

New York Premium Fin. Corp. v Stanislaw Paul
2008 NY Slip Op 31381(U)
May 6, 2008
Supreme Court, New York County
Docket Number: 604122/06
Judge: Marcy Friedman
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PRESENT: **MARCY S. FRIEDMAN**

PART 57

Justice

Index Number : 604122/2006
NEW YORK PREMIUM FINANCE
vs.
PAUL, STANISLAW
SEQUENCE NUMBER : 002
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for postage fees

PAPERS NUMBERED
1
2, 3
4

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
MAY 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5-6-08

[Signature]

MARCY S. FRIEDMAN 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
NEW YORK COUNTY - - PART 57

NEW YORK PREMIUM FINANCE CORP.,

Plaintiff(s),

against

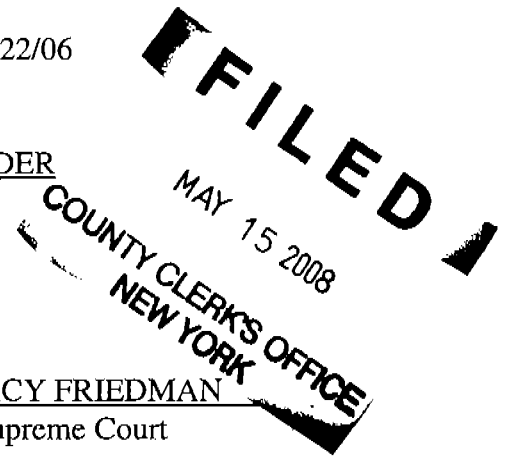
STANISLAW PAUL, et al.,

Defendant(s).

Index No.: 604122/06

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court



In this breach of contract action, City Marshal Martin Bienstock ("Marshal Bienstock") moves for an order, pursuant to CPLR 8012, directing payment to him of poundage fees in the amount of \$5,133.81, plus a \$15.00 statutory fee.

"It is well settled that a marshal's right to receive poundage fees, which are in the nature of a percentage commission upon moneys recovered pursuant to a levy or execution of attachment, is wholly statutory. Normally, in order to be entitled to poundage fees the marshal must actually collect or obtain money, except where a settlement is made after levy by virtue of an execution, where an execution is vacated or set aside, or where the party who issued the process under which the marshal acts interferes with the collection of the money. Such statutory exceptions authorizing poundage for noncollection are in derogation of common law and must be strictly construed." (Solow Mgt. Corp. v Tanger, 38 AD3d 49, 50-51 [1st Dept 2007], lv granted 9 NY3d 806; CPLR 8012[b]).¹ See Alvarez v Brooklyn Hosp.-Caledonian Hosp., 255 AD2d 278,

¹CPLR 8012(b)(1) provides that "[a] sheriff is entitled, for collecting money by virtue of an execution, an order of attachment, or an attachment for the payment of money in an action, * * * to poundage of * * * five per cent of the sum collected." CPLR 8012(b)(2) provides, in part, that "[w]here a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the

280 [2d Dept 1998].)

In this case, plaintiff New York Premium Finance Corp. obtained a default judgment against defendants DKS Contractors Inc. and DKS Construction, Inc. ("DKS defendants") in the amount of \$102,676.29, which was entered on August 6, 2007. On August 21, 2007, plaintiff hired Marshal Bienstock to levy upon a bank account of DKS defendants/judgment debtors. In an affidavit submitted in support of his motion, Marshal Bienstock attests that he served a Levy and Demand on Commerce Bank on August 22, 2007. On August 22, 2007, defendants moved by order to show cause to vacate the default judgment and obtained an order staying enforcement of the judgment or execution or levy upon any assets of defendant DKS Contractors, Inc. pending the hearing of the motion.² By stipulation dated September 19, 2007, the action was settled.

Plaintiff contends that the Marshal is not entitled to poundage fees because the levy was "ineffectual." In particular, plaintiff argues that the levy was null and void because a stay was in effect at the time the Marshal served the Notice of Execution.

The parties disagree as to the date on which the Notice of Execution was served on the bank. Marshal Bienstock contends that the execution was served on August 22, 2007. Plaintiff's counsel claims that it was served on August 23, 2007, and that Marshal Bienstock was notified of the stay on August 22, 2007. Marshal Bienstock represents that he did not receive notice of the stay until August 28, 2007.

value of the property levied upon, not exceeding the sum at which the settlement is made." It is not disputed that these sections also apply to a New York City Marshal.

²The order to show cause is dated August 22, 2007, but contains a notation that the parties were present for a hearing on the TRO on August 23. The parties are in agreement that the appearance was on August 22 and that the OSC was signed on that date.

The Marshal's contentions as to these dates are supported by his office records, while plaintiff's counsel's contentions are based solely on hearsay. Plaintiff's counsel asserts that his associate, who does not submit an affidavit, notified the Marshal of the stay on August 22. He also asserts, without producing any documentary evidence from the bank, that the bank confirmed that the execution was not served until August 23. The court finds that plaintiff does not raise a triable issue of fact as to these dates, given its counsel's failure to submit any competent evidence or any explanation for the failure to do so.

The court further finds that DKS defendants are liable for payment of the Marshal's poundage fees. CPLR 8012(b)(2) provides that "[w]here an execution is vacated or set aside, * * * the court may order the party liable therefor to pay" the poundage fees. Here, on or about August 6, 2007, plaintiff obtained a default judgment against defendants DKS Contractors Inc. and DKS Construction, Inc. based on their failure to answer. (Judgment, Ex. A to DKS' Response to Motion to Collect Marshal's Poundage.) When DKS defendants moved to vacate the default, they did not dispute that they had failed to answer, but argued that they had a reasonable excuse for their delay in answering. (Castoldi Aff. in Support of Motion to Vacate Default Judgment, annexed to DKS' Response to Motion to Collect Marshal's Poundage, ¶ 8.) The motion was withdrawn, prior to a decision, when the parties settled the action. (Stipulation, Ex. 2 to Kogan Aff. in Opp.) However, where, as here, "the plaintiff's entry of a default judgment and its issuance of execution to the Sheriff were triggered by the defendants' failure to answer the complaint, * * * the defendants were liable for any poundage fees." (Norberto & Sons, Inc. v Burman, 160 AD2d 787 [2d Dept 1990]. See Red Cheek, Inc. v Crown Confections,

Inc., 129 AD2d 787 [2d Dept 1987].)

Marshal Bienstock's motion is accordingly granted to the extent that it is

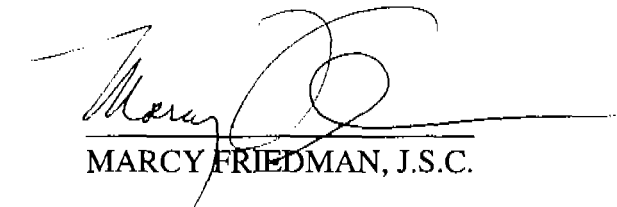
ORDERED that DKS defendants are directed to pay poundage fees in the amount of \$5,133.81, plus a statutory fee of \$15.00, to Marshal Bienstock; and it is further

ORDERED that, within 30 days of service by movant of a copy of this order with notice of entry, DKS defendants shall deliver the above-ordered amount to counsel for Marshal Bienstock; and it is further

ORDERED that, in the event that DKS defendants fail to comply with the above-ordered payment, Marshal Bienstock may enter judgment against DKS defendants in the amount of \$5,148.81 without further notice to defendants.

This constitutes the decision and order of the court.

Dated: New York, New York
May 6, 2008


MARCY FRIEDMAN, J.S.C.

FILED
MAY 15 2008
COUNTY CLERK'S OFFICE
NEW YORK