

Katz v Cassini

2023 NY Slip Op 31199(U)

April 17, 2023

Supreme Court, New York County

Docket Number: Index No. 159662/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

MICHAEL KATZ, as Assignee of Joseph DeFino, Assignor,
Petitioner,

INDEX NO. 159662/2017

MOTION DATE 08/12/2022

MOTION SEQ. NO. 006

- v -

MARIANNE NESTOR CASSINI, a/k/a MARIANNE
NESTOR,

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 82, 83, 84, 85, 87, 88, 89, 91, 92, 93, 94

were read on this motion to/for STAY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of respondent to vacate the judgment dated September 30, 2013 of the Surrogate Court, County of Nassau and State of New York, entered in the action entitled Nestor Cassini v Christina Cassini, Nassau County Surrogate Court Index No. 343100/2011, as modified by Order by the order of the Appellate Division, Second Department dated August 28, 2014, and to permit discovery with respect to the Assignments of such Judgment dated September 8, 2015, from Barnosky and Cassini Belmont to Joseph DeFino and from Joseph DeFino to Michael Katz, is DENIED; and it is further

ORDERED that the motion of respondent pursuant to CPLR § 5240 for a further stay of the sheriff's sale of 135 East 19th Street, New York, New York is GRANTED, provided respondent tender four hundred thousand dollars (\$410,000) to petitioner herein, within sixty days of service of a copy of this order with notice of entry; and it is further

ORDERED that should respondent default in the foregoing payment, petitioner may move for leave to resume execution on the subject real property, upon papers that include a statement concerning the status of the proceeds from the sale of the Connecticut real property and the application of such proceeds to the judgment, i.e., the extent to which the judgment remains unsatisfied.

DECISION

Petitioner is correct that any relief that respondent seeks from the underlying judgment entered in Nestor Cassini v Christina Cassini, the Nassau County Surrogate Court, Index No. 343100/2011, as modified by the Appellate Division, Second Department, must be sought in those tribunals, or by seeking leave from the New York State Court of Appeals to appeal in such case. This court, which presides over the herein turn-over proceeding, has no authority to grant any relief from such judgment entered against respondent at bar, who was petitioner in another case brought in the Surrogate Court of Nassau County, before different judges.

Of course, in the herein case, in order to satisfy the underlying judgment, respondent can avoid the Sheriff's turning her real property (i.e., her home) to petitioner, by paying off such judgment with her personal funds, which she asserts she has the financial wherewithal to do (NYSCEF Document Number 81, Affidavit of Marianne Nestor Cassini, sworn to on April 27, 2021, ¶ 3[a]). See 79 Madison LLC v Embrahimzadeh, 203 AD3d 589, 591 (1st Dept 2022).

With respect to respondent's attempt to now challenge the Assignments of the underlying judgment in this turn-over proceeding, respondent stipulated to entry of judgment herein, thus failing to contest the validity of the judgment assignments. Such admission of all the facts of the petition was unlike National Fire Ins Co of Pittsburgh, Pa v State Bank of Long Island, (263 AD2d 490 [2nd Dept 1999]), where an objection to an assignment of funds deposited in the judgment debtor's bank was made at the outset of such case. Moreover, in opposing petitioner's motion to substitute him as petitioner, respondent never raised the validity of the assignments. By admitting the allegations of the herein petition on consent and not opposing the motion to substitute Michael Katz, the assignee of Frank DeFino, as petitioner, respondent conceded the validity of the assignments. Therefore, there is no issue concerning same on which discovery may be sought. See Prudential Lines,

Inc v Firemen's Ins Co of Newark, NJ, 91 AD2d 1, 3 (1st Dept 1982) ("[party that consented to judgment] is precluded from relitigating the 'issues (that were) resolved by agreement of the parties.'")

Respondent sets forth no reasonable grounds for an **unconditional** further stay of petitioner's right to enforce the underlying judgment. See Colonial Sur Co v Lakeview Advisors, LLC, 93 AD3d 1253, 1256 (4th Dept 2012).

However, as stated in Guardian Loan Co, Inc v Early, 47 NY2d 515, 518-519 (1979):

Any judicial sale, especially one involving the judgment debtor's residence, is a tragic event. Debtors are often divested of their only real asset to satisfy a previous obligation, however small. In many instances, the family home is sold for substantially less than the debtor's equity in it (see Concord Landscapers v. Pincus, 41 A.D.2d 759, 760, 341 N.Y.S.2d 538, 540; Wandschneider v. Bekeny, 75 Misc.2d 32, 346 N.Y.S.2d 925). Even the very threat of a sale of a residence places enormous pressure on the debtor. This is particularly unfortunate where there are less drastic means by which a creditor may enforce his judgment (see, generally, CPLR 5231 (income execution); CPLR 5232-5233 (levy and sale of personal property)). It is evident, however, that the Legislature was not unaware of this problem. For example, it has recently raised the homestead exemption, which provides that upon a judicial sale of the debtor's principal place of residence, the first \$10,000 of the proceeds representing the debtor's equity may not be used in satisfaction of the judgment (CPLR 5205, subd. (a)).

CPLR 5240 is perhaps the most practical method to protect judgment debtors from the often harsh results of lawful enforcement procedures. The statute provides: "The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may

require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article." Designed to replace myriad provisions of the Civil Practice Act which often led to conflicting results (see 10 Carmody-Wait 2d, NY Prac, §64:434), CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (Third Preliminary Report of the Advisory Comm on Practice and Procedure, 1959, p 314; see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5240:1, pp 451-452; Siegel, New York Practice, § 522).

Although on the whole judgment debtors have failed to take advantage of the protective provisions of CPLR 5240, in many instances the statute has been applied in an extremely beneficial manner in accordance with its stated purpose. By way of illustration, courts have restrained impending sales of residences on the ground that creditors could easily resort to less intrusive means to satisfy judgments (see Hammond v Econo-Car of North Shore, 71 Misc2d 546; Holmes v W. T. Grant, Inc., 71 Misc2d 486; Gilchrist v Commercial Credit Corp., 66 Misc2d 791). In other cases, where there has been a showing that a judicial sale will not bring a representative price, the terms of the sale have been varied from those set forth in CPLR 5236 to safeguard the judgment debtor's interest (see, e.g., Olsen v Robaey, 45 Misc 2d 33).

Unlike the judgment debtors in Hammond, supra, and Holmes, supra, respondent herein appears to be a woman of means, with no dependents, and therefore, fully capable, as she contends, to pay off the judgment with cash, by, inter alia, selling personal property she owns or with her own personal funds. This court has broad discretionary powers to grant two months to respondent in which to do so. Should she default on such condition, and

petitioner resume execution on respondent's Manhattan real property, respondent will certainly be entitled to any surplus, which appears will be substantial and is forecasted to arise once funds in the amount of about four hundred ten thousand dollars (\$410,000), representing the unsatisfied portion of the underlying judgment¹, are applied thereto from the substantial proceeds of sale of her New York County residence. Under such circumstances, respondent has the right to move for an order of this court to set aside the judicial sale, should circumstances arise raising a presumption of fraud. See Fisher v Hersey, 33 Sickels 387 (1879).

Debra A. James

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4/17/2023		DEBRA A. JAMES, J.S.C.
DATE		
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

¹To the letter dated May 11, 2022, to this court, from petitioner NYSCEF (NYSCEF Document Number 90), is attached an appraisal of the Connecticut real property, which lists an appraised value of \$335,000. In such letter, petitioner states that as September 10, 2014, the total amount of judgment, which was originally \$395,604.57, with post judgment statutory interest, the amount of the underlying judgment, has mushroomed to \$644,835.55. Petitioner states that the Connecticut court awarded him title, but not yet possession of real property that respondent owns in that state, as of September 16, 2021. This court approximates that upon petitioner's acquisition of possession of such real property, approximately \$300,000 of the judgment will be satisfied, which total judgment, including interest through September 10, 2022, is approximately \$680,000, with such amount growing at about \$2,967 per month to the date of this decision and order, to a total of \$710,000.