

Hillwick Inc. v Advanced Ready Mix Supply Corp.

2017 NY Slip Op 32156(U)

May 15, 2017

Supreme Court, Kings County

Docket Number: 503351/2014

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 11th day of May, 2017.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
HILLWICK INC.,
Plaintiff,

Index No.: 503351/2014

DECISION & ORDER

-against-

ADVANCED READY MIX SUPPLY CORP.,
ADVANCED TRANSIT MIX CORP., ROCCO
MANZIONE AND ANTONIETTA CICILLINI,

Defendant(s).

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion And Affidavits (Affirmations)	<u>1-2, 4</u>
Opposing Affidavits (Affirmations)_____	<u>6</u>
Reply Affidavits (Affirmations)_____	<u>8</u>
<u>Other Papers: Memoranda of Law and Affidavits of Service</u>	<u>3, 5, 7, 9</u>

Introduction

Non-party movant Advanced Transit Mix Supply Corp., moved by order to show cause, sequence number four, for an order (1) vacating the restraining notice issued by judgment creditor Hillwick Inc. to Chase Bank, N.A. restraining non-party Advanced

Transit Mix Supply's bank account in connection with a judgment obtained against defendants, Advanced Ready Mix Supply Corp. and Advanced Transit Mix Corp.; and (2) awarding sanctions, including costs and reasonable attorneys' fees against Hillwick and its attorneys for the intentional abuse of New York's post judgment enforcement procedures. Plaintiff, Hillwick Inc., opposes this application.

Procedural History

This is an action for breach of contract and an account stated. Plaintiff commenced this action against defendants Advanced Ready Mix Supply Corp. (Advanced 1), Advanced Transit Mix Corp. (Advanced 2), Rocco Manzione and Antonietta Cicillini, by filing the summons and verified complaint on April 17, 2014. The complaint states "that plaintiff Hillwick and Advanced entered into an agreement ... whereby Hillwick would provide labor and materials to Advanced in connection with certain construction work." On May 18, 2016, the Hon. Bernadette Bayne issued an order awarding summary judgment to the individual defendants Rocco Manzione and Antonietta Cicillini. A default judgment was entered against defendant Advanced 1.

The matter was referred to this Court for trial on January 11, 2017. The trial was to commence on January 12, 2017. By letter dated January 11, 2017, counsel for Advanced Transit Mix Corp. (Advanced 2), withdrew all of its defenses in this action. That letter noted that counsel for defendant Advanced 2 did not represent the other corporate defendant Advanced Ready Mix Supply Corp. (Advanced 1). An inquest was held wherein Advanced 1 and 2 were held jointly and severally liable in the amount of

\$73,063.97 with statutory costs and interest. A judgment was entered by the Clerk of Kings County on January 30, 2017, for the amount of \$91,923.78.

Background

Rocco Manzione stated by affidavit that he is the president of Advanced Transit Mix Supply Corp. (Advanced 3), the non-party movant herein. He is also the president of Advanced Transit Mix Corp. (Advanced 2) and Advanced Ready Mix Supply Corp. (Advanced 1), defendants and judgment debtors herein. On January 31, 2017, plaintiff, the judgment creditor, served a “Restraining Notice With Information Subpoena” on Chase Bank which stated, in part, that

it appears that you have information pertaining to the Judgment Debtor Advanced Transit Mix Corp. s [sic] assets, owe a debt to Judgment Debtor Advanced Transit Mix Corp and/or are in possession or custody of property in which Judgment Debtor Advanced Transit Mix Corp has an interest, including but not limited of certain banking account bearing account number [*****]0318.

(see Manzione Affidavit [2], Exhibit E, Restraining Notice with Information Subpoena). Plaintiff also served a separate Restraining Notice pursuant to CPLR § 5222(b). The notice referenced defendant Advanced Transit Mix Corp. (Advanced 2) and it covers all property in which the judgment debtor has an interest and which is now in Chase Bank’s possession or custody. This notice included, but was not limited to Chase Bank account number [*****]0318. Chase Bank restrained nonparty Advanced Transit Mix Supply Corp. (Advanced 3’s) account number [*****]0318 in the amount of \$43,225.77 (see Affirmation in Opposition [6], Exhibit I, Chase Bank letter dated February 8, 2017).

Rocco Manzione stated in his affidavit that Chase Bank account number [*****]0318, which was subject to the restraint, is the operating account for the non-party movant Advanced Transit Mix Supply Corp (Advanced 3). Manzione further explained in his affidavit that the three corporations are separate and distinct entities. In support of this position he annexed the New York Department of State, Division of Corporations printouts for each corporation which indicated as follows:

Entity Name:	Advanced Transit Mix Supply Corp., ¹ (non-party movant Advanced 3)	Advanced Transit Mix Corp. ² (defendant Advanced 2)	Advanced Ready Mix Supply Corp. ³ (defendant Advanced 1)
DOS ID #:	4788131	3558064	4000571
Initial DOS Filing Date:	July 13, 2015	August 20, 2007	September 28, 2010
County:	Kings	Queens	Queens
Jurisdiction:	New York	New York	New York
Entity Type:	Domestic Business Corporation	Domestic Business Corporation	Domestic Business Corporation
Current Entity Status:	Active	Active	Active

Manzione stated by affidavit that the

29. Non-party movant and the Judgment Debtors have separate: (a) employer identification numbers; (b) bank accounts; (c) financial records; and (d) tax returns

36. No funds in the restrained Account have been transferred between Non-Party Transit Mix Supply and the Judgment

¹ (see Affidavit of Rocco Manzione, Exhibit F).

² (see Affidavit of Rocco Manzione, Exhibit G).

³ (see Affidavit of Rocco Manzione, Exhibit H).

Debtors, and Judgment Debtors have no interest in any of the funds in the restrained Account.

(Manzione Affidavit [2]).

Prior to bringing this application, the non-party movant sent a letter to plaintiff's counsel on February 3, 2017. That letter stated, in part, that the Advanced Transit Mix Supply Corp. (Advanced 3)'s account was restrained at Chase Bank. Advanced 3 is not the judgment debtor in this action. "[T]he judgment in the Action was entered against Advanced Ready Mix Supply Corp. and Advanced Transit Mix Corp., not Advanced Transit Mix Supply Corp. – a separate and distinct legal entity that was not a party to, and did not participation the Action" (*see* Manzione Affidavit [2], Exhibit I).

The order to show cause to vacate the restraining notice was filed and signed on February 7, 2017. The non-party movant provided notice of this application to plaintiff in accordance with 22 NYCRR 202.7 (*see* Braverman Affirmation [4], Exhibit B). At that time, a consent order was entered into, wherein the restraining notice was lifted subject to the non-party movant Advanced Transit Mix Supply Corp. (Advanced 3) posting a bond in an amount equal to the amount restrained (*see* Affirmation in Opposition [6], Exhibit K, Undertaking on Temporary Restraining Order).⁴

The non-party movant contends that plaintiff incorrectly utilized the post judgment enforcement mechanism in CPLR § 5222(b). Advanced Transit Mix Supply Corp.

⁴ The order to show was signed on February 7, 2017, and the matter was scheduled to be heard on March 24, 2017. The plaintiff served opposition to the order to show cause shortly before March 24. Accordingly, the matter was adjourned to April 4, 2017, to provide the movant sufficient time to reply. At that time, a consent order was entered extending the terms of the February 7, 2017 order; the bond was to remain until the hearing and determination of this application.

(Advanced 3) contends, by affidavit of Manzione and counsel's affirmation in support of the application, that plaintiff improperly restrained the movant's bank account inasmuch as it is a separate and distinct legal entity from the judgment debtors. The movant further avers that the restrained bank account is not, and has never been, the property of the judgment debtors. Therefore, the restraining order should be vacated. Advanced 3 further seeks sanctions pursuant to 22 NYCRR 130-1.1 stating that plaintiff "and its attorneys seized upon the similarity in the names of the Non-Party Transit Mix Supply and Judgment Debtors, specifically Transit Mix Corp., to deceive Chase Bank into effectuating the restraint." (Memorandum of Law in Support [3]).

Plaintiff, in opposition, submitted a three-page affirmation by counsel which simply recites the exhibits annexed thereto (*see generally* Affirmation in Opposition [6]). Exhibits A through E are documents related to the litigation against the defendants which resulted in the judgment. Exhibit F is: (1) a "restraining notice and information subpoena" to Astoria Bank "pertaining to Judgment Debtor Advanced Transit Mix Corp.'s assets"; (2) the "restraining notice"; and (3) "questions and answers with information subpoena". Astoria Bank responded with a copy of the notice, which was stamped "No Accounts".

Plaintiff annexed what appears to be a Facebook cover page for defendant Advanced Transit Mix Corp. (Advanced 2). The cover page indicates that "Advanced Transit Mix is a ready mix concrete supplier located in Brooklyn New York. Contact: (718) 497-5020 advancedtransitmix@gmail.com" (*see* Affirmation in Opposition [6],

Exhibit M, Facebook Page). Plaintiff also annexed a printout of the defendant Advanced Transit Mix Corp. (Advanced 2)'s website which states "(718) 497-5020 610 Johnson Avenue, Brooklyn, New York" (see Affirmation in Opposition [6], Exhibit N, Website). Counsel for plaintiff argues that

[t]o say that "Advanced is a corporate chameleon would be an understatement. It, through its owner, Mr. Rocco Manzione, has existed in several different colors, namely Advanced Ready Mix Corp. ... Advanced Ready Mix Supply Corp., ... Advanced Transit Mix Corp, and now Advanced Transit Mix Supply ... All of these companies have similar names and appear to operate out of the same location, utilize the same equipment, offer the same service, and share a common owner, Rocco Manzione. In fact, contrary to Mr. Manzione's claim that [non-party movant Advanced Transit Mix Supply Corp.,] is a separate and distinct entity, his own website shows that he continues to operate under [defendant Advanced Transit Mix Corp.'s] name. In other words, although the skin has changed color, the actual reptile is always the same.

(see Memorandum of Law in Opposition [7] at p 1).

Discussion

Restraining Notice

As an initial matter, "the restraining notice serves as an injunction prohibiting the transfer of the judgment debtor's property (*Distressed Holdings, LLC v. Ehrler*, 113 A.D.3d 111, 976 N.Y.S.2d 517 [2 Dept., 2013], citing *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 439 N.Y.S.2d 316 [1981]). "Indeed, it is an injunction, issued by the attorney acting as an officer of the court." (McKinney's CPLR Practice Commentaries 5222:4 Effect of Restraining Notice). "If the restraining notice is

defective in some way, ... or for any other reason that undermines it, it can be vacated on motion. The motion should of course be made to the court out of which the restraining notice issued (i.e., was captioned), which will usually but not invariably be the court that rendered the judgment being enforced.” (McKinney’s CPLR Practice Commentaries 5222:9 Vacating the Notice).⁵

The Court of Appeals stated that “[a] party seeking to enforce a judgment may seek to restrain or prohibit the transfer of a judgment debtor’s property in the hands of a third party pursuant to CPLR 5222(b)” (*Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.*, 21 N.Y.3d 66, 990 N.E.2d 121 [2013]). CPLR § 5222(b) entitled “Effect of restraint; prohibition of transfer; duration” states, in part that

A restraining notice served upon a person *other than the judgment debtor* or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or *he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest*, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor *or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served*. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice

⁵ Similarly, CPLR § 5224(iii) provides that “if an information subpoena, served on an individual or entity other than the judgment debtor, ... the individual, corporation, ... receiving the subpoena, may move to quash the subpoena pursuant to section twenty-three hundred four of this chapter, except that such motion shall be made in the court that issued the underlying judgment.”

....

A judgment creditor ... which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint. . . [emphasis added]

In the instant case, plaintiff issued a restraining notice on non-party Advanced 3, pursuant to CPLR § 5222. Plaintiff contends that Advanced 3 is in possession of property which it knew, or had reason to believe, that the judgment debtors have an interest. Specifically, plaintiff avers that Rocco Manzione, President of Advanced 1-3, transferred the remaining assets from an account belonging to judgment debtors (Advanced 1 and 2), to the restrained account which belongs to non-party Advanced 3. Plaintiff argues that Mr. Manzione is utilizing corporate formalities to evade his creditors.

Plaintiff relies on *Plaza Hotel v. Wellington Associates, Inc.*, (8 Misc.2d 777, 378 N.Y.S.2d 859 [Special Term, 1975]) and *Blue Giant Equip. Corp. v. Tec-Ser, Inc.*, (92 A.D.2d 630, 359 N.Y.S.2d 948, [3 Dept., 1983]) for the premise that plaintiff, as a judgment creditor, may restrain third party assets when it reasonably believes those assets belong to a judgment debtor, without the need to prove alter-ego (*see* Memorandum of Law in Opposition [7] at p 8). In *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, (295 F. Supp. 2d 366 [SDNY 2003]) the United States District Court for the Southern District of New York, analyzed *Plaza Hotel* and *Blue Giant* in the context of CPLR § 5222 restraining notices issued on nonparties.

These cases, like the others cited by the plaintiff, support the proposition that a judgment creditor may restrain the assets of a judgment debtor wherever those assets may be. They do not

support the proposition that the assets of third parties may be restrained in anticipation of a finding that those third parties are alter egos or hold assets of alleged alter egos of the judgment debtor. Such a conclusion is not only unsupported by the text of N.Y. C.P.L.R. § 5222 or any of the cases cited by the plaintiff, but would also pose significant due process problems.

Therefore, to the extent that the restraining notices issued by the plaintiff affect solely the property of Reich and Jossem, they are improper under N.Y. C.P.L.R. § 5222. Restraining notices under § 5222 may be issued to prevent the disposition of the assets of a judgment debtor, in this case IDTS. But they may not be used as an end-run around the requirements of the prejudgment attachment statutes. Although the plaintiff may attempt to prove the alter ego liability of Reich and Jossem as part of a judgment enforcement proceeding, their assets may not be restrained pursuant to § 5222 until their alleged alter ego status has been adjudicated and their liability for the previous judgment determined.

(*JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366 [SDNY 2003]).

Non-party Advanced 3 moves to vacate the restraining notice. Advanced 3 relies on *JSC* for the proposition that plaintiff cannot restrain a non-party's property absent a determination on its liability, here, by means of the alter-ego doctrine (*see* Memorandum of Law in Support [3] at ¶ 2). However, more recently, the United States District Court for the Eastern District of New York, held that

[*JSC*] stands only for the proposition that alleged "alter ego" status alone is insufficient to issue a restraining notice against assets of a third party without evidence of fraudulent conveyance or a showing that the third party is actually holding assets of the judgment debtor. *JSC Foreign Ass'n Technostroyexport v. Int'l Dev. and Trade Serv.*, 295 F.Supp.2d 366, 392–93 (S.D.N.Y.2003). In this case, the appropriate test to be applied is whether the government has made a *prima facie* showing that the 1990 transfer of the

Property to Dorothy was a fraudulent conveyance. *Blue Giant Equip. Corp. v. Tec-Ser, Inc.*, 92 A.D.2d 630, 459 N.Y.S.2d 948 (3d Dep't 1983) (finding issuance of restraining notice on third party appropriate where plaintiff made out “a *prima facie* case showing that the assignment of [the judgment debtor's] accounts receivable was not made in good faith or for adequate consideration.”).

(*United States v. Ceparano*, 2009 WL 8690129, 2009 U.S. Dist. LEXIS 131257 [EDNY 2009]).⁶

In the instant case, non-party movant established, through the affidavit of Advanced President Rocco Manzione, that Advanced 3 is not in possession of property which belongs to the judgment debtors, Advanced 1 or 2. Mr. Manzione stated that the judgment debtors have separate (1) employer identification numbers; (2) bank accounts; (3) financial records; and (4) tax returns from non-party movants. The employer identification numbers are different and the businesses bank at different institutions (*see* Manzione Affidavit [2] at ¶ 29-35). Mr. Manzione specifically stated that “no funds in the restrained account have been transferred between Non-Party Transit Mix Supply [Advanced 3] and the Judgment Debtors, and Judgment Debtors have no interest in any of the funds in the Restrained Account” (Manzione Affidavit [2] at ¶ 36).

In opposition, plaintiff failed to make an adequate showing that Advanced 3 is actually holding assets that belong to the judgment debtors. Plaintiff simultaneously

⁶ In *Plaza Hotel*, the court found that plaintiff made a *prima facie* showing that the movant partnership and defendant corporation are “one in the same” by providing “documentation establishing a series of transactions by which ownership of various properties has been shifted from one ... enterprise to another”, and sworn testimony that “defendant corporation ‘is still in business under a partnership’” (8 Misc.2d 777, *supra*). Additionally, in *Blue Giant*, the court held that plaintiff’s papers “make out a *prima facie* showing that the assignment of ... accounts receivable was not made in good faith or for adequate consideration” (359 N.Y.S.2d 948, *supra*).

issued both an Information Subpoena and a Restraining Notice on non-party Advanced 3 in January 2017. Based on the record before this Court, it is unclear whether plaintiff received a response to this information subpoena, which may have provided proof that the non-party is in possession of property belonging to the judgment creditors. Plaintiff states that because Advanced 3 was organized about a year after the summons and complaint was filed, and Advanced 2 withdrew all of its defenses at trial, that alone demonstrates that Advanced 2's assets were already moved. To refute Mr. Manzione's affidavit, which pointedly states that no funds in the restrained account have been transferred between non-party and the judgment debtors, plaintiff merely provided the Facebook cover page and website for defendant Advanced Transit Mix Corp. (Advanced 2). These printouts provide an address and contact information. Plaintiff asserts that this demonstrates that the companies share the same owner, operate out of the same location, utilize the same equipment and offer the same services as non-party Advanced 3. Plaintiff's suppositions are speculative and conclusory, and are therefore, simply insufficient to support such a claim. Accordingly, non-party movant Advanced 3's motion to vacate the restraining notice is granted; the bond is vacated.

Sanctions

Non-party Advanced 3 further moves for sanctions against plaintiff. 22 NYCRR 130-1(a), provides, in pertinent part that,

[t]he court, in its discretion, may award . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct . . . in addition to or in lieu of awarding costs, the court, in its

discretion may impose financial sanctions upon a party or attorney . . . who engages in frivolous conduct . . .

“The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion” (*Matter of Khan-Soleil v. Rashad*, 111 A.D.3d 727, 974 N.Y.S.2d 798 [2 Dept., 2013]; *see also Perna v. Realty Roofing, Inc.*, 122 A.D.3d 821, 996 N.Y.S.2d 692 [2 Dept., 2014]). The rule authorizes two possibilities for monetary punishment for frivolous conduct; (1) costs, which include litigation costs and reasonable attorney’s fees are a compensatory award, as they reimburse actual expenses incurred and go to the person who sustained the expense; or (2) sanctions, which are a punitive award. Where a sanction is imposed against a lawyer for frivolous conduct, it goes to the Lawyers Fund for Client Protection (*see* 22 NYCRR 130-1.3). There is a \$10,000.00 cap on any punitive award (*see generally* Siegel, NY Prac § 414A [5th ed 2015]).

The Rules of the Chief Administrator of the Courts § 130-1.1(c) further provide:

For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time

available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

The party seeking sanctions has the burden to demonstrate that its opponent's conduct was frivolous within the meaning of 22 NYCRR 130-1.1(c) (*see Stone Mountain Holdings, LLC v. Spitzer*, 119 A.D.3d 548, 990 N.Y.S.2d 39 [2 Dept., 2014]).

Advanced 3 contends that plaintiff's attorneys "abused their positions as 'officers of the court' by improperly utilizing a drastic enforcement remedy against an innocent non-party without any legitimate basis" (Memorandum of Law in Support [3] at p 7). Advanced 3 further contends that Hillwick deliberately neglected to inform Chase Bank that the restrained account belongs to a non-party and seized on the similar names of the corporations to deceive Chase Bank into restraining the account, in violation of the Professional Code of Responsibility. In opposition, plaintiff contend that the court should not sanction plaintiff, but instead should sanction defendants and Advanced 3.⁷

In the instant case, Advanced 3 failed to meet their burden and demonstrate that plaintiff's conduct was frivolous within the meaning of 22 NYCRR 130-1.1(c). Plaintiff issued a restraining notice on non-party Advanced 3's account. Here, the facts do not support movant's contention that plaintiff seized on the similarity in the corporate names to deceive Chase into restraining the account. There was no need for plaintiff to deceive Chase, since CPLR § 5222 clearly permits a restraining notice to be served upon "a

⁷ This Court notes that although plaintiff argues that sanctions should be issued against defendants in the form of an award of attorney's fees, plaintiffs failed to cross-move for such relief.

person other than the judgment debtor”, where that person “is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest”. Furthermore, Advanced 3 failed to substantiate this allegation. This Court will not surmise such a proposition.

It is clear that plaintiff’s counsel is attempting to enforce the legally obtained judgment against defendants in this action. Therefore, based on the facts presented herein, plaintiff’s counsel’s restraining notice and information subpoena do not constitute frivolous conduct or a drastic enforcement remedy against an innocent non-party. Although plaintiff’s counsel did not sufficiently prove that assets were transferred from Advanced 1 and 2 to Advanced 3, counsel is performing his due diligence by using supplementary proceedings in an effort to enforce his judgment. There is no evidence that this conduct was without merit, or undertaken to delay, harass or maliciously injure defendants or the non-party. Accordingly, Advanced 3’s motion for sanctions is denied.

This Court notes that both the non-party movant and plaintiff employ the similar corporate names to advance their arguments. The non-party movant states that plaintiff seized on the similarities of the corporate names to deceive Chase. Plaintiff maintains that Rocco Manzione, the president of Advanced Transit Mix Supply Corp., Advanced Ready Mix Supply Corp. and Advanced Transit Mix Corp, is utilizing the similar names of his corporate entities to continue to conduct business while deceiving judgment creditors; to wit Manzione incorporated Advanced 3 on July 13, 2015, after commencement of this action.

Conclusion

That branch of non-party movant Advanced 3's order to show cause to vacate the restraining notice is granted. That branch of Advanced 3's order to show cause seeking sanctions is denied. Any applications not specifically addressed herein are denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi

J.S.C.
Lara J. Genovesi
J.S.C.

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