

**Adelaide Productions, Inc. v BKN International, AG**

2006 NY Slip Op 30323(U)

March 14, 2006

Supreme Court, New York County

Docket Number: 0114522/2005

Judge: Richard B. Lowe

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SCANNED ON 3/24/2006  
\* 1 \*  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. RICHARD B. LOWE, III

PRESENT: \_\_\_\_\_

PART 52

Index Number : 114522/2005  
ADELAIDE PRODUCTIONS INC

vs  
BKN INTERNATIONAL AG

Sequence Number : 001  
TURNOVER PROCEEDING

INDEX NO. \_\_\_\_\_

MOTION DATE 10/27/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits Exhibits Aff (Scher), Answer/Copy

Replying Affidavits Pet Reply, Notice Settlement, Rep Reply & Memo, Transcript

Cross-Motion:  Yes  No

PAPERS NUMBERED

1A-1B,  
2, 3A, B  
4, 5, 6, 7, 8

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

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Dated: 3/24/06

[Signature]  
HON. RICHARD B. LOWE, III J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 56**

-----X  
ADELAIDE PRODUCTIONS, INC., and  
ELP COMMUNICATIONS,

Petitioners,

Index No.,  
114522/2005

-against-

BKN INTERNATIONAL AG,

Respondent.

**DECISION,  
ORDER &  
JUDGMENT**

-----X  
**LOWE III, RICHARD B., J.:**

Petitioners Adelaide Productions, Inc., and ELP Communications (collectively “Adelaide”) move for an order, pursuant to CPLR §§ 5225 [b] and 5227, directing the turnover of property and for an award of costs from Respondent BKN International AG (“BKNIAG”). Respondent opposes the motion in the entirety.

**BACKGROUND**

The salient facts giving rise to this instant proceeding has its genesis in a separate, but related action between Adelaide and Durham Capital Holdings, Inc., f/k/a BKN, Inc. (“Durham”) and its principal Allen Bohbot (“Bohbot”) (Adelaide Productions, Inc. and ELP Communications v Durham BKN International AG and Allen Bohbot, Index No., 601293/2002; see also, *Adelaide Productions, Inc. v BKN Intern. AG*, 15 AD3d 316), and a second separate, but related matter wherein the Court awarded judgment (the “Judgment”), dated April 30, 2004, in favor of the petitioners and against Durham in the amount of \$24,868,532.67 (Index No., 602561/2003). Bohbot is also a principal of BKNIAG. Adelaide seeks to satisfy the Judgment against any and all assets of the now defunct Durham. Adelaide seeks any stock and/or monies either had or owed to Durham.

In this petition, Adelaide seeks to satisfy in part the Judgment against certain BKNIAG stock owned by Durham and a debt owed by BKNIAG to Durham. Adelaide maintains that BKNIAG and its principal, Bohbot, regularly conducts business from Rye, New York, where a BKNIAG’s

wholly-owned United States subsidiary is located. Petitioners maintain this Court has jurisdiction over the property they seek to seize in partial satisfaction of the Judgment. Petitioners seek to have the Westchester County Sheriff levy upon certain property in which Durham has an interest, but not capable of being delivered.

The petitioners identify two properties: (1) a debt of \$1,904,439.30 as of September 9, 2005, owed by BKNIAG to Durham in connection with the latter's assumption of certain liabilities once owed by BKNIAG to non-third parties (the "Debt"); and (2) shares of BKNIAG owned by Durham for which there is no outstanding stock certificate (the "Stock").

Petitioners maintain that the Debt is past due and BKNIAG remains indebted to Durham. Petitioners also note to Bohbot's deposition testimony that Durham owns approximately 2,285,000 shares of Stock. Therefore, the petitioners argue that pursuant to CPLR § 5201 [c] [1] BKNIAG is the proper garnishee of the Stock as it "consist of share[s] in the \* \* \* corporation \* \* \* for which a certificate of stock \* \* \* is not outstanding." Petitioners also argue that BKNIAG is the proper garnishee for the Debt, pursuant to CPLR § 5201 [a].

Petitioners sought to have the Westchester County Sheriff execute on both the Stock and the Debt (the "Execution"). Petitioners commenced this proceeding after they were informed by the Westchester Sheriff that BKNIAG intended not to comply with the Execution. Petitioners maintain their rights in the Debt and Stock are superior to those of BKNIAG and now move for judgment ordering BKNIAG to turn over the Debt and Stock or a cash equivalent as well as award Petitioners their costs and attorneys' fees pursuant to CPLR § 5227.

Respondent BKNIAG answers the petition, denying the material allegations of the petition and interposing certain affirmative defenses: (1) lack of jurisdiction over the petition on the ground BKNIAG does not do business in New York; (2) the petition does not state a cause of action; (3) there is no Debt due and owing from BKNIAG to Durham nor control of Stock held in the name

\* 4 ]  
of Durham; and (4) the petition fails to meet the pleading requirements of CPLR § 5225 [b].

BKNIAG concedes that Durham owns approximately 15% of the Stock in BKNIAG (Scher 11/28/05 "Affidavit", p1), but that BKNIAG is a German corporation with no business presence, no offices, no bank accounts in New York. Moreover, BKNIAG maintains that German law does not provide a mechanism for it to turn over the Stock. Furthermore, BKNIAG maintains it does not possess the Stock, constructively or physically, claiming the Stock is maintained in the name of the specific owner in a depository bank, but concedes that the shares are not embodied in a share certificate as the "relationship between [BKNIAG] and its shareholders is not similar to the relationship of a domestic New York corporation" (Scher 11/28/05 "Affidavit," p 2).

The respondent also maintains that German law determines whether the Stock can be transferred from BKNIAG to Adelaide, referring to the Uniform Commercial Code ("UCC") § 8-405 (and the "re-issue of lost or stolen share certificates"- which is not the issue in this case), and that the UCC provides that German law dictates the validity of the security, rights and duties of the issuer, and any transfer of stock. BKNIAG argues that German law control and does not permit the "re-issuance or transfer" of the Stock. Therefore, BKNIAG contends the petition must be dismissed.

BKNIAG also argues by way of a "conflict-of-laws analysis" that Germany has the greater interest with respect to "internal practices and procedures of corporations" and, therefore, the transfer of the Stock. Hence, BKNIAG maintains that German laws control and provide no "ability [to BKNIAG] to transfer shares of its stock from Durham to Petitioners and also lacks the ability to re-issue such shares of stock" ( Scher 11/28/05 "Affidavit," p 5).

Therefore, BKNIAG argues that the petition is defective as the Court cannot order BKNIAG to perform an act which it cannot do and the relief requested as to the Stock is beyond the scope of CPLR §§ 5225 [b] and 5227.

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<sup>1</sup> Attorney Scher submits a notarized "affidavit" although an attorney for BKNIAG.

As to the Debt, BKNIAG contends that it is no longer owed to Durham and that reference to BKNIAG's own corporate records of 2001 (Annual 2001 Report for BKNIAG) is of no real moment. BKNIAG contends that it is Durham who owed BKNIAG money (*id.*, p 6). BKNIAG now claims (referring to its Annual 2003 or 2004 Report) that as of the end of 2002 the Debt was extinguished, claiming that the "indebtedness of Durham to [BKNIAG] exceeded the indebtedness of [BKNIAG] to Durham" and that BKNIAG's auditor in Germany instructed BKNIAG to "write off the [Durham] debt in 2002 after \* \* \* attempt[s] to collect the debt" from Durham failed (Scher 11/28/05 "Affidavit," p 6-7). Hence, BKNIAG argues there is no Debt due and owing from it to Durham (citing, *Gabor v Renaissance Associates*, 170 AD2d 390 [citing New York law as opposed to German law, although there is no reference that the Debt was incurred in New York, paid in New York or subject to any New York contract]), BKNIAG cannot be compelled to pay Adelaide.

**DISCUSSION**

The jurisdiction objection is of no legal moment. BKNIAG has been sued in New York by Adelaide in a separate and related action (Adelaide Productions, Inc., et al., v BKN International AG, et al., Index No., 602561/2003)<sup>2</sup>. In fact, Bohbot was served with process in that action and did not object on the ground of lack of jurisdiction. BKNIAG appeared in that action and sought affirmative relief. Moreover, Adelaide provides numerous documents that reveal BKNIAG does business in New York either directly or with its Rye, New York subsidiary, BKN New Media, Inc.

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<sup>2</sup> See Adelaide Productions, Inc., BKN Intern. AG, (15 AD3d 316), wherein this Court denied defendants' motion pursuant to CPLR 3211 [a] to dismiss the complaint with costs, finding that the complaint sufficiently alleged new facts concerning defendants' purportedly fraudulent intentions motion to dismiss on grounds of issue preclusion (see also, *TMS Entertainment Ltd., v Madison Green Entertainment Sales, Inc. (f/k/a BKN Entertainment, Inc.), Bkn Studios, Inc. (f/k/a BKN Entertainment, Inc.), BKN International AG and Allen Bohbot*, 2005 WestLaw 2063786 [Dist CT NY]; *TMS Entertainment Ltd, v Madison Green Entertainment Sales, Inc. (f/k/a Bkn Entertainment, Inc.), BKN Studios, Inc. (f/k/a BKN Entertainment, Inc.), BKN International AG and Allen*, 2005 WestLaw 476663 [Dist CT NY]).

(Brody 11/22/05 Aff.<sup>3</sup>[Exhibits A-T; see also, Petitioner Reply Memo In Opposition, pp 5-10; *Landoil Resources Corp. v Alexander & Alexander Services, Inc.*, 77 NY2d 28; *Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88). Moreover, the petition does plead causes of action for execution on assets either in the form of stock or debt, BKNIAG's contentions are of no moment and simply flawed (see, CPLR § 5201 [a] and [b] ("debt" and "property" are subject to satisfaction of a judgment]). Lastly, the specificity of the pleading is unequivocally clear (CPLR § 5225 [b]).

CPLR § 5201 provides:

**(a) Debt against which a money judgment may be enforced.** A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

**(b) Property against which a money judgment may be enforced.** A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

**[c] Proper garnishee for particular property or debt.**

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.
2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.
3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.
4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

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<sup>3</sup> Attorney Brody, too, submits a notarized "affidavit" although an attorney for Adelaide.

Uniform Commercial Code § 8-112 provides:

**§ 8-112. Creditor's Legal Process**

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

[c] The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

Durham is unquestionably an adjudicated New York Judgment Debtor. Furthermore, BKNIAG concedes that Durham is the holder of "approximately 2.2 million shares \* \* \* about 15% of BKNIAG's issued shares" (Benetz 10/31/05 Aff., p 2). Moreover, the petitioners note that respondent does not claim - nor can it in view of its averments in its opposing papers which are relied on by the Court - that there is no claim that the Stock was stolen or lost. Lastly, BKNIAG is subject to the jurisdiction of New York and therefore subject to CPLR § 5201 [c].

However, BKNIAG contends it cannot be compelled to transfer Stock owned by Durham under German law. Adelaide argues the contention is of no legal moment and there is no need to discuss a conflict of laws analysis as German law has no bearing to this proceeding seeking to execute on Stock claimed by petitioners to be held by BKNIAG in New York.

But, the respondent submits the affidavit of a German attorney, Mr. Rainer Sussman, a partner of a Frankfurt-based law firm, Lovells ("Sussman"). Sussman affirms in affidavit form that

BKNIAG issued shares to stockholders by way of “global share certificates.” These “global share certificates” are “certified” and “deposited with Clearstream Banking AG, Frankfurt am Main, the German central depository bank (‘Clearstream’) via book entry.” Sussman further avers that the “right of shareholders to receive share certificates is excluded (sec., 5 para Articles of Association).” Moreover, Sussman avers that all shares of BKNIAG “can only be delivered \* \* \* in the form of co-ownership of share certificates exclusively held by Clearstream via book entry \* \* \* any shareholdings in BKN can only be evidenced by declaration of each shareholder’s depository bank.” Although it is unclear from Sussman’s affidavit whether he is an attorney for BKNIAG and familiar with BKNIAG’s factual representations, Sussman nonetheless avers that “[BKNIAG] is not aware of the names of any of the depository banks who hold its shares on behalf of [shareholder’s] accounts and it is not entitled by German law to request or receive this information” (Scher 11/28/05 “Affidavit” [Exhibit B, Sussman 10/31/05 Aff.]).

Sussman’s affidavit reveals that the subject Stock was never delivered by way of a stock certificate. Moreover, BKNIAG issues the “global share certificates” which are then deposited with Clearstream and any share in BKNIAG can only be delivered and traded in the form of “co-ownership” of the global share certificate exclusively held by Clearstream via book entry. It is of no moment that BKNIAG has “no ability to maintain a list of shareholders” (Scher 11/28/05 “Affidavit” [Exhibit B, Sussman 10/31/05 Aff.]), as it is undisputed that Durham is a shareholder of the Stock. Furthermore, Sussman’s averment that BKNIAG “is not aware of the names of any of the depository banks who hold its shares” (*id.*) is clearly contradicted by BKNIAG’s annual reports. As noted in its own 2004-Annual Report (Scher 11/28/05 “Affidavit,” [Exhibit F, p 9), BKNIAG identifies 14 German banks where 2,281 shareholders have “stock” accounts.

Petitioners dispute the claim by BKNIAG that the situs of the Stock and/or “global share certificate” is Germany and not New York. It is a well established principle that a New York court

cannot attach property not within its jurisdiction (*Fidelity Partners, Inc. v Philippine Export & Foreign Loan Guarantee Corp.*, 921 FSupp 1113, 1119-21 ["although [plaintiff] argues that nothing more than a valid money judgment is necessary for the issuance of a restraining order and an order of execution, the law in fact does require more: it requires that the property sought to be levied against exist within the jurisdiction"]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Employment Concepts, Inc.*, 269 AD2d 101; *Intercontinental Credit Corp. v Roth*, 152 Misc2d 751 ["[A] New York court cannot attach property not within its jurisdiction"]).

Here, it is unclear whether BKNIAG is legally unable to convey to the Judgment Creditor, Adelaide the Stock owned by the Judgment Debtor, Durham by way of a "global certificate" that is certified. Sussman avers that BKNIAG can deliver the Stock in the "form of co-ownership of share certificates exclusively held by Clearstream via book entry" (Sussman 10/31/05 Aff.,). BKNIAG's annual reports clearly reveal that there are New York shareholders of its stock. Hence, the inference raised is that BKNIAG can indeed deliver stock. Therefore, there is an issue of whether the subject Stock is available and whether it can be conveyed in New York to Adelaide. CPLR § 5201 provides some recourse for Adelaide, but only if the Stock can be conveyed in New York (see, *Koehler v Bank of Bermuda, Ltd.*, \_\_\_FSupp2d \_\_\_, 2005 WestLaw 1115 [March 2005]; *ABKCO Indus., Inc. v Apple Films, Inc.*, 39 NY2d 670, 676 ["some intangibles are deemed to have become embodied in formal paper writings, e.g., negotiable instruments, and in such instances attachment depends on the physical presence of the written instrument within the attaching jurisdiction"]; *Dyer v Dyer*, 231 App Div 453, 454 ["Shares owned by a non-resident defendant in a foreign corporation are not property within the State of New York, even though the corporation is doing business here, unless the stock certificates themselves are found within the State"]).

As to the Stock, there is a material disputed fact as to whether BKNIAG can convey the subject Stock by way of a simple paper instrument. Here, although the record reveals that Bohbot, a

past principal of the defunct Durham, is also the principal of BKNIAG, that, without more, is insufficient proof to rebut the material disputed fact raised in the opposing papers that the Stock cannot be conveyed by BKNIAG, either physically or constructively in New York.

CPLR §5227 provides for a hearing to determine whether the Stock is subject to execution on the ground that BKNIAG is a proper garnishee. Hence, the issue of whether the Stock is subject to execution under CPLR § 5201 and UCC 8-112 shall be set down for hearing. BKNIAG's "jury demand" interposed in its answer does not preclude the Court from referring the issue to the Special Referee to hear and report with recommendations. It is noted that case law suggests no right to a jury trial with respect to the issue to be referred (*First Small Inv. Co. v Zaretsky*, 46 Misc2d 328).

With regard to the Debt, the contention that the Debt owed by BKNIAG to Durham was extinguished as a result of BKNIAG's claim of post-2002 transactions with Durham resulted in Durham owing BKNIAG more than the Debt amount, is not supported by the record.

The Debt has been established by BKNIAG's own records. The Debt was due in January 2003. The Debt was not paid in January 2003. Adelaide commenced its other action against Durham in August 2003 and obtained the Judgment against Durham in April 2004. In her "affidavit," BKNIAG's attorney Ms. Scher avers that a Durham debt to BKNIAG was due and owing before 2002 and written off in 2002 (Scher 11/28/05 "Affidavit," pp 6-7)<sup>4</sup>. At the time this claimed debt was written off the Debt in issue was not due and owing. In fact, the Debt was due and owing in January 2003 (*id.*, Ex C, p 23 [Debt payable in January 2003]). Therefore, the claimed write off of a 2002-precedent claimed debt did not extinguish the January 2003-Debt. The Debt was not due and owing in 2002.

It is further noted that on or about December 2, 2002 in open-court, counsel for Bohbot represented to the Court in the Durham action that Durham had no directors, the company was then

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<sup>4</sup> BKNIAG's attorney avers that "currently" Durham owes BKNIAG the sum of \$178,000.00, but how can Durham owe a "current" debt when BKNIAG's auditors directed that the debt be "written off" (*id.*, p 6, ¶ 30).

defunct, that Durham had sold off most of its assets several years ago, the sole remaining asset was shares in BKNIAG (Brody 11/22/05 Aff.[Exhibit S]). Furthermore, the deposition of a director of Durham in 2002 and a present member of BKNIAG’s Supervisory Board, one Robert Paff, testified at his deposition on October 25, 2005, that Durham was “inactive” in 2002 (*id.*, [Exhibit J]). Grace Collins’ deposition of August 11, 2005 reveals that Durham was not an ongoing entity in May 2002 (*id.*, [Exhibit I])<sup>5</sup>.

Moreover, Bohbot testified at his June 13, 2005-deposition that after December 2001 (underscore added for emphasis) BKNIAG did not engage in any transactions with Durham (Brody 11/22/05 Aff.[Exhibit R [Bohbot 06/13/05 EBT, p 99)]. Bohbot is both a principal of BKNIAG and was the principal of the “defunct” Durham. Hence, the inference is that no business transactions took place between Durham and BKNIAG in 2002 and any claimed debt owed by Durham is based on a transaction(s) that predated the payment date for the Debt which became due and owing in January 2003. In essence, Durham had the right to demand payment of the Debt when it accrued in January 2003, when it became due and owing. The payment date of the Debt postdated BKNIAG’s claimed 2002 write-off.

Furthermore, there is no material disputed fact that at the relevant time in issue Durham had not transacted business with BKNIAG nor accrued any new debt in 2002. Bohbot’s sworn deposition testimony of June 13, 2005 is not contradicted by the affidavit of Wayne Mowat, the CFO of BKNIAG, dated October 28, 2005, who avers only that at the end of 2002, BKNIAG had an outstanding receivable from Durham that both predated the due date of the Debt and also exceeded the

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<sup>5</sup> BKNIAG’s contention that deposition testimony is not “admissible” in this proceeding because BKNIAG had “no opportunity” to attend the deposition is disingenuous, to say the least (*see*, BKNIAG Reply Memo of Law, pp 5-6). The deposition testimony used by Adelaide was taken from a separate action where BKNIAG had no right to attend the deposition. Its attempt to “crash” the deposition was met with its ejection as that deposition involved litigation between Adelaide and the now “defunct” Durham. BKNIAG’s attorneys’ contentions border on frivolity.

Debt (which was not due until January 2003) and that efforts to collect the outstanding receivable ended in December 2002 at which time BKNIAG was instructed by its German auditors to “write-off” the receivable due from Durham (Scher 11/28/05 “Affidavit” [Exhibit D]).

Whatever the argument, at the time of the claimed write off in 2002, it was simply a write off. In short, if anything, the Debt in issue became due and owing in 2003 and any precedent debt (2002) by Durham that was written off in 2002 did not extinguish the 2003-Debt.

Adelaide maintains BKNIAG is a “proper garnishee” through whom property of the Judgment Debtor, Durham can be reached. Adelaide argues that BKNIAG is a garnishee as it holds property belonging to Durham or owes Durham money. It is clear to the Court that there is jurisdiction over BKNIAG and enforcement can be pursued (*Breezevale Ltd. v Dickinson*, 262 AD2d 248). Adelaide, a Judgment Creditor can pursue for enforcement any property interest that Durham, the Judgment Debtor, had or could have assigned, and this also includes the Debt owed to Durham by BKNIAG.

The record demonstrates that the Debt is due and owing as of January 2003 (CPLR § 5201[a]; see also, *ABKCO Industries, Inc. v Apple Films, Inc.*, 39 NY2d 670 [when the debt is not certain to become due, but there is a possibility that it will, the creditor is entitled to go ahead with enforcement by treating the thing as “property” under subdivision (b) of CPLR § 5201 instead of “debt” under subdivision (a)]), and could not have been extinguished by any claimed debt due from Durham because that debt was written off in 2002.

Adelaide has demonstrated its proof as to the existence of the Debt. A debt owed to Durham, the Judgment Debtor, is very much an asset that the Judgment Creditor, Adelaide, is entitled to pursue from BKNIAG. BKNIAG claims the Debt is not owed because it was extinguished by a precedent debt and premised on pre-2002 transactions between Durham and BKNIAG. The claim is rejected. BKNIAG’s contention that it does not owe the Debt is of no moment. There can be no

dispute that this Debt is due and owing, and the Judgment Debtor's debtor-- here, BKNIAG - the Garnishee, has no valid ground to dispute it.

Although CPLR §5227 provides for a hearing to determine whether a debt is owed, the record clearly reveals that no such material dispute exists (but see, *Winkler v Allvend Industries, Inc.*, 186 AD2d 734 [hearing required where trust had been revoked several months before Judgment Debtor purported to transfer stock to trust raised factual issue as to whether debtor was shareholder of corporation and whether stock in question was in possession of Judgment Debtor]; *Penn v Faber*, 42 AD2d 574 [in view of Judgment Debtors' most recent unequivocal statements as to whereabouts of stock certificates which Judgment Debtors were to deliver to sheriff, it was error to grant turnover orders without conducting a hearing to resolve disputed issue, at which Judgment Debtors would be obligated to substantiate their claim that the stock certificates were in possession of their uncle]; see, *General Motors Acceptance Corp. v Norstar Bank of Hudson Valley*, 156 AD2d 876 [in a turnover proceeding brought by Judgment Creditor, an evidentiary trial is required to resolve factual disputes in light of documentary evidence and verified answer indicating that both the Debt and Stock claimed by the Judgment Creditor are not in its possession and/or extinguished]). BKNIAG's "jury demand" interposed in its answer is moot in view of the finding that there is no material disputed fact that the Debt exists.<sup>6</sup>

Moreover, CPLR § 5227 provides that costs of the proceeding may be imposed on one who disputes the indebtedness without a legal or factual basis. Generally, the court should refuse costs where the refusal to release is not the equivalent of disputing the indebtedness so as to invoke costs. Here, Adelaide has demonstrated that BKNIAG's refusal to pay over any part of the Debt amounted to such a dispute.

However, the "costs" contemplated under CPLR § 5227 do not encompass attorneys'

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<sup>6</sup> Moreover, as noted herein there is no right to a jury trial with respect to the equitable nature of this proceeding (*First Small Inv. Co. v Zaretzky*, 46 Misc2d 328).

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fees. In fact, CPLR § 8101 provides that “[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances.” Moreover, attorneys’ fees are incidents of litigation and the prevailing party may not collect them from the loser unless the award is authorized by agreement between parties, or by statute, or court rule (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487). “Costs” are not the same as “counsel fees” (*Ex parte People ex rel. Sabbeth v Sabbeth*, 2 Misc2d 593, 595). Here, the statute is direct and specific and provides only for an award of “costs.”

Pursuant to CPLR § 8101 costs awarded to a party are recoverable from the losing party in partial reimbursement for the expenses in recovering a judgment. The amount of costs is fixed by Article 82 (*Moniz v National Constructors, Inc.*, 201 Misc 393). Disbursements are also recoverable and are distinguished from costs. The latter are actual out-of-pocket expenses incurred by a party in the prosecution of his or her action, and, unlike costs, cannot be recovered without proof that expenses were actually incurred. The disbursements that are to be “taxed” are set out in Article 83 of the CPLR, and subject to increase under CPLR § 8301(d). Whoever is entitled to costs is also entitled to disbursements (CPLR § 8301). In this instance, the Court awards Adelaide half of its costs and taxable disbursements as allowed under CPLR §§ 5227, 8101, 8301, to be computed by the Clerk (CPLR § 8401).

#### CONCLUSION

Accordingly, it is adjudicated that BKNIAG owes the Debt to the Judgment Debtor, Durham, and that the Judgment Creditor, Adelaide, is entitled to payment of the Debt. Furthermore, Adelaide is awarded costs to the extent that half of the costs and disbursements incurred in this litigation are awarded in view of petitioners’ partial success on the petition (CPLR §§ 5227 and 8101). This does not preclude Adelaide from recovering full costs and disbursements in the event it is entirely successful. The Court renders a judgment to that effect and in favor of Adelaide directly against

BKNIAG. In addition, the issues of whether the Stock is subject to execution and whether an award of costs and disbursements are also warranted as to the Stock are referred to the Special Referee to hear and report with recommendations.

**ORDERED AND ADJUDGED** that the Petition is GRANTED in part and DENIED in part; and it is further


**ORDERED AND ADJUDGED** that branch of the petition seeking turn over of the Stock is referred to the Special Referee to hear and report as to whether the Stock is subject to execution pursuant to CPLR § 5201 and UCC 8-122 against the respondent BKN INTERNATIONAL AG; and it is further

**ORDERED AND ADJUDGED** that branch of the petition seeking turn over of the Debt is granted and petitioners ADELAIDE PRODUCTIONS, INC., and ELP COMMUNICATIONS, shall recover the sum of ONE MILLION FIVE-HUNDRED FORTY-FIVE THOUSAND and 00/100 EUROS (€ 1,545,000) from the respondent BKN INTERNATIONAL AG, payable in U.S. Dollars as of the date of entry of this Judgment, with statutory interest to be calculated from the date of entry herein; and it is further

**ORDERED AND ADJUDGED** that petitioners ADELAIDE PRODUCTIONS, INC., and ELP COMMUNICATIONS are awarded half of their costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: March 14, 2006

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk room, 141B).

  
RICHARD B. LOVE, III  
HON. RICHARD B. LOVE III, J.S.C.