

Matter of Breslin Realty Dev. Corp. v Smith & De Groat, Inc.

2015 NY Slip Op 30814(U)

January 8, 2015

Supreme Court, Nassau County

Docket Number: 14-008594

Judge: Daniel R. Palmieri

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SHORT FORM ORDER AND JUDGMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. DANIEL PALMIERI
J.S.C.**

TRIAL/IAS PART 20

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**In the Matter of the Application of
BRESLIN REALTY DEVELOPMENT CORP.,**

Index No. 14-008594

Petitioner,

Mot. Seq. #001

Mot. Date: 10-6-14

Submit Date: 11-7-14

**For a Judgment Pursuant to CPLR §5225(a), CPLR
§5225(b) and CPLR §5227 to Compel Delivery of Property**

-against-

**SMITH & DE GROAT, INC.
SMITH & DRAKE REALTY, CORP. d/b/a
SMITH & DEGROAT REAL ESTATE, and also d/b/a S &
D REAL ESTATE, MS ADVISORY SERVICES, INC. and
LANDMARK REAL ESTATE SERVICES INC.,**

Respondents.

MARTIN I. SCHACKNER a/k/a MARTIN SCHACKNER,

Judgment Debtor.

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The following papers were submitted on this motion:

- Order to Show Cause, dated 3-3-14.....1**
- Proposed Order and Judgment.....2**
- Affirmation in Opposition, dated 10-30-14.....3**
- Affirmation in Opposition, dated 10-30-14.....4**
- Reply Affirmation, dated 11-6-14.....5**
- Reply Affirmation, dated 11-6-146**

This petition made pursuant to CPLR 5225(a) and (b), and CPLR 5227, for an order directing the judgment debtor Martin I. Schackner to turn over to petitioner all of his interest in respondents MS Advisory Services, Inc. ("MSA") and

Landmark Real Estate Services, Inc. ("Landmark"), and further ordering Smith & De Groat, Inc., Smith & Drake Realty, Corp. d/b/a Smith & Degroat Real Estate to the entities owned by the judgment debtor ate, and also d/b/a S & D Real Estate ("Smith & DeGroat") to turn over all monies now due and owing, or to become due and owing to the entities owned and controlled by the judgment debtor (in effect, a permanent mandatory injunction), in order to satisfy judgments in favor of petitioner, and also for production of records by all respondents regarding monies paid to the debtor or to entities he controls, for the past 6 years, is granted to the extent indicated in this decision.

Initially, the Court notes that petitioner's counsel has advised the Court by letter dated December 17, 2014 that one of the two judgments sought to be enforced, in the amount of \$280,997.04, has been satisfied. However, the second judgment against Schackner, in the amount of \$1,567,915.80, remains outstanding.

The petition alleges that Schackner is a licensed real estate broker and Certified Public Accountant, and an independent contractor for respondent Smith & DeGroat, where he has the title of Management Director. The debtor manages two real estate portfolios for Smith & DeGroat, generating approximately \$3 million in annual revenues. The petition further alleges that Schackner has received fees and commissions of approximately half that amount, or \$1.5 million per year, as an independent contractor. Invoices for his services, including commissions and broker's fees, direct that payment be made to MS and Landmark, which the petition alleges are wholly owned and controlled by him. The petition alleges that these

entities are not bona fide corporations entitled to recognition as such, but rather are mere alter egos of the debtor, and were set up for the purpose of shielding assets from creditors, including petitioner.

In support of this contention the petitioner alleges, among other things, that at a debtor's deposition in 2009 (arising from a bankruptcy, described below) Schackner acknowledged that he directed Smith & DeGroat to make payments owed to him to Landmark. He testified that he is the only officer and director of the corporation, but had no recollection of ever issuing stock in Landmark, or creating by-laws, or that there were any minutes of meetings. He also could not produce any books or records of the corporation.

The petitioner further alleges that the debtor would transfer money from these corporations to his wife's checking account and would, with her consent and upon her signature, utilize those funds. His wife admitted at her deposition that "the only reason her husband, Martin Schackner, did his personal banking through her checking account was because of the litigation by Wilbur Breslin, who is the CEO of Breslin Realty Development Corp..." Petition, at ¶ 54.

An involuntary bankruptcy was filed against the debtor in 2008, and his debts were declared non-dischargeable by the Bankruptcy Court, including the debts leading to the present subject judgment of \$1,567,915.80, which was entered in 2012. Based on the foregoing, petitioner seeks the relief described above.

In opposition the debtor, through counsel, contends that there is a contract between Smith & DeGroat and MSA, under which payment for management

salary. He annexes a spreadsheet showing a monthly salary of \$5,000 per month from MSA to him, gross wages. Counsel also states that in addition to “management commissions” earned by Schackner, he also acts as either a selling or listing broker, earned \$110,000 in 2012 and \$20,000 in 2013. Counsel argues that, at best, petitioner would be entitled to garnish 10% of the debtor’s wages from MSA (in effect, pursuant to CPLR 5205(d)[2]). He further argues that if petitioner obtains an order directing turnover of stock in both Landmark and MSA debtor will no longer work for those entities, Smith & DeGroat will terminate its contracts with MSA and may then hire Schackner as an employee. In that case, the 10% maximum would continue to apply. Based on the foregoing, counsel concludes that a turnover of MSA and/or Landmark would be a meaningless gesture, and that the Court should not engage in such meaningless gestures.

There is no response to the other requests for relief sought in the petition.

Smith & DeGroat has also submitted opposition. By counsel, it denies an employer-employee relationship with Schackner, but acknowledges that it uses MSA as a service provider, which is owned by Schackner, and before that Landmark, stated to be dissolved in July, 2009. It complains that petitioner’s prior counsel sought no enforcement pursuant to CPLR article 52, that the current application seeks overbroad discovery, and that present counsel has misconstrued the source of the petition’s claim of \$3 million in revenue. That figure, taken from Smith & DeGroat’s promotional material, refers to total rental income to Nassau County (not to Smith & DeGroat) from landmark and veterans’ housing programs,

and was made in the context of explaining how Smith & DeGroat had succeeded in increasing the County's revenue from these sources. It thus denies that the debtor would have been able to receive half of the \$3 million for himself.

Smith & DeGroat further questions the propriety of a turnover of the entities to petitioner; if petitioner means to collect all fees due the debtor it would require the debtor to voluntarily work with Smith & DeGroat but have all fees go to petitioner – “enslaving” the debtor, in the words of Smith & DeGroat's counsel – or step into the debtor's shoes as owner of MSA. Smith & DeGroat also notes that it would retain the power to terminate the relationship at will, and thus should not be forced to continue the relationship by Court order.

As to the discovery requests, Smith & DeGroat claims that the requests amount to harassment, and that petitioner is entitled to no more than information about the amounts it paid to the debtor's entities. It contends that as it has already appeared for a non-party deposition and has responded to an information subpoena it has fulfilled its responsibility and should not be asked to do more.

Pursuant to CPLR 5225(a) and (b), property held by the debtor or by third parties in which the debtor has an interest may be subject to delivery to the creditor to satisfy the judgment. CPLR 5227 provides that debts owed to the debtor by third parties similarly may be subject to a turnover.

It is undisputed that the debtor was not a W-2 “employee” of Smith & DeGroat. The debtor argues that he is an employee of MSA, and thus the 10% maximum available to creditors pursuant to CPLR 5205(d)(2) should apply to

payments made to him by that entity. However, the proof presented by petitioner regarding the use of this entity as a mere funnel for funds earned by the debtor himself is persuasive, and the evidence in rebuttal is insufficient to find otherwise or to require a hearing. The debtor has not submitted an affidavit, and no other viable proof is advanced by his counsel. The simple spreadsheet is inadequate as contrary proof. Although Smith & DeGroat agrees with the debtor in that its counsel states that its services contract was with MSA, not the debtor, the only written documents presented here are those indicating a contract with Schackner himself as a sales associate, as an independent contractor under Smith & DeGroat's oversight as the broker. There is no contract presented either by the debtor or by Smith & DeGroat indicating an agreement between Smith & DeGroat and MSA for separate management services. Smith & DeGroat's promotional material names Schackner, not the corporation, as its Management Director. Further, there is no response to the deposition transcripts cited by petitioner, nor to the brokerage contracts.

In addition, the witness for Smith & DeGroat, Matthew Smith, stated at his his deposition taken pursuant to Bankruptcy Rule 2004 that commissions earned by Schackner were paid, at the latter's direction, to the entity rather than to Schackner personally. He also testified that Smith & DeGroat had not entered into "any" contracts with either Landmark or MSA. Transcript, petition ex. "4", at 20. Under these and the other circumstances described above, the debtor's position on this application that MSA was simply the corporate contractor with Smith & DeGroat, and by clear implication was not set up for the purpose of shielding money from

creditors, rings hollow.

Accordingly, to the extent that property or any monies are owed to MSA, Landmark or the debtor personally by Smith & DeGroat, the same shall be turned over to the petitioner consistent with the following discussion.

Initially, the Court rejects the debtor's argument that he is entitled to the 90% exemption under CPLR 5205 (d)(2) as an employee of MSA, as it is his burden to establish that his income therefrom are earnings for "personal services" rendered to MSA, and he has failed to do so. *See Swig v Properties Asset Mgmt. Servs., LLC*, 85 AD3 427 (1st Dept. 2011). Rather, and as set forth above, the evidence points to his use of this company as a means of receiving income from the entity which was the actual recipient of Schackner's services, Smith & DeGroat.

Nevertheless, to the extent payments are made to MSA from Smith & DeGroat, Schackner would be entitled to the 90% exemption, as it would be inconsistent for petitioner to argue that MSA is a mere alter ego of Schackner and then deny him the income exemption because MSA received the payments. The mere fact that he was not a Smith & DeGroat W-2 "employee" is not dispositive regarding the application of CPLR 5205(d)(2), as the statute simply states that "earnings of the judgment debtor for his personal services" is covered by the exemption. Of note, the word "wages" appears nowhere in the statute. Thus, the question is a factual one, and a reviewing court must decide whether the payments to the debtor were consistent and regular and were for "personal services" rendered by

the debtor to the payor. *Cf., Swig v Properties Asset Mgmt. Servs., LLC, supra*, at 428-429 [mere fact that W-2 was issued to the debtor does not necessarily render payments 90% exempt].

In the present case, all factors point to the kind of relationship and personal services by the debtor as Management Director that would qualify the debtor to assert the exemption. Accordingly, under a properly served income execution petitioner will be entitled to collect/garnish from Smith & DeGroat's its payments for personal services rendered by the debtor, but no more than 10% thereof. This applies irrespective of whether payments are made pursuant to an agreement with Landmark, MSA or Schackner personally, or where Schackner designates such payments to be made, including any other entity or person not yet named by him.

As to any lump sums that may become due to Schackner from Smith & DeGroat in the future for commissions/fees associated with real estate transactions under the contract between them, the Court first finds that such sums are distinct from the payments for personal services described above. Rather, they were a separate form of compensation to be paid under a business arrangement that would not be covered by the 90% exemption. *Swig, supra*.

However, the Court cannot direct Smith & DeGroat to pay over any future sums as a "debt" owed to Schackner, because the obligation to do so may never mature. CPLR 5201(a) defines a debt against which a money judgment may be enforced as one "which is past due or which is yet to become due, certainly or upon

demand of the judgment debtor.” Although CPLR 5227 provides for payment of a debt “upon maturity,” the debt still must be a “fixed obligation.” *Matter of Supreme Mdse. Co. v Chemical Bank*, 70 NY2d 344, 349 (1987). A potential liability, such as a commission on a real estate deal that may never close, or happen at all, therefore is not a “debt” for purposes of enforcement pursuant to CPLR 5227. *See JP Morgan Chase v Motorola*, 47 AD3d 293, 302 (1st Dept. 2007). Thus, as the obligation on Smith & DeGroat’s part to pay commissions/fees to Schackner for real estate transactions may or may not arise in the future, a direction in the form of a mandatory injunction from this Court to turn over such monies as they might arise cannot be issued.

However, there is authority that a contingent future obligation that might become fixed may be reached by a creditor as “property” pursuant to CPLR 5225(b), rather than pursuant to CPLR 5227 as a “debt”, if it meets the requirements of the former statute, and provided it is founded on a present interest in the debtor’s favor, such as one created by contract. *See ABKCO Indus. v Apple Films*, 39 NY2d 670, 674 (1976); *JP Morgan Chase v Motorola*, *supra*, at 302-303. Thus, if a particular real estate transaction is under contract but has not yet closed, the Court would consider Schackner to have a property interest in any proceeds that would become due to Smith & DeGroat as the broker upon the closing. Such interest arises under Schackner’s existing contract with Smith & DeGroat, as the latter would be obligated to pay him thereunder, and thus would be subject to a turnover of property

by Smith & DeGroat under this decision. The Court notes that the sales associate contract between Smith & DeGroat and Schackner is terminable at will by either party, but the foregoing still would apply to transactions that occurred as a result of the debtor's actions under the contract before such termination, assuming termination occurs.

In sum, compensation paid for regular personal services rendered by the debtor to Smith & DeGroat is subject to an income execution for 10% of what is owed, and 100% of commissions earned under the sales associate contract must be turned over, subject to the restrictions indicated above.

With regard to the turnover of Schackner's corporations themselves, it may be, as argued by the debtor's attorney, that turning over these entities to the petitioner would be meaningless. However, whether or not they prove of any use to petitioner, they are undisputedly the debtor's property, and thus may be sought. Accordingly, the debtor is directed to turn over all stock certificates and other related documents for both Landmark and MSA to the petitioner within 20 days of the date of service upon him of a copy of this decision, with notice of entry thereof.

That branch of the petition that is for discovery is granted as to Smith & DeGroat to the extent that petitioner may serve upon Smith & DeGroat a demand for disclosure that has not previously been provided that is consistent with the foregoing, within 20 days of service upon him of a copy of this decision, with notice

of entry thereof. Although CPLR 5223 provides that a creditor “ may compel disclosure of all matter relevant to the satisfaction of the judgment”, a Court always retains the ability to oversee such disclosure, and to prevent unnecessary annoyance, disadvantage and prejudice. *See Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457 (2d Dept. 2006). In view of the substantive rulings made here, petitioner should be allowed to pursue its discovery of this respondent, but with Smith & Groat’s obligations, as limited by this decision, in mind.

As respondents MSA and Landmark, and the debtor himself, have not objected to discovery requests made of them, that branch of the petition is granted as to them.

The temporary injunction granted on the execution of the order to show cause shall be permanent, to the limited extent that the debtor and all respondents and those acting on their behalf are restrained from selling, removing, transferring, hypothecating, pledging, assigning, encumbering, using, concealing or otherwise disposing of any property and monies held by, for or owed to the debtor, except to the extent that this is inconsistent with the balance of this decision as set forth above, and, in the case of the debtor, is used for the expenses of daily living.

All other requests for relief not specifically addressed are denied. The Court declines to sign the proposed Order and Judgment submitted by the petitioner.

The Court retains jurisdiction to resolve any discovery disputes arising from

the demands to be served by petitioner on Smith & DeGroat.

This shall constitute the Decision, Order and Judgment of this Court.

Dated: January 8, 2015

ENTER:



HON. DANIEL PALMIERI
Supreme Court Justice

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ENTERED

JAN 12 2015

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