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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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ALBERTON DEVELOPERS, INC.,

Plaintiff(s), **Index No.: 8778/01**
Mot. Date: 1/14/13

-against- **Mot. Cal. No. 13**
Mot. Seq. 1

ALL TRADE ENTERPRISES, INC. Et al.,
Defendant(s).

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The following papers numbered 1 to 10 read on this motion by City Marshal Martin Bienstock for an order setting poundage fees pursuant to CPLR 8012(b); determining which parties are liable for payment, and granting attorneys' fees in its favor and dismissing the complaint as against it.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Reply Affirmation	8-10

Upon the foregoing papers, it is ordered that the motion is granted as follows:

The non-party movant, City Marshal Martin Bienstock moves for an assessment of poundage fees, for a determination of the parties liable for payment thereof, and for attorneys' fees attributable to the collection process.

All Trade Enterprises, Inc. ("All Trade") was awarded a judgment against Alberton Developers, Inc. ("Alberton") in the sum of $615,084.93 on or about January 26, 2009. The attorney for the judgment creditor Alberton retained City Marshal Martin Bienstock to enforce the judgment. He directed the marshal to levy upon the assets being held by the attorney for Alberton as garnishee. The marshal served the execution on or about February 9, 2009 and again on July 27, 2010 by Notice of Levy and Sale upon

Alberton's counsel's escrow account containing $369,801.00. On or about August 6, 2010, counsel for Alberton moved by Order to Show Cause to stay the execution of the judgment on the grounds that there were "multiple contradictory claims to the release of escrow funds held by your deponent." However, counsel for Alberton never commenced an interpleader. In opposition to that application, counsel for Marshal Bienstock reiterated his demand for his client's fee. On September 15, 2010, the Court (Schulman, J.) issued an order denying the motion with leave to renew following the lifting of the bankruptcy stay on the ground that there was a stay in Bankruptcy based upon Alberton's Chapter 11 Bankruptcy filing on August 31, 2010. In spite of requests for payment and a status of the matter from both attorneys, the bankruptcy stay was lifted at some point and the matter settled on or before June 7, 2011 for the total sum of $550,000. Counsel for Alberton sent the proceeds that he was holding in his escrow account which were levied upon by the marshal directly to counsel for All Trade pursuant to a settlement agreement subscribed by both parties and their counsel. The settlement agreement provided for indemnity in favor of counsel for Alberton and Alberton from counsel for All Trade and All Trade in the event that the marshal sought to collect his poundage.

" 'Poundage is a fee awarded to the Sheriff in the nature of a percentage commission upon moneys recovered pursuant to a levy or execution of attachment' " (Alvarez v Brooklyn Hosp.-Caledonian Hosp., 255 AD2d 278, 279-280 [2d Dept. 1998] quoting Southern Indus. v Jeremias, 66 AD2d 178, 186 [2d Dept. 1978]; see generally Solow Management Corp., v Tanger, 10 NY3d 326 [2008]). A sheriff's right to collect poundage fees is wholly statutory (see CPLR 8012 [b]; Personeni v Aquino, 6 NY2d 35, 37[1959]). Moreover, the statute must be strictly construed (see Famous Pizza v Metss Kosher Pizza, 119 AD2d 721, 501 NYS2d 135 [2d Dept. 1986]). "Where a settlement is made after a levy by virtue of service of an execution, the sheriff is entitled to poundage upon the judgment or settlement amount, whichever is less" (CPLR 8012 [b] [2], see Solow Mgt. Corp. v Tanger, supra at 330; Kurtzman v Bergstol, 62 AD3d 757, 758 [2d Dept. 2009]). A marshal's "powers, duties and liabilities as" to the taking and restitution of property is the same as that of a sheriff (NY City Civ Ct Act § 1609 [1]).

In general, the sheriff must actually collect or obtain money to be entitled to poundage, but there are three exceptions to this requirement: (1) when a settlement is

made after a levy by virtue of service of an execution (see CPLR 8012 [b] [2]; L 2008, ch 441); (2) when an execution is vacated or set aside after levy (see CPLR 8012 [b] [2]; L 2008, ch 441); and (3) "when there has been affirmative interference with the collection process, thus preventing a [sheriff] from actually collecting the levied assets through some affirmative action" (Solow Mgt. Corp. v Tanger, supra at 330-331[2008]; see Personeni v Aquino, supra at 38; DePasquale v Estate of Joseph C. DePasquale, 89 AD3d 672, 673-674 [2d Dept. 2011] ; Martin v Consolidated Edison Co. of N.Y., 177 AD2d 548 [2d Dept. 1991], affirming 146 Misc 2d 756 [Sup. Ct. Kings Co.1990]).

If payment by the debtor is made directly to the creditor after a sheriff levies, the payment constitutes a settlement, and the sheriff will be entitled to poundage (see Morris v Morris, 43 Misc 2d 854, 855, 252 NYS2d 641 [1964]; see also Martin v Consolidated Edison Co. of N.Y., supra at 759 affirmed 177 AD2d at 576 NYS2d 290 [2d Dept. 1991]; Weinstein-Korn-Miller, NY Civ Prac P 8012.05). Kurtzman v Bergstol, supra]).

In the case at bar, physical levy of the funds in the attorney's escrow account was impossible, since the account contained funds not only belonging to the judgment-debtor, but to other clients of the attorney as well. For that reason, enforcement against an attorney escrow account is fraught with peril and imprudent on counsel's part. In addition, the poundage fee ostensibly belonging to the city marshal was also contained within that account. In addition, both excepted contingencies entitling the marshal to poundage under the CPLR occurred. The parties settled the case after the marshal's execution. Moreover, the parties also affirmatively interfered with the collection process by drafting their own settlement agreement unbeknownst to the marshal, which failed to provide for collection of the marshal's poundage, while acknowledging the existence of such fee in the same agreement. Said agreement simply required the judgment debtor to direct the stakeholder to pay out the balance in the escrow account. This impaired on the marshal's ability to pursue collection (see Cabrera v Hirth, 87 AD3d 844 [1st Dept. 2011]).

CPLR 8012 [b] [2]) permits the Court to find counsel representing the judgment creditor or debtor liable for poundage fees to the marshal (see County of Westchester v Riechers, 6 Misc. 3d 584, 2004 NY Misc. LEXIS 2464, 2004 NY Slip Op 24491 [Sup. Ct. Westchester Co. 2004]; Cappiello v ICD Publ'ns, Inc., 2012 U.S. Dist. LEXIS 161729 [EDNY 2012]). Ordinarily, the party liable to the marshal is the one who hired the

marshal. However, given the fact that the parties and their counsel were signatories to the settlement agreement which attempted to circumvent payment of the city marshal's poundage, the rule of law and the interests of equity militate in favor of holding all of these parties and their counsel jointly and severally liable for payment of the poundage. This is particularly the case insofar as the plaintiff has sought bankruptcy protection, and may be without liquid means to pay the fee.

In connection therewith, neither opposing counsel demonstrated that the marshal's fee should be discharged by bankruptcy. The execution is a continuing levy until modified by order of the court or by a discharge in bankruptcy.. (In re International Distributing Export Co., 219 F Supp. 412, 413 [SDNY1963]). There has been no tender of proof that either modification by court order nor discharge in bankruptcy of the judgment debtor has occurred. Liability on the judgment was extinguished by the defendant settling its claims against the judgment debtor. Thus, the marshal is entitled to his poundage on the amount of the settlement (In re International Distributing Export Co., supra.).

Unquestionably, rather than turning a blind eye to the marshal's claimed entitlement to poundage, the stakeholder here ought to have commenced an interpleader action to address the issue. CPLR §1006, which concerns interpleader actions, provides, in pertinent part:

> (a) Stakeholder; claimant; action of interpleader. A stakeholder is a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.
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> (b) Defensive interpleader. A defendant stakeholder may bring in a claimant who is not a party by filing a summons and interpleader complaint. Service of process upon such a claimant shall be by serving upon such claimant a summons and interpleader complaint and all prior pleadings served in the action.

A stakeholder, i.e., a person with custody or control of money or property, who

anticipates exposure to multiple liability stemming from adverse claims, may, before being sued, compel the adverse claimants to litigate their respective claims in a single interpleader action by instituting such action against them pursuant to CPLR 1006. When the stakeholder is a defendant in a pending suit by one of the claimants, another claimant may be brought in by instituting defensive interpleader through service of a summons and an interpleader complaint.

The "adverse claims" that form the basis for interpleader need not actually have been asserted. Interpleader is appropriate when a claimant may be expected to make such a claim. That expectation, however, may not be so patently without substance that the defendant [i.e. stakeholder] can reject it without risk. (See 1-7 Weinstein, Korn & Miller CPLR Manual § 7.08).

In any event, the marshal's poundage fee was placed in the attorney's escrow account along with the settlement proceeds, and paid out to the judgment creditor pursuant to the settlement agreement, without regard to any potential liability of the stakeholder therefor. It has been said that a defendant's payment of settlement proceeds, while on notice of an attorney's charging lien, is made at a defendant's peril (see Schneider, Kleinick, Weitz, Damashek & Shoot v City of NY, 302 AD2d 183 [1st Dept. 2002]). By analogy, payment of the settlement proceeds in counsel's attorney escrow account while on notice of the marshal's poundage was made at the peril of the parties and their counsel.

Accordingly, based upon the foregoing, the non-party's motion is granted in all respects; Alberton and All Trade and their respective counsel are jointly and severally liable for marshal's poundage in the sum of $27,500.00 (5% of the settlement amount of $550,000.00), and the movant is further awarded reasonable attorneys' fees in the sum of $2,500.00, also payable in whole or part jointly and severally by the abovementioned parties.

This constitutes the opinion, decision and order of the Court.

Dated: March 19, 2013

TIMOTHY J. DUFFICY, J.S.C.