Marine Midland Bank, N.A. v Koch
2009 NY Slip Op 33448(U)
November 10, 2009
Supreme Court, New York County
Docket Number: 100613/09
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART THREE

MARINE MIDLAND BANK, N.A.,

Petitioner,

- against -

RICHARD F. KOCH, RICHARD F. KOCH d/b/a KOCH REALTY CO., LEONARD MAGGIO, WHALENECK ENTERPRISES, INC., and 3010 WHALENECK REALTY CORP.,

Respondents.

Index No.: 100613/09
Motion Date: 7/22/09
Motion Seq. No.: 002

BRANSTEN, J.:

In this turnover proceeding, petitioner Marine Midland Bank, N.A. ("Marine Midland") seeks an order directing respondents Whaleneck Enterprises, Inc., 3010 Whaleneck Realty Corp. and Leonard Maggio (collectively the "Whaleneck Respondents") to turn over any shares in the Whaleneck corporations that are owned by judgment-debtor Richard F. Koch ("Koch"). Long ago, Marine Midland obtained a multi-million dollar judgment against Koch and Richard F. Koch d/b/a Koch Realty Co. (collectively the "Koch Respondents").

In this motion, Marine Midland seeks to amend the caption to reflect that the judgment was assigned to 645 W. 44th St. Associates ("Associates"), which should be the named petitioner. Respondents do not object to amendment of the caption, which was granted in an August 25, 2009 Order, but they cross-move to dismiss the petition based on improper

service. Additionally, the Koch Respondents cross-move to dismiss on the grounds of champerty. Petitioner opposes the cross-motions.

Background

In 1992, Marine Midland commenced an action against the Koch Respondents on a commercial mortgage on a building located at 645 West 44th St. in Manhattan. Judgment was entered against the Koch Respondents in 1993. Thereafter, Marine Midland made several efforts to determine the whereabouts of the Koch Respondents' assets.

In 1994, Marine Midland assigned the judgment to Associates, which purchased the building. In 2007, in a matter captioned *645 West 44th Street Assoc. v. Koch* (113873/2007), Associates, as assignee, moved to renew the judgment and for summary judgment. This Court (Gische, J.) granted Associates summary judgment against the Koch Respondents, entitling it to $3,539,221.95 exclusive of interest.

In this proceeding, Associates, as Marine Midland's assignee, seeks to recover Koch's shares in the Whaleneck entities. The Koch Respondents, who were entitled to notice of the collection effort, are named as respondents in addition to the Whaleneck Respondents.

On February 9, 2009, the Whaleneck Respondents served their Verified Answer, which included lack of jurisdiction "for failure of proper service" as their second affirmative defense (Mushkin Aff., Ex. 1, at ¶ 9). Ten days later, on February 19, 2009, the Koch

Respondents served their Verified Answer, which also included a lack-of-jurisdiction affirmative defense based on "failure to effectuate proper service of the Order to Show Cause and Petition" (Mushkin Aff., Ex. B, at ¶ 9).

In March 2009, the Whaleneck Respondents moved to disqualify Marine Midland's counsel. The motion was subsequently denied.

In early May 2009, the Koch Respondents made this cross-motion to dismiss the petition on the ground that personal jurisdiction is lacking because they were not properly served. Specifically, they contend that this court required "personal service" of the order to show cause and accompanying papers, including the petition, by January 23, 2009 (*see* Koch Affidavit, Ex. A). The Koch Respondents assert that Marine Midland "caused documents to be purportedly served upon Respondent Richard F. Koch's son at a location that is neither Richard F. Koch's place of residence nor place of business" because Koch lives in Florida (Memorandum of Law in Support of Cross-Motion ["Koch Mem"] at 2). The Koch Respondents also seek dismissal based on Judiciary Law § 489, which prohibits champerty,* arguing that the "primary, if not sole, purpose of the assignment of the judgment . . . was to commence litigation" (Koch Respondents' Memo at 4).

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* Champerty is the "act or fact of maintaining, supporting or promoting another person's lawsuit" (*see* Black's Law Dictionary 224 [7th ed. 1999]).

The Whaleneck Respondents in early May also cross-moved for dismissal. They maintain that Maggio was never personally served with the Order to Show Cause and that incredibly there is only a three-minute time difference between when Koch was served and when he was served at a different location (Maggio Aff at ¶ 10). The Whaleneck Respondents also argue that service was completed too late--long after the court-imposed deadline.

Petitioner responds that the cross-motions to dismiss based on improper service are untimely as they were made more than 60 days after service of respondents' answers. Petitioner also maintains that service was proper because the order to show cause did not require personal delivery, and thus, any of the methods contemplated by CPLR 308 were appropriate. With respect to champerty, petitioner urges that the Koch Respondents are raising the argument too late since Associates already obtained summary judgment against them and the assignment was upheld.

On reply, the Koch Respondents submit that their cross-motion is timely because they served an amended answer on March 9, 2009 and moved within 60 days on May 8th. Respondents further contend that their motion cannot be time barred based on CPLR 406, which provides that motions "in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time."

Analysis

CPLR 3211(c) provides that an objection that a notice of petition and petition have not been properly served "is waived if, having raised such objection in a pleading, a party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." The rule equally applies when a petition has been served along with an order to show cause. A contrary result would undermine the 60-day rule (*see* Siegel, Practice Commentaries, McKinneys Cons. Laws of NY, Book 7B, CPLR 3211:59, at 91 [2005] ["practically speaking" 60-day deadline should apply to answer to a petition accompanying an order to show cause as it is "clear that the legislature intended to have the special proceeding governed by (CPLR 3211[c])]).

The whole point of requiring a motion based on improper service within 60 days or deeming the defense waived is to ensure prompt adjudication of service as a threshold matter. Here, the Whaleneck Respondents affirmatively sought relief from this Court--they moved to disqualify petitioner's counsel, albeit unsuccessfully--and it would make absolutely no sense to permit parties to actively litigate a matter only to later claim entitlement to dismissal because they were never properly served. It would also make little sense to re-start the 60-day clock from an amended answer. The Legislature authorizes 60 days from service of an answer to challenge the propriety of service. Once those 60 days lapse so does the time to contest service absent a court-authorized extension of time.

Respondents did not move to dismiss on the basis of improper service within 60 days of serving their original answers containing the defense as required by CPLR 3211 (e). Nor did they seek an extension of time for undue hardship. Thus, their motions must be denied (*see Farkas v Chase Manhattan Bank*, 290 AD2d 253, 254 [1st Dept 2002]).

CPLR 406 does not change the result. That provision authorizes abbreviated notice in the context of motions brought in the course of special proceedings and requires that they be heard at the same time as the hearing on the petition to ensure expedition. CPLR 406 was adopted to *reduce* the time otherwise provided for motions in the context of a special proceeding, not to *enlarge* time frames or authorize delay. In fact, "aside from abbreviated notice, the usual CPLR rules of motion practice apply in a special proceeding," and reliance on CPLR 406 is completely misplaced (*see* Alexander, Practice Commentaries, McKinneys Cons. Laws of NY, Book 7B, CPLR 406, at 481 [2001].

To the extent the Koch Respondents seek dismissal based on champerty, they should have raised that argument in the 2007 Proceeding before Associates was awarded summary judgment and became legally entitled to recover the judgment.

Accordingly, it is

ORDERED that the motion to amend the caption is granted without opposition in accordance with the Order signed by this Court on August 25, 2009; and it is further

ORDERED that the caption is amended and shall read:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART THREE

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645 W. 44TH ST. ASSOCIATES, as assignee of
MARINE MIDLAND BANK, N.A.,

Index No.: 100613/09

Petitioner,

- against -

RICHARD F. KOCH, RICHARD F. KOCH
d/b/a KOCH REALTY CO., LEONARD
MAGGIO, WHALENECK ENTERPRISES, INC.,
and 3010 WHALENECK REALTY CORP.,

Respondents.

----------; and it is further

ORDERED that respondents' cross-motions to dismiss are denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
November 10, 2009

ENTER:

Hon. Eileen Bransten

FILED
Nov 13 2009
NEW YORK
COUNTY CLERK'S OFFICE