

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

AMUSING DIVERSIONS, INC.,

Petitioner,

v.

UNIVERSAL MUSIC CORP. d/b/a
UNIVERSAL MUSIC PUBLISHING GROUP,

Respondent.

Index No. 154258/2014

**MEMORANDUM OF LAW OF
UNIVERSAL MUSIC CORP. IN
SUPPORT OF ITS
OPPOSITION TO THE PETITION**

PRELIMINARY STATEMENT¹

Petitioner Amusing Diversions, Inc. (“Amusing Diversions”) seeks an order requiring Respondent Universal Music Corp. d/b/a Universal Music Publishing Group (“UMC”) to pay directly to Amusing Diversions any money that UMC owes or will owe to judgment debtor Earl Simmons a/k/a DMX (“DMX”). However, as Amusing Diversions has been informed and well knows, its claim is at least third in priority behind two Income Withholding Orders (IWOs) issued by Child Support Agencies from the Counties of Erie and Westchester. UMC has not received a termination order for either of these two IWOs. Furthermore, since UMC is in compliance with these two IWOs and has never received termination orders for these two IWOs, it is not liable to Amusing Diversions.

STATEMENT OF FACTS

UMC has received three IWOs issued by Child Support Agencies from the Counties of Erie and Westchester. On or about December 5, 2011, UMC received notice of an “Income Withholding for Support” issued by the Supreme or Family Court of Westchester County. Miller

¹ Filed together herewith is the Affirmation of Carla M. Miller, Esq., dated May 12, 2014 (“Miller Aff.”).

Aff., Exhibit A at p. 1. According to the IWO, it was issued for child support for DMX's ten-year-old daughter, Sasha R. Simmons. Miller Aff., Exhibit A at p. 3. The IWO noted, "Withholding for support has priority over any other legal process under New York State law against the same income." Miller Aff., Exhibit A at p. 2. The IWO further stated:

If you fail to withhold or remit income as the NOTICE directs, you are liable to the creditor and the debtor for such failure. Either party may commence a proceeding against you for the accumulated amount you should have withheld and remitted from the employee's/obligor's income, together with interest and reasonable attorney's fees, and any other penalties set by State or Tribal law/procedure.

In New York State, upon a finding by family court that you failed to withhold or remit withholdings as directed in this NOTICE, the Court shall issue an order directing your compliance and may direct the payment of a civil penalty to the creditor not to exceed \$500 for the first instance and \$1,000 per instance for the second and subsequent instances of noncompliance.

Miller Aff., Exhibit A at p. 2. The IWO explained that in the event UMC receives additional IWOs, "Unless you receive a Terminated NOTICE, those deductions, if any, remain in effect." Miller Aff., Exhibit A at p. 3.

On or about September 25, 2012, UMC received an Amended IWO from Erie County for DMX's ten-year-old daughter, Jaden S. Oden. Miller Aff., Exhibit B at p. 1. According to the IWO, "Do not stop any existing IWO unless you receive a termination order." Miller Aff., Exhibit B at p. 1. The IWO added:

If you comply with this IWO you will not be subject to civil liability to any individual or agency for conduct in compliance with this IWO. If you fail to withhold income from the employee/obligor's income as the IWO directs, you are liable for both the accumulated amount you should have withheld, together with interest and reasonable attorney's fees, and any penalties set by State or Tribal law/procedure. In New York State, pursuant to Civil Practice Law and Rules (CPLR) §5241, upon a finding by the Family Court that you failed to withhold or remit withholdings as

directed in this IWO, the Court shall issue an order directing your compliance and may direct the payment of a civil penalty not to exceed \$500 for the first instance and \$1,000 per instance for the second and subsequent instances of noncompliance.

Miller Aff., Exhibit B at p. 2.

On or about March 23, 2014, UMC received a notice from Erie County reflecting an amended IWO with regard to DMX's daughter, Jada S. Oden. Miller Aff., Exhibit H. at p. 1.

UMC has never received a termination notice for the IWO for the benefit of Jada S. Oden.

On or about March 25, 2014, UMC received a notice from Westchester County regarding the termination of the IWO on behalf of DMX's daughter, Sasha R. Simmons. Miller Aff., Exhibit G at p. 1. This is the only termination notice that UMC has received for any IWO regarding DMX.

On or about April 1, 2014, UMC received an amended IWO from Westchester County for the benefit of four additional children of DMX: Xavier E Simmons (19), Tacoma Simmons (14), Sean Simmons (11), and Praise M. Simmons (8). Miller Aff., Exhibit J at p. 1. UMC has never received termination notices for the IWOs for the benefit of Jaden S. Oden, Xavier E Simmons, Tacoma Simmons, Sean Simmons, and Praise M. Simmons. The only termination notice received by UMC was for the IWO for the benefit of Sasha R. Simmons.

Despite the above indisputable facts, Amusing Diversions claims that it has hearsay evidence that the IWOs for the benefit of Jaden S. Oden, Xavier E Simmons, Tacoma Simmons, Sean Simmons, and Praise M. Simmons have been terminated. Nevertheless, UMC has not received any notices from the Courts of Erie and Westchester that the above-referenced IWOs have been canceled, and Amusing Diversions has failed to provide any termination notices from the Courts. Until instructed otherwise, UMC will comply with orders issued by the Courts and not with unsupported demands issued by Amusing Diversions' counsel.

ARGUMENT

I. Child Support Orders have First Priority

Child support orders “take priority over any other assignment, levy or process.” CPLR §5241(h). Moreover, after receiving an IWO, “the income execution is binding until further notice.” CPLR §5241(c)(vi). Despite counsel’s allegations, hearsay press reports are not equivalent to notice from the courts.

If one complies with an IWO, one “shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.” CPLR §5241(c)(xi). However, if one is served with an IWO and fails to comply with the IWO, one “shall be liable to the creditor for failure to deduct the amounts specified, “ CPLR §5241(g)(2)(A), and may be liable for additional civil penalties. The Court “may direct the payment of a civil penalty not to exceed five hundred dollars for the first instance and one thousand dollars per instance for the second and subsequent instances of employer or income payor noncompliance.” CPLR §5241(g)(2)(D).

Amusing Diversions demands that UMC, without having received any termination notices, disregard IWOs for the benefit of Jaden S. Oden, Xavier E Simmons, Tacoma Simmons, Sean Simmons, and Praise M. Simmons. While UMC has some sympathy for Amusing Diversions as a creditor, UMC cannot disregard lawful IWOs for the benefit of five children simply based upon speculative inferences made by counsel for Amusing Diversions.

II. Amusing Diversions speculates that UMC should infer that the IWOs have been terminated

Petitioner argues that DMX’s performances in Europe are proof that he has somehow settled his child support demands and that the IWOs are terminated. In support of this speculative, unsupported theory, Amusing Diversions argues that DMX could not travel outside the U.S. because he owes more than \$2,500.00 in child support, and the U.S. Government would

not issue DMX a passport to travel pursuant to 42 U.S.C. §652(k)(2) and 22 C.F.R. §51.60(a)(2).

Petition at §§ 31-38.

According to 42 U.S.C. §652(k)(1) and (2),

(1) If the Secretary receives a certification by a State agency in accordance with the requirements of section 654(31) of this title that an individual owes arrearages of child support in an amount exceeding \$2,500, the Secretary shall transmit such certification to the Secretary of State for action (with respect to denial, revocation, or limitation of passports) pursuant to paragraph (2).

(2) The Secretary of State shall, upon certification by the Secretary transmitted under paragraph (1), refuse to issue a passport to such individual, and may revoke, restrict, or limit a passport issued previously to such individual.

Furthermore, CFR §51.60 adds,

(a) The Department may not issue a passport, except a passport for direct return to the United States, in any case in which the Department determines or is informed by a competent authority that:

* * *

(2) The applicant has been certified by the Secretary of Health and Human Services as notified by a state agency under 42 U.S.C. 625(k) to be in arrears of child support in an amount determined by statute.

Amusing Diversions makes a number of assumptions. One, Amusing Diversions assumes that DMX is in arrears for at least \$2,500 in child support payments. Two, Amusing Diversions assumes that a Court and a State agency reported the arrearage to the federal government. Three, Amusing Diversions assumes that New York State Courts did not allow DMX to travel and perform to support his children even if he did owe child support payments. In conclusion, Amusing Diversions makes numerous assumptions, none of which are conclusive, none of which are facts, and none of which are as conclusive as a court order terminating child support. UMC

will not rely on Amusing Diversions assumptions and speculations but will rely on termination notices supplied by the courts.

III. Amusing Diversions Frivolous Claim for Turnover and Attorneys' Fees

Amusing Diversions claims that if UMC refuses to unilaterally place Amusing Diversions in priority over DMX's five children, than Amusing Diversions is entitled to costs and attorneys' fees under 22 NYCRR §130-1.1. Petition at § 15. 22 NYCRR §130-1.1 asserts:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part.

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Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section.

(emphasis added).

Given that UMC has complied with CPLR § 5241 and every court order and that Amusing Diversions is demanding that UMC disregard lawful IWOs and pay Amusing Diversions instead of DMX's five children, and, given that Amusing Diversions is requesting that UMC be sanctioned for refusing to disregard lawful IWOs, UMC respectfully requests that Amusing Diversions be sanctioned under the provisions of 22 NYCRR §130-1.1 and that Amusing Diversions be ordered to pay the reasonable attorneys' fees of UMC in responding to this Petition.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition of Amusing Diversions, in its entirety and with prejudice, and award UMC its attorneys' fees in defending against this Petition.

Dated: New York, New York
May 12, 2014

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