

Cohan v Movtady

2011 NY Slip Op 31724(U)

June 14, 2011

Supreme Court, Nassau County

Docket Number: 2845/11

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

In 2009, petitioners commenced a civil action against respondent in the United States District Court, Eastern District of New York (the "Federal Action"). On November 2, 2010, the Clerk of the Court in the Federal Action entered a Judgment against respondent in the amount of \$5,374,240.55. Petitioners filed Abstracts of Judgment in the Nassau County Clerk's Office on December 7, 2010. On January 14, 2011, petitioners' counsel served respondent with a *subpoena duces tecum* by certified mail, return receipt requested, and by regular mail. Petitioners submit that respondent signed for and received the certified mail copy of the *subpoena duces tecum* on January 19, 2011. Petitioners further submit that respondent did not appear in petitioners' counsel's office in compliance with the aforementioned *subpoena duces tecum*, nor has he produced any documents or information in response thereto. Petitioners argue that respondent has wholly failed to pay the Judgment and has wrongfully refused and neglected to do so and said refusal was calculated to defeat, impair, impede and prejudice the rights of petitioners.

Petitioners additionally submit that respondent is the sole owner of Tilden LLC, Kadilac Mortgage Bankers, Ltd. and Surf Breeze, LLC and is a fifty percent (50%) owner of LI Business LLC. Petitioners argue that, because respondent has refused to satisfy the Judgment, he should be ordered to turn over his ownership interests in these entities pursuant to CPLR § 5225(a) and once respondent complies with a turnover order and conveys his ownership interest in the aforementioned businesses, the parties shall have the opportunity to establish the value of those interests through a hearing before the court.

Petitioners further submit that they are entitled to an order, pursuant to CPLR § 5225, directing respondent to provide petitioners with expedited discovery, including production of

documents and testimony under oath, concerning the value of his ownership interest in Tilden LLC, Kadilac Mortgage Bankers, Ltd. and Surf Breeze, LLC and a hearing to establish the value of those interests.

In opposition to petitioners' application, respondent argues that (1) there has never been a Court order that was ever issued that respondent allegedly violated; (2) the notice of deposition and *subpoena duces tecum* upon respondent is legally deficient and cannot be enforced, much less the basis for a finding of contempt of court; (3) the supplementary discovery served upon the non-party entities is "null and void" under the applicable provisions of the CPLR and also cannot be the basis for a finding of contempt of court; (4) a turnover proceeding must be brought by Notice of Motion under CPLR 5225(a) - not bootstrapped to a legally deficient Order to Show Cause; (5) Article 52 of the CPLR sets forth an extensive and mandatory statutory mechanism for a party to enforce a judgment. Petitioners' Order to Show Cause seeks to circumvent those statutory requirements; (6) the request to set a hearing to determine the value of property of certain non-party entities should be summarily denied pursuant to the statutory strictures of Article 52 of the CPLR. Respondent adds that he has no objection to setting up an appropriate discovery schedule that complies with both the substantive and procedural requirements of the CPLR.

With respect to respondent's first argument, that there has never been a court order that respondent has violated, respondent is incorrect in his argument that a violation of a court order could only be the basis for an order of contempt against him. The "[r]efusal or willful neglect of any person to obey a subpoena...issued pursuant to [CPLR Article 52]...shall be punishable as a contempt of court." *See* CPLR §5251.

With respect to respondent's second argument, respondent submits that, pursuant to CPLR § 3110(1), "[a] deposition within the state on notice shall be taken: (1) when the person to be examined is a party or an officer, director, or member or employee of a party, *within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending;*" (emphasis added). Petitioners' own petition alleges that "[r]espondent Mordechay Movtady is an individual residing at 17 Fir Drive, Kings Point, NY 11024." Petitioners also do not allege that respondent "has an office for the regular transaction of business" in New York County. Petitioners' *subpoena duces tecum* commanded respondent to "appear and attend before Kaufmann Gildin Robbins & Oppenheim LLP, attorneys for judgement creditors Perry Cohan and Rezvan Lahiji, at 777 Third Avenue, 24th Floor, New York, New York 10017 on the 10th day of February 2011 at 10:00 o'clock in the forenoon and at any recessed or adjourned date for the taking of a deposition under oath upon oral or written questions on all matters relevant to the satisfaction of said judgment." Since respondent is a Nassau County resident and all of his alleged businesses are located in Nassau County, scheduling the deposition in New York County was in violation of CPLR § 3110(1) and makes said *subpoena duces tecum* defective on its face. Consequently, respondent cannot be held in contempt for allegedly violating a defective *subpoena duces tecum*. Therefore, petitioners' application to find respondent in contempt is denied.

With respect to respondent's third argument that the supplementary discovery served upon the non-party entities is "null and void" under the applicable provisions of the CPLR and also cannot be the basis for a finding of contempt of court, respondent argues that pursuant to CPLR § 5224(3)(i) and (ii), "information subpoenas, served on an individual or entity other than the judgment debtor, may be served on an individual, corporation, partnership or sole

proprietorship only if the judgment creditor or the judgement creditor's attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting his or her judgment. Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT....(ii) if an information subpoena, served on an individual or entity other than the judgment debtor, does not contain the certification provided for in subparagraph (i) of this paragraph, such subpoena shall be deemed null and void." The Court notes that the information subpoenas served upon non-parties Kadilac Mortgage Bankers, Ltd. and Surf Breeze, LLC did not contain the aforementioned mandatory certification and therefore are null and void pursuant to CPLR § 5224(3)(i) and (ii).

With respect to respondent's fourth and fifth arguments, that a turnover proceeding must be brought by Notice of Motion under CPLR 5225(a) (not bootstrapped to a legally deficient Order to Show Cause) and that Article 52 of the CPLR sets forth an extensive and mandatory statutory mechanism for a party to enforce a judgment and that petitioners' Order to Show Cause seeks to circumvent those statutory requirements, the Court notes the following:

"CPLR contains the device used by the judgment creditor when it can be established that the judgment debtor or garnishee has possession of money or property subject to application to the judgment....The primary burden of the judgment creditor under CPLR 5225 is one of proof.

The court will not direct 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 the 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." See N.Y. CIVIL PRACTICE LAWS AND RULES CPLR §5225 (McKinney 1997).

As the Court has already found that petitioners' *subpoena duces tecum* for respondent was defective and petitioners' information subpoenas for non-parties Kadilac Mortgage Bankers, Ltd. and Surf Breeze, LLC were null and void pursuant to CPLR § 5224(3)(i) and (ii), petitioners lack any proof that the property at issue is in respondent's possession or control. Consequently, petitioners request for a turnover order pursuant to CPLR § 5225 is denied.

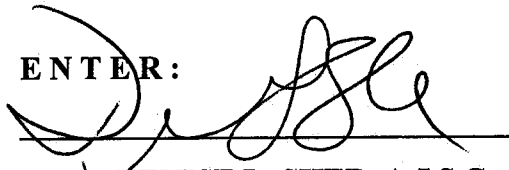
With respect to respondent's sixth argument, that the request to set a hearing to determine the value of property of certain non-party entities should be summarily denied pursuant to the statutory strictures of Article 52 of the CPLR, respondent argues that the scheduling of such a hearing must necessarily follow petitioners' compliance with the previously mentioned statutory provisions of the CPLR - both substantive and procedural. As previously stated, petitioners have failed to prove that the property at issue is in respondent's possession or control, therefore there is no need at this time for a hearing with respect to the value of said entities. Consequently, petitioner's request for said hearing is also denied.

The Court once again notes that respondent does not have any objection to setting up an

appropriate discovery schedule that complies with the substantive and procedural requirements of the CPLR.

Based upon all of the above, petitioners' application is hereby **DENIED** and the petition is dismissed.

This constitutes the Decision and Order of this Court.

ENTER: 
DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
June 14, 2011

ENTERED
JUN 17 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE