

Cadles of Grassy Meadow II, L.L.C. v Katz

2008 NY Slip Op 32674(U)

September 15, 2008

Supreme Court, New York County

Docket Number: 106022/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CADLES OF GRASSY MEADOWS II, L.L.C.,

Plaintiff,

Index No. 106022-2006

-against-

HOWARD B. KATZ,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff, Cadles of Grassy Meadows II, L.L.C., ("plaintiff") moves pursuant to §§ 5225 and 5205(c)(5), for an order directing defendant, Howard B. Katz ("defendant"), to turn over the funds held in his accounts at Fidelity Investments, *to wit*: 2AA-089893, 2AX-077330, Z67-426342, Z67-432873, X86-104027, X86-104035, and X86-104043 (the "Fidelity Accounts" or "Accounts"), in partial satisfaction of a certain judgment against the defendant, Judgment-Debtor, in this action.

According to the plaintiff, on or about April 15, 1991, a deficiency judgment (the "Connecticut Judgment") was entered in favor of plaintiff's predecessor-in-interest, The New Connecticut Bank and Trust Company, N.A., and against defendant in the case entitled, *The New Connecticut Bank and Trust N.A. v 6 and 12 Saltonstall Avenue, Inc., Howard B. Katz, et al.*, before the Superior Court, Judicial District of New Haven in the State of Connecticut. The Connecticut Judgment was for the total sum of \$386,061.96 in favor of plaintiff.

The Connecticut Judgment was assigned to J.D.C. Finance Company III, L.P. J.D.C. Finance Company III, L.P. assigned it to Value Recovery Group, Inc. Value Recovery Group,

Inc. assigned it to The Cadle Company, which then assigned it to plaintiff herein.

On May 3, 2006, plaintiff commenced the instant action to domesticate the Connecticut Judgment to New York. Based on the Connecticut Judgment, on March 1, 2007, the Clerk entered a judgment against defendant in a total amount of \$870,272.05 (the "Judgment"). Plaintiff engaged in post-judgment proceedings, and ascertained that defendant maintained the aforementioned financial accounts at Fidelity Investments.

Plaintiff contends that it is authorized under CPLR §5225(a) to seek recovery of the funds which are held in defendant's Fidelity Accounts. Moreover, pursuant to CPLR § 5205(c)(5), the additions to the Fidelity Accounts occurring from 90 days prior to the filing of the instant action on May 3, 2006, through January 31, 2008, which total \$384,878.95, are not subject to exemption from execution as IRA, pension, or trust funds. Furthermore, all of such monies would be subject to execution as fraudulent conveyances, also in accordance with the CPLR §5205(c)(5). Therefore, this amount would not be exempt from execution pursuant to CPLR §5205(c)(5). In further support, plaintiff submits copies of the statements from the Fidelity Accounts, for the period 2006 through January 2008. Plaintiff also submits a listing of each addition to the Fidelity Accounts, with the date of each addition and description of the type of addition, *i.e.*, deposit, interest, or dividend (the "List"). Plaintiff contends that the total additions to the accounts over the past two years amount in the aggregate to \$384,878.95, and that plaintiff is entitled to an order for turnover of that sum in partial satisfaction of the Judgment.

Defendant's Cross-Motion

In response, defendant cross moves pursuant to CPLR § 5222(b)¹ and (d) for an order vacating the restraints plaintiff currently has on his Fidelity Accounts.

Defendant argues that plaintiff's motion is procedurally defective. Plaintiff cannot bring this motion within the ambit of an action which sought summary judgment *in lieu* of complaint. This action was one for summary judgment *in lieu* of complaint seeking recognition of a purported default judgment obtained against defendant in Connecticut. When plaintiff was granted summary judgment *in lieu* of complaint, this action was disposed. Therefore, plaintiff's request that defendant turnover the funds in his Fidelity Accounts must be brought as a special proceeding.

Further, plaintiff erroneously stayed the Fidelity Accounts without serving upon defendant a Notice to Judgment-Debtor. Defendant claims that he first learned of the restraints when he inquired about the Accounts, and that he never received a copy of the restraining notice served upon Fidelity Investments as required by law.

Defendant further argues that plaintiff's motion is substantively defective. Defendant asserts that he is a Florida domiciliary. Plaintiff brought this action for summary judgment *in lieu* of complaint in New York, instead of Florida, after having voluntarily discontinued its action in Florida, in order to take advantage of New York law, and executed its judgment against property located in Florida that it was not able to execute against under Florida law. Given that the Fidelity Accounts are all located in Florida, and subject to Florida law, the New York Court

¹ Although defendant cites to 5222(b), defendant fails to articulate how such section renders the instant motion defective.

cannot exercise its jurisdiction upon them.

Defendant further contends that none of the Fidelity Accounts are of the type which can be executed upon. First, two of the accounts are retirement accounts. Next, two others are accounts which defendant holds with his wife as tenants by the entirety, a type of ownership not recognized in the state of New York with regard to bank accounts. Even if plaintiff could execute on such accounts, plaintiff would only arguably be entitled to an interest in this account if defendant's wife predeceased him. Further, one of such accounts has been closed since March 2007. Finally, the remaining three accounts are all UGMA accounts of which defendant is the custodian and in which defendant has no beneficial interest.

Inasmuch as the Fidelity Accounts do not have the amount of money plaintiff seeks, plaintiff's argument that it is entitled to every dollar that went into and out of such Accounts over the past two years is wholly without merit and warrants sanctions against plaintiff. Further, plaintiff has stricken out the name of the Account holders on each of the Fidelity Accounts statements, making it appear as if defendant was the sole account holder; such action is also sanctionable.

Plaintiff's Reply

In opposition to defendant's cross-motion, plaintiff argues that defendant fails to support its purported defenses with any relevant case law. The instant motion was unquestionably served, with notice to the defendant, Judgment-Debtor, pursuant to CPLR § 5225(a). The action does not cease to exist after Judgment is entered and plaintiff need not commence a new action.

Further, contrary to defendant's contention, this Court has jurisdiction over defendant, the Judgment-Debtor, to direct the turnover of the funds in his Fidelity Accounts to the plaintiff to

satisfy the Judgment. Judgment-debtors can be ordered to turn over out-of-state assets to a New York Sheriff. Further, the instant matter was reduced to a judgment and defendant never successfully claimed that the Court herein lacked jurisdiction over him. Notwithstanding, defendant has sufficient minimum contacts with the State of New York, in that defendant leases an apartment in New York, New York. And, since Fidelity Investments is registered to do business in New York State, the Court has jurisdiction over the Fidelity Accounts as well.

In light of the statements from the Fidelity Accounts, defendant's argument that the amount sought is not in his accounts lacks merit.

With respect to the accounts defendant holds with his wife as tenants by the entirety, defendant admits that New York does not recognize tenants by the entirety with regard to bank accounts. However, pursuant to Banking Law § 675, there is a legal presumption that half of the money in such accounts is his and not his wife's. Defendant should thus be ordered to turn over one half of all the funds held in the Fidelity Accounts which are held as tenants by the entirety.

Defendant's claim that he is only "custodian" of three of the Fidelity Accounts also lacks merit. All of such Accounts bear his name and none say that they are UGMA accounts. In any case, the money still belongs to defendant and can be withdrawn at any time. It is clear that the funds for said Accounts go directly into defendant's own pocket, for his own benefit, to avoid satisfaction of the Judgment. Further, defendant cannot refute that the money transferred into such Accounts are all fraudulent conveyances and subject to turnover pursuant to the Judgment herein.

Defendant failed to establish any bases as to why the subpoena with restraining notice should be lifted. Finally, Fidelity investments, and not the plaintiff, redacted the account names

when it provided plaintiff with the copies of the statements.

Defendant's Reply

Plaintiff undisputedly served the restraining notices upon Fidelity Investments against defendant's Fidelity Accounts without serving defendant with a Notice to Judgment-Debtor pursuant to CPLR § 5222(d). Thus, the restraints must be lifted.

By defendant's own admission, \$381,365.55 of these deposits were made into defendant's "checking" accounts. "Checking" accounts are not the types of accounts delineated in CPLR § 5205(c)(5), and therefore, \$381,365.55 of the \$384,878.95 to which plaintiff claims it is entitled cannot be the subject of a turnover order. And, it is undisputed that these accounts no longer had these monies within them.

Furthermore, two of the accounts are individual retirement accounts, which are specifically exempt from being turned over pursuant to CPLR §5225(a). All plaintiff would arguably be entitled to are funds deposited into these accounts within 90 days of the imposition of the claims set forth herein pursuant to CPLR §5225(c)(5). However, by plaintiff's own admissions, there were no such deposits.

The only interest plaintiff could plausibly have in the "checking" accounts held as tenants by the entirety pursuant to Florida law, is a survivorship interest in the event defendant survives his wife. While New York does not have these types of accounts, New York must abide by the laws of the State in which the accounts are located.

Furthermore, the three remaining accounts are all indisputably UTMA accounts and cannot be the subject of a turnover order.

Plaintiff cannot bring a motion pursuant to CPLR 5225 within an action for summary

judgment *in lieu* of complaint pursuant to CPLR 3213. Bringing this motion as part of a 3213 action which sought recognition of a sister-state judgment would deprive defendant of his right to challenge jurisdiction here and further burden his substantive and procedural due process rights of the federal and state constitutions. In a motion for summary judgment *in lieu* of complaint, defendant has a much more difficult time having the matter dismissed for want of personal jurisdiction, inasmuch as in that instance, the New York Court is exercising jurisdiction over a sister-state's judgment. A motion for turnover would thus have to be brought as part of an enforcement action in which the Court would examine whether it had jurisdiction over defendant's person and whether it had jurisdiction over defendant's property. Here, the Court does not have jurisdiction over defendant's person or property, inasmuch as the only contact defendant has with New York is his lease of an apartment in New York, which leasing had nothing to do with this lawsuit. Plaintiff's argument would subject every foreign citizen who rents an apartment within the state of New York, but is domiciled elsewhere, to the Court's jurisdiction regardless of the claim. This is not only inequitable, but also unconstitutional. Therefore, defendant's cross-motion to dismiss must be granted.

Analysis

CPLR § 5225(a) provides that

"Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested."

At the outset, the Court finds that contrary to defendant's contention, plaintiff need not commence a special proceeding to request that a turnover order be entered against the defendant. "When the person against whom an application under CPLR 5225 is made is the judgment debtor, the procedure is a mere motion. No special proceeding or other independent application is necessary. The motion is deemed to arise out of the action that produced the judgment and should in most instances bear the caption of that action and court. . . . When the person who has possession or control of the money or property is not the judgment debtor, subdivision (b) rather than subdivision (a) governs and the application takes the form of a special proceeding instead of a motion (David Siegel, McKinney's Consolidated Laws of New York Annotated CPLR § 5225).

Here, the instant motion bears the caption of the action giving rise to the Judgment against defendant and this turnover motion is made against the defendant, the Judgment-Debtor. Therefore, it cannot be said that the instant motion is defective on the ground that plaintiff failed to commence a special proceeding.

Defendant's mere allegation that the Fidelity Accounts "were opened within the State of Florida and are used primarily only within the State of Florida" is insufficient to establish that the Fidelity Accounts are all located in Florida. Even assuming that the Accounts were located in Florida, such fact does not deprive this Court of jurisdiction over the said Accounts, as it has been stated that a "turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York" (*Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.*, 41 AD3d 25, 836 NYS2d 4 [1st Dept 2007]). Therefore, defendant's claim that this Court lacks jurisdiction over his Fidelity Accounts is insufficient to warrant denial of plaintiff's motion. Thus, provided the Court has jurisdiction over the defendant, defendant's

out-of-state assets may be subject to a turnover order.

As to defendant's claim that this Court lacks jurisdiction over him, it has been held that "a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts. No such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution, from which jurisdictional basis requirements derive" (*Lenchyshyn v Pelko Elec., Inc.*, 281 AD2d 42, 723 NYS2d 285 [4th Dept 2001]). Where a court of competent jurisdiction has determined that the defendant is a debtor of the plaintiff, "there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, *whether or not that State would have jurisdiction to determine the existence of the debt as an original matter*" (*Lenchyshyn v Pelko Elec., Inc.*, 281 AD2d 42, 723 NYS2d 285 [4th Dept 2001] *citing Shaffer v Heitner*, at 210, n. 36, 97 S Ct 2569 [emphasis supplied]). Moreover, a sister-state judgment can be enforced in New York by means of a motion for summary judgment *in lieu* of a complaint (CPLR 3213) (*Blackburn v Blackburn*, 113 Misc 2d 619, 449 NYS2d 827 [N.Y.Sup. 1982]), and defendant failed to raise or challenge personal jurisdiction when plaintiff brought this action pursuant to CPLR 3213.

Notwithstanding the above, as articulated in CPLR § 3213 McKinney's Practice Commentaries (David D. Siegel),

If the defendant claims that the court lacks jurisdiction of his person--as where the summons was served in an unauthorized manner or there was extrastate service without a jurisdictional basis--he may so urge in his opposing papers and the court would of course have to consider the objection.

If there is no jurisdiction and the judgment results from the defendant's default in

appearing, the defendant may treat the judgment just as he would a similar default judgment in an ordinary action, e.g., he can contest its jurisdictional validity when sued on the judgment in a subsequent action, within or without the state, or move in New York to vacate it for lack of jurisdiction, etc.”

(C3213:15. Lack of Personal Jurisdiction).

It appears from the Summons in this action that extrastate service was made upon the defendant at his address Boca Raton, Florida, and defendant now argues that such “ extrastate service without a jurisdictional basis.” Although plaintiff responds to defendant’s lack of personal jurisdiction claim by asserting that defendant maintains an apartment in New York, New York, plaintiff fails to cite any caselaw indicating that the submission of one check, which is drawn against defendant’s bank account in Florida, and indicates defendant’s address in Florida, is sufficient to confer jurisdiction over the defendant’s person in New York.

Moreover, as defendant points out, a judgment-creditor applying for an order directing the judgment-debtor to turnover certain funds pursuant to CPLR 5225 “must include the equivalent of the CPLR § 5222(e)² notice if none such has already been given to the judgment debtor” (*Id.*).

² Under CPLR § 5222(e), the notice to the judgment-debtor must include the following, in substantially similar form:

“Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be “exempt”. The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);
2. Social security;
3. Public assistance (welfare);
4. Alimony or child support;
5. Unemployment benefits;
6. Disability benefits;
7. Workers' compensation benefits;
8. Public or private pensions; and
9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money

Although plaintiff served the motion upon the defendant, plaintiff, as the Judgment-Creditor, must establish that service of a notice to the defendant, Judgment-Debtor was made within a year *before* service of the subject restraining notices, or, in the alternative, *four days* after the service of such restraining notices, and a copy of such restraining notices together with the notice to judgment debtor must be mailed by first class mail or personally delivered to the defendant, Judgment-Debtor (*Id.*, citing *Prudential Farms v Palladino*, NYLJ, Nov. 20, 2001, p.28, col.3 [Dist. Ct., Nassau County]; see also *Weinstein v Gitters*, 119 Misc 2d 122, 462 NYS2d 553 [N.Y.Sup. 1983]). “The gist of the subdivision (d) requirement is that the judgment debtor be given the notice prescribed by subdivision (c) [of CPLR § 5222]” (David D. Siegel, Supplementary Practice Commentaries to CPLR § 5222:11 (emphasis supplied)).

Neither the motion nor plaintiff’s reply affirmation indicates that the defendant, Judgment- Debtor, was given notice in compliance with the above sections. Plaintiff’s reply papers fail to address the applicability of the notice requirement of CPLR § 5222(e) to the instant turnover proceeding. As plaintiff failed to establish that it followed the procedure outlined in CPLR § 5222(e), the instant turnover motion is therefore defective and must be denied, without prejudice.

Further, the Fidelity Accounts are exempt from execution pursuant to CPLR 5205(c)(1)

footnote 2, contd.

may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.”

and (2), which provide as follows:

1. Except as provided in paragraphs four and five of this subdivision, *all property while held in 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 . . .* established as part of, and all payments from, either any trust or plan, which is qualified as *an individual retirement account . . .* shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (IRR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

However, CPLR §5205(c)(5) provides as follows:

Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of a claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

As to the Accounts, 2AA-089893 and 2AX-077330, defendant's IRA and retirement accounts, respectively, such accounts are exempt from execution. However, any contributions to such accounts made after the date that is 90 days before the interposition of the claim on which the judgment herein was entered are not exempt from execution in accordance with CPLR §5205(c)(5). The instant action was filed on or about May 3, 2006. Thus, amounts transferred to such accounts after the "date that is ninety days before" May 3, 2006, i.e., after February 2, 2006, are not exempt. According to the List submitted by plaintiff (Exh. C), additions to such Accounts were made after February 2, 2006 in an approximate total amount of \$177.

As to Accounts, Z67-426342 and Z67-432873, which defendant holds with his wife as

tenants by the entirety, plaintiff seeks one-half of the funds held in such accounts based on a presumption established under New York law. However, defendant argues that under Florida law, plaintiff's interest in such accounts arises to the extent defendant's wife predeceases him. Based on the record before the Court, defendant failed to establish that Florida, and not New York, law applies so as to deprive plaintiff of one-half of the funds in such Accounts. Further, in light of the statements and defendant's assertion that Account number Z67-426342 is closed, an issue remains as to whether a turnover order regarding this account is warranted.

Finally, as to defendant's Accounts, X86-104027, X86-104035, and X86-10404, the record indicates that defendant is the "custodian" of such "UTMA" accounts. Funds held in such accounts cannot be executed upon in order to satisfy a judgment against the defendant, unless it is shown that the account was created for a fraudulent purpose (*see Friedman v Mayerhoff*, 156 Misc 2d 295, 592 NYS2d 909 [N.Y. City Civ. Ct. 1992]). Although plaintiff generally claims that all of defendant's Fidelity Accounts constitute fraudulent conveyances, plaintiff failed to allege any facts or submit any documents establishing this claim.


Conclusion

In light of plaintiff's failure to comply with CPLR § 5222(e), issues as whether certain Accounts are exempt from execution, and whether such Accounts contain funds in the amount sought by plaintiff, the instant motion for an order directing defendant turnover funds in his Fidelity Accounts is denied, without prejudice.

Further, the failure of plaintiff to comply with CPLR § 5222(e) warrants vacatur of the restraints placed upon defendant's Fidelity Accounts. Therefore, the cross-motion by defendant for an order vacating the subject restraints is granted.

This constitutes the decision and order of the Court.

Dated: September 15, 2008



Hon. Carol Robinson Edmead, J.S.C.

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