

Matter of RBC Capital Mkts. Corp. v Bittner
2011 NY Slip Op 31231(U)
May 9, 2011
Supreme Court, New York County
Docket Number: 106651/2008
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

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In the Matter of the Application of the Arbitration Between
RBC CAPITAL MARKETS CORPORATION,

Petitioner,

Index No. 106651/2008

- against -

BRIAN M. BITTNER,

Decision and Order

FILED

Respondent.

MAY 10 2011

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HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This Article 75 petition to confirm an arbitration award against respondent was granted by decision dated November 28, 2009. Petitioner seeks to compel respondent and respondent's attorney to comply with post-judgment subpoenas. Respondent cross-moves to renew and reargue this Court's prior decisions.

BACKGROUND

By decision and order dated April 20, 2009, this Court granted petitioner an additional 120 days to serve the pleadings upon respondent. By decision dated November 28, 2009, this Court granted the petition to confirm the arbitration award, and directed petitioner to settle judgment. Judgment against respondent was signed on February 1, 2010, and filed with the County Clerk on February 22, 2010, in the total amount of \$546,525.42.

Petitioner asserts that, on August 17, 2010, it personally served respondent in a public area outside of respondent's residence with an Information Subpoena with Restraining Notice, Subpoena Duces Tecum, and Subpoena For Taking Deposition. Alfano Affirm., Exs 1, 2. Petitioner also asserts that it sent, via certified mail, to respondent's counsel, Frederick Bittner Jr., an Information

Subpoena which directed Frederick Bittner Jr. to answer questions about respondent. Respondent served responses to petitioner's Information Subpoena and to petitioner's Subpoena Duces Tecum. *See* Alfano Affirm., Exs 11, 12.

Petitioner moves to compel respondent and his attorney to comply with the post-judgment subpoenas. According to petitioner, respondent did not appear for a deposition or comply with the subpoena duces tecum (Alfano Affirm. ¶43), but petitioner acknowledged that, after this motion was filed, respondent produced tax returns for years 2007-2010, but did not produce a tax return for 2006, which was requested in the subpoena duces tecum. Mem. in Further Support, at 12 n 1.

Respondent opposes the motion, claiming that petitioner "falsely reported" the judgment to various credit bureaus as a "tax lien," and that petitioner committed an abuse of process, and that petitioner violated the "Federal Debt Collections Practices Act" and "New York General Business Law's fair debt collection provision." Mem. at 16-19.

I.

Respondent's arguments in opposition to the motion are unavailing. As petitioner points out, the Fair Debt Collection Practices Act (15 USC 1692 *et seq.*) does not apply here to petitioner, which is a creditor.

"As a general matter, creditors are not subject to the FDCPA. However, a creditor becomes subject to the FDCPA if the creditor 'in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.' A creditor uses a name other than its own when it uses a name that implies that a third party is involved in collecting its debts, 'pretends to be someone else' or 'uses a pseudonym or alias.' Although a creditor need not use its full business name or its name of incorporation to avoid FDCPA coverage, it should use the 'name under which it usually transacts business, or a commonly-used acronym,' or any name that it has used from the inception of the credit relation."

Maguire v Citicorp Retail Services, Inc., 147 F3d 232, 235 (2d Cir 1998)(internal citations omitted). Here, petitioner, the creditor, was clearly identified on the subpoenas. *See* Alfano Exs 4-6, 8. To the extent that respondent argued that petitioner violated Article 29-H of the General Business Law, which also regulates debt collection practices, "the article does not create a private cause of action, but authorizes only the Attorney-General or a District Attorney to commence an action for violation of its provisions." *Varela v Investors Ins. Holding Corp.*, 81 NY2d 958, 961 (1993).

The Court has reviewed respondent's answers to the Information Subpoena (Alfano Affirm., Ex 11) and agrees with petitioner that respondent must supplement his responses to the Information Subpoena dated August 17, 2010 by fully answering questions 3, 4, 8, 9, 11, 15-22, and 32. Petitioner either did not answer these questions, partially answered these questions, or objected to the questions.

"CPLR 5223 compels disclosure of 'all matter relevant to the satisfaction of the judgment,' and sets forth 'a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property.'"

Gryphon Domestic VI, LLC v GBR Info. Servs., Inc., 29 AD3d 392, 393 (1st Dept 2006).

The questions in the Information Subpoena seek relevant information to enforce petitioner's judgment against respondent, and to determine the existence of other prior or current outstanding debts of respondent, which could affect the priority or recovery of petitioner's judgment.

The Court has also reviewed respondent's answers to the Subpoena Duce Tecum (Alfano Affirm., Ex 12) and agrees with petitioner that respondent must supplement his document by producing responsive documents from 2005 until March 12, 2010. The document requests of the Subpoena Duces Tecum covered the period from 2005 to the present, but respondent answered only

for the period since March 12, 2010. Like the Information Subpoena, the demands in the Subpoena Duces Tecum seek relevant documents as to respondent's possible assets to enforce petitioner's judgment against respondent. Petitioner may inquire about the period from 2005 until the present to determine what became of respondent's assets after respondent allegedly resigned his employment with petitioner in June 2005, and after the arbitration seeking repayment of respondent's indebtedness to petitioner was purportedly commenced in October 2005. "A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order '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 AD3d 931, 932 (2d Dept 2007).

Petitioner has demonstrated that it made good faith efforts to get respondent and Frederick Bittner, Jr. to respond to the subpoenas. Alfano Affirm. ¶¶ 33-43. Therefore, the Court compels respondent to appear for a deposition, and to provide supplemental responses to the information subpoena and to comply with the subpoena duces tecum, as indicated above.

Respondent's request for a deposition "by video communication" between New York City and Poughkeepsie (Bittner Aff. ¶ 34) is denied. Respondent states that he resides at "217 Haven Avenue, New York, New York 10033." *Id.* ¶ 1. The deposition subpoena requested respondent to appear for a deposition in New York County. Alfano Affirm. Ex 6. Respondent's choice of an attorney whose office is in Poughkeepsie, New York is not a valid basis for directing that petitioner examine respondent in respondent's attorney's office in Poughkeepsie, or that the deposition be conducted by video communication.

The Court notes that respondent did not raise any additional arguments specific to the

[* 6]

information subpoena upon respondent's attorney, Frederick Bittner, Jr., who is also respondent's father. Respondent stated that he "needs to borrow from relatives for any and all support" and received "borrowings from impoverished relatives." Alfano Affirm., Ex 11 [Answers Nos. 7 & 22]. The information subpoena served upon Frederick Bittner, Jr. contained the requisite certification under CPLR 5224 and was served by certified mail, return receipt requested in compliance with CPLR 5224 (a) (3). The return receipt was signed and returned to petitioner's counsel. Alfano Affirm., Ex 9. Given that the Court has rejected petitioner's arguments in opposition to petitioner's motion, and that Frederick Bittner, Jr. did not raise any objections particular to the information subpoena served upon him, the Court also compels Frederick Bittner, Jr. to comply with information subpoena mailed to him.

The letter dated December 6, 2010 from Frederick Bittner, Jr. is not an adequate response to the information subpoena. Alfano Affirm., Ex 22. Written answers to an information subpoena must be "under oath by the person upon whom served, if an individual." CPLR 5224 (a) (3). Moreover, the letter did not answer any question of the information subpoena "separately and fully" as required by the statute. *Id.*

The Court does not address respondent's allegations of abuse of process. There is no cause of action for abuse of process against petitioner before this Court. Respondent's allegation that petitioner falsely reported the judgment to credit bureaus as a "Manhattan Federal Tax Lien" or as a "Manhattan County Tax Lien" (Bittner Affirm., Ex D), which petitioner disputes, is not a defense to enforcement of the subpoenas, or indeed, to enforcement of the judgment.

Given all of the above, the branch of respondent's cross motion that seeks a protective order or supervision of the post-judgment discovery, and a deposition of petitioner, is denied.

II.

Turning to respondent's cross motion, respondent seeks to renew and reargue the Court's decision and order dated April 20, 2009, and the Court's decision dated November 28, 2009. Respondent contends that the arbitration award was not confirmed within one year after it was rendered, and that the award was not affirmed in accordance with CPLR 7507. Respondent argues that the merits of the petition were not reviewed when the Court granted petitioner an extension of the time to serve the pleadings, and asserts that respondent was not allowed to present a defense or counterclaim in the arbitration.

The branch of respondent's cross motion seeking reargument is denied. "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992)(internal citations omitted). Thus, respondent's arguments that the arbitration award was defectively affirmed, and that respondent was not allowed to present a defense or counterclaim during the arbitration, should have been raised in opposition to confirmation of the award.

Contrary to respondent's argument, the Court did consider the merits of the petition when it granted petitioner additional time to serve the pleadings. On page 9 of the Court's decision and order dated April 20, 2009, the Court stated, "Respondent has not articulated a ground for vacating the award." Because CPLR 7510 provides that "the court shall confirm an award . . . unless the award is vacated or modified . . ." that respondent failed to assert any ground to vacating the award established that the petition had merit, insofar as an extension of time to serve the pleadings.

The Court's decision and order dated April 20, 2009 rejected respondent's argument that the

petition was not timely commenced within a year after its delivery. The prior decision stated, in pertinent part:

"Respondent's argument that the petition should be dismissed as untimely under CPLR 7510 is without merit. The arbitrators signed the award on May 15, and May 16, 2007, and the petition was filed on May 13, 2008. Even assuming that the award was delivered on the day that award was signed, the petition was brought within one year of delivery of the award."

Respondent claims to have "recently learned on December 21, 2010 that the Petition to Confirm Arbitration Award. . . was date stamped by petitioner's attorney [on May 13, 2008] . . . which document was later properly date stamped at the County Clerk's office with the date, May 19, 2008 . . . which is the official filing date." Mem. at 3; see also Bittner Affirm. ¶¶ 13-16.

Renewal is denied. The "newly discovered" evidence of a copy of the notice of petition bearing a County Clerk date stamp of May 19, 2008 would not change the prior determination that the Article 75 proceeding was timely commenced on May 13, 2008. CPLR 2221 (e) (2). The Court takes judicial notice that the petition was scanned by the County Clerk on May 14, 2008. The scanned petition bears a "Filed" date stamp of "May 13, 2008." See http://10.132.37.7:8080/iscroll/C_PDF?CatID=COMPLAINTS&CID=116797&Fname=UCOMPSPET1066512008t84418 [accessed May 4, 2011]. Moreover, petitioner submits copies of County Clerk receipts, which apparently indicate that the index number and RJI were purchased on May 13, 2008. Most importantly, petitioner submits a copy of a decision dated May 14, 2008, wherein Justice Stallman declined to sign petitioner's order to show cause. The existence of a copy of the pleadings that bears a date stamp of May 19, 2008 only indicates that the particular copy was filed with the County Clerk on May 19, 2008, not that the proceeding was commenced on May 19, 2008.

CONCLUSION

Accordingly, it is hereby

ORDERED that petitioner's motion to compel respondent to comply with post-judgment enforcement subpoenas is granted, and it is further

ORDERED that, within 30 days of service of a copy of this order with notice of entry, respondent Brian M. Bittner shall

(1) appear and attend before a notary public of the State of New York at the offices of petitioner to be examined under oath concerning all matters relevant to the satisfaction of the judgment

(2) provide supplemental written answers to petitioner's information subpoena dated August 17, 2010 as to questions 3, 4, 8, 9, 11, 15-22 and 32;

(3) produce documents responsive to petitioner's subpoena duces tecum for the period from 2005 until March 12, 2010; and it is further

ORDERED that, within 30 days of service of a copy of this order with notice of entry, Frederick Bittner Jr. shall provide petitioner with written answers to the information subpoena dated August 17, 2010; and it is further

ORDERED that respondent's cross motion is denied.

Dated: May 9, 2011
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

MAY 10 2011

NEW YORK
COUNTY CLERK'S OFFICE