

Amazon Concrete, Inc. v Maffei
2013 NY Slip Op 33856(U)
February 15, 2013
Supreme Court, Westchester County
Docket Number: 63199/12
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED
/ /13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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AMAZON CONCRETE, INC.,

Petitioner,

MOTION DATE: 2/8/13
INDEX NO.: 63199/12

-against-

MASSIMO MAFFEI a/k/a MAX MAFFEI, ROBIN HEXNER
a/k/a ROBIN HEXNER-VINGO a/k/a ROBIN VINGO and
484 MAIN STREET REALTY CORP.,

Respondents.

-----X

The following papers numbered 1 to 15 were read on this petition for post-judgment enforcement relief pursuant to CPLR 5227 and/or CPLR 5225, subd. (b), and on this cross-motion for an Order dismissing the petition.

Papers Numbered

Amended Notice of Petition - Petition - Exhs. (A-K) -	
Memorandum of Law	1-4
Notice of Cross-Motion - Affirmation (Vlock) - Affidavits	
(Maffei, Hexner) - Exh. - Memorandum of Law	5-10
Answering/Replying Memorandum of Law	11
Replying Affidavits (Henning, Maffei) - Exh. - Memorandum	
Of Law	12-15

Upon the foregoing papers, it is Ordered that this petition for post-judgment enforcement relief pursuant to CPLR 5227 and/or CPLR 5225, subd. (b), and this cross-motion for an Order dismissing this proceeding are disposed of as follows:

Judgment had been entered, on or about July 2, 2009, in the amount of \$325,760.36 in petitioner's favor on its cross-claim against non-party Maxx Construction ("Maxx"), in a Kings County action entitled Nycon Supply Corp. against Maxx Construction and Amazon Concrete.¹ A prior attempt by petitioner to satisfy this judgment through levy by the Westchester County Sheriff had been unsuccessful.

Petitioner had ascertained in connection with supplementary judgment enforcement proceedings during which respondent Maffei, owner and president of Maxx Construction, Inc., had testified, that Maxx Construction, Inc. did not file any tax returns after 2009, but that, in its 2009 Federal Income Tax Return for an S Corporation, Maxx Construction, Inc. had listed as an asset "due" it in the sum of \$114,031 from non-party Park Avenue, "the 280 Park debt," of which respondent Maffei is the owner of 280 Park Avenue, Harrison, New York.

Also, petitioner states that Maxx Construction, Inc.'s 2009

¹As of July 1, 2012, the amount owed on this judgment is \$413,715.65.

tax return also lists as a then current asset payment "due" it the sum of \$70,731 from non-party 33 Brown Place, "the 33 Brown Place property," located in Harrison, New York, of which respondents Maffei and Hexner are the owners.

Additionally, petitioner states that Maxx Construction, Inc.'s 2009 tax return also lists as a then current asset a payment "due" it in the sum of \$38,544 from 3606 Edgehill Road "the 3606 Edgehill property," located in Yorktown Heights, New York. According to petitioner, the 3606 Edgehill property is jointly owned by respondents Maffei and Hexner.

Further, petitioner states that Maxx Construction, Inc.'s 2009 tax return also lists as a then current asset a payment "due" it in the sum of \$146,998 from 3316 Rombouts, "the 3316 Rombouts property." According to petitioner, the 3316 Rombouts property, located in the Bronx, New York, is jointly owned by respondents Maffei and Hexner.

Finally, petitioner states that Maxx Construction, Inc.'s 2009 tax return also lists as then current assets a payment "due" it from 484 Main St. Realty in the sum of \$4,236.00, and a payment "due" it from 484 Main Street Corp. in the amount of \$78,931.00. According to petitioner, respondent Maffei is the owner of real property in Beacon, New York known as 484 Main Street.

Based upon those above representations of Maxx Construction,

Inc. set forth in its 2009 tax return as to debts "due" it from the above identified five "Entities," petitioner presently is seeking to enforce its judgment herein against each respondent pursuant to CPLR 5227 and/or for a Turnover Order pursuant to CPLR 5225, subd. (b).

In opposition thereto, respondents are cross-moving for an Order dismissing this petition, arguing that there are no loans due and owing from respondents to non-party Maxx Construction, Inc., without which it is argued no basis for this proceeding exists, that the Statute of limitations bars this proceeding as against respondent 484 Main Street Realty Corp. and that the Statute of Fraud bars this proceeding as against all respondents. In partial support thereof, respondent 484 Main Street Realty Corp. has submitted a copy of its 2009 tax return which, respondents contend, establishes conclusively that 484 Main Street Realty Corp. owed Max Construction, Inc. nothing in 2009.

Respondent Maffei submits his affidavit wherein he states:

I have never prepared, authorized, or signed a promissory note to pay any money to Maxx Construction, Inc. and I have never had any written or oral agreement to pay any money to Maxx construction, Inc. I have never received any money as a loan from the company or with the requirement that I pay it back at any time. I have never made any payments to Maxx Construction, Inc. for loans or any other type of money due by me. Nor have I ever paid any principal or interest or otherwise agreed to pay any principal or interest on anything remotely similar to a loan.

Respondent Maffei further avers that Maxx Construction, Inc. never has lent him money, and he expressly denies that he is personally liable for purported debts which petitioner asserts are due from Park Avenue, 33 Brown Place, 3606 Edgehill Road, and 484 Main Street Realty Corp. Maffei expressly denies that he ever has owed money to Maxx Construction, Inc. through these entities, and that these entities do not owe any money to Maxx Construction, Inc.

Respondent Hexner submits a substantively identical affidavit to that of Maffei.

Moreover, to the extent that a review of Maxx Construction, Inc.'s Federal tax return from 2005 "shows that the money which Petitioner is seeking [from 484 Main Street Corp.] was listed on the return at that time," respondents argue that the six-year statute of limitation bars recovery on any such loan and thus that petitioner's claim based thereon necessarily too is time-barred.

In their replying papers, respondents also have submitted an affidavit from Steven L. Henning, a licensed public accountant, a self-proclaimed expert in litigation matters that address improper financial or tax reporting. Mr. Henning has reviewed the 2009 Federal tax return for Maxx Construction here in issue, and specifically those five entries identified by petitioner as being debts or loans of the five identified entities, as well as Maxx Construction's returns from 2007 and 2008 (copies of which are not

submitted), in addition to its general ledgers for the year 2000 through 2006 (copies of which are not submitted), and the tax returns of 484 Main Street Corp. for the years 2008, 2009 and 2010 (copies of which are not submitted). It is Mr. Henning's professional opinion that the 2009 tax return of Maxx Construction, Inc. does not set forth debts or loans owed by the five identified entities to Maxx Construction, Inc. but rather "distributions to the owners of the Entities. (Emphasis in original)." According to Mr. Henning, the vast majority of the "due from" amounts contained in Maxx Construction's 2009 tax return "appear[] to be" various mortgage payments made by Maxx Construction, Inc. for those properties on behalf of the owners of the Entities, charges related to the costs of upkeep and improvements to the properties, and utility charges, tax payments and attorney's fees incurred by the Entities that Maxx Construction also paid for on behalf of the owners. Mr. Henning avers that the various "due from" entries relied upon by petitioner "do not exhibit all of the characteristics routinely associated with debt," including a written document memorializing, or any other evidence of, an understanding that there exists a present duty or responsibility of the Entities to Maxx Construction to settle the amounts due to it by transfer of or use of an asset at a specified or determinable date, or upon occurrence of a specified event. Respondents

maintain that petitioner fails to even allege what the terms of the purported loans were, including dates of loan, the length of the loans, the maturity dates and the interest rates.

Addressing the merits of the matters before the Court, the inescapable fact is that the only asserted proof of the alleged debts by the Entities to Maxx Construction, Inc. is the submitted 2009 Federal tax return, which document respondent Maffei had signed.² His signature thereon, by statute, constitutes a written declaration under the penalties of perjury that the return is accurate. See 26 U.S.C. §6065. Moreover, in the absence of proof to the contrary, this Court must find that the tax return and attendant schedule L balance sheet which sets forth the alleged debts here in issue had been prepared, in accordance with the Federal tax manual requirements, based upon Maxx Construction, Inc.'s 2009 books and records. Notably, respondent's expert Mr. Henning does not address these facts, and he specifically does not state that he has reviewed the business records and ledgers of the involved Entities.

²Although respondents initially argue that petitioner has failed to prove that Maffei had signed this 2009 return, the submitted copy of which is indeed unsigned, Maffei is identified on the return as being the president of Maxx Construction, Inc., his name is typed under the "Sign Here" line on the return, and Maffei himself not only does not deny that he had signed the return but admits that, if there is a mistake, he will "have it corrected." Respondents' "unsigned" argument therefore is unavailing.

Maffei's averments at bar that he had relied upon his accountant with respect to the preparation of his 2009 tax filing, and that if the 2009 return shows a loan or other money due and owing by the entities, "then the tax return is in error and was improperly prepared," are wholly insufficient for this Court to treat the presently uncorrected 2009 tax return as anything other than constituting binding admissions by Maffei. See Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 (2009); Acme Am. Repairs, Inc. v. Uretsky, 39 A.D.3d 675 (2nd Dept. 2007), lv. to app. dsmd: 9 N.Y.3d 979 (2007).

Nor does this Court find respondents' dismissal argument predicated upon the Statute of Frauds persuasive. General Obligations Law section 5-701(a)(1) requires only that agreements which are not to be performed within one year after the making thereof to be in writing. See Sheehy v. Clifford Chance Rogers & Wells LLP, 3 N.Y.3d 554, 559 (2004). Here, the debts, if any, plainly could have been repaid within one year, and therefore they are outside the ambit of the Statute of Frauds. Accordingly, respondents are not entitled to dismissal of the petition on this basis.

Further, the Court finds that respondents' reliance upon subparagraph (2) of General Obligations Law section 5-701(a) in support of dismissal of the petition also to be misplaced. As

judgment creditor herein, petitioner has stepped into the shoes of Maxx Construction, Inc., see McKinney's Cons. Laws of N.Y., Book 7B, CPLR CS201:15, p. 76), and is seeking to recover money allegedly owed by several companies to Maxx Construction, Inc., which companies are owned either by respondent Maffei and/or by respondent Hexner. Accordingly, no writing is required under subparagraph (2) of GOL §5-701(a) as maintained by respondents because there is not at issue any promise by anyone to answer for the debt of another person; rather, petitioner is seeking to enforce Maffei's companies' debts to Maxx Construction, respondent Hexner's companies' debts owed to Maxx Construction and respondent 484 Main Street Realty Corp.'s own debt owed to Maxx Construction.

The Court also denies the cross-motion to the extent that respondents seek to dismiss the petition seeking to enforce its judgment pursuant to CPLR 5227 and/or for a Turnover Order pursuant to CPLR 5225, subd. (b), as against respondent 484 Main Street Corp. in the amount of \$78,931.00. Although respondents argue that said claim against 484 Main Street Corp. is time-barred by the applicable six-year statute of limitations, this Court finds controlling that body of law holding that a Court of equity will not permit the statute of limitations to run where, as here, the one claiming the benefit of the statute is the one charged in law with the duty of asserting and enforcing the claim before the

statute runs. See PET, Inc. v. Lustig, 77 A.D.2d 445, 447 (4th Dept. 1980). Since there is no evidence before this Court establishing that Maxx Contractors, Inc. had any shareholders other than Maffei, it had been Maffei who apparently had been responsible to pursue Maxx Contractors, Inc.'s claim against 484 Main Street Corp. to repay its debt, and Maffei will not now be permitted the benefit of arguing Maxx Contractors, Inc.'s claim is time-barred. See A.L.F. Falck S.p.A. v. E.A. Karay Co., Inc., 722 F. Supp.2d 12, 16-17 (S.D.N.Y. 1989).

The Court parenthetically notes that the affidavit of Mr. Henning, submitted as part of respondents' papers and which is offered to prima facie establish respondents' entitlement to dismissal of the petition, cannot properly be considered by this Court. See Yeom v. Clove Lakes Health Care and Rehabilitation Center, Inc., 71 A.D.3d 739 (2nd Dept. 2010); Barrera v. MTA Long Island Bus, 52 A.D.3d 446 (2nd Dept. 2008); Rengifo v. City of New York, 7 A.D.3d 773 (2nd Dept. 2004); Johnston v. Continental Broker-Dealer Corp., 287 A.D.2d 546 (2nd Dept. 2001).

As to the remaining substantive issues before this Court, the petition and cross-motion are hereby adjourned for the holding of a framed issue hearing to determine whether the Entities identified

as Park Avenue, 33 Brown Place, 3606 Edgehill Road, 484 Main St. Realty and 484 Main Street Realty Corp. have outstanding debts to Maxx Corporation, Inc., as reflected in the latter's 2009 Federal tax return. See Pam Am. World Airways v. Overseas Raleigh Romany, 79 A.D.2d 960 (1st Dept. 1981). In this regard, the Court observes that the lack of loan documents and terms of repayment do not necessarily preclude the finding that a debt exists. See Bass v. Bass, 140 A.D.2d 251, 252 (1st Dept. 1988). Moreover, judgment creditor petitioner, standing in the shoes of judgment debtor Maxx Construction, Inc., properly has chosen to proceed against property in which Maxx Construction, Inc. allegedly has interests, see Sochor v. International Business Machines Corp., 90 A.D.2d 442 (2nd Dept. 1982), revd. on other grnds., 60 N.Y.2d 254 (1983). Further, petitioner correctly has chosen to name the individual general partners of the various subject Entities alleged to owe Maxx Construction, Inc. monies, and these properly named individual respondents, who have been personally served herein, may be held personally liable for their partnership's debts. See CPLR 1025; Gately v. Deters, 128 Misc.2d 209 (Sup. Ct. Niagra Co. 1985).

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on April 3, 2013.

In the event that the Hearing Court determines that a subject Entity has a debt to Maxx Construction, Inc., then the petition is

granted to that extent and as against the individual owner or owners of said Entity, who do not dispute their ownership interests in any of the identified Entity companies. See City of New York v. Midmanhattan Realty Corp., 119 Misc.2d 968 (Sup. Ct. NY Co. 1983). The petition otherwise shall be denied to the extent that the Hearing Court determines that any specific Entity does not have an outstanding debt to Maxx Contractors, Inc. Concomitantly the cross-motion is granted or denied to the extent that the Hearing Court determines that subject Entities do or do not have debts to Maxx Construction, Inc.

Dated: February 15, 2013
White Plains, New York



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J.S.C.

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