

Gibson, Dunn & Crutcher LLP v D'Anna
2020 NY Slip Op 30478(U)
February 21, 2020
Supreme Court, New York County
Docket Number: 160471/2016
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 160471/2016

GIBSON, DUNN & CRUTCHER LLP,

Plaintiff,

- v -

MOTION SEQ. NO. 006, 007, 008, and 009

JOSEPH D'ANNA, ELIO D'ANNA, ELIO D'ANNA, ELIA D'ANNA, GEORGE KOUKIS,

Defendants.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 108, 109, 110, 111, 112, 113, 114, 115, 139

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 108, 109, 110, 111, 112, 113, 114, 115, 139

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 123, 124, 125, 126, 127, 128, 129, 130, 141

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 123, 124, 125, 126, 127, 128, 129, 130, 141

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 116, 117, 118, 119, 120, 121, 122, 140

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 008) 116, 117, 118, 119, 120, 121, 122, 140

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 131, 132, 133, 134, 135, 136, 137, 138, 142, 143, 144

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 009) 131, 132, 133, 134, 135, 136, 137, 138, 142, 143, 144

were read on this motion to/for

MISCELLANEOUS

Motion sequence numbers 006, 007, 008, and 009 are hereby consolidated for disposition.

This action was commenced by plaintiff Gibson Dunn & Crutcher, LLP seeking, inter alia, to set aside allegedly fraudulent conveyances by defendants Joseph d'Anna, Elio d'Anna, Sr., Elio d'Anna, Jr. ("Jr."), Elia d'Anna, and George Koukis ("Koukis") (collectively "defendants") which, plaintiff claims, were violative of the Debtor Creditor Law. On July 9, 2019, this Court entered a judgment against defendants, jointly and severally, in the amount of 325,346.03, plus \$84,313.65 in interest, plus costs and disbursements as awarded by the Clerk in the amount of \$800, a total of \$410,459.68. Doc. 82. Since the entry of the judgment, plaintiff has attempted to collect on the same, to no avail, and the motions addressed below involve such efforts.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the prior orders of this Court dated January 29 (Doc. 31), June 13 (Doc. 75), and July 26, 2019. (Doc. 85). Any additional relevant facts are set forth below.

On September 27, 2019, plaintiff served nonparty House of Luxury ("HOL"), of Los Angeles, California, with an information subpoena pursuant to CPLR 5224 and General Business Law ("GBL") § 601 by certified mail, return receipt requested. Doc. 111-114. The information subpoena was served based on Jr.'s LinkedIn profile, which reflects that he was the founder of HOL. To date, HOL has not responded to the information subpoena. Doc. 109.

Plaintiff now moves (motion sequence 006), pursuant to CPLR 5224(a)(3)(iv) and CPLR 2308(b), to compel HOL to respond to the information subpoena on the ground that it may have information which will assist it in collecting the judgment. Doc. 108-110. It also seeks to collect from HOL costs of \$50, as well as a penalty of \$50, plus actual damages incurred due to HOL's failure to comply. Doc. 109. The motion is unopposed.

On September 27, 2019, plaintiff served nonparty Temenos, of Boston, Massachusetts, with an information subpoena pursuant to CPLR 5224 and GBL 601 by certified mail, return receipt requested. Doc. 126-129. The information subpoena was served based on the fact that Temenos was founded by Koukis, who is a member of its board and a non-executive director. Doc. 124. To date, Temenos has not responded to the information subpoena. Doc. 125.

Plaintiff now moves (motion sequence 007), pursuant to CPLR 5224(a)(3)(iv) and CPLR 2308(b), to compel Temenos to respond to the information subpoena on the ground that it may have information which will assist it in collecting the judgment. Docs. 126-129. It also seeks to collect from Temenos costs of \$50, as well as a penalty of \$50, plus actual damages incurred due to its failure to comply. Doc. 124. The motion is unopposed.

On September 27, 2019, plaintiff served nonparty Stromasys, of Raleigh, North Carolina, with an information subpoena pursuant to CPLR 5224 and GBL 601 by certified mail, return receipt requested. Doc. 119-122. The information subpoena was served based on the fact that Koukis is a member of the Board of Directors of Stromasys. Doc. 117. To date, Stromasys has not responded to the information subpoena. Doc. 118.

Plaintiff now moves (motion sequence 008), pursuant to CPLR 5224(a)(3)(iv) and CPLR 2308(b), to compel Stromasys to respond to the information subpoena on the ground that it may have information which will assist it in collecting the judgment. Docs. 116-122. It also seeks to

collect from Stromasys costs of \$50, as well as a penalty of \$50, plus actual damages incurred due to its failure to comply. Doc. 117. The motion is unopposed.

On September 27, 2019, plaintiff served nonparty Temenos USA Inc. (“Temenos USA”) of Malvern, Pennsylvania, with an information subpoena pursuant to CPLR 5224 and GBL 601 by certified mail, return receipt requested. Docs. 134-137. The information subpoena was served based on the fact that Temenos USA was founded by Koukis, who is a non-executive director and a former Chairman of the Board. Docs. 132, 138. To date, Temenos has not responded to the information subpoena. Doc. 133.

Plaintiff now moves (motion sequence 009), pursuant to CPLR 5224(a)(3)(iv) and CPLR 2308(b), to compel Temenos USA to respond to the information subpoena on the ground that it may have information which will assist it in collecting the judgment. Docs. 131-133. It also seeks to collect from Temenos USA costs of \$50, as well as a penalty of \$50, plus actual damages incurred due to its failure to comply. Doc. 132.

Temenos USA opposes the motion, arguing that Koukis was the founder and non-executive director of Temenos AG, Temenos USA’s Switzerland-based ultimate parent company, and that Koukis has no relation to Temenos USA. Docs. 143-144. Temenos USA further asserts that, since it responded to the information subpoena by providing publicly available information contained in Temenos AG’s annual report regarding Koukis’ interest in Temenos AG and the compensation he received from that company for serving on its board, the motion must be denied as moot. Doc. 143. Additionally, Scott J. Spooner, Esq., Senior vice President of Temenos USA Inc. submits an affidavit in opposition to the motion in which he asserts that the company was never served with the information subpoena. Doc. 144. Temenos USA further maintains that the motion to compel

Temenos to respond to the information subpoena must also be denied as moot since such entity does not exist. Doc. 143.

In support of each of the foregoing motions, plaintiff argues, inter alia, that “New York State courts have upheld service of information subpoenas outside the state of New York.” Docs. 109, 117, 124, 132.

LEGAL CONCLUSIONS:

Post-judgment disclosure allows a judgment creditor to learn whether a judgment debtor has the assets to satisfy a judgment. *See* 11 Weinstein-Korn-Miller, NY Civ Prac 5223.05. Among the post-judgment disclosure devices designed to assist a judgment creditor in collecting on a judgment is an information subpoena, which directs the recipient to respond to written interrogatories regarding the judgment debtor’s assets. Siegel, NY Prac § 509 at 971 (6th ed 2018). An information subpoena may be served in the same manner as a summons or may be served by registered or certified mail, return receipt requested. CPLR 5224(a)(3); Siegel, NY Prac § 509 at 971-972 (6th ed 2018).

Each of the information subpoenas plaintiff seeks to enforce were served on entities in states other than New York. Although plaintiff contends that service on these entities by certified mail, return receipt requested, was proper, this Court, after analyzing the relevant case law, disagrees.

In support of its contention that service of the information subpoenas by certified mail on entities outside of New York State was proper, plaintiff relies on *U.S. Corrugated , Inc. v Scott*, 2014 NY Slip Op 31287(U) (Sup Ct New York County 2013), *Harbor Footwear Group, Ltd. v*

ASA Trading, Inc., 1 Misc3d 911(A) (Sup Ct Nassau County 2004), and *Banco do Estado de Sao Paulo S.A. v Mendes Junior Int'l Co.*, 218 NYLJ 1011, p. 29, col. 4 (Sup Ct New York County 1997). Both the *U.S. Corrugated* and *Harbor Footwear* decisions relied on *Banco do Estado* in holding that an information subpoena could be served on a judgment creditor outside of New York State.

In *Banco do Estado*, this Court (Ramos, J.), held that “[t]he notion that out of state service of an information subpoena is not authorized is unduly restrictive” and that, since the court “possessed sufficient jurisdiction to render a judgment in the underlying action”, then “forbidding extrastate service of a subpoena designed to enforce that judgment” would result in “frustrat[ing] long arm jurisdiction under CPLR 302.” However, *Banco do Estado* is clearly distinguishable herein, since the information subpoena in that matter was served on the judgment debtor, over which the court had jurisdiction in the action in which the judgment was rendered. The same was true in *U.S. Corrugated* and *Harbor Footwear*, in which the information subpoenas were served on the judgment debtors by certified mail out of state. Here, however, the information subpoenas were served on entities which were nonparties to the action in which the judgment was rendered, and over which this Court never had jurisdiction.¹

Other New York decisions, not cited by plaintiff, have also held that, given the holding in *Banco do Estado*, an information subpoena could be served out of state. *See Estate of Robert*

¹ The *Banco do Estado* case is also distinguishable because the parties in that matter had a written agreement in which they consented to service of process by mail.

Marecca, 2006 NYLJ LEXIS 4870 (Surr Ct New York County 2006); Aquavella v Equivision, Inc., 181 Misc2d 322 (Sup Ct Monroe County 1999), appeal dismissed 270 AD2d 972 (4th Dept 2000). However, these cases are also distinguishable insofar as they involved parties over which the court had jurisdiction.

Importantly, in DeLeonardis v Subway Sandwich Shops, Inc., 219 NYLJ 59, p. 28, col. 3 (Sup Ct New York County 3/30/98), this Court (Tompkins, J.) acknowledged that Banco do Estado was persuasive but that it was bound to accept the holding of the Appellate Division, First Department in Siemens v Halske, GmbH v Gres, 37 AD2d 768 (1st Dept 1971) that “[t]here is no indication that service of a subpoena without the state is authorized.” Indeed, this Court (Schecter, J.) has relied on Siemens in denying a motion to compel compliance with an information subpoena served out of state. See Lewis v Broadcasturban Filmworks, LLC, 2015 NY Slip Op 32333(U) (Sup Ct New York County 2015).

In light of the foregoing, it is hereby:

ORDERED that plaintiff’s motions (motion sequences 006, 007, 008, and 009) are denied; and it is further

ORDERED that this constitutes the decision and order of the court.

20200221164501KFR000B126BC7BA25C41908BF1679448A5DB7B

KATHRYN E. FREED, J.S.C.

2/21/2020
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>