

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN WILEY & SONS, INC.,

08 CV 7834

Plaintiff

-against-

SUPAP KIRTSAENG D/B/A BLUECHRISTINE99
and JOHN DOE NOS. 1-5,

Defendants

_____X

DEFENDANT’S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION FOR AN ORDER
DIRECTING THE DEFENDANT TO BRING ASSETS INTO THE STATE

Defendant Supap Kirtsaeng (“**Kirtsaeng**” or “**Defendant**”) submits this memorandum of law and supporting declaration (the “**Kirtsaeng Decl.**”) in opposition to the motion of Plaintiff John Wiley & Sons, Inc., (“**Plaintiff**” or “**Wiley**”) seeking An Order Directing The Defendant To Bring Assets Into The State (the “**Motion**”) as follows:

I.

PRELIMINARY STATEMENT

As the Court is well-aware, the disposition of this case turned on a closely contested copyright issue, namely whether the Defendant could avail himself of the so-called *first sale* entitlement under 17 U.S.C. § 109 in selling overseas manufactured books in this country; the resolution of this technical issue (one upon which experts have strenuously disagreed) foretold the ultimate disposition of the case.

Notably, in ruling on the issue, this Court denied the Defendant what would have been a complete defense to the Plaintiff’s claims, but it did so with less than absolute confidence (referring to the issue as a *close jurisprudential question*).

No matter how slender its victory on the law, however, the Plaintiff scored an unprecedented jury verdict in its favor. Now, even as the case is on appeal (with multiple supporting amicus in submission), the Plaintiff would exploit its victory by demanding that the Defendant deliver his few personal items from California to New York City for immediate liquidation and application toward its windfall judgment. Among other things,

the Plaintiff hopes to strip the Defendant of a computer and printer he currently needs to secure his doctoral degree and thereby inflict an injury which would transcend reversal.

Fortunately, the Plaintiff's purpose is as unavailing as it is malicious. First, the Defendant does not even own the central item targeted by the Plaintiff, namely the 2001 Audi automobile; the car falls squarely outside the reach of section 5225 (a) and at best, requires the commencement of a fresh action against a non-party. Second, the computer and all- in one- machine referenced in the Motion are exempt from the cited CPLR turnover provision as *working tools* and/or *professional implements*. See CPLR section 5205. Finally, with respect to the only remaining item-- a set of golf-clubs-- the most that the Plaintiff may demand is delivery of *title*; the physical shipment of the clubs themselves to New York is not mandated.

In short, the Motion must be denied in its entirety.

II ARGUMENT

POINT 1 **SECTION 5225 DOES NOT REQUIRE THE DEFENDANT TO TRANSFER THE 2001 AUDI TO THE PLAINTIFF SINCE HE IS NOT IN POSSESSION OF THE VEHICLE**

CPLR section 5225 provides as follows:

- (a) 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.
- (b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is

shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to 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. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. 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. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

(Emphasis added.)

CPLR § 5225 (a) makes clear that it is directed only at money or personal property in which the judgment debtor has an interest. The Defendant has testified that he does not own the vehicle that the Plaintiff demands that he deliver to New York. See Dunnegan Decl. Exh. A, deposition testimony of Supap Kirtsaeng at tr. 8 lns 4- 10. ln. 25. Even if the Defendant could drive the car to New York, he cannot transfer its title to the Plaintiff since it is not in his name. In short, turnover of the car cannot be ordered under subsection a. See Erin Capital Mgt., LLC v. Celis, 19 Misc. 3d 390; 854 N.Y.S.2d 640 (Nassau Co. 2008)(“The court found that the judgment creditor failed to clearly show that property was in the judgment debtor's possession or control. ...At the very least, a third party was listed as a title holder, and therefore was an owner of the vehicle. As a joint owner, it was required that such person be given the opportunity to be heard.”).

If anything, the Plaintiff "must follow the procedure set forth in [CPLR] 5225 (b), which requires that the creditor `commence an action against the person in possession,' instead of merely filing a motion in the original action." Runaway Dev. Group v Pentagon Tech. Intl. Ltd., 396 F. Supp. 2d 471, 473 (S.D. N.Y. 2005)(quoting Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 21 (2d Cir. 1999). “5225 and

5227 require the judgment creditor to proceed against the party that can produce the asset that the judgment creditor seeks, whether that party is the judgment debtor itself, or some third party.” Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 21 (2d Cir. N.Y. 1999).

The Motion must be denied with respect to the Audi.

POINT 2
**CPLR SECTION 5205 EXEMPTS THE DEFENDANT’S COMPUTER
AND PRINTER/FAX MACHINE/COPIER FROM THE TURNOVER STATUTE**

The Defendant owns a computer and an “all in one” fax/ copier/ printer machine which are necessary implements for his completion and defense of his doctoral thesis. Thus, beyond seeking assets of comparatively little value toward the satisfaction of a judgment of this size, the Plaintiff demands that the Defendant altogether forfeit the degree he has been working toward for the last five years. At his January 14, 2010 post-judgment deposition, the Defendant even offered to hand his computer and fax machine over to the Plaintiff once his studies are over, see Dunnegan Decl. Exh. A, depo. Tr. at 69. Ins. 18- 25, but the Plaintiff demands the implements without delay.

Needless- to-say a Second Circuit reversal of this Court’s decision on the copyright issue will do nothing to restore the doctoral degree the Plaintiff hopes to spoil. Under § 5205, however, New York State has prevented such abusive efforts by a judgment creditor in excluding this kind of personal property from the ambit of the turnover statute. Subsection 7 exempts “necessary working tools and implements, including those of a mechanic, farm machinery, team, professional instruments...provided, however, that the articles specified in this paragraph are necessary to the carrying on of the judgment debtor's profession...” CPLR § 5205.

In that the Defendant’s computer and all in-one-machine are exempt from the reach of the turnover statute, the Court should deny the Motion to the extent it seeks to have these items turned-over to a “receiver.” See also Frobel v. County of Broome, 419 F. Supp. 2d 212, 224 (N.D.N.Y 2005) (noting that a computer is an item which may be exempt from collection to satisfy a judgment)

POINT 3
CPLR SECTION 5225 C IS SATISFIED BY
ORDERING A TRANSFER OF TITLE AND DOES NOT REQUIRE
THE PHYSICAL DELIVERY OF THE GOLF CLUBS TO NEW YORK

CPLR section 5225 c provides that to effect payment or deliver, “[t]he court may order any person to execute and deliver any document necessary to effect payment or delivery.” Indeed, the Advisory committee notes acknowledge that "delivery" of property may be achieved by *assignment* or *transfer* under subd (c). Nothing in the statute requires that the Defendant physically transport his golf-clubs to New York State.

POINT 4
CPLR SECTION 5225 DOES NOT CALL
FOR THE APPOINTMENT OF A RECEIVER

The Plaintiff maintains that the Court should appoint a receiver to marshal the Defendant’s assets. See Pl. Memo. at 5. No authority in favor of this relief is cited, however, nor is any theory advanced as to its propriety. Without more, the application must be denied.

III.
CONCLUSION

For the foregoing reasons, the Defendant respectfully submits that the Motion should be denied in its entirety and the Court should grant such other and further relief that it deems just and proper.

Dated: New York, New York
February 10, 2010

Respectfully submitted:
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