

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No.: 12012447-CI-011

GAWKER MEDIA, LLC aka
GAWKER MEDIA; et al.,

Defendants.

_____ /

**DEFENDANT A.J. DAULERIO'S RESPONSE TO THE
NOTICE TO APPEAR AND ORDER TO SHOW CAUSE**

Defendant A.J. Daulerio submits this response to the Court's August 1, 2016 Notice to Appear and Order to Show Cause ("Notice and Order").¹ As explained below, the Court erred in granting Plaintiff's motion for supplementary proceedings, the proceedings are improper due to the *ex parte* nature of Plaintiff's motion, and all of the personal property identified in the Notice and Order is either beyond this Court's reach or exempt from execution as a matter of law.

I. These Supplementary Proceedings are Improper and in Error.

1. The Court should not have granted Plaintiff's motion for supplementary proceedings because Plaintiff failed to satisfy the basic requirements of Fla. Stat. § 56.29. "Under Florida law, a party is entitled to proceedings supplementary if the party: (1) establishes that the party is the holder of an unsatisfied judgment; (2) identifies the issuing court and case

¹ This response is filed contemporaneously with Mr. Daulerio's affidavit. *See* Fla. Stat. § 56.29(2) ("A responding affidavit must raise any fact or defense opposing application of the property described in the Notice to Appear to satisfy the judgment, including legal defenses, such as lack of personal jurisdiction. Legal defenses need not be filed under oath but must be served contemporaneously with the affidavit."). Mr. Daulerio did not have access to a notary before these papers were due, and so has signed his affidavit with an electronic signature. He will supplement the record with a notarized version of his affidavit as soon as possible.

number; (3) states the unsatisfied amount of the judgment; and (4) confirms that execution is valid and outstanding.” *Estrada v. Sorrento Townhomes, LLC*, 117 So. 3d 1097 (Fla. 3d DCA 2013) (citing § 56.29(1)). The fourth prong “requires the filing of an affidavit showing a valid unsatisfied writ of execution on any assets prior to instituting supplementary proceedings.”

Lahav Flooring & Fixtures, Inc. v. Weinstein, 590 So. 2d 1055, 1056 (Fla. 3d DCA 1991) (citing *Standard Prop. Inv. Trust v. Luskin*, 585 So. 2d 1099 (Fla. 4th DCA 1991)); accord Philip J. Padovano, *Proceedings Supplementary*, 5 Fla. Prac., Civil Practice § 13:6 (2015-2016 ed.).

Plaintiff’s affidavit did not confirm in this manner that there is a writ of execution or that it is unsatisfied—it instead asserts merely that the “**Final Judgment** is valid and outstanding.”

Bollea Aff. ¶ 8 (emphasis added). That alone is insufficient to satisfy the requirements of § 56.29:

The judgment creditor’s lien attaches to personal property and priority is established at the time the writ of execution is delivered to the sheriff in the county where the personal property is located. Thus, the exhaustion of remedies in supplemental proceedings prevents a judgment creditor from gaining an advantage over judgment creditors who have priority in execution over and against a defendant’s property.

Lahav Flooring & Fixtures, 590 So. 2d at 1056 (citations omitted); see also *id.* at 1056-57

(reversing trial court’s order granting supplementary proceedings where the judgment creditor’s affidavit was “not sufficient and clearly did not comply with section 56.29”).

2. These supplementary proceedings are also flawed because the Plaintiff improperly sought relief in an *ex parte* filing. See Pl.’s *Ex Parte* Motion for Proceedings Supplementary ¶¶ 18-19. Plaintiff has not cited—and Defendant is not aware of—any authority allowing a judgment creditor to move *ex parte* for supplementary proceedings. Instead, Plaintiff states that “[t]he granting of the relief requested in this Motion is ministerial” and cites *Biloxi Casino Corp. v. Wolf*, 900 So. 2d 734 (Fla. 4th DCA 2005) (per curiam), for the unremarkable

proposition that “[u]pon the showing of the[] statutory requirements under § 56.29, *Fla. Stat.*, a court has no discretion to deny the motion.” *Id.* Setting aside that Plaintiff did not even satisfy these requirements, *see supra* ¶ 1, a party cannot move *ex parte* simply because the court may lack discretion to deny a motion. As the Florida Supreme Court explained in *Randolph v. State*, 853 So. 2d 1051 (Fla. 2003):

Canon 3B(7) of the Code of Judicial Conduct provides that “[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending *or impending* proceeding.” Based on this principle, we have repeatedly stated there is nothing “more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.”

Id. at 1057 (citations omitted and emphasis added). The Code of Judicial Conduct allows limited *ex parte* communications *only* “for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits.” Fla. Code Jud. Conduct Canon 3B(7)(a).² Those limited exceptions simply do not apply here. Indeed, it cannot be seriously argued that a motion initiating proceedings to seize all of Mr. Daulerio’s assets is ministerial or administrative, and does not address a substantive matter. Thus, Plaintiff’s motion to initiate supplementary proceedings on an *ex parte* basis, the related communications with the Court about those proceedings, and this Court’s entry of an order in response to that motion are facially improper.

3. The dangers of *ex parte* communications are clear in Plaintiff’s filing. As noted above, Plaintiff has not even complied with the basic requirements of Fla. Stat. § 56.29 to obtain the relief he seeks. Moreover, his filing appears to include statements that are false or misleadingly incomplete. For example, Plaintiff asserts that one of Mr. Daulerio’s assets is a

² Similarly, Florida Rule of Professional Responsibility 4-8.4(f) provides that lawyers shall not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”

right of indemnification, but he neglects to tell *this* Court that he told the *Bankruptcy* Court in New York the exact opposite. *See* Ex. 1 (Bollea Mem. of Law in Opp’n to Debtor’s Mot. for Prelim. Inj.) at 3 ¶ 9 (“Debtor [Gawker] has no indemnity obligations to Messrs. Denton and Daulerio”); *id.* at 16 ¶ 40 (same); *id.* at 17-18 n.5 (“To the extent Debtor claims a ‘policy and practice’ of indemnifying employees,” there is no indemnification for “Messrs. Denton and Daulerio . . . for the Bollea Litigation.”); *id.* (“Debtor cannot indemnify Mr. Denton or Mr. Daulerio for this judgment”); *id.* at 18 ¶ 44 (“With regard to the Bollea Litigation,” there are no “indemnification obligations that Debtor [has] toward Messrs. Denton and Daulerio.”).³

4. Similarly, he writes that “Mr. Bollea has incurred and is obligated to pay the undersigned counsel reasonable attorneys’ fees and costs.” Pl.’s *Ex Parte* Mot. ¶ 17. But, Silicon Valley billionaire Peter Thiel has publicly stated that he is funding this litigation. *See* <http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>. Indeed, Plaintiff’s counsel, David Houston, has effectively confirmed that Mr. Bollea has *not paid* counsel’s legal fees because Mr. Thiel is footing the bill. *See* <http://www.nytimes.com/2016/08/02/business/media/nick-denton-gawker-bankruptcy.html> (responding to Nick Denton’s statement that Peter Thiel’s funding of the litigation was designed to drive him into bankruptcy by saying that “his bankruptcy has nothing to do with who paid Mr. Bollea’s legal bills”).

5. The whole point of the prohibition on *ex parte* communications is to prevent one side from being able to engage in such machinations and to invite the Court to do so as well.

Plaintiff’s motion should be stricken and the Notice and Order vacated.

³ Plaintiff similarly omits any mention of the objections he and the other members of the creditors’ committee filed in the Bankruptcy Court objecting to Gawker incurring any expense in connection with the ongoing defense of Mr. Daulerio (and Mr. Denton). *See* Ex. 2 (Limited Obj. to Debtors’ Appls. for Entry of Orders re: Special Litigation Counsel) at 10-11.

II. The Identified Assets are Beyond this Court’s Reach or Exempt from Execution.

A. Shares of Stock in GMGI and RGFree

6. First, Plaintiff asks this Court to apply shares in GMGI and RGFree to satisfy the judgment. But, this Court is without jurisdiction to execute on Mr. Daulerio’s shares in those two entities, both of which are out-of-state companies. The law is clear that “Florida courts do not have in rem or quasi in rem jurisdiction over foreign property.” *Sargeant v. Al-Saleh*, 137 So. 3d 432, 434 (Fla. 4th DCA 2014). Thus, a trial court cannot order judgment debtors to “turn over” stock that is “located outside the state.” *Id.* at 433-35 (rejecting effort to execute against a trio of judgment debtors’ stock located outside of Florida in a case involving supplementary proceedings under § 56.29); *accord In re McCuan*, 2015 WL 7717422, at *3 (Bankr. M.D. Fla. Nov. 30, 2015). As this Court is well aware, GMGI is a Cayman Islands company. Daulerio Aff. ¶ 2b. RGFree is a Delaware company. *Id.* ¶ 2a. Mr. Daulerio’s GMGI and RGFree shares are therefore outside the jurisdiction of and not subject to execution by this Court.

B. Indemnification and/or Choses in Action

7. In light of Plaintiff’s vigorous argument in the Bankruptcy Court that Gawker has no indemnification obligation to Mr. Daulerio, Plaintiff should be estopped from arguing here that any indemnification right of Mr. Daulerio is an asset that can be seized. *See supra* ¶ 3.

8. As Mr. Daulerio describes in his Affidavit, his employment agreement contains an indemnification provision. Daulerio Aff. ¶ 4a & Ex. 3. (Although Plaintiff contends that was concealed from him, Mr. Daulerio’s employment agreement was produced to Plaintiff in July 2013.) As reflected in that provision, the right of indemnification against a claim typically encompasses a right to payment of defense costs and a separate right to payment of a judgment. Any right that Mr. Daulerio may have to payment of his defense costs are personal to him and

could not be executed on by Plaintiff. *See Shaughnessy v. Klein*, 687 So. 2d 43, 44 (Fla. 2d DCA 1997); *Mickler v. Aaron*, 490 So. 2d 1343, 1344 (Fla. 4th DCA 1986). As for the judgment, Daulerio does not know whether he will be indemnified, particularly in light of Gawker’s bankruptcy, Daulerio Aff. ¶ 4, but that will ultimately be decided by the Bankruptcy Court, as explained below.⁴

9. Turning to GMGI, Plaintiff has identified no basis for indemnification, and in fact argued the exact opposite in the Bankruptcy Court, as explained above. In any event, he is unable to make a claim against a supposed indemnitor unless this Court has jurisdiction over it. *See Schron v. Nunziata*, 136 So. 3d 684, 685 (Fla. 2d DCA 2014) (court must have personal jurisdiction over party against which execution is sought in supplementary proceedings). Here, the Court has already dismissed GMGI for lack of personal jurisdiction, and there is no basis for a Florida court to assert jurisdiction over a Cayman Islands company that has never done any business in or directed any activity at the State of Florida.

10. Finally, the Court is not entitled to transfer to Plaintiff any rights under an indemnity obligation unless the indemnitor is brought before the Court to assert any objections or defenses it may have. *See, e.g., id.* at 686 (in “supplementary proceedings in Florida . . . impleaded third parties must have an opportunity to raise defenses and protect their interests in a manner consistent with due process.”); *Puzzo v. Ray*, 386 So. 2d 49, 51 (Fla. 4th DCA 1980) (judgment creditor allowed to reach judgment debtor’s cause of action against third party where

⁴ As Mr. Daulerio explains in his Affidavit, undersigned counsel cannot advise him about indemnification rights against Gawker since they are also representing the company. Daulerio Aff. ¶ 4d. That has not been an issue previously since Gawker has been paying the cost of Mr. Daulerio’s defense. *Id.* ¶ 4b. However, since it has recently become apparent that Plaintiff has objected in the bankruptcy proceeding to Gawker’s continuing to pay for his defense in this action and/or to indemnifying him, Mr. Daulerio is attempting to engage separate counsel to address indemnification issues. *Id.* ¶ 4d; *see supra* note 3.

third party “was properly impleaded and afforded due process”) (citations omitted). Putting aside the issue of personal jurisdiction over GMGI, this Court is prohibited – under the automatic stay provisions of the United States Bankruptcy Code – from bringing GMGI or Gawker Media, LLC before it now, or adjudicating whether either company has an obligation to indemnify Mr. Daulerio or the scope of that obligation. *See* 11 U.S.C. § 362. Accordingly, Plaintiff is prevented under both Florida and federal law from asking this Court to transfer rights Mr. Daulerio may have against Gawker or GMGI for indemnification of the judgment.

C. Mr. Daulerio’s Bank Account

11. Mr. Daulerio’s remaining assets are exempt from execution as a matter of Florida law. Under the Florida Constitution, he is entitled to an exemption of \$1,000 of personal property. *See* Fla. Const. art. X, § 4(a)(2); *In re Hawkins*, 51 B.R. 348 (Bankr. S.D. Fla. 1985). In addition, because Mr. Daulerio is not “claim[ing] or receiv[ing] the benefits of a homestead exemption” under Article X, Section 4(a)(1) of the Florida Constitution, he is entitled to exempt an additional \$4,000 worth of his personal property “from attachment, garnishment, or other legal process.” Fla. Stat. § 222.25(4). The only assets identified in the Notice and Order that are subject to execution – namely, his bank account – are worth less than \$5,000. Specifically, after spending modest sums to pay ordinary living expenses, job search expenses and the like, Mr. Daulerio has \$1,505.78 remaining in his checking account. *Daulerio Aff.* ¶ 2c. Since the other items identified are not subject to execution, the limited funds in Mr. Daulerio’s bank account are within the exemption and may not be executed upon. Nevertheless, in light of Plaintiff’s *ex parte* filing seeking to garnish that account, Mr. Daulerio’s bank has frozen the account, and he

cannot access those funds, including within the amount of the constitutional and statutory exemptions. He should be permitted to use the money within the legal exemptions.⁵

CONCLUSION

For the foregoing reasons, these supplementary proceedings should be terminated based on Plaintiff's failure to satisfy the requirements of § 56.29 and on the improper *ex parte* nature of Plaintiff's motion. If the Court nevertheless elects to allow these supplementary proceedings to go forward, none of the items identified in the Notice and Order can be applied to satisfy the Final Judgment for the reasons set forth above.

Dated: August 9, 2016

Respectfully submitted,
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⁵ Mr. Daulerio reserves his right to respond more fully to the *ex parte* Writ of Garnishment Plaintiff obtained and served on his bank and to seek all appropriate remedies for that action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

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