

William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh
2015 NY Slip Op 32127(U)
February 5, 2015
Supreme Court, Nassau County
Docket Number: 010223/14
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 12

WILLIAM J. JENACK ESTATE APPRAISERS AND
AUCTIONEERS, INC.,

X

Plaintiff,

Index No. 010223/14
Motion Sequence...01, 02
Motion Date...12/18/14
XXX

-against-

ALBERT RABIZADEH,

Defendant.

X

Papers Submitted:
Notice of Motion.....x
Notice of Cross-Motion.....x
Affirmation in Opposition to Cross-Motion...x

Upon the foregoing papers, the motion (Mot. Seq. 01) by the Defendant, Albert Rabizadeh, non-party, brought pursuant to CPLR § 2304, seeking an order quashing the Subpoena Duces Tecum, dated September 22, 2014, and the Cross-motion (Mot. Seq. 02) by the Plaintiff, William J. Jenack Estate Appraisers and Auctioneers, Inc., seeking an order, pursuant to CPLR § 511, changing the venue of this action, are decided as hereinafter provided.

The Plaintiff obtained a judgment against the Defendant in the amount of \$471,002.79. (See Copy of Judgment annexed to the Notice of Cross-Motion (Mot. Seq. 02) as Exhibit "A") The judgment was entered in the Orange County Clerk's Office on August

3, 2010, under the index number 000546/2009. The Plaintiff, by its attorneys, caused a Subpoena Duces Tecum to be served upon the Defendant seeking his testimony on October 23, 2014 and to produce documents relevant to the satisfaction of the judgment. (See Copy of Subpoena annexed to the Notice of Motion (Mot. Seq. 02) as Exhibit "A") The Subpoena Duces Tecum requested that the Defendant produce documents including: personal income tax returns filed by the Defendant jointly or individually for 2009 through 2013, bank statements for checking or savings accounts held by the Defendant either jointly or individually between January 1, 2009 and July 31, 2014, Internal Revenue forms, W2, 1099, or K-1 issued in the Defendant's name or to the Defendant between January 1, 2009 and December 31, 2013, stock certificates, bonds, or other securities held in Defendant's name or in conjunction with another person, deeds evidencing the ownership of real property by the Defendant either individually or jointly. (*Id.*)

The Plaintiff submits the Affidavit of Service for the subpoena, which states: "on the 23rd day of Street, 2014, at approximately 1:10 p.m., deponent served a true copy of the Subpoena Duces Tecum upon Albert Rabizadeh at 15 Cricket Lane, Kings Point, NY by personally delivering and leaving the same with the House Keeper, Doris Portillo, a person of suitable age and discretion at that address, the actual place of residence."¹ (See Copy of

¹The Court takes notice that there was a typographical error in the Affidavit of Service and it states "the 23rd day of Street" instead of "the 23rd of September." This can be presumed based on the Subpoena being dated on September 22, 2014 and the Affidavit of Service being signed and notarized on September 25, 2014. However, a revised Affidavit of Service, which corrects this error and was sworn to on October 22, 2014, was also furnished. (See Copy of Affidavit annexed to the Notice of Cross-Motion as Exhibit "C")

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Affidavit of Service annexed to the Notice of Motion (Mot. Seq. 01) as Exhibit "B")

In support of his motion, Defendant argues that the Subpoena should be quashed for two reasons. First, the Defendant argues that the Affidavit of Service is defective because it does not contain the date on which the Defendant was served. The Defendant points to the language, "23rd day of Street, 2014" contained in the Subpoena. As previously discussed the Court recognizes the typographical error contained in the Affidavit of Service and will not quash the subpoena on a jurisdictional basis due to such an error.

Second, the Defendant argues that the subpoena should be quashed because it requires him to disclose books and records that are irrelevant, confidential, over burdensome and not designed to secure any information to execute the judgment set forth in the subpoena. The Defendant contends that persons and/or entities, other than the Defendant, that are on his joint tax returns or corporate records and accounts were not parties to the action that resulted in the judgment and are not obligated to the Plaintiff. The Defendant argues that inasmuch that all of the documents requested by the Plaintiff related to individuals and/or entities not liable for the judgment, such documents requested are not relevant to the satisfaction of the judgment and exceeds the scope of discovery.

The Defendant's attorney asserts that she contacted the Plaintiff's counsel requesting that he withdraw the subpoena, but the Plaintiff's counsel refused. Accordingly, the Defendant made the instant application.

In opposition to the motion, the Plaintiff argues that the subpoena should not be quashed on jurisdictional grounds because there was clearly a typographical error in the

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Affidavit of Service and the Defendant has not suffered any prejudice as a result.

In support of its Cross-motion to change venue, the Plaintiff argues that a motion to quash should be brought in the court in which the subpoena is returnable. The Plaintiff argues that the subpoena was issued by counsel for the Plaintiff in the Supreme Court in Orange County, where the money judgment was entered in 2010. The Plaintiff further contends that there is a motion pending in Orange County to enforce the subpoena at issue here. The Plaintiff's counsel contends that on October 29, 2014 he served a demand by mail to the Defendant's counsel to change venue to the Supreme Court in Orange County, but the Defendant did not consent.

As to the merits of the Defendant's motion to quash, the Plaintiff argues that the subpoena was issued pursuant to CPLR § 5223, which states, "...at any time before a judgment is satisfied or vacated, the judgment creditor may compel the disclosure of all matter relevant to the satisfaction of the judgment..." The Plaintiff argues that the subpoena requires production of the types of records that are customarily sought in post judgment proceedings in order to reveal evidence of income and assets of the judgment debtor. The Plaintiff argues that the fact that the documents are requested in the name of the Defendant, individually or jointly, is of no moment. The Plaintiff contends that while a third party might be entitled to request that the court quash, modify or limit the subpoena, the Defendant has no such right. The Plaintiff further argues that so long as the information requested is reasonably relevant to its effort to satisfy the judgment, the Defendant should not be permitted to withhold records merely because he receives income or owns assets together

with another person.

In opposition to the Plaintiff's cross-motion to change venue, the Defendant argues that venue cannot be laid in Orange County pursuant to CPLR § 5221 (a) and (b). The Defendant argues that the Plaintiff's counsel has made misrepresentations to the Court by not stating that he filed his Order to Show Cause, seeking to compel the Defendant to comply with the subpoena, four days after the Defendant filed and served the instant motion in Nassau County. The Defendant asserts that on November 9, 2014, during the hearing for the Order to Show Cause in Supreme Court, Orange County, Justice Catherine Bartlett adjourned the Order to Show Cause awaiting a determination of the instant motion. The Defendant argues that based on the CPLR, a proceeding commenced regarding subpoenas must be commenced in the county in which the respondent resides or is regularly employed. The Defendant is a resident of Nassau County and he is not employed nor does he regularly transact business in Orange County. Accordingly, the Defendant argues that the proper venue is Nassau County and the Plaintiff's Cross-motion to change venue should be denied.

In further support of his motion to quash, the Defendant argues that financial documents of individuals and entities that are not a judgment debtor herein, are not discoverable since their finances cannot be used to pay the judgment.

Initially the Court must determine whether the instant motion was properly brought in Supreme Court, Nassau County.

CPLR § 2304 provides:

A motion to quash, fix conditions or modify a subpoena shall be

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made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court; except that such motion with respect to a child support subpoena issued pursuant to section one hundred eleven-p of the social services law shall be made to a judge of the family court or the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

CPLR § 5221 (b) provides:

A notice of subpoena authorized by this article may be issued from, and a motion authorized by this article may be made before, any court in which a special proceeding authorized by this article could be commenced if the person served with notice, subpoena or notice of motion were respondent.

CPLR § 5221 (a) (4) provides:

In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this article shall be commenced, either in the supreme court, or a county court, in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person, or if there is no such county, in any county in which he may be served or the county in which the judgment was entered.

Here, the subpoena at issue was not returnable in any Court, but was returnable at the Plaintiff's attorney's office. Therefore, based on the foregoing provisions of the CPLR, the proper venue for the instant motion is the county in which the Defendant resides, is regularly employed or has a place for the regular transaction of business. The Defendant submits an Affidavit, sworn to on December 4, 2014, whereby he states that he resides in Nassau County and that he does not reside in Orange County nor is he employed or transacts

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business in Orange County. The Plaintiff submits no evidence to show that the Defendant resides, transacts business or is employed in Orange County. Accordingly, the Plaintiff's Cross-motion to change venue to Orange County is **DENIED**.

As to the Defendant's motion to quash the subpoena, CPLR § 5240 grants the court broad discretionary power to control and regulate proceedings to enforce a money judgment to prevent "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." (*Liberty Company v. Rogene Industries, Inc.*, 272 A.D.2d 382 [2nd Dept. 2000]) "Pursuant to CPLR § 5223 'all matter relevant to the satisfaction of the judgment' is discoverable and 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.'" (*Siemens & Halske GmbH v. Gres*, 77 Misc.2d 745 [N.Y. Sup. Ct. 1973]; quoting *Leonard v. Wargon*, 55 N.Y.S.2d 626 [N.Y. Sup. Ct. 1945])

The Defendant argues that the *Siemens* case is distinguishable from the instant case because, unlike in *Siemens*, the judgment debtor is within the court's jurisdiction. The Court disagrees with Defendant's distinction and finds that the principal holding in *Siemens*, that all matter relevant to the satisfaction of the judgment is discoverable, is applicable to the instant case. Further, CPLR § 5201 (b), states, in pertinent part, that "A money judgment may be enforced against any property which could be assigned or transferred..."

Here, the Court finds that the documents and information requested by the subpoena are relevant to the Plaintiff's enforcement of the money judgment. The Court further finds that the documents and information requested, which relate to property held by

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the Defendant jointly with another individual and/or entity, are properly requested because the jointly held property is capable of being assigned or transferred by the Defendant.

Accordingly, it is hereby

ORDERED, that the Defendant's motion to quash the Subpoena Duces Tecum (Mot. Seq. 01), dated September 22, 2014, is **DENIED**; and it is further

ORDERED, that the Plaintiff's Cross-motion to change venue (Mot. Seq. 02), is **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
February 5, 2015



Hon. Randy Sue Marber, J.S.C.
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ENTERED

FEB 09 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE