

**Commodore Factors Corp. v Habib Am. Bank**

2011 NY Slip Op 31297(U)

May 13, 2011

Supreme Court, New York County

Docket Number: 113342/10

Judge: Judith J. Gische

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SCANNED ON 5/17/2011

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 113342/2010  
COMMODORE FACTORS CORP.  
vs.  
HABIB AMERICAN BANK  
SEQUENCE NUMBER : 001  
MONEY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

**FILED**

MAY 17 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

*Motion decided in accordance  
with annexed decision + order*

Dated: 5/13/11

  
JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

MAY 17 2011

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

NEW YORK  
COUNTY CLERK'S OFFICE  
DECISION/ORDER

-----X  
COMMODORE FACTORS CORP.,

Petitioner,  
-against-

Index No.: 113342/10  
Seq. No.: 001, 002

HABIB AMERICAN BANK,

Respondent.

Present:  
Hon. Judith J. Gische  
J.S.C.

-----X

*Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):*

<b>Papers - 001</b>	<b>Numbered</b>
Pet's n/petition, verified petition, exhs .....	1
Resp Answer .....	2
2/17/11 Transcript .....	3

<b>Papers - 002</b>	<b>Numbered</b>
Resp's n/m (3212), AMT affid, SA affid, exhs .....	1
Resp Statement of Facts .....	2
HGR affid, exhs .....	3
Pet's Statement of Material Facts .....	3

*Upon the foregoing papers the decision and order of the court is as follows:*

In this action, petitioner seeks to hold the respondent-bank liable for a third-party judgment because, *inter alia*, respondent allegedly failed to freeze the third-party's accounts upon service of a restraining notice. In motion sequence number 001, petitioner seeks entry of a money judgment against the respondent. Respondent opposes that motion, and in motion sequence number 002, moves for summary judgment dismissing the petition, and for attorneys fees (22 NYCRR § 130 *et seq.*). Petitioner opposes that motion.

Because the disposition of each motion impacts the other, the court hereby consolidates them for its consideration and determination in this single decision/order.

Issue has been joined, and the note of issue has not yet been filed. Therefore, summary judgment relief is available (CPLR § 3212, Brill v. City of New York, 2 NY3d 648 [2004]).

The material facts are not in dispute. On October 13, 2009, petitioner commenced an action against non-party Atlantic Pacific Connections Inc. a/k/a Atlantic Pacific Group, LLC (the "Judgment Debtor") in New York Supreme Court bearing Index Number 603133/09, to recover damages. Thereafter, a judgment was entered in that action in favor of petitioner and against the Judgment Debtor in the amount of \$483,714.25. No part of this judgment has been paid or satisfied.

On March 21, 2010, a Restraining Notice together with an information subpoena was served on respondent at its New York branch located at 99 Madison Avenue, New York, New York. The Restraining Notice identified the Judgment Debtor as "Atlantic Pacific Connections Inc. a/k/a Atlantic Pacific Group LLC."

Respondent notes that the Restraining Notice had an address at 499 Seventh Avenue, 11<sup>th</sup> Floor, New York, New York 10018, and did not provide any account number or tax identification number for the Judgment Debtor. Respondent also highlights that the question number 1 of the Questionnaire referred to an account number 122041989 for the Judgment Debtor. Respondent claims that it does not have any accounts with this type of numbering.

Upon receipt of the Restraining Notice, respondent searched its account records

at the New York Branch under the names "Atlantic Pacific Connections Inc. a/k/a Atlantic Pacific Group LLC" as well as "Atlantic Pacific Connections Inc." and "Atlantic Pacific Group LLC" and found no accounts for the Judgment Debtor. Respondent then conducted a computer search of account records at all other branches and searched for "Atlantic Pacific Connections Inc. a/k/a Atlantic Pacific Group LLC" and "Atlantic Pacific Connections Inc." Respondent admits it did not search for "Atlantic Pacific Group LLC." Saheed Amin, Assistant Vice President of the Deposit Services Division of Respondent explains:

[Respondent] cannot computer search a category of accounts at other branches labeled "a/k/a", and thus could not search "a/k/a Atlantic Pacific Group LLC."

As a result, respondent did not find any accounts at other branches for either "Atlantic Pacific Connections Inc. a/k/a Atlantic Pacific Group LLC" or "Atlantic Pacific Connections Inc."

Apparently, respondent maintained four separate accounts for the Judgment Debtor: two checking accounts, a credit line account and a certificate of deposit ("CD") account. Further, substantial sums of money passed through those accounts after the Restraining Notice was served, and would have been sufficient to pay the Judgment.

Therefore, petitioner commenced this action, seeking to hold respondent liable for the judgment pursuant to CPLR §§ 5222, 5239. Petitioner maintains that respondent's response to the Restraining Notice and Information Subpoena and actions subsequent thereto were unreasonable under the facts and circumstances.

## Discussion

The court will first address the motion for summary judgment.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (Zuckerman v. City of New York, *supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

CPLR § 5222 requires the recipient of a restraining notice to retain up to twice

the amount due on a judgment. Violation of a restraining notice by the party served is punishable by contempt and subjects the garnishee to personal liability in a separate plenary action or a special proceeding brought by the judgment creditor (CPLR §§ 5222 [a]; 5251; see i.e. Aspen Indus. v. Marine Midland Bank, 52 NY2d 575 [1981]).

At its core, this case turns on the value of the Judgment Debtor's accounts held by respondent on March 21, 2010, the date the Restraining Notice was served. Respondent claims that since the two checking accounts each had negative balances, one account was a credit line, and the other was a CD which served as collateral for the credit line account, petitioner cannot recover against respondent for a violation of the restraint, since respondent did not owe the Judgment Debtor any money and otherwise had a superior right to set-off with respect to the CD account.

Petitioner, in turn, contends that there is are genuine issues of fact, to wit, that respondent has failed to establish that the accounts had no funds in them on March 21, 2010 and that respondent has failed to establish that the CD was collateral for the credit line account. Both of petitioner's arguments are rejected.

Respondent maintains that on March 21, 2010, the two checking accounts had a negative balance of nearly \$41,900. The account statements submitted to the court concerning the two checking accounts reveal that on 3/19, the first account had a balance of - \$41,899.60 and the other had a balance of \$19.44. The next business day, 3/22, the former account had a balance of - \$9,464.34 and the latter had a balance of \$5.56. As for the CD, that account served as collateral for the credit line account. A document entitled "Assignment of Deposit Account" which has been provided to the

court reveals that the CD was indeed pledged as collateral for the business credit loan account. Therefore, respondent's right to set-off with respect to that account was superior to petitioner's rights under the Judgment and Restraining Notice (see Aspen Indus., *supra*).

CPLR § 5222 (b) states that "[a] restraining notice served on 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 possession or custody of property in which he or she knows or has reason to believe the judgment debtor... has an interest..." Here, since respondent was not in possession of property in which the Judgment Debtor had an interest nor owed any debt to the Judgment Debtor on March 21, 2010, respondent did not violate the restraint. Petitioner has failed to raise an issue on this point. Therefore this petition must be dismissed. Given this result, the court need not consider respondent's remaining arguments.

Respondent also seeks an order awarding it its attorneys fees. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. While petitioner's arguments were rejected, the court cannot say that they were frivolous within the meaning of the court rule. The request for attorneys fees is denied.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that the motion for summary judgment is granted only to the extent the

**[\* 8]**  
petition is dismissed; and it is further

**ORDERED** that the motion for summary judgment is otherwise denied; and it is further


**ORDERED** that Clerk is directed to enter a judgment in favor of the respondent and against the petitioner dismissing the petition.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
May 13, 2011

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

MAY 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE