

M & E Petroleum, Inc. v Coven
2010 NY Slip Op 31208(U)
May 14, 2010
Supreme Court, New York County
Docket Number: 114888/2001
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 30

Index Number : 114888/2001
M & E PETROLEUM, INC.
VS.
COVEN, STANLEY
SEQUENCE NUMBER : 002
TURNOVER PROCEEDING

INDEX NO. _____
MOTION DATE 5/17/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in 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
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff pursuant to CPLR §5225(a) and CPLR §5228 is granted to the extent that (1) defendant Stanley Coven shall turn over and deliver certain described property in his possession and/or control, to wit, the shares of Task Oil Corp. (including, but not limited to, real estate at 1210 Grand Avenue, Baldwin, New York 11510, and the shares of Neptune Equities, Inc. (including, but not limited to real estate at 1711 Neptune Avenue, Brooklyn, New York 11224, and all books, deeds, bank accounts and other properties and documents, or so much as is sufficient to satisfy the judgment entered in this action, and (2) a receiver shall be appointed for the above-named properties to dissolve Task and Neptune, and to sell their properties, real and personal, to satisfy the said judgment; and it is further

ORDERED that the branch of plaintiff's motion for an order directing defendant to pay over to plaintiff's attorney \$466,322.55 plus 9% interest from August 3, 2001, in satisfaction of the judgment within 10 days, is denied; and it is further

ORDERED that plaintiff shall submit a proposed Order directing the appointment of a receiver; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 5/17/10 This constitutes the decision and order of the Court.

[Signature]
HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
M & E PETROLEUM, INC.,

Plaintiff,

Index No. 114888-2001

-against-

DECISION/ORDER

STANLEY COVEN,

Defendant.

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

FILED
MAY 18 2001
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

M & E Petroleum, Inc. ("plaintiff") moves for an order (a) pursuant to CPLR §5225(a), mandating defendant Stanley Coven, judgment debtor ("defendant"), to turn over and deliver certain described property in his possession and/or control, *to wit*, the shares of Task Oil Corp. ("Task") (including, but not limited to, real estate at 1210 Grand Avenue, Baldwin, New York 11510 (the "Task property")), and the shares of Neptune Equities, Inc. ("Neptune") (including, but not limited to real estate at 1711 Neptune Avenue, Brooklyn, New York 11224 (the "Neptune property")), and all books, deeds, bank accounts and other properties and documents, or so much as is sufficient to satisfy the judgment entered in this action, or, alternatively, to pay over to plaintiff's attorney \$466,322.55 plus 9% interest from August 3, 2001, in satisfaction of the judgment within 10 days, and (b) pursuant to CPLR §5228, appointing a receiver for the above-named properties and, if necessary, to dissolve Task and Neptune, and to sell their properties, real and personal, to satisfy the said judgment.

Factual Background

Plaintiff seeks to recover payment from defendant on a judgment entered in Florida

against him in 2000 and domesticated in New York in 2001.

Plaintiff's prior order to show cause sought an order requiring, *inter alia*, (a) defendant to turn over, to the Sheriff or a receiver all shares of stock defendant owns in Task and Neptune to pay the judgment on the ground that he is the owner of said stock and that the companies' property be sold, if necessary, (b) plaintiff's counsel be appointed as receiver to take any necessary action to satisfy the judgment, including dissolving and selling any property of Task and Neptune, (c) defendant to turn over all documents associated with any trust of which he may be a creator, trustee, and/or a beneficiary from August 3, 2001, (d) defendant to turn over all documents concerning Task and Neptune to the receiver.

After a hearing on the "issue of whether there is sufficient evidence to form a basis of control to warrant an appointment of a receiver as sought in the motion" the Court denied the order to show cause, but directed defendant to produce the Will and other estate-related documents in accordance with the transcript (see September 14, 2009 Order). The transcript reflects the Court's conclusion that:

On the issue of whether or not there has been established a sufficient basis of control and influence by the judgment debtor to warrant the appointment of a receiver . . . to turn over to the sheriff or a receiver . . . all shares of stock [defendant] owns and Task Oil and Neptune Equities to pay the judgment herein, the appointment of a receiver has been insufficiently established to warrant that;
(Page 98).

* * *

Now, he is the beneficiary allegedly of the Dorothy Coven estate. The will of Dorothy Coven needs to be turned over so that you could then determine how, if any, the distributions should or what his interests are.
(Page 101).

In support of its present motion, plaintiff submits a letter from the accountant for both Neptune and Task, who wrote on June 26, 2008 that the Estate of Dorothy Coven ("Mrs. Coven")

owns both companies.¹ In further support, plaintiff submits an affidavit from Kerstin Thompson ("Thompson"), wherein she states that on September 14, 2009, defendant testified in Court that Neptune owns the Neptune property and that Task owns the Task property. Defendant also testified that (he believed that) the will of Dorothy Coven (the "Will") was probated in Long Island. Plaintiff made a search of the records of the Surrogate's Court of the State of New York, in Nassau County, and no probate file was found in the name of Dorothy Coven. Further, the Will indicates that defendant is the only beneficiary of the Estate of Dorothy Coven and the judgment remains wholly unsatisfied.

In opposition, respondent contends that Thompson has no personal knowledge about him, Task, or Neptune or this action, other than the fact that she purchased a judgment from plaintiff. Respondent further argues that the Court decided the issues raised by plaintiff herein (*i.e.*, turn over of shares, property and records and appointment of receiver) pursuant to an Order, dated September 14, 2009. Plaintiff failed to appeal or set forth any new facts or legal allegations, except for its request that monies be paid to plaintiff's attorney to satisfy the judgment, which is duplicative in light of the fact that a judgment was already entered. Defendant argues that he already complied with the September 14, 2009 Order (by providing plaintiff with the Will), and incurred substantial attorneys' fees in defending the initial order to show cause by plaintiff. Plaintiff did not search the Surrogate's Court in Suffolk County, and did not explain what search plaintiff made of the Surrogate's Court in Nassau County. And, the Will states that defendant and his daughter are beneficiaries of the Coven's Estate. Thus, defendant cross moves for

¹ The Court notes that defendant also testified in Court that the Estate of Dorothy Coven owned Task and Neptune (p. 30, lines 23-26).

sanctions for the itemized amount of \$2,400.00, arguing that plaintiff's instant motion is frivolous as it contains no new law or facts, is completely without merit and duplicative, and fails to disclose that the Court previously decided the issues raised. Defendant requested from plaintiff that it withdraw this motion, to no avail.

In reply, plaintiff argues that defendant's testimony at the Court's hearing and Will produced as a result of the September 14, 2009 Order formed the basis of the instant motion, particularly in regard to the ownership of Neptune. Contrary to defendant's contention, Mrs. Coven bequeathed "all tangible personal property" owned by her at the time of her death to defendant, not to defendant and his daughter; his daughter is a contingent beneficiary, only taking if defendant predeceased Mrs. Coven, which is not the case. As the Executor, defendant knows the county in which his wife's Will was probated. Further, the unsworn letter by the companies' accountant produced by defendant was false and an attempt by defendant to mislead the Court and delay enforcement of the judgment. Thus, plaintiff's instant motion to renew is based on new proof not used before.

In further support of his cross-motion, defendant argues that although the Will bequeaths all of his wife's "personal" property to him, it bequeaths all of her "assets" to a Trust and designate defendant and his two children as Trustees. Only defendant's two children are denominated as Trustees for any other Trusts created by the Will, and upon defendant's death, all assets of the Trust are to be distributed to his children. Defendant "does not consider the stock of Neptune . . . and Task . . . as personal property, such as clothing, dishes" Nothing in the Will mandates that Mrs. Coven's property, personal or not, be transferred, sold, or otherwise conveyed, and defendant has not distributed any property of Mrs. Coven, and the stock of the

companies have never been conveyed from the Estate.

Discussion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Belny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277, 524 NE2d 879.)" In light of the Will submitted by plaintiff and this Court's direction that defendant produce the Will and that the Will is presented to the Court to determine how the distributions thereunder are or should be made to defendant to assess what his interests are, renewal is warranted.

Although defendant claimed he did not know the identity of the Executor, it is now uncontested that the Will expressly names defendant as the Executor of the Will, and that Mrs. Coven owned Task and Neptune at the time of her death. A reading of the Will reveals that in the event defendant survives Mrs. Coven, which is the case herein, the Will expressly bequeaths (1) to defendant, all of Mrs. Coven's "*tangible* personal property" to defendant (*see* ¶ "SECOND"), (2) to certain Trustees, "the maximum amount by which [her] federal taxable

estate”(less (a) “dispositions under other Articles of this Will which are not allowed as a marital or charitable deduction for federal and estate tax purposes,” and (b) “property passing outside of this Will” which is included in her gross estate and which are not allowed as a marital or charitable deduction for federal and estate tax purposes) may be increased without increasing her estate taxes (see ¶ THIRD), and (3) again to the defendant, the remainder of her “property and estate” to defendant and (see “FOURTH”). Nothing in the Will indicates that the real property and shares of Task and Neptune fall within the provision bequeathing such property to the Trustees. Thus, in the absence of evidence to the contrary, defendant is the beneficiary of all the property of the estate of his late wife, and this property includes the shares and real property of Task and Neptune. That *defendant* does not consider the stock of Neptune and Task “as personal property, such as clothing, dishes . . .”, is inconsequential, in the absence of proof to the contrary. Also, contrary to defendant’s contention, the Will does not contain any provision bequeathing all of Mrs. Coven’s “assets” to a Trust; nor does the Will specify that stocks or shares are considered such “assets.”

Therefore, upon renewal, the Court grants plaintiff’s motion for a turnover of defendant’s property as described herein and for an appointment of a receiver as requested herein. As a result, plaintiff’s request in the alternative for an order directing defendant to pay over to plaintiff’s attorney \$466,322.55 plus 9% interest from August 3, 2001, in satisfaction of the judgment within 10 days, is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff pursuant to CPLR §5225(a) and CPLR §5228 is

granted to the extent that (1) defendant Stanley Coven shall turn over and deliver certain described property in his possession and/or control, *to wit*, the shares of Task Oil Corp. (including, but not limited to, real estate at 1210 Grand Avenue, Baldwin, New York 11510, and the shares of Neptune Equities, Inc. (including, but not limited to real estate at 1711 Neptune Avenue, Brooklyn, New York 11224, and all books, deeds, bank accounts and other properties and documents, or so much as is sufficient to satisfy the judgment entered in this action, and (2) a receiver shall be appointed for the above-named properties to dissolve Task and Neptune, and to sell their properties, real and personal, to satisfy the said judgment; and it is further


ORDERED that the branch of plaintiff's motion for an order directing defendant to pay over to plaintiff's attorney \$466,322.55 plus 9% interest from August 3, 2001, in satisfaction of the judgment within 10 days, is denied; and it is further

ORDERED that plaintiff shall submit a proposed Order directing the appointment of a receiver; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 14, 2010



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

HON. CAROL EDMEAD
FILED
 MAY 18 2010
 NEW YORK
 COUNTY CLERK'S OFFICE