

Matter of Hoenlein v Kaplan

2005 NY Slip Op 30370(U)

October 3, 2005

Supreme Court, New York County

Docket Number: 109385/05

Judge: James A. Yates

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. JAMES A. YATES PART 41
Justice

In the Matter of the Application of

INDEX NO. 109386-06
Motion Seq.: 001

MALCOLM HOENLEIN,

Petitioner,

-against-

GIZELLE KAPLAN (nee COHEN),

Respondent.

FILED
OCT 28 2005
NEW YORK COUNTY CLERK'S OFFICE
OCT 27 2005
MOTION SECTION
SUPPORT OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... | _____

Answering Affidavits - Exhibits _____ | _____

Replying Affidavits _____ | _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that Petitioner Martin Hoenlein's motion for a "turn over" order, pursuant to CPLR sections 5222 and 5225, to collect a default judgment against Gizelle Kaplan, a third party, is granted (see attached Order and Decision).

Settle order accordingly.

Dated 10-3-05

HON. JAMES A. YATES

ENTER: _____, J.S.C.

PART 507
SUP. CT. N.Y. COUNTY

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

CASEDISD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Y

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 In the Matter of the Application :
 of :
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 MALCOLM HOENLEIN, :
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 Petitioner, :
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 -against- :
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 GIZELLE KAPLAN (nee COHEN), :
 :
 Respondent. :
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FILED
 OCT 28 2005
 NEW YORK
 COUNTY CLERK'S OFFICE
 Decision and Order
 Ind. No. 1385/05

Hon. James A. Yates, J.S.C.

On March 3, 1992 Petitioner Malcolm Hoenlein obtained a judgment, in the amount of \$250,000 plus interest in Westchester County Supreme Court against Pacific Financial Corporation, Inc. (Pacific Financial), a defunct corporation. Having failed to collect the judgment, Hoenlein seeks a "turn over" order, pursuant to CPLR sections 5225 and 5222, to collect the judgment against a third party, Gizelle Kaplan, a shareholder of Pacific Financial, claiming that she held, then wrongfully converted property belonging to Pacific Financial - a stock certificate representing 100,000 shares of Applied Microbiology (AMI) stock.

In a previous proceeding, following a hearing, this Court determined that Kaplan was not the rightful owner of the asset in question, but had obtained title by committing a fraud upon the Court. See December 24, 2003 Order and Decision. Notwithstanding, Kaplan now cross-moves, to dismiss the petition on the ground that Hoenlein is barred by the statute of limitations for fraud, asserting that the alleged wrongful conversion by Kaplan occurred more than six years ago.

Since a judgment creditor's right to proceed against a third party in possession of a judgment debtor's assets is not contingent upon proof of fraud or wrongful conversion by the third party, the applicable statute of limitations in this case is twenty years, not six years, and the action is timely. To hold otherwise would reward fraudulent conversion by reducing the time within which a judgment creditor could move to enforce a judgment against a third party in wrongful possession of a judgment debtor's property.

A. Background

1. Prior Proceedings

In 1988, Gizelle Kaplan extended a loan of approximately \$100,000 to Ivan Tillem, President of Pacific Financial. Pursuant to the terms of a stock pledge agreement, Kaplan was given, as first lien security, the AMI stock certificate owned by Pacific Financial. On July 26, 1989, less than one year later, Pacific Financial paid Kaplan \$127,040 in full satisfaction of the loan. In fact, the payment not only covered the \$100,000 loan but included an excess payment of \$27,040, presumably for "interest." Nonetheless, Kaplan held onto the AMI stock.

Less than one month after repayment of the loan, in August, 1988, Tillem met an untimely death in an airplane crash and, shortly thereafter, Pacific Financial was dissolved. In 1991, Hoenlein sued to recover monies owed him by Pacific Financial, and on March 3, 1992, a judgment for \$250,000 plus interest in the amount of \$102,29.54 was entered in Supreme Court, Westchester County.

On June 20, 1996, Kaplan commenced an Article 78 proceeding in the Supreme Court, New York County (Justice Stanley Sklar) for an Order directing AMI and its transfer agent, American Stock Transfer and Trust, to recognize her as the owner of the 100,000 shares of AMI. She claimed Pacific Financial defaulted on the loan. No mention was made of the \$127,040 payment in satisfaction of the loan she received from Pacific Financial.

In response to published notice of the proposed order, Hoenlein appeared and asserted a claim to the shares as judgment creditor of Pacific Financial. On June 27, 1996, in reliance upon Kaplan's affirmation, the Court determined that Kaplan was the "sole and exclusive owner of such 100,000 shares * * * without prejudice to the rights, if any, of Malcolm Honleim [sic], as a creditor of Pacific Financial Corporation, Inc., against said 100,000 shares or against the proceeds of any sale thereof * * * ." (See Justice Sklar's June 27th Order and Decision, at 2-3).

Following entry of the order, Hoenlein, made several attempts to learn the status of the shares. Unbeknownst to Hoenlein or counsel, Kaplan sold the shares on June 28, 1996, one day after Judge Sklar's Order. Some thirteen days later, on August 13, 1996, Kaplan's counsel advised Hoenlein, for the first

[*4]
time, that the shares had been sold. According to Petitioner's income tax filings, she sold the stock for \$510,709. For gains tax purposes, she claimed a "basis" of \$340,388 - not the \$100,000 which she purportedly paid to Tillem - thereby substantially, if not fraudulently, reducing her tax liability.

On August 13, 1996, Kaplan's counsel, Barry J. Bendes, in a telephone conversation with Bernard D. Fischman, counsel for Hoenlein, asserted that he had advised his client, Kaplan, to hold the net proceeds "intact." On August 14, 1996, by way of fax, Fischman, wrote Bendes that "This letter confirms my understanding that Gizelle Kaplan is holding the proceeds of the sale * * * subject to the claims of Malcolm Hoenlein [sic] to the proceeds of said sale, in accordance with the Court order of June 27, 1996."

In order to preserve his claim, Hoenlein requested and obtained a conference with Justice Sklar on October 3, 1996. At the conference, Bendes informed the Court that Kaplan had retained another attorney, Valerie S. Amsterdam, and that he was no longer authorized to act on her behalf. He also told the Court that he had advised her to hold the proceeds from any sale of the shares intact. (See Sklar November 19th Order and Decision). Despite the Court's order specifying that Kaplan held title subject to any interest that Hoenlein may have and despite counsel's advice to hold the stock intact, Kaplan did not preserve the asset. On December 3, 1996, Hoenlein was advised by new counsel for Kaplan that Kaplan now claimed that she had "transferred the proceeds [of the sale] to her spiritual adviser, the Tosher Rebbe."¹ (Letter to J. Sklar from Bernard D. Fischman, Counsel to Hoenlein, June 12, 1997, at 3). However, Kaplan's 1996 tax return indicated a contribution to the Tosher Rebbe of only \$200,000 - not the full proceeds from the sale of the stock - \$510,709.

On February 5, 1997, Hoenlein moved for an order to hold Kaplan in civil contempt of Justice Sklar's June 27th order, claiming she had failed to preserve the net proceeds of the sale.² Justice Sklar denied the motion, finding that contempt

¹ Rabbi Moshe Feiwish Lowy, a religious leader, based in Montreal.

² Section 9-504 [2] and [3] of the Uniform Commercial Code (UCC) provides: " If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." The pledge agreement permitted sale upon default "for the full amount of the note." Here, the moneys realized by the sale far exceed the amount of the note. Even if the

did not lie, since the June 27th Order and Judgment did not clearly or unequivocally mandate that Kaplan keep the proceeds from the sale intact. While recognizing that the Order "did preserve any right Hoenlein might have to the shares or proceeds thereof," the Court ruled that "a civil contempt motion * * * is not the proper vehicle for pursuing or establishing such rights." (Sklar November 19th Order and Decision).

On July 30, 1999, Hoenlein moved again, this time as an "interested party" pursuant to CPLR section 5015, to vacate the Order and Judgment of June 27, 1996 on the ground that it was procured by fraud. He claimed wrongful conversion of Pacific Financial's assets by Kaplan. In particular, Hoenlein claimed that Kaplan, in her application of June, 1996: (1) wrongfully asserted that she had provided requisite written notice to Pacific Financial of her intent to retain the shares³; (2) wrongfully failed to disclose that she had received payment on the loan in July, 1989; and (3) wrongfully claimed that she had accepted the shares in satisfaction of the debt in April, 1989. On July 21, 2000, Justice Sklar referred the three issues to a Special Referee.

On November 7, 2002, the Hon. Frank Lewis, Special Referee, issued his Report and Recommendation. Kaplan then moved to confirm and vacate, in part, the findings of the Special Referee. In a prior decision, this Court determined that: (1) Kaplan was paid \$127,040 in full satisfaction of the loan to Pacific Financial - thereby vitiating her right to retain the AMI stock; and (2) Kaplan knew of Hoenlein's interest in the net proceeds but, for several months, kept from him the fact that she sold the shares for \$510,079 - the day after the Court's Order - in a transparent attempt to thwart Hoenlein's claim for the surplusage. See December 24, 2003 Order and Judgment.

On February 5, 2004, a conference was held and the Court ordered briefing from the parties. On March 12, 2004, Kaplan moved for reconsideration of the Court's decision and for denial of Hoenlein's motion to vacate Justice Sklar's June 27, 1996 order as procured by fraud. On June 30, 2004, the Court granted Hoenlein's motion to vacate. In February 2005, Kaplan's attorney,

Court had accepted Kaplan's claim that some portion of the \$127,040 payment was intended to satisfy the \$100,000 loan, there is still a substantial surplus. Under the obligations imposed by the UCC and by the terms of the pledge, Respondent was not entitled to retain the surplus.

James M. Branden, moved for an Order relieving him as counsel pursuant to CPLR section 321 [b][2]. That same month, Hoenlein moved for restitution pursuant to CPLR section 5015 [d]. He argued that restitution was the logical conclusion to the litigation because it would give effect to the court's order vacating the June 27, 1996 Order and Judgment. Following an April 29, 2005 conference with the Court, Hoenlein, through his attorney, submitted a supplemental affirmation, dated May 16, 2005. On May 18, 2005, the Court granted Branden's motion. By order, dated June 29, 2005, the Court denied Hoenlein's motion for restitution "without prejudice to commencement of a new special proceeding."

2. CPLR § 5225 [b] Motion

On July 7, 2005, Hoenlein brought, by order to show cause, a petition for turnover relief pursuant to CPLR section 5225 [b]. Kaplan cross-moved to dismiss the petition on the ground that it was barred by the six-year statute of limitations for fraud and unjust enrichment. Hoenlein argues that his claim is based on a money judgment and that the action has a twenty-year statute of limitations.

On August 25, 2005 oral argument was heard. Subsequently, the parties submitted letter briefs in support of their positions.

B. Discussion

The "turn over" statute allows a judgment creditor to reach the assets owned by a judgment debtor, even if those assets are in the hands of a third party. In part, CPLR section 5225 [b], entitled "Property not in possession of judgment debtor", provides that:

"Upon a special proceeding commenced by a judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest * * * where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee * * * the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and , if the amount to be so paid is

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insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff."

The remedy that CPLR section 5225 [b] provides stems from the principle that "a judgment creditor stands in the same position as the judgment debtor with respect to property held by a garnishee, and therefore may reach an interest in the property to which the judgment debtor would be entitled." *Aluminum Co. of America v Moskovitz*, 1990 US DIST LEXIS 16467, *8; 1990 WL 201658, *3 [US Dist Ct, SD NY 1990].

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Nonetheless, CPLR section 5225 [b] requires a two-part showing before the Court can order the third party to turn over the money to the judgment creditor. First, it must be demonstrated that the judgment debtor has an interest in the property that the creditor is trying to reach. Whether the debtor held an interest in the property at the time the judgment was docketed will suffice (see *Jones v Knowlton*, 199 AD2d 871 [3d Dept 1993]). In this case, the facts clearly demonstrate Pacific Financial's interest as a judgment debtor in the disputed money. In 1996, despite the fact that Kaplan's loan to Pacific Financial had already been satisfied, Kaplan procured an order from the Court by fraud, in an effort to convert 100, 000 shares of AMI stock to her name. Upon discovery of the fraudulent nature of Kaplan's action, this Court in 2004, vacated the 1996 order. Because the vacate order essentially nullified any rights that Kaplan may have had to the shares or to the proceeds of the sale of such shares, the outstanding shares or proceeds of which, reverted back to Pacific Financial, notwithstanding its dissolution, may now be used to satisfy any outstanding debts that Pacific Financial has with other judgment creditors.

Pursuant to CPLR section 5225 [b], once the first step has been satisfied, the second step requires the Court to find either that the judgment debtor is entitled to the possession of such property, or that the judgment creditor's rights to the property are superior to those of the party who controls or possesses that property. In this case, Hoenlein, as judgment creditor of Pacific Financial, has a right to recovery against Pacific Financial for the judgment that it obtained against the corporation by default, which remains unsatisfied to this day. Notably, CPLR section 5225 [b] is not limited in its use "only to instances when a respondent has custody or possession of the funds or other property at issue * * * By its terms, [the statute] also permits a special proceeding to be brought against, and recovery to be had from, 'a transferee of money or other personal property from the judgment debtor' if it

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can be demonstrated that the debtor is entitled to the property or that the creditor's interest is superior to that of the transferee." *FDIC v Conte*, 204 AD2d 845, 846 [3d Dept 1994] citing *Federal Deposit Ins. Corp. v Heilbrun*, 167 AD2d 294 [1st Dept 1990]. Since Hoenlein has a valid judgment entitling him to levy upon Pacific Financial's assets, and Kaplan has no right to such assets as per the vacated 1996 order, Hoenlein's interest is superior to that of Kaplan's.

Kaplan claims that she is no longer in control or possession of the proceeds from the sale of the stock shares. However, that Kaplan is allegedly no longer in possession of the proceeds does not bar Hoenlein's recovery. CPLR section 5225 [b] "furnishes a mechanism for obtaining a money judgment against the recipient of a fraudulent conveyance who has, in the interim, spent or dissipated the property conveyed." *FDIC v Conte*, 204 AD2d at 846. Moreover, where the property transferred to the third party is no longer in existence as a result of the wrongful disposition or depreciation of the conveyed property, the Court may, alternatively, grant a money judgment. *TLC Merchant Bankers Inc., v Brauser*, 2003 US DIST LEXIS 3564, 2003 WL 1090280, *3 [US Dist Ct SD NY March 11, 2003]; *Manufacturers and Traders Trust Co. v Laurer's Furniture Acq.*, 226 AD2d 1056 [4th Dept 1996] (holding that though a creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance, where the assets however have been sold or commingled with another party, a money judgment may be properly obtained as a substitute of those assets); *Marine Midland Bank v Murkoff*, 120 AD2d 122 [2d Dept 1986]; *Brown v Kimmel*, 68 AD2d 896 [2d Dept 1979]. The amount of the money judgment is naturally limited to the value of the transferred property. *Brown v Kimmel*, at 897. Thus, Hoenlein is entitled to collect upon the money judgment up to the value of the wrongfully transferred property, or its proceeds.

According to Kaplan, this proceeding is barred by the six-year statute of limitations for fraud. However, Hoenlein is not suing Kaplan for fraud. Hoenlein is simply seeking enforcement of the default judgment that he had obtained against Pacific Financial in 1992. He is entitled to Pacific Financial assets held by Kaplan without regard to her later fraud upon the Court. Where the proceeding is simply an action for the enforcement of a money judgment, such proceeding falls squarely under the provisions of the CPLR. *Siegmán v Rosen*, 248 AD2d 180 [1st Dept 1998]; *Altman v Finkel*, 268 AD 666 [1st Dept 1945] *affd* 295 NY 651; *but see Maio v Gardino*, 267 AD2d 816 [3d Dept 1999]]. Although CPLR section 5225 [b] is silent as to a specific time frame by which the special proceeding must be brought, under CPLR section 211, an action to

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enforce a money judgment is subject to a twenty-year statute of limitations, which begins to accrue from the date of the entered judgment. Thus, contrary to Kaplan's argument, Hoenlein's claim is not time barred as he has until March 3, 2011 to enforce his money judgment against Pacific Financial.

Kaplan further argues that the doctrine of laches should apply in this case since Hoenlein delayed filing suit against her for an unreasonable or inexcusable period of time after he knew or reasonably should have known of the claim against her. This argument is without merit as well.

The doctrine of laches is inapplicable given Kaplan's unclean hands. Any delay in the commencement of the proceeding was caused by, in whole or in part, Kaplan's wrongful conversion. Regardless of the legal remedies that Hoenlein allegedly could have pursued upon initial discovery of the fraud, Kaplan is not entitled to equitable relief as her fraudulent conduct "bears an immediate and necessary relation to the equity sought in the litigation or affect[s] the equitable relation between the parties." *Reuters Transaction Servs. v Bloomberg LP*, 2004 US Dist LEXIS 27336 [US Dist Ct, SD NY July 29, 2004] citing *Consol. Aluminum Corp. v Foseco Intl. Ltd.*, 910 F2d 804,810 [Fed Cir 1990]; *Keystone Driller Co. v Gen. Excavator Co.*, 290 US 240, 245 [1933]. On the other hand, for Hoenlein, it still appears that "the right to recover [is] fundamentally and necessarily cognizable in equity." *Buttles v Smith*, 281 NY 226, 237 [1939] (holding that the assets of the corporation which had been fraudulently conveyed in order to prevent the judgment creditor from satisfying the judgment obtained against it, constituted a "fund for the payment of [the corporation's] debts and creditors may follow them into whatever hands they be illegally transferred.")

Accordingly, because Hoenlein's application for a turn over order pursuant to CPLR section 5225 [b] was timely made and he is not precluded from relief by that statute, the petition is granted and Kaplan's motion is denied.

Settle order.

Dated: October 3 , 2005
New York, New York

HON. JAMES A. YATES

JAMES A. YATES, J.S.C.

PART 80Y
SUP. CT. N.Y. COUNTY