

Estate of Ungar v Palestinian Auth.

2009 NY Slip Op 32938(U)

December 9, 2009

Supreme Court, New York County

Docket Number: 105521/2005

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Estate of James Morgan
- v -
The Palestinian Authority

INDEX NO. 105521/05
MOTION DATE 11/5/09
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for Reurge

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2 + exhibits
2 9/15/09 transcript

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 17 2009

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: _____

12/9/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

ESTATE OF YARON UNGAR, et al.,

Index No. 105521/2005

Plaintiffs-Judgment Creditors,

DECISION & ORDER

-against-

THE PALESTINIAN AUTHORITY et al.,

Defendant-Judgment Debtors.

HON. SHIRLEY WERNER KORNREICH, J.S.C.

FILED
DEC 17 2009
NEW YORK COUNTY CLERK'S OFFICE

In this supplementary proceeding to enforce a foreign judgment domesticated in this court¹, plaintiffs/judgment-creditors move to reargue a decision of this court, dictated on the record on September 15, 2009, which quashed three non-party subpoenas. The motion to reargue is granted and the court will reconsider the motion, as the court misapprehended a relevant fact.²

The non-parties served with the subpoenas urge that the subpoenas must be quashed because they were not issued in a pending action; or because they are redundant, unduly burdensome and constitute harassment. Alternatively, they contend that the subpoenas should be stayed pending an appeal of the underlying judgment; or should be limited to written questions, pursuant to CPLR 5240. The motion to quash is granted in part and denied in part for the reasons that follow.

Background

The underlying judgment is against the Palestinian Authority (PA) and the Palestinian

¹ The judgment was entered in the United States District Court for the District of Rhode Island (Rhode Island Court) on July 13, 2004 (underlying judgment).

² The court overlooked that the subpoenas bore the certification required by CPLR 5224(a)(3)(i).

Liberation Organization (PLO). The non-party subpoenas were issued to three individuals, Naguib Sawiris (Sawiris), Aldo Mareuse (Mareuse) and Ossama Bessada (Bessada) (collectively, the witnesses), present or former principals of Orascom Telecom Holdings S.A.E. (Orascom), an Egyptian corporation. Sawiris is the Chairman and Chief Operating Officer of Orascom, Mareuse is its Chief Financial Officer, and Bessada was its Chief Commercial Officer for about one year.³ The law firm representing the witnesses accepted service on their behalf, pursuant to a stipulation.

Mareuse and Sawiris were deposed previously by plaintiffs on March 13 and 15 and 2007, respectively. The Mareuse and Bessada subpoenas are dated May 29, 2008; the Sawiris subpoena is dated October 17, 2008. The dates set for their depositions were as follows: Bessada - June 8, 2008; Mareuse - July 1, 2008; and Sawiris- November 11, 2008. The depositions compel the witnesses to give testimony at the offices of plaintiffs' attorneys in New York City, and Bessada was given the option of appearing in Florida.

Each subpoena, issued on the authority of CPLR 5223 and 5224, was a combined testimonial and information subpoena, to which was appended a list of questions to be answered by the witness in writing. The tenth and final question in the Sawiris subpoena, seeks information concerning litigation between the Palestinian Investment Fund (PIF) and Orascom.

It asks:

Describe in full the current status and disposition of any and all legal proceedings involving Orascom and any parties purporting to be the Palestinian Investment Fund.

The remaining questions relate to activities or assets of Orascom in the United States, its

³ He left to become Chief Operating Officer of an Italian-based corporation.

possessions and territories.

It is undisputed that Orascom owes a debt to the PIF. However, although plaintiffs allege that PIF is a wholly owned investment arm of the PA, two federal judges have found it to be an open question of fact. *See, Estate of Yaron Ungar v Orascom Telecom Holding SAE*, 578 F Supp2d 536 (SDNY 2008)(McMahon, J.)(no ancillary subject matter jurisdiction over Orascom for turnover pursuant to CPLR 5227 due to inability to resolve whether PIF and PA are same entity); *Knox v Orascom Telecom Holding S.A.E.*, 477 F Supp2d 642 (SDNY 2007)(Marrero, J.)(same holding).

In 2005, the United States District Court for the Southern District of New York determined that Orascom had insufficient minimum contacts to serve as a predicate for personal jurisdiction under the due process clause in the Fourteenth Amendment of the United States Constitution. *Estate of Yaron Ungar v The Palestinian Authority*, 400 F Supp2d 541, 552. Plaintiffs were given an opportunity to conduct discovery on the issue of jurisdiction over Orascom in federal court. *Id.* at 544-545; *Estate of Yaron Ungar v Orascom Telecom Holding SAE, supra*, 578 F Supp2d at 539. Plaintiffs claim that they may continually subpoena individuals with a connection to Orascom, when they enter New York, to determine whether Orascom's activities have ripened into sufficient minimum contacts to confer personal jurisdiction. The judgment-creditors' attorney admits that he served the subpoenas at issue on this motion to ascertain Orascom's amenability to personal jurisdiction in the period following the District Court's decision. *See* September 15, 2009 transcript, pp 54-55.

The subpoenas were issued by the judgment-creditors' attorney with the caption and index number set forth above, except that the court was identified as Supreme Court, Kings

County, rather than New York County. All of the subpoenas recite that a transcript of the underlying judgment was filed in Kings County on April 25, 2008, under the index number of this New York County action. The witnesses assert that there was no action pending in Supreme Court, Kings County, when the subpoenas were issued. Plaintiffs counter that they filed a transcript of the underlying judgment in the Kings County Clerk's Office.

Discussion

The court agrees with plaintiffs that there is a pending action to enforce the judgment. CPLR 5402(a) permits a judgment-creditor to file an authenticated judgment of a federal court in any county clerk's office within New York State. A judgment so filed "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of this state and may be enforced or satisfied in like manner."

CPLR 5402(b).

CPLR 5018(b) provides that a judgment creditor may docket a federal court judgment, with the county clerk of any county in New York State, which shall have the effect as a judgment of the supreme court entered in the county where the federal judgment was docketed. Pursuant to CPLR 5018(a), a judgment-creditor may obtain a transcript of a judgment entered and docketed by the clerk of one county and have it docketed in another county in New York State, where it shall have the same effect as a judgment entered in the county where it was originally entered.

Plaintiffs followed the prescribed procedures. Thus, there are actions pending in both Kings and New York Counties from which the subpoenas could issue in aid of enforcing the underlying judgment. According to this court's records, plaintiffs filed the underlying judgment in New York County on April 21, 2005. Subsequently, plaintiffs docketed a transcript of the

New York County judgment in Kings County. This court verified, by telephone, that the judgment docketed in this court was docketed with the Kings County Supreme Court under the New York County index number.

Service of the subpoenas by the attorneys of record for plaintiffs was proper. CPLR 2302(a). CPLR 5524 (a) permits the judgment-creditor to serve a subpoena to take the testimony of a witness and an information subpoena to elicit written answers to questions. The legislative history of that section provides that CPLR 2302(a) governs who may issue such subpoenas. Book 7B, *McKinney's Cons. Laws of NY*, © 1997, CPLR 5224, Legislative Studies and Reports on subd. (a), p. 250. CPLR 2302(a) provides that an attorney for a party to an action may serve a subpoena.

An application to quash a subpoena should be granted where the futility of the process to uncover anything legitimate is inevitable or obvious, or where the information sought is utterly irrelevant to any proper inquiry. *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 332 (1988)(investigatory subpoena); *Ayubo v Eastman Kodak Co.*, 158 AD2d 641, 642 (2d Dept 1990)(judgment enforcement subpoena).

CPLR 5223 authorizes service of a subpoena "to compel disclosure of all matter relevant to the satisfaction of the judgment." This has been interpreted to include the testimony of any third person with knowledge of the debtor's property. *Gryphon Dom. VI, LLC v GBR Info. Servs., Inc.*, 29 AD3d 392 (1st Dept 2006); *Omaha Cold Storage Co. v Chas. H. Nolte, Inc.*, 264 AD 740 (2d Dept 1942).

CPLR 5240 gives a court broad discretion, on its own initiative or upon motion of any interested person, to make an order "denying, limiting, conditioning, regulating, extending or

modifying the use of any enforcement procedure.” *Liberty Co. v Rogene Indus.*, 272 AD2d 382 (2d Dept 2000)(pruned information subpoena in exercise of broad discretion). Effective January 1, 2007, CPLR 5224(a)(3) was amended to protect third-party witnesses from harassment by information subpoenas. Siegel, *Practice Commentaries*, Book 7B, *McKinney’s Cons. Laws of NY*, © 1997, C5224:2 (2007), *citing* Legislative Memorandum, L. 2006, Ch. 452. The statute now provides that an information subpoena may be served on a third-party only if the judgment creditor or his attorney “has a reasonable belief that the party receiving the subpoena has information *about the debtor* that will assist the creditor in collecting his or her judgment.” [emphasis supplied]. CPLR 5224(a)(3).

In *Ayubo* a motion to quash was denied where the third-party witness was a corporation operating at the same address, with the same telephone number, ownership and management as the judgment-debtor corporation, which had been dissolved shortly after the judgment was entered and had evaded enforcement of the judgment. In *Stern v Carlin Communications*, 210 AD2d 110, 111 (1st Dept 1994), the First Department quashed a supplementary proceeding subpoena seeking financial records of non-party corporations, claimed to be closely related to defendants. However, in *Stern*, there was a fraudulent conveyance case pending involving the issue of whether the corporations were alter egos of one individual. Hence, the First Department held that the judgment-creditor would be relegated to discovery in the fraudulent conveyance action, instead of the enforcement subpoena. Both cases are distinguishable from the one at bar.

Unlike in *Ayubo*, the witnesses in this case are not the corporations alleged to have assets or to be the alter ego of the debtor, but individuals related to a corporation that owes a debt to an entity that may or may not be an alter ego of the judgment-debtor. Unlike in *Stern*, there is no

fraudulent conveyance action pending in which disclosure is taking place. Further, the deposition testimony of Mr. Sawiris, quoted in *Estate of Yaron Ungar v Orascom Telecom Holding SAE*, *supra*, 578 F Supp2d at 544, fn. 4, demonstrates that Orascom made a decision not to pay the debt to the PIF. Thus, plaintiffs are alleging a non-conveyance by a third-party, not a fraudulent conveyance by the judgment-debtor. Finally, most of the information sought by way of information subpoena relates only to personal jurisdiction over Orascom, not the judgment debtors assets.

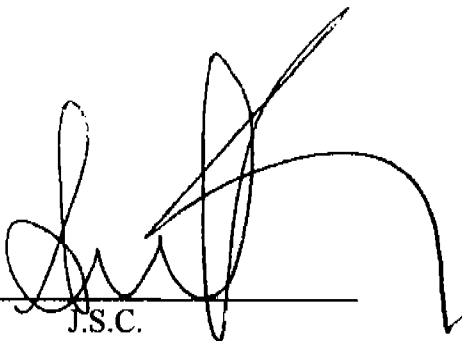
On balance, because personal jurisdiction over Orascom is beyond the scope of inquiry permitted by CPLR by 5223, and in the exercise of discretion under CPLR 5240, the court quashes the subpoenas, with the exception that Sawiris shall answer in writing the tenth question in his subpoena. Other than the last question posed to Sawiris, plaintiffs' attorney is seeking disclosure from third-party witnesses for the purpose of updating information about Orascom's contacts in order to establish personal jurisdiction over the corporation. This is not an inquiry directed at uncovering information about the judgment-debtors' property that could be used to satisfy the judgment. Hence, it is utterly beyond the scope of the broad inquiry authorized by CPLR 5223. In reaching this determination, the court considered the following factors: the previous jurisdictional discovery concerning Orascom afforded to plaintiffs in federal court, the policy of protecting third-party witnesses from harassment by information subpoenas, the prior depositions of Sawiris and Mareuse, the lack of personal jurisdiction over Orascom – the only entity arguably holding an asset owed to the judgment-debtor, the admission of plaintiffs' attorney that he is seeking discovery to establish personal jurisdiction over Orascom, the holdings of the federal courts that there is a factual issue as to whether the PIF and the PA are alter egos, the fact

that the witnesses are foreign nationals who would have to appear in the United States for depositions, and the fact that Mr. Bessada is no longer employed by Orascom. However, as the tenth question in the Sawiris subpoena could uncover information about the status of the debt owed to the PIF, which may or may not be the alter ego of the PA, and because it is not burdensome, the court will order Mr. Sawiris to answer it under oath. Accordingly, it is

ORDERED that the motion to reargue is granted and, upon reargument, motion to quash the subpoenas served on Naguib Sawiris, dated October 17, 2008, Aldo Marcuse, dated May 29, 2008 and Ossama Bessada, dated May 29, 2008, is granted, with the exception that Naguib Sawiris shall answer in writing the tenth question in the subpoena dated October 17, 2008, within thirty days of service upon his attorneys of a copy of this order with notice of entry.

Dated: December 9, 2009

ENTER:



J.S.C.

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