

Exhibit 6

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Central States, Southeast and Southwest Areas Pension Fund v. Freyco Trucking, Inc.
N.D.Ill.,2004.

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United States District Court,N.D. Illinois, Eastern Division.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and Howard McDougall, Trustee, Plaintiffs,
v.

FREYCO TRUCKING, INC., Defendant.

No. 02 C 3380.

Feb. 19, 2004.

Thomas Maurice Weithers, Robert Anthony Coco, Joseph R. Scott, Albert M. Madden, Central States Law Department, Rosemont, IL, for Plaintiffs.
Steven A. Johnson, Johnson & Rappa, LLC, Merrillville, IN, for Defendant.

Plaintiffs then commenced supplemental collection proceedings by serving Cindi Frey ("Frey") in her capacity as "President of Freyco Trucking, Inc." with a citation to discover assets. Plaintiffs scheduled Frey's deposition pursuant to the citation, but she failed to appear. Instead, William Frey (Frey's husband) and Bill Tutlewski, both former Freyco employees, appeared and testified. According to plaintiffs, William Frey's and Tutlewski's testimony, and the documents they produced, reveal that: (i) Freyco ceased operations "at the end of December 2001"; (ii) Freyco never had any assets other than accounts receivable; (iii) Frey was Freyco's sole shareholder and officer; and (iv) at or around the time of Freyco's dissolution, equity distributions amounting to \$25,380.00 were made only to Frey.

Having had no success in enforcing the judgment against the now-dissolved Freyco, plaintiffs move for a default judgment against Frey.

MEMORANDUM OPINION

GRADY, J.

*1 Before the court is plaintiffs' motion for judgment against Cindi Frey. For the reasons set forth below, the motion is denied.

BACKGROUND

Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund") and Howard McDougall, the Pension Fund's trustee (together, "plaintiffs") brought this ERISA action against Freyco Trucking, Inc. ("Freyco") seeking to recover employer contributions Freyco allegedly owed to the Pension Fund. Freyco was properly served with a summons and complaint but failed to respond. Upon plaintiffs' motion, the court on July 24, 2002 entered a default judgment against Freyco in the amount of \$31,932.35.

DISCUSSION

Litigants who have secured judgments in federal court can seek to enforce those judgments either in state court (*see* 735 ILCS 5/12-650, *et seq.*) or in federal court pursuant to Federal Rule of Civil Procedure 69(a). *See Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir.1993). Plaintiffs have opted for the latter route, and Rule 69(a) instructs federal courts, in the absence of an applicable federal statute, to apply the law of the forum state in post-judgment collection proceedings. *See Cacok v. Covington*, 111 F.3d 52, 53 (7th Cir.1997); *Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193, 1195 (7th Cir.1996). No federal law applies here, so the law of Illinois, the forum state, is controlling.

Our analysis begins, and ends, with the Seventh Circuit's holding in *Matos*. In that case, the plaintiff had won a judgment in a Title VII action against

her former employer, Nellis, Inc., which had since been dissolved. The plaintiff had difficulty collecting and suspected that Nellis, Inc.'s owner, Mr. Nellis, had withdrawn all of the company's assets. Following unsuccessful Rule 69 proceedings against Mr. Nellis, the plaintiff moved the district court for a turnover order and sanctions. Instead, the district court (a visiting judge who had tried the Title VII case) terminated the Rule 69 proceedings "ruling that a federal court lacks authority to require an investor to pay the corporation's debts." *Matos*, 101 F.3d at 1195.

*2 On appeal, the Seventh Circuit acknowledged that "Rule 69 conforms collection proceedings to state law, and Illinois likely would not permit veil-piercing in supplementary proceedings...." *Id.* But, the Court held, since Nellis Inc. had been dissolved, the case did not present a veil-piercing issue, and under Illinois law, collection proceedings against a defunct corporation's distributees were proper. *See id.* The Court explained:

Nellis Inc. is gone, dissolved under state law, and the investors who received its assets are liable for the debts, to the extent of the distributions they received. For all practical purposes ... the distributees replace the defunct corporation as the real parties in interest. Distributee liability lasts for five years, and this action was commenced in time, so Nellis and any other recipients of corporate assets are directly answerable.

Matos is entitled to use Rule 69 proceedings to find out how much Nellis received, and the district judge must direct Nellis to divulge that information and turn over the proceeds (if there was a distribution) to satisfy the judgment.

101 F.3d at 1195-96 (citations omitted).

Therefore, because *Matos* allows a litigant who holds a judgment against a dissolved corporation to enforce that judgment directly against the corporation's distributees, plaintiffs here need not pursue a

separate judgment against Frey. Instead, plaintiffs may enforce the Freyco judgment against Frey, pursuant to Rule 69, to the extent of any asset distributions she received as a result of Freyco's dissolution. If Frey did receive any such distributions, she will be ordered to turn over those proceeds in satisfaction, or partial satisfaction, of the Freyco judgment.

Going forward, then, we must determine what distributions, if any, were received by Frey. Typically, the court would order Frey to appear at citation deposition or to appear before this court for a hearing on the matter. *See generally* *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 850 (7th Cir.1981). However, at least at this point, a second citation deposition and/or hearing are unnecessary. "Proceedings to enforce judgments are meant to be swift, cheap, informal [and] Illinois law appears to leave the procedure to be followed in such proceedings largely to the judge's discretion...." *Resolution Trust Corp.*, 994 F.2d at 1226 (citations omitted). And here, the evidence proffered in support of plaintiffs' motion—the deposition transcript of Messrs. Frey and Tutlewski, as well as Freyco balance sheets and accounting statements—is *already* sufficient to make a *prima facie* showing that Frey did in fact receive Freyco asset distributions totaling \$25,380.00. Frey's response brief, consisting of unsupported and conclusory denials, does nothing to rebut plaintiffs' evidence. However, we recognize that prior to this order the basis for Frey's potential liability may not have been clear, so we will give her another at-bat.

*3 Any renewed filing by Frey shall include a statement detailing all Freyco asset distributions she received from January 2001 to the present. In addition, to the extent Frey contests plaintiffs' characterization of monies she received as being something other than distributions, she shall explain the nature of those payments, complete with any supporting evidence available. In other words, plaintiffs have come forth with sufficient evidence to shift the burden to Frey to show that the pay-

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ments which plaintiffs have identified were *not* Freyco asset distributions.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for judgment against Cindi Frey is denied. Frey may have until March 5, 2004 to file a brief consistent with this opinion and with counsel's obligations under Fed.R.Civ.P. 11. Should the court require a further response from plaintiffs, they will be so notified. If Frey fails to make a showing that makes further briefing necessary, the court will order Frey to pay plaintiffs an amount equal to her Freyco asset distribution.

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