

**Matter of 275 Seventh Ave. Bldg. LLC v DMI Sports,  
Inc.**

2009 NY Slip Op 32240(U)

September 25, 2009

Supreme Court, New York County

Docket Number: 114207/2008

Judge: Eileen Bransten

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PRESENT: HON. EILEEN BRANSTEN

PART 3

Justice

Index Number : 114207/2008  
370 PETERSON AVENUE BUILDING LLC  
VS.  
DMI SPORTS, INC.,  
SEQUENCE NUMBER : # 001  
OTHER

INDEX NO. 11420708  
MOTION DATE 5/22/09  
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

**IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM**

NYS COUNTY CLERK  
SEP 28 2009  
MADISON  
EMERGENCY SERVICE

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 9-25-09

Eileen Bransten  
HON. EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MSA

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

-----X

In the Matter of the Application of  
275 SEVENTH AVENUE BUILDING LLC,

Petitioner,

Index No.: 114207/08

Motion Date:

For a Judgment pursuant to CPLR § 5225 and § 5227

Motion Seq. No.: 001

-against -

DMI SPORTS, INC.,

Respondent.

-----X

PRESENT: HON. EILEEN BRANSTEN:

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Petitioner 275 Seventh Avenue Building LLC (“Landlord”) moves, pursuant to CPLR 5225 and 5227, for a judgment declaring that DMI Sports, Inc. (“DMI Sports”) is a continuation of the business of DMI, Inc. (“DMI”) and awarding judgment in its favor and against DMI Sports in the amount of \$143,725.90.

**BACKGROUND**

Landlord is the owner and landlord of the building known as 275 Seventh Avenue, New York, New York (the “Building”), wherein DMI occupied a portion of the ground floor (the “Premises”) (Petition at ¶ 1).

DMI, the judgment-debtor of a judgment entered June 17, 2008 (the “Judgment”) in an action captioned *DMI Inc. v 275 Seventh Avenue LLC and 275 Seventh Avenue Building*

LLC, Index No. 117463/05 (Sup Ct, NY County), is a New York corporation formed in 1992, and is still an active entity authorized to do business in the State of New York (*id.* at ¶ 2).

In September 2005, DMI abandoned the Premises and, in December 2005, commenced an action against Landlord, seeking damages allegedly caused by its refusal to consent to a proposed sublet (*id.* at 10). In February 2006, Landlord counterclaimed for unpaid rent and additional rent due (*id.* at 11). In January 2007, Landlord moved for summary judgment (*id.*). By order dated December 7, 2007, Landlord's summary judgment motion was granted in its entirety (the "Order") and it was awarded it \$143,752.90 on its counterclaims (*id.* at 12).

DMI Sports, formed in 1993, is a Pennsylvania corporation, with its principal offices, warehouse, storage and shipping facilities currently located in Fort Washington, Pennsylvania. It is engaged in the manufacture and sale of billiard, dart-board and table-tennis equipment throughout the United States (*id.* at 3).

Landlord asserts that the business conducted by DMI was part of a single integrated enterprise that currently continues in operation as DMI Sports (*id.* at 14). Specifically, it points out that (1) the principals of DMI are the same as the principals of DMI Sports, including Paul Geigerich and Gary Geigerich (*id.* at 15) and (2) DMI Sports is conducting the same business and is selling the same products and equipment that DMI was selling at the Premises (*id.* at ¶¶ 16, 17).

Thus, pursuant to the continuity of business doctrine, Landlord argues that DMI Sports should be deemed responsible for payment of the Judgment based on its continuation of the business of DMI in Pennsylvania.

### ANALYSIS

CPLR 5225 (b) authorizes commencement of a special proceeding 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.”

A judgment creditor seeking to invoke the provision must establish (1) “that the judgment debtor has an interest in the property that the creditor is trying to reach” (*Hoenlein v Kaplan*, 234 NYLJ 84, \* 11 [Sup Ct, NY County 2005], citing *Jones v Knowlton*, 199 AD2d 871 [3d Dept 1993]) and “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 party who controls or possesses that property” (*id.* at 11-12; CPLR 5225 [b]).

Here, Landlord alleges, upon information and belief, that DMI Sports “is conducting the same business that [DMI] had been conducting at the Premises” (Petition at ¶ 16) and that DMI Sports is selling the same products and equipment that [DMI] was selling at the Premises” (*id.* at ¶ 17).

In opposition, DMI Sports alleges that “DMI ceased conducting business in or about September 2005 due to the fact that DMI was continuously operating at a loss” (Giegerich Aff at ¶ 9). DMI Sports further alleges that “DMI has no assets and has had no assets since September 2005” and that inventory was its only asset (*id.* at ¶¶ 12, 13).

This assertion, however, is undermined by DMI’s 2006 tax return, submitted by DMI Sports itself; a redacted entry suggests that inventory was held at the beginning of the year, but not at the end of the year (*see* Giegerich Aff, Ex D, at 3). Moreover, the address in DMI’s tax return is listed as 375 Commerce Drive, Fort Washington, Pennsylvania – the city in which DMI Sports operates. Indeed, the only affidavit submitted in opposition to the petition is by Paul Giegerich, the secretary of DMI Sports—who swears to having full familiarity with DMI’s business, finances, human resources, the timing of when it ceased conducting business and the assets and inventory it held (*see* Giegerich Aff at ¶¶ 5-14). Further, he does not deny Landlord’s allegations that he was also a principal of DMI.

To obtain a summary determination, the evidence submitted must be competent (CPLR 3212 [b] [“The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit”]; CPLR 403 [b]). With nothing more than conclusory allegations and speculation based “upon information and belief, the petition here is glaringly insufficient. It is actually DMI Sports’ submissions, including the affidavit

of Paul Giegerich and the attached tax return of DMI, that create an issue of fact as to whether respondent was in the possession or custody of money or other personal property that the judgment debtor has an interest in. This issue cannot be summarily determined on affidavits and should be tried as provided in CPLR 410.

Accordingly, it is

ORDERED that petitioner's motion seeking judgment as to its first cause of action is DENIED; and it is further

ORDERED that respondent is granted 10 days from service of a copy of the order to be entered hercon, in the discretion of the court, to answer the petition or move with respect thereto; and it is further

ORDERED that petitioner should thereafter without undue delay bring the matter on for trial.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
September 25, 2009

**FILED**  
SEP 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER



Hon. Eileen Bransten