

**Garcia v Dupont Realty, LLC**

2007 NY Slip Op 30798(U)

April 11, 2007

Supreme Court, New York County

Docket Number: 0100332/2006

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**  
**J.S.C.** Justice

PART 1

Index Number : 100332/2006

GARCIA, MAXIMINO

INDEX NO. 100332/06

vs  
DUPONT REALTY, LLC

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

COMPEL

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

The following papers, numbered \_\_\_\_\_

motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1

Replying Affidavits \_\_\_\_\_

2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 11, 2007

**MARTIN SHULMAN**  
**J.S.C.** J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
MAXIMINO GARCIA,

Index No.: 100332/06

Plaintiff,

- against -

DUPONT REALTY, LLC,

Defendant.  
-----X

Decision/Order  
**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Maximino Garcia ("judgment creditor" or "Garcia") moves pursuant to CPLR §5226 for an order directing Defendant Dupont Realty, LLC ("judgment debtor" or "Dupont") to make monthly installment payments of \$20,000.00 to Garcia to be applied towards a judgment entered on January 10, 2006 in Garcia's favor against Dupont (the "judgment").<sup>1</sup> The judgment debtor opposes the motion.

Dupont concedes that it is the owner of premises located at 590 West 187<sup>th</sup> Street, New York, New York (the "building"). Garcia, presumably a rent regulated tenant at the building, obtained the judgment by order of the New York State Division of Housing and Community Renewal ("DHCR") which he docketed with this court pursuant to New York City Administrative Code §26-516. The judgment creditor alleges, upon information and belief, that Dupont derives rental income from the building and thus is able to make payments in satisfaction of the judgment. Gerrald Supp. Aff. at ¶¶ 8 & 9.

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<sup>1</sup> The original judgment amount was \$104,533.66. Judgment creditor alleges that a portion of the judgment has been satisfied and a balance of \$99,258.86 remains outstanding. Gerrald Supp. Aff. at ¶ 7 and Exh A to motion.

The judgment debtor alleges that the income it derives from the building "is barely sufficient to pay carrying expenses of the building, primarily the mortgage, heating costs, employees such that the [judgment debtor] will not be able to maintain the building, to the detriment of the tenants if it should be ordered to pay installment payments, as requested by the [judgment creditor]. . ." <sup>2</sup> Hakakian Opp. Aff. at ¶2. Dupont submits various documentary evidence in support of its claim that its rental income, after deducting various building operating expenses, is insufficient to allow payment of monthly installments to Garcia. Such documentation includes Dupont's building rent roll, its 2005 income tax return, mortgage statement, fuel bills and insurance bills.

### Analysis

CPLR §5226 provides in relevant part:

Upon motion of the judgment creditor . . . where it is shown that the judgment debtor is receiving or will receive money from any source . . . the court shall order that the judgment debtor make specified installment payments to the judgment creditor. . . In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received . . .

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<sup>2</sup> Referring to its 2005 income tax returns, the judgment debtor alleges it collected \$279,025.00 per year in rental income (\$23,252.08 per month) and reported a loss of \$15,154.00 for net rental real estate income in 2005. Hakakian Opp. Aff. at Exhs. B and C. Dupont estimates its monthly operating deficit at \$3,987.92. Hakakian Opp. Aff. at ¶16.

It is undisputed that Dupont receives and will continue to receive rental income. Thus, the judgment creditor has established entitlement to an installment payment order under CPLR §5226.

As the statute expressly provides, in fixing the amount of the payments, the court must consider *inter alia* the judgment debtor's "reasonable requirements". Dupont having alleged that its rental income is insufficient to permit installment payments to the judgment creditor, it must establish its "reasonable requirements". *Camphill Special Schools, Inc. v. Prentice*, 126 Misc.2d 707, 708, 483 N.Y.S.2d 888, 889 (Sup. Ct., Onondaga Cty., 1984)(burden of establishing necessity or reasonable requirements is on the judgment debtor); *Sure Fire Fuel Corp. v. Martinez*, 75 Misc.2d 714, 716, 348 N.Y.S.2d 502, 506 (Civ. Ct., NY Cty., 1973).

Here, Dupont submits evidence which, while mostly<sup>3</sup> probative, is inconclusive of its rental income and claimed necessary and reasonable expenses. For example, the judgment debtor submits what appears to be a self-generated rent roll to establish its current monthly rental income. Hakakian Opp. Aff. at Exh. A. More probative evidence of rental income might consist of certified DHCR rent records (including the status of any applications which may be pending before the DHCR for rent increases due to hardship or capital improvements) and/or copies of current leases. Similarly, more probative evidence of Dupont's expenses might consist of copies of bills and invoices and proof of Dupont's payment thereof.

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<sup>3</sup> The fuel bill Dupont submits is addressed to "Duke Assoc., LLC" rather than Dupont, and references what appears to be different premises located at 575 West 187<sup>th</sup> Street, New York, NY. Hakakian Opp. Aff. at Exh. E.

Further, the focus of CPLR §5226 “is on the present and future financial condition of the judgment debtor without regard to past activities.” *Camphill Special Schools, Inc. v. Prentice, supra*. Rather than provide proof of its current expenditures, Dupont primarily provides evidence of its 2005 expenses, such as insurance and utilities, via its 2005 tax returns. Hakakian Opp. Aff. at Exhs. B & C.

Under these circumstances, a hearing is warranted to ascertain Dupont’s current and future rental income and its reasonable requirements for operating the building, and whether any surplus income is available to satisfy the judgment. Further, Garcia should have the opportunity to dispute the judgment debtor’s alleged needs.<sup>4</sup> See, e.g., *Camphill Special Schools, Inc. v. Prentice, supra*; *Southern Tier Masonry, Inc. v. Browning*, 194 A.D.2d 983, 984, 599 N.Y.S.2d 173 (3<sup>rd</sup> Dept., 1993)(trial was required where disputed facts existed concerning the extent of judgment debtor’s income and his reasonable requirements and obligations). Accordingly, it is

ORDERED that Garcia’s motion is granted to the extent that a hearing is hereby directed to ascertain the amount and frequency of the installment payments to be made to Garcia, by evaluating and determining: Dupont’s current and future rental income; its reasonable requirements for operating the building; and whether any surplus income is available for payment of monthly installments to Garcia to be applied towards the judgment. Such hearing shall be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the

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<sup>4</sup> The remedy Garcia seeks via this motion, to wit, an installment payment order, is without prejudice to any other rights he may have and other enforcement procedures which may be available to him.

parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues. The final determination of this matter is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this decision and order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special referee.

This constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been provided to counsel for both parties.

Dated: New York, New York  
April 11, 2007

\_\_\_\_\_  
Hon. Martin Shulman, J.S.C.

**FILED**  
APR 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE