

**Matter of Verizon New England, Inc. v IDT Domestic
Telecom, Inc.**

2010 NY Slip Op 32387(U)

September 1, 2010

Supreme Court, New York County

Docket Number: 104207/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

VERIZON NEW ENGLAND, INC.

Petitioner,
-against-

INDEX NO. 104207/10

MOTION DATE 6/09/10

MOTION SEQ. NO. 001

IDT DOMESTIC TELECOM, INC.
Respondent.

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-6 *for County Court*

The J.C. Clerk's Office will not accept a motion for entry and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is hereby decided in accordance with the accompanying decision, order and judgment.

Dated: September 1, 2010


O. PETER SHERWOOD, 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: IAS PART 61**

**Application of
VERIZON NEW ENGLAND INC.,**

Index No. 104207/2010

Petitioner,

**For Contempt, a Protective Order, and a
Judgment Pursuant to CPLR 5225(b), CPLR
5227, CPLR 5240, and CPLR 5251 to Compel
Payment of Money and Delivery of Property**

**DECISION, ORDER
AND JUDGMENT**

-v-

IDT DOMESTIC TELECOM, INC.,

Respondent.

**JUDICIAL NOTICE
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).**

O. PETER SHERWOOD, J.:

In this turnover proceeding, Verizon seeks an order pursuant to CPLR 5225(b) and 5227 to require respondent, IDT Domestic Telecom, Inc. ("IDT") to turn over property of and debts owed to Global NAPs, Inc., ("GNAPs") and, in the alternative, for a finding of civil contempt against IDT for violation of a restraining notice served on it by Verizon. IDT maintains that it possesses no property and owes no debt to GNAPs and requests that the petition be dismissed.

In January 2009, petitioner, Verizon New England Inc. ("Verizon"), obtained a judgment in the amount of \$57,716,714 in the United States District Court for the District of Massachusetts ("Federal Court") against NAPs and other defendants. Verizon domesticated the judgment in New York and, thereafter, issued restraining notices with information subpoenas to GNAPs' customers, including IDT. The restraining notice to IDT is dated March 27, 2009. Thereafter, GNAPs moved to vacate the restraining notice. The motion was denied in an order of former Justice Walter Tolub dated November 17, 2009. Verizon maintains that IDT violated the restraining notice and made payments to GNAPs, which payments should have been turned over to Verizon.

Verizon argues that IDT and GNAPs have had an ongoing business relationship pursuant to which GNAPs provided telecommunication services, including local origination and termination

services. IDT states that no written contract ever existed between it and GNAPs and that either party may terminate at any time without notice. Since 2004, GNAPs has provided services to IDT on a pre-paid basis. IDT described the relationship as one in which IDT informs GNAPs of anticipated service needs for the following month and GNAPs informs IDT of the costs. IDT then pre-pays GNAPs and GNAPs provides for the month. Historically, the pre-payments were made by wire transfer. At GNAPs' request, pre-payments have been made by check since January 2009.

IDT states that, in May 2010, the Federal Court, entered an order appointing a monitor over the property and interests of GNAPs. As a result of a communication between IDT and the monitor, IDT now makes pre-payments on a weekly basis. The pre-payments are made to GNAPs care of the monitor at a new address.

Verizon maintains that an ongoing six year relationship between IDT and GNAPs pursuant to which IDT made monthly payments to GNAPs and received services, shows that IDT had an ongoing obligation to make payments to GNAPs and that such payments are property in IDT's possession at the time IDT received the restraining notice pursuant to CPLR § 5222(b). As such, Verizon is entitled to receive from IDT an amount equal to the sums paid to GNAPs between April 2, 2009 and November 4, 2009.

Discussion

CPLR § 5222(b) provides in relevant part:

A restraining notice served upon a person other than the judgment debtor is effective only if, at the time of service, he or she owes a debt to the judgment debtor...or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor...has an interest, or if the judgment creditor...has stated in the notice...that the judgment debtor...has an interest in specified property in the possession or custody of the person served.
(emphasis added)

“Restraining notices issued pursuant to CPLR 5222 are effective against assets in which the judgment debtor has an ‘interest,’ and they ‘only reach property and debts with such a connection to the judgment debtor.’” (*JSC Foreign Econ. Ass'n Technostroyexport v Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 391 [SDNY 2003] quoting *AG Worldwide v Red Cube Mgmt.*, 2002 WL 417251, at *8 [SDNY Mar. 15, 2002]). If third parties “do not have property or debts in which the

judgment debtor has an interest, the restraining notices are not effective.” *Id.* Any rights that a judgment creditor enjoys in the property are exclusively derived from the rights of the judgment debtor. (*Smith v Amherst Acres, Inc.*, 43 AD2d 792 [4th Dept 1973]). Courts have interpreted a “[j]udgment debtor’s ‘interest’ in property...to mean a direct interest in the property itself which, while it may require a court determination, is leviable and not an indirect interest in the proceeds of the property. (*Matter of Sumitomo Shoji New York, Inc. v Chemical Bank New York Trust Co.*, 263 NYS2d 354, 358 [NY Sup. 1965]).

Verizon makes two arguments in support of its claims to enforce the restraining notice:

(1) the ongoing business relationship with GNAPs meant that IDT had property of GNAPs in its possession at the time it received the restraining notice; and (2) at the time of service and receipt of the restraining notice in April 2009, IDT was accepting services for which it incurred an obligation to pay GNAPs and, therefore, IDT owed a debt to GNAPs.

CPLR § 5201 states:

(a) Debt against which a money judgment may be enforced.

A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced.

A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

In *ABKCO Indus. v Apple Films* (39 NY2d 670, 674 [1976]), the Court of Appeals found that CPLR § 5201 “property” includes the bundle of rights such as a debtor’s intangible right to net profits from the future promotion of a film “of which...the obligation to pay...was the principal feature of

economic significance.” The court held that the contract right under review was property that could be assigned and therefore, was subject to levy under CPLR 5201(b).

In a case brought by Verizon against another customer of GNAPs to collect on the same judgment involved in this proceeding, Justice Singh of this court found that under the pre-payment for services arrangement between GNAPs and the customer similar to the arrangement involved in this case, the customer was not in possession of property in which GNAPs had an interest (*see Verizon New England, Inc. v Transcom Enhanced Services, Inc.*, 2010 NY Misc LEXIS 1988 *11 [Sup Ct New York County June 17, 2010]). Justice Singh held that “[t]he ‘[principal] feature of economic significance’ [in the pre-payment for services arrangement] is that Transcom had no continuing obligation or commitment of any sort to purchase the services offered by GNAPs” *id.* He concluded that “[s]ince GNAPs had no right to payment in advance under its business arrangement with Transcom, it had no right that it could assign to its creditors. In light of this economic reality...there is no property or debt in the instant matter subject to a restraining order, levy or turnover pursuant to Article 52 of the CPLR” *id.*

This analysis is fully applicable in this case. The issuance of one or more checks by IDT in pre-payment for services is no more evidence of a debt than pre-payments by wire transfer. The means of pre-payment does not alter the economic reality between IDT and GNAPs. Accordingly, Verizon’s petition must be denied.

The court has considered the other arguments of the parties and finds them to be without merit.

Accordingly, it is

ORDERED and ADJUDGED that the petition is DISMISSED. Any and all restraints are vacated forthwith. The application to hold IDT in contempt is DENIED.

This constitutes the decision, order and judgment of the court.

DATED: September 1, 2010

ENTER:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1478).


O. PETER SHERWOOD
J.S.C.