

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1348

CA 10-00567

PRESENT: FAHEY, J.P., LINDLEY, SCONIERS, AND GORSKI, JJ.

THOMAS V. CASE, PLAINTIFF,

V

MEMORANDUM AND ORDER

ANTONE R. CASE, CASE BROS., A NEW YORK
PARTNERSHIP, DOING BUSINESS AS TC PACKING
COMPANY, WYOMING COUNTY BANK,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

DIBBLE & MILLER, P.C., APPELLANT,
DAVID A. SHULTS AND BARBARA L.S. FINCH,
INTERVENORS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (GERARD F. NORTON OF COUNSEL), FOR
APPELLANT PRO SE.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-RESPONDENT ANTONE R. CASE.

SHULTS AND SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR
INTERVENORS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Kenneth R. Fisher, J.), entered July 30, 2009 in an action for
dissolution of a partnership. The order, insofar as appealed from,
distributed plaintiff's second share to nonparty creditors in a
federal action and determined that the second share is a fund
independent of a lien by Dibble & Miller, P.C.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs.

Memorandum: Plaintiff and his attorneys, Dibble & Miller, P.C.
(appellant), appeal from, inter alia, that part of an order directing
the distribution of plaintiff's share of post-accounting income in a
partnership dissolution proceeding to plaintiff's nonparty creditors
pursuant to an order of the United States District Court for the
Western District of New York, despite the existence of an attorney's
lien filed by appellant. Following the filing of a notice of appeal
in this matter, however, the United States Court of Appeals for the
Second Circuit reversed the order of the District Court denying
appellant's motion to intervene in the federal matter, ordered that
the funds at issue be held by the clerk of the District Court and
remanded the matter to the District Court for further proceedings (see

Eastern Potato Dealers, Inc. v TNC Packing Corp., 363 Fed Appx 819, 822). We thus note that all of the necessary parties and the relevant issues are currently before the District Court. Further, this matter involves consideration of the Perishable Agricultural Commodities Act (7 USC § 499a *et seq.*), and "considerations of comity, orderly procedure, and judicial economy demand that the [f]ederal action be tried first" (*Theatre Confections v Andrea Theatres*, 126 AD2d 969, 970). We therefore conclude that the appeal must be dismissed without consideration of the merits. To the extent, if any, that the order appealed from is or may become inconsistent with a federal court order, plaintiff and appellant may seek relief from Supreme Court (see generally CPLR 2221 [a], [e]; 5015).

Entered: November 12, 2010

Patricia L. Morgan
Clerk of the Court