

Indo-Med Commodities, Inc. v Wisell

2014 NY Slip Op 33918(U)

September 29, 2014

Supreme Court, Nassau County

Docket Number: 600546/14

Judge: F. Dana Winslow

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

INDO-MED COMMODITIES, INC.,

**TRIAL/IAS, PART 3
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.: 001, 002
MOTION DATE: 7/8/14**

**JOHN T. WISELL, SR., CAROL WISELL,
INDO-MED NORTH AMERICA, INC., SCALA-
WISELL INTERNATIONAL, INC., SCALA WISELL
CO., INC.,**

INDEX NO.: 600546/14

Defendants,

-and-

**MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED,**

Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....	1
Notice of Cross Motion.....	2
Memorandum of Law in Support of Cross Motion.....	3
Amended Affidavit in Support of Cross Motion.....	4
Reply Affirmation.....	5
Summons.....	6

In this proceeding, plaintiff/petitioner Indo-Med Commodities, Inc. (“Indo-Med”) seeks a judgment and order pursuant to CPLR Article 4 and CPLR Sections 5206(e), 5525(a) and (b), and 5227, and Debtor and Creditor Law Article 10, to set aside certain fraudulent transactions made to hinder Indo-Med’s effort to satisfy the \$2,927,697.01 judgment entered against John Wisell in 2009.

Respondents John T. Wisell, Sr., Carol Wisell, Indo-Med, Scala-Wisell

International, Inc. and Scala Wisell Co., Inc. (collectively referred to as “Respondents”) cross-move for an order pursuant to CPLR 5240 granting a protective order restraining petitioner from selling or executing upon John’s interest in the marital residence of John Wisell and Carol Wisell located at 48 Wellington Road, Garden City, New York, until it becomes vacant, is sold or until Carol Wisell predeceases John Wisell, is determined as follows.

For a detailed background of this matter, this Court respectfully refers to the Honorable Leonard B. Austin’s Decision After Trial dated May 2, 2006, the Decision and Order of Justice Leonard B. Austin dated November 27, 2006, the Judgment dated March 16, 2009, and the Stipulation and Order dated March 16, 2009.

In its amended petition and complaint, Indo-Med seeks, among other things, (i) to set aside all of John Wisell’s fraudulent conveyances under the Debtor and Creditor Law because they were made with actual intent to hinder, delay or defraud John Wisell’s creditors and (ii) a judgment against Carol Wisell, Scala Inc., and S-W International for the value of fraudulently conveyed assets they received.¹

In support of its petition, Indo-Med submits the following documents:

- Exhibit 1: Justice Leonard B. Austin’s decision after trial, dated May 2, 2006 determining Indo-Med’s counterclaims in the Nassau County Action, in which Justice Austin found, among other things, that John Wisell breached his fiduciary duties to Indo-Med through substantial fraudulent conduct, and the stipulation and order, dated June 19, 2006, and so-ordered on June 22, 2006;
- Exhibit 2: The decision and order of Justice Leonard B. Austin, dated November 27, 2006, denying the plaintiff’s motion to correct the decision after trial;

¹Indo-Med also claims in the petition and complaint that the transfers are constructive fraudulent conveyances under Sections 273, 273-a, 274 and 275 of the Debtor and Creditor Law.

- Exhibit 3: The judgment in the Nassau County Action in favor of Indo-Med and against John Wisell and Indo-Med NA for \$2,927,697.01, entered in the office of the Nassau County Clerk on March 19, 2009, and the stipulation and order, dated March 16, 2009, and entered on March 19, 2009;
- Exhibit 4: Indo-Med's counterclaims in the Nassau County Action upon which the Judgment was entered, filed on April 21, 2000;
- Exhibit 5: Deed dated August 9, 1983 for the Garden City Property, as recorded on August 17, 1983;
- Exhibit 6: Quitclaim deed dated May 8, 2006 for the Garden City Property, as recorded May 9, 2006;
- Exhibit 7: Mortgage dated October 6, 2006, by Carol Wisell in favor of Home Loan Center, Inc. d/b/a Lendingtree Loans, a California Corporation, as recorded on February 13, 2007, with respect to a \$289,600 loan secured by the Garden City Property;
- Exhibit 8: Quitclaim deed dated December 19, 2006 for the Garden City Property, as recorded on December 20, 2006;
- Exhibit 9: Mortgage dated April 4, 2007 by Carol Wisell and John Wisell in favor of Bank of America, N.A., as recorded on May 8, 2007, with respect to a \$200,000 home equity line of credit secured by the Garden City Property;
- Exhibit 10: Deed dated May 4, 1978 for the Floral Park Property, as recorded on May 10, 1978;
- Exhibit 11: Quitclaim deed dated May 8, 2006 for the Floral Park Property, as recorded on May 9, 2006;
- Exhibit 12: Quitclaim deed dated May 8, 2006 for the Floral Park Property, as recorded on December 20, 2006; and

Exhibit 13: Statements from John Wisell’s Merrill Lynch Account showing \$45,000 of additions to the Merrill Lynch Account beginning in April 2000, and an account total as of October 31, 2013, of more than \$171,000.

Indo-Med brought this action as a “hybrid” - i.e., an Article 52 special proceeding and a plenary action based on Debtor and Creditor Law. Specifically, petitioner has served and filed an Amended Notice of Petition seeking relief under CPLR 5206(e) and a summons. Petitioner has labeled its new pleading an “Amended Verified Petition and Complaint.”

In opposition, respondents argue that hybrid actions are not recognized by the CPLR and the Amended Verified Petition and Complaint should be dismissed.

Contrary to respondents’ contention, courts in New York allow such hybrid proceedings. Accordingly, this hybrid proceeding is appropriate (*see Dumbo Neighborhood Foundation, Inc. v City of New York*, 94 AD3d 986 [2d Dept 2012]). The hybrid proceeding involves the same subject matter – fraudulent conveyances.

This Court will first address the Merrill Lynch Account.

CPLR 5205(c)(5) provides that:

Additions to an asset described in paragraph two of this subdivision [such as the Merrill Lynch Account] shall not be exempt from application to the satisfaction of a money judgment if (I) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

CPLR 5205 “limit[s] an individual’s ability to secrete funds in an IRA in an attempt to avoid paying a money judgment” (*Pauk v Pauk*, 232 AD2d 392, 394 [2d Dept 1996]). John Wisell approximately \$171,000 in cash and securities in the Merrill Lynch Account, at least \$45,000 of which is non-exempt. Since April 2000 (a period beginning less than 90 days before interposition of the claims upon which the judgment was entered; *see Brickman Aff., Ex. 4*), John Wisell made contributions to the Merrill Lynch Account totaling approximately \$45,000. (*See*

Petition ¶¶ 80-84; Brickman Aff., Ex. 13).

A judgment creditor’s ability to satisfy a judgment in his or her favor from assets that are not in the possession of the judgment debtor is governed by CPLR 5225 (*Miraglia v Essex Ins. Co.*, 96 AD3d 945 [2d Dept 2011]). “According to the express language of CPLR 5225(b), a judgment creditor must first establish that the judgment debtor has an interest in the property held by the third party, and then must demonstrate either that the judgment debtor is entitled to possess the property or that the judgment creditor has a right to the property superior to that of the party who possesses it” (*Id.*; *Goldberg & Connolly v Xavier Const. Co., Inc.* 94 AD3d 1117 [2d Dept 2012]; *Beauvais v Allegiance Securities, Inc.*, 942 F2d 838, 840-841 [2d Cir 1991]; *JRP Old Riverhead, Ltd. v Hudson City Sav. Bank*, 106 AD3d 914 [2d Dept 2013]; *Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917 [2d Dept 2009]).

“A summary judgment analysis may be employed where, as here, a party is seeking a turnover order pursuant to CPLR 5225(a) (*cf. Matter of Centerpointe Corporate Park Partnership 350 v. MONY*, 96 AD3d 1401, 1402 [4th Dept 2012], *lv dismissed* 19 NY3d 1097 [2012]; *Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 72 AD3d 694, 695 [2d Dept 2010]; *Estate of Giustino v Estate of DelPizzo*, 21 AD3d 523 [2005]), and plaintiff made a *prima facie* showing that – at that point in time – the underlying judgment had not been paid in full” (*Valley Psychological, P.C. v Government Employees Ins. Co.*, 105 AD3d 1110 [2d Dept 2013]).

This statute “provides for an expedited special proceeding by a judgment creditor to recover ‘money or other personal property’ belonging to a judgment debtor ‘against a person in possession or custody of money or other personal property in which the judgment debtor has an interest’ in order to satisfy a judgment” (*Matter of Signature Bank v HSBC Bank USA, N.A.*, *supra* at 918 [internal citation omitted], quoting CPLR 5225[b]).

“Where it is shown that a judgment debtor (“debtor”) is in possession of money or personal property, a judgment creditor (“creditor”) may by notice of motion/OSC seek a court order pursuant to CPLR 5225(a) directing the debtor to turn over said money or property.

Significantly, respondents have not opposed the liability portion of this point or addressed the claim for interest. Accordingly, Indo-Med is entitled to an order under CPLR 5225(a) and (b) requiring John Wisell and Merrill Lynch to turn over to Indo-Med approximately \$45,000 of John Wisell's contributions to the Merrill Lynch Account (an Individual Retirement Account), plus interest at the legal rate on each of his additions to the Merrill Lynch Account from the date of each transfer. (Indo-Med Brief, pp. 9-10).

In support of their cross-motion for a protective order, respondents argue that John Wisell and Carol Wisell own the Garden City property as tenants by the entirety; and if John Wisell's interest is sold at an execution sale, Carol Wisell will retain her rights of survivorship.

Initially, this Court notes that the correction quitclaim deed for the Garden City property dated December 19, 2006 transfers the property to "John T. Wisell and Carol Wisell, his wife" and states that "[t]his is a correction deed to confirm title in grantees as tenants by the entireties. . ." The handwritten words "Correction is Return to Joint Tenancy" on the back of the deed has no legal significance as it is not subscribed to.

In opposition to the cross-motion for a protective order, petitioners argue that the residence is owned as a joint tenancy and that the cross-motion is premature as questions of fact exist regarding the transfers set forth in the petition and complaint that require disclosure.

Pursuant to CPLR 5240, the court has broad discretionary powers to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The exercise of these powers requires harmonizing the judgment debtor's interest in avoiding irreparable family harm resulting from execution upon the real property with the legitimate interest of a creditor in securing payment of a valid debt (*Holmes v W.T. Grant, Inc.*, 71 Misc2d 486 [Sup Ct, Nassau County, 1972]).

This court recognizes that "[a]ny judicial sale, especially one involving the judgment debtor's residence, is a tragic event" (*Guardian Loan Co. v Early*, 47 NY2d 515, 518 [1979]). However, petitioner's attempts to collect the substantial

amounts owed have been repeatedly frustrated by respondents. Indo-Med has demonstrated a credible effort to collect from the judgment debtor husband. In the present context, there are no circumstances on which an order staying the execution sale might appropriately be premised (*Amev Capital Corporation v Kirk*, 180 AD2d 791 [2d Dept 1991]).

At bar, “the sale of the husband’s interest in the real property would convey a hybrid tenancy in common, with survivorship but no partition rights to a third party stranger who then could have some conceivable right to use immediately an undivided one-half share of the property” (*Id.*)

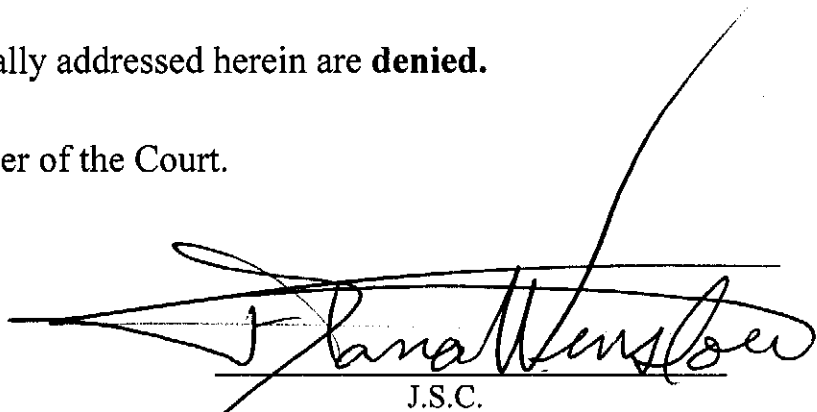
In view of the foregoing, the petition is granted to the extent that Indo-Med is entitled to an order under CPLR 5225(a) and (b) requiring John Wisell and Merrill Lynch to turn over to Indo-Med the \$45,000 of additions he made to the Merrill Lynch Account (an Individual Retirement Account), plus interest.

The cross-motion for a protective order is **denied**.

All matters not specifically addressed herein are **denied**.

This constitutes the Order of the Court.

Dated: September 29, 2014


J.S.C.

ENTERED

OCT 10 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE