

[*1]

Janet O. v James O.
2006 NY Slip Op 51985(U)
Decided on October 17, 2006
Supreme Court, New York County
Visitación-Lewis, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through October 30, 2006; it will not be published in the printed Official Reports.

Decided on October 17, 2006

Supreme Court, New York County

Janet O., Plaintiff,
against
James O., Defendant.

33023/74

Laura Visitación-Lewis, J.

Through newly-retained New York counsel, defendant former husband, a longtime resident of Mexico and fugitive against whom adjudications of contempt and related warrants of arrest and commitment have been pending for over two decades, moves by order to show cause filed March 20, 2006, for vacatur and interim stay of the contempt adjudications and warrants in order that he may enter this country with

impunity. The contempt decisions and orders, issued by the Supreme Court, New York County (Gabel, J.), on November 28, 1983, January 20, 1984, and February 27, 1984, and the related warrants of commitment, issued on January 5, 1984, and May 11, 1984 (Gabel, J.), arose in connection with child and spousal support enforcement proceedings commenced by plaintiff former wife following the parties' divorce in New York County on September 25, 1975. [\[FN1\]](#)

Specifically, plaintiff sought to enforce the terms of the Separation Agreement (Agreement) dated August 29, 1975, pursuant to which defendant was obligated to pay child support for the parties' children, J.O., G.O., and P.O., as well as lifetime spousal maintenance. The Agreement provided that his then attorney, Victor A. Kovner, Esq., would serve as defendant's agent for service of process in any enforcement proceedings. It further specified that his substitution for that purpose required the prior written consent of plaintiff, the consent of the substituting agent, and delivery to plaintiff's attorney of defendant's written designation of the substituting agent.

Under the terms of the Agreement, defendant's support obligations were to be calculated annually in accordance with an agreed-upon formula based upon his income. Defendant was therefore required to regularly disclose his income to plaintiff and to make payments accordingly. After executing the Agreement of August 29, 1975, defendant proceeded to neither provide his income information nor to make a single child or spousal maintenance support payment in the three decades that followed.

Instead, as he traveled around and lived in various states, known to include Pennsylvania and South Carolina, as well as foreign countries, known to include Barbados, the Dominican [\[*2\]](#) Republic, and Mexico, defendant remarried, adopted his new wife's two daughters and, he contends in the instant filing, lived in complete ignorance that enforcement actions were being pursued by his former spouse. [\[FN2\]](#) As required under the Agreement, service of every decision and order was made upon Mr. Kovner, defendant's designated agent for service of process. Said agent, for whom no substitute was ever designated, claimed no knowledge of defendant's whereabouts.

In the meantime, unable to locate defendant and with no other means of support, plaintiff and the three children fell into a life of poverty and public assistance. The hardships described in plaintiff's filings include a winter she spent with the youngest child, P.O., who suffers from schizophrenia, in a darkened, abandoned building without heat, hot water, or elevator service, and the teenaged J.O. and G.O. having to work part-time and summer jobs to help support the family. Ultimately, the family's financial circumstances forced G.O. to quit college and take a job as a construction worker. Plaintiff suffered a heart attack at age 58 and underwent multiple surgeries, including hip replacement, double knee replacement, and treatment for carotid artery disease. A wheelchair-user for the past ten years, plaintiff continues to live with and care for P.O., who, in addition to his mental illness, also suffers from various physical ailments, including obesity and high blood pressure. Plaintiff continues to depend upon her two older sons for financial support.

DISCUSSION

In seeking relief from the contempt orders and warrants arising out of his failure to meet his support obligations, defendant invokes both law and equity. First, defendant challenges jurisdiction, arguing that, because he never received copies of plaintiff's enforcement applications and the orders and warrants issued upon his default, he was not properly served. This claim is unaccompanied by any reference to the provision of the Agreement specifying that service of process was to be upon his designated agent, or explanation as to why he failed to keep either the plaintiff or his agent informed of his shifting locations, and how, in any event, he could possibly have believed that his non-compliance with the income disclosure and support obligations contained in the Agreement would go unnoticed or unaddressed.

Defendant's filings include an affidavit of service dated December 9, 1983, and supporting affidavits of plaintiff's attorney, dated December 23, 1983 and May 3, 1984, attesting to service of the contempt orders upon Victor A. Kovner, Esq., defendant's designated agent for service of process in enforcement proceedings. An affirmation submitted by counsel for plaintiff on April 9, 2006, reaffirms that all

documents related to the enforcement proceedings were served upon defendant's counsel. Defendant does not dispute that this service of process was the method to which he specifically agreed for enforcement, and does not challenge his attorney's averment of inability to forward court filings and orders, or to otherwise contact defendant. In light of these circumstances, defendant's motion to vacate and stay the contempt orders and related warrants of commitment on the ground of improper service is summarily denied. [*3]

Defendant alternatively seeks relief in equity, urging the court to exercise its discretion and vacate the warrants of commitment and contempt adjudications in the interests of justice. Defendant's claim is that he cannot enter the United States without being subject to arrest, and is therefore precluded from visiting his adult daughters, one of whom sustained a brain injury in a fall in February 2005, and has been in a long-term care facility in North Carolina ever since. The second adopted daughter, according to defendant, suffers from Epstein-Barr Syndrome and chronic kidney infections. With no apparent sense of irony, defendant urges the court to vacate the orders so that he may enter the United States without risk of being detained on the outstanding warrants because his adopted daughters "desperately need [his] support" (Defendant's Affidavit, 2/17/06, ¶ 37).^[FN3] Defendant, who says nothing of the underlying basis for the contempt adjudications and warrants, states that this application is made "with the utmost desperation and good faith" (*Id.* at ¶ 48). Although parental solicitude is generally welcomed and encouraged, defendant's fatherly appeal for relief in the interests of justice rings hollow, given the utter indifference and lack of concern with which he abandoned the parties' three minor children to a life of poverty.

Given defendant's thirty-year history of violating stipulated and court-ordered support obligations to the serious and continuing detriment of plaintiff and his sons, while successfully evading the court's power to compel compliance by remaining outside the jurisdiction, the court concludes that the interests of justice will best be served not by vacating the warrants and adjudications of contempt, but by enforcing them in order to secure defendant's appearance and finally and fully enforce his

support obligations.

Nor does the law governing equitable relief dictate otherwise. In addition to impermissibly seeking equitable relief with unclean hands (*see, e.g., Muscarella v Muscarella*, 93 AD2d 993 [4th Dept 1983]), defendant is a fugitive from justice and, as such, is not entitled to relief from the very court orders that he continually evaded and violated by fleeing the

jurisdiction (*see, e.g., Joshua M. v Dimari N.*, 9 AD3d 617 [3d Dept 2004]; *Peppin v Lewis*, 194 Misc 2d 151 [Fam.Ct., Albany Co., 2002]). [\[FN4\]](#)

For all these reasons, defendant's applications for vacatur and stay of the contempt orders and warrants of commitment are summarily dismissed, and the court reaffirms the validity of the [*4] outstanding contempt adjudications and warrants, as well as of the Agreement that obligated defendant to, *inter alia*, pay plaintiff lifetime spousal maintenance and child support, now arrears, for the parties' three children.

Plaintiff's cross-motion to have defendant extradited and produced before this court on the outstanding warrants and for further enforcement proceedings is granted. Counsel for plaintiff is directed to serve this decision and order, together with copies of the underlying pleadings, contempt decisions and orders, and warrants of commitment, upon the United States Attorney's Office for the Southern District of New York, the Office of New York State Attorney General, and the New York County District Attorney's Office, for review and appropriate action.

That branch of plaintiff's cross-motion seeking enforcement of the terms of the Agreement obligating defendant to disclose his income to plaintiff is granted. Defendant is directed to provide to plaintiff, within thirty days of the date of this decision and order, copies of his federal income tax returns for each year from 1972 to the present. In addition, the court will execute subpoenas presented by plaintiff's attorney for the production of any other financial documents or statements necessary to ascertain defendant's income for the relevant periods, from appropriate financial

institutions, agencies, business entities, or individuals.

Pending defendant's compliance with discovery as required under the Agreement and directed by this court, the court rejects defendant's conclusory and self-serving claims of inability to pay. [\[ENS\]](#)

Similarly, the court rejects on its face defendant's claim that "impossibility" renders "moot" plaintiff's application for spousal support, spousal and child support arrears, and counsel fees. Child support arrears accumulated prior to an application for modification must be awarded in full (*Dox v Tynon*, 90 NY2d 166, 173-74 [1997] ["(N)o excuses at all are tolerated with respect to child support"] [*quoting* Scheinkman, Practice Commentary, McKinney's Cons. Laws of NY, Book 14, Domestic Relations Law § 244, at 752]; *see* DRL § 244 ["Upon application the court shall make an order directing the entry of judgment for the amount of arrears of child support"]). Pursuant to DRL § 244, defendant's maintenance arrears that have been reduced to a final judgment are not subject to modification or annulment. Furthermore, maintenance arrears that accrue prior to a modification application are not subject to modification or annulment absent a showing of "good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears" (DRL § 244). Where, as here, the defaulting party fails to make such a showing, the court must direct the entry of judgment for the arrears (*Id.*).

Moreover, having absconded and remained a fugitive for decades, defendant will not now be heard and from the safety of his foreign haven at that to argue that his age of 73 years and [*5]his income, which he baldly claims consists of retirement benefits, should serve to excuse him from finally meeting his obligations to his children and former spouse.

For all these reasons, defendant's motion is denied in its entirety, and plaintiff's cross-motion for child and spousal support arrears, and for enforcement of defendant's obligation to pay lifetime spousal support, is granted.

Given the undisputed default by defendant on his support obligations, counsel for plaintiff may simultaneously pursue any available alternative means of enforcement, including income execution pursuant to CPLR 5241, upon any sources of income that are known, or may be revealed during these proceedings, including, but not limited to, Social Security benefits. Counsel for plaintiff shall notify the court upon completion of discovery or the exhaustion of disclosure efforts. Defendant's failure to comply with financial disclosure will subject him to sanctions, including fines, adverse inference, and imputation of income.

Plaintiff's application for counsel fees incurred in the instant and prior applications for enforcement of support arrears is granted pursuant to DRL §§ 237 and 238. Counsel for plaintiff is directed to submit, within fifteen days of the date of this decision and order, an affirmation detailing services provided and hourly rates. WHEREFORE, it is hereby

ORDERED, that defendant's application for vacatur and interim stay of contempt decisions and orders dated November 28, 1983, January 20, 1984, and February 27, 1984, and warrants of commitment dated January 5, 1984, and May 11, 1984, is summarily denied and dismissed, and defendant's motion is otherwise denied in its entirety; and it is further

ORDERED, that plaintiff's application to have defendant extradited and produced before this court on the outstanding warrants and for further enforcement proceedings is granted; and it is further

ORDERED, that counsel for plaintiff serve this decision and order, together with copies of the underlying pleadings, contempt decisions and orders, and warrants of commitment, upon the United States Attorney's Office for the Southern District of New York, the Office of New York State Attorney General, and the New York County District Attorney's Office, for review and appropriate action; and it is further

ORDERED, that the branch of plaintiff's cross-motion seeking enforcement of the terms of the Agreement obligating defendant to disclose his income to plaintiff is

granted, and defendant is directed to provide to plaintiff, within thirty days of the date of this decision and order, copies of his federal income tax returns for each year commencing in 1972 to the present; and it is further

ORDERED, that plaintiff's applications for child and spousal support arrears, and for enforcement of defendant's obligation to pay lifetime spousal support, are granted; and it is further

ORDERED, that counsel for plaintiff pursue any available alternative means of enforcement with respect to any known sources of income that defendant may have, including, but not limited to, Social Security benefits; and it is further

ORDERED, that counsel for plaintiff shall notify the court upon completion of discovery or exhaustion of disclosure efforts; and it is further

ORDERED, that defendant's failure to comply with financial disclosure shall subject him to sanctions, including fines, adverse inference, and imputation of income; and it is further [*6]

ORDERED, that plaintiff's application for counsel fees incurred in the instant and prior applications for enforcement of support arrears is granted, and counsel for plaintiff shall submit, within fifteen days of this decision and order, an affirmation detailing services provided and hourly rates.

This constitutes the decision and order of the court; any matters not herein decided are denied.

ENTER:

LAURA VISITACIÓN-LEWIS, J.S.C.

Footnotes

Footnote 1: The parties had resided together in New York with their children until they separated in 1973.

Footnote 2: In an apparent attempt to further demonstrate that he should not be faulted, defendant goes so far as to suggest that he was unaware of his obligations because Hurricane Hugo destroyed his divorce documents, including the 1975 Agreement, in 1989.

Footnote 3: The warrants have been entered into the computer databases of the National Crime Information Center and the Department of Criminal Justice Services. On several occasions, defendant was detained by the United States Customs Service as he attempted to enter the United States, but then inexplicably released. In what appears to have been his latest such attempt, defendant was detained in Houston, Texas, on or about September 20, 2004. New York State ordered that defendant be held for extradition, resulting in his arrest and incarceration by the Houston police. Defendant retained local counsel and succeeded in having the extradition proceedings dismissed on the ground that the demanding jurisdiction did not request extradition. There is no indication that the New York State Supreme Court was informed of the detention or consulted before extradition was declined.

Footnote 4: Shortly after the filing of his application, this court directed defendant, through his current counsel, to personally appear. To date, he has not done so.

Footnote 5: The parties' middle son, G.O., notes in his supporting affidavit dated April 11, 2006, that, despite defendant's claims of insufficient income and funds, his income and assets have enabled him to, *inter alia*, adopt and support his second wife's daughters; fund a doctoral degree for himself and two Masters degrees for his second wife; promptly retain counsel when detained in Houston; and secure the representation of current counsel. Plaintiff's submission contains assertions by both plaintiff and G.O. that defendant has secreted assets consisting of income and a sizable inheritance.

[Return to Decision List](#)