

**Southampton Brick & Tile, LLC v Suffolk County
Natl. Bank**

2011 NY Slip Op 33550(U)

December 29, 2011

Sup Ct, Suffolk County

Docket Number: 08-16798

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/14/08 (#001)
MOTION DATE 3/25/11 (restored)
ADJ. DATE 12/16/11
Mot. Seq. # 001: MotD; CaseDisp
Settle Judgment

-----X		
SOUTHAMPTON BRICK & TILE, LLC,	:	BRODY, O'CONNOR & O'CONNOR
	:	Attorneys for Petitioner
Petitioner	:	7 Bayview Avenue
	:	East Northport, NY 11768
- against -	:	
	:	BALFE & HOLLAND, PC
THE SUFFOLK COUNTY NATIONAL BANK,	:	Attorneys for Respondent
	:	135 Pinelawn Road Suite 25 North
Respondent	:	Melville, NY 11747
	:	
	:	
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Upon the following papers numbered 1 to 12 read on the petition, answer and other papers served in this special proceeding for a turn over order ; Notice of Petition and supporting papers 1-3 ; Notice of Motion and supporting papers _____ ; Notice of Cross Motion and supporting papers _____ ; Answer and Supporting papers 4-5; 6-7 ; Reply and Supplemental reply papers 7-8; 9-10; 11-12 ; Other _____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the petition (#001) served in this special proceeding commenced, in effect, for an order compelling payment by the respondent of funds on a deposit in a bank account which were seized as a set-off , is considered under CPLR Articles 52 and 62 and is granted to the extent set forth below.

This special proceeding was commenced by the petitioner, Southampton Brick and Tile, LLC ("SBT") in 2008 to recover from the respondent, The Suffolk County National Bank, the sum of \$157,740.32. These funds were on deposit in an account titled in the name of Southampton Tile & Marble Corp. ("STM") in July of 2007, when the petitioner obtained an order of this court dated July 17, 2007, that temporarily restrained said funds from removal. That order was issued in the context of a prior proceeding commenced by the petitioner, SBT, against STM and its principal, Angelo Toscano (see Index

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No. 20976-07). By such action, the petitioner sought recovery of money damages in excess of 2 million dollars by reason of the purported acts of fraud, conversion, self-dealing and other tortious conduct on the part of Toscano and STM. The petitioner claimed that by such conduct, monies allegedly belonging to the petitioner were wrongfully diverted to and/or converted by Toscano and STM.

The above described prior action commenced by the petitioner under Index No. 20976-07 remains an active case in the inventory of the undersigned, due in part to stays and other circumstances arising from federal actions against Angelo Toscano. Nevertheless, the petitioner did obtain an order of this court on February 29, 2008 granting, among other things, an attachment of the STM account on deposit with the respondent at issue herein and an order pursuant to CPLR 6212 directing the Sheriff to levy, at any time prior to final judgment, upon said account.

During the pendency of the petitioner's motion for an attachment of the subject account, the respondent Bank herein commenced a separate action against STM and Toscano under Index No. 31684-07 for recovery of amounts due under a promissory note in favor of the respondent Bank. By order dated March 31, 2008, the respondent's motion for summary judgment in lieu of complaint was granted by the Hon. Joseph Farnetti, AJSC, as was the petitioner's cross motion for leave to intervene in that action. A judgment in favor of the respondent herein against STM, Angelo Toscano and his wife in excess of \$840,000.00 was entered in that action on April 18, 2008.

The petitioner claims that on or about March 20, 2008, its attorneys sent the Sheriff an execution with notice to garnishee (respondent) to levy upon the subject account at the respondent Bank (*see* Petition, Ex. H). The petitioner further alleges that "upon the Sheriff's appearance at the Suffolk County Bank, the Bank decided to seize the funds in the account rather than allow the Sheriff to levy upon them" (*see* Petition, ¶ 22). Continuing, the petitioner alleges that the "Bank seized the funds (\$157,740.32) in the account notwithstanding that Toscano had averred under oath that the funds were not his, but rather were the funds of SBT". The petitioner alleged that said seizure was wrongful in light of the prior order of this court, dated July 17, 2007, which froze the funds in said account¹, and/or the February 29, 2008 order which granted the petitioner's motion for an attachment and prejudgment levy on the subject account.

While the petitioner failed to allege the date on which the Sheriff appeared at the respondent Bank's office with the March 20, 2008 execution authorizing the levy, it appears from correspondence between counsel that the levy was attempted on Friday, April 18, 2008, the same date as the entry of the respondent's judgment in the separate action on the promissory note that the respondent commenced against STM and Toscano under Index No. 31684-07. More clearly apparent is that the respondent Bank executed its previously asserted claimed right to a set-off by seizing the funds in the subject account in

¹This temporary restraining order, by its terms, expired in August of 2007 on the return date of the order to show cause in which it was contained. The record is devoid of any evidence that the temporary restraining order was continued by order of this court or stipulation of the parties.

response to the Sheriff's appearance at the respondent's Bank office on Friday, April 18, 2008, the date on which its judgment against STM and the Toscanos was entered.

After its demands for release of the funds seized from the subject account were rejected by the respondent Bank, the petitioner commenced this special proceeding on April 30, 2008² Motion practice and an appeal delayed the submission of the petition until April 8, 2011. In the wherefore clause of its petition, the petitioner demands an order: (a) compelling the respondent to comply with the Sheriff's levy on the account; (b) pursuant to CPLR 5225(b), directing the Bank to turn over the funds to the Sheriff; (c) an order against the respondent imposing sanctions; and (d) such other and further relief the court deems just and proper. In support of its demands for relief, the petitioner originally relied upon two affidavits, one by Bret E. Brodsky, a member of an LLC which co-owns SBT together with Angelo Toscano, and one by Angelo Toscano, himself, both of which were submitted in the petitioner's previously commenced action against STM and Toscano.

In its original papers, the petitioner characterized the averments set forth therein as conclusive proof that the monies deposited by Toscano in the account at issue herein belonged to the petitioner rather than STM, the title holder of said account. Such claims were predicated, principally, on the first sentence of ¶ 23 of Toscano's affidavit that was submitted in opposition to the petitioner's motion for injunctive and other provisional relief dated August 9, 2007. Therein, Toscano acknowledged that all deposits made to the Suffolk County Bank account . . . were for the benefit of the petitioner SBT, "subject only to adjustment at closing." Petitioner thus claims that the respondent Bank had no right to a "set-off" against the account at issue notwithstanding that it was and remain titled in the name of STM, because the monies deposited therein belong to the petitioner, SBT.

In its answer to the petition, the respondent set forth four affirmative defenses, including failure to state a claim, estoppel and that the affidavits relied upon by the petitioner are not competent proof as to the ownership of the funds on deposit in the subject account. In addition, the respondent claimed in its second affirmative defense that pursuant to § 9-g of the Banking Law, the respondent had a right to set-off the matured debt owing to the respondent from STM and Toscano under the terms of the promissory note, upon which, the Bank had successfully sued and obtained a judgment in the related action before acting Justice Farnetti (Index No. 31684-07). In advancing this statutory defense, the respondent emphasized that the petitioner was aware that Toscano was depositing funds in the subject account titled in the name of STM when such deposits were made. The answer contained no assertion of the statutory defense under §151 of the Debtor and Creditor Law that had been advanced in the Bank's original opposing papers (*see* Affirmation in Opposition by Amy J. Zamir, Esq., dated June 6, 2008).

². Such commencement was well within the 90 day period imposed by CPLR 6214(e) upon the grantee of an order of attachment who seeks to preserve a levy of execution (*see* CPLR 6214(d); (e)).

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By order dated February 23, 2011, the petition served in this special proceeding for an order directing the Bank to turnover the seized funds, was restored as re-noticed to the motion calendar of this court for March 25, 2011. In response, the respondent Bank moved for an order granting it leave to conduct discovery (*see* CPLR 408). In support of its cross motion, the Bank claimed that to defeat the petitioner's claims of entitlement to the funds at issue, depositions of Angelo Toscano, Bret Brodsky and his partner Barnett Brown, who were the co-owners of the petitioner, SBT, were required. The Bank further claimed that such discovery was necessary because Toscano, Brodsky and Brown (LLC) were co-owners of the petitioner SBT who operated out of two locations, one in Suffolk County and the other in Nassau County. After their business relationship began, disputes arose and Toscano and the LLC resolved to wind down their business with Toscano. The parties allegedly agreed that Toscano would keep the business operation in Suffolk County and Brodsky and Brown through their LLC, would keep the Nassau County business operations. Agreements were allegedly struck between the two factions regarding the maintenance of separate Banks and accountings of the separate business operations, out of which, the subject account was opened and titled in the name of STM rather than SBT. The respondent Bank argued that depositions of the principals of both factions were necessary in order to ascertain the true owner of the funds in the subject account at the time the respondent seized said funds in April of 2008 to offset the debt owed by STM and Toscano to the respondent.

By order dated May 2, 2011, this court rejected the petitioner's demands for a "turn over" order pursuant to CPLR 5225(b), since the petitioner was not a judgment creditor within the purview of Article 52 of the CPLR. However, the court found that the petitioner's demands for relief were cognizable under CPLR 6214(d), since the petitioner was the grantee of the February 29, 2008 order of attachment³. A summary determination of the petitioner's claims was found, however, to be precluded by issues of fact regarding whether the Sheriff's levy had been accomplished prior to the respondent Bank's seizure of the funds in the STM account on Friday, April 18, 2008 and whether the set-off so executed by the Bank was valid under Banking Law § 9-g. Issues regarding whether title to the account trumped beneficial ownership of the monies on deposit therein were also cited by this court as presenting additional mixed questions of fact and law that precluded a summary determination of the petition (*see* Short Form Order dated May 2, 2011, p. 5).

In addition to making these findings, the court, in its May 2, 2011 order, conditionally granted the Bank's motion for discovery to the extent that the Bank was granted leave to engage discovery limited to the depositions of Angelo Toscano, Bret Brodsky and Barnett Brown. The respondent's leave was conditioned upon the issuance and service of a non-party subpoena and notice to take the deposition of Angelo Toscano within 60 days of the date of the May 2, 2011 order and the conclusion of all depositions

³Pursuant to the terms of that order of attachment, the petitioner was authorized to issue an execution to the Sheriff authorizing him to levy upon the subject Bank account prior to the issuance of any judgment in the underlying action between the petitioner and STM and Toscano, which it did in March of 2008.

within 90 days of the date of such order. The return date of the petition was adjourned to allow the parties time to conduct the discovery contemplated by the May 2, 2011 order.

The deposition of Anthony Toscano was held on July 22, 2011. The depositions of the other two individuals, for which leave was granted, were not held for reasons unknown to the court. Thereafter, counsel met with the court on several occasions to explore settlement possibilities, but no settlement was attained. Although both sides were invited to prepare further submissions following the depositions for which leave was granted, only the petitioner availed itself of such opportunity. Included as part of the petitioner's supplemental submissions, dated September 8, 2011, is a copy of the transcript of the July 22, 2011 deposition testimony of Anthony Toscano. Therein, Toscano testified, unequivocally, that the monies on deposit in the STM account belonged to the petitioner and that no agreement for the division of those or any other funds between the principals of STM and SBT was ever consummated.

On December 16, 2011, the petition (#001) was marked submitted for determination by this court. Upon its review of the pleadings served and filed herein, the affirmations and other submissions of the parties in support of and in opposition to the petition, the court finds that the petitioner is entitled to an order and judgment pursuant to CPLR 6214(d) directing the respondent Bank to pay over to the plaintiff monies in the amount of \$157,740.32 which the Bank seized as a purported lawful set-off in response to the execution levied by the Sheriff against the account titled in the name of Southampton Tile and Marble (STM) but belonging to the plaintiff, Southampton Brick and Tile (SBT). The proof adduced by the petitioner established, prima facie, the following facts: 1) that the petitioner was the beneficial owner of the funds on deposit in the name of STM at the time of their seizure by the respondent Bank; 2) that pursuant to an order of attachment issued by this court on February 29, 2008 in a separate action, the petitioner was authorized to issue an execution to the Sheriff authorizing him to levy upon the subject Bank account prior to the issuance of any judgment in that separate action; 3) that the petitioner issued an execution to the Sheriff in March of 2008 and that the Sheriff's levy of such execution was accomplished prior to the respondent Bank's seizure of the funds in the STM account on Friday, April 18, 2008. The opposing papers submitted to this court by the respondent Bank failed to rebut the plaintiff's prima facie showing. The court thus finds that the set-off executed by the Bank in response to the levy by the Sheriff was invalid. The petitioner is thus entitled to an order and judgment pursuant to CPLR 6214(d) directing the Bank to pay over to the petitioner the sum of \$157,740.32, which amount the Bank seized from the account titled in the name of STM on April 18, 2008. The petitioner is further awarded, pursuant to its omnibus demand for relief, interest at the legal rate on the principal sum \$157,740.32 from March 25, 2011, the date on which the petition herein was restored to the calendar of this court following the petitioner's appeal of the order dated August 5, 2008.

The petitioner's demands for relief pursuant to CPLR 5225(b) are denied as unmeritorious in accordance with the prior order dated May 2, 2011. The petitioner's pleaded demands for an award of sanctions and attorney's fees are denied for want of proof of an entitlement thereto under the facts or the law.

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In view of the foregoing, the petition (#001) is granted only to the extent that the petitioner is awarded an order judgment pursuant to CPLR 6214(d) against the respondent Bank in the principal amount of \$157,740.32, with interest at the legal rate from March 25, 2011 and costs. The petitioner is directed to settle, upon a copy of this order, a proposed order and judgment reflecting the material terms of this order, the relief awarded to the petitioner pursuant to CPLR 6214(d).

Settle judgment, upon a copy of this order.

DATED: 12/29/11



THOMAS F. WHELAN, J.S.C.