

<b>Lupe Dev. Partners, LLC v Pacific Flats I, LLC</b>
2013 NY Slip Op 31891(U)
August 9, 2013
Supreme Court, New York County
Docket Number: 108168/11
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

LUPE DEVELOPMENT PARTNERS, LLC and  
STEVE MINN,  
Plaintiffs,

Index No.: 108168/11

Motion Date: 02/08/13

Motion Seq. No.: 04

- v -

Motion Cal. No.: \_\_\_\_\_

PACIFIC FLATS I, LLC, PACIFIC FLATS II,  
LLC, FRED DEUTSCH and DEUTSCH DEVELOPMENT,  
Defendants.

The following papers, numbered 1 to 6 were read on this motion to quash.

PAPERS NUMBERED	
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5, 6

Notice of Motion/Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_  
 Answering Affidavits - Exhibits \_\_\_\_\_  
 Replying Affidavits - Exhibits \_\_\_\_\_

**FILED**  
 AUG 14 2013

**Cross-Motion:**      **Yes**      **No**     COUNTY CLERK'S OFFICE  
 NEW YORK

Upon the foregoing papers,

The motion and cross-motion renew in substantial part the parties' prior applications in this matter based upon a previous subpoena served by plaintiffs-judgment creditors upon non-party Penny Baird. The prior motions were denied (Order on Motion Seq. No 1, dated April 17, 2012, settled June 1, 2012) or otherwise mooted (Order on Motion Seq. No 2, dated April 17, 2012, settled June 1, 2012) due to plaintiff's failure to comply with CPLR 5224.

Check One:      **FINAL DISPOSITION**      **NON-FINAL DISPOSITION**  
 Check if appropriate:      **DO NOT POST**      **REFERENCE**  
     **SETTLE/SUBMIT ORDER/JUDG.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Plaintiff subsequently served a new subpoena dated May 31, 2012, (the "subpoena") upon non-party Penny Baird which was in most respects nearly identical to the first subpoena and the parties have now renewed their arguments with respect to the new subpoena that on its face remedies the defect of compliance with CPLR 5224. Movant Penny Baird moves for an order quashing the subpoena, issuance of a protective order, a change of venue, and the disqualification of plaintiffs' law firm. Plaintiffs' cross-move for a motion compelling a response to the subpoena.

CPLR 5223 provides that

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

CPLR 5224 (a) (2) provides the procedure for seeking such disclosure stating, as relevant here, "Any or all of the following kinds of subpoenas may be served . . . 2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein." CPLR 5240 provides the procedure for a party seeking to challenge such disclosure stating "The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting,

conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article." Finally, CPLR 3208 (b) (1) provides the procedure for enforcing such a subpoena stating in pertinent part that

Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply.

In defining the obligations of a party served with a subpoena the First Department has stated

CPLR 5223 compels disclosure of all matter relevant to the satisfaction of the judgment, and sets forth a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property. Since GBR has not conclusively established that it lacks information to assist the judgment creditors in obtaining satisfaction of the judgment, petitioners are entitled to pursue discovery against it.

Gryphon Domestic VI, LLC v GBR Information Services, Inc., 29 AD3d 392, 393 (1<sup>st</sup> Dept 2006) (citations and internal quotations omitted). However, where disclosure is sought from persons and entities who were not parties to the proceedings which resulted in the judgment, "disclosure must be limited to information about . . . assets which are applicable in satisfaction of the

judgment, and not to . . . individually owned property, which may not be so applied." Levin v Total Hockey Associates, 64 AD2d 622 (2d Dept 1978). However, a judgment debtor "may inquire into [] transfer[s] to determine whether there was an intent to defraud the creditor." ICD Group, Inc. v Israel Foreign Trade Co. (USA) Inc., 224 AD2d 293, 294 (1st Dept 1996); Young v Torelli, 135 AD2d 813, 815 (2d Dept 1987) (judgment creditor "permitted to inquire into such transfers to determine whether the judgment debtors concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment").

Thus the propriety of the requests made in plaintiffs' subpoena is solely dependent on whether they seek information likely to assist them in locating assets that are available to satisfy the judgment debtor's obligations.

An examination of the 22 document requests contained within the subpoena served upon the movant reveals that none of the requests seeks information about the assets of the judgment debtor. Thus plaintiffs' requests can only be deemed relevant to the extent they seek information about "such transfers to determine whether the judgment debtors concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment." Young v Torelli, 135 AD2d at 815. That is, the scope of

discovery permitted under CPLR 5223 as to third parties is limited to (1) information those third parties have relevant to the judgment debtor's assets and/or (2) information those third parties have relevant to the concealment or transfer of assets made by the judgment debtor where such assets could be used to satisfy the judgment but for the transfers.

In this case, the affidavit of plaintiffs' counsel in support of the filing within this court of the Minnesota judgment that is the subject of this execution states that the Minnesota action was commenced in December 2009. Therefore, as argued by the movant, she cannot be held to have received from the judgment debtor assets transferred so as to impair the enforcement of a possible judgment debt where such transfers occurred prior to that date or the earlier of the date on which the judgment debtor could have been said to have been aware of a possible judgment against him. There is a difference between an action upon an alleged fraudulent transfer intended to deprive current creditors of the ability to seek repayment (see Debtor and Creditor Law 273-276, 278, 279) and a proceeding seeking disclosure in aid of enforcing a judgment (CPLR 5223, 5224). The focus under CPLR Article 52 is enforcement of money judgments. Contrary to plaintiffs' implicit assertions, proceedings under CPLR Article 52 are not a substitute for an otherwise time-barred fraudulent conveyance claim.

With respect to plaintiffs' subpoena, the first five demands seek information about the movant's purchase of a "Paris" property in December 2006 on the grounds that the judgment debtor provided a portion of the purchase price for the property as a gift. Plaintiffs assert that they are entitled to inquire about this property because the judgment debtor provided a gift towards its purchase by the movant. However, as this transfer occurred nearly three years before the commencement of the litigation underlying the judgment, plaintiffs have not established that this transfer was intended to conceal assets in contemplation of their judgment.

As to subpoena requests 6 - 10, plaintiffs concede that any alleged transactions concerning the judgment debtor occurred prior to 2003 and therefore these requests are similarly unsupportable under CPLR 5223. Requests 11 - 16 relating to gifts made by the judgment debtor to his children predate this litigation by over three years and are similarly outside the scope of permissible discovery. Requests 17 through 22 relating to investigations about forgeries by the judgment debtor similarly fail to establish any relevance to the identification of assets that could be used to satisfy the judgment.

Based upon the foregoing it is clear that plaintiffs have failed to establish that the subpoenas seek information relevant to the identification of assets of the judgment debtor that could

be used to satisfy their claim. Therefore the court shall grant the motion to quash the subpoena and issue a protective order against disclosure of the information sought.

With respect to the other applications made by the parties, the court notes as a general matter that the litigation collateral to the enforcement of the judgment under CPLR Article 52 has no applicability in this context. The sole focus of this proceeding is judgment enforcement. To the extent that issues related to other litigation have arisen between the parties, the proper forum for those disputes is before the tribunals that heard them.

Thus the motion to disqualify plaintiff's law firm shall be denied as the movant has failed to demonstrate that she has standing to make such a motion because there is no allegation of an attorney-client relationship between her and plaintiff's law firm. Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 99 (1<sup>st</sup> Dept 2008) (party seeking disqualification must demonstrate the existence of an attorney-client relationship). Further, plaintiff's application to change venue shall also be denied because there is no allegation that the judgment was not properly entered in this court and to the extent that any agreement was breached application should be made before the court that entered and/or supervised the agreement.



Finally, plaintiffs' cross-motion shall be denied in accordance with the foregoing.

Accordingly, it is

ORDERED that the motion of Penny Baird to quash the subpoena in this proceeding dated May 31, 2012, and to issue a protective order as to same is GRANTED and the movant need not produce the documents requested therein; and it is further

ORDERED that the motion of Penny Baird is otherwise DENIED; and it is further

ORDERED that the plaintiffs' cross-motion is DENIED.

This is the decision and order of the court.

Dated: August 9, 2013

ENTER:

*Debra A. James*  
**DEBRA A. JAMES** J.S.C.

**FILED**

AUG 14 2013

COUNTY CLERK'S OFFICE  
NEW YORK