

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

\_\_\_\_\_  
ON DEMAND PARTNERS, LLC,

Plaintiff,

TRIAL/IAS, PART 6  
NASSAU COUNTY

INDEX No. 000065/07

MOTION DATE: Jan. 11, 2007  
Motion Sequence # 001

-against-

CA, INC. and J.P. MORGAN CHASE BANK, N.A.,

Defendants.  
\_\_\_\_\_

The following papers read on this motion:

- Notice of Petition..... X
- Reply Affirmation..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

This application, by petitioner On Demand Partners, LLC, to vacate the restraint placed upon petitioner's bank account with respondent J. P. Morgan Chase Bank is **granted** on condition that petitioner agrees to accept service of the order of attachment, petitioner's exhibit 2, retroactive to November 20, 2006.

This is a special proceeding pursuant CPLR § 6221 to determine adverse claims to attached property. Petitioner is a Delaware limited liability company, and Sanjay Kumar is one of petitioner's three members.

On November 15, 2006, this Court issued an order of attachment in the underlying action brought by respondent CA, Inc. against Kumar, its former official, to recover legal fees and expenses which it had advanced to him pursuant to an indemnity agreement.

According to CA, Inc., the Nassau County sheriff levied by serving the order of attachment upon Chase on November 17 and 20, 2006. In a letter to CA, Inc.'s attorney dated December 8, 2006, Chase acknowledged that they were in receipt of the order. In the letter, Chase indicated that they were in possession of certain property in which Kumar had an interest, namely two accounts maintained by Kumar, and also an account maintained by petitioner.

Section 601 of the Limited Liability Law provides that "A member has no interest in specific property of the limited liability company." Since Kumar has no interest in On Demand's bank account, the account is not subject to attachment by Kumar's creditors (CPLR § 6202). Nevertheless, CA, Inc. argues that the restraint on petitioner's account with Chase should be upheld because the limited liability company was formed for the purpose of defrauding creditors. CA, Inc. stresses that On Demand was formed on October 4, 2004, just two weeks after Kumar was indicted on criminal charges. CA, Inc. indemnified Kumar for his legal expenses in defending the criminal charges and the related investigation, and CA, Inc. is seeking to recover those legal expenses in the underlying action.

CPLR § 6221 provides that "Prior to the application of property or debt to the satisfaction of a judgment, any interested person may commence a special proceeding against the plaintiff to determine the rights of adverse claimants to the property or debt". In determining the proceeding, "The court may vacate or discharge the attachment, void the levy, direct the disposition of the property or debt, direct that undertakings be provided or released, or direct that damages be awarded." Because, as noted, Kumar has no interest in On Demand's specific property, the court is authorized by CPLR § 6221 to void the levy upon the Chase account maintained by On Demand.

CA, Inc. claims, in essence, that Kumar acquired his membership interest in On Demand through a fraudulent conveyance, that is with the actual intent to hinder, delay, or defraud his creditors (Debtor and Creditor Law § 276). If CA, Inc. establishes that On Demand was formed to defraud creditors, CA, Inc. is entitled to have the conveyance, Kumar's investment in the LLC, set aside or disregard the conveyance and attach or levy execution upon the property conveyed (Debtor and Creditor Law § 278). Whether CA, Inc. seeks to have Kumar's investment set aside or to levy upon the funds directly, CA, Inc. must prove that On Demand was formed in fraud of creditors. CA, Inc. proves that the limited liability company was fraudulently formed by bringing an action against On Demand, the grantee of the fraudulent conveyance (Matter of Granwell, 20 NY2d 91, 1967). CA, Inc. might have brought such an action against the fraudulent grantee in conjunction with the main action against Kumar for breach of contract. However, CA,

Inc. is not permitted to circumvent the requirement that it prove that On Demand was fraudulently formed by enforcing the Order of Attachment against the LLC's specific property. Although the basis of the Order of Attachment was that Kumar had disposed of assets with the intent to frustrate enforcement of a judgment, no evidence was presented and the court made no findings with respect to the formation of the limited liability company.

While CA, Inc. may not levy upon On Demand's bank account, it is free to levy upon Kumar's membership interest in On Demand, including his right to a share in the profits of the limited liability company (See Limited Liability Company Law § 102[r]). Moreover, CA, Inc. may levy upon Kumar's membership interest, regardless of whether the LLC was formed for the purpose of defrauding creditors. The CPLR is unclear as to how a creditor levies upon a member's interest in a limited liability company. A noted commentator is of the view that the member's interest should be considered a "security" within the meaning of the Uniform Commercial Code (Walker, *New York Limited Liability Companies and Partnerships*, § 13:9). Thus, if a certificate evidencing the member's interest has been issued, (See Limited Liability Company Law § 603[b], the sheriff would levy upon the membership certificate by taking it into his custody (CPLR §§ 5201[c][4]; 5232[b]). On the other hand, if a certificate evidencing the member's interest has not been issued, the limited liability company itself or a manager or member may presumably be the garnishee (CPLR § 5201[c][1]).

The Court concludes that it need not determine the proper method of levy upon a member's interest in an LLC within the context of this proceeding. Because of the equitable discretion inherent in special proceedings, (See Saxton v. Nye, 4 AD2d 135, 4<sup>th</sup> Dept., 1957), and the range of permissible relief expressly provided by CPLR § 6122, the Court concludes that it may impose reasonable conditions upon the voiding of a levy. Accordingly, the restraint placed upon petitioner's bank account with respondent J. P. Morgan Chase Bank is voided on condition that petitioner stipulates to accept service of the order of attachment retroactive to November 20, 2006. Settle judgment on notice.

Dated FEB 9 - 2007

  
J.S.C.

**ENTERED**

FEB 15 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE