

Adelaide Prods., Inc. v BKN Intl. AG

2008 NY Slip Op 33022(U)

November 3, 2008

Supreme Court, New York County

Docket Number: 601634/2008

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, J.

PRESENT:

PART 56

Justice

Index Number : 601634/2008
ADELAIDE PRODUCTIONS, INC.,
 vs.
BKN INTERNATIONAL AG
 SEQUENCE NUMBER : # 001
 TURNOVER

INDEX NO. 601634-08
 MOTION DATE 7/2/08
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

_____ 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

FILED
NOV 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION
IN ACCORDANCE
MEMORANDUM DECISION

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

Dated: 11/3/06

HON. RICHARD B. LOWE, J.
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: IAS PART 56**

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ADELAIDE PRODUCTIONS, INC., and
ELP COMMUNICATIONS,

-against-

Petitioners

Index No.,
601634/2008

BKN INTERNATIONAL AG and BKN NEW MEDIA,
INC.,

Respondents.

**DECISION &
ORDER**

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NOV 07 2008
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Hon. Richard B. Lowe, III:

Petitioners Adelaide Productions, Inc., and ELP Communications (collectively "Adelaide") move for an order, pursuant to CPLR §§ 5225 [b] and 5227, directing the turnover of property and for an award of costs from respondents BKN International AG ("BKNIAG") and BKN New Media ("BKN New Media"). The respondents oppose the motion in the entirety.

There is a long history of litigation between Adelaide and BKNIAG (e.g., *see, Adelaide Productions, Inc. v BKN Int'l AG*, 51 AD3d 598 [2008]; *Adelaide Productions, Inc. v BKN Intern. AG*, 40 AD3d 317 [2007]; *Adelaide Productions, Inc. v BKN Intern. AG*, 39 AD3d 254 [2007]; *Adelaide Productions, Inc. v BKN Intern. AG*, 38 AD3d 221 [2007]; *Adelaide Productions, Inc. v BKN Intern. AG*, 15 AD3d 316 2005]; *Adelaide Productions, Inc. v Durham Capital Holdings, Inc.*, 307 AD2d 781 [2003]). The salient facts giving rise to the instant proceeding are well known by the parties, and are contained in prior decisions in the above referenced matters. Reference is made herein to those decisions.

In this special proceeding, Adelaide seeks the turnover of property and the payment of a debt from the respondents to Adelaide. The petitioners move for such relief pursuant to CPLR

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¹ Adelaide Productions, Inc., et al., have inadvertently captioned themselves as plaintiffs and BKN International AG, et al., as defendants. In fact, as this is a special proceeding, the parties are designated as petitioners and respondents (CPLR § 401).

§§ 5225 and 5227. In conjunction with their application, the petitioners also seek an award of attorneys' fees and costs incurred in this proceeding.

Upon review of the papers herein (Notice of Petition and Exhibits A-F; Petitioners' Memo., of Law in Support of Petition; Affirmation of Brody and Exhibits 1-8; Affirmation of Meier and Exhibits A-D; Affidavit of Collins and Exhibit A; Memo., of Law in Opposition to Petition; and Reply Memo., of Law on Costs and Attorneys Fees), and consideration of the relevant statutes and case law, the petition is denied.

DISCUSSION

CPLR § 5225 provides in pertinent party the following:

Payment or Delivery of Property of Judgment Debtor

“ (a) Property in the possession of judgment debtor. 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. . . .

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, *against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor*, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to 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.” (*italics/bolding added for emphasis*).

CPLR § 5225 contains the device used by the judgment creditor when it can be established that the judgment debtor or garnishee *has* possession of money or property subject to

application to the judgment.

Adelaide's attorney affirms that "proceeds from BKNIAG's copyrights . . . are the subject of a lien by" petitioners in the United States Copyright Office and they are entitled to possession of any and all copyright proceeds (Brody 05/30/08 Affirm., p 3). But, there is no demonstration in the record of the existence of a valid lien and it is noted that at oral argument, BKNIAG's attorney represented on the record that Adelaide secured no such lien on any copyright. A representation that was not challenged by Adelaide's attorney at oral argument (see, Official Court Transcript, 07/02/08, pp 23-25). Furthermore, it is not articulated by Adelaide as to who "has" possession of the copyright proceeds nor do they explain away whether entitlement to the proceeds must first be premised on a lien upon the copyrights.

CPLR § 5225 [a] clearly contemplates an indicia of present possession. It must be clearly shown that the judgment debtor or other person is in possession or control of the asset sought to be turned over. Only when the property or money being pursued *is in the* possession or custody of the judgment debtor himself or other person, subdivision [a] governs (*Eastern Federal Sav. and Loan Ass'n. v Sabatine*, 76 AD2d 899 [where real property was sold pursuant to mortgage foreclosure action and surplus money was deposited with county treasurer and part of money had been paid to judgment creditors who properly filed notices of claim, *money remaining was money belonging* to judgment debtor and it was proper subject for turnover proceeding]; *Stuhler v State*, 127 Misc2d 390 [under turnover statute, rights of judgment creditor in funds *in possession or custody* of transferee who received funds from judgment debtor are derived from, and are therefore no better than, those of judgment debtor]; *Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.*, 41 AD3d 25 [in turnover proceeding, trial court should have ordered judgment debtor to execute documents transferring ownership interests in its subsidiaries and affiliates to judgment creditors; debtor *was in*

possession of sufficient money, and there was no legal reason why judgment had to be subordinate to agreement between debtor and its other creditors]). Here, there is no demonstration that the “property” in issue is in the present possession or control of the judgment debtor or BKN New Media.

CPLR § 5227 provides in pertinent party the following:

Payment of debts owed to judgment debtor

“Upon a special proceeding commenced by the judgment creditor, against any person who it is shown *is or will* become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. . .”
(*Italics* and **bold** added for emphasis).

Adelaide complains that co-respondent BKN New Media is a wholly owned subsidiary and an operating arm of BKNIAG in New York, and that the former owes a debt of \$1,770,000.00 to the latter as “reflected in BKN New Media’s ‘Answers to An Information Subpoena’ (*id.*, p 2). But, Adelaide relies on an affidavit that is dated May 31, 2006 (Petition, Ex E [Collins 05/31/06 Aff.]), which is more than two years and five months old.

The proof only suggests that in 2006 there was a debt owed and not that the debt is or will become due and owing as of the date of this petition. The statute clearly contemplates an existing debt or one that is to become due in the near future. The averment of an existing debt in May 2006 is not proof of an existing debt or a debt that will be due and payable (see, *Vanderbilt Credit Corp. v Chase Manhattan Bank, NA*, 100 AD2d 544 [since trust account which was subject of turnover proceeding initiated by judgment creditor constituted debt owed by bank to judgment debtor, this section providing that a special proceeding may be commenced by judgment creditor against any person *who is or will become indebted* to judgment debtor was applicable statute]; *Michigan*

Associates v Emigrant Sav. Bank, 74 Misc2d 495 [no basis for intervention by judgment debtor in special proceeding by judgment creditor against judgment debtor's bank pursuant to rule providing for such a proceeding against any person *who it is shown is or will become indebted* to judgment debtor]; *Shaklee Corp. v Loehmann's Inc.*, 218 AD2d 511 [CPLR 5227 clearly applies against any person *who it is shown is or will become indebted* to the judgment debtor, and the court may require such person to pay to the judgment creditor the debt upon maturity]).

For the reasons stated, the petitioners have failed to satisfy their burden of establishing possession or custody of money or other personal property in the judgment debtor's possession or other person, or the payment of debts owed to judgment debtor presently are owed or will be owed (CPLR § 5227 ; *Matter of Prudential Blake Realty v Schenectady Indus. Dev. Agency*, 255 AD2d 622; *Trustco Bank, Nat. Ass'n v Strong*, 261 AD2d 25).

Accordingly, the petition is denied and it is dismissed without prejudice to restore upon the submission of current information with regard to the property of the judgment debtor and payment of debts owed to the judgment debtor.

Ordered the petition is dismissed without prejudice.

Dated: November 3, 2008

ENTER:



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