

<b>780 E., LLC v Commerce Bank</b>
2005 NY Slip Op 30538(U)
July 11, 2005
Supreme Court, New York County
Docket Number: 103088/2005
Judge: Herman Cahn
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

3

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 49

-----X  
 780 EAST, LLC, RIGGED RITE, INC. (a NJ Corp.),  
 RIGGED RITE, INC. (a NY Corp), THE PADDED  
 WAGON OF NEW JERSEY, INC., THE PADDED  
 WAGON OF LOS ANGELES, INC., THE PADDED  
 WAGON OF GEORGIA, INC.,

Petitioners,

- against -

Index No. 103088/2005

COMMERCE BANK and THE INSURANCE  
 COMPANY OF THE STATE OF PENNSYLVANIA,

Respondents.

-----X  
 HERMAN CAHN, J.:

Petitioners move to: (1) vacate restraining notices allegedly issued by counsel for respondent The Insurance Company of the State of Pennsylvania (ICSP) against bank accounts held in petitioners' names in respondent Commerce Bank, CPLR 5240; and (2) for damages allegedly incurred by them as a result of the improper restraints, CPLR 5222 (b).

This proceeding arises in connection with ICSP's attempts to collect a \$145,453.53 judgment (the Padded Wagon Judgment), which was entered in favor of Bell Atlantic Yellow Pages Co. against The Padded Wagon, Inc., in an action entitled *Bell Atl. Yellow Pages Co. v Padded Wagon, Inc.* (Sup Ct, NY County, Jan. 25, 2000, Cozier, J., Index No. 603737/98). Padded Wagon obtained a stay of proceedings to enforce the judgment, pending appeal, by posting an undertaking in the form of a bond issued by ICSP. As part of the application for the appeal bond, Edmond Dowling, the president and owner of Padded Wagon, entered into an indemnity agreement, pursuant to which he personally agreed to indemnify ICSP in the event that it was required to pay the judgment under the bond.

When the Padded Wagon Judgment was affirmed on appeal (*Bell Atl. Yellow Pages Co. v Padded Wagon, Inc.*, 292 AD2d 317 [1st Dept], *lv denied* 98 NY2d 611 [2002]), and the stay of enforcement proceedings expired, Padded Wagon refused to satisfy the judgment. ICSP paid on the judgment, and received a partial assignment of the judgment from Bell Atlantic Yellow Pages Co.

ICSP thereupon commenced an action against Edmond Dowling (*The Insurance Co. of the State of Pennsylvania v Dowling*, Sup Ct, NY County, Index No. 602673/03), seeking a judgment against him individually, based upon his alleged breach of the aforesaid indemnity agreement. A judgment was entered against Dowling in said action, on July 9, 2004, for \$170,311.10, of which only \$24,669.14 has been satisfied.

ICSP avers: that a property execution on the Padded Wagon Judgment was delivered to a New York City Marshal (the Marshal); that the Marshal levied upon the Padded Wagon at its premises on July 7, 2003; that a restraining notice was served upon Padded Wagon, pursuant to CPLR 5222, on March 30, 2004; and that the Marshal continues to actively pursue enforcement of the Padded Wagon Judgment. At a deposition on June 14, 2004, Dowling testified that Padded Wagon deposited the income from its ongoing operations in an account at Commerce Bank (*see Dowling EBT*, at 10). However, the Marshal has allegedly advised ICSP that he has been unable to recover any funds held on account at Commerce Bank in the name of Padded Wagon.

The petition alleges that ICSP's attorney served restraining notices upon Commerce Bank, together with "a cover letter asking that additional accounts, which were distinct business entities from the judgment debtors, be frozen" (Petition, ¶ 7). Allegedly as a result of the restraining notices and cover letter, Commerce Bank "improperly froze the accounts of the ... Petitioners," and petitioners "have, and will continue to, incur damages" (*id.*, ¶¶ 9, 10). Petitioners have not submitted a copy of any of the purported restraining notices, and the record contains no evidence that the restraints which are the subject of the petition arose from more than a single restraining notice, dated March 1, 2005, a copy of which has been submitted by ICSP. Petitioners contend that the restraints on their bank accounts are improper, because they are based upon a judgment which was entered against Padded Wagon, not against any of the petitioners, and because petitioners are business entities separate and distinct from Padded Wagon.

Petitioners' motion and the petition are both denied, and the proceeding is dismissed. The petition is denied as moot, insofar as it is brought by the petitioners other than Rigged Rite, Inc. (a

NJ Corp.) and Rigged Rite, Inc. (a NY Corp.) (either, individually, or both, collectively, Rigged Rite), inasmuch as the parties' counsel have apparently entered into a stipulation, dated March 11, 2005, pursuant to which ICSP agreed to vacate and remove any restraint affecting accounts held by Commerce Bank in the names of the petitioners other than Rigged Rite.

With regard to Rigged Rite, petitioners' contention that the restraining notice was improperly issued and should be vacated -- because it is based on a judgment against Padded Wagon, a business entity separate and distinct from Rigged Rite -- is without merit. CPLR 5222 (b) provides, in relevant part, that:

A restraining notice served upon a person other than the judgment debtor ... is effective ... if, at the time of service, ... he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor ... has an interest, or if the judgment creditor ... has stated in the notice ... that the judgment debtor ... has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor ... is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, ... shall be subject to the notice.

Where a judgment creditor offers evidence establishing “that a judgment debtor regularly has used another’s bank account as a ‘recipient’ of the debtor’s personal assets or as a source for payment of the debtor’s expenses,” the judgment debtor will be found to “ha[ve] an interest’ in the specified bank account[] (CPLR 5222[b]),” such that “the account may be restrained under the statute” (*Bingham v Zolt*, 231 AD2d 479, 479 [1st Dept 1996]; *see also JSC Foreign Economic Assn. Technostroyexport v International Dev. and Trade Servs., Inc.*, 295 F Supp 2d 366, 392 [SD NY 2003]; *ERA Management, Inc. v Morrison Cohen Singer & Weinstein*, 199 AD2d 179, 179 [1st Dept 1993]).<sup>1</sup>

---

<sup>1</sup>By contrast, the assets of a third party, other than a judgment debtor, may ordinarily not be restrained, pursuant to CPLR 5222, merely on the basis of a judgment creditor’s unproven and adjudicated allegations that the third party is an alter ego of the judgment debtor (*see JSC Foreign Economic Assn. Technostroyexport v International Dev. and Trade Servs., Inc.*, 295 F Supp 2d at 392-393). However, that principle is not relevant to the court’s determination of the instant motion, inasmuch as ICSP does not attempt to justify the propriety of the restraining notice against Rigged Rite’s accounts on the ground that Rigged Rite is an alter ego of Padded Wagon.

ICSP has offered sufficient evidence to establish that Padded Wagon has regularly used bank accounts held in Commerce Bank in the name of Rigged Rite, as recipients of Padded Wagon's assets, including copies of the fronts and backs of 19 checks, dated from June 29, 2004 through December 31, 2004, and having a face value in the aggregate amount of \$89,539.79, which: (1) appear to have been tendered to Padded Wagon by three of its customers; (2) are made payable to Padded Wagon; and (3) have ostensibly been endorsed only by Rigged Rite, and deposited into two of the bank accounts held in that entity's name by Commerce Bank. That evidence sufficiently establishes that Padded Wagon has an interest in the bank accounts held by Commerce Bank in the name of Rigged Rite, such that those accounts may properly be restrained, pursuant to a restraining notice issued under CPLR 5222.

Inasmuch as petitioners have failed to establish that the restraining notice was improperly issued, their application for an award of damages, is denied. The petitioners other than Rigged Rite have also failed to identify any damages sustained as a result of the restraining notice, between March 1, 2005, when the restraining notice was allegedly issued, and March 11, 2005, when the parties entered into the stipulation removing the restraints affecting those petitioners' accounts.

**CONCLUSION, ORDER, AND JUDGMENT**

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the motion and the petition are both denied, and the proceeding is dismissed.

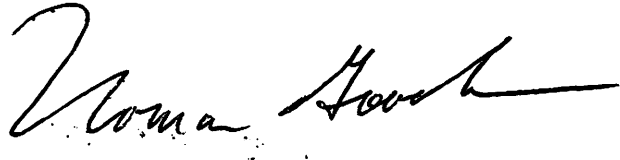
Dated: July 11, 2005

ENTER:  
  
 \_\_\_\_\_  
 J.S.C.

**FILED**

JUL 20 2005

**COUNTY CLERKS OFFICE  
 NEW YORK**

  
 \_\_\_\_\_  
 CLERK