

**GJF Constr. Corp. v Creative Interiors Plus, L.L.C.**

2010 NY Slip Op 33202(U)

November 4, 2010

Sup Ct, NY County

Docket Number: 106165/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

G-Jf Construct, on

INDEX NO. 106165/10

- v -

Creative Interiors

MOTION DATE 9/27/10

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Increased Interest

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-5

Replying Affidavits \_\_\_\_\_

6-7, 8-9, 10-11

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the annexed memorandum decision, order and*

~~\_\_\_\_\_~~

**FILED**  
NOV 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11-4-10

JANE S. SOLOMON

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: IAS PART 55

-----X

GJF CONSTRUCTION CORPORATION,

Petitioner,

-against-

CREATIVE INTERIORS PLUS, L.L.C.,

Respondent.

-----X

Index N<sup>o</sup>. 106165/2010  
DECISION & ORDER

**FILED**  
NOV 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**SOLOMON, J.:**

This is a special proceeding for accrued installments under CPLR 5231(f). Petitioner GJF Construction Corporation (GJF) seeks judgment against respondent Creative Interiors Plus, L.L.C. (Creative) for unpaid income installment payments from the wages of its employee Louis Serrante (Serrante).

On February 25, 2009, judgment was entered in New York County, in favor of GJF against Serrante in the amount of \$510,121.10 (*Serrante v. GJF Construction Corporation*, Index No. 113750/2007) (the Underlying Action). On April 23, 2009, GJF domesticated the judgment in New Jersey. Serrante responded to a New Jersey form of information subpoena, which he signed on June 17, 2009, setting forth his home address in New Jersey and identifying respondent as his employer with a New Jersey address.

On August 26, 2009, GJF delivered a New York State form of income execution (Income Execution, attached to Petition, Ex. C) to the New York County Sherrif's Income Execution Unit (the IEU), as required under CPLR 5231[d)]; this document identified Creative at a 10 Rockefeller Plaza address in Manhattan. In

September 2009, pursuant to CPLR 5231(d), the IEU served Serrante with the income execution by certified mail, return receipt requested, and regular mail (Supplemental Affirmation, Ex. K & L). Serrante did not honor it. In December, pursuant to CPLR 5231(e), the IEU served Creative at the Rockefeller Plaza address, by certified mail return receipt requested (Petition, Ex. G, Supplemental Affirmation, Ex. K & L). Creative did not pay (Petition, Ex. E). This action followed.<sup>1</sup>

Creative answered the petition and opposes it on the grounds that jurisdiction has not been obtained over it or Serrante due to improper service, and that it no longer employs him. In support of the latter position, Cadil Rodriguez, Creative's principal, states in his affidavit that Serrante was Creative's Chief Operating Officer, although not an "officer", "up until around June 2009" and he "received W2 wages for his services as a salesman and overall construction or project supervisor" (Rodriguez Affidavit, ¶ 2).

In opposing the motion, Creative makes the following arguments. Serrante was not properly served with the New York income execution as there is insufficient evidence that GJF effected service, and that Creative has not been properly served with the income execution because it was sent to 10 Rockefeller

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<sup>1</sup>Subsequent to serving the New York Income Execution, in February 2010, the Bergen County Sheriff served an income execution on Creative in the New Jersey caption (see, Petition, Ex. F). Creative does not contend that it is following that income execution.

Plaza, an address used by Creative only to "give the impression of having a New York presence." (Id., ¶ 9). Rodriguez states that Creative has never maintained staff, or conducted any business from that location, and that Serrante has never worked or resided there (Id.), and that Serrante ceased being an employee of Creative in July of 2009.

Service of an income execution is governed by CPLR 5231(d), which relates:

Service upon debtor. Within twenty days after an income execution is delivered to the sheriff, the sheriff shall serve a copy of it upon the judgment debtor, in the same manner as a summons or . . . by certified mail return receipt requested provided an additional copy is sent by regular mail to the debtor. If service is by mail as herein provided, the person effecting service shall retain the receipt together with a post office certificate of mailing as proof of such service.

If the debtor defaults on the income execution, or the Sheriff is unable to serve the income execution, CPLR 5231(e) allows the following:

Levy upon default or failure to serve debtor. If a judgment debtor fails to pay installments pursuant to an income execution served upon him for a period of twenty days . . . the sheriff shall levy upon the money that the judgment debtor is receiving or will receive by serving a copy of the income execution . . . upon the person from whom the judgment debtor is receiving or will receive money personally within the county in the same manner as a summons or by certified mail return receipt requested . . .

Once service has been effected under CPLR 5231(d) and (e), CPLR 5231(f) requires the following.

Withholding of installments. A person served with an income execution shall withhold money then or thereafter due to the judgment debtor . . . and pay them over to the sheriff. If such person shall fail to so pay the

sheriff, the judgment creditor may commence a special proceeding against him for accrued installments.

From the initial submissions, it was unclear whether the sheriff had properly served Serrante. After oral argument on the motion, the court directed the parties to submit further papers on this issue. GJF submits the affidavits of Richard Obshatko, a supervisor of the Income Execution Division of the City of New York (Supplemental Affidavit, Ex. K & L), wherein he states that he reviewed the case card regarding service on Serrante, and that the card disclosed that service was made on September 15 by a Deputy no longer employed by the agency. The affidavits reflect service on Serrante at his New Jersey home (Ex. K) and service on him c/o Creative, at 10 Rockefeller Plaza (Ex. L). Attached to the affidavits are copies of the certified mail receipt and the first class certificate of mailing.

Accordingly, Serrante was properly served. His failure to make installment payments triggered CPLR 5231(e). The sheriff mailed the income execution to "Creative Interiors Plus, 10 Rockefeller Plaza, Attn Payroll" (Reply, Ex. G). The document was accepted and signed for at that location (Id.). This, in conjunction with Rodriguez's statement that Creative uses the Rockefeller address to create "an impression that his company had a presence in New York," is sufficient to establish proper service of the income execution on Creative. Creative's argument that Obshatko's affidavits are insufficient because he was not the Deputy who actually placed the service in the mail is

unpersuasive; nor is there a requirement that the signed return receipt be produced.

Creative's claim that Serrante no longer is one of its employees is suspect, especially in light of Rodriguez's deposition testimony (taken on August 24, 2010).

Rodriguez: When I have a job that I need somebody to have the knowledge to run that job and understand the business, that's what he does. . . .

Q. And when is the last time [Serrante] did that?

A. You could say he's doing that job for me right now.

Q. For Creative?

A. For Creative.

Q. Are you paying Mr. Serrante for that job?

A. No, not at this time.

(Rodriguez EBT, attached to supplemental affirmation, Ex. M, p. 64-

5). It is unlikely that Serrante, despite being removed from Creative's payroll in July 2009 (mere weeks after filling out the information subpoena), would continue to work for Creative through 2010 without compensation. Moreover, it is noted that Serrante's wife was, and remains, an employee of Creative (its bookkeeper), handling the payroll for the company. The conclusions that can be drawn from these facts, are, at present, speculative, and irrelevant to this motion.

That being said, there is insufficient proof submitted that Serrante was, in fact, paid by Creative between September 2009 (the date of service of the New York income execution) and the present. Accordingly, judgment cannot be granted for accrued installments from that period of time.

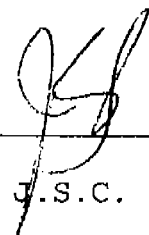
Finally, GJF's claim that 100% of Serrante's income should be paid towards satisfaction of the judgment under CPLR 5205(d) and

5226, which was first raised in the supplemental affirmation, is denied as such relief was not requested in the petition.

In accordance with the foregoing, it hereby is

ORDERED that, notwithstanding the validity of the income execution and its service, the petition for accrued installments is denied.

Dated: November 4, 2010

Enter:   
\_\_\_\_\_  
J.S.C.

NOV 8 2010

**FILED**  
NOV 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE