Silver Cup Funding LLC v Horizon Health Ctr., Inc.
2020 NY Slip Op 51529(U) [70 Misc 3d 1201(A)]
Decided on December 18, 2020
Supreme Court, Ontario County
Schiano, Jr., Justice.
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Charles A. Schiano, Jr., J.:

Defendant brings this motion pursuant to CPLR 5015(a) and CPLR 5240 to vacate an execution by plaintiff and levy by a New York City Marshal, for restitution of moneys improperly executed on and levied and for reasonable attorney's fees. Defendant Horizon Health Center, Inc. OBA Alliance Community Healthcare is a not-for-profit medical center providing health and welfare services for medically under served communities in the Jersey City, New Jersey, area. Defendant Arlene Simon is the owner and Chief Operating Officer (defendants are collectively referred to hereafter as "Horizon"). Plaintiff Silver Cup Funding, LLC ("Silver Cup"), which did not submit an affidavit in opposition, relying on a Memorandum of Law by its attorneys, appears to be in the business of purchasing at a discount the future cash receivables of various businesses in need of funds, utilizing so called "merchant agreements."

Silver Cup and Horizon entered into a series of three merchant agreements on December 26 and 28 of 2018. Two agreements were made on December 26th. The first agreement (Agreement 1) provided that Silver Cup was to purchase $1 ,301 ,575.70 (purchased amount) of Horizons future receivables for $866,296 (purchase price). To collect on the purchased amount, the parties agreed that Silver Cup would take 95 daily automatic withdrawals in the amount of $13,700 from Horizons receivables account. The agreement indicated this amount represented 20% of Horizons daily receivables.

The second contract (Agreement 2) called for Silver Cup to purchase $924,679.12 (purchased amount) of Horizons future receivables for $616,877 (purchase price). To collect on the purchased amount, the parties agreed that Silver Cup would take 225 daily (Monday through Friday) automatic withdrawals in the amount of $4, 100 from Horizons receivables account. This amount, too, was

purported to be 20% of Horizons daily receivables, without reference to the first contract.

Two days later, Horizon entered into a third merchant agreement (Agreement 3) with Silver Cup on December 28, 2018. This contract called for Silver Cup to purchase $254,830 (purchased amount) of Horizons future receivables for $133,617 (purchase price). To collect on the purchased amount, the parties agreed that Silver Cup would take 82 daily automatic withdrawals in the amount of $3,116 from Horizons receivables account. This amount was purported to be 20% of Horizons daily receivables, without reference to the first two contracts.

In addition, Simon provided a guarantee of each contract and a confession of judgment, authorizing it to be filed in any county in New York.

Simon avers that Silver Cup changed the terms of the contracts at the last minute so that the full purchase price was never advanced and instead Silver Cup would pay the purchase price under each Agreement in weekly installments, Agreement 1 paying $88,435 per week, Agreement 2 paying 23,604 per week, and Agreement 3 paying $15,580 per week. The purchased amount payment terms remained unchanged, however. Accordingly, despite paying the purchase price in installments, Silver Cup still sought to collect $68,500 per week under Agreement 1, $20,500 per week under Agreement 2, and $15,580 per week under Agreement 3. In total, Silver Cup advanced $133,617 per week and collected $104,580 per week.

On February 1, 2019, Silver Cup declared that the Agreements were in default and filed the confession of judgment here in Ontario County and obtained a judgement on February 19, 2019 in the amount of $431.563, plus interest at 16% in the amount of $3,216.03, and attorney's fees in the amount of $143,477.08, for a total judgement amount of $578,481.11.

On or about July 23, 2020, a New York City Marshal, at the direction of Silver Cup, filed an execution and levy on a New York City branch of plaintiff's bank, TD Bank.[FN1] Simon avers that the receivables account in question was maintained in a TD Bank branch in Hoboken, New [*3]Jersey. In a submission to the court post oral argument, counsel for plaintiff states that $62,685.86 was collected from defendant post-judgment and prior to the execution and levy (NY St Cts Elec Filing [NYSCEF] Doc No. 27, letter to Court]). At oral argument, Horizon's counsel asserted Silver Cup continues to take money from its account under the execution and levy. Silver Cup's counsel stated Silver Cup has not taken any money since it originally obtained "thirty something thousand" from the account under the execution and levy. No documentation supporting either of these assertions has been submitted to the Court.

Silver Cup argues that the court should not consider the merits of Horizon's motion on procedural grounds. First, Silver Cup argues that both a CPLR 5015[a] motion and CPLR 5240 motion must be brought by order to show cause and to bring

such a motion by notice of motion, as Horizon did here, is a jurisdictional defect requiring denial of the motion.

CPLR 5015(a) provides that any interested person may bring a motion "with such notice as the court may direct." These words are commonly interpreted to require an order to show cause so that the court may direct when and how notice is to be provided. Bringing on a motion by notice of motion rather than order to show cause has been held to be a jurisdictional defect (*Smith v Smith*, 291 AD2d 828 [4th Dept 2002]). Nevertheless, Silver Cup sought and obtained an adjournment for additional time to respond to the motion. Thereafter Silver Cup "opposed the defendant's motion and did so without claiming any prejudicial effect. The court shall thus consider the merits of the defendants motion as any jurisdictional defect was waived by the plaintiffs failure to object thereto" (*Vin-Mike Enter. v Grigg*, 2015 NY Slip Op 31625[U], *3 [Sup Ct, Suffolk County 2015]).

Next, Silver Cup asserts vacature of a execution and levy may not be sought under CPLR 5015(a) because that provision applies only to judgements and orders, and that CPLR 5240 cannot provide relief after the affected property or asset already has been seized and turned over.

"CPLR Article 52 sets forth procedures for the enforcement of money judgments in New York, which may include the imposition of a restraining notice against a judgment debtor's bank account to secure funds for later transfer to the judgment creditor through a sheriffs execution or turnover proceeding (*Cruz v TD Bank, N.A.*, 22 NY3d 61 , 66 [2013]). Article 52 also "contains general provisions that permit 'any interested person'-including a judgment debtor-to secure remedies for wrongs arising under the statutory scheme" (*Cruz v TD Bank, N.A.*, 22 NY3d at 74). "CPLR 5240 permits a court 'at any time, on its own initiative or the motion of any interested person' to issue an order 'denying, limiting, conditioning, regulating , extending or modifying the use of any enforcement procedure'-and therefore grants the court substantial authority to order equitable relief" (*Cruz v TD Bank, N.A.*, 22 NY3d at 75).

Silver Cup's argument that CPLR 5240 is not available after the money has been removed from Horizon's account is not availing in this case. *Cruz v TD Bank, N.A.*, makes it clear that bank restitution of bank account funds improperly seized may be ordered even where the funds have already been transferred to the judgement creditor (*Cruz v TD Bank, N.A.*, 22 NY3d at 76). Silver Cup cites authority relating to the seizure and sale of real estate where the sheriff's sale was completed and title turned over to a third party (*Guardian Loan Co. v Early*, 47 NY2d 515 [1979]; *Mikulec v United States*, 705 F2d 599 [2d Cir 1983]). This case does not involve real estate and the concerns discussed in those cases are not relevant here.

Horizon relies on New York's separate entity rule, arguing that an execution and levy on a [*4]garnishee's bank's New York branch is ineffective to levy assets

held in the bank's foreign branches. That is, an execution in levy served on TD Bank's New York City branch is ineffective to reach funds held in its Hoboken, New Jersey branch. This Court agrees.

"In order to be subject to attachment, property must be within the court's jurisdiction, and the mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York subject to attachment merely by serving a New York branch" (*National Union Fire Ins. Co. v Advanced Empt. Concepts, Inc.*, 269 AD2d 101 [1st 2002]). Contrary to defendant's argument, the separate entity rule remains viable, though it is sometimes described as arcane (*Mortorola v Standard Bank*, 24 NY3d 149 [2014][holding the separate entity rule remains in place in the international context and noting that lower courts have found it applicable in the domestic context including the Appellate Division, First Department in *National Union Fire Ins. Co.*, 269 AD2d 101).

Motorola affirmed the viability of the separate entity rule in the international banking context, and left undisturbed lower court rulings as to domestic application. The Court of Appeals stated:

Most cases applying the separate entity rule involved bank branches in foreign countries, but some have applied the rule to bar a restraint even where the unserved branch is located in New York (see e.g. *Det Bergenske Dampskibsselskab v Sabre Shipping Corp.*, 341 F2d 50, 53-54 [2d Cir 1965]). In this case, we have no occasion to address whether the separate entity rule has any application to domestic bank branches in New York or elsewhere in the United States. The narrow question before us is whether the rule prevents the restraint of assets held in foreign branch accounts, and we limit our analysis to that inquiry.

(*Motorola v Std. Bank*, 24 NY3d 149, 159, n 2 [2014]).

The parties have not cited, nor has the Court found, any Appellate Division Fourth Department case law on point as to the applicability of the separate entity in a domestic context i.e., whether service on a New York bank branch is sufficient to reach funds held in a New Jersey branch of the bank. Accordingly, this court is bound to follow the precedent set in the Appellate Division First Department in *National Union Fire Ins. Co., v Advanced Empl. Concepts* [269 AD2d 101] (*Phelps v Phelps*, 128 AD3d 1545 [4th Dept 2015]["It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes § 72 [b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals"). In *National Union Fire Insurance Co.*, the petitioner sought to attach bank accounts held by respondent in Florida by serving a

New York branch of respondents bank. The court held that the New York courts were without jurisdiction over the Florida bank branch and service on the New York branch was ineffective to reach the Florida branch accounts. The Court found the trial court's order vacating a retraining order and order of attachment issued against respondent's Florida accounts was proper for lack of jurisdiction.

Therefore, plaintiff's execution in question here was improperly issued, execution on a New York branch TD Bank cannot reach defendant's funds held in a New Jersey branch of TD [*5]Bank and the levy based on the improper execution is void.

Horizon also raises the issue that the Marshal's levy calculations are incorrect. The Court notes that the Marshal appears to have levied an incorrect amount and seeks more poundage than is properly due (NYSCEF Doc No. 16, Levy and Demand on TD Bank). The Marshal seeks to levy on $691,923.63. This amount includes the full amount of the Judgment, $578,481.11. The execution, however, notes that only $515,894.25 remains outstanding and the Marshal's levy is accordingly for an improper amount. To the extent the poundage of $32,466.85 is also based on a calculation including $578,481.11, the poundage asserted is improper. The court has no information to determine whether the interest amount asserted is correct as detailed accounting of the payments on the judgement was not filed with the Court. In any event, the Court need not reach this issue as the separate entity rule is determinative.

As the execution and Marshal's levy were improper here, Horizon is entitled to restitution by Silver Cup (*Cruz v TD Bank, N.A.*, 22 NY3d at 76 [explaining restitution of improperly restrained funds may be ordered pursuant to CPLR 5240 even after such funds were transferred to the judgment creditor]). The order on this Decision shall provide for restitution of all funds removed from Horizon's account under the execution and levy within 30 days of the filing with notice of entry of the order.

Horizon also seeks an award of reasonable attorney's fees for brining this motion. It appears that Horizon may have a cause of action for damages, but also that a plenary action is required. "If process is vacated because of irregularity, e.g., lack of jurisdiction, an action may be brought after the vacatur in the nature of trespass [*Day v Bach*, 87 NY 56 (1881); *Siegel v Northern Blvd. & 80th St. Corp.*, 31 AD2d 182 (1968)] (*Gaines v Gaines*, 109 AD2d 866, 869 [2d Dept 1985]).

Accordingly, Horizon's application for attorney's fees on the instant motion is denied.

Defendants are to submit an order.

Dated: December 18, 2020
Canandaigua, New York

Hon. Charles A. Schiano, Jr.
Supreme Court Justice

Footnote 1: The Court takes judicial notice that TD Bank is headquartered in Cherry Hill, New Jersey (TD Bank, https://newscenter.td.com/us/en/contact-us [last accessed December 16, 2020])