SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

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LSQ FUNDING GROUP, L.C.

Plaintiff(s) **Index no. 650390/2017**

-against- **DECISION/ORDER**

DANIEL WERTHER AND WERTHER PARTNERS, L.L.C.

Defendant(s)

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Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion brought pursuant to CPLR § 5225(a)

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	1
Affidavits in Opposition of Daniel Werther and Caroline Werther	2 & 3
Judgement Debtors' Memorandum of Law in Opposition to the Application of the Judgment Creditor for a Turnover	4
Affirmation in Opposition to Motion for Turnover	5
Replying Affidavits	6

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Following a trial in the Circuit Court of Orange County Florida Court, on November 30, 2016, that court entered a judgment (the **Florida Judgment**) against Daniel Werther in the amount of $837,496.67 and against Werther Partners, L.L.C. in the sum of $1,900,711.21 (hereinafter, Daniel Werther and Werther Partners, L.L.C., collectively the **Defendants**) in favor of LSQ Funding, L.C. (the **Judgment Creditor**). By Order, dated January 24, 2017, the Florida Judgment was recognized and entered as a judgment in New York (hereinafter, the **Judgment**).

In this turnover proceeding brought pursuant to CPLR §5225(a), the Judgment Creditor seeks partial satisfaction of the Judgment by having Mr. Werther's membership in Bridgehampton Road Races LLC, a Delaware limited liability company d/b/a The Bridge and the Bridge Golf Club, Inc. (the **Country Club**) resigned and that such resignation be turned over as to permit the Judgment Creditor to use the proceeds occasioned by that resignation, as more fully discussed below, to partially satisfy the Judgment.

In the Defendants' opposition papers, the Defendants argue that (I) if the Country Club membership is "property", the property is not in the possession or custody of Mr. Werther and that the turnover procedure therefore must be dismissed as procedurally defective because the action should have been brought as against the Country Club with notice to Mr. Werther under CPLR § 5225(b) and not under CPLR § 5225(a) but that (II) the Country Club membership is not "property" and, thus, cannot be subject to a turnover pursuant to CPLR § 5201(b), and (III) that the Country Club membership is the separate property of Caroline Werther, Mr. Werther's wife, and is therefore not subject to turnover in satisfaction of Mr. Werther's debt.

The Country Club made a limited appearance for the purpose of opposing the CPLR §5225(a) motion. In their opposition papers, the Country Club essentially echos the first two arguments advanced by the Defendants – i.e., (I) the Judgment Creditor needed to bring this proceeding pursuant to CPLR § 5225(b) and not CPLR § 5225(a) and the failure to do so requires dismissal and (II) the Country Club membership isn't property because it is not assignable. The court notes that, the Country Club does not also make the Defendants' third argument – that the Country Club membership is Ms. Werther's separate property.

The controlling issues in this case are whether the membership in the Country Club and the right to resign that membership and receive return of the Membership Deposit[1] is (i) in the possession of Mr. Werther, (ii) property subject to a turnover proceeding brought pursuant to CPLR §5225(a), and (iii) not the "separate property" of Ms. Werther. Because we answer all three questions in the affirmative, the Judgment Creditor's motion pursuant to CPLR §5225(a) is granted to the extent that Mr. Werther is ordered to (A) execute and turnover forthwith his

[1] Reference is made to a certain (i) Membership Agreement (the Country Club Agreement), dated ____, 2008 between the Country Club and Daniel Werther and (ii) a Country Club Membership Plan, (the Country Club Membership Plan), dated January, 2008. Terms used but not otherwise defined shall have the meaning set forth in the Country Club Agreement.

resignation as a member of the Country Club and (B) the Membership Deposit and any other proceeds received in connection with such resignation up to the unpaid amount of the total amount owed by him in respect of the Judgment.

I. The Property in Question is in the Possession of the Defendant

CPLR § 5225(a) provides in relevant part that

> Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession of or custody of money of other personal property in which it has an interest, the court shall order that the judgment debtor pay the money or so much of it as it as is sufficient to satisfy the judgment to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.[2]

The Defendants and the Country Club argue in their opposition papers that the property is "clearly in the possession or custody of the Club"[3] and that instant action must be dismissed as it should have been brought pursuant to CPLR § 5225(b) and not CPLR § 5225(a).[4] This argument is however contradicted by the express language of the Country Club Agreement and the Country Club Membership Plan. Specifically, Section II.A. of the Country Club Agreement provides in relevant part that the Country Club "hereby issues to the Member, and the Member hereby acquires from the Company, a revocable license."

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[2] CPLR § 5225(b) provides for a turnover of property not in the possession of the debtor and requires that a special proceeding be brought against a person in possession or custody of money or other personal property in which the judgment debtor has an interest.

CPLR § 5225 (c) empowers the court to "order any person to execute and deliver any documents necessary to effect payment and or delivery."

The Country Club argues that the court can not grant the relief requested by the Judgment Creditor in that that the property would need to be turned over to a designated sheriff and not the Judgment Creditor. However, CPLR § 5255(a) must be read in connection with CPLR § 5225(c). The court clearly has the authority under CPLR § 5225(c) to order Mr. Werther to execute a simple resignation letter and to have the resignation letter sent to the Country Club. The clear intent of CPLR § 5255(a)'s requirement of delivery of personal property to a sheriff is to provide for the orderly sale of personal property where the mere ministerial act of execution of papers contemplated by CPLR § 5225(c) would not monetize the personal property.

[3] Judgment Debtors' Memorandum of Law in Opposition to the Application of the Judgment Creditor for a Turnover. Pg. 6.

[4] Affirmation in Opposition to Motion for Turnover, dated April 18, 2018, by Carmela M. Di Talia, Pg. 3.

Page 5 of the Country Club Membership Plan under the heading ***Transfer of Membership to the Club*** provides that a member may

> transfer his or her[5] Golf Membership only through the Club. In the event that a member desires to resign from the Club, the Member will be required to give thirty days' prior written notice to the Club The resigned membership will be reissued on a first-resigned, first-reissued basis as described above under "Refund Upon Resignation of Golf Membership".

In other words, the express terms of the Country Club Agreement provides that the member (i.e., Mr. Werther) acquired a revocable license from the Country Club and the Country Club Membership Plan provided for the manner in which the member could transfer his or her interest in the Country Club. It is therefore beyond doubt that the Country Club membership (i.e., the revocable license) is in the possession of Mr. Werther.

II. The Country Club Membership is Property subject to a Turnover Proceeding

The Defendants and the Country Club next argue that the Country Club membership is not property within the meaning of CPLR § 5201. More specifically, the Defendants and the Country Club argue that CPLR § 5201(b) permits the enforcement of a money judgment against any property which can be assigned or transferred and the Country Club membership is neither assignable nor transferable.

In support of this proposition, the Defendants cite *Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrolo, S.A., 190 F.3d 15 (2nd Cir. 1999), Heller v. Frota Oceania E. Amazonica, S.A., 81 A.D.3d 894, 920 N.Y.S.2d 86 (2nd Dept. 2011),* and *Carbo Industries, Inc. v. Alcus Fuel Oil, Inc., 46 Misc. 3d 726, 998 N.Y.S.2d 571 (2014 N.Y. Misc. LEXIS 4958 (Sup. Ct. Nass. Co. 2014).* None of the cases cited however remotely support their position.

Alliance Bond Fund, Inc. involved the potential turnover of receivables due from a toll road concessionaires' work done on the Mexican toll road construction project or notes to be issued pursuant to the Mexican government's promise to assume the concessionaires' construction debt to the note holders which notes were issued by

[5] The court notes that the Plan refers to "his or her" Golf Membership as further evidence that the sexist remark referred to by Mr. and Ms. Werther in their affidavits that the Country Club preferred husbands to be the members is simply not supported by the documentary evidence submitted to the court.

Grupo Mexicano De Desarrolo, S.A. (one of several construction firms hired to build Mexico's inner city toll road). The Second Circuit held that even if the receivables could be characterized as "debt" (re: CPLR § 5201 (a)), the plaintiffs in that action had failed to make the necessary showing that the receivables were made available to judgment creditors or that the judgment creditors had the ability to produce the asset. The issues presented in *Alliance* are not at all present here. Simple resignation by the Defendants in this action will produce the property that the Judgment Creditor seeks.

Heller involved the assignment of an appeal bond in connection with an action to recover attorneys' fees. In 1995, a judgment was entered against Frota Oceanica Brasileira, S.A., predecessor to Frota Oceanica E Amazonia, S.A. (**Frota**) and in favor of S.M. Pires and his wife Virginia for $4 million in consequential damages, $1 million in loss of consortium damages, and $16 million in punitive damages plus interests and costs. Thereafter, Frota appealed and filed an appeal bond in the amount of $32,983,181.59 issued by St. Paul Fire and Marine. On appeal, the First Department modified the judgment vacating the awards for loss of consortium and punitive damages and remitted the action for consideration of an award of the attorneys' fees. In 1999, the Supreme Court entered judgment awarding attorney's fees of $5.4 million in favor of Kenneth Heller and his firm Kenneth Heller, P.C. (collectively, **Heller**). On appeal, the First Department reversed and directed that judgment should be entered in favor of Mr. and Ms. Pires payable by Frota in a sum equal to the amount of the attorney's fees charged to and already paid by Mr. and Ms. Pires. In 2002 and 2003, the Supreme Court entered orders directing that the amount of attorneys' fees paid be determined by a referee. In 2004, the Appellate Division affirmed the orders referring these issues to a referee. In 2006, the underlying action was transferred to the Supreme Court, Bronx County. In December 2006, Heller commenced the action against Frota and United States Fidelty and Guaranty Company as successor to St. Paul Fire and Marine Insurance in the Supreme Court, Kings County to recover the supplemental attorneys fees. Heller moved to attach the appeal bond filed in the underlying action to obtain jurisdiction over Frota. The court denied the attachment because the appeal bond was security for a debt owed by Frota to Mr. and Ms. Pires, it was not a debt owed to Frota. In other words, *Heller* involved a third party obligation to a party other than the debtor. It simply has no application to the Country Club membership interest at issue in the case before the court where the obligation of the Country Club upon resignation of Mr. Werther would in fact run to Mr. Werther to return his Membership Deposit per the terms of the Country Club Agreement and Country Club Membership Plan.

Carbo Fuel involved a question as to whether a judgment debtor's credit card line was assignable or transferable property within the meaning of CPLR § 5201. That is, the court was confronted with the question of whether the judgment debtor could be ordered to draw down on its credit line to satisfy the judgment creditor – i.e., whether a debtor could be ordered in a turnover proceeding to borrow money from Peter to pay Paul. Relying on the seminal decision of *Abkco Industries, Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511(1976)* which addressed whether an absent debtor's intangible contract right to net profits from the future promotion of a film was debt or property within the meaning of CPLR § 5201 and held that the contract right could be treated as either CPLR § 5201(a) debt or CPLR § 5201(b) property and that the operative fact was whether the property interest had potential economic value, the court held that the plaintiffs failed to establish legal authority that a credit card line is assignable or transferable and that permitting the attachment would only serve to create another creditor for the defendants that was not likely to be repaid.

This case also has no application to the case at bar. This case does not in any manner involve creating one debt to pay off another. The property at issue here per Section II.A of the Country Club Agreement, is a revocable license. The Country Club Membership Plan indicates that the membership is in fact assignable – albeit, only through the Country Club. In addition, per Section IV. B of the Country Club Agreement, subject to a 30 day notice requirement, a member has the unrestricted right to resign his or her revocable license and receive a refund of a portion of their Membership Deposit. It is therefore axiomatic that the membership has potential economic value and that by simply resigning the membership interest is transferable. *See Abkco Industries, Inc. v. Apple Films, Inc., 39 N.Y.2d 60, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).*

III. The Country Club Membership is not Ms. Werther's Separate Property

All property acquired by either spouse during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action regardless of the form in which title is held is marital property. *See Pensmore Investment, LLC v. Gruppo, Levey & Co., 137 A.D.3d 558 (2016) citing Domestic Relations Law § 236[B][1][c]; Fields v. Fields, 15 N.Y.3d 158, 162, 905 N.Y.S.2d 783, 931 N.E.2d 1039 [2010].* "Separate property" is not marital property. *Pensmore Investment, LLC v. Gruppo, Levey & Co., 137 A.D.3d 558 (2016) citing Tatum v. Simmons, 133 A.D.3d 550, 21 N.Y.S.2d 208 [1st Dept. 2015]; Spielfogel v. Spielfogel, 96 A.D.2d 443, 947 N.Y.S.2d 56 [1st Dept. 2012], lv. Denied 21 N.Y.3d*

978, 970 N.Y.S. 2d 747, 992 N.E.2d 1091 [2013]; Epsten v. Epstein 289 A.D.2d 78, 734 N.Y.S.2d 144 [1st Dept. 2001].

Section 236 [B](1)(d) of the Domestic Relations Law sets forth the following four categories of property that constitute separate property:

> (1) Property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse;
> (2) Compensation for personal injuries;
> (3) Property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
> (4) Property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

The question of whether property is separate property or marital property typically arises in the context of a proceeding involving the dissolution of a marriage. And, in analyzing whether the property in question is separate property, the statute creates a presumption that all property unless clearly separate is deemed marital property and the burden rests with the titled spouse to rebut that presumption. *Fields v. Fields, 15 N.Y.3d 158 (2010) citing Dejesus v. Dejesus, 90 N.Y.2d 643, 647, 665 N.Y.S.2d 36, 687 N.E.2d 1319 (1997).* Indeed, the statute codifies the intent to recognize both the direct and indirect contributions of each spouse and also acknowledges the marriage as an economic partnership. *Fields v. Fields, 15 N.Y.3d 158 (2010) citing Hartogv. Hartog, 85N.Y.2d 36, 47, 623 N.YS.2d 537, 647 N.E.2d 749 (1995) citing Governor's Approval Mem., L. 1980, ch. 281, and Assembly Mem., 1980 N.Y. Legs. Ann., at 129-130; Price v. Price 69 N.Y.2d 8, 15, 511 N.Y.S.2d 219, 503 N.E.2d 684 (1986).* Separate property which is commingled with marital property loses its separate character and is treated as marital property. *McManus v. McManus, 298 A.D.2d 189 (2002).*

The Defendants argue that the Country Club membership is Ms. Werther's separate property as having been acquired by bequest, devise or descent per Section 236 [B](1)(d)(1) of the Domestic Relations Law. In support of this proposition, the Defendants offers only 2 affidavits[6] – one from Mr. Werther and

[6] To be clear, the Defendants do not offer a post-marital agreement designating the Country Club membership as Ms. Werther's separate property or a nominee agreement indicating that Mr. Werther is the named nominee of Ms. Werther's Country Club membership or any other agreement or other documentary evidence contemporaneous to when the Country Club membership was assigned to Mr. Werther designating the property as Ms. Werther's separate property.

one from Mr. Werthers' wife, each indicating that the Country Club membership in *his name* belongs in fact to Ms. Werther, and each such affidavit executed some 10 years after the Country Club membership was obtained.[7]

More specifically, in her affidavit, Ms. Werther claims that the Country Club membership was her father's (Howard Gettis) who bequeathed all of his property to his three daughters equally and that she received a reduced share in his estate in consideration for her acquisition of the Country Club membership.[8] She further alleges that the Country Club through a "representative" advised that there were two conditions to her taking over her deceased father's membership – (1) "that husbands were normally the named member" which she "was not concerned about" because "both husbands and wives have equal right to access the Club's facilities"[9] and (2) that she pay, which she alleges she did out of her own separate funds, the difference between what the Country Club membership was at the time and what her father had paid.[10] Finally, she claims that "it has been [her] separate property since that time".[11] In his affidavit, Mr. Werther also claims that the Country Club membership is in his name because "the Club preferred that husbands be the named member".[12] Lastly relying on *Pensmore Investments, LLC v. Gruppo, Levey & Co., et al., 137A.d2d 558 (2016),* the Defendants argue that if the Court does not dismiss the action outright, the Court should hold a hearing to determine the interest of Ms. Werther.[13]

The problem with the Defendants argument is that even taking all of the allegations set forth in their affidavits as true, without a nominee agreement or post marital agreement or any other evidence whatsoever executed at the time that the Country Club Membership was assigned to Mr. Werther establishing the Country Club Membership as Ms. Werthers' separate property, the Country Club membership can not be her separate property under established law and the governing documents. To wit, either the Country Club membership and the additional separate money Ms. Werther alleges that she paid at the time of the transfer of the Country Club membership to her husband was (x) an outright gift to her husband as the Country Club membership is in his name or (y) it became marital property. The Country Club Agreement and the Country Club Membership Plan also contradict her position. For example, pursuant to Section II.A of the Country Club

[7] Affidavit of Caroline Werther and Affidavit of Daniel Werther, each dated April 15, 2018.
[8] Affidavit of Caroline Werther, dated April 15 ,2018. Paragraph 2 and 3.
[9] Affidavit of Caroline Werther, dated April 15, 2018. Paragraph 6.
[10] Affidavit of Caroline Werther, dated April 15, 2018. Paragraph 5.
[11] Affidavit of Caroline Werther, dated April 15, 2018. Paragraph 8.
[12] Affidavit of Daniel Werther, dated April 15, 2018. Paragraph 4.
[13] Affirmation in Opposition to Motion for Turnover, dated April 18, 2018, by Carmela M. Di Talia, Pg. 12.

Agreement, the Country Club consented to the assignment of the Golf Membership by Howard Gittis to Mr. Werther. Pursuant to Section II.A, Mr. Werther acknowledged that the Golf Membership at the time of Mr. Gittis' death required the payment of a total of $850,000 which consisted of a non-refundable Initiation Fee of $400,000 and a refundable Membership Deposit of $450,000 and pursuant to Section II.B, Mr. Werther delivered a $350,000 Initiation Fee plus sales tax (i.e., $380,187.50) to the Country Club and agreed that upon the assignment to him of the Golf Membership from Mr. Gittis, $50,000 of the $500,000 membership deposit that had been made by Mr. Gittis shall be non-refundable as the balance of the Initiation Fee and $450,000 shall be the **"Member's refundable Membership Deposit"** *(emphasis added).*[14] Notably, Section II.B further provided that

> if the Estate of Howard Gittis advises that it will not assign the Gittis Membership and/or demands that the Company refund the Gittis Membership Deposit to the Estate, **the Member agrees to pay to the Company, within 30 days of the Company's request therefor, $500,000 in payment of the balance of the Initiation Fee and the Membership Deposit, plus $43,125 in payment of sales tax thereon** (*emphasis added).*

In other words, pursuant to Section II.B of the Country Club Agreement, the Country Club membership was to be assigned to Mr. Werther and if Mr. Gettis' estate wanted its deposited money back, it could obtain it, and Mr. Werther would then have to make an additional deposit in accordance with Section II.B of the Country Club Agreement, but in any event, *Mr. Werther* (and not Ms. Werther) would be the member of the Country Club and own the Country Club membership (re: revocable license). In addition, and significantly, Section IV of the Country Club Agreement Refund of Membership Deposit addresses the refunding of the Membership Deposit. Section IV.B provides in relevant part:

> If the Member resigns his or her Golf Membership prior to the expiration of the Membership Term, the Company **shall refund to the Member** (emphasis added) the Membership Deposit.

That is, upon resignation by Mr. Werther, the Membership Deposit is returnable to Mr. Werther – not to the Estate of Mr. Gettis, and not to the Defendant's wife. Schedule B of the Country Club Agreement, Member Information, under the heading of Member Information, it has been handwritten as "Daniel J. Werther"

[14] Section II.B of the Country Club Agreement. For the avoidance of doubt, Member is defined in the Country Club Agreement as Daniel Werther.

and not "Caroline Werther" and in the line identified as Spouse, the name "Caroline Gittis Wether" has been handwritten.

Moreover, the court notes that the per the express terms of the Country Club Membership Plan, the Country Club membership is not inheritable to the children of existing members – only the spouse of an existing member.

Page 8 of the Country Club Membership Plan under the heading **Death of a Member** provides as follows:

> Upon the death of a Member, the Golf Membership will be transferred to the Member's surviving spouse without the payment of any additional Membership Deposit, provided that the surviving spouse applies for an is approved for membership in the Club. **If there is no surviving spouse, or if the surviving spouse does not apply for membership, or if the surviving spouse applies but is not approved for membership in the Club, the Golf Membership shall be deemed resigned and shall be reissued in the same fashion as any other resigned Golf Membership.** *(emphasis added)*

In other words, per the terms of the Country Club Membership Plan, Mr. Gettis' membership could not have passed by inheritance to Ms. Werther. And, for the avoidance of doubt, the sexist assertion advanced by Mr. and Ms. Werther that the "Club preferred that husbands be the named member" is directly contradicted by the Country Club's Membership Plan which permitted inheritance by a surviving spouse regardless of the gender of the survivor.

Put another way, accepting the affidavits of Mr. and Ms. Werther as true, under established law and the Country Club Agreement, the assignment of the Country Club membership from the Estate of Howard Gettis was the same as if (i) Mr. Gettis resigned or his membership was deemed resigned and Ms. Werther received the Membership Deposit back, (ii) Ms. Werther paid both the returned Membership Deposit and the additional required payment to the Country Club and then (iii) put the Country Club membership in her husband's name. Whatever separate status the property may have under those circumstances at the time of the distribution from the estate of Mr. Gettis to Ms. Werther, pursuant to Domestic Relations Law § 236 [B](1)(d)(1), once put in Mr. Werther's name and without a contemporaneous post-marital agreement or nominee agreement (designating Mr. Werther as the owner in name only), the Country Club membership lost its status as "separate" property and became either an outright gift to Mr. Werther or marital property. It is therefore beyond cavil that the membership in the Country Club is

Mr. Werther's and has never in any manner whatsoever been maintained as "separate property" by Ms. Werther.

Finally, the court notes that the Defendants reliance on *Pensmore Investments, LLC v. Gruppo, Levey & Co., 137 A.D.2d 558 (2016)* is misplaced in indicating that a hearing is required to determine the status of Ms. Werther's interest in the Country Club Membership. In *Pensmore,* a judgment creditor brought a proceeding to enforce a money judgment against the judgment debtor (**Hugh**) by obtaining a turnover of personal property that was in his former marital residence – i.e., personal property that was in the possession of his estranged wife (**Wendy**). The judgment creditor had obtained a judgment pursuant to a settlement made by Hugh to personally guarantee a debt owed by codefendants Gruppo, Levey. The judgment creditor obtained a turnover order requiring that Hugh turnover his personal property in satisfaction of his debt, including personal property claimed to belong to Hugh and located in his former residence which he had shared with Wendy.

Wendy had sought to intervene in the turnover proceeding seeking a permanent stay of the enforcement of the turnover order and brought a separate action seeking a declaration that the property in her possession sought in the turnover proceeding was her "separate property". The trial court did not permit Wendy to intervene. Wendy appealed.

The First Department reversed holding that (i) because Hugh was not in physical possession of the property, the proceeding should have been brought pursuant to CPLR § 5225(b) and not CPLR § 5255(a) and that Wendy was required to be named in the petition because Wendy was the party in actual possession of the disputed property, (ii) the error in not naming Wendy could be cured by permitting her to intervene (re: dismissal was not required) so long as the burden of proof remained on the judgment creditor to establish that Hugh had an interest in the property that is superior to Wendy's as she was the one in actual possession of the disputed property, and (iii) the trial court was required to hold a hearing to determine whether the "personal property in Wendy's possession is her sole separate property or marital property."[15] Significantly, the First Department noted that the property in that case involved tangible personal assets which were in Wendy's physical possession and which assets are not typically titled (e.g., fur coat, furniture, silverware, certain artwork, etc.) and that Wendy had put before the court in addition to her own affidavit, her mother's last will and testament, a 1996

[15] *Pensmore Investments, LLC v. Gruppo, Levey & Co., 137 A.D.2d 558 (2016)*

letter from an attorney who filed a gift return for her grandmother's estate, referring to the items of tangible property and documents showing that Hugh did not claim any of the disputed property she identified as belonging to him in a personal bankruptcy filing. In other words, Wendy argued and produced evidence to the court that she had either inherited the disputed property in her possession or received the disputed property in her possession as a gift from Hugh before he had guaranteed the debt.

The case in front of this court does not involve personal property not typically titled in the possession of Ms. Werther. Quite the contrary, the property at issue involves a Country Club membership which is in fact titled in the name of Mr. Werther. In addition, unlike in *Pensmore,* where the spouse of the judgment debtor produced documentary evidence executed prior to the turnover proceeding that the disputed property was separate property, the Defendants in this action have produced only two self serving affidavits executed some 10 years after the acquisition of the Country Club membership and after the Judgment was obtained and this action was commenced. Moreover, and most significantly, the Country Club Agreement by its terms addresses the proceeds from resignation as belonging to Mr. Werther and not Ms. Werther. Therefore, based on the evidence presented to the court, there simply is insufficient evidence to support the Defendants' request for a hearing and it is therefore denied.

CONCLUSION

Inasmuch as the court holds that the Country Club membership (re: revocable license) and the unrestricted right to resign the Country Club membership interest and monetize the Country Club membership is (i) in the possession of Mr. Werther, (ii) property within the meaning of CPLR §5201 and subject to a turnover proceeding pursuant to CPLR § 5525(a), and (iii) not the separate property of Ms. Werther, Mr. Werther's is ordered to (A) execute and turnover forthwith his resignation of his membership in the Country Club and (B) the Membership Deposit and any other proceeds received in connection with any such resignation up to the unpaid amount of the total amount owed by him in respect of the Judgment.

For the avoidance of doubt, the Country Club may rely on this Order and this Order shall serve as notice of Mr. Werther's resignation and Mr. Werther's

resignation from the Country Club pursuant to Page 5 of the Membership of Country Club Membership Plan **Transfer of Membership to the Club.**

Dated: July 11, 2018

Hon. Andrew Borrok
J.S.C.

Hon. Andrew Borrok