

**Matter of Northwest 5th & 45th Realty Corp. v
Mitchell, Maxwell & Jackson, Inc.**

2015 NY Slip Op 31660(U)

August 31, 2015

Supreme Court, New York County

Docket Number: 150344/13

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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IN THE MATTER OF THE APPLICATION OF
NORTHWEST 5TH & 45TH REALTY CORP.,

Petitioner,

DECISION AND
ORDER

For a judgment pursuant to Section 5225(b) of the
Civil Practice Law and Rules,

- against -

Index No.
150344/13

MITCHELL, MAXWELL & JACKSON, INC.,
STEVEN KNOBEL, et al.,

Respondents.

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HON. ANIL C. SINGH, J.:

Petitioner/judgment-creditor Northwest 5th & 45th Realty Corp., moves by
order to show cause for an order:

- a) confirming the referee’s report which determined that respondent Steven Knobel received \$679,940.00 from the judgment-debtor, Michell, Maxwell & Jackson, Inc. (“MMJ”), and that portion of the referee’s report which determined that Knobel received no salary and/or commission income from the judgment-debtor in 2010 and 2011;

- b) directing respondent Knobel to turn over to petitioner an amount equal to the total outstanding balance of the money judgments, including interest and costs, entered in the New York County Clerk’s Office in favor of petitioner and against judgment-debtor on April 26, 2012, and December 12, 2012, in the amounts of \$450,823.75 and \$38,500.00, respectively (the “judgments”);

c) pursuant to CPLR 5016(c), and the court's decisions dated July 25, 2013, and March 4, 2014, disregarding the corporate veil of the judgment-debtor and directing a judgment be entered holding Steven Knobel jointly and severally liable for the judgments of \$450,823.75 and \$38,500.00, plus interest and costs; and

d) pursuant to CPLR 5229 and 5222(b), restraining Steven Knobel from transferring or dissipating assets with the same effect as if a restraining notice has been served by petitioner upon Steven Knobel after judgment, and permitting petitioner to conduct discovery of Steven Knobel pursuant to CPLR 5223 and 5224.

Respondent Steven Knobel opposes the motion and cross-moves to reject the report in part, and for sanctions against petitioner and its attorneys for frivolous and harassing conduct.

Petitioner Northwest 5th & 45th Realty Corp., is the judgment creditor of its former tenant, judgment debtor Mitchell, Maxwell & Johnson, Inc.

MMJ was engaged in the business of conducting residential real estate appraisals. Steven Knobel was the president of MMJ and a 50% owner of the corporation. He was a real estate appraiser for the corporation, receiving a salary and commissions for his work.

Petitioner commenced this special proceeding under CPLR 5225(b) by filing a verified petition on January 11, 2013, seeking payment on the judgments, by setting aside alleged fraudulent conveyances in excess of \$2.14 million from debtor to respondents. The petition alleged that debtor's bank statements showed

fraudulent conveyances from 2010 through 2012 by debtor to Knobel amounting to \$691,960.

The Court granted the petition in part in a memorandum opinion dated July 25, 2013. Regarding Steven Knobel, the memorandum opinion states:

Some of the payments to Knobel ... are allegedly salary payments. While transfers from the debtor to insiders to repay loans made by the insiders are deemed fraudulent conveyances, transfers for salaries in return for work are not. An economically distressed corporation's continued payment of an officer's salary while it remains actively engaged in business is not a fraudulent conveyance where there is no evidence that the salary is either excessive or unreasonable or that the corporation did not receive full value in return.

...

A judgment will be entered ordering Knobel to pay what he received, less his salary, and piercing the corporate veil between Knobel and debtor, and Knobel and the other respondents.

(Memorandum Opinion dated July 25, 2013, pp. 11-12, 16).

On August 30, 2013, Knobel and MMJ filed a motion to reargue and renew pursuant to CPLR 2221, contending that new evidence should be considered regarding MMJ's solvency and Knobel's salary.

Not long after the Court issued its decision and order directing Knobel to submit his tax returns, Knobel contends that in September 2013 he filed an amended federal income tax return with the Internal Revenue Service ("IRS"). Knobel asserts that he filed the amended return to report additional salary and/or

commissions that he inadvertently failed to report when he filed tax returns in 2010 or 2011.

Subsequently, in a memorandum opinion dated March 4, 2014, the Court granted Knobel's motion to renew, stating:

Renewal is granted on Steven Knobel's assertion that this commission income in 2010 and 2011 was \$385,929.05 and not \$183,000. Knobel maintains there was an error in the Quickbook account. As a result, his full earnings on his 1099s were not taken into account. Knobel asserts that he paid taxes on the full amount of the 1099s. Knobel submitted his 2010 and 2011 tax returns for an *in camera* inspection on this issue.

I decline to conduct an *in camera* inspection because petitioner is entitled to review the tax returns and cross-examine Knobel on the discrepancies on his earned income for 2010 and 2011.

Accordingly, it is

ORDERED that the matter is referred to a Special Referee who shall hear and report on: 1) the amount Knobel earned in 2010 and 2011; and 2) the sums that Knobel received from the insolvent corporation, less his salary.

(Memorandum Opinion dated March 4, 2014, pp. 4-5).

Only a few days after the Court issued the memorandum opinion, Knobel mailed a check in the amount of \$4,224.90 to the IRS. That check is dated April 12, 2014 (Affirmation of Daniel S. LoPresti dated March 18, 2015, exhibit F).

The parties appeared before Judicial Hearing Officer Ira Gammerman for a hearing on September 8, 2014.

At the conclusion of the hearing, the JHO declined to rule on whether the amount Knobel earned as salary should be based on the original tax return or the amended return. JHO Gammerman stated that he could not rule on that specific issue because it is a legal issue for this Court. Accordingly, the JHO reported that Knobel received a total of \$679,940, if the Court ultimately holds that Knobel is bound by the original tax returns that were filed. On the other hand, the JHO reported that Knobel received a total of \$310,953, if the Court ultimately decides to rely on the amended tax returns.

Petitioner contends that Knobel filed an amended income tax return for the sole purpose of foiling the judgment creditor. Petitioner points to the timing of the amended return. The Court issued the decision piercing the corporate veil on July 25, 2013. Soon thereafter, Knobel filed an amended tax return in September 2013.

Petitioner notes that filing the amended tax return was ultimately to Knobel's financial advantage. On the one hand, he had to pay an additional \$4,224.90 to the IRS. On the other hand, the amended tax return could be used in the instant proceeding as documentary evidence that Knobel earned more salary and/or commissions than originally reported. In other words, the amended tax return could enable Knobel to realize over \$300,000 in income by reducing the amount of any judgment entered against Knobel in the present proceeding.

In response, Knobel asserts that the amended tax return was filed for the primary purpose of reporting income from commissions that was inadvertently omitted from the original tax return. Copies of invoices for appraisals for the period June 1, 2010, through November 30, 2011, are annexed to the cross-motion as exhibit D. Knobel asserts that the invoices were submitted to the company contemporaneously with the work in 2010 and 2011; he billed for all the appraisals he performed; the amounts were put in the 1099 forms; and the amount matched exactly with what was reported on Knobel's amended tax return.

Discussion

“A party to litigation may not take a position contrary to a position taken in an income tax return” (Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 [2009]).

After careful consideration, the Court finds that Knobel is bound by the original income tax return for two reasons.

First, based on the timing of the amended tax return, this Court agrees with petitioner's contention that Knobel filed the amended return as a tactic calculated to deliberately evade enforcement of the judgments. It is no coincidence that Knobel filed the amended tax return shortly after this Court's decision piercing the corporate veil. Under such circumstances, Knobel must be bound by the original

tax return.

Second, the Court finds that the invoices offered as proof of commissions earned are self-serving and lack probative value. It is important to note that Knobel has not submitted cancelled checks or bank statements as proof that he was paid commissions on the invoiced amounts.

Knobel annexes a “billing summary” from the IRS as evidence that he paid additional taxes (Knobel Affidavit, exhibit F). On its face, the document fails to state the amount Knobel earned from commissions. It states in pertinent part:

Changes to your 2011 Form 1040
Amount due: \$4,224.90
We made the changes you requested to your
2011 Form 1040 to adjust your:

- business income (or loss)
- Schedule D
- self-employment tax

As a result, you owe \$4,224.90.

(Knobel Affidavit, exhibit F, p. 3).

Knobel also exhibits a redacted online account transcript of his 2010 and 2011 amended tax returns (Knobel Affidavit, exhibit F). Although this document states that Knobel filed amended tax returns, it does not corroborate Knobel’s contention that he was paid commissions amounting to \$385,929. The account transcript under the heading “information from the return or as adjusted” states that

Knobel's adjusted gross income for 2010 was \$72,601.00, and his adjusted gross income for 2011 was \$65,927.00. In light of the significant discrepancy between the amount Knobel contends he earned in the form of commissions and the amount of adjusted gross income on the IRS account transcript, the Court finds that the invoices Knobel relies upon lack probative value.

Finally, it is noteworthy that Knobel has not produced certified copies of the alleged amended tax returns.

Accordingly, the referee's report which determined that Steven Knobel received \$679,940.00 from the judgment-debtor, and that portion of the referee's report which determined that Knobel received no salary and/or commissions from the judgment-debtor in 2010 and 2011, is hereby confirmed.

The branch of petitioner's order to show cause seeking a turnover order was not addressed in the moving papers. Accordingly, the request for a turnover order is denied without prejudice.

Settle judgment on notice.

Dated: August 31, 2015

ENTER:



ANIL C. SINGH