(3)

COUNTY OF ERIE

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October 15, 2014

Mr. Scott W. Kroll, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Kroll:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Hamilton Equity Group, LLC, as Assignee of HSBC Bank USA, National Association v. Joseph A. Ables, et al.*
Documents Received:	Affidavits and Memorandum of Law
Name of Petitioner:	Hamilton Equity Group, LLC, as Assignee of HSBC Bank USA, National Association
Petitioner's attorney:	Kyle C. DiDone, Esq. Rupp, Baase, Pfalzgraf, Cunningham Coppola LLC 1600 Liberty Building 424 Main Street Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle Parker
First Assistant County Attorney

MMP:dld
Enc.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HAMILTON EQUITY GROUP, LLC, as Assignee of
HSBC BANK USA, NATIONAL ASSOCIATION,

Petitioner/Judgment Creditor,

v.

Index No.: 2012-001788

JOSEPH A. ABLES, JR., JUAN E. IRENE, PLLC,
JUAN E. IRENE, Individually and d/b/a
THE LAW OFFICE OF JUAN E. IRENE, ESQ.,

Respondents.

JUAN E. IRENE, PLLC,
JUAN E. IRENE, Individually and d/b/a
THE LAW OFFICE OF JUAN IRENE, ESQ.,

Judgment Debtors.

2014 OCT -3 PM 12:04

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO VACATE PETITIONER'S TURNOVER ORDER

RUPP, BAASE, PFALZGRAF,
CUNNINGHAM & COPPOLA LLC
Attorneys for Petitioner
Hamilton Equity Group, LLC
Kyle C. DiDone, Esq., of Counsel
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PRELIMINARY STATEMENT

Petitioner Hamilton Equity Group, LLC ("Hamilton"), as Assignee of HSBC Bank USA, National Association, submits this memorandum of law in opposition to respondent Juan E. Irene's motion for an order pursuant to CPLR 2221(d) vacating and setting aside a turnover order previously granted by this Court on June 28, 2012 and an order directing the Erie County Sheriff to return the proceeds from the turnover order to Juan E. Irene.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The procedural history and factual background of this case are set forth in the accompanying affidavit of Kyle C. DiDone, Esq., sworn to October 1, 2014 ("DiDone Affidavit"), to which this Court is respectfully referred.

ARGUMENT

POINT I

JUAN E. IRENE IS NOT ENTITLED TO VACATUR OF THIS COURT'S TURNOVER ORDER

It is incredible that Juan E. Irene brings this motion over two years after the Court granted the turnover order and nearly two years since the Appellate Division issued its memorandum and order. In his motion, Mr. Irene argues that because he is not personally liable

to Hamilton, Hamilton should not be entitled to the fees that were owed to Juan E. Irene, PLLC. Mr. Irene is conflating Hamilton's *de facto* merger claim, which allowed Hamilton to recover judgment against him, with Hamilton's replevin claim, which allowed Hamilton to recover certain fees that Juan E. Irene, PLLC had pledged to Hamilton as collateral. The former claim was rejected by the Appellate Division, Fourth Department. The latter claim was affirmed by the Fourth Department. The Fourth Department may have vacated Hamilton's judgment against Mr. Irene, but it affirmed this Court's order of replevin and writ of seizure with respect to Hamilton's entitlement to the pledged fees. Any attempt by Mr. Irene to revisit these issues and to seek to have the Court's turnover order vacated runs afoul of the law of the case and should be rejected by the Court.

It is undisputed that Juan E. Irene, PLLC is indebted to Hamilton pursuant to a certain business line of credit agreement. This Court granted Hamilton judgment as against Juan E. Irene, PLLC pursuant to its May 24, 2011 decision and order. Juan E. Irene, PLLC's time to appeal from that decision and order expired long ago. Hamilton's judgment is final and not dependent or contingent on the outcome of any future event. Hamilton is a judgment creditor of Juan E. Irene, PLLC and has a mature claim.

In addition to this Court granting Hamilton judgment as against Juan E. Irene, PLLC, it granted Hamilton an order of replevin and writ of seizure with respect to certain accounts that Juan E. Irene, PLLC had pledged to Hamilton as collateral for the repayment of its debt. Hamilton's entitlement to an order of replevin and writ of seizure arose out of the general

security agreement ("Security Agreement") that Juan E. Irene, PLLC executed in Hamilton's favor. (*See* Exhibit C to the DiDone Affidavit, Exhibit B thereto). As set forth in the Security Agreement, Hamilton has a security interest in all assets and property of every description of Juan E. Irene, PLLC, including, but not limited to all "accounts" of Juan E. Irene, PLLC. (*Id.* at ¶ 1). The UCC defines accounts as "a right to payment of a monetary obligation, whether or not earned by performance, [...] for services rendered or to be rendered." UCC § 9-102(a)(2). For law firms that have pledged accounts as collateral, the fees owed by clients are considered a pledged asset. *See, e.g., PNC Bank, Delaware v. Berg,* 1997 Del. Super. LEXIS 19, 27, 45 U.C.C. Rep. Serv. 2d (Callaghan) 27 (Del. Super. Ct. 1997) (holding that an attorney's hourly billing and contingency fee contracts are accounts under U.C.C. § 9-102(a)(2)); *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC,* 519 F. Supp. 2d 515, 523 (E.D. Pa. 2006) (holding that "unmatured contingency fee arrangements" are accounts under U.C.C. § 9-102(a)(2)).

In this case, defendants acknowledged that Juan E. Irene, PLLC possessed at least 12 personal injury cases at the time it was dissolved. (*See* Exhibit F to the DiDone Affidavit, Exhibit B thereto). Those cases were the cases of Yan Carlos Ayala, Mary Elowsky, Sonia Maldonado, Robin Mallory, Hamaayah Moody, Ramon Rivera, David Rybicki, Raynee Smith, Dierdre Sniatecki, Ann Sterlace, Kory Scheeler, and Ledesma Xidmara. In its May 24, 2011 decision and order, this Court found that Hamilton had an interest in and was entitled to the fees owed by those clients. In its June 28, 2012 turnover order, this Court directed Joseph A. Ables to turn over to the Erie County Sheriff any monies that were in his possession related to the

Maldonado case. Mr. Ables turned those funds over to the Sheriff and the Sheriff turned those funds over to Hamilton.

Mr. Irene did not appeal from the turnover order. Mr. Irene did appeal from the Court's May 24, 2011 decision and order, but only with respect to the judgment against him. Mr. Irene did not appeal from the order-of-replevin and writ-of-seizure portions of the May 24, 2011 decision and order. The Fourth Department vacated the judgment against him, but left intact the order-of-replevin and writ-of-seizure rulings that had granted Hamilton the right to possession of the fees in the 12 above-referenced cases, including the Maldonado case.

Mr. Irene's motion to vacate the turnover order is misguided at best and frivolous at worst.

POINT II

THE TURNOVER ORDER AND THE ORDER-OF-REPLEVIN AND WRIT-OF-SEIZURE PORTIONS OF THIS COURT'S MAY 24, 2011 DECISION AND ORDER ARE LAW OF THE CASE

It is the law of the case that Hamilton is entitled to an order of replevin, writ of seizure, and turnover order with regard to the attorneys' fees that Joseph A. Ables owed to Juan E. Irene, PLLC. Those fees constituted Hamilton's collateral. The Fourth Department affirmed the order-of-replevin and writ-of-seizure portions of this Court's May 24, 2011 decision and order. This Court's ruling in its turnover order was consistent with its ruling in its May 24, 2011

decision and order. There has been no intervening change in the law to merit this Court reversing its prior rulings.

The law of the case doctrine provides that once an issue has been determined in a litigation, it should not be overturned or reversed by the same court or a court of coordinate jurisdiction. *See Martin v. Cohoes*, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687 (1975) (the doctrine "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"); *see also O'Brien v. Lehigh V. R. Co.,* 177 Misc. 25, 26, 30 N.Y.S.2d 287 (Sup. Ct., Monroe Co. 1941) (relief from an adverse decision made as a matter of law cannot be obtained by moving upon the same facts before a court of coordinate jurisdiction; instead, the party must seek relief by appeal), *aff'd*, 264 A.D. 831, 35 N.Y.S.2d 752 (4th Dep't 1942), *aff'd*, 289 N.Y. 783 (1943). A trial court "'has no revisory or appellate jurisdiction to correct by amendment [an] error in substance affecting the judgment.'" *Id.* at 678-79 (quoting *Herpe v. Herpe*, 225 N.Y. 323, 327, 122 N.E. 204 (1919)). Rather, trial courts possess the authority only to cure those mistakes that do not affect the substantial rights of parties. *See Kiker v. Nassau County*, 85 N.Y.2d 879, 881, 649 N.E.2d 1199, 626 N.Y.S.2d 55 (1995).

Although a trial court may revisit a prior decision if there is a change in statutory or decisional law, there has been no such change in this case. *See Stern v. Charter Oak Fire Ins. Co.*, 59 A.D.3d 930, 872 N.Y.S.2d 618 (4th Dep't 2009) (holding that the doctrine of the law of

the case could not be invoked because the analysis employed in a prior appeal no longer reflected the current state of the law). The Appellate Division, Fourth Department, in its December 28, 2014 memorandum and order, did not overturn or otherwise modify the portions of this Court's May 24, 2011 decision and order that granted an order of replevin and writ of seizure. Mr. Irene has not presented any controlling decisions not previously considered by this Court when it determined as a matter of law that Hamilton was entitled to possession of its collateral. That collateral included the fees owed to Juan E. Irene, PLLC in the Maldonado matter. In fact, Mr. Irene's attempt to use his motion to recover the fees owed in the Maldonado matter is inconsistent with his prior position on this issue. As the Fourth Department points out in its memorandum and decision: "[p]ersonal injury cases previously handled by the PSLLC were transferred to defendant's law practice, and ***defendant does not dispute that plaintiff has a security interest in a portion of the attorneys' fees that may be generated by those personal injury cases.***" (emphasis added) (*see* Exhibit M to the DiDone Affidavit). Mr. Irene's attempt to recover these fees is tantamount to conversion.

Mr. Irene's proper course of action for seeking to vacate the turnover order should have been to seek relief from the Fourth Department, not to ask this Court to reverse itself nearly two and one-half years after it had made this ruling. It is the law of the case that Hamilton is entitled to the fees that were owed to Juan E. Irene, PLLC in the Maldonado matter, and this Court should stand by its ruling and deny Mr. Irene's motion.

CONCLUSION

For the foregoing reasons, the Court should deny Mr. Irene's motion in all respects.

Dated: October 1, 2014
Buffalo, New York

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