

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21504
Y/kmg

_____AD3d_____

Argued - October 30, 2008

STEVEN W. FISHER, J.P.
RUTH C. BALKIN
WILLIAM E. McCARTHY
JOHN M. LEVENTHAL, JJ.

2007-09434
2007-09398
2007-09919

DECISION & ORDER

Riverside Capital Advisers, Inc., etc., plaintiff,
Winchester Global Trust Company Limited, etc.,
respondent, v First Secured Capital Corporation,
et al., defendants, Thomas B. Donovan Family Trust,
defendant-appellant; Thomas B. Donovan, et al.,
nonparties-appellants.

(Index No. 20600/99)

Rosenberg Calica & Birney, LLP, Garden City, N.Y. (Ronald J. Rosenberg, John S. Ciulla, and Peter J. Williams of counsel), for defendant-appellant, and Phillips Nizer, LLP, Garden City, N.Y. (Alfred D. Lerner and George Berger of counsel), and Kenneth J. Weinstein, Garden City, N.Y., for nonparties-appellants (one brief filed).

Greenberg Traurig, LLP, New York, N.Y. (Kenneth A. LaPatine, Daniel Milstein, and Jennifer L. Zuch of counsel), for respondent.

In an action, inter alia, to recover damages for breach of a loan agreement, the defendant Thomas B. Donovan Family Trust and the nonparties, Thomas B. Donovan and Pamela Donovan, appeal (1) from an order of the Supreme Court, Nassau County (Warshawsky, J.), dated August 30, 2007, which granted the motion of the plaintiff Winchester Global Trust Company Limited, as Trustee of the Factored Receivables Trust, as Successor in Interest to Highlands Financial Services, Inc., to impose a fine in an amount equal to an unsatisfied judgment in the sum of \$21,471,650.29 plus interest, entered in favor of that plaintiff and against the defendant First Secured Capital Corporation, based upon the failure of the defendant Thomas B. Donovan Family Trust and

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the nonparties Thomas Donovan and Pamela Donovan to purge their civil contempt, and directed the incarceration of the nonparties Thomas Donovan and Pamela Donovan in the event of failure to pay the fine, (2), as limited by their brief, from so much of an order of the same court dated September 11, 2007, as denied their application to vacate the order dated August 30, 2007, and (3) from an order of the same court dated October 12, 2007, which vacated the stay of enforcement of the order dated August 30, 2007, which had been granted in the order dated September 11, 2007.

ORDERED that on the Court's own motion, the notices of appeal from the orders dated September 11, 2007, and October 12, 2007, are deemed to be applications for leave to appeal, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the orders dated August 30, 2007, and October 12, 2007, are affirmed; and it is further,

ORDERED that the order dated September 11, 2007, is affirmed insofar as appealed from, and it is further,

ORDERED that one bill of costs is awarded to the plaintiff Winchester Global Trust Company Limited, as Trustee of the Factored Receivables Trust, as Successor in Interest to Highlands Financial Services, Inc.

After a finding of contempt has been made, it is the contemnor's burden to demonstrate that he or she has purged the contempt or that it is impossible for him or her to purge (*see Bansal v Bansal*, 281 AD2d 503, 504; *James Talcott Factors v Larfred, Inc.*, 115 AD2d 397, 401; *Matter of Storm*, 28 AD2d 290, 294). The contemnor must demonstrate compliance by clear and convincing evidence (*see Matter of Nestler v Nestler*, 125 AD2d 836, 837). Contrary to their contentions, the appellants did not demonstrate compliance by clear and convincing evidence.

Pursuant to Judiciary Law § 773, where there is a showing of actual loss or injury, the amount of a contempt fine should be sufficient to indemnify the aggrieved party for the actual loss or injury caused by “the misconduct proved against the offender” (*State of New York v Unique Ideas*, 56 AD2d 295, 298, quoting Judiciary Law § 773, *affd* 44 NY2d 345; *see also Corpuel v Galasso*, 240 AD2d 531, 532). Here, the respondent presented evidence to establish that it sustained an actual loss in the amount of an unsatisfied judgment. A review of the record demonstrates that the nonparties Thomas B. Donovan and Pamela Donovan, who completely controlled the judgment debtor, caused the judgment debtor to dispose of the respondent's collateral and to transfer the proceeds of those dispositions to several other related entities controlled by themselves, removing them from the respondent's reach. The record further establishes that these transactions constituted a misappropriation of the respondent's collateral and left the judgment debtor almost entirely without assets. The appellants have steadfastly refused to disclose information about the location of assets to satisfy the outstanding judgment and have been held in contempt three times (*see Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 455; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 43 AD3d 1023; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 43 AD3d 1025). Under these circumstances, the contemnors' conduct completely impeded

and defeated the respondent's ability to collect upon the judgment.

The appellants' remaining contentions are without merit.

FISHER, J.P., BALKIN, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court