

Valiotis v Safran

2011 NY Slip Op 32085(U)

July 26, 2011

Supreme Court, New York County

Docket Number: 106276/11

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Efstathios "Steve" Valiottis

INDEX NO. 106276/11

- v -

MOTION DATE _____

MOTION SEQ. NO. 1

Edward B. Safedan

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3,4</u>

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUL 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/26/11

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

EFSTATHIOS "STEVE" VALIOTIS,

Petitioner,

-against-

EDWARD B. SAFRAN,

Respondent.

Index No.
106276/11

**DECISION
and ORDER**

FILED Mot. Seq.
001

JUL 29 2011
X

-----X
HON. EILEEN A. RAKOWER:

NEW YORK
COUNTY CLERK'S OFFICE

Efstathios Valiotis ("Petitioner") brings this petition for an order directing respondent Edward B. Safran ("Safran") to pay to Petitioner money he has in his possession belonging to Demetrios K. Demetrios ("Mr. Demetrios" or "judgment debtor"). Petitioner states that, on August 17, 2005, he docketed a \$152,933.23 judgment ("the 2005 judgment") against Mr. Demetrios in a Nassau County action with the index number 001873/1995 ("the Nassau Action"). Petitioner claims that Mr. Demetrios has divested himself of assets to evade creditors, and that all collection efforts made on his behalf subsequent to the 2005 judgment have failed.

Petitioner states that on May 18, 2011, he received a letter from William Shayne, his attorney in the Nassau Action, stating that he believed that Mr. Demetrios was party to an action that had recently been settled, and that he may be in possession of funds which could be applied toward the 2005 judgment. On May 23, 2011, Petitioner received an e-mail from Richard Schrier, Shayne's co-counsel in the Nassau Action, advising that Mr. Demetrios and his wife "received a substantial cash sum, well in excess of the [2005] judgment sum" in connection with the settlement of an action. Schrier identified Safran as Mr. Demetrios's attorney in the matter settled.

On May 24, 2011, Petitioner served a restraining notice upon Safran, preventing him from making or suffering any sale, assignment or transfer of, or any interference with property in which Mr. Demetrios has an interest, including settlement monies.

Safran responded to the restraining notice by letter dated May 25, 2011. Safran provided the complaint of the recently settled action, which was brought in Supreme Court, Queens County, and was titled *Athena Lazarides Demetrios v. John Kalafatis and Metro B.C., LLC*, Index No. 14231/2008 (“the Queens Action”). The plaintiff in the Queens Action (“Mrs. Demetrios”) is the wife of Mr. Demetrios. The Queens Action was brought by Mrs. Demetrios for judicial dissolution of Metro B.C. LLC (“the LLC”). Mrs. Demetrios was a 50% member of the LLC. Defendant John Kalafatis owned the other 50% of the LLC. Mrs. Demetrios alleged, *inter alia*, that Kalafatis breached his fiduciary duties, usurped control of the LLC, excluded Mrs. Demetrios from participating in the LLC.

Safran also provided the April 1, 2011 stipulation of settlement in the Queens Action. The stipulation resolved two actions: the Queens Action, and a second action in which Skyline Restoration Inc. (“Skyline”), a company owned by Kalafatis, sued the LLC for money lent to the LLC by Skyline. The stipulation provided that the two matters were settled on the following terms (along with other terms not relevant herein):

1. DEMETRIOS shall execute:

a. A letter of resignation as an officer and member of METRO and relinquishment of any and all right title or interest of Metro in which DEMETRIOS has or has ever had in Metro which shall be forwarded to counsel for Metro who shall hold same in escrow pending the receipt and clearance of the funds set forth below; and

b. An unconditional general releases [sic] to the benefit of Metro, Kalafatis and Skyline which shall be forwarded to counsel for Metro Kalafatis and Skyline, respectively, who shall hold same in escrow pending the receipt and clearance of the funds set forth below;

2. DEMETRIOS’S husband, DEMETRIOS K. DEMETRIOS a/k/a DIMITRIOS PAULOS DIMITRIOLAKIS shall execute an unconditional general release to the benefit of Metro, Kalafatis and Skyline which shall be forwarded to counsel for Metro, Kalafatis and Skyline, respectively who shall hold same in escrow

pending the receipt and clearance of the funds set forth below;

3. METRO KALAFATIS and SKYLINE shall each execute unconditional general releases to the benefit of DEMETRIOS and DEMETRIOS'S husband, DEMETRIOS K. DEMETRIOS a/k/a DIMITRIOS PAULOS DIMITRIOLAKIS which shall be forwarded to counsel for DEMETRIOS who shall hold same in escrow pending the receipt and clearance of the funds set forth below;

4. Upon receipt of the aforementioned documents by METRO's counsel, METRO shall pay to DEMETRIOS's counsel the total sum of \$350,000.00 within 10 days thereafter. DEMETRIOS's counsel shall notify all parties when the funds have cleared his escrow account after which all documents held in escrow may be released

Safran also provided a copy of the settlement check. The check is payable to "Edward B Safran as atty, Athena Lazarides Demetrios and Demetrios K Demetrios" in the amount of \$350,000.

In his letter, Safran stated that all of the proceeds of the settlement were for Mrs. Demetrios since only she and Kalafatis were members of the LLC, "notwithstanding that [Mr. Demetrios's] name was unilaterally included as a co-payee on the settlement check by the issuer." Safran further stated that "[t]he only reason the judgment debtor's name appears in the settlement agreement, is that as an element of the negotiated settlement, mutual releases were exchanged between the judgment debtor on the one hand, and Metro Kalafatis and Skyline on the other to prevent any further litigation for undisclosed claims"

Safran cross-moves to dismiss the petition. Safran states that he was retained by Mrs. Demetrios, and by her alone, in connection with the Queens Action in 2006. He provides a copy of the retainer agreement, addressed to and signed solely by Mrs. Demetrios. He states that he never represented Mr. Demetrios, and that Mr. Demetrios was only included in the stipulation (despite not being a party to either of the actions settled thereby) because

During the negotiations Mr. Kalafatis voiced a concern that Athena's husband would later sue him for matters arising out of construction industry transactions in which they had been involved some years before - transactions unrelated to Metro BC. Since it was apparent that Demetrios K. Demetrios had not filed a lawsuit against Mr. Kalafatis or any of his companies over the years, and since I was informed that he had no intention of commencing any such action, as an accommodation to his wife and to help her facilitate the settlement with Mr. Kalafatis, Mr. Demetrios agreed to execute and deliver a release to Mr. Kalafatis and his company from any claims, provided he was given with [sic] a reciprocal release. That reciprocal release was the sole consideration for his delivery of a release.

Safran also provides the affidavit of Mrs. Demetrios. Mrs. Demetrios states that, pursuant to the stipulation in the Queens Action, she conveyed her ownership interest in the LLC to Kalafatis in consideration of a payment of \$350,000. She states that Mr. Demetrios had no ownership interest in the LLC and that, aside from monies due her attorney, she is the sole owner of the \$350,000 in settlement proceeds.

On reply, Petitioner submits additional documents which he claims demonstrate that Mr. Demetrios is a co-recipient of the settlement monies. These include a May 20, 2011 letter from Kalafatis's attorney Jeffrey M. Samberg to Safran, wherein Samberg states "I am also enclosing my escrow check in the sum of \$350,000 payable to yourself and your clients."

CPLR §5225(b) provides, in pertinent part, as follows:

(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

* 6]

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

It is undisputed that Mrs. Demetrios was a 50% shareholder in the LLC at issue in the Queens Action, with the other half being owned by Kalafatis. Pursuant to the stipulation, it was agreed that Kalafatis would buy out Mrs. Demetrios's interest in the LLC. However, nowhere in the stipulation do the parties indicate how the \$350,000 was to be allocated. The check on its face names Mr. Demetrios as a payee, which would indicate that Mr. Demetrios was to receive some monetary compensation pursuant to the stipulation. On the other hand, Safran and Mrs. Demetrios provide affidavits attesting that the entirety of the monies was to be paid to Mrs. Demetrios (save for Mr. Safran's legal fees). In the face of the conflicting evidence in the record, the court finds that a hearing is required to determine what portion of the settlement monies, if any, were attributable to Mr. Demetrios.

Wherefore, it is hereby

ORDERED that the parties shall appear for a hearing on Tuesday, August 30, 2011 at 11:00 a.m. at 80 Centre Street, Room ~~309~~ 308

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 26, 2011


EILEEN A. RAKOWER, J.S.C.

FILED

JUL 29 2011

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