

State of New York

Court of Appeals

*Decided and Entered on the
twenty-seventh day of May, 2021*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

SSD 28

James W. Gilliam II,
Appellant,

v.

Discover Bank et al.,
Respondents.

Appellant having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court *sua sponte*,
upon the ground that no substantial constitutional question is directly involved.



Heather Davis
Deputy Clerk of the Court

APPENDIX B:

**State of New York Supreme Court, Appellate Division Third Judicial
Department ORDER dated March 25, 2021, denying Respondent's appeal.**

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

Decided and Entered: March 25, 2021

531335

JAMES W. GILLIAM II,
Appellant,

v

MEMORANDUM AND ORDER

DISCOVER BANK et al.,
Respondents.

Calendar Date: February 5, 2021

Before: Garry, P.J., Lynch, Aarons, Pritzker and Reynolds
Fitzgerald, JJ.

James W. Gilliam II, Warwick, appellant pro se.

Greenberg Traurig, LLP, New York City (Toby S. Soli of counsel) and Kirschenbaum & Phillips, PC, Wantagh (Michael L. Kohl of counsel), for respondents.

Aarons, J.

Appeal from an order of the Supreme Court (Meddaugh, J.), entered April 26, 2020 in Sullivan County, which granted defendants' motions to dismiss the complaint.

In a separate action by defendant Discover Bank against plaintiff's spouse, Discover Bank was awarded summary judgment on its claim for an account stated. Defendant Kirschenbaum & Phillips (hereinafter K&P) subsequently entered a money judgment against the spouse. K&P then issued a restraining notice to the bank where the spouse had an account. This account was held jointly with plaintiff. Plaintiff, pro se, commenced this

action alleging, among other things, that defendants fraudulently restrained the funds in the joint bank account and violated Judiciary Law § 487. In separate pre-answer motions, defendants moved to dismiss the complaint under CPLR 3211 (a) (1). Supreme Court granted the motions. Plaintiff appeals. We affirm.

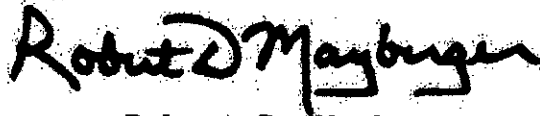
The crux of plaintiff's complaint is that defendants failed to comply with CPLR 5222-a when restraining the joint bank account. K&P, as counsel to Discover Bank, is permitted to issue a restraining notice (see CPLR 5222 [a]). Issuing such notice requires that K&P provide the subject bank with "the restraining notice, a copy of the restraining notice, an exemption notice and two exemption claim forms" (CPLR 5222-a [b] [1]). The record discloses that compliance with CPLR 5222-a (b) (1) was met in that K&P sent to plaintiff's bank an information subpoena with restraining notice, an exemption notice and two blank exemption forms. Given that the documentary evidence utterly refuted plaintiff's claims, Supreme Court correctly granted defendants' motions (see Galway Co-Op.Com, LLC v Niagara Mohawk Power Corp., 171 AD3d 1283, 1284 [2019]).

To the extent that plaintiff argues that Supreme Court should have vacated the order granting Discover Bank's summary judgment motion or the subsequent judgment – both of which were issued in Discover Bank's action against the spouse – such claim is without merit. As the court correctly reasoned, it could not overrule a court of coordinate jurisdiction (see Matter of Dondi v Jones, 40 NY2d 8, 15 [1976]). We also note that an appeal has been taken from the order, and it is currently pending before the Second Department. Plaintiff's remaining contentions are either improperly raised for the first time on appeal or without merit..

Garry, P.J., Lynch, Pritzker and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court

APPENDIX C:

Supreme Court of the State of New York County of Sullivan
DECISION/ORDER dated April 26, 2020, dismissing Petitioner's cause of
action.

At a term of the Supreme Court of the
State of New York, held in and for the
County of Sullivan, at Monticello,
New York, on February 28, 2020

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

-----X
JAMES W. GILLIAM II,

Plaintiff,

-against-

DECISION/ORDER

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**DISCOVER BANK, and
KIRSCHENBAUM & PHILLIPS, P.C.,**

Defendant.
-----X

**Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court**

Appearances: James W. Gilliam, II
Pro se Plaintiff
75 West Street
Warwick, NY 10990

Greenberg Traurig, LLP
by: Timothy E. DiDomenico, Esq. and Toby S. Soli, Esq.
Attorneys for the Defendant, Discover Bank
445 Hamilton Avenue, 9th Floor
White Plains, NY 10601

Kirschenbaum & Phillips, P.C.
By: Michael L. Kohl, Esq.
*Attorneys for the Defendant,
Kirschenbaum & Phillips, P.C.*
3018 Merrick Road
Wantagh, NY 11793

MEDDAUGH, J.:

By Notice of Motion dated February 12, 2020, the Defendant, Kirschenbaum & Phillips, P.C., by its attorney filed a motion seeking to dismiss the Plaintiff's complaint against it.

By Notice of Motion dated February 7, 2020, the Defendant, Discover Bank, filed a motion seeking to join in the motion to dismiss made by co-Defendant, Kirschenbaum &

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Phillips, P.C., adopting and incorporating by reference each of the arguments set forth in the co-Defendant's Motion.

Prior to the motions being filed, but after a court appearance on January 15, 2020, the Plaintiff filed a Memorandum in opposition to "any and all" motions to dismiss and for summary judgment, which was verified on January 20, 2020. Thereafter, the Plaintiff filed an Addendum to his Memorandum of Law opposing the Defendants' motion to dismiss, dated February 15, 2020.

By Affirmation in Reply, dated February 27, 2019, Michael L. Kohl, Esq., of Kirschenbaum & Phillips, P.C., replied to the Plaintiff's opposition.

This is an action which arises out of consumer credit action which was brought in the Orange County Supreme Court by the Defendant herein, Discover Bank, against the Plaintiff's wife, Laura Gilliam, in which Discover Bank was granted summary judgment, by Decision/Order dated January 22, 2018, and was awarded a judgment in the amount of \$12,704.04 together with costs and disbursements. A judgment in the amount of \$13,354.04 was entered in the Orange County Clerk's Office on February 15, 2018.

The judgment was appealed in the Second Department, and it appears that the appeal is still pending. The attorney for Kirschenbaum & Phillips asserts that the appellant did not seek a stay of enforcement of the judgment in either the Supreme Court or the Appellate Division.

In the instant action, the Plaintiff seeks to vacate the judgment entered against his wife in the Orange County Supreme Court, and he also claims that the restraint placed on the joint bank account of the Plaintiff and his wife was done without following the proper procedures.

In their motions to dismiss, the Defendants argue that the Plaintiff lacks standing to bring this action to vacate a judgment entered against his wife. It is further argued that collateral estoppel bars the Plaintiff from relitigating issues previously decided in the Orange County

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action, and finally, that CPLR §5015(a) requires that an application to vacate a judgment be brought before the same court which rendered the judgment.

The Defendants also refute the Plaintiff's claims that the restraint of the parties' jointly held bank account was not done in accordance with the requirements of CPLR §5222-a.

In his complaint and his initial submission opposing the motions to dismiss, the Plaintiff makes a number of arguments regarding the alleged invalidity of the underlying judgment, including that discovery was not provided in the Orange County action, that the Defendants herein engaged in fraud, have unclean hands, and that the firm of Kirschenbaum & Phillips, P.C. engaged in attorney misconduct as defined in Section 487 of the Judiciary Law. Finally, it is argued that the Orange County Supreme Court did not permit him to defend the action as his wife's attorney-in-fact, pursuant to a power of attorney.

In addition to alleging these infirmities in the underlying judgment, the Plaintiff asserted that the restraining notice failed to comply with Section 5222-a of the CPLR, in that the bank account which he holds in joint names with his wife was restrained without first giving him an opportunity to claim that the property was exempt.

In his supplemental submission in opposition, the Plaintiff argues that the Defendants' motion to dismiss was not filed until February 13, 2020, which failed to comply with the Court's direction in a Letter Order dated January 16, 2020, requiring that the motions be made by February 7, 2020.

In reply, it is requested that the Court extend the deadline pursuant to CPLR §2004, in the absence of any prejudice shown by the Plaintiff. It is further argued by the attorneys for Kirschenbaum & Phillips, P.C., that the delay was caused by the submission on February 4, 2020, of Plaintiff's Memorandum in opposition to the Defendants' anticipated motions, which

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memorandum was 41 pages in length, thus requiring the Defendant to re-do its motion papers to address the myriad of issues raised in the memorandum.

CONCLUSIONS OF LAW

The Court finds an initial matter that it shall extend, *nunc pro tunc*, the deadline for the Defendant, Kirschenbaum & Phillips, P.C., to make its motion to dismiss, pursuant to CPLR §2004, based upon the Defendant's showing of good cause, and in the absence of any demonstrated prejudice by the Plaintiff.

The Court has reviewed the procedure followed by the attorney for Discover Bank in restraining the Plaintiff's bank account, and finds that there was full compliance with CPLR §5222-a.

The garnishee bank, Key Bank, was sent two copies of information subpoenas and restraining notices, together with an exemption notice, and two exemption claim forms which complied with CPLR §5222-a (b)(4). The cover letter sending these documents to Key Bank was dated November 16, 2019 (a Saturday), and Key Bank responded to them on November 20, 2019 (Wednesday). On the same date, Key Bank also sent a letter to the judgment debtor advising her that \$1,272.64 in one of the accounts that she holds in joint names with her husband, James Gilliam, had been restrained, together with a \$100.00 litigation fee. The judgment debtor was also provided with the exemption notice, as well as the exemption claim forms. Section 5222-a(b)(3) of the CPLR requires that these documents be sent within two business days of the bank's receipt of the restraining notice, which was complied with in this case.

The Plaintiff herein, James Gilliam, responded on November 26, 2019, acknowledging receipt of Key Bank's letter, claiming that he and his wife had previously submitted exemption claim forms dated July 19, 2019, to Kirschenbaum & Phillips, P.C., in response to an Information Subpoena and restraining notice served on Laura Gilliam, as the judgment debtor on

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July 15, 2019. The Plaintiff asserts that these exemption claim forms established that the funds in their accounts was exempt, consisting of direct deposited social security, VA disability payments, and a retirement annuity (see, CPLR §5222-a(b)(4)). Mr. Gilliam indicates in his letter to the bank that he was attaching the exemptions claim forms previously provided to Kirschenbaum & Phillips, P.C., together with supporting documentation.

Key Bank responded to the information subpoena and restraining notice served upon it in November of 2019, by faxing an exemption claim form to Kirschenbaum & Phillips, P.C. on December 6, 2019, which was within twenty days of November 16, 2019. The Plaintiff herein, did not send his November 26, 2019 letter to Kirschenbaum & Phillips, P.C., nor did she complete the new exemption claim forms which were sent to his wife by Key Bank, within twenty days of the date that they were sent to her (see CPLR §5222-a(4)©).

Despite the fact that the Judgment Debtor failed to comply with CPLR §5222-a (4)©, in that she failed to send her exemption claim form to Kirschenbaum & Phillips, P.C., the firm voluntarily withdrew the restraining notice on December 6, 2019, eight hours prior to receiving the exemption claim form from Key Bank.

Based on all of the foregoing, the Court finds the Defendants have established that they fully complied with CPLR §5222-a.

It appears that the Plaintiff is also arguing that his funds cannot be restrained prior to being notified of his right to claim that the funds are exempt. Section 5222(b) of the CPLR, which governs restraining notices in general, provides, in pertinent part, that:

A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (I) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated.

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Subdivision (h) provides, in pertinent part, that:

"if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the restraining notice was served on the banking institution, then the banking institution shall not restrain two thousand five hundred dollars in the judgment debtor's account."

Subdivision (l) provides that a restraining notice shall not apply to an amount that is two hundred and forty times the federal minimum hourly wage, currently \$7.25 per hour (<https://www.dol.gov/general/topic/wages/minimumwage>), or \$1,740.00.

In the case at bar, the bank exempted \$3,600.00 in the Plaintiff's bank account from restraint (Def. Ex. G).

Section 5222(e) of the CPLR advises the judgment debtor that in order to claim that the account contains exempt funds, he or she "must act promptly because the money may be applied to the judgment or order."

Similarly, Section 5222-a(c)(3) of the CPLR provides, that:

The banking institution shall release all funds in the judgment debtor's account eight days after the date postmarked on the envelope containing the executed exemption claim form mailed to the banking institution or the date of personal delivery of the executed exemption claim form to the banking institution, and the restraint shall be deemed void, except where the judgment creditor interposes an objection to the exemption within that time.

Section 5222-a(c)(4) of the CPLR provides, in pertinent part, that:

Where the executed exemption claim form sent to the judgment creditor is accompanied by information demonstrating that all funds in the account are exempt, the judgment creditor shall, within seven days of the postmark on the envelope containing the exemption claim form and accompanying information, instruct the banking institution to release the account, and the restraint shall be deemed void.

The foregoing provisions of CPLR §5222 and §5222-a make it clear that, upon receipt of a restraining notice, the bank cannot release the funds until eight days after the bank is notified

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of the judgment debtor's claim that the restrained funds are exempt, except as provided in CPLR 5222(h) and (i).

Therefore, the Plaintiff's claim that the Defendants conspired to circumvent CPLR §5222-a is without merit.

The Plaintiff has also asserted that the amount of the judgment listed in the restraining notice (\$13,354.04) was incorrect, in that the Decision and Order granting summary judgment to Discover Bank awarded it a judgment of \$12,704.04. A review of the Decision and Order from Orange County, dated January 22, 2018 (see, Def. Ex. C), reveals that Discover Bank was awarded a judgment of \$12,704.04, "together with the costs and disbursements of this action." Thereafter, a judgment was entered in the Orange County Clerk's Office in the amount of \$13,354.04, which included \$650.00 in costs. Therefore, the amount of the judgment listed in the restraining notice was the correct amount.

The Court also finds, that based on foregoing, there is no basis to find that the Defendant, Kirschenbaum & Phillips, P.C., engaged in any attorney misconduct with regard to the restraining notice and their efforts to enforce the judgment.

The Plaintiff has alleged that Kirschenbaum & Phillips, P.C. engaged in misconduct by providing Key Bank with the blank exemption forms in November of 2019, after having received the exemption form from the Judgment debtor in July of 2019, which indicated that she was unemployed and that all of her household income was derived from her husband.

Section 5222© of the CPLR provides that leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order, and that a judgment creditor shall not serve more than two restraining notices per year upon a natural person's banking institution account. The Defendant's herein did not violate this provision. There is no statutory requirement that the judgment creditor provide the banking institution with

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an exemption claim form previously provided by the judgement debtor, and as found above, the judgment creditor and Kirschenbaum & Phillips, P.C. complied with the requirements of CPLR 5222-a (b) with regard to service of the restraining notice, the exemption notice and exemption claim forms.

The Plaintiff also seeks to vacate the judgment issued by the Orange County Supreme Court, in the action entitled Discover Bank v. Laura Gilliam, Index # Index No, 6315 / 2017.

The Defendants have moved to dismiss the Plaintiff's complaint which on the basis of a defense founded upon documentary evidence (CPLR 3211 ([a][1]), on the grounds of collateral estoppel (CPLR 3211 ([a][5]), and on the grounds that the pleading fails to state a cause of action (CPLR 3211 ([a][7])).

"A court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another Judge of equal authority," and the Plaintiff herein has interposed claims that were already reviewed and ruled upon in the Orange County action (Nong Yaw Trakansook v. 39 Wood Realty Corp., 18 A.D.3d 633, 634, 796 N.Y.S.2d 367, 368 [2 Dept., 2005]).

Furthermore Rule 5015 of the CPLR provides, in pertinent part, that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct." A litigant's remedy for fraud, or other alleged misconduct of an adverse party committed in the course of a prior proceeding (see CPLR 5015 (a)(3), "lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due its fraudulent procurement, [or other misconduct], not a second plenary action collaterally attacking the judgment in the original action" (Vinokur v. Penny Lane Owners Corp., 269 A.D.2d 226, 226, 703 N.Y.S.2d 35 [1 Dept., 2000]; see also, Kai Lin v. Dep't of Dentistry, Univ. of Rochester Med. Ctr., 120 A.D.3d 932, 991 N.Y.S.2d 207 [4 Dept., 2014], *lv. denied*, 24 N.Y.3d 916, 4 N.Y.S.3d 602 [2015]). The

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Third Department held in *Hrouda v. Winne*, 77 A.D.2d 62, 432 N.Y.S.2d 643 (3 Dept., 1980) that the Court in which a proceeding is brought to vacate an order issued by another Judge of equal authority, is without jurisdiction to entertain the application.

Accordingly, the Court finds that the portion of the Plaintiff's complaint which seeks to vacate the judgment issued by the Orange County Supreme Court, which is currently the subject of an appeal in the Second Department, must be dismissed for a failure to state a cause of action, and pursuant to CPLR 5015.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that the motions of the Defendants, Kirschenbaum & Phillips, P.C. and Discover Bank, are granted in their entirety; and it is further

ORDERED the Plaintiff's complaint is dismissed.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: April 26, 2020
Monticello, New York

ENTER


HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Dismiss of the Defendant, Kirschenbaum & Phillips, P.C., dated February 12, 2020
2. Affirmation in Support of Michael L. Kohl, Esq., affirmed on January 30, 2020
3. Affirmation in Support of James M. Scully, Esq., undated, but Efiled on February 13, 2020