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CAUSE NO. 2019-79857A

PATRICK A.P. DE MAN,	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC., GARNISHEE	§ §	61ST JUDICIAL DISTRICT
	§	
RAIDEN COMMODITIES, L.P., and ASPIRE COMMODITIES, L.P.	§ §	

EMERGENCY MOTION TO DISSOLVE WRIT OF GARNISHMENT

Plaintiff Patrick DeMan ("DeMan") improperly obtained A Writ of Garnishment After Judgment against the Electric Reliability Council of Texas, Inc. ("ERCOT"), which transacts business with Movants Raiden Commodities, L.P. ("Raiden") and Aspire Commodities, L.P. ("Aspire") (together, "Movants"), based on the vague and inaccurate statement—from someone other than DeMan himself—that "Defendant does not possess property within the state that is subject to execution and that is sufficient to satisfy" an interlocutory and unenforceable judgment DeMan seeks to collect. In fact, DeMan knows full well that Movants possess property within the state sufficient to satisfy the judgment because DeMan obtained a Temporary Restraining Order requiring Movants to deposit in a segregated account the amount of the purported judgment, an order with which Movants are complying. Accordingly, the Writ of Garnishment should be dissolved immediately because (1) there is no valid, subsisting judgment on which DeMan can collect; (2) the affidavit filed in support of the Writ of Garnishment is defective; (3) DeMan should know full well that Movants have sufficient assets in Texas; and (4) the amount of the purported judgment is already being segregated pursuant to a temporary restraining order. Furthermore,

Movants should be entitled to reasonable costs and attorneys' fees in moving to dissolve the Writ of Garnishment because the affidavit purporting to support it contain misrepresentations.

BACKGROUND

On December 27, 2018, the Superior Court of Bayamon granted DeMan's Motion for Partial Summary Judgment against Movants, ordering Movants to pay DeMan $690,847 in employee wages and $103,627.05 in attorneys' fees (the "Judgment Amount"). *See* Partial Judgment at 8–9, attached to Notice of Filing. The court made clear that its order was a "[p]artial sentence." *Id*. at 9. The parties continue to litigate a litany of other issues related to DeMan's business relationship with Movants—issues that were not disposed of by the Partial Judgment and may not be disposed of for some time. *See id*. at 2–3.

After the Partial Judgment was entered, and during Movants' appeal of that Partial Judgment, DeMan filed an amended complaint. Movants subsequently filed a motion asking the court to declare the Partial Judgment null and void due to the amended complaint.

On November 1, 2019, DeMan attempted to domesticate the Partial Judgment by filing a Notice of Foreign Judgment with this Court. He did not provide Movants with notice of that filing until November 21, 2019. On December 16, 2019, Movants filed a Motion to Vacate DeMan's attempt to domesticate the foreign judgment (*See* Exhibit 1) and a hearing on the Motion to Vacate is set for March 19, 2020.

On December 18, 2019, the Court issued a Temporary Restraining Order ("TRO") requiring Raiden and Aspire to "deposit in a segregated bank account of their choosing, the Judgment Amount of $794,474.05" and restraining Movants and "any affiliated individual or entity" from "caus[ing] any portion of the Judgment Amount to be removed for any reason during the pendency of the order." *See* Exhibit 2. During the TRO hearing, DeMan served a Notice of Garnishment attaching the Writ of Garnishment against ERCOT ("Writ of Garnishment"). Exhibit

3. Notably, the affidavit purporting to support the Writ of Garnishment was sworn to by William C. Boyd, signed by Richard L. Fason, and contained no statement regarding DeMan's knowledge of Movants' property. *See* Ex. 3.

On December 19, 2019, DeMan filed a corrected affidavit, this time stating that Richard Fason was the affiant—DeMan still affirmed nothing. *See* Exhibit 4. Later that day, DeMan also filed a Declaration in Support of Writ of Garnishment. Exhibit 5. In the declaration, DeMan stated that within his knowledge, "Defendant does not possess property within the ***Commonwealth of Puerto Rico*** that is subject to execution and that is sufficient to satisfy the judgment." *See Id.* (emphasis added). Finally, on December 19, 2019, DeMan served in the underlying domestication action Plaintiffs' Post-Judgment Interrogatories, Request for Admissions and Production. *See* Exhibit 6.

ARGUMENT

I. The Writ of Garnishment Should be Dissolved Because DeMan Does Not Have a Valid Subsisting Judgment.

Texas Civil Practices & Remedies Code § 63.001(3) states that a writ of garnishment is available where a:

> plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution to satisfy the judgment.

As explained in the Motion to Vacate (*see* Ex. 1), a foreign judgment is not entitled to full faith and credit—and therefore should not be enforced by a Texas court—where, as here, the judgment is interlocutory. *See Reading & Bates Const. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702, 713 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see also Carter v. Cline*, No. 03-10-00855-CV, 2011 WL 4924214, at *4 (Tex. App.—Austin Oct. 13, 2011, no pet.) ("debtor can avoid enforcement by timely asserting and establishing one or more . . . exceptions to the

requirement that a foreign judgment be afforded full faith and credit," including, where "the decree is interlocutory"). Unlike a judgment after a trial on the merits, a summary judgment "is presumed to dispose of only those issues expressly presented, not all issues in the case." *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988). "A summary judgment that fails to dispose expressly of all parties and issues in the pending suit is interlocutory," unless the judgment has been severed from the case, which the Partial Judgment has not. *Id*.

Here, the rendering court was explicit as to the non-finality of the Partial Judgment: it is a "partial sentence" being granted at one "stage" of a lawsuit that is still pending. *See Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 482 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("The finality of a judgment or order is controlled by its substance, not its label or form."). The Partial Judgment does not "expressly state that all issues were resolved, nor that all matters between parties were decided." *See Guillory*, 751 S.W.2d at 492 (holding court of appeals erred in holding partial judgment was a final, appealable judgment). The Partial Judgment is therefore, on its face, facially non-final, *i.e.*, interlocutory, and not entitled to the full faith and credit of the Texas courts unless and until it is deemed final and enforceable after the March 19, 2020 hearing on the Motion to Vacate.

Furthermore, the Partial Judgment infringes the due process rights of the Movants, therefore, it is null and void and unenforceable in Texas. As explained in Movants' complaint to the Puerto Rico court, once DeMan amended his complaint in the Puerto Rico action, the Partial Judgment was nullified and of no effect. DeMan cannot enforce his judgment here because the Partial Judgment is void. *See Karstetter v. Voss*, 184 S.W.3d 396, 402 (Tex. App.—Dallas 2006, no pet.) ("A collateral attack on a judgment is successful only where the judgment is established as void."). In any event, the Partial Judgment is not a subsisting judgment on which DeMan can

seek the Writ of Garnishment because motions on the validity of the Partial Judgment are still being considered in the rendering jurisdiction. Accordingly, the Writ of Garnishment should be dissolved.

II. The Affidavit Supporting the Writ of Garnishment is Defective Because it is not Based on DeMan's Knowledge as Required and is not Signed by the Purported Affiant.

Tex. Civ. Prac. & Rem. Code § 63.001(3) requires "an affidavit stating that, within the ***plaintiff's*** knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment." (emphasis added). The affidavit submitted to support the Writ of Garnishment doees not meet this requirement. The purported affiant is William C. Boyd, yet the affidavit was signed by Richard L. Fason. *See* Ex. 3. For this reason alone, the affidavit is defective and cannot support the Writ of Garnishment. DeMan effectively conceded the affidavit is defective when he filed on December 19, 2019 a corrected affidavit replacing Boyd's name with Fason's. *See* Ex. 4. This corrected affidavit is proof that the original affidavit is defective and the Writ of Garnishment should be dissolved.

Moreover, the affidavit is not based on the ***plaintiff's*** knowledge as required by Tex. Civ. Prac. & Rem. Code § 63.001(3), rather, it appears to be based on his attorney's purported knowledge. But without DeMan's knowledge, the affidavit is defective and cannot support the Writ of Garnishment. And DeMan's subsequent filing on December 19, 2019 of his Declaration in Support of Writ of Garnishment is of no avail as they state:

> Within my knowledge, Defendant does not possess property within the Commonwealth of Puerto Rico that is subject to execution and that is sufficient to satisfy the judgment.

See Ex. 5. Unfortunately for DeMan, Tex. Civ. Prac. & Rem. Code § 63.001 requires DeMan to affirm that the "defendant does not possess property in Texas subject to execution sufficient to

satisfy the judgment." (emphasis added). Therefore, DeMan's late-filed declaration is of no consequence and cannot rehabilitate the defective writ.

Underscoring DeMan's lack of personal knowledge that Movants do not possess property in Texas subject to execution is the fact that on December 19, 2019—***for the first time***—DeMan served on Movants Plaintiff's Post-Judgment Interrogatories, Request for Admissions and Production. *See* Ex. 6. Responses to DeMan's discovery requests are not due until January 20, 2020, therefore any attempt by DeMan to affirm ***today*** that Movants do not possess property in Texas subject to execution is premature and should not be countenanced. The Writ of Garnishment should be dissolved.

III. The Writ of Garnishment Should be Dissolved Because DeMan Knows Movants Possess Property Within Texas Subject to Execution and Sufficient to Satisfy the Purported Judgment.

First, Movants have within the State of Texas assets far in excess of the Judgment Amount DeMan seeks to recover. *See* Declaration of Adam Sinn, attached hereto as Exhibit 7, ¶ 4. DeMan, as a former Raiden employee, should know this to be true. Perhaps that is why some combination of his attorneys signed the deficient affidavit purporting to support the Writ of Garnishment and DeMan did not sign the affidavit himself.

Second, DeMan knows that the Judgment Amount can be executed upon as he obtained a TRO specifically directing Movants to segregate the Judgment Amount into a bank account and restraining Movants or any affiliated individual or entity from causing "any portion of the Judgment Amount to be removed for any reason," while the TRO is in effect. In other words, there is no basis for any assertion regarding Movants' lack of property in Texas and this lack of knowledge cannot support the Writ of Garnishment. Accordingly, it should be dissolved.

CONCLUSION

There is no valid, subsisting judgment on which DeMan can collect, the affidavit purporting to support the Writ of Garnishment is defective, and Movants have sufficient property within this state subject to execution and sufficient to satisfy the purported judgment, if it is finalized and deemed enforceable in Texas. Accordingly, the Writ of Garnishment should be dissolved. Movants further request an award of attorneys' fees and costs.

Dated: December 20, 2019

Respectfully submitted,

/s/ Benjamin T. Pendroff
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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019 a true and correct copy of the foregoing document was served via electronic service to all counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/ Benjamin T. Pendroff
Benjamin T. Pendroff