HASY LIMOUSINE and SARATOGA LUXURY LIMOUSINE, et al.,
Appellants,
et al.,
Defendants.

MEMORANDUM AND ORDER

Calendar Date: February 10, 2021

Before: Lynch, J.P., Clark, Aarons, Reynolds Fitzgerald and Colangelo, JJ.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Albany (Marc J. Kaim of counsel), for appellants.

LaMarche Safranko Law PLLC, Albany (Aimee E. Greer of counsel), for respondent.

Colangelo, J.

Appeal from an order of the Supreme Court (Buchanan, J.), entered November 26, 2019 in Saratoga County, which granted plaintiff's motion to confirm an order of attachment.

In October 2018, a rental limousine suffered a catastrophic brake failure and crashed in the Town of Schoharie, Schoharie County, killing Amanda Halse (hereinafter decedent) and 19 others. The limousine was titled to defendant Shahed Hussain as the proprietor of a limousine rental business run under various names, an enterprise owned and/or operated by himself, defendant Nauman Hussain and defendant Malik Riaz Hussain. An investigation after the accident revealed failings in the registration, inspection, maintenance and operation of the limousine, and Nauman Hussain, who was handling the day-to-day affairs of the limousine rental business during the relevant period, is facing criminal charges for improperly putting the limousine into service on the day of the crash.

In October 2019, plaintiff, the administrator of decedent's estate, commenced this action asserting various claims against the Hussains and defendant Mavis Discount Tire, Inc., which had inspected the limousine and claimed to have performed repair work on it before the crash. Plaintiff simultaneously sought an ex parte order of attachment against four parcels of real property – one titled to Malik Riaz Hussain, one to Shahed Hussain and two to Nauman Hussain – that had been listed for sale. The order of attachment was granted and, following levy, plaintiff moved to confirm it in a timely manner (see CPLR 6211 [b]). The confirmation motion was granted by Supreme Court in a November 2019 order, and Shahed Hussain and Nauman Hussain (hereinafter collectively referred to as defendants) appeal.

We begin by noting that defendants did not take an appeal from the October 2019 order of attachment and, indeed, had no right to do so given that it was granted without notice (see CPLR 5701 [a] [2]; Cascioli v Gonzalez, 173 AD2d 1064, 1064 [1991]). As such, their attempt to directly attack the October

2019 order is not properly before us. The appropriate inquiry is instead whether Supreme Court, in the November 2019 order, abused its discretion by granting plaintiff's motion to confirm and continue the order of attachment (see CPLR 6211 [b]; Morganthau v Avion Resources Ltd., 49 AD3d 50, 58 [2007], mod on other grounds 11 NY3d 383 [2008]). After considering the record from that perspective – and bearing in mind that the statutory provisions authorizing the drastic remedy of attachment must be "strictly construed in favor of those against whom it may be employed" (Grafstein v Schwartz, 100 AD3d 699, 699 [2012]; accord Northeast United Corp. v Lewis, 137 AD3d 1387, 1388 [2016]) – we affirm.

In order to obtain confirmation, plaintiff was obliged to "demonstrate[] the grounds for the attachment, the need for the continuing levy and the probability that [he] would succeed on the merits in [his] action against" defendants (Board of Educ. of City of N.Y. v Treyball, 86 AD2d 639, 640 [1982], appeals dismissed 56 NY2d 683, 803 [1982], lvs dismissed 57 NY2d 601, 670, 673 [1982]; see CPLR 6211 [b]; 6212 [a]). Notwithstanding defendants' complaints, plaintiff appropriately attempted to satisfy that burden via an attorney affirmation in which counsel annexed documentary evidence to support some allegations and cited sources for others made "upon information and belief" (see Swiss Bank Corp. v Mehdi Eatessami, 26 AD2d 287, 290 [1966]; Executive House Realty v Hagen, 108 Misc 2d 986, 988 [1981]; see also Kuriansky v Bed-Stuy Health Care Corp., 135 AD2d 160, 169-170 [1988], affd 73 NY2d 875 [1988]). Plaintiff demonstrated a probability of success on his claims, pointing to an affirmation from the Schoharie County District Attorney and supporting exhibits setting forth how the limousine was not safe to drive at the time of the accident because of brake problems and other regulatory and safety issues and that Nauman Hussain, who was handling the day-to-day affairs of the business after Shahed Hussain left the country, knew or should have been aware of that fact. It further appears that the potential recovery on those claims exceeds any counterclaims from defendants (see CPLR 6212 [a]). The issue accordingly turns to whether plaintiff established one or both of his claimed grounds for attachment, and we address each in turn.

Plaintiff first pointed to CPLR 6201 (3), which, because he is likely to succeed in recovering a money judgment against defendants, applies if defendants "assigned, disposed of, encumbered or secreted property," or were about to do so, with the "intent to defraud [their] creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor" (see Northeast United Corp. v Lewis, 137 AD3d at 1388). The four parcels at issue were listed for sale in 2019 and, contrary to defendants' contention, those listings constituted an attempt to "dispose[] of" the parcels (CPLR 6201 [3]; see Arzu v Arzu, 190 AD2d 87, 92 [1993]; Black's Law Dictionary [11th ed 2019], disposition). As "[t]he mere removal or assignment or other disposition of property is not grounds for attachment," however, plaintiff was further required to show that defendants offered the four properties for sale with the requisite intent to either defraud their creditors or frustrate a potential money judgment (Laco X-Ray Sys. v Fingerhut, 88 AD2d 425, 429 [1982], appeal dismissed 58 NY2d 826 [1983], lvs dismissed 58 NY2d 606, 970 [1983]; see 651 Bay St., LLC v Discenza, 189 AD3d 952, 953 [2020]).

Plaintiff endeavored to do so by noting, among other things, defendants' long history of retaining effective control over real property while engineering the transfer of title between themselves, Malik Riaz Hussain, other family members and closely held business entities, as well as their penchant for using aliases and impersonating other family members. Plaintiff further articulated how that behavior was ongoing, describing how one of defendants' close relatives had transferred title for several properties to a limited liability company that is apparently controlled in part by defendants and that bases its operations at a motel, purportedly operated by the relative, on one of the parcels at issue. The foregoing proof, particularly given that defendants placed the parcels at issue on the market when they knew or should have known that litigation relating to the limousine accident was looming, readily permitted the inference that their actions were intended to frustrate enforcement of a potential money judgment against them (see City of New York v Citisource, Inc., 679 F Supp 393, 397 [SD NY 1988]; Albany Sav. Bank v All Advantages Limousine Serv., 154

AD2d 759, 761-762 [1989]). Plaintiff therefore met his burden of showing that defendants harbored the requisite intent in attempting to dispose of the parcels at issue and, in the absence of any proof to rebut that showing, he was properly granted confirmation under CPLR 6201 (3) (see Albany Sav. Bank v All Advantages Limousine Serv., 154 AD2d at 761-762; compare Northeast United Corp. v Lewis, 137 AD3d at 1388-1389).

Plaintiff was also entitled to confirmation with regard to Shahed Hussain because he was "a nondomiciliary residing without the state" within the meaning of CPLR 6201 (1). Plaintiff represented, with support from annexed newspaper accounts, that Shahed Hussain left New York for Pakistan in March 2018 and had no plans to return to the United States. Those facts, which defendants presented no evidence to dispute, were sufficient to show that Shahed Hussain had established his domicile in Pakistan (see Matter of Brunner, 41 NY2d 917, 918 [1977]; Gotham Natl. Bank v Martin, 167 App Div 271, 273 [1915]). Further, even accepting that Shahed Hussain had submitted to the jurisdiction of Supreme Court so as to require the additional showing of "an identifiable risk that [he] will not be able to satisfy the judgment,"[1] that risk is apparent from defendants' conduct in placing the parcels at issue on the market with the intent to frustrate the enforcement of a money judgment (VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 60 [2013]; see ITC Entertainment, Ltd. v Nelson Film Partners, 714 F2d 217, 219, 221 [2d Cir 1983]). Thus, CPLR 6201 (1) provided a separate basis to confirm the order of attachment with regard to the parcel owned by Shahed Hussain.

Finally, although defendants complain that their ability to sell their real property is being impaired, they have the

[1] Shahed Hussain suggested that he would submit to jurisdiction because he had already done so in a related action, but the record reflects that he raised a jurisdictional defense therein. Plaintiff further represented at oral argument that, in this action, Shahed Hussain refused to reveal his whereabouts so that he could be served and, after being served via publication, raised a jurisdictional defense in his answer.

power to restore that ability by moving for a discharge of the attachment and giving an undertaking "in an amount equal to the value of the property . . . sought to be discharged" that can be paid to plaintiff should he recover a money judgment against them (CPLR 6222). To the extent not addressed above, defendants' contentions have been considered and are meritless.

Lynch, J.P., Clark and Reynolds Fitzgerald, JJ., concur.

Aarons, J. (concurring).

The majority concludes that plaintiff's motion to confirm the ex parte order of attachment was correctly granted based upon CPLR 6201 (3) and, alternatively, under CPLR 6201 (1). I concur with the majority's analysis concerning CPLR 6201 (3). I disagree, however, with that part of the majority's decision concluding that defendant Shahed Hussain (hereinafter defendant) was "a nondomiciliary residing without the state" (CPLR 6201 [1]).

In support of his motion, plaintiff's counsel alleged in an affidavit that, "upon information and belief," defendant was "sojourning in Pakistan" since March 2018 and did not intend to return to the United States.[1] In making this statement, plaintiff relied on newspaper articles reporting on defendant's whereabouts. Such newspaper articles are hearsay (see Baker v City of Elmira, 271 AD2d 906, 909 [2000]). Although plaintiff may allege facts upon information and belief, "that information and belief must be competently derived" (Swiss Bank Corp. v Medhi Eatessami, 26 AD2d 287, 290 [1966]). The newspaper articles merely make generalized statements about defendant's location and do not reveal how those statements were derived. Plaintiff defends his reliance on such hearsay evidence by arguing that primary evidence of defendant's domicile would have to come from defendant himself and, therefore, was unavailable to him. Domicile, however, can be proved by evidence of an

[1] I note that a "sojourn" is defined as "a temporary stay" (Merriam-Webster On-line Dictionary, https://www.merriam-webster.com/dictionary/sojourn).

individual's conduct (see Matter of Clute v Chu, 106 AD2d 841, 843 [1984]; see e.g. Matter of Brunner, 41 NY2d 917, 918 [1977]; Laufer v Hauge, 140 AD2d 671, 673 [1988], appeal dismissed 72 NY2d 1041 [1988]). As such, in my view, plaintiff did not submit competent evidence establishing that defendant was a nondomiciliary.

Even assuming that these articles provided a competent basis for the allegations made "upon information and belief," the articles still failed to show that defendant was a nondomiciliary. Some articles represented that defendant had surgery at Albany Medical Center and that he returned to Pakistan to recover from medical treatment. Although plaintiff posited that defendant had no plan of returning from Pakistan, one article made a qualification by stating that "there [was] no indication that [defendant was] returning anytime soon" (emphasis added). The article did not state that defendant never intended to return to New York. This same article also noted that defendant was at one point a "Loudonville resident." Another article reported that defendant lived in Tennessee for a period before returning to New York.

"Attachment is a drastic remedy, and CPLR 6201 is strictly construed in favor of those against whom it may be employed" (Northeast United Corp. v Lewis, 137 AD3d 1387, 1388 [2016] [internal quotation marks and citation omitted]). In my opinion, plaintiff's proof was hardly convincing to show that defendant was a nondomiciliary. It is true that defendant did not counter plaintiff's evidence. The failure to do so, however, is of no moment. Plaintiff, as the party seeking the order confirming an ex parte order of attachment, bore the burden of establishing that defendant was a nondomiciliary (see CPLR 6212 [a]). Because plaintiff failed to meet his burden in the first instance (see Laufer v Hauge, 140 AD2d at 673), defendant's lack of a response thereto is irrelevant. As such, CPLR 6201 (1) did not provide a basis for plaintiff to confirm the ex parte order of attachment.

ORDERED that the order is affirmed, with costs.

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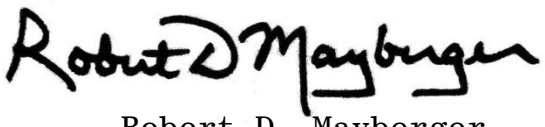

Robert D. Mayberger
Clerk of the Court