

Davis v Morse
2018 NY Slip Op 31552(U)
February 9, 2018
Supreme Court, New York County
Docket Number: 157421/2017
Judge: Arlene P. Bluth
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NYSCEF DOC. NO. 34

RECEIVED NYSCEF: 02/09/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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EARL DAVIS,

Petitioner,

-against-

LEIGH MORSE, HOFFMAN MANAGEMENT AND
417 RIVERSIDE DRIVE, INC.,

Respondents.

FOR A JUDGMENT PURSUANT TO CPLR 5225 TO
COMPEL PAYMENT OF A DEBT OWED BY
JUDGMENT DEBTOR,
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Index No. 157421/2017
Motion Seq: 001

DECISION
ARLENE P. BLUTH, JSC

The petition to *inter alia* require respondents to turn over respondent Leigh Morse's co-op shares is granted and the cross-motion to dismiss is denied.

Background

This proceeding arises in relation to a criminal proceeding involving petitioner (as the victim) and respondent Morse. Morse was convicted of a scheme to defraud, a felony, in which she took art created by petitioner's father. The scheme involved the undisclosed sale of consigned artworks. In 2011, an order of restitution was entered against Morse for the benefit of petitioner for \$1 million. Petitioner seeks to enforce this judgment.

Petitioner sent information subpoenas to respondents Hoffman Management and 471 Riverside Drive, Inc. to inquire about Morse's ownership of co-op shares related to an apartment located at 417 Riverside Drive. The responses from these respondents indicated that Morse holds 268 shares individually. Petitioner then served an information subpoena on Morse and she

responded in April 2017. Morse claimed that she and her husband jointly own these co-op shares. However, in this proceeding, Morse does not claim that the shares are owned jointly. And in reply to her cross-motion, Morse contends that she is seeking to claim the homestead exemption in connection with her co-op shares rather than argue that the shares are marital property (*see* NYSCEF Doc. No. 33 at 2). At oral argument, Morse's counsel indicated that Morse owns these shares individually.

Morse submits an answer and also cross-moves to dismiss on the ground that petitioner is collaterally estopped from seeking to enforce his judgment through the use of these co-op shares. Morse claims that this issue was raised before the Justice of the Supreme Court presiding over her criminal case and the judge excluded the co-op shares from the restitution order. Morse claims that this ruling was oral and submits an affirmation from her attorney in the criminal matter (Clinton Calhoun) who claims that he did not recall if a written decision was issued.

In opposition to the cross-motion, petitioner disputes that collateral estoppel applies. Petitioner insists that Morse still owes him \$976,837.18 (out of the \$1 million). Petitioner also stresses that Morse owns the shares individually (not jointly) as evidenced by the information subpoena response from Hoffman Management (*see* NYSCEF Doc. No. 26).

Discussion

CPLR 5225(a) provides that:

"Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the

judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.”

“The doctrine of collateral estoppel, a narrow species of *res judicata*, precludes a party from relitigating a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984]).

Here, Morse argues that petitioner was in privity with the District Attorney’s office and that the judge assigned to her criminal case ruled that the co-op shares were excluded from the restitution order. As an initial matter, the Court is unable to analyze Morse’s claim about collateral estoppel because Morse did not submit the previous decision from the criminal judge (Justice Obus). Morse’s attorney from that criminal case claims that Justice Obus excluded the co-op shares from the restitution order in a conference call on November 12, 2014 although the attorney could not recall if there was a written decision (NYSCEF Doc. No. 19, ¶ 7 [Calhoun Affirmation]).

The Court cannot assess whether that ruling has preclusive effect on this proceeding because the Court does not know exactly what Justice Obus found. Justice Obus could have ruled that the shares were excluded for a certain time period or off-limits for purposes of the restitution order only, but not necessarily from future civil proceedings. In order to grant Morse’s cross-motion, the Court would have to accept respondent’s characterization of the contours of Justice Obus’ ruling. This Court simply cannot do that.

To be clear, the Court does not doubt the veracity of Calhoun's affirmation— but an affirmation alone is not enough to meet Morse's burden to show that collateral estoppel should apply.

And, even if there was a written decision, the Court finds that petitioner was not in privity with the District Attorney's Office. The Court recognizes that prosecutors consult victims, especially in cases involving restitution. But the fact is that a victim is not the prosecutor's client— the prosecutor represents the state, not an individual victim. That is why the caption of a criminal case does not include the victim's name— instead, it lists the People of the State of New York. The District Attorney's Office, alone, decides whether to pursue charges, the severity of those charges and whether to settle the case with a defendant (by offering and entering a plea agreement). Because the victim does not have an official voice in those determinations, the Court cannot find that a decision in a criminal case relating to restitution has a preclusive effect on a victim's right to seek satisfaction of a judgment in a civil proceeding. Morse fails to cite any case law in support of her contention that collateral estoppel should apply in these circumstances.

The Court rejects Morse's claim that the Homestead Exemption should apply (*see* CPLR 5206) because it was raised for the first time in reply to the cross-motion. Although Morse cited to it in a footnote in the memorandum of law in support of her cross-motion (*see* NYSCEF Doc. No. 18, fn 1), there is no argument about its application in her moving papers. In any event, even if that claim was considered, Morse did not meet her burden to show that it should apply here— it strains credulity to assert that co-op shares for a four-room apartment located in the Upper West Side of Manhattan are not worth more than \$165,000. The Court notes that in the criminal

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proceeding, Morse's attorney stated that the market value of the apartment was approximately \$700,000 in 2014 (*see* NYSCEF Doc. No. 21, ¶ 8).

The Court observes that Morse contends that it would be difficult to move because her husband suffers from a disability. But that does not mean that the Court can simply ignore a judgment for \$1 million rendered in favor of petitioner against Morse. Inconvenience, even forcing a judgment debtor to move, is not enough to absolve Morse of her obligation to pay restitution. Therefore, the Court also rejects Morse's claim, raised for the first time in reply, that this Court should dismiss the petition on equitable grounds. Another Court has already found that petitioner should be compensated for Morse's criminal acts and a judgment has been entered against her. This Court recognizes that decision and judgment and finds that petitioner is entitled to execute on that judgment.

The petition is granted and petitioner is directed to e-file a proposed order and judgment on this special proceeding (*and* send a hard copy to the courtroom—Room 432 at 60 Centre Street) on or before March 6, 2018.

Dated: February 9, 2018
New York, New York



ARLENE P. BLUTH, JSC