

**Matter of Cambridge Packing Co., Inc. v Lajaunie**

2021 NY Slip Op 32304(U)

November 16, 2021

Supreme Court, New York County

Docket Number: Index No. 150942/2021

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.



2016)). The respondent signed the confession on behalf of LBI as its officer and director. On July 7, 2016, the petitioner served a post-judgment information subpoena upon the respondent to ascertain whether and where LBI maintained assets. When he did not respond to the subpoena, the petitioner commenced a proceeding against the respondent on September 27, 2016 to compel compliance with the subpoena and, failing compliance, to hold him in contempt of court (*see Matter of Cambridge Packing Co., Inc. v Lajaunie*, Sup Ct, N.Y. County, Index No. 158128/2016). After repeated judicial interventions over a period of five years, the respondent finally gave a post-judgment deposition on July 19, 2018, and thereafter enabled the petitioner to obtain his personal bank records, LBI's bank records, LBI's tax returns, and accounting records. On January 16, 2021, the parties settled that proceeding and, by order dated November 16, 2021, that proceeding was disposed.

After reviewing the deposition transcript and the records that it obtained, the petitioner commenced this turnover proceeding against the respondent on January 27, 2021 (*see CPLR 304[a]*), alleging that the respondent possessed assets belonging to LBI or that he owed a debt to LBI that should be turned over to the petitioner to satisfy its judgment against LBI. According to the petitioner, after taking account of accrued interest on the judgment (*see CPLR 5003*), the judgment obligation had increased to the sum of \$166,655.66.

The respondent initially moved to dismiss the petition in this proceeding (SEQ 002), asserting that he was not properly served with process because he did not reside at the Manhattan addresses to which the petitioner had delivered the notice of petition and petition. At oral argument on September 8, 2021, the respondent agreed to accept service of process by email transmission to two email addresses that he provided to the court. The court, by order dated September 8, 2021, directed the petitioner to serve the respondent in that manner (*see CPLR 308[5]*). On October 1, 2021, the petitioner effected service of process upon the respondent in accordance with the September 8, 2021 order by transmitting the notice of petition, petition, and supporting papers to the respondent at the two subject email addresses.

In his answer, served on October 24, 2021, the respondent generally denies that he holds any assets belonging to LBI or that he personally owes any debt to LBI that should be turned over to the petitioner. He also asserts that he was not properly served and that, in any event, the court lacks long-arm personal jurisdiction over him because he does not reside in New York, and has not resided in New York since April 20, 2021, having moved to California as of that date. In addition, he contends that the proceeding is time-barred.

The petitioner's request to consolidate this proceeding with the 2016 contempt proceeding must be denied. CPLR 602 permits consolidation of two actions that "are pending before a court." Inasmuch as the 2016 contempt proceeding has been disposed, it is not "pending," and consolidation is impermissible (*see NY Prime Holding LLC v. Nationstar Mtge., LLC*, 2019 NY Slip Op 30857[U], \*9, 2019 NY Misc LEXIS 1553, \*14 [Sup Ct, N.Y. County, Mar. 27, 2019] [Kelley, J.]; *Gallo Nero, Inc. v Bordeliw, Inc.*, 2014 NY Slip Op 32461[U], 2014 NY Misc LEXIS 4208 [Sup Ct, N.Y. County, Sep. 23, 2014]).

The respondent waived the defense of improper service of process by consenting to service by email. Inasmuch as the court directed the petitioner to serve process in that fashion, and the petitioner complied with the directive, the petitioner was properly served in any event (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141-142 [1st Dept 2010]; *see also Kozel v Kozel*, 161 AD3d 700 [1st Dept 2018]). Moreover, the respondent does not dispute that he was a resident of New York on January 27, 2021, the date on which this proceeding was commenced. Hence, there is no basis for his claim that the court lacks personal jurisdiction over him (*see Parker v Parker*, 277 App Div 876, 876 [2d Dept 1950]; *cf. Lukezic v Royal Bank of Can.*, 2013 NY Slip Op 50870[U], 39 Misc 3d 1233[A] [Sup Ct, Tompkins County, May 29, 2013] [defendant conceded that New York courts had personal jurisdiction over him because he had moved to New York from Ontario, and resided in New York when the action against him was commenced, but complaint is dismissed because New York was an inconvenient forum, as all relevant incidents occurred in Ontario]; *20@LLC v Lynde*,

2012 NY Slip Op 32114[U], 2012 NY Misc LEXIS 3854 [Sup Ct, Nassau County, Aug. 1, 2012] [whether or not defendant was a New York domiciliary at the time the action was commenced, he had sufficient contacts with New York to subject him to long-arm jurisdiction under CPLR 302]; *Competitive Tech., Inc. v Pross*, 2007 NY Slip Op 50161[U], 14 Misc 3d 1224[A].[Sup Ct, Suffolk County, Jan. 26, 2007] [court need only consider question of long-arm jurisdiction over individual defendant where he did not reside in New York on the date that the action was commenced]). Contrary to the respondent's contention, this turnover proceeding is not barred by the three-year limitations period of CPLR 214. Rather, a turnover proceeding pursuant to CPLR 5225(b) is one to enforce a judgment and, thus, is subject to the 20-year limitations period of CPLR 211(b) that is applicable to such proceedings (see *Siegman v. Rosen*, 248 AD2d 180, 180 [1st Dept 1998]; *Hoerlein v Kaplan*, 2005 NY Misc LEXIS 3508, \*14-15 [Sup Ct, N.Y. County, Oct. 31, 2005]).

With respect to the merits of the petition, the petitioner asserts that the respondent, at his July 19, 2018 post-judgment deposition, conceded that LBI did not have any by-laws, resolutions, or share certificates and that he was LBI's only shareholder, making all corporate decisions and directing every aspect of LBI's operations. In addition, according to the petitioner, both the respondent's deposition testimony and the bank and accounting records that the petitioner secured subsequent to the entry of the judgment establish that the respondent owes LBI the sum of \$1,413,567.00 for the repayment of shareholder loans that LBI made to him. As described by the petitioner, a review of LBI's 2014 corporate tax return, which it does not submit with its papers, reflects that LBI reported outstanding loans in the sum of \$1,413,567.00 to shareholders at the end of that tax year, as compared to \$1,289,506.00 in outstanding loans to shareholders at the beginning of that tax year. At his 2018 deposition, the respondent asserted that he was the sole shareholder of LBI, but that he was unsure as to whether he had ever signed a promissory note in favor of LBI reflecting the loans that LBI purportedly made to him.

As framed by the petitioner, the sum of \$1,413,567.00 in shareholder loans have not been forgiven and, at least as of July 19, 2018, had not been repaid.

In his answer, the respondent avers that the deposition transcript "speaks for itself," denies that he owes any debt to LBI, denies knowledge and information as to whether the 2014 tax return that the petitioner relies upon is a true and accurate version, and asserts that all other substantive allegations constitute legal argument, to which he is not obligated to respond.

As relevant here, CPLR 5227 provides that

"Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding."

Thus, should it be proven that the respondent has failed to repay a shareholder loan that LBI made to him, and remains indebted to LBI, he would be liable to pay the amount of his indebtedness directly to the petitioner to the extent of LBI's judgment (*see Allied Plywood Corp. v. G.S.W. Mfg., Ltd.*, 157 AD2d 637 [2d Dept 1990]).

Inasmuch as the respondent denies that he still has any obligation to repay LBI, this matter cannot be determined on papers alone. CPLR 408 provides that, in a special proceeding such as the instant matter, leave of court must be obtained to conduct disclosure. The court exercises its discretion to direct very limited disclosure to aid the court in determining the outcome of this matter; consequently, on or before December 31, 2021, the petitioner shall provide the respondent with a legible copy of LBI's 2014 corporate tax return, the transcript of his July 19, 2018 deposition, and legible copies of all bank and accounting records that it obtained in connection with the 2016 contempt proceeding, and shall deliver additional copies

thereof to the court for in camera inspection. The parties shall thereafter appear, via the Microsoft Teams remote conference computer application on January 25, 2022, at 2:30 p.m., for a hearing on the merits of whether the respondent currently owes a debt to LBI, and the extent of any such debt, and the court shall provide invitations to the parties so that they can access the hearing.

Accordingly, it is

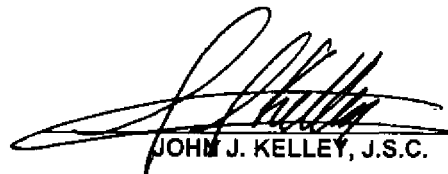
ORDERED that the petition is granted to the extent that,

- (a) on or before December 31, 2021, the petitioner shall provide the respondent with a legible copy of the 2014 corporate tax return of Le Boucherie, Inc., doing business as Les Halles, the transcript of the respondent's July 19, 2018 deposition, and legible copies of all bank and accounting records that the petitioner obtained in connection with the proceeding entitled *Matter of Cambridge Packing Co., Inc. v Lajaunie*, New York County Index No. 158128/2016, and shall deliver additional copies thereof to the court for in camera inspection at 71 Thomas Street, Room 304, New York, NY 10013, and
- (b) on January 25, 2022, at 2:30 p.m., the parties shall appear, via Microsoft Teams remote conference computer application, for a hearing on the merits of the petitioner's claim that the respondent presently owes a debt to Le Boucherie, Inc., doing business as Les Halles, and the extent of any such debt and the court shall provide invitations to the parties so that they can access and appear at the hearing,

and the petition is otherwise held in abeyance pending completion of the hearing.

This constitutes the Decision and Order of the court.

11/16/2021  
DATE

  
JOHN J. KELLEY, J.S.C.

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