

Swig v Properties Asset Mgt. Servs., LLC

2010 NY Slip Op 34107(U)

February 26, 2010

Supreme Court, New York County

Docket Number: 114519/09

Judge: Bernard J. Fried

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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KENT M. SWIG. :

Petitioner, :

-against- :

~~Index No. 602942/09~~

PROPERTIES ASSET MANAGEMENT
SERVICES, LLC, :

Respondent. :

-----X
SQUARE MILE STRUCTURED DEBT (ONE) :
LLC and SQUARE MILE STRUCTURED DEBT :
(THREE) LLC. :

Petitioners. :

-against- :

Index No. 114519/09

KENT M. SWIG, PROPERTIES ASSET
MANAGEMENT SERVICES, LLC and TERRA
HOLDINGS, LLC. :

Respondents. :

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Fried, J.:

These are two special proceedings under Article 52 of the CPLR being considered together for disposition. The first proceeding (Index No. 602942/09) is brought by the petitioner Kent M. Swig, in which he seeks a declaration that the respondent Properties Asset Management Services,

LLC ("PAMS") is not restrained from making payments to Swig for personal services under the Asset Management Agreement dated March 1, 1995 (the "Asset Management Agreement" between PAMS and Terra Holdings, LLC ("Terra Holdings"), requiring PAMS to make 90 percent of such payments pursuant to CPLR 5205(d) (the "Swig petition").

The second proceeding (Index No. 114519/09) is brought by the petitioners Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC (together, "Square Mile"), in which they seek an order, *inter alia*, directing the respondents Swig, PAMS and Terra Holdings to turn over to the petitioners the funds at issue in the Swig petition (the "Square Mile petition"). For the reasons that follow, I deny the Swig petition and grant the Square Mile petition.

On March 1, 1995, PAMS entered into the Asset Management Agreement with BHS Holdings, LLC ("BHS"), whose interests were succeeded by Terra Holdings. Swig holds a 25 percent ownership interest in PAMS. Pursuant to the Asset Management Agreement, PAMS acts as asset manager to Terra Holdings.

On July 27, 2009, judgment was entered in the amount of \$32,432,288.87 against Swig, pursuant to my decision dated July 17, 2009, in an action entitled *Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC v Kent M. Swig*, Index No. 603825/08, based upon Swig's default on a promissory note (the "Square Mile Action"). As Swig's judgment creditors, Square Mile thereafter issued restraining notices to all of the entities in which it believed Swig, judgment debtor, held an ownership interest. The restraining notices informed those entities that they were restrained from, *inter alia*, making any distributions to Swig, pursuant to CPLR 5222(b). Two such entities that received restraining notices, were Terra Holdings and PAMS.

At argument, judgment debtor Swig and judgment creditor Square Mile set forth their

arguments with respect to funds owed to Swig, pursuant to the Asset Management Agreement.¹

Swig argues that the funds are exempt from restraint by CPLR 5205(d) because they are characterized as compensation for his personal services. He claims that he needs the money to pay for family expenses, attorneys' fees and restructuring advisors.

Square Mile argues that the funds are characterized as compensation for the services provided by PAMS as asset manager to its customer Terra Holdings. It further argues that the funds ordinarily distributed to Swig, pursuant to the Asset Management Agreement, are in large part based upon a distribution of Terra profits in line with the percentage of membership interest Swig holds in PAMS. Thus, Square Mile argues that the funds are not exempt from restraint by CPLR 5205(d). I agree.

CPLR 5205(d)(2) provides:

Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as the court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment[.]

This statute requires a two prong analysis. First, a determination must be made as to whether the funds at issue are exempt from restraint. Second, if the funds are determined to be exempt, an inquiry must be made to determine whether such funds are necessary for the reasonable requirements of the judgment debtor and his dependents.

Turning to the first prong in the Article 52 analysis. The threshold question is whether the

¹ Respondent PAMS took no position in the argument and awaits the outcome of this petition. (See 10/21/09 Tr. at 33; 11/13/09 Tr. at 10-11).

funds that are the subject of the Swig petition are exempt under 5205(d).

“Traditionally, the judgment debtor bears the burden of claiming and proving the applicability of an exemption, but only when the exempt status of the property is unclear to the judgment creditor or a levying officer.” (*Balanoff v Niosi*, 16 AD3d 53, 56 [2d Dep’t 2005]). “By contrast, if property or funds are easily identifiable as exempt, the judgment debtor does not have the burden of claiming the exemption in order to benefit from its application.” (*Id.*). Here, I find that the funds are not easily identifiable as exempt because such identification requires an inquiry into the terms of the Asset Management Agreement. Thus, Swig bears the burden of proving the exemption.

Pursuant to the Asset Management Agreement, as asset manager to its customer Terra Holdings, PAMS receives a monthly base salary and incentive compensation for services, a portion of which is then allocated to Swig as a member of PAMS. (*See* Asset Management Agmt. § 2.1). Specifically, section 2.1 provides:

Compensation. (a) As compensation for its services hereunder, the Asset Manager [PAMS] and the Advisor [Jabel, Co.] shall receive an aggregate annual base salary (“Base Salary”) and incentive compensation (“Incentive Compensation”) as set forth in Schedule 3 annexed hereto and made a part hereof. The Base Salary and Incentive Compensation shall be allocated among members of the Asset Manager and the Advisor as set forth in Schedule 3.

Schedule 3 provides the computational formula for the Base Salary and the Incentive Compensation, and Swig is listed as a member of the Asset Manager, who receives a portion of the allocation. One component of the Incentive Compensation is “Operating Cash Flow,” which is defined in Schedule 3 as “operating profit of the Company, before deduction for depreciation and amortization and interest on loans outstanding of the Company or any Related Company.” The Company is defined

at the beginning of the Agreement as BHS, whom it is undisputed has been succeeded by Terra Holdings. Thus, Incentive Compensation is based in large part on the operating profits of Terra Holdings.

Therefore, contrary to Swig's position that the funds earned under the Asset Management Agreement are in exchange for his personal services, I find that they are attributable to PAMS as Asset Manager in exchange for its services provided to Terra Holdings.

Accordingly, having determined that the funds at issue in the Swig petition are not exempt under CPLR 5205(d), no further analysis under the second prong in the Article 52 analysis is necessary. Thus, my inquiry ends here.

In light of the foregoing, I find that Swig has failed to meet his burden of proving that the funds in question are exempt from CPLR 5205(d).

Accordingly, it is

ADJUDGED that the Swig petition (Index No. 602942/09) is denied and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that the Square Mile petition (Index No. 114519/09) is granted.

This constitutes the decision and judgment of this court.

Dated: February 26, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED