

Cooke v Flanagan

2008 NY Slip Op 31233(U)

April 25, 2008

Supreme Court, New York County

Docket Number: 0601867/2004

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
EDMEAD
Justice

PART 35

COOKE, JOSEPH J.,
ET AL.
- v -
RICHARD J. FLANAGAN,
ET AL.

INDEX NO. 601867/04
MOTION DATE 4/21/08
MOTION SEQ. NO. 05
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of Plaintiffs Joseph J. Cooke, Joseph A. French, and Cooke & French, LLP, for an order from the court appointing a receiver pursuant to CPLR 5228 to administer the affairs of defendants Richard J. Flanagan and Flanagan & Associates, PLLC, and collect monies due plaintiffs/judgment creditors in order to satisfy a judgment entered in favor of plaintiffs/judgment creditors on March 23, 2007 in the sum of \$103,146.55, is **denied without prejudice**; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

FILED

APR 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/25/08

[Signature]

HON. CAROL EDMEAD

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: PART 35

JOSEPH J. COOKE, JOSEPH A. FRENCH and
COOKE & FRENCH, LLP,

Index No. 601867/04

Plaintiffs,

-against-

DECISION/ORDER

RICHARD J. FLANAGAN and
FLANAGAN & ASSOCIATES, PLLC,

Defendants.

EDMEAD, J.S.C.

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NEW YORK

MEMORANDUM DECISION

Plaintiffs Joseph J. Cooke (“Cooke”), Joseph A. French (“French”), and Cooke & French, LLP (“C&F”) (collectively “plaintiffs” and/or “plaintiffs/judgment creditors”), seek an order from the court appointing a receiver pursuant to CPLR 5228 to administer the affairs of defendants Richard J. Flanagan (“Flanagan”) and Flanagan & Associates, PLLC (“F&A”) (collectively “defendants” and/or “defendants/judgment debtors”), and collect monies due plaintiffs/judgment creditors in order to satisfy a judgment entered in favor of plaintiffs/judgment creditors on March 23, 2007 in the sum of \$103,146.55.

Plaintiffs/Judgment Creditors’ Contentions

Plaintiffs Cooke and French are former partners of defendant Flanagan. The within action was brought by plaintiffs/judgment creditors to recover sums due under a negotiated settlement respecting the dissolution of their former law firm. On March 23, 2007, a judgment was entered in favor of plaintiffs against defendants for the sum of \$103,146.55.

Plaintiffs/judgment creditors were able to apply funds from a security deposit held by the former

firm to satisfy \$11,208.64 of the judgment, thereby leaving an outstanding balance of \$91,937.91, plus interest from March 23, 2007.¹

On May 1, 2007, plaintiffs/judgment creditors served both Flanagan and Flanagan & Associates, PLLC with a subpoena duces tecum to take deposition and separate information subpoenas as permitted under CPLR 5224. The subpoena duces tecum contained a restraining notice which prohibited defendants from any sale, assignment, transfer or interference with any property in which they had an interest. Defendants/judgment debtors failed to comply with a subpoena duces tecum requiring the production of documents and records.

By Order to Show Cause dated July 17, 2007, plaintiffs/judgment creditors sought to hold defendants/judgment debtors in contempt of court for their failure to respond to the subpoenas. By Order dated September 18, 2007, this court instructed the Sheriff's office to arrest Mr. Flanagan and bring him before this court based on his failure to respond to the subpoena.

Subsequent to the issuance of said Order, defendants/judgment debtors produced certain documents in response to the subpoena. The production of these documents revealed that the both judgments debtors ignored the restraining notice which accompanied the subpoena duces tecum. For example, bank records of F & A show checks being written and money being transferred into and out of its corporate accounts after the return receipt cards for the subpoena with restraining notice were signed on May 3, 2007. Those records also show a multitude of ATM withdrawals and debit card charges.

¹ By order of this court dated this date, the application of plaintiffs/judgment creditors for an order requiring Master Plumbers Council of the City of New York, Inc., to pay over to plaintiffs/judgment creditors the sum of at least \$10,000.00 in its possession in satisfaction of a judgment entered against defendants/judgment debtors, was granted, on default. As such, the amount due plaintiffs/judgment creditors will be reduced thereby.

When plaintiffs/judgment creditors served restraining notices on the banks with whom defendants/judgment debtors do business, the accounts had been drained of all funds. The accounts had no money despite the fact that Mr. Flanagan continues to practice law and presumably bills his clients through defendant F & A for those services.

In addition, the accounts receivable report produced by defendants/judgment debtors showed \$865,570.38 in money due.

Based on the report and the client names provided, plaintiffs/judgment creditors served approximately 100 restraining notices/information subpoenas on current or former clients of Mr. Flanagan's law practice. Incredibly, of those companies responding, not one client acknowledged a single penny due to Mr. Flanagan or his firm.

As it is clear that defendants/judgment debtors have no intention to voluntarily pay plaintiffs and that they continue to ignore the restraining notice served, it is necessary that a receiver be appointed to manage the flow of funds in and out of Mr. Flanagan's law practice and his personal accounts in order to satisfy the judgment.

Defendants/Judgment Debtors' Opposition

The Judgment at issue was in favor of two separate parties. One, Cooke & French, LLP, has settled with defendants/judgment debtors and will be filing a Partial Satisfaction of Judgment upon final payment in early May of this year.

The other party with a Judgment is plaintiff, Joseph J. Cooke. His Judgment is in the sum of \$30,000.00 with interest. Accordingly, it is in aid of the enforcement of this remainder of the Judgment that the appointment of a receiver must be considered.

Given the magnitude and identity of the accounts receivable contained in records

produced in this court on August 17, 2007, and which were memorialized in the accounts receivable report printed September 23, 2007, it should not require the introduction of another person to proceed to collection.

Mr. Cooke's claimed inability to use the instrumentalities afforded to him through the CPLR does not create a basis to appoint a receiver.

Further F & A's receivables are accurate. And, defendants/judgment debtors cannot be held responsible if current or former clients dispute that amounts are due and owing to F & A.

Should the court believe that a receiver would be helpful, we propose Mr. John T. McCarron, Flanagan's co-counsel.

Analysis

CPLR 6401(a) authorizes the appointment of a receiver where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." As the First Department has noted, "The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties.... 'There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established' " (*DiBona v General Rayfin Ltd.*, 45 A.D.2d 696, 357 N.Y.S.2d 71, quoting *Laber v Laber*, 181 App.Div. 733, 735, 168 N.Y.S. 1040).

This court finds that there has been an insufficient showing that, absent a receivership, plaintiffs/judgment creditors would suffer an irreparable loss. And, although the evidence of the draining of the funds from the banks with whom defendants/judgment debtors do business is compelling, it is insufficient to warrant the conclusion that the firm's assets are being diverted or

wasted (*see Matter of Harrison Realty Corp.*, 295 A.D.2d 220, 744 N.Y.S.2d 23).

Further, as noted by the court above (*infra* p.2, footnote 1), some collection efforts by plaintiffs/judgment creditors are progressing successfully.

Finally, this court will await the filing a Partial Satisfaction of Judgment upon final payment in early May of this year by defendants/judgment debtors in favor of Cooke & French, LLP.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of Plaintiffs Joseph J. Cooke, Joseph A. French, and Cooke & French, LLP, for an order from the court appointing a receiver pursuant to CPLR 5228 to administer the affairs of defendants Richard J. Flanagan and Flanagan & Associates, PLLC, and collect monies due plaintiffs/judgment creditors in order to satisfy a judgment entered in favor of plaintiffs/judgment creditors on March 23, 2007 in the sum of \$103,146.55, is **denied without prejudice**; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: April 25, 2008



Carol Robinson Edmead, J.S.C.

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