

Marcus v Trautman Wasserman & Co., Inc.
2007 NY Slip Op 33724(U)
November 14, 2007
Supreme Court, New York County
Docket Number: 0103106/2007
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: KORNREICH
Justice

PART 54

LAWRENCE MARCUS
- v -
TRAUTMAN WASSERMAN & CO,

INDEX NO. 903106/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for contempt

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
NOV 20 2007
NEW YORK COUNTY CLERKS OFFICE

Dated: 11/14/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
LAWRENCE MARCUS,

Plaintiff,

-against-

TRAUTMAN WASSERMAN & CO., INC.

Defendant.
-----X

SHIRLEY WERNER KORNREICH, J.

**DECISION
& ORDER**

Index No. 103106/2007

FILED
NOV 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequences 001, 002 and 003 are hereby consolidated for disposition.

This contempt proceeding was brought to punish Gregory O. Trautman ("Trautman") for failing to appear for an examination pursuant to an information subpoena for an examination and production of documents, dated May 28, 2007 ("Trautman Subpoena"), served by plaintiff, a judgment creditor. Plaintiff now moves in motion sequence 001 to punish Trautman for contempt for failing to obey the Trautman Subpoena, for issuance of a warrant to arrest Trautman, for attorneys fees and costs, for an award of interest, and for an order directing Trautman to appear for an examination pursuant to the Subpoena. Motion sequences 002 and 003 seek to quash information subpoenas for testimony and production of documents served by plaintiff on Leon Borenstein ("Borenstein" and "Borenstein Subpoena") and Samuel Wasserman ("Wasserman" and "Wasserman Subpoena").

Borenstein is the long-time attorney for the defendant/judgment debtor, Trautman Wasserman & Co., Inc. ("TW"). Wasserman and Trautman are principals of TW, although Borenstein avers that Wasserman "has not been associated with TWCO [TW] since 2006."

Trautman's affidavit states that "TW has ceased to exist and has no office for the conduct of its business."

The three subpoenas seek various records of TW, TW Holding Co., Inc. ("Holding"), and TW Private Equity Corporation ("Equity"), for the period January 1, 2001 to the present, TW's corporate minute book and "books, papers and records in your possession or control which have or may contain information concerning the property, income or other means of the judgment debtor relevant to the satisfaction of the judgment."

The judgment-creditor/plaintiff seeks to inquire about assets in order to collect a judgment, dated December 11, 2006 ("Judgment"), entered in the Superior Court of California, County of San Francisco, in favor of plaintiff and against TW. The Judgment was entered upon an arbitration award of a National Association of Securities Dealers Dispute Resolution panel, dated September 30, 2006 ("Award"). The court takes judicial notice of the fact that the Judgment was filed and docketed in the New York County Clerk's Office on March 14, 2007. It is undisputed that the Judgment remains unpaid.

The underlying arbitration involved claims by plaintiff against his employer, TW, for breach of contract and violations of the California Labor Code. Plaintiff's amended claims in the arbitration proceeding, added as respondents Holding, Equity, Trautman and Samuel Wasserman ("Wasserman") and set forth claims of "alter ego/disregard of corporate entity theory of liability," fraud and conversion. Award, p. 2. Trautman's affidavit states that, "[p]laintiff argued at the arbitration that [TW] had wrongfully transferred assets to Holding and Equity and therefore Plaintiffs [sic] should be entitled to judgment against them too." Plaintiff was awarded judgment against TW for compensatory damages in the amount of \$100,000.00 on his breach of contract

* 4]
claim and attorneys' fees under the California Labor Code, both with interest. All claims against Holding, Equity, Trautman and Wasserman were dismissed. August 24, 2006, was the last day of the arbitration hearing.

Trautman contests the contempt application on the grounds that he was not properly served, that plaintiff must attempt to obtain information from TW before Trautman is subpoenaed, that plaintiff is not entitled to documents from Holding or Equity based upon the dismissal of plaintiff's claims against Equity and Holding in the arbitration, and that Trautman does not have contact with TW's accountants.

The Trautman Subpoena was properly served. Trautman's objection to the manner of service is that it was left with a person that was neither his employee nor a person authorized to accept service on his behalf. These objections are unavailing. A subpoena must be served in the same manner as a summons. CPLR §2303. A summons may be served upon a natural person by leaving it with a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served, followed by mailing. CPLR §308(2). The affidavit of service of the Trautman Subpoena states that it was left with a person of suitable age and discretion, "Gillie Trautman, co-worker" at Trautman's actual place of employment and then mailed. Trautman does not dispute that process was left at his place of business and mailed, or that Gillie Trautman was a person of suitable age and discretion.

A judgment creditor is not required to seek information from the judgment debtor before seeking information from third parties. CPLR §5223 provides that an information subpoena may be served upon "any person." This entitles a judgment creditor to seek information from "any third person with light to shed on the debtor's property, present or potential." *7B McKinney's*

Cons. Laws of NY, Practice Commentaries, David Siegel, C5223:2, © 1997. There is no priority in the use of disclosure devices. *Id.* at C5223:1. CPLR §5223 sets forth a “generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property.” *Gryphon Domestic VI, LLC, v. GBR Information Services, Inc.*, 29 A.D.3d 392 (1st Dept. 2006), citing *ICD Group v Israel Foreign Trade Co. [USA]*, 224 A.D.2d 293, 294 (1996). A person seeking to avoid supplementary proceeding disclosure must conclusively establish that he or she lacks information to assist the judgment creditor in obtaining satisfaction of the judgment. *Id.* Principals of the debtor entity “are the natural and proper parties from whom information regarding the location and extent of” the debtor entity’s assets may be obtained. *Levin v. Total Hockey Associates*, 64 A.D.2d 622 (2nd Dept. 1978)(enforcement of subpoenas served on general partners of judgment-debtor limited partnership).

Plaintiff has established that he is entitled to examine Trautman, Wasserman and Borenstein about TW’s assets. They have not conclusively established that they lack relevant information; in fact, they do not deny it. Trautman and Wasserman, former principals of TW, are natural targets of inquiry concerning the assets of the now-defunct judgment debtor.

It is true that the claim that TW made illegal transfers to Equity and Holding was determined adversely to plaintiff in the prior arbitration proceeding. The doctrine of *res judicata* bars relitigation of claims that were actually determined or could have been litigated in a prior proceeding between the same parties. *Res judicata* applies to determinations made in arbitration proceedings. *Matter of American Ins. Co. v. Messinger*, 43 N.Y.2d 184, 189-190 (1977). The burden is on the party asserting the bar to prove that the same issues were determined on the

* 6]

merits in the prior proceeding. *Seabrook v. City of N.Y.*, 306 A.D.2d 68 (1st Dept. 2003). “[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357 (1981). A "pragmatic" test has been applied to make this determination--analyzing "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94 (2005).

Here, plaintiff does not dispute that during the arbitration, he argued unsuccessfully that assets were wrongfully transferred by TW to Holding and Equity. Plaintiff's sole argument against the application of *res judicata* is that a fraudulent conveyance and piercing the corporate veil are different causes of action. This is insufficient. *Id.* It appears from the record that illegal transfers from TW to Holding or Equity were a subject in the arbitration and, therefore, at least as of the close of the hearing on August 24, 2006, it was determined that illegal transfers were not made by TW to Equity or Holding. Therefore, inquiry as to transfers prior to August 24, 2006 cannot be attacked as illegal under the doctrine of *res judicata*.

Moreover, plaintiff has made no evidentiary showing that transfers were made by TW to Holding or Equity that could be set aside as fraudulent conveyances under the Debtor and Creditor Law §270 et seq. There is no evidence of transfers to Holding or Equity made without fair consideration, with intent to hinder, delay or defraud TW's creditors, or which rendered TW insolvent. These elements must be shown to set aside a conveyance as fraudulent. *Id.*; *Rebh v. Rotterdam Ventures, Inc.*, 252 A.D.2d 609 (3rd Dept. 1998).

This leads to the conclusion that all of the subpoenas are overbroad to the extent that they seek documents of Holding and Equity. The only evidence presented is that Equity was set up as a vehicle to compensate employees of TW, the consideration for which could have been services performed. In order to obtain information relating to transferee entities, the judgment creditor must show a transfer of assets to the transferee from the judgment debtor. *Id.*; *Young v. Torelli*, 135 A.D.2d 813 (2nd Dept. 1987). Without this showing, the subpoenas are irrelevant insofar as they seek information concerning Holding and Equity. *Matter of Reuters v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337 (1st Dept. 1997); *People v. Zilberman*, 297 A.D.2d 517 (1st Dept. 2002).

However, rather than quash the subpoenas, the court will exercise its discretion to compel the examinations of Borenstein, Wasserman and Trautman, pruning the requests for documents. *Rebh v. Rotterdam Ventures, Inc.*, *supra*; *Young v. Torelli*, *supra*. Trautman, Wasserman and Borenstein shall produce at their examinations all requested documents in their possession, custody or control, relating to TW for the period June 8 2005, the date the arbitration statement of claim was filed, to the date of the examinations, as well as TW's corporate minute book. Plaintiff may renew its application to examine records of Holding and Equity during the period after August 24, 2006 in the event that the examination of TW's records reveals evidence of fraudulent transfers. In addition, as suggested by plaintiff, production of documents relating to transfers shall be limited to transfers in the amount of \$1,000.00 or more, rather than \$500.00 or more.

Motion sequence 001 is denied insofar as it sought to hold Trautman in contempt, issuance of an arrest warrant and for interest, attorneys' fees and costs is denied in light of the decision that the Trautman Subpoena was overbroad. Accordingly, it is

ORDERED that the motion to hold Gregory O. Trautman in contempt and other relief is granted solely to the extent that he is directed to appear for an examination limited to the assets of

TW, pursuant to the subpoena dated May 24, 2007, within 20 days of service upon him of a copy of this order with notice of entry, and to bring with him the following requested documents in his possession, custody or control: documents that the relate to TW and transfers by TW (other than transfers to Equity ad Holding) for the period June 8, 2005 to the date of the examination, and transfers by TW of \$1,000.00 or more to Equity and Holding for the period August 24, 2006 to the date of the examination, as well as TW's corporate minute book (no date limitation), and in all other respects the motion is denied; and it is further

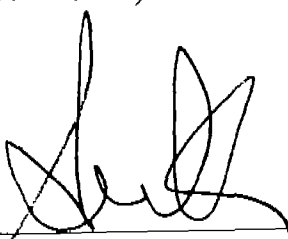
ORDERED that the motion to quash the subpoena, dated June 22, 2007, served upon Leon Borenstein is denied and Leon Borenstein is directed to appear for an examination limited to the assets of TW, within 20 days of service upon him of a copy of this order with notice of entry, and to bring with him the following requested documents in his possession, custody or control: documents that the relate to TW and transfers by TW (other than transfers to Equity ad Holding) for the period June 8, 2005 to the date of the examination, and transfers by TW of \$1,000.00 or more to Equity and Holding for the period August 24, 2006 to the date of the examination, as well as TW's corporate minute book (no date limitation); and it is further

ORDERED that the motion to quash the subpoena, dated May 11, 2007, served upon Samuel Wasserman is denied and Samuel Wasserman is directed to appear for an examination limited to the assets of TW, within 20 days of service upon him of a copy of this order with notice of entry, and to bring with him the following requested documents in his possession, custody or control: documents that the relate to TW and transfers by TW (other than transfers to Equity ad Holding) for the period June 8, 2005 to the date of the examination, and transfers by TW of \$1,000.00 or more to Equity and Holding for the period August 24, 2006 to the date of the

examination, as well as TW's corporate minute book (no date limitation).

Dated: November 14, 2007

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