

Matter of Bethpage Fed. Credit Union v John

2011 NY Slip Op 31652(U)

April 19, 2011

Supreme Court, Nassau County

Docket Number: 20089/10

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

In the Matter of the Application of:
BETHPAGE FEDERAL CREDIT UNION,
For Turnover of Debtor's Assets and Other Relief
Pursuant to Article 52 of the N.Y. *Civil Practice Law
& Rules*,
Petitioner,

TRIAL / IAS PART 30
NASSAU COUNTY
Index No. 20089/10
Motion Sequence No. 001

- against -

THOMAS JOHN,
Respondent.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

This motion was transferred here by an order of the Hon. F. Dana Winslow dated February 8, 2011 as this court had rendered a decision in a prior action entitled *In the Matter of the Application of Bethpage Federal Credit Union, For Turnover of Debtor's Assets and Other Relief Pursuant to Article 52 of the N.Y. Civil Practice Law & Rules v THOMAS JOHN, Index No 5653/10* by Order, dated June 22, 2010 involving the same parties for the same or similar relief.

This underlying action herein for monetary damages was commenced on or about December 18, 2009 under Index No. 025929/09. On February 9, 2010 the plaintiff was granted a Default Judgment against the defendants in the amount of \$774,505 plus interest and costs. In a prior order of this court under Index No. 5653/10 of June 22, 2010 this court denied the petition by the plaintiff for an order to compel the Respondent to turnover his interests in two business entities and to hold

the Respondent THOMAS JOHN in contempt as a motion to vacate the Default Judgment was pending before another Justice of this court. In an order dated June 30, 2010 the Hon. Timothy Driscoll of this court denied the motion by the Respondents to vacate the Default Judgment.

The Petitioner herein BETHPAGE FEDERAL CREDIT UNION now moves this court by an order to show cause for an order pursuant to CPLR §§ 5225 and 5228: (i) compelling the Respondent THOMAS JOHN (JOHN) to endorse and deliver his shares in the business entities which he owns in whole or in part, as listed in the Verified Complaint, for which he possesses stock certificates, share certificates or other written certificates of ownership that are capable of being endorsed in blank to the Nassau County Sheriff for Petitioner's benefit so that the certificated interests can be sold in seriatim at public auction to satisfy Petitioner's February 9, 2010 Default Judgment; (ii) appointing a receiver for the business entities, as listed in the Verified Complaint, which JOHN owns in whole or in part for which no certificate of ownership capable of being endorsed in blank to the Nassau County Sheriff exists and ordering the receiver to administer and/sell those business entities in a manner necessary to satisfy Petitioner's February 9, 2010 Default Judgment.

In an affirmation in support of the motion, MONICA M.C. LEITER, attorney for plaintiff, argues that in its prior petition of March 2010 plaintiff had sought an order requiring Respondent JOHN to turnover his shares in two entities, Hollis Gardens Realty Corp.(Hollis) and Bailey Gardens Realty Corp.(Bailey). Plaintiff alleged that based on documents JOHN had provided to plaintiff in connection with the underlying promissory note that Hollis and Bailey owed Respondent JOHN a combined summary judgment in excess of \$7,000,000 and owed additional money to Respondent TAJ which was wholly owned by Respondent JOHN. Plaintiff alleges that Respondent JOHN has fraudulently conveyed his interest in Hollis and Bailey to a third party after he was served with the underlying complaint. Plaintiff further alleges that Respondent JOHN has refused to comply with plaintiff's lawful attempts to obtain post-judgment discovery causing plaintiff to

needlessly incur the expense of the March 2010 Petition. Petitioner contends that other creditors of Respondent JOHN are activity foreclosing upon the Respondent's remaining assets and unless the court orders the Respondent to turn over the demanded assets for sale plaintiff will never be able to enforce its judgment.

The plaintiff submits a Statement of Financial Condition dated December 31, 2007 provided by the Respondent that contains, inter alias, a detailed list of the Respondent's holding in numerous closely held corporations and limited liability corporations that invested in residential and commercial real estate. Plaintiff asserts that Respondent JOHN is a debtor in possession of assets that can be used to satisfy its judgment.

In an affirmation in opposition, Kwarma Vanderpuye, attorney for Respondent, denies that the transfer of the Hollis and Bailey properties were fraudulent. Counsel asserts that at the time the stock pledge of these properties were made on December 31, 2009 Respondent owed Signature Bank, the party to whom the stock was transferred the sum of \$2,736,338.47. Counsel argues that under New York Debtor and Creditor Law, if a transfer is made for fair consideration, the conveyance is not fraudulent. Counsel further argues that Respondent is no longer in possession of the vast majority of the assets claimed by petitioner having lost most to foreclosure and the change in economic conditions and that petitioner is aware of these facts. Counsel asserts that the appointment of a receiver would be unduly harsh as the Respondent is responsible for paying a mortgage on those same properties from the rents owed on those properties and that the appointment of a receiver would impare upon the rights of the various mortgage holders as well as the rights of other shareholders.

The defense counsel also refers to two motions it had filed with this court which were pending under Index No. 5653/10 at the time of the submission of this motion. In an order dated December 1, 2010 this court denied the motion by the Respondent to quash Petitioner's Subpoena Duces Tecum and for a protective order from the disclosure sought by the Petitioner. In an order

dated March 10, 2011 this court denied the motion by the Respondent for stay of all proceeding in this matter.

CPLR 5225 provides:

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

In his commentaries to section CPLR 5225 Professor David Siegel discusses the use of CPLR 5225 as a device used by the judgment creditor.

See McKinney's Consolidated Laws of New York C5225:1. Delivery or "Turn-Over"

Direction.

The primary burden of the judgment creditor under CPLR 5225 is one of proof. The court will not direct the judgment debtor to pay over money, for example, unless it has been clearly established that the judgment debtor has money to pay over. Nor will it compel the judgment debtor to deliver property that has not clearly been shown to be in the judgment debtor's possession or control. Useful though this device is, therefore, the judgment creditor must approach it armed with a convincing array of evidence. The judgment creditor will usually find it helpful to exploit CPLR 5223 and 5224, the disclosure provisions, in advance of an application under CPLR 5225, deposing the judgment debtor and others about the defendant's property, and/or using an information subpoena under CPLR 5224(a)(3). This enables the creditor to gather up all possible data to convince the court that the judgment debtor has money or property applicable to the judgment.

When the judgment is substantial, it may behoove the judgment creditor to conduct an extensive investigation on the side, to muster the needed proof. Herein lies the drawback of CPLR 5225, and of the other so-called "supplementary proceedings", meaning all of the enforcement devices except the executions. They often put the judgment creditor to time, trouble, and expense to gather evidence, and thus end up of practical benefit only in connection with substantial judgments, or wealthy judgment creditors. The supplementary proceeding devices may be needed just as much to help in the enforcement of a small judgment, but for reasons of economics they are beyond its reach.

Accordingly, in accord with the prior orders of this court of December 1, 2010 and March 10, 2011 the motion is granted conditionally. The Respondent hereby is ordered to respond to all of Petitioner's post-judgment discovery demands, including Petitioner demand for an examination of the Respondent within 45 days of service of a copy of this order with Notice of Entry. If the Respondent fails to comply with this order the motion is granted in its entirety. This constitutes the order and judgment of the court.

So ordered.

Dated: April 19, 2011

ENTER:

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

APR 21 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**