

**Banco Popular N. Am. v Philian Designs,  
LLC**

2007 NY Slip Op 30856(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0603226/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOPEZ, III  
Justice

PART 54

Banco Popular North America

INDEX NO. 603226/06

MOTION DATE 2/14/07

MOTION SEQ. NO. 002

- v -

Phelican Designs LLC

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

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

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

PAPERS NUMBERED

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

APR 23 2007

NEW YORK  
COUNTY CLERK'S OFFICE

DECISION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

HON. RICHARD B. LOPEZ, III

Dated: 4/16/07

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

-----X  
BANCO POPULAR NORTH AMERICA  
Plaintiff,

Index No. 603226/06

-against-

PHILIAN DESIGNS, LLC.  
Defendant.

**FILED**  
APR 23 2007  
NEW YORK  
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-----X  
**Hon. Richard B. Lowe, III:**

Respondent Philian Designs LLC (Philian) moves by ~~order~~ to show cause to renew and reargue a decision and order of this court dated December 12, 2006. Petitioner Banco Popular opposes the motion to renew and reargue and cross-moves for an extension of time to serve additional garnishees with an order of attachment. CPLR 2221.

**Background**

In the underlying action, *Banco Popular North America v Gruppo IL Gioiello, Ltd., International Luxury Products, Inc. and Elliot W. Shelby* (Sup Ct, New York County, Index No. 602193/06) (the main action), Banco Popular obtained a money judgment against the defendants (collectively, Gruppo). In these proceedings, Banco Popular seeks to enforce an order of attachment which was served on Philian on August 8, 2006, as a garnishee of debts owed to, or property held for Gruppo.

On September 11, 2005, Banco Popular commenced this special proceeding to enforce the order of attachment. The petition alleges that after being served with the order of attachment by the Sheriff of New York County (the Sheriff), Philian failed to

serve a statement upon the Sheriff, as is required by CPLR 6219, and failed to pay over to the Sheriff money owed or property held for Gruppo. The petition seeks to recover \$500,000 of Gruppo's assets allegedly held by Philian.

In opposition to the petition, Philian cross-moved to dismiss the petition and submitted the affidavits of its attorney and of Phillip Shelby, the managing director of Philian. Banco Popular submitted the affidavit of its attorney and of Sammy Maslaton (Maslaton), who alleged that he had personal knowledge of the inventory, accounts receivable and other personal property of Gruppo IL Gioiello, Ltd., International Luxury Products, Inc. and International Luxury Products, Inc.

This court permitted oral argument on the petition on December 12, 2006. Following oral argument, the court granted the relief requested in the petition and denied the cross motion to dismiss the petition.

On this motion to renew and reargue, Philian claims that the court overlooked fundamental facts and governing principles of law, and that numerous facts and circumstances were not called to the court's attention by prior counsel. Philian claims that the court lacked jurisdiction to decide this petition since the wrong corporation was served with process, and neither the Sheriff nor the defendants in the main action were served with the summons and notice of petition as is required by CPLR 6214 (b). Philian further claims that the court based the entry of judgment against it on Philian's failure to file a statement of assets in its possession with the Sheriff, pursuant to CPLR 6219.

While Philian's present counsel concedes that prior counsel failed to point out the flaws in service of process to the court, at a minimum, Philian seeks an evidentiary hearing and a stay of further proceedings for the entry of judgment against respondent.

### Discussion

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue: ... (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979).

The procedure for resolving a special proceeding commenced by petition is spelled out in CPLR 409. That section states that the court shall make a summary determination of the petition "to the extent that no triable issues of fact are raised." CPLR 409 (b). Further, the court may make any orders that would be permitted on a motion for summary judgment. *Ibid*.

Philian identifies, as an issue of law which the court is alleged to have misapprehended, that the judgment granted to Banco Popular exceeded the remedies

permitted by CPLR 6219, for a garnishee's failure to file a statement of assets with the Sheriff, and that nothing in the statute requires a garnishee who does not hold any assets to file such a statement. Philian is in error with respect to both of these contentions. Although it is true that the court may order a garnishee who fails or refuses to submit a statement of assets to serve such a statement, and may also enter an order directing disclosure, the garnishee's failure or refusal to serve a statement does not impair the effectiveness of the levy. *Korytkowski v Greniewicki*, 220 App Div 237 (4<sup>th</sup> Dept 1927); 12 Weinstein, Korn, Miller, New York Civil Practice 2<sup>nd</sup> ¶ 6219.04. Nothing in CPLR 6219 limits the remedies available to the court in this special proceeding. In addition to any remedies imposed upon Philian for its failure to file a statement with the Sheriff, all of the remedies under CPLR 409, including treating the petition as a motion for summary judgment, remained available to the petitioner and the court on the hearing of the petition.

Issues of fact alleged to have been overlooked by the court include evidence that two days after the order of attachment was served on Philian, Phillip Shelby sent a letter to counsel for defendants in the main action stating that he, Shelby, did not have any merchandise belonging to Gruppo in his office, or anywhere else. Philian claims there is no evidence in the record which establishes that it held any of Gruppo's property; that the judgment amount of \$500,000 was "concocted out of thin air"; and that the proceeding was commenced against the wrong party. Philian also claims that Maslaton, Banco Popular's sole witness regarding assets in Philian's possession, is totally lacking in

credibility since he is a convicted felon, and that his affidavit has no probative value and should have been disregarded by the court. On this motion to renew and reargue, Philian offers affidavits to refute Maslaton.

At a minimum, Philian claims that disputed questions of fact require the court to conduct a hearing to determine whether respondent holds property or debts which should be turned over to Banco Popular.

Finally, Philian claims that enforcement of the judgment in these proceedings violates the stay of enforcement granted by the court in the main action, by order dated November 3, 2006. The express intent of the stay against enforcement in the main action was to permit enforcement of the order of attachment in issue in these proceedings to proceed to a sale of assets, first. A stay of these proceedings would bring all enforcement proceedings to a halt, which clearly is not the court's intent.

Philian's motion to renew and reargue is granted. Upon renewal and reargument, the court adheres to its original decision.

Pursuant to CPLR 2221 (e), a motion to renew must be based upon new facts not offered on the prior motion, which facts would change the prior determination, and movant must offer a reasonable justification for the failure to present such facts in the earlier proceedings. Philian has failed to offer any justification for its earlier failure to present any of the new evidence offered, except to suggest that its prior counsel omitted to include such information. Law office failure, however, fails to provide a basis for

changing the outcome from the prior determination, where there has neither been a change in the facts or the law since this petition originally came before the court to be heard. *See Davidson v Ambrozewicz*, 23 AD3d 903 (3<sup>rd</sup> Dept 2005).

Respondent claims that the court lacks subject matter jurisdiction based on a host of procedural flaws. Among the flaws cited are: petitioner's failure to serve the notice of petition on the Sheriff and the defendant in the main action, pursuant to CPLR 6214 (d); a notice of levy served in the main action which names a corporation other than the respondent in this special proceeding; and the late filing of the Sheriff's Certificate of Service.

Respondent cites *Rodriguez v State of New York* (307 AD2d 657 [3<sup>rd</sup> Dept 2003]), decided under the Court of Claims Act. In *Rodriguez*, the court found that a statutory requirement for service by certified mail upon the Attorney General required a dismissal for lack of subject matter jurisdiction where claimant made service by ordinary mail, since a "statutory requirements conditioning suit must be strictly construed." *Id.* at 657 (citation omitted).

Respondent's remedy for alleged defects in the order of attachment was to move, pursuant to CPLR 6223, to vacate or modify the order of attachment. Petitioner is then entitled to an opportunity to correct any such defects. CPLR 6223. Nothing in CPLR 6214 (d) suggests that a failure to serve the notice of petition on the Sheriff or the defendant in the main action voids the order of attachment, and no authority has been

cited by respondent to support this argument. This, and other procedural defects, alleged by the respondent for the first time on this motion to renew and reargue, do not void an otherwise valid order of attachment.

The cross motion is denied. Petitioner's cross motion requests that, if the court vacated its decision, permission to serve Philip Shelby personally be granted. This application is moot. The request to add additional parties Philian LLC and Philip Shelby to this special proceeding, as necessary parties, is denied, without prejudice. CPLR 1001 describes necessary parties as those who ought to be joined if complete relief is to be accorded between the persons who are parties. Pursuant to CPLR 6214 (e), petitioner may move, on notice to all parties to the main action, to extend the levy in aid of a further order of attachment against any necessary parties.

**Conclusion**

Accordingly, it is

ORDERED that the motion to renew and reargue is granted; and it is further

ORDERED that upon renewal and reargument the court adheres to its decision dated December 12, 2006; and it is further

ORDERED that the cross motion is denied.

Dated: April 16, 2007

ENTER:

**FILED**  
APR 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. RICHARD D. LOWE, JR.  
\_\_\_\_\_  
J.S.C.