

Adelaide Prods. Inc. v BKN Intl. AG

2007 NY Slip Op 34087(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0114522/2005

Judge: Richard B. Lowe

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

PRESENT: _____
Justice

PART 56

Index Number : 114522/2005

ADELAIDE PRODUCTIONS

VS.

BKN INTERNATIONAL AG

SEQUENCE NUMBER : 009

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE 11/29/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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 OF DECISION.

Dated: 12/3/07

HON. RICHARD E. LORE III

J.S.C

Spec: one FINAL DISPOSITION NON-FINAL DISPOSITION

By: [Signature] = [Signature] = [Signature]

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

-----X

ADELAIDE PRODUCTIONS INC. and
ELP COMMUNICATIONS,

Index No. 114522/05

Petitioners,

-against-

BKN INTERNATIONAL AG,

Respondent.

-----X

Hon. Richard B. Lowe, III

Petitioner moves pursuant to CPLR 4403 for an order confirming the report of the Special Referee dated October 1, 2007. Respondent cross-moves for an order rejecting the Referee’s Report.

Background

This is a proceeding brought pursuant to CPLR §§ 5201 and 5227 against Respondent BKN International AG (BKNIAG) for the turnover of a debt. The salient facts in this matter are set out in prior decisions of the court and will only be discussed as is relevant to the instant motion.

In April 2004, Petitioners obtained a \$24 million judgment against Durham Capital Holdings, Inc. (“Durham”) for breach of various licensing agreements. The judgement has not been paid and Durham is no longer an active business.

Durham transferred its assets and BKNIAG, a German company operated by Allen Bohbot (“Bohbot”), who also controls Durham, entered into an agreement with Durham. Pursuant to the agreement, BKNIAG promised to pay Duraham € 1, 545,000 in exchange for

Durham assuming certain liabilities of BKNIAG to third parties. BKNIAG never repaid this debt to Durham. Therefore, Petitioners sought to execute on this debt as partial satisfaction of the judgment. They were unsuccessful and later brought this turnover action.

In a decision and order dated March 14, 2006, this court entered judgment against BKNIAG in the full amount of the debt. Thereafter, by decision and order dated April 5, 2007, the Appellate Division reversed this court. It held that “the petition established the existence of a debt owed by respondent to the judgment debtor” (*Adelaide v BKN International AG*, 39 AD3d 254, 255 [1st Dept 2007]). However, the court stated there was a factual issue as to the amount of the debt that BKNIAG owed to Durham, if any, as of the date the proceeding was commenced and directed a “fact-finding hearing” on this issue. By order dated April 16, 2007, this Court referred the issue of whether BKNIAG repaid the debt to a Special Referee to hear and report.

The hearing was held on June 26 and 27, 2007. The referee issued a comprehensive decision which recommended that the full amount of the debt be paid to the Petitioners. Specifically, the referee stated, “upon review of the credible testimony of the witnesses, I find and report that the petitioners have demonstrated the existence of a debt and that the respondent has not demonstrated its burden that the debt was repaid before the commencement of the proceeding” (*Notice of Motion, Exhibit A at 37*).

The Petitioner moves to confirm the report in its entirety. The Respondent cross-moves to reject the report. The Respondent argues the Special Referee improperly shifted the burden of proof to it and that his finding goes against the weight of the evidence.

Discussion

First, the Respondent has waived its objection to the referee's imposition of the burden of proof upon it. A party must object to a Special Referee's ruling at a hearing, or the objection will be waived (*Isaacson v Karpe*, 84 AD2d 868, 869 [3rd Dept 1981]); (*see also Shen v Shen* 21 AD3d 1078, 1079 [2nd Dept 2005]). Respondent does not dispute that BKNIAG at no time waived the objection. To the contrary BKNIAG accepted the ruling and proceeded on this basis. BKNIAG also does not dispute that it did not object in its post-hearing brief either. The failure to object at any time prior to this motion to confirm will deem the objection waived.

Furthermore, even had the objection not been waived, the Special Referee properly imposed the burden of proof upon the Respondents as to the amount of debt owed Durham. The Appellate Division recognized the Petitioner successfully established the existence of a debt in 2001 through the production of the 2001 Annual Report of BKNIAG (*Adelaide v BKN International* , 39, AD3d 254, 255 [1st Dept 2007]). The court then went on to hold the Respondent created an issue of fact as to the amount of the debt , if any remained, at the time this action was commenced (*Id.*) This issue required a further hearing as directed by the Appellate Division.

The Special Referee properly acknowledged in his decision that there were limited issues of fact to be addressed and he also properly recognized that these issues were raised by the Respondant BKNIAG in its defense (*Notice of Motion, Exhibit A, p 22*). Having recognized that prior proceedings held the Petitioner met its burden there was debt owed, he then placed the burden upon Respondent to support its defense that it was not owed at the time the proceeding was commenced and if so, the amount, which was owed.

As Respondent correctly points out, in a turnover proceeding, a party claiming the right to funds in the possession of a non party bears the burden of proving the existence of debt and its rights to payment (*See Muhl v Ardia Ins. Co., Ltd.*, 246 AD2d 413 [1 st Dept 1998]). This has been done by the Petitioner (*Adelaide v BKN International* , 39, AD3d 254, 255 [1st Dept 2007]).

Next, the Appellate Division found the Respondent adequately raised a defense as to the time when the debt was owed and the amount (*Id.*) Payment is an affirmative defense and a party bears the burden of demonstrating its own affirmative defense(*See Olko v Citibank, N.A.*, _____ Ad3d _____ [1st Dept 2007])(“In this action to recover the principal sum plus interest on a certificate of deposit, plaintiff presented evidence of the certificate of deposit, thus shifting the burden to defendant bank to establish the defense of payment, and based on the evidence before it the jury fairly concluded the burden had not been met.”)

The court also notes that the information required to establish payment of the debt was solely within the possession and control of BKNIAG. BKNIAG did not provide this information. Rather the Special Referee acknowledged the failure to produce the relevant documents upon which witness testimony was based or to introduce them into evidence despite their ready availability (*Notice of Motion, Exhibit A* at 2, n. 2).

The Respondents remaining arguments ask this court to review the Special Referee’s determinations of credibility. “It is well-settled that the Report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility since the Special Referee is in the best position to determine the issues presented (*Nager v Panadis*, 238 AD2d

135 [1st Dept 1997).

The Special Referee found that the testimony of two witnesses regarding two payments by BKNIAG and their assertion they were done to pay down the debt, not credible (*Notice of Motion, Exhibit A* at 24). The Special Referee clearly points out his support in the record for this conclusion and re-emphasizes the lack of knowledge of these witnesses, the incredibility of their testimony, their contradictions, as well as their apparent “guessing” or “surmising” of their claims (*Id.*) This court will not step into the place of the Special Referee who was in the best position to assess the credibility of these witnesses. Having failed to produce relevant documentation, despite its availability, to support its witness’ testimony, the Respondents chose to rely solely on this testimony and its credibility. Aware of the deference given to a Special Referee’s determination of credibility, they cannot now come to the court and complain of the Special Referee’s determinations.

The court also rejects the Respondents assertions that the Special Referee placed improper focus on Generally Accepted Accounting Principals (“GAAP”) when addressing the witness testimony alleging BKNIAG wrote off the remaining debt in 2003 as uncollectible. Respondent argues the Special Referee improperly placed the burden of whether there was a deviation from GAAP principals on BKNIAG.

It is clear from the decision, the Special Referee did not improperly consider GAAP when rejecting the testimony as to whether there was such a write off. Again, the court notes the Special Referee had to rely only upon the testimony of the witnesses; much of the supporting documentation was not provided. Indeed, the Special Referee, when assessing the credibility of the witness testimony, supported his finding that there had been no set off by acknowledging the

witness's own testimony that to have done so would have violated GAAP principals (*Notice of Motion, Exhibit A* at 29). The Special Referee also noted the assertion was not supported by the 2003 Audited report. The referee made his finding that there was no set off and supported it by noting the rest of the witness testimony was not credible, inconsistent with GAAP as testified to by the witness, and unsupported by any document (*Id.*) For this reason, the Respondents' argument is unavailing.

The court is not compelled by the Respondents remaining arguments.

Conclusion

Therefore, based on the foregoing, it is hereby

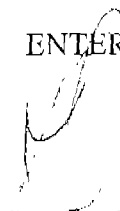
ORDERED the motion to confirm the report of the Special Referee is granted and the cross motion to reject the report is denied.

This shall constitute the Order and Decision of the Court.

Settle Order.

Dated: December 7, 2007

ENTER:



HON. RICHARD A. LOPEZ, III
J.S.C.