

<b>Bloomfield v Macshane</b>
2008 NY Slip Op 32309(U)
August 14, 2008
Supreme Court, New York County
Docket Number: 0406613/2007
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

**EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_

**J.S.G.**  
*Justice*

PART 5

Index Number : 406613/2007

**BLOOMFIELD, MARSHALL E.**

vs.

**MACSHANE, DERMOT**

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

INDEX NO. 406613-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

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

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

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):

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

**FILED**

AUG 19 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/14/08

*[Signature]*

**EILEEN A. RAKOWER** 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  
COUNTY OF NEW YORK: PART 5

-----X  
MARSHALL E. BLOOMFIELD,

Petitioner-Judgment Creditor,

Index No.  
406613/07  
**ORDER AND  
DECISION**

- against -

DERMOT MACSHANE

Respondent-Judgment Debtor,

and

Mot. Seq. (001&  
002

SERGEANT'S BENEVOLENT ASSOCIATION  
ANNUITY FUND, THE CITY OF NEW YORK  
POLICE PENSION FUND, and THE FUND  
OFFICE OF LOCAL 580 OF ARCHITECTURAL  
AND ORNAMENTAL IRON WORKERS,

Respondents

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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EILEEN A. RAKOWER, J.S.C.

Petitioner-Judgment Creditor, Marshall Bloomfield ("Bloomfield"), initiated a special proceeding to foreclose a lien upon the personal property of Respondent-Judgment Debtor Dermot MacShane ("MacShane"). Bloomfield now moves for: (1) an order granting foreclosure upon the retaining and charging lien in favor of him and against MacShane, and any interest accruing in property to him upon the final disposition of the equitable distribution phase of MacShane's divorce proceedings; (2) an order directing MacShane to execute any and all documentation necessary to deliver to Bloomfield funds necessary to satisfy said retaining and charging liens, including, but not limited to, that documentation deemed necessary by Sergeant's Benevolent Association Annuity Fund ("the Annuity Fund"), The Fund Office of Local 580 of Architectural and Ornamental Iron Workers ("Local 580"), and the City of New York Police Pension Fund ("Pension Fund"); (3) an order directing the Sheriff of New York County ("the Sheriff") to execute such documentation upon the failure

\* 3 ]

of MacShane to do so; (4) an order directing the Sheriff to collect such proceeds in the place of MacShane upon his failure to execute said documents; (5) upon the collection of said proceeds, an order directing the Sheriff to pay Bloomfield; and (6) upon satisfaction and discharge of said charging and retaining liens, an order directing the Sheriff to pay any excess or surplus funds to MacShane. The Annuity Fund opposes Bloomfield's motion. By separate motion the Pension Fund moves to dismiss pursuant to CPLR §3211(a)(7) and opposes Bloomfield's motion. No party opposes the Pension Fund's motion and neither MacShane nor Local 580 file papers on either motion.

Bloomfield was MacShane's attorney throughout his divorce proceeding and MacShane become indebted to him for legal fees. Bloomfield brought an Order to Show Cause to be relieved as counsel and for an order approving Bloomfield's interest in MacShane's property pursuant to 22 NYCRR §202.16(c)(2). The Order to Show Cause was adjourned twice and was finally heard on October 6, 2004. Justice Fred L. Shapiro of the Supreme Court, Putnam County granted the Order to Show Cause in its entirety and issued an order dated January 6, 2005, relieving Bloomfield as counsel and granting the retaining lien. At that hearing Mr. MacShane acknowledged and agreed to the lien:

Mr. MacShane: In light of the lien on the property do I have access to my file?

The Court: No. Until you either pay the bill or I set the lien, if you want to agree to the lien I'll have him send the file over, but in no event will any money go to you, but I'm not going to lift the lien on any property.

Mr. MacShane: I'm not looking for a lift on the lien. I'm agreeing to the lien.

Justice Shapiro issued a total judgment against Mr. MacShane in the amount of \$30,392.19, and awarded Bloomfield an "interest in the property of" MacShane. An amended decision and order dated December 12, 2005 was issued by Justice Andrew P. O'Rourke of a Carmel Court, also the Supreme Court of the State of New York, which was silent as to MacShane's pension and annuity funds, but which allowed the garnishment of MacShane's wages, and directed the New York City Police Department to pay the sum of \$200.00 per pay period to Bloomfield. Additionally, Justice O'Rourke ordered that any money held by HSBC, Citibank, Allstate Financial Services and/or Wachovia f/k/a First Union in the name of MacShane to be turned

\* 4 ]  
over until the judgment was paid in full.

On March 20, 2007 Bloomfield served Local 580 with an information subpoena regarding his judgment against Mr. MacShane. On May 8, 2007, Bloomfield filed an action requesting a judgment “foreclosing the retaining and charging lien” against MacShane and directing payment of annuity and pension fund accounts held on behalf of MacShane by respondents. Local 580 answered and stated that Bloomfield’s claims were “barred by the anti-alienation provision of ERISA Section 206(d)(1).”

On May 21, 2007 respondent Local 580 filed a petition to have the case removed to federal court urging that the federal court had original jurisdiction over the proceeding pursuant to ERISA §206(d)(1). Bloomfield and respondent the New York City Police Fund filed separate motions to remand the action back to state court.

In a memorandum decision issued on November 9, 2007, Local 580's petition was denied and Bloomfield’s motion to remand was granted, based on the finding that the court did not have subject matter jurisdiction. Thereafter, in an order dated January 15, 2008, the Putnam County Supreme Court vacated its order dated October 1, 2007<sup>1</sup> in response to a petition filed by Bloomfield, which sought to have venue transferred from Putnam to New York County. Local 580 and the Annuity Fund cross-moved to dismiss the May 8, 2007 petition. The newly issued order granted Annuity Fund and Local 580's cross-motion and transferred venue to New York County.

Bloomfield, in support of this motion, argues that Mr. MacShane was personally served on May 10, 2007 with a copy of the special proceeding commenced on May 8, 2007 and that he failed to answer or otherwise appear. Bloomfield argues that, as the time has passed within which to answer, Mr. MacShane is in default and that a judgment of foreclosure should be granted.

The Annuity Fund, in opposition, argues that the funds Bloomfield seeks under the lien are exempt property pursuant to CPLR §5205( c) and that a lien on these funds is barred by Section 410(a)(13) of the Internal Revenue Code of 1986 (“the code”) and Section 14.9 of the Annuity Plan Document . Further, the Annuity Fund argues that the issue was previously decided in the January 15, 2008 order which

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<sup>1</sup>A copy of the October 1, 2007 order of the Putnam County Supreme Court is not submitted here.

\* 5 ]  
dismissed Bloomfield's petition and is the law of the case. The Pension Fund makes similar arguments in its motion to dismiss and in opposition to Bloomfield's motion. By way of reply, Bloomfield argues that the Annuity Fund misrepresents what the purpose of the within petition is. Bloomfield asserts that he does not seek relief against any third-party garnishees but rather, he seeks relief against Mr. MacShane personally for a default judgment of foreclosure.

CPLR §5205 states, in relevant part:

(c) Trust exemption.

1. . . . all property while held in trust for a judgment debtor, where the trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment
2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under . . . of the United States Internal Revenue Code of 1986 . . . shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor . . .

In support of his contention that the within motion should be granted, Bloomfield cites to *Matter of State of New York v. Avco Fin. Serv. of N.Y.*, 50 NY2d 383(1980). There, the Attorney General, acting on a consumer complaint, instituted a special proceeding to enjoin respondent's use of a clause in a loan agreement form which created a security interest in items of personal property which were exempt pursuant to CPLR §5025. The court found that:

From its inception, this statute—along with its venerable antecedents—has embodied the humanitarian policy that the law should not permit the enforcement of judgments to such a point that debtors and their families are left in a state of abject deprivation . . . it is well recognized, however, that simply because the law exempts such property from levy and sale upon execution by a judgment creditor does not mean that the exemption statute was intended to serve the far more paternalistic function of

restricting the freedom of debtors to dispose of these possessions as they wish . . . for example, while contractual waivers of a debtor's statutory exemptions are usually held to be void, the law has not forbidden a debtor to execute a mortgage upon the property so protected and thus create a lien which may be foreclosed despite the property's exempt status.

Initially, the January 15, 2007 order granted the Annuity Fund's cross-motion to dismiss, precluding the re-litigation of that issue under the doctrine of collateral estoppel. That order states, in relevant part:

In Petitioner's opposition to the cross motion of Local 580 he again states "my Petition does not seek to have this Court order Local 580 pay funds held for the benefit of Mr. MacShane directly to me." Petitioner alleges Local 580 is named because they hold funds belonging to Mr. MacShane and they are therefore an interested party. Therefore after reading all of the motions, affidavits and exhibits it appears Petitioner's motion is directed solely to this court's authority to transfer this matter to the New York County Supreme Court. In order to clear all questions herein the Court will vacate the order dated October 1, 2007 and herewith, issue a new order transferring this action to the Supreme Court of New York County for trial and disposition. *Thus the cross motion[s]. . . are granted in that Petitioner's application to invade the respective pension fund is denied.* (emphasis added).

The doctrine of "collateral estoppel" precludes a party from re-litigating an issue decided against him in a prior proceeding when he had a full and fair opportunity to litigate that point. (*CIBC Mellon Trust Co. v. Samuel Montagu & Co., Ltd.*, 25 AD3d 492[1st Dept. 2006]). Bloomfield does not claim that he did not have a full and fair opportunity to litigate the issue before the Putnam Supreme Court. Rather, he states that he is not re-litigating the issue and seeking to invade the funds but is merely attempting to bring a foreclosure judgment against MacShane personally for default. Thus, Bloomfield urges this court to consider the question of MacShane's default and not consider this an attempt to circumvent the former ruling of the Putnam Supreme Court and the protections afforded exempt property from the reach of creditors.

[\* 7 ]  
issue raised by a defendant's anticipated defense does *not* create federal question jurisdiction . . .

The District Court goes on to reason why no original federal jurisdiction exists in the instant case:

the Order to Show Cause and Verified Petition filed in New York state court recite only state law causes of action . . . it is clear . . . that Bloomfield's complaint, on its face, raises no issue of federal law . . . However, Local 580 Fund and SBA Fund argue that subject matter jurisdiction exists because this action will raise federal questions, specifically, the applicability of . . . federal anti-alienation provisions that allegedly protect the respective respondents. *While interpretation of these statutory provisions will likely be a central issue in this litigation*, these federal statutes arise only in the context of defenses to Petitioner's claims . . . Because the federal issues in this action relate only to anticipated defenses to petitioner's claim, the mere presence of these issues in the litigation are not sufficient to raise subject matter jurisdiction. (emphasis added).

Thus, the District Court decision merely asserted that the complaint itself did not contain federal questions but it did not foreclose the possibility that federal questions would arise in the context of defenses to Bloomfield's petition. Indeed, such federal questions have arisen and have, as predicted by the District Court, become a central issue in this litigation.

Bloomfield is seeking an order compelling MacShane to execute the documentation necessary to secure funds from his annuity plan in order to satisfy his money judgment. Further, upon the failure of MacShane to do so, he is seeking an order directing the Sheriff of New York County to "execute such documentation in the place and stead" of MacShane. If the court were to grant such relief it would effectively be ordering the invasion of the fund, contrary to 26 U.S.C.A. §401(a)(13). Accordingly, the relief Bloomfield seeks must be denied.

[\* 8 ]  
CPLR § 3215( c) states:

Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Petitioner submits an affidavit of service showing Mr. MacShane was served with the underlying petition on May 10, 2007, and was noticed to appear on May 22, 2007. An answer was to be served at least two days prior to such appearance. MacShane did not answer nor appear. A motion for a default upon such failure to appear would have to have been made within one year. The instant motion for a default dated June 12, 2008, is untimely.

Wherefore it is hereby

ORDERED that The City of New York Police Pension Fund's motion to dismiss is granted without opposition; and it is further

ORDERED that Marshall E. Bloomfield's motion for a default judgment, is denied and the petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 14, 2008

  
EILEEN A. RAKOWER, J.S.C

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK