

Gryphon Domestic VI, LLC v GBR Information Services, Inc.

2004 NY Slip Op 30298(U)

October 29, 2004

Supreme Court, New York County

Docket Number: 601890/04

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

GRYPHON DOMESTIC VI, LLC, et. al,
Petitioners/Judgment Creditors,

INDEX NO. 601890/04
MOTION DATE 08-03-04
MOTION SEQ. NO. 001

- against -

GBR INFORMATION SERVICES, INC.,
Respondent,

APP INTERNATIONAL FINANCE COMPANY, B.V.,
et. al.,
Judgment Debtors.

The following papers, numbered 1 to _____ were read on this motion to/for Post-judgment discovery

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this petition is decided in accordance with the accompanying memorandum decision and order and this matter is transferred to the Motion Support Office for re-assignment to an all purpose IAS part, for the purpose of conducting further proceedings in accordance herewith.

FILED

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Dated: October 29, 2004

KFP
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4**

-----X
**GRYPHON DOMESTIC VI, LLC,
 OCM OPPORTUNITIES FUND II, L.P.,
 OCM OPPORTUNITIES FUND III, L.P.,
 COLUMBIA/HCA MASTER RETIREMENT TRUST,
 GRAMERCY EMERGING MARKETS FUND and
 WARNER MAISON FUND,**
 Petitioners/Judgment Creditors,

Index No. 601890/04
 Motion Seq. 001

- against -

GBR INFORMATION SERVICES, INC.,
 Respondent,

**APP INTERNATIONAL FINANCE COMPANY, B. V.,
 P. T. LONTAR POPYRUS PULP & PAPER INDUSTRY,
 ASIA PULP & PAPER COMPANY LTD.,
 INDAH KIAT INTERNATIONAL FINANCE COMPANY
 B.V. and P. T. INDAH KIAT PULP & PAPER
 CORPORATION,**
 Judgment Debtors.

DECISION/JUDGMENT

-----X
KIBBIE F. PAYNE, J.:

This is a proceeding supplementary to judgment commenced pursuant to Article 52 of the CPLR. In the petition dated June 18, 2004, Gryphon Domestic VI, LLC, OCM Opportunities Fund II, L.P., OCM Opportunities Fund III, L.P., Columbia/HCA Master Retirement Trust, Gramercy Emerging Markets Fund and Warner Maison Fund (collectively referred to herein as the "judgment creditors"), move for an order directing respondent GBR Information Services, Inc. (GBR) to turnover and deliver to Siller Wilk LLP, as attorneys for the judgment creditors, all sums and/or property alleged to belong to the judgment debtors, in response to a subpoena duces tecum and restraining notice previously served (CPLR §§ 5222, 5225 and 5227).

The judgment creditors have recovered a judgment of the Supreme Court, New York

County, filed under Index No. 603315/02, in an amount exceeding \$385 million dollars against APP International Finance Company, B.V., P.T. Lontar Papyrus Pulp & Paper Industry, Asia Pulp & Paper Company LTD., Indah Kiat International Finance Company B.V. and P. T. Indah Kiat Pulp & Paper Corporation (collectively referred to herein as the “judgment debtors”). The judgment debtors are foreign corporations operating in the Netherlands, Jakarta and Indonesia. The judgment creditors claim that GBR, a New York City based corporation, has been retained by one or more of the judgment debtors to perform bondholder solicitation or other related services in connection with arranging transactions for the restructuring of the promissory notes underlying the judgment. The judgment creditors claim further that GBR is in possession of money and/or property allegedly belonging to the judgment debtors, including bondholder lists and other compilations of information, which should “in the current business environment where intellectual property forms the primary assets of many companies” be subject to a turnover order pursuant to CPLR 5225 (b). As such, the judgment creditors contend they are entitled to secure a partial satisfaction of their judgment by utilizing section 5225 post-judgment procedure. In furtherance of their attempt to recover on the unpaid judgment, the judgment creditors on May 21, 2004, served GBR with a restraining notice which reads in pertinent part as follows:

“WHEREAS, to the extent you are in possession or in custody of property in which any or all of the judgment debtors *** have an interest, including any bank account, regular, checking, savings or Christmas club, safe-deposit vault, certificates of deposit, repurchase agreements, treasury bill, money market fund, note, bond, any security held, applications, financial statement or collateral given, accounts payable, inventory, consumer products, building products, any items of value, or any other kind of tangible or intangible asset, whether it has accrued or may accrue in the future.

TAKE NOTICE, that pursuant to subdivision (b) of Section 5222 of the Civil Practice Law and Rules, *** **YOU ARE FORBIDDEN** to make or suffer

any sale, assignment or transfer of, or interfere with, any such property or pay over or otherwise dispose of any such debt except as therein provided. TAKE FURTHER NOTICE, that this notice also covers all property in which the judgment debtors have an interest hereafter coming into your possession or custody and all debts hereafter coming due from you to the judgment debtors.”

Accompanying the service of the restraining notice was a cover letter from counsel for the judgment creditors, Siller Wilk LLP, stating that to the extent GBR was in “possession, custody or control” of property belonging to the judgment debtors, or in which the judgment debtors have an interest, or “to the extent GBR gathers information at the request of the Judgment Debtors, such information, too, may be intellectual or other property subject to the restraint and, if so, such information should not be disseminated to the Judgment Debtors or their agents.” Elsewhere in their moving papers, the judgment creditors allude to retainer funds, cash or cash equivalents, securities, intellectual property or financial documents received from the judgment debtors, or on behalf of the judgment debtors, or any anticipated exchange offer documents which if implemented would result in a dissipation of the judgment debtors’ assets. The judgment creditors also contend that if they are allowed to obtain the sought bondholders lists, they may be able to trace the flow of the judgment debtors’ assets to other third parties.

In opposition to the petition for a turnover, GBR moves to quash the subpoena with restraining notice served on it. In his affidavit attached to the opposing affirmation, John A. Baxter, the president of GBR, admits that GBR was hired by two of the judgment debtors, P.T. Indah Kiat Pulp & Paper Corporation and P.T. Lontar Papyrus Pulp & Paper Industry, to serve as an information agent “to secure bondholder identification” and to assist in the restructuring transaction. However, Baxter maintains in his sworn affidavit, that GBR owes no debt to the judgment debtors, nor is there any property in GBR’s possession in which the judgment debtors

have an interest. Baxter avers further that the information gathered by GBR to assist the judgment debtors does not qualify as “property” against which a money judgment may be enforced within the meaning of CPLR 5201 (b). Baxter also claims the bondholders lists and the process by which GBR gathered such bondholder information is confidential and that the bondholders’ participation is based on GBR’s assurance to the bondholders’ that their right to privacy will be honored. Lastly, Baxter argues that the judgment creditors’ request for the bondholders lists is made only to harass, because such information is irrelevant and can in no way lead to the satisfaction of the judgment.

The court finds that the moving papers are insufficient to direct a turnover. The petition fails to provide any details concerning the terms of the contractual arrangement between GBR and the judgment debtors. The allegation that GBR is indebted to the judgment debtors, or holds property belonging to the judgment debtors is conclusory. Although GBR’s president has admitted that there is an agreement for GBR to perform services and that the compilation of the bondholders lists are a part of that arrangement, Mr. Baxter’s affidavit still raises disputed issue of fact as to whether this arrangement makes GBR indebted to the judgment debtors, or the possessor of property in which the judgment debtors have an interest.

Under New York Law, a judgment creditor seeking a turnover order directing a third party to make available property in their possession belonging to the judgment debtor must show that the judgment debtor is presently entitled to possession of the property, or that the judgment creditor’s rights to possession of the property is superior to that of the third party (see, *Burstin Investors, Inc. v K. N. Investors, Ltd.*, 255 AD2d 478; *Gallant v Kanterman*, 198 AD2d 76; *United Intern Holdings, Inc. v Wharf (Holdings) Ltd.*, 988 F. Supp 367). The allegation of the

attorney for the judgment creditors that the bondholders lists belong to the judgment debtors is not probative. Based on the little known about GBR's transaction with the judgment debtors, one would presume that it is the judgment debtors who are indebted to GBR for the services performed on their behalf, rather than the reverse. It would also seem logical to assume that, as the information agent and compiler of the bondholders lists, it is GBR, not the judgment debtors, who owns or has an interest in the bondholders lists.

In the proceeding pending before Justice Helen Freedman, the judgment creditors moved pursuant to CPLR 5251, for an order punishing GBR for contempt, alleging GBR had disobeyed a restraining notice by continuing to disseminate intellectual property consisting of drafts of exchange, legal documents and bondholders lists. Justice Freedman denied the motion and found that such items "do not constitute property that can be applied to the judgment pursuant to CPLR § 5201 (b) because they are not assignable or transferable interests of the Judgment Debtors."¹ On the instant motion, however, I see no need to reach the question of whether or not the bondholders lists constitute intellectual property subject to turnover under CPLR 5225 (b), since the judgment creditors have not adequately demonstrated that the bondholders lists are property belonging to the judgment debtors, or that the judgment creditors have interest in such lists which is superior to the rights of GBR.

While a turnover order is not appropriate at this time, there is sufficient reason to believe that GBR may have information that can assist the judgment creditors in obtaining a satisfaction of the judgment. The judgment creditors must have the opportunity to gather additional

¹ See decision and order of Justice Freedman dated July 26, 2004, filed under Supreme Court, New York County Index No. 603315/02.

information by disclosure and the examination of such lists. This may lead to uncovering the location of assets belonging to the judgment debtors (see, *Oates v Oates*, 33 AD2d 133, 135). The sworn statement of GBR's president that GBR has no money or property of the judgment debtors cannot deprive the judgment creditors of the right to conduct discovery, since Baxter's averment is not the equivalent of an examination (*First National Bank v Gow*, 139 App. Div. 576; *DeLepomme v Luquer*, 39 NYS2d 283). Moreover, since there is no claim that the material sought is privileged, or palpably improper, it is within this court's discretion to allow an examination of the bondholders lists and other compilations subpoenaed despite GBR's claim of confidentiality. The judgment creditors have made a strong showing of necessity i.e., such information is relevant and cannot be obtained from an alternate source (*Zimmer v Cathedral School of St. Mary and St. Paul*, 204 AD2d 538, 539; *Consentino v Schwartz*, 155 AD2d 640). Consequently, the motion by the judgment debtors to quash the subpoena duces tecum served is denied, as the standard to be applied on a motion to quash *** is whether the requested information is "utterly irrelevant to any proper inquiry" (*Ayubo v Eastman Kodak Co., Inc.*, 158 AD2d 641, 642). Accordingly, it is

ORDERED that petitioners' motion for an order directing the turnover of property is denied without prejudice to renewal following discovery; and it is further

ORDERED that respondents' motion to quash the subpoenas duces tecum served is denied. The petitioners are authorized to conduct post-judgment discovery of GBR and any other person or persons who may have information relating to the nature, extent and location of property belonging to the judgment debtors, as well as to any other matter relevant to the satisfaction of the judgment (CPLR §§ 409 and 5223); and it is further

ORDERED that this proceeding is transferred to the Motion Support Office for reassignment to an all purpose IAS part. This constitutes the decision and order of the court.

DATED: OCT 29 2004

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