

Cadlerock Joint Venture, L.P. v Bersson

2012 NY Slip Op 31976(U)

July 18, 2012

Supreme Court, New York County

Docket Number: 604191/2006

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA R. KAPNICK
J.S.C.

PRESENT: _____
Justice

PART 39

Index Number : 604191/2006
CADLEROCK JOINT VENTURE, L.P.
VS.
BERSSON, DAVID S.
SEQUENCE NUMBER : 011
PUNISH FOR CONTEMPT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is *decided in accordance with the accompanying memorandum decision.*

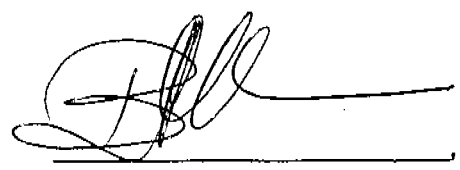
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/18/12


_____, J.S.C.

BARBARA R. KAPNICK
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x
CADLEROCK JOINT VENTURE, L.P.,

Plaintiff,

-against-

DAVID S. BERSSON, DAVID COOPER, MEL
COOPER, and SARAH C. HILLER,

Defendants.
-----x

BARBARA R. KAPNICK, J.:

Motion seq. nos. 009 and 011 are consolidated herein for
disposition.

DECISION/ORDER
Index No. 604191/06
Motion Seq. No. 009
and 011

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In motion seq. no. 009, plaintiff Cadlerock Joint Venture, L.P. ("Cadlerock") moves, pursuant to CPLR 2308, 5210 and 5251, to punish defendant/judgment debtor David Cooper by fine, the costs of this motion or imprisonment, or both, for contempt of, violation of and non-compliance with the Order of this Court dated September 1, 2010, as well as the Judicial Subpoenas Duces Tecum, each dated March 25, 2009, and for conduct that was calculated to, or actually did defeat, impair, impede or prejudice plaintiff's rights or remedies, in that the defendant failed to produce documents ordered by this Court and required by Subpoena, and to compel defendant David Cooper to comply with said Order and Subpoenas.

In motion seq. no. 011, plaintiff moves pursuant to the same

sections of the CPJR, to punish Cara Ottilio-Cooper (the wife of defendant/judgment debtor David Cooper) by fine, the costs of this motion or imprisonment, or both, for contempt of, violation of and non-compliance with the Judicial Subpoenas Duces Tecum, dated May 11, 2011, and for conduct that was calculated to, or actually did defeat, impair, impede or prejudice plaintiff's rights or remedies, in that Mrs. Ottilio-Cooper failed to produce documents required by Subpoena and failed to appear for her deposition, and to compel her to comply with said Order and Subpoenas.

Plaintiff holds a Judgment by assignment against the defendants in this case in the sum of \$335,243.55 which was filed in the New York County Clerk's Office on May 7, 2007. Based on the Judgment, plaintiff served a Judicial Subpoena Duces Tecum dated March 25, 2008 on defendant David Cooper. While David Cooper did appear for a deposition on February 17, 2010, he allegedly has not complied with plaintiff's document requests.

In addition, this Court issued an Order dated September 1, 2010 directing David Cooper (and his father, co-defendant Mel Cooper) to turn over documents requested in the Subpoena and during the post-judgment deposition held on February 17, 2010. However, according to Cadlerock, judgment-debtor David Cooper has failed to produce any of the documents required by said Order, despite

numerous requests by plaintiff and conferences with this Court. David Cooper contends that all responsive documents were already provided prior to the February 17, 2010 deposition and that any newly discerned documents were attached to the opposition papers dated April 29, 2011.

By Interim Order dated May 13, 2011, this Court directed Cadelrock "to issue a subpoena to [David] Cooper's wife directly for mortgage-related documents and for her deposition" based on David Cooper's testimony that those records and the management of the mortgage account are handled by his wife.

Apparently, Subpoenas Duces Tecum were served on Mrs. Ottilio-Cooper in May 2011 and Cadelrock contends that she too is refusing to comply with those Subpoenas by failing to produce documents or to appear for a deposition.

In opposition papers dated October 2011, Mrs. Ottilio-Cooper claimed that she had just given birth to her first child, and was the child's primary care giver, making it difficult for her to respond to the Subpoenas or be away from her son long enough to appear for a deposition.

The Court adjourned these motions several times and on

February 28, 2012, counsel for Mrs. Ottilio-Cooper raised for the first time the issue of whether or not her individual accounts were discoverable pursuant to the post-judgment Subpoena served on her. The Court gave each side time to submit short letter briefs to address this one issue. Steven Giordano, Esq. Of Vlock & Associates, P.C. submitted a letter on behalf of plaintiff Cadlerock dated March 6, 2012. Harmon Lutzer, Esq. submitted a letter on behalf of Cara Ottilio-Cooper on March 14, 2012. Michael Fishman, Esq. Of Monteiro & Fishman LLP also submitted a letter on March 14, 2012 on behalf of David Cooper.

CPLR 5223 governs the scope of disclosure regarding post judgment subpoenas. It provides in relevant part that "[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena. . . ." (emphasis added).

CPLR 5223 "permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property." *ICD Group v. Israel Foreign Trade Co. (USA)*, 224 AD2d 293, 294 (1st Dep't 1996).

The judgment creditor is entitled to seek disclosure in respect of "all matter relevant

to the satisfaction of the judgment." This is a generous standard and permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential.

Relevancy is the central theme. An attempt to delineate the inquiries that can be made or the materials that can be elicited would be futile. Illustrations abound. A joint income tax return, for example, is discoverable even though only one of the spouses is the judgment debtor. It is relevant to the judgment debtor's income and property.

David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5223:2.

In *Estate of Robert Marceca*, 2006 N.Y. Misc. LEXIS 5240, at *9 (Sur Ct, NY Co 2006), the executors of an estate sought an order to compel respondent's wife, who was not a party to the action, to answer a Subpoena Duces Tecum enabling petitioners to enforce an outstanding judgment. The respondents maintained that the requested discovery improperly inquired into the finances of the respondent's wife. The Court stated in relevant part:

The function of the post-judgment disclosure is to enable a judgment creditor to learn whether the judgment debtor has the means to satisfy the outstanding obligation. The scope of permissible disclosure includes direct inquiry of the judgment debtor's family and friends, and any third person who can provide information, identify, or locate property which may be used to satisfy the judgment.

Id. (internal citations omitted). The Court then held that ". . .

the finances of respondent's wife . . . are proper subjects of inquiry to the extent of respondent's interests therein." *Id.* (citing *Oates v. Oates*, 33 AD2d 133 [1st Dep't 1969] [upholding a post-judgment subpoena served on judgment debtor's mother alleged to hold joint bank accounts with debtor]).

Here, Cadlerock maintains that Ottilio-Cooper's individual records are all relevant under a broad reading of CPLR 5223. See *Raji v. Bank Sepah-Iran*, 139 Misc2d 1026 (Sup Ct, NY Co 1988) which states, "[t]his is a generous standard and permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential." Further, in *Siemens & Halske v. Gres*, 77 Misc2d 745 (Sup Ct, NY Co 1973), *aff'd* 43 AD2d 1021 (1st Dep't 1974), the Court stated that "the public policy is 'to put no obstacle in the path of one seeking to secure the enforcement of a judgment of a court of competent jurisdiction.'"

Mrs. Ottilio-Cooper argues, however, that the "all matters relevant to the satisfaction of the judgment" standard set forth in CPLR 5223 should be strictly construed in situations involving non-parties. She cites numerous cases attempting to bolster her position that New York courts have routinely quashed or otherwise failed to enforce Subpoenas which seek the individual, personal

or proprietary information of a non-party witness, as plaintiff attempts to do here. However, this Court finds that these cases are not applicable to the facts here, where David Cooper has testified that his wife controls the mortgage accounts and other financial matters.

While Mrs. Ottilio-Cooper maintains that Cadlerock is not entitled to her personal, private information, she asks that to the extent this Court believes that her personal bank accounts are discoverable, that any line item regarding her personal expenses be redacted and only items be disclosed as they relate to the judgment debtor. This Court declines to order such redactions.

Accordingly, the Court directs that Mrs. Ottilio-Cooper produce all her bank account statements from May 7, 2007, the date of the Judgment, to the present, to plaintiff's attorney within 30 days of the date of this Order, and appear for a deposition within 30 days after that.

After 60 days have transpired, the issue as to whether defendant David Cooper and non-party Cara Ottilio-Cooper have fully complied with the Subpoenas served upon them by plaintiff shall be referred to a Special Referee who shall be designated to hear and report with recommendations to this Court.

It is ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date, after September 20, 2012, upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available Special Referee to hear and report as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax or e-mail an Information Sheet¹ containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties and the non-party of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part, and it is further

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/suptctmanh under "References" section of the "Courthouse Procedures" link.

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury and, except as otherwise directed by the Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of this Court.

Date: *July 18,* 2012

Barbara R. Kapnick
J.S.C.

FILED

JUL 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

**BARBARA R. KAPNICK
J.S.C.**