

Berg v Au Cafe, Inc.

2009 NY Slip Op 31392(U)

June 24, 2009

Supreme Court, New York County

Docket Number: 108437/05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
Justice

PART 10

BERG, MARION

INDEX NO.

108437/05

MOTION DATE

- v -
AU LAFF, INC,
ETAL.

MOTION SEQ. NO.

13

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: JUN 24 2009

HON. JUDITH J. GISCH

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

-----x

Marion Berg,

Plaintiff,

Decision/Order

-against-

Index# 108437/05

Mot. Seq. # 013

Au Café, Inc., The Shubert Foundation, Inc.,
1700 Broadway Co., 1700 Broadway LLC,
53-54 Partners, LP and Brighton Line Corp.,
and Schlosserei J. Meissl GMBH.,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review
of this (these) motion(s):

PAPERS

Notice of Motion, JES affirm., exhibit.....	1
CMR affirm., exhibits.....	2

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

By decision dated May 1, 2009, this court authorized the entry of a judgment in favor of defendant Schlosserei Meissl GMBH ("Meissl") against co-defendant Au Café, Inc. ("Au Café"). The decision authorized the entry of a judgment for \$150,000 with costs, disbursements and pre-judgment interest from September 11, 2008. Entry of the judgment was held in abeyance pending resolution of the ancillary issue of the amount of legal fees due Meissl from Au Café.

Meissl now moves for an order directing Au Café to answer question under oath concerning its finances and to produce financial records relative to the enforcement of the judgment that will eventually be entered. It also seeks an injunction preventing Au

Café from making or suffering any sale, assignment, transfer or interference with property in which Au Café has an interest until the judgment is satisfied, except to the extent necessary to operate the Maison restaurant located at 1700 Broadway, New York, NY and in the ordinary course of business, or upon the direction of the sheriff or pursuant to an order of the Court. The court issued such a stay pending resolution of the underlying motion.

Au Café opposes the stay, arguing that it has filed a Notice of Appeal and that there is no danger that any judgment against Au Café is not enforceable. The claims about the collectability of any judgment against Au Café are contained in only the affirmation of an attorney, who has not revealed any personal basis for this knowledge.

CPLR § 5229 provides as follows:

"In any court before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order an examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment."

The decision about whether to allow relief under CPLR § 5229 rests with the discretion of the court. In a few reported cases where such discretion was exercised, the court considered the viability of claims that the defendant was engaging in conduct that would render the judgment eventually entered ineffectual. Unex Ltd. v. Asygrain Intern Corp., 102 Misc2d 810 (Sup Ct. NY Co. 1979); Sequa Capital Corp. v. Nave, 921 F Supp 1072 (SDNY 1976). Such a showing, however, is not necessary in order to obtain the requested relief. SAS v. Cohen 21 Misc3d 1135(a)(Sup Ct. NY Co. 2009). Gallegos v. Elite Model Mangement Corp., 1 Misc3d 200 (Sup Ct. NY Co. 2003). The

court also considers the adverse effect, of any, upon the putative judgment debtor.

Sequa Capital Corp. v. Nave, *supra*.

At bar, Meissl claims that Au Cafe's attorneys told its attorneys that collection on any judgment would be very difficult. Au Cafe's attorneys now claim that they may have "postured with Meissl with respect to working out a settlement" but "it was simply a strategic measure taken and there is no proof, which indicates that AU CAFÉ will dispose or transfer any assets..." There is likewise no proof that Au Cafe's earlier representations about the collectability of the judgment was untrue, and making untrue representations about the financial wherewithal of a client is not posturing.

There is no claim that Au Café will be effected by the restraint sought, since it permits Au Café to carry on its business in the ordinary course.

The filing of a Notice of Appeal is irrelevant. There is no stay of the court's May 1, 2009 order. There was no bond filed on the appeal. While Au Café is free to pursue its remedies, at this point the mere filing of a Notice of Appeal is not sufficient to stop plaintiff from pursuing its rights of enforcement on the extant orders.

Accordingly the motion is granted.

In accordance herewith it is hereby

ORDERED that Au Café from making or suffering any sale, assignment, transfer or interference with property in which Au Café has an interest until the judgment is satisfied except to the extent necessary to operate the Maison restaurant located at 1700 Broadway, New York, NY, except in the ordinary course of business, or upon the direction of the sheriff or pursuant to an order of the Court , and it is further

ORDERED that on or before 30 days from the date of this order Au Café shall appear by someone with knowledge of the facts at the offices of Meissl's attorney to answer questions under oath regarding its finances, and it is further

ORDERED that within 25 days fo this order Au Café shall produce such financial records from January 2008 through the present as may be necessary to document its financial ability to satisfy any judgment that may be entered int his action , and it is further

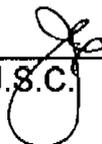
ORDERED that Meissl may only use such financial information it obtains from Au Café in connection with this case and the enforcement of any monetary obligations it may be owed herein from Au Cafe, and it is further

ORDERED that any requested relief not expressly granted herein is denied.

This shall constitute the decision and order of the Court.

Dated: New York, NY
June 24, 2009

SO ORDERED:



J.G. J.S.C.

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK