

**Computer Horizons Corp. v Gay Fin. Network,
LLC**

2007 NY Slip Op 30619(U)

January 2, 2007

Supreme Court, New York County

Docket Number: 0104938/2003

Judge: Barbara R. Kapnick

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

PRESENT: KRONIK
Justice

PART 12

COMPUTER HORIZONS CORP

INDEX NO. 104938/03

MOTION DATE _____

- v -

MOTION SEQ. NO. 3

DAY FINANCIAL NETWORK

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
JAN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/2/07

[Signature]
BANDMAN **PNIGK**

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION **J.S.C.**

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 12

-----X
COMPUTER HORIZONS CORP.,

Plaintiff,

-against-

GAY FINANCIAL NETWORK, LLC,

Defendant.

DECISION/ORDER

Index No. 104938/03
Motion Seq. No. 003
Action No. 1

-----X
Application of COMPUTER HORIZONS CORP.,

Petitioner,

Index No. 117666/05
Motion Seq. No. 002
Action No. 2

For a Judgment and Order Pursuant to
CPLR 5225(b) to Compel Payment of
Money and Delivery of Personal
Property of Judgment Debtor,
Gay Financial Network, LLC, n/k/a,
gfn.com, LLC,

vs.

GAY FINANCIAL NETWORK, Inc., n/k/a
gfn.com, Inc. GFN Holdings, LLC, GFN
Financial, Inc., and Walter B. Schubert, Jr.,

Respondents.

FILED
JAN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA R. KAPNICK, J.:

Plaintiff/petitioner seeks in these two actions to satisfy a
default judgment entered in its favor and against defendant Gay
Financial Network, LLC in the Superior Court of New Jersey.

Background

Computer Horizons Corp. is a publicly held New York
corporation with offices in New York and New Jersey which provides

information technology and solutions and computer consulting services.

Defendant Gay Financial Network, LLC, which changed its name on March 20, 2000 to gfn.com, LLC ("GFN, LLC"), was a privately held limited liability company formed in 1997 under the laws of the State of New York to develop and operate gfn.com, an internet website that provides financial advice to members of the lesbian, gay, bisexual and transgender community.

Plaintiff initially commenced an action against GFN, LLC in the Superior Court of New Jersey, Law Division, Morris County, to recover for services allegedly rendered by plaintiff's predecessor in interest, G. Triad Development Corporation, for the website during the period January through March 2000, pursuant to a written Independent Contractor Agreement with The Gay Financial Network, Inc. ("GFN, Inc.")¹

A default judgment in favor of plaintiff Computer Horizons Corp. and against defendant GFN, LLC was entered by the New Jersey Court on January 29, 2003 (Docket No. MRS-L-3401-02).

¹ It is not clear from the papers submitted why plaintiff commenced the initial action in New Jersey solely against GFN, LLC, even though it had entered into the contract with GFN, Inc.

Plaintiff then commenced Action No. 1 to enforce the New Jersey Judgment and moved pursuant to CPLR § 3213 for summary judgment in lieu of complaint. This Court granted that motion on default by Decision/Order dated May 14, 2003, and a Judgment in favor of Computer Horizons and against GFN, LLC in the total amount of \$165,820.25 was entered on May 23, 2003. To date, no portion of that Judgment has been satisfied.

GFN, LLC was dissolved by Articles of Dissolution filed with the Secretary of State on September 10, 2004.

GFN, Inc., the party which actually entered into the written Independent Contractor Agreement with plaintiff, was a privately held corporation organized under the laws of the State of Delaware. GFN, Inc. filed an application to do business in New York on August 5, 1999, and changed its name to gfn.com, Inc. on March 21, 2000.

However, GFN, Inc. allegedly became insolvent in or around 2001. It filed a Certificate of Dissolution with the Secretary of State of Delaware on June 8, 2004, and surrendered its authority to do business in New York on December 1, 2004.

A third entity, GFN Holdings, LLC ("Holdings") is a privately held limited liability company formed on August 1, 2001 under the laws of the State of Delaware for the purpose of operating the

website upon the insolvency of GFN, Inc. Holdings, which filed an application to do business in New York on or about October 10, 2001, continues to operate the gfn.com website.

A fourth entity, GFN Financial, Inc. ("Financial"), is a privately held corporation organized under the laws of the State of Delaware on October 21, 2002. There is no indication that it has filed an application for authority to do business in New York.

Walter B. Schubert, Jr. was the chief executive officer of GFN, LLC and president of GFN, Inc., and is the sole member and Chief Executive Officer of Holdings, as well as an officer and director of Financial.

Mr. Schubert claims that as the first openly gay member of the New York Stock Exchange, it was his mission "to create an internet enterprise that addressed the under-served financial needs of the American Gay and Lesbian community." He further indicates that for him, "this enterprise, GAY FINANCIAL NETWORK, INC. was more than just a business; it was a personal mission to make a positive contribution to, and to help improve, the lives of the members of a community desperately seeking full equality in American society."

Mr. Schubert testified at a deposition held on November 11, 2003 that the Judgment Debtor, GFN, LLC, transferred all of its money and assets, including the assets relating to the website

(i.e., computer servers, trademark rights, furniture, computers, accounts receivable and cash) to GFN, Inc. in or about 1999.

There is no dispute that all of GFN, LLC's membership interests were transferred to GFN, Inc. in March 2000, in exchange for shares of stock of GFN, Inc. which were issued to the members of GFN, LLC, pursuant to a Resolution adopted by all the directors of GFN, Inc. The document was signed by Mr. Schubert in his capacity as "Manager" of GFN, LLC, and was signed by him a second time in his capacity as "Chairman of the Board and Chief Executive Officer" of GFN, Inc.

Plaintiff contends that GFN, LLC thus became a wholly owned subsidiary of GFN, Inc. Schubert does not dispute this description of the relationship between the two entities. In fact, he represents that "in an effort to meet the goals of taking the company public, the Board of the Directors of GAY FINANCIAL NETWORK, INC. deemed it more advisable that GAY FINANCIAL NETWORK, INC. acquire all of the outstanding members' shares of GAY FINANCIAL NETWORK, LLC, in exchange for the issuance of stock in the GAY FINANCIAL NETWORK, INC., and to hold respondent, GAY FINANCIAL NETWORK, LLC, as a subsidiary of the GAY FINANCIAL NETWORK, INC."

Mr. Schubert contends that all the assets of GFN, LLC, including the website and its trademarks, were transferred in March 2000 in connection with the transfer of the membership interests.

Plaintiff, on the other hand, argues that there is no documentary evidence showing that GFN, LLC ever transferred its money and assets in 1999 or 2000 or at any time prior to its dissolution in 2004.²

Mr. Schubert and five other shareholders of GFN, Inc. (collectively, "the lenders") made loans totaling \$56,000 to the corporation on or about June 13, 2001, secured by all of the assets of the corporation. As a result of these loans, a lien was placed on GFN, Inc.'s assets, thereby encumbering the membership interests of GFN, LLC which the corporation had obtained in March 2000.

The proceeds of the loan to GFN, Inc., however, were deposited into a bank account in the name of GFN, LLC.

GFN, Inc. and Holdings entered into an Agency Agreement in or about October 2001, by which GFN, Inc. appointed Holdings as its

² Plaintiff claims that GFN, LLC thus owned and operated the gfn.com website during the period of January through March 2000 when it rendered its services, and that GFN, LLC, therefore, received the benefit of those services.

exclusive agent for the promotion and solicitation of its business and the general management of its operations.

The agreement was signed by Walter Schubert as "CEO" of GFN, Inc. and by Edward (Frits) Abell as "President" of Holdings. However, Mr. Abell has since testified that he was never actually the President of Holdings, but merely signed the document in that capacity at the request of Mr. Schubert, who as the sole member and Chief Executive Officer of Holdings, is in charge of its day-to-day operations.

By letter dated August 14, 2002 to GFN, Inc. (Attention: Walter Schubert, President), Timothy Murray, as Agent for the Lenders, declared the corporation in default of the June 11, 2001 loans and stated, in relevant part, as follows:

Any obligations not previously matured are hereby accelerated and due and owing. The Lenders reserve all rights provided in the Notes and the Security Agreements and as provided by law. If immediate payment of all amounts due is not made by the Company, the Lenders may take further legal action to enforce the Company's obligations, including, without limitation, to foreclose on their security.

Mr. Abell, as President of Financial (which had been incorporated only months earlier) sent a "Notice of Taking Possession of Collateral" dated February 12, 2003 to Mr. Schubert.

The letter indicated that Financial was the "successor by assignment of, or is the agent for," the lenders.

Mr. Schubert claims that the senior secured lenders transferred their security interest in GFN, Inc. to Financial

because if each of the senior secured lenders was forced to foreclose individually, there would have been duplication in their efforts and each of the senior secured lenders would have had a partial interest in an asset that could not readily be divided. The use of GFN FINANCIAL, INC, as the vehicle through which the senior secured notes were foreclosed ensured that the end result of the foreclosure would be an entity which held title to the entire collateral (i.e., the gfn.com website).

However, Mr. Schubert claims that Financial, which seized the collateral on February 21, 2003, "does not own any assets at the present time."

After Computer Horizons obtained the default judgment against GFN, LLC under Index No. 104938/03, Computer Horizons commenced a second action under Index No. 601443/04 against GFN, Inc., Holdings, Financial, Walter B. Schubert Jr. (individually and as constructive trustee of the assets of GFN, Inc.) and Edward Abell (individually and as constructive trustee of the assets of GFN, Inc.) for breach of contract, fraudulent conveyance under the New York Debtor and Creditor Law, aiding and abetting, civil conspiracy, and the imposition of a constructive trust (hereinafter referred to as "the fraudulent conveyance action"). GFN, LLC was not named as a party to that action.

Plaintiff's First Amended Complaint in the fraudulent conveyance action contends that the granting of a security interest in the assets of GFN, Inc. to its shareholders, in exchange for purported "loans" to the corporation in June 2001, and the Agency Agreement between GFN, Inc. and Holdings, were fraudulent as to the corporation's creditors, including plaintiff. Plaintiff's First Amended Complaint further alleges that all of the assets of GFN, Inc., including the website, were thereby transferred to Financial.

Plaintiff moved in the fraudulent conveyance action for a preliminary order of attachment pursuant to CPLR § 6201(3) claiming, inter alia, that the defendants therein, with intent to defraud their creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, assigned, disposed of, encumbered or secreted property, or removed it from the state or were about to do any of those acts.

In opposition to Computer Horizon's motion for an attachment, Mr. Schubert proposed as follows:

At this juncture, and to bring closure to this painful and forever money losing matter, I and the other Defendants are fully prepared to transfer the website back to GFN.COM Inc., which is the relief Plaintiff seeks in its complaint, i.e., the avoidance of the transfer. However, it should be noted that GFN.COM Inc. has no funds with which to operate the website and the website will immediately thereafter "go dark" and what little if any, remaining value therein will be forever lost.

However, this offer was apparently not accepted and there is no indication that the website was ever transferred back to GFN, Inc.

By Decision/Order dated January 28, 2005, the Hon. Debra A. James denied Computer Horizons' motion, finding, in relevant part, as follows:

The record before this court does not support a finding of intent on the part of any of the defendants to defraud plaintiff judgment creditor by secreting and disposing of corporate assets. Such a finding is belied by the efforts of Gay Financial Network, Inc. to settle with plaintiff. Plaintiff failed to reject or even respond or acknowledge the settlement proposals that such defendant made in November 2000 and May 2002. Rather plaintiff did not begin collection efforts for more than two years after defendant's first proposal. It then failed to name defendant Gay Financial Network, Inc., the entity with whom it had the contract in its New Jersey action. It waited seven months more after deposing defendant Schubert pursuant to an information subpoena to commence the action now before the court. Contrary to its allegations, plaintiff has failed to show any intent on the part of any of the defendants to frustrate the enforcement of any judgment, who, for more than two years after the final invoices of April 2000, received no communication from its creditor. Plaintiff has made no showing that any defendant secreted or disposed of any property with any intent to defraud creditors in the face of such silence, leaving the court to accept plaintiff's version of a stubborn, herculean, but perhaps ill advised mission on their part to continue to personally finance an insolvent enterprise.

Nor does plaintiff allege that there is any threat that the corporate defendant assets, such as funds in bank accounts, computers, website, or trademark will be or have been removed from this jurisdiction.

The fraudulent conveyance action was subsequently reassigned to this Court pursuant to the Order of Justice James dated March 7, 2006 "to prevent disparate decisions" in these related actions.

Discussion

Plaintiff now moves by Order to Show Cause in the instant 'disposed' action (Index No. 104938/03) for an order pursuant to CPLR § 5225(a):

(1) directing GFN, LLC to turn over and deliver to it all money in which it has an interest up to an amount sufficient to satisfy plaintiff's Judgment;

(2) in the event that the amount of money turned over and delivered to the plaintiff by GFN, LLC is insufficient to fully satisfy the Judgment, directing GFN, LLC to turn over and deliver to the Sheriff of New York City all assets in which it has an interest including, but not limited to, the website 'gfn.com' and its associated hardware, software, trademarks and contract rights ("the assets");

(3) directing that GFN, LLC's interest in the assets be sold by the Sheriff of New York City; and

(4) directing that the proceeds from the sale of the assets up to an amount sufficient to satisfy the Judgment be paid to the plaintiff.

Plaintiff contends that there is no documentary or testimonial evidence that ownership or title to the money or assets of GFN, LLC was ever transferred to GFN, Inc. Plaintiff argues that such a showing is required since "a corporation and its stockholders are separate entities and that the title to the corporate property is vested in the corporation and not in the owner of the corporate stock." Monterey Life Systems, Inc. v. Unites States, 635 F.2d 821, 825 (Ct. Cl. 1980).

Walter Schubert, however, has submitted an affidavit in opposition to plaintiff's motion in which he claims that

[d]espite the Plaintiff's attempts to convince this Court otherwise, the assets of GAY FINANCIAL NETWORK, LLC, which consisted primarily of the website gfn.com and its trademarks, were transferred to respondent, GAY FINANCIAL NETWORK, INC. in connection with the transfer of the membership interests. The members of GAY FINANCIAL NETWORK, LLC, who owned the assets of the company, took their respective asset ownership and transferred it to GAY FINANCIAL NETWORK, INC.

Mr. Schubert further argues that "[i]t is inconceivable that Plaintiff can come before this Court and argue that the assets of GAY FINANCIAL NETWORK, LLC should be seized, when the pleadings it filed in the Fraudulent Conveyance Action acknowledge that those very same assets are presently owned by GFN FINANCIAL, INC."

Finally, Mr. Schubert represents that "there is nothing which can be seized to satisfy Plaintiff's judgment" because GFN, LLC "does not own any assets at the present time".³

Related proceeding

In the special proceeding commenced under Index No. 117666/05, Computer Horizons has moved for an order pursuant to CPLR § 5225(b):

(1) directing respondents to turn over and deliver to Computer Horizons all money in their possession or custody in which the Judgment Debtor, GFN, LLC, has an interest up to an amount sufficient to fully satisfy the Judgment (entered under Index No. 104983/03);

(2) in the event that the amount of money turned over and delivered to petitioner by these respondents is insufficient to fully satisfy the New York Judgment, directing respondents to turn over to the Sheriff of New York City all assets in their possession or custody in which GFN, LLC has an interest, including, but not limited to, the website 'gfn.com' and its associated hardware, software, trademarks and contract rights;

(3) directing that the respondents' interest in these assets be sold by the Sheriff of New York City upon the ground that GFN, LLC has title and the right to possession of the assets, and the

³ Mr. Schubert claims that the website has been and continues to lose money. He further claims that, as a creditor, he is owed approximately \$100,000.

rights of Computer Horizons as Judgment Creditor in and to the assets are superior to those of respondents;

(4) directing that the proceeds from the sale of the assets up to an amount sufficient to satisfy the New York Judgment be paid to Computer Horizons; and

(5) directing respondents who dispute the interest in or right to possession of the assets of GFN, LLC to pay the costs of this proceeding.

Computer Horizons contends that GFN, LLC's money and assets, including the website, are in the possession of Schubert, Financial, Holdings and possibly GFN, Inc. Computer Horizons further argues that the fraudulent conveyance action is irrelevant to this special proceeding because it is not required to establish a fraudulent conveyance of GFN, LLC's cash and assets, since, as discussed above, plaintiff contends that the title to GFN LLC's cash and assets was never transferred.

The respondents oppose the motion based on their contention that GFN, LLC has no remaining funds or assets since they were, in fact, transferred to GFN, Inc. and subsequently acquired by Financial.

There is no dispute that plaintiff has a judgment against GFN, LLC which has never been satisfied. GFN, LLC's only argument in opposition to the motions is that it no longer owns or has title to any money or transferable assets, an allegation which plaintiff

disputes despite its conflicting allegations in the fraudulent conveyance action.

Therefore, based on the papers submitted and the oral argument held on the record on February 1, 2006, Computer Horizon's motions pursuant to CPLR §§ 5225(a) and (b) are granted to the extent of directing defendant GFN, LLC and/or any of the other respondents who possess and/or control any assets still owned by defendant GFN, LLC to 1) turn over and deliver to plaintiff all money in their possession or custody in which the judgment debtor, GFN, LLC has an interest up to an amount sufficient to satisfy plaintiff's Judgment entered on May 23, 2003 in Index No. 104983/03; 2) in the event that the amount of money turned over and delivered to the plaintiff pursuant to paragraph 1) above is insufficient to fully satisfy the Judgment, directing GFN, LLC and the respondents in the related special proceeding (Index No. 117666/05) to turn over and deliver to the Sheriff of New York City all assets in their possession or custody in which GFN, LLC has an ownership interest, including, but not limited to the website 'gfn.com' and its associated hardware, software, trademarks and contract rights; 3) directing that GFN, LLC's interest in the assets be sold by the Sheriff of New York City; and 4) directing that the proceeds from the sale of the assets up to an amount sufficient to satisfy the Judgment be paid to the plaintiff/petitioner.

That portion of petitioner's motion in the special proceeding seeking to direct respondents to pay the costs of this proceeding is denied in the discretion of this Court.⁴

A pre-trial conference in the fraudulent conveyance action shall be held in IA Part 12, 60 Centre Street, Room 341 on January 31, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 2, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
JAN 05 2007
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⁴ Although CPLR § 5225(b) precludes the awarding of costs "against a person who did not dispute the judgment debtor's interest or right to possession", the statute does not mandate the granting of costs under other circumstances.