

McDermott v McDermott
2019 NY Slip Op 33570(U)
December 6, 2019
Supreme Court, New York County
Docket Number: 150208/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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JAMES J. MCDERMOTT and MARY L. MCDERMOTT
JOINT REVOCABLE LIVING TRUST DATED:
JANUARY 10, 1997 (A STATE OF WISCONSIN TRUST)
BY ITS SUCCESSOR TRUSTEE, ROBERT T. MCDERMOTT

Index No.
150208/2019

Petitioner,

**DECISION
and ORDER**

- v -

JAMES J. MCDERMOTT, JR.,
WHITE OAKS INTERNATIONAL, LLC,
SPENCER CARRUCCI, U,
DARBEY S. MCDERMOTT,
KEEFE, BRUYETTE & WOODS, INC., and
PAUL W. FEDYK,

Mot. Seq. 1

Respondents.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner/Judgment Creditor James J. McDermott and Mary L. McDermott Joint Revocable Living Trust Dated: January 10, 1997 (A State of Wisconsin Trust) By Its Successor Trustee, Robert M. McDermott ("Petitioner") moves for an Order holding Respondents James J. McDermott ("Judgment Debtor"), White Oaks International, LLC ("White Oaks"), Spencer Carrucci ("Carrucci"), Keefe, Bruyette & Woods, Inc. ("KBW"), Darby S. McDermott ("Darby") and Paul W. Fedyk ("Fedyk") (collectively, "Respondents") in contempt pursuant to CPLR § 5251 for failing to provide complete and accurate responses to information subpoenas. KBW opposes. Judgment Debtor cross-moves to dismiss the Verified Petition.

Factual Background

According to the Verified Petition and exhibits thereto, Petitioner filed a suit in the Circuit Court of Wasukessa County, State of Wisconsin, Case No. 09-Cv-02894 against Judgment Debtor for theft, conversion, unjust enrichment, breach of fiduciary duty, and bad faith claims (the "Wisconsin Action").

Thereafter, Judgment Debtor filed for Bankruptcy in the United States Bankruptcy Court for the Southern District of the State of New York, Case No. 11-2250 (RDD) and Petitioner filed an “adversary action” against Judgment Creditor, Case No. 11-08298 (RDD) (collectively, the “Bankruptcy Action”).

Litigation proceeded on both the Wisconsin Action and the Bankruptcy Action.

On January 7, 2016, an Order for Judgment was entered for Petitioner against Judgment Debtor in the sum of \$3,070,619.01 in the Wisconsin Action.

On November 15, 2016, the Bankruptcy Court entered a Judgment (“Bankruptcy Judgment”), stating in relevant part:

“ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of the Trust and against the Defendant declaring, pursuant to 11 U.S.C. § 523(a)(4) and (a)(6), that the amount of \$185,000 in compensatory damages, plus pre-judgment interest, exemplary damages, and attorney’s fees and costs determined by the Wisconsin State Court to be owed by the Defendant to the Trust in respect of the Pre-September 2005 Transfers and otherwise fixed and adjudicated by the Wisconsin State Court in the aggregate amount of \$3,074,194.39 (the ‘Judgment’) is not dischargeable, and the Trust shall, notwithstanding the Defendant’s bankruptcy discharge, have all rights under applicable non-bankruptcy law to recover, execute and enforce the Judgment against the Defendant and Defendant’s property...” (Ex. B to Verified Petition).

On April 5, 2016, Petitioner filed the Bankruptcy Judgment with the New York County Clerk. Petitioner asserts that on April 10, 2018, it “served the Judgment Debtor with a Notice of Entry, a Notice of Judgment Debtor as to exemptions pursuant to CPLR § 5222, an exemption notice, a restraining notice and an information subpoena and two copies of a questionnaire” upon Respondents in efforts to enforce the Bankruptcy Judgment.

Petitioner filed this special proceeding by filing a Verified Petition on January 8, 2019.

Parties' Contentions

Petitioner argues that Respondents' failure to reply to the subpoenas is *prima facie* evidence that Respondents are attempting to delay and hinder Petitioner's attempt to enforce the Bankruptcy Judgment. Petitioner asserts that Respondents have been willful in refusing to respond and therefore should be held in contempt. Petitioner argues that the Court should compel Respondents to respond to the subpoenas because they are material and necessary for Petitioner to collect the Judgment.

Respondents argue that the Verified Petition should be denied because the Bankruptcy Judgment is not a money judgment, rather it only determined that the Wisconsin Action was not discharged in Judgment Debtor's Bankruptcy Action. Respondents assert that the Judgment from the Wisconsin Action was not domesticated in New York State and therefore New York State Courts cannot enforce it. Respondents further assert that the Bankruptcy Court lacks jurisdiction to enter and enforce a money judgment for a non-dischargeable claim.

In Reply, Petitioner argues that the Bankruptcy Judgment "was clearly a money judgment." (Petitioner's Reply at 2). Petitioner contends that the Court has subject matter jurisdiction to adjudicate the Verified Petition because the Bankruptcy Judgment was domesticated in New York County.

Discussion

"Courts have broad discretionary power, under CPLR Article 52, to control and regulate the enforcement of a *money judgment* in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." *Gryphon Dom. VI, LLC v APP Intern. Fin. Co.*, 58 AD3d 498, 498 [1st Dept 2009] (emphasis added).

Here, however, the Bankruptcy Judgment is not a "money judgment," and use of Article 52 to enforce post judgment relief is not applicable. The Bankruptcy Judgment provides that the Wisconsin Judgment "is not dischargeable, and the Trust shall, notwithstanding the Defendant's bankruptcy discharge, have all rights under applicable non-bankruptcy law to recover, execute and enforce the Judgment against the Defendant and Defendant's property." The Bankruptcy Judgment is not an independent judgment. Furthermore, Petitioner has not domesticated the Wisconsin Judgment," which prevents this Court from enforcing it. Therefore, the Subpoenas served upon Respondents are invalid and the motion to compel a response to them is denied.

Wherefore, it is hereby

ORDERED that the Verified Petition is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: DECEMBER 6, 2019



Eileen A. Rakower, J.S.C.