Bethpage Fed. Credit Union v TAJ Bldg. Prods. Co.
2010 NY Slip Op 33435(U)
November 30, 2010
Supreme Court, Nassau County
Docket Number: 025929-09
Judge: Timothy S. Driscoll
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

BETHPAGE FEDERAL CREDIT UNION,

Plaintiff,

-against-

TAJ BUILDING PRODUCTS CO., THOMAS JOHN, HILLSIDE GARDENS REALTY LLC and PHILLY GARDENS REALTY CORP.,

Defendants.

----------x

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 025929-09
Motion Seq. No: 4
Submission Date: 10/4/10

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibits.....x

This matter is before the Court for decision on the motion filed by Defendants on August 2, 2010 and submitted on October 4, 2010. For the reasons set forth below, the Court denies Defendants' motion and directs that the third party served with the subpoena at issue must comply with that subpoena by producing the requested documents and providing the requested oral testimony on or before January 14, 2011.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR § 2304, quashing Plaintiff's Subpoena Duces Tecum and Schedule A attached thereto (collectively "Subpoena"); and 2) pursuant to CPLR § 3101, granting a protective order with respect to the Subpoena.

Plaintiff Bethpage Federal Credit Union ("Plaintiff" or "Bethpage") opposes Defendants' motion.

B. The Parties' History

Bethpage previously obtained a default judgment ("Judgment") (Ex. 1 to Leiter Aff. in Opp.) dated February 9, 2010 in the sum of $785,323.30 against Defendants as a result of Defendants' nonpayment pursuant to certain commercial instruments executed in 2007, including a Promissory Note and Commercial Loan Agreement. By decision of the Court dated June 30, 2010 ("Prior Decision") (Ex. 2 to Leiter Aff. in Opp.), the Court denied Defendants' motion to vacate the Judgment.

In support of the instant motion, counsel for Defendants affirms that on or about July 15, 2010, Plaintiff served the Subpoena on Blanchfield, Meyer, Kober & Rizzo, LLP, the accountants for Defendants ("Accountants"). The Subpoena directs the Accountants to produce certain documents ("Documents") set forth on Schedule A to the Subpoena, and testify in court regarding the Documents. The requested Documents include, but are not limited to, 1) copies of all federal, state and local tax returns filed by or on behalf of Defendants Thomas John ("John"), TAJ Building Products Co. ("TAJ"), Hillside Gardens Realty LLC ("Hillside") and/or Philly Gardens Realty Corp. ("Philly") for the years 2003 through the present, and 2) copies of all work papers, financial records and other documents relating to or used for the preparation of federal, state and local tax returns filed by or on behalf of John, TAJ, Hillside and/or Philly for the years 2003 through the present.

Counsel for Defendants submits that the Subpoena is "clearly overbroad, excessively burdensome and went well beyond the scope of any information necessary to locate assets to enforce a judgment" (Vanderpuye Aff. in Supp. at ¶ 4). Counsel for Defendants affirms that much of the information sought was already in Plaintiff's possession and submits that the expense of producing the requested documents is "clearly prohibitive" (*Id.*).

Plaintiff opposes Defendants' motion. Counsel for Plaintiff affirms that, after obtaining the Judgment, Plaintiff sent John a subpoena duces tecum on February 18, 2010 that required him to appear for a deposition and produce documents on March 8, 2010 (Ex. 3 to Leiter Aff. in Opp.). John failed to appear for the deposition and failed to produce documents, as reflected by the deposition transcript for that proceeding (Ex. 4 to Leiter Aff. in Opp.). Despite being given

numerous opportunities to reschedule John's deposition, Defendants' counsel refused to reschedule that deposition. Plaintiff, therefore, filed a petition seeking to hold John in contempt for his non-compliance, and to compel John to turn over his shares in two entities so that those shares could be sold to satisfy the Judgment. Justice Brandveen, by decision dated June 22, 2010 ("Judge Brandveen Decision") (Ex. 5 to Leiter Aff. in Opp.) denied Plaintiff's application with leave to renew. The Judge Brandveen Decision was issued before the Court issued its Prior Decision denying Defendants' motion to vacate the Judgment.

Plaintiff affirms that it continued its "good faith efforts" (Leiter Aff. in Opp. at ¶ 7) to obtain documents and testimony from John following the Prior Decision, to no avail, as demonstrated by correspondence between counsel (Exs. 6 and 7 to Leiter Aff. in Opp.). On July 16, 2010, the same date on which Defendants' counsel again refused to provide documents or testimony, Plaintiff served the Subpoena on the Accountants. On July 28, 2010, Plaintiff's counsel spoke with Bruce Meyer ("Meyer"), a representative of the Accountants who advised Plaintiff's counsel that he was willing to cooperate with the Subpoena, and was in the process of collecting the responsive documents. Meyer did not complain that the Subpoena was burdensome or object to the scope of the Subpoena.

Unaware that Defendants had served the instant motion, Plaintiff's counsel sent a copy of the Subpoena to Defendants' counsel by letter dated July 28, 2010 (Ex. 9 to Leiter Aff. in Opp.). Defendants' counsel responded, via letter of the same date (Ex. 10 to Leiter Aff. in Opp.) in which she objected to the Subpoena and advised Plaintiff's counsel that "pursuant to CPLR [§] 3101, there will be no depositions or production of documents by either Defendants or their accountants pending disposition of our Motions by the court."

Plaintiff's counsel contacted Defendants' counsel in an effort to resolve this dispute as reflected by his letter dated August 2, 2010 (Ex. 11 to Leiter Aff. in Opp.). Defendants' counsel responded, via letter dated August 3, 2010 (Ex. 12 to Leiter Aff. in Opp.) by again objecting to the Subpoena; as noted by Plaintiff's counsel, Defendants' counsel made no efforts to resolve the dispute, such as offering to produce a subset of the requested documents or providing particularized objections to the documents sought by the Subpoena.

Plaintiff's counsel submits that the failure of Defendants' counsel is particularly troubling in light of the foreclosures of Defendants' properties, as reflected by a Notice of

Sheriff's Sale with respect to property owned by Defendant Philly (Ex. 13 to Leiter Aff. in Opp.) and Notice of Foreclosure Sale of Cooperative Apartments against Defendant John (Ex. 14 to Leiter Aff. in Opp.). Plaintiff's counsel contends that if Defendants are permitted to continue to stall the enforcement of the Judgment, there may be no assets left to satisfy the Judgment.

C. The Parties' Positions

Defendants submit, *inter alia*, that 1) the Subpoena is unreasonable because it seeks documents from 2003, which predate the loan agreement between Plaintiff and Defendants; 2) the information sought in the Subpoena is identical to information obtained by Plaintiff prior to the execution of the loan agreement; and 3) Plaintiff previously filed, in connection with a prior application in this matter, an accounting statement from the Accountants with respect to the financial condition of Defendant John as of December 31, 2007 (Ex. B to Vanderpuye Aff. in Supp.) and, therefore, should not be permitted to request information again from the Accountants.

Plaintiff submits, *inter alia*, that 1) Defendants have failed to provide factual support for their conclusory assertions that the Subpoena is overly broad and burdensome; 2) Defendants have failed to provide legal support for their application; 3) the Subpoena is appropriate because it seeks information material and necessary to the enforcement of the Judgment that, as a result of Defendants' conduct, Plaintiff cannot obtain through other means; 4) the documents sought by the Subpoena are relevant because it seeks information about Defendants' assets and liabilities, including revenue sources, that could be used to satisfy the Judgment; 5) Plaintiff has properly sought documents predating the execution of the loan documents as they may reveal information regarding assets that were fraudulently conveyed; 6) Defendant John's actions in failing to comply with the subpoena served upon him demonstrate that Plaintiff has been unsuccessful in obtaining the requested information from Defendants; and 7) Defendants have failed to comply with the procedural requirements of a discovery motion by a) failing to make a good faith attempt to reach a resolution of the discovery issue prior to bringing the motion; and b) failing to request a conference, pursuant to the applicable Commercial Rule.

RULING OF THE COURT

Preliminarily, the Court notes and shares Plaintiff's concern that Defendants have failed to make a good faith attempt to reach a resolution of the discovery issue prior to bringing this motion. *See Fanelli v. Fanelli*, 296 A.D.2d 373 (2d Dept. 2002) (trial court properly denied motion to quash subpoena and for protective order where counsel failed to provide required affirmation of good faith effort to resolve the dispute). While the Court does not countenance that failure, the Court will nevertheless address the merits of Defendants' motion.

CPLR § 5323 compels disclosure of all matter relevant to the satisfaction of the judgment. A judgment creditor is entitled to discovery from either the judgment debtor or a third party to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment. *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 A.D.3d 931, 932 (2d Dept. 2007), quoting *Young v. Torelli*, 135 A.D.2d 813, 815 (2d Dept. 1987).

CPLR § 5240 provides the court with broad discretionary power to control and regulate the enforcement of a money judgment under Article 52 to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice. *Technology Multi, supra*, at 932, quoting *Paz v. Long Is. R.R.*, 241 A.D.2d 486, 487 (2d Dept. 1997). Nonetheless, an application to quash a subpoena should be granted only 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. *Id.*, quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-332 (1988) (internal citations omitted).

In *Technology Multi, supra*, the Second Department held that the trial court had properly exercised its discretion in denying the motion of a nonparty to quash a subpoena served on it by plaintiff in the course of seeking to enforce its judgment against defendant. *Id.* at 932. In reaching that conclusion, the Second Department considered, *inter alia*, the fact that the defendant had failed to satisfy the judgment and had evaded all attempts by the plaintiff to obtain discovery in connection with enforcement of the judgment. *Id.* at 932-933.

Applying the foregoing principles to the matter at bar, the Court denies Defendants' motion to quash, and/or for a protective order, in light of 1) the Court's conclusion that the Subpoena properly seeks information regarding assets owned by the Defendants, and may also

reveal information reflecting whether Defendants have concealed any assets or transferred any assets so as to defraud Plaintiff, the judgment creditor, or improperly prevented the collection of the underlying Judgment, 2) John's failure to comply with the subpoena served on him, which necessitated the issuance of the Subpoena at issue, and 3) the Defendants' failure to satisfy the Judgment.

The Court directs Blanchfield, Meyer, Kober & Rizzo, LLP to comply with the Subpoena by providing the requested documents and testimony on or before January 14, 2011.

The Court directs counsel for Plaintiff to serve a copy of this Order with Notice of Entry on Blanchfield, Meyer, Kober & Rizzo, LLP, 1200 Veterans Memorial Highway, Suite 350, Hauppauge, New York 11788 via certified mail, return receipt requested, within ten (10) days of the date of this Order.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court notes that Defendants have filed another motion to quash a different subpoena (motion sequence number 5), and that motion is currently returnable before the Court on January 31, 2011. The Court directs counsel for the parties to appear before the Court on January 31, 2011 at 10:30 a.m. for oral argument on that motion.

ENTER

DATED: Mineola, NY
November 30, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE