

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

INDEPENDENT BANK,

Plaintiff,

vs.

O.L.T. SPECIAL SERVICES, LLC; PULSE
6053, LLC; and CRAIG OUDENDYK,

Defendants.

Case No. 15-00673-CKB

HON. CHRISTOPHER P. YATES

ORDER DENYING PLAINTIFF'S MOTION FOR ALTERNATE SERVICE

Plaintiff Independent Bank's seemingly innocuous request for alternate service of a subpoena for a debtor's examination requires the Court to wade into the morass of post-judgment collection. On February 26, 2015, the Court entered a consent judgment signed by Defendant Craig Oudendyk on behalf of himself and both of the corporate defendants. That consent judgment referred to two separate judgment amounts of \$84,706.28 (bearing interest of 8.25 percent) and \$8,371.91 (bearing interest of 13 percent). Following the entry of the consent judgment, the plaintiff began collection efforts. As is often the case, however, the judgment turned out to be easier to obtain than to collect. Plaintiff Independent Bank pursued garnishment to no avail, and then Independent Bank turned its attention to the signatory of the consent judgment, Defendant Oudendyk.

Plaintiff Independent Bank chose to conduct a debtor's examination of Defendant Oudendyk, as permitted by MCL 600.6110(1) and MCR 2.621(A)(2), but Oudendyk proved too difficult to find. As explained in the affidavit of a process server, Oudendyk could not be served with a subpoena for the debtor's examination. On five separate occasions from May 3, 2016, through May 12, 2016, the

process server went to Oudendyk's residence on Coolidge Street on Scottsdale, Arizona, but came up empty in each attempt to serve Oudendyk. According to the process server, Oudendyk was home on at least one of those five occasions, but he peered through the peephole and "started to open the door but stopped." After the fifth failed attempt, the process server gave up and Independent Bank submitted a request for alternate service of the subpoena.

The Court has no sympathy whatsoever for Defendant Oudendyk. He obviously knows that a consent judgment has been entered against him, yet he seems to be going to great lengths to avoid involvement in Plaintiff Independent Bank's lawful effort to collect on the judgment he signed. But the Court cannot authorize alternate service of the subpoena for a debtor's examination merely based upon disapprobation of Oudendyk's behavior. Instead, the Court must satisfy itself that there exists a legal basis for such authorization. Although the path to that authorization is circuitous, the Court concludes that alternate service can be authorized as an appropriate method for serving a subpoena for a debtor's examination. Unfortunately for Independent Bank, however, that method of service can only be employed within the State of Michigan.

Procedures for collection of judgments are prescribed by the Proceedings Supplementary to Judgment Act, MCL 600.6101, *et seq.* See Green v Ziegelman, 282 Mich App 292, 297 (2009). As MCR 2.621(A)(2) states, "[w]hen a party to a civil action obtains a money judgment, that party may, by motion in that action or by a separate civil action, obtain relief supplementary to judgment under MCL 600.6101-600.6143[.]" With regard to the type of debtor's examination contemplated in this case, "the judge may issue a subpoena requiring the judgment debtor . . . to appear at a specified time and place, and be examined on oath, and to produce for examination any books, papers, or records in his or its possession or control which have or may contain information concerning the property

or income of the debtor.” See MCL 600.6110(1). Thus, Independent Bank has a right pursuant to Michigan law to conduct a debtor’s examination of Defendant Oudendyk to obtain information about his property and income, but the Proceedings Supplementary to Judgment Act does not prescribe the method for issuing a subpoena directing Oudendyk to appear for a debtor’s examination.

In the absence of legislative guidance, the Court must turn to the Michigan Court Rules. The most logical source of information is MCR 2.621(C), which is entitled “Subpoenas and Orders” and includes a cross-reference to MCR 2.105, but that “subrule does not apply to subpoenas for ordinary witnesses.” See MCR 2.621(C). Thus, the Court must look elsewhere for the procedure governing the service of a subpoena upon an “ordinary witness” for a debtor’s examination. Consequently, the Court next turns to MCR 2.506, which includes a subrule entitled “Service of Subpoena and Order to Attend; Fees.” See MCR 2.506(G). Under that subrule, a “subpoena may be served anywhere in Michigan in the manner provided by MCR 2.105.” See MCR 2.506(G)(1). Because MCR 2.105(I) allows for alternate service, the Court concludes that a subpoena for a debtor’s examination may be served in that manner upon court approval in conformity with the requirements of MCR 2.105(I). But that conclusion affords no succor to Plaintiff Independent Bank in the instant case because MCR 2.506(G)(1) limits such service to witnesses who are served “anywhere in Michigan[.]” As a result, unless Independent Bank can provide the Court with a reason to believe that alternate service of a subpoena upon Defendant Oudendyk “anywhere in Michigan” may be “reasonably calculated to give [Oudendyk] actual notice of the [debtor’s examination] and an opportunity to be heard[.]” see MCR 2.105(I)(1), the Court must deny Independent Bank’s motion for alternate service.

Plaintiff Independent Bank’s pending motion for alternate service furnishes no justification for permitting it to proceed in that fashion. To the contrary, the process server’s affidavit leads the

Court to conclude that Defendant Oudendyk is currently living in Scottsdale, Arizona, so traditional methods of alternate service appear highly unlikely to give Oudendyk proper notice of the debtor's examination. The Court's concern about lack of notice matters a great deal in this situation. Beyond the due-process concerns that make alternate service a constitutionally risky proposition, see, e.g., Lawrence M Clarke, Inc v Richco Construction, Inc, 489 Mich 265, 274-275 (2011), the Court notes that the remedy for a witness's failure to honor a subpoena is contempt. See MCR 2.506(F)(1). In light of the serious consequences that could flow from Oudendyk's failure to appear for his debtor's examination, the Court must err on the side of caution in approving a method of service that may not satisfy the Michigan Court Rules or provide adequate notice to Oudendyk. Accordingly, the Court shall deny Independent Bank's motion for alternate service.

IT IS SO ORDERED.

Dated: May 26, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge