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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 SUFFOLK COUNTY**

PRESENT:

**WILLIAM B. REBOLINI**
**Justice**

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John McNamara and Joann Perricone,

Petitioner(s)

-against-

Citibank, N.A. and General Motors Acceptance Corp.,

Respondent(s)

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Motion date: 3/29/06
Submitted: 1/31/07
Motion Sequence No.: 003 MD
004 MG
Case Disp.
Index No.: 8667-06

Attorney for Petitioners:
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Attorney for Respondent General Motors Acceptance Corp.:
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Upon the following papers numbering 1 to 11 read upon this petition and motion to dismiss:

Order to Show Cause and supporting papers 1 - 4;
Notice of Cross Motion and supporting papers 5 - 7;
Affidavit in Opposition and supporting papers 8 - 9;
Reply Affidavits and supporting papers 10 - 11; it is

**ORDERED** that this petition by John McNamara and Joann Perricone brought by order to show cause for an order pursuant to CPLR 5015 and 5240 quashing an enforcement subpoena served upon Joann Perricone and further vacating the assignment of a judgment from respondent Citibank, N.A. to respondent General Motors Acceptance Corp. "(GMAC") is denied; and it is further

**ORDERED** that this cross motion by respondent GMAC for an order dismissing the petition is granted.

According to the petition, petitioner, John McNamara pleaded guilty in 1992 in federal court to violating the Racketeer Influenced and Corrupt Organizations Act ("RICO") predicated on wire and mail fraud to obtain $412 million dollars in loans from GMAC in order to finance non-existent large vans to be converted. In 1996, McNamara was sentenced to serve five years in federal prison and was ordered to make full restitution to GMAC. At the time the criminal action was pending a companion forfeiture action proceeded in federal court. To date, GMAC has recovered approximately $41 million dollars. In 1996, GMAC commenced a separate civil action for money damages in federal court, which action remains unresolved.

In 1998, Citibank, N.A. obtained a judgment in the amount of $5,542,219.78 against John McNamara, which it later assigned to GMAC. While this assignment was entered on June 2, 2003, GMAC claims the actual assignment occurred in 2000, but the Clerk of the Court required a notarized assignment, which was accomplished in 2003. Attached to the affidavit of William B. Solomon, Group Vice President and General Counsel of GMAC and signatory to the assignment is a copy of a check in the amount of $150,000.00 representing the amount GMAC paid for the assignment.

GMAC recently began to attempt to enforce this judgment, and toward that end, GMAC served the subject subpoena on Joann Perricone.

In this proceeding, petitioners seek a judgment pursuant to CPLR 5015 vacating the assignment of judgment obtained against John McNamara by Citibank, N.A., to GMAC in the action Citibank v. Angst, Inc., (New York County 600148-98) and for a further judgment pursuant to CPLR 5240 quashing the subpoena served upon Joann Perricone. In the order to show cause that brought on this proceeding, petitioners further seek to stay enforcement of the money judgment pending determination of the petition.

To the extent that this petition seeks to vacate the assignment of judgment, the court finds that the same is an improper attempt to collaterally attack a judgment entered in a separate action. "The court which entered a judgment or order may relieve a party from it upon terms that may be just, on motion of any interested person with such notice as the court may direct upon the ground of * * * (3) fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). "The remedy for fraud allegedly committed during the course of a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment, and not by another plenary action collaterally attacking that judgment" (Parker & Waichman v. Napoli, 29 AD3d 396, 815 NYS2d 71 [1st Dept. 2006]). Where a party commenced an action against counsel who represented his adversary in a prior action alleging violations of Judiciary Law §487, the court dismissed the claim holding that the plaintiff's exclusive remedy was to move pursuant to CPLR 5015 to vacate the judgment and not a second plenary proceeding (Cramer v. Sabo, 31 AD3d 998, 818 NYS2d 680 [2d Dept. 2006]). Petitioner requests that the court disregard its request for relief pursuant to CPLR 5015 and treat this petition as one seeking a declaratory judgment, which would be more properly brought as an action and not a proceeding. Regardless of how petitioner characterizes the relief sought, however, the gravamen of the petition is a challenge to the assignment of a judgment entered in a separate action. The court further notes that the action

where the judgment was entered remains in active litigation. Accordingly, the petition, to the extent that it seeks to vacate the assignment of the judgment entered in the separate New York County action, is an improper collateral attack. Petitioner's sole remedy, if any, lies in the New York County action.

To the extent that the petition seeks to quash the subpoena, the cross motion is likewise granted, and the petition dismissed. Petitioner, citing CPLR 5221(a)(4) claims that the subpoena served upon Joann Perricone, a Suffolk County resident, must be quashed because it is captioned in the New York County action. Pursuant to CPLR 5221(a)(4), an enforcement proceeding shall be brought in the Supreme Court or County Court "* * * in a county where the respondent resides, or is regularly employed, or has a place for the regular transaction of business * * * " However, an enforcement subpoena is not a "special proceeding" (Coutts Bank v. Anatian, 275 AD2d 609, 713 NYS2d 45 [1st Dept. 2000]; Cornell Federal Credit Union v. Thorpe, 199 AD2d 936 [3d Dept. 1993]). "Thus, while the subpoena * * * served in this case 'is one of the so-called supplementary proceedings' (Siegel, New York Practice [Third Edition]) §509, p. 827), it 'does not commence a special proceeding * * * [I]t is merely captioned in the action itself * * * and its deemed an adjunct of it' (Id.)." (Coutts Bank v. Anatian, supra.).

Pursuant to CPLR 5224[c], such deposition shall be held during business hours "* * * at a place specified in rule 3110. Pursuant to CPLR 3110, the deposition of a non-party resident shall be held "* * * within the county in which he (or she) resides, is regularly employed or has an office for the regular transaction of business in person* * *" Since the subject subpoena is noticed for Central Islip, Suffolk County, the county where Perricone claims to reside, the subpoena is in compliance with CPLR 3110 and 5224. Furthermore, even if the court were to accept petitioner's argument that GMAC was required to commence a special proceeding under CPLR 5221 to serve the subject subpoena, an argument the court rejects, the petition does not allege, nor do petitioners provide an affidavit from Joann Perricone stating, that she is not regularly employed in New York County or that she does not maintain a place for the regular transaction of business in New York County.

Finally, in accordance with the order of the Hon. Charles E. Ramos in the New York County action wherein he permitted the deposition of John McNamara to be videotaped, that part of the petition seeking to quash the subpoena on the ground that it provides for the examination to be videotaped is denied.

Dated: March 13, 2007

**HON. WILLIAM B. REBOLINI, J.S.C.**