

<b>Long Is. Network of Community Servs., Inc. v Kinzer</b>
2015 NY Slip Op 30480(U)
March 24, 2015
Sup Ct, Suffolk County
Docket Number: 19053-2012
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**Present:****HON. EMILY PINES**

J. S. C.

**Motion Date:** 11/25/2014**Submit Date:** 01/27/2015**Motion No.:** 005 MOTD

006 MOTD

 **Final** Non Final

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**LONG ISLAND NETWORK OF  
COMMUNITY SERVICES, INC.,**

**Plaintiff,****- against -****DEBORAH KINZER,****Defendant.**

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Factual Background

Plaintiff has filed an Order To Show Cause seeking to sell the 1/3 interest that Defendant owns in her residence, located in Queens County.<sup>1</sup> More specifically, the Property address is 167-05 Foch Boulevard, Jamaica, New York, 11434 ("Property"). Plaintiff is also seeking an Order compelling Defendant to comply with Judgment Creditor's Information Subpoena. Lastly, Plaintiff is seeking that Defendant reimburse Plaintiff for the costs and expenses, including attorneys' fees,

<sup>1</sup> The Court would like to acknowledge the valuable aid of Andrew Schnissel, legal intern.

incurred in obtaining the relief sought in the instant matter.

Plaintiff contends that Defendant failed to comply with a valid and enforceable Information Subpoena seeking discoverable information regarding this matter to enforce a \$268,298.02 Judgment against Defendant, entered March 12, 2014. Plaintiff alleges Defendant has continuously delayed and hindered Plaintiff's attempts to enforce the aforesaid Judgment. Plaintiff further alleges that without a court order requiring immediate specific compliance, Defendant will not comply and will continue to hinder Plaintiff's efforts to enforce the aforesaid Judgment.

Plaintiff alleges that Defendant's 1/3 interest in the Property should be sold and the proceeds from the sale "exceeding \$50,000" should be applied to the payment of the Plaintiff's Judgment.

Plaintiff contends that on May 20, 2013, Plaintiff filed an amended complaint containing seven causes of action. Plaintiff moved for Summary Judgment on August 5, 2013. This Court granted Plaintiff's Summary Judgment motion on the third, fourth, fifth, sixth and seventh causes of action and denied summary judgment on the first and second causes of action. This Court awarded Plaintiff a Judgment entered on March 12, 2014, in the amount of \$268,298.02. Plaintiff states that this Judgment was duly transcribed, filed and docketed in the office of the Queens County Clerk on March 12, 2014.

Plaintiff alleges that Plaintiff served Defendant and Defendant's attorney with a copy of an Information Subpoena and advised Defendant her response to the aforesaid Subpoena was due within

seven days pursuant to CPLR 5224(a). Plaintiff further alleges that Defendant's attorney advised Plaintiff at a settlement conference on July 1, 2014, that Defendant would respond to the Information Subpoena within ten days. Plaintiff alleges that after not receiving a timely response to the aforesaid Subpoena. Plaintiff contacted Defendant's attorney on July 24, 2014 to determine whether Defendant would respond to the aforesaid Subpoena. Plaintiff contends Defendant provided a response to the Subpoena on July 25, 2014. Plaintiff further contends that Defendant's response was inadequate because Defendant failed to answer portions of questions, specifically relating to her husband and his employer.

Plaintiff states that Plaintiff informed Defendant's attorney that the answers provided by Defendant were insufficient and requested that Defendant fully respond to the Information Subpoena by August 4, 2014. Plaintiff further states Defendant failed to respond to the aforesaid Subpoena and to date has not fully complied with the aforementioned Subpoena. Plaintiff argues that Defendant never provided information relating to her spouse and his employer, and that this information is discoverable and relevant to the satisfaction of the aforesaid Judgment because the information may be used to help satisfy the aforesaid Judgment. Plaintiff alleges that Plaintiff has been and continues to be prejudiced by Defendant's "dilatatory tactics and failure to satisfy her discovery obligations" and that such tactics may have allowed Defendant to conceal, transfer or dissipate assets that may have satisfied the aforesaid Judgment. Plaintiff contends that Defendant's failure and refusal to comply with Plaintiff's Subpoena has prejudiced Plaintiff's ability to enforce the aforementioned Judgment.

Plaintiff contends that the Judgment remains wholly unpaid to date and Plaintiff still owns the Judgment in its entirety. Plaintiff alleges that upon information and belief, Defendant acquired

a 1/3 interest in the Property on November 12, 2010, that the Property is valued at \$245,000 and that Defendant's interest in the Property exceeds \$50,000.

On the other hand, Defendant claims that all relief sought in Plaintiff's Order To Show Cause be denied. Defendant alleges that the Property is her primary residence where she resides with her husband and her three children. Defendant states that on or about November 12, 2010, she purchased a 1/3 interest in the Property from her aunt. Defendant contends that since the aforesaid sale, Defendant has owned an undivided 1/3 interest in the subject Property as a tenant-in-common, and that Defendant's mother and father own the remaining 2/3 interest in the Property as tenants-by-the-entirety.

Defendant also alleges that she fully complied with Plaintiff's Information Subpoena pursuant to CPLR 5223 and that Plaintiff has no obligation to provide the requested information because it concerns a non-party and the questions posed are not directly related to the satisfaction of Plaintiff's Judgment.

Defendant has also filed a cross-motion in which Defendant argues that Plaintiff should be restrained from selling Defendant's 1/3 interest in her home because Plaintiff failed to comply with CPLR 5206(e) by not commencing a special proceeding in the county where the Property is located and therefore this Court lacks subject matter jurisdiction over the instant proceeding. Also in the cross-motion, Defendant argues that the Property is subject to a \$150,000 Homestead Exemption pursuant to CPLR 5206 and that "once the \$150,000 homestead exemption is applied, there is no

remaining equity in the Property to which Plaintiff's Judgment can attach". Lastly, Defendant argues in the cross-motion that Plaintiff has failed to take less draconian measures to enforce the aforesaid Judgment.

### Legal Analysis

#### I. Judicial Sale of Defendant's Property

Plaintiff failed to commence the proceeding in the proper county. Plaintiff is required to commence the special proceeding in the county in which the homestead is located.

"A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding fifty thousand dollars in value." *see*: CPLR 5206(e).

"If the judgment sought to be enforced was entered in the city court of any city outside the city of New York, and the respondent resides or is regularly employed or has a place for the regular transaction of business in person within the county in which the court is or was located, a special proceeding authorized by this article shall be commenced in that court or in the county court of that county." *see*: CPLR 5221(a).

Professor David D. Siegel wrote in *New York Practice* that "to the extent that any judicial aid is needed, the aim of CPLR 5221 is to *require* the judgment creditor to seek it *only* in a place convenient to the person against whom the device is aimed." [David D. Siegel: *New York*

*Practice* § 493, at p. 668, quoting *Gary Morgan Chevrolet & Oldsmobile, Inc v Main*, 146 Misc 2d 472, 473 (Co. Ct. 1990)].

In addition to failing to commence the instant proceeding in the proper county, Plaintiff neglected to secure a new index number and commence a special proceeding. Accordingly, the petition was never properly commenced against the Defendant. [*see: Braz v. Shvartsman*, 300 AD2d 582 (Second Dept. 2002)]. To properly file this lawsuit, Plaintiff is required to secure a new index number and commence a special proceeding.

Here, Plaintiff has failed to commence a proceeding in the proper county. In order to obtain sale of Defendant's share of her Homestead, Plaintiff is required to commence a special proceeding in Queens County, as that is where Defendant's homestead is located and this the most convenient place for Defendant to adjudicate this matter.

Accordingly, Plaintiff's motion seeking an Order compelling a sale of Defendant's 1/3 interest in real property located in Queens County is denied; and Defendant's cross-motion is granted to the extent that Plaintiff is required to bring a special proceeding in Queens County.

## II. Plaintiff's Information Subpoena

While this Court shall not decide the merits of the aforementioned requested judicial sale, this Court does have authority to determine whether Defendant shall comply with Plaintiff's Information Subpoena.

CPLR 5223 compels disclosure of “all matter relevant to the satisfaction of the judgment,” and sets forth “a generous standard which 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 A.D.2d 293, 294, 638 N.Y.S.2d 430 [1996] ).

A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order “to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment” (*Young v Torelli*, 135 AD2d 813, 815 [1987]). Furthermore, Defendant has the burden of establishing that the requested material was “ 'utterly irrelevant to any proper inquiry' ” (*Ayubo v Eastman Kodak Co.*, *supra*, at 642, quoting *Matter of Dairymen's League Coop. Assn. v Murtagh*, 274 App Div 591, 595).

Here, Defendant has not conclusively established that it lacks information to assist Plaintiff in obtaining satisfaction of the judgment. Since Plaintiff is entitled to obtain information from a third party, the Defendant's spouse is not excluded from providing Plaintiff with the requested information.

Accordingly, Defendant is directed to fully and completely respond to the questions posed by Plaintiff's Information Subpoena.

### III. Plaintiff's Expenses & Attorneys Fees

There is no statutory basis requiring this Court to reimburse a Judgment Creditor for costs, expenses and/or attorneys' fees in the instant matter. Plaintiff has failed to set forth any basis whatsoever requiring this Court to order the requested reimbursement. Thus, Plaintiff's requested reimbursement is DENIED in all respects.

This constitutes the *ORDER* and *DECISION* of the Court.

**Dated: March 24, 2015**

Riverhead, New York

  
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EMILY PINES

J. S. C.

Final

Non Final