SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

THE CIT GROUP/EQUIPMENT FINANCING, INC.

Plaintiff,

-against-

INDEX NO.: 020870/06

BURGER KING FIRST AVENUE CORP. D & F FOOD SERVICE, INC., OCEANSIDE RESTAURANT ASSOCIATES, L.P., 1085 RESTAURANT CORP., SSB ASSOCIATES, LLC, AND THIRD AVENUE ASSOCIATES, LLC,

Motion date: 6/29/07
Motion Seq. No.: 002

Defendants.

STEVEN ZAVIDOW, BMZ MULTI-FOOD CORP., RMB FOOD CORP.,

Judgment Debtors,

IRWIN FRANCHISE CAPITAL CORPORATION,

Applicant for Intervention.

The following papers having been read on the motion (numbered 1-3):

Order to Show Cause.....1
Affirmation in Opposition to Order to Show Cause to Intervene.....2
Reply Memorandum of Law.....3

Motion by Irwin Franchise Capital Corporation for leave to intervene is **granted** to the extent indicated below. Irwin's motion to amend this court's order of May 7, 2007 is granted only to the extent of ordering a hearing as indicated below.

This is a special proceeding pursuant to CPLR § 5225(b) to compel respondents to pay money in which a judgment debtor has an interest to the judgment creditor. Petitioner also seeks to compel respondents to pay certain debts owed to the judgment debtor to petitioner pursuant to CPLR § 5227.

Judgment debtors Jerome and Steven Zavidow owned or controlled several corporations which operated Dunkin Donuts franchises in the New York metropolitan area. Petitioner CIT Group/Equipment Financing, Inc. made a series of loans to the corporations which were personally guaranteed by the Zavidows. On May 15, 2001, CIT Group made a $1.4 million loan to judgment debtor BMZ Multi-Food Corp., which is one of the corporations. On July 9, 2002, CIT Group made an $850,000 loan to judgment debtor RMB Food Corp., another of the Zavidow corporations.

In support of their creditworthiness, the guarantors submitted financial statements to CIT Group, representing that they were each 50% shareholders of another corporation, respondent 1085 Restaurant Corp. 1085 leases a Burger King restaurant located at 3190 Long Beach Road in Oceanside and subleases the restaurant to respondent Oceanside Restaurant Associates, LP. The right to receive rent pursuant to the sublease is 1085's sole asset. On October 30, 2003, the Zavidows refinanced the CIT Group loans, and new guaranties were executed.

Meanwhile, the Zavidow corporations were also receiving financing from another lender. On July 18, 2002, BMZ Multi-Food Corp. entered into a security agreement with proposed intervenor, Irwin Franchise Capital Corporation. The agreement granted Irwin Capital a security interest in all goods, including inventory, equipment, and money, then or thereafter acquired by BMZ in the course of operating a Dunkin Doughnuts restaurant in Rego Park. The agreement secured the payment by BMZ of all indebtedness then existing or thereafter arising, including a secured promissory note in the amount of $750,000 executed by BMZ that date. Jerome and Steven each executed written guaranties of the loan to BMZ. The agreement provided that a breach or default by either guarantor under any other agreement with the lender would constitute an event of default under the security agreement

On November 12, 2003, Jerome and Steven Zavidow and 1085 Restaurant Corp. entered into a written "assignment agreement" with Irwin Franchise.[1] The agreement recites that BMZ was in default under the security agreement by virtue of S. Z. Restaurant Corp.'s having closed a Burger King restaurant in which Irwin Franchise had a security interest.[2] In consideration of Irwin's forbearance in declaring the BMZ loan in default, Jerome and Steven as guarantors assigned to Irwin their interests in the "excess" rent payments due under the sublease between 1085 and Oceanside Restaurant Associates. The excess rent payments were defined as the net amounts remaining after 1085 paid the rent which was payable under the prime lease. These "excess rents" were further defined as including all payments to Jerome and Steven whether paid as shareholder dividends, wages, or distributions of any type. However, Irwin Franchise agreed that notwithstanding the assignment, Jerome and Steven could receive such shareholder dividends or distributions until another default by BMZ. 1085 Restaurant agreed that upon Irwin's notice of default, it would forward payments equal to the excess rent to Irwin. 1085 further agreed that upon default by BMZ, Irwin could notify the subtenant, Oceanside Restaurant, to send the rent payments directly to Irwin.

BMZ Multi-Food defaulted on the loan from Irwin Franchise in October, 2004. Irwin Franchise thereupon notified Oceanside to forward its rent payments to Irwin. Irwin filed a UCC-1 financing statement naming 1085 Restaurant Corp. as the debtor on October 22, 2004. The financing statement described the collateral as "all of debtor's rights...as sub-landlord in and to all rents and other payments" due under the sublease between 1085 and Oceanside Restaurant Associates. The financing statement also described the demised premises by block and lot number and street address.[3]

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[1]See Irwin Franchise's Exhibit D.

[2]The Burger King operated by S. Z. Restaurant was located at 547 W. 110th Street in Manhattan. Presumably, Jerome or Steven Zavidow had also guarantied a loan from Irwin Franchise to S. Z. Restaurant Corporation.

[3]See petitioner's exhibit 7.

BMZ Multi-Food and RMB Food Corp. also defaulted on the CIT Group loans, and CIT Group commenced the underlying action against the corporations on the loans and against the Zavidows on their guaranties. On December 16, 2005, a judgment was entered in the amount of $3,650,977 against Jerome and Steven Zavidow and in the amounts of the outstanding loan balances against the corporations.

In an effort to enforce the judgment, CIT Group commenced an action against Steven Zavidow in New Jersey Superior Court to set aside certain transfers to his wife as fraudulent conveyances. CIT Group commenced a similar action against Jerome Zavidow in Supreme Court, Queens County. In the course of discovery in the fraudulent conveyance actions, CIT Group learned of 1085 Restaurant Corp.'s assignment to Irwin Franchise of the rents payable pursuant to the sublease.

This supplementary proceeding was commenced by petitioner on January 10, 2007.[4] Petitioner alleges that respondents D & F Food Service, Inc. and Burger King First Avenue Corp. operate the Burger King franchises that were previously owned or controlled by judgment debtor Steven Zavidow. Petitioner further alleges that Steven Zavidow holds a 70% interest in respondent SSB Associates, LLC which subleases to Burger King First Avenue one of the restaurants which was previously operated by the judgment debtors. Petitioner asserts that respondent Third Avenue Associates, LLC, which holds the remaining 30% interest in SSB Associates, may also be controlled by Zavidow.[5] Of more relevance to the present application, petitioner alleges that Steven Zavidow is now the President and 100% owner of 1085 Restaurant Corp. and is entitled to receive the excess rent payments pursuant to the sublease.

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[4]Shortly after commencement of this proceeding, CIT Group served a subpoena on Irwin Franchise in the New Jersey action, requesting documents relating to the assignment of rents or any other transactions with Steven Zavidow.

[5]The basis for this assertion is that Third Avenue Associates' address for service of process is the accounting firm that prepared the judgment debtors' financial statements.

Petitioner requests a judgment directing respondents to deliver to petitioner monies due to Steven Zavidow or any entity owned or controlled by him in an amount sufficient to satisfy the underlying judgment. Petitioner also requests that the judgment direct Steven Zavidow to turn over his interests in the respondent limited liability companies as well as his shares in the respondent corporations.

By unopposed order entered May 7, 2007, the court directed respondents to turn over to petitioner money in which judgment debtor Steven Zavidow has an interest in an amount sufficient to satisfy the judgment. The court also directed respondents to comply with certain discovery. Although granting the relief requested, the court expressed concern as to the sufficiency of proof as to Steven Zavidow's interest in 1085 Restaurant Corp. and also whether 1085 actually received notice of the proceeding.[6] In view of these concerns, the court directed petitioner to serve a copy of the order upon respondents by personal service.

By order to show cause dated May 31, 2007, Irwin Franchise moves to intervene in the present proceeding. Irwin Franchise requests an order amending this court's order of May 7, 2007 to provide that CIT Group may not attach the rent payments under the sublease between 1085 and Oceanside Restaurant and declaring that CIT Group's interest in the rent payments is subordinate to Irwin's. In the order to show cause, the court's May 7, 2007 turn-over order was stayed as to the assets of 1085 Restaurant Corp., and specifically the sublease rent payments.[7]

In opposition, CIT Group argues that there was no valid assignment by 1085 Restaurant of its right to receive rent payments under the sublease. Alternatively, CIT Group argues that the assignment by 1085 is voidable as a fraudulent conveyance.

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[6]The court expressed a similar concern as to the sufficiency of proof as to Steven Zavidow's interest in SSB Associates and whether SSB actually received notice of the proceeding.

[7]Pending decision of this motion, the subtenant, Oceanside Restaurant Associates, was directed to pay rent to the attorney for the prime landlord.

CPLR § 5225(b) provides that upon a special proceeding commenced by a judgment creditor, the court shall require a person in possession of money in which the judgment debtor has an interest to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor. If the amount to be so paid is insufficient to satisfy the judgment, the court may require the person to deliver any other personal property in which the judgment debtor has an interest, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff(CPLR § 5225[b]). The court may permit any adverse claimant to intervene in the proceeding and may determine the claimant's rights in the money or property in accordance with CPLR § 5239.

Pursuant to CPLR § 5227, a judgment creditor may commence a special proceeding to require a person who is or will become indebted to the judgment debtor to pay the debt to the judgment creditor upon maturity, or so much of it as is sufficient to satisfy the judgment. As is provided under CPLR § 5225(b), the court may permit any adverse claimant to intervene in the proceeding and may determine the claimant's rights in accordance with CPLR § 5239.

CPLR § 5239 provides that any interested person may commence a special proceeding against the judgment creditor, or other person with whom a dispute exists concerning rights in property or a debt, which is subject to a levy, prior to the application of the property or debt to the satisfaction of a judgment. Where there appear to be disputed questions of fact, the court shall order a separate trial to determine the disputed issues(CPLR § 5239). As is also true of special proceedings pursuant to CPLR § 5225(b) and § 5227, a proceeding under CPLR § 5239 is plenary(Seigel, New York Practice § § 510, 521). The court may also permit any interested person to intervene in a CPLR § 5239 proceeding.

Since all three of these CPLR provisions provide that the court may "permit" an interested person to intervene, an application for leave to intervene in a proceeding to determine adverse claims is subject to the discretion of the court(*Vanderbilt Credit Corp. v. Chase Manhattan Bank*, 100 A.D.2d 544 [2d Dep't 1984]). These specific provisions authorizing permissive intervention "pre-empt" the general permissive intervention provision, CPLR § 1013

(100 A.D.2d at 545). Nevertheless, the criteria for granting leave under the general intervention statute are not irrelevant on a motion to intervene in a turn-over proceeding. CPLR § 1013 provides that intervention may be permitted upon "timely motion." The statute further provides that in exercising discretion, the court shall consider whether intervention will "unduly delay" the determination of the action or prejudice the substantial rights of any party. The requirement of timeliness ensures that intervention is not used as a means to revive stale claims or to undo matters which have already been determined by the court(*Greater New York Health Care v. DeBuono*, 91 NY2d 716, 720 [1998]). Particularly in supplementary proceedings, equity favors the diligent(*Hulbert v.Hulbert*, 216 NY 430, 441 [1916]). Thus, CIT Group's winning the race to the courthouse should not go totally unrewarded by the court. While CIT Group was required to give notice of the proceeding to the judgment debtor, it was not required to serve any other party who may have an interest in the rent payments(CPLR § § 5225(b), 5227).

Irwin did not move to intervene until after petitioner's application for a turn-over order was already granted. However, because there was no opposition by respondents or the judgment debtor, there was no opportunity for the court to make findings as to the judgment debtor's entitlement to the payments subject to the turn-over order. The court concludes that Irwin Franchise's motion for leave to intervene is timely as to rents which had not been paid over to petitioner as of May 31, 2007. The motion for leave to intervene is granted to that extent.

In determining priority as between CIT Group, who is the judgment creditor, and Irwin Franchise, who claims to be a secured party, the court must consider three issues: 1) whether the assignment of rents gave rise to a security interest in favor of Irwin, 2) whether the security interest was perfected, and 3) whether the granting of the security interest constituted a fraudulent conveyance.

Article 9 of the Uniform Commercial Code applies to transactions which create a security interest in personal property or fixtures by contract(UCC § 9-102(73); *Spearing Tool & Mfg. Co. v. Crestmark Bank*, 412 F.3d 653 657 [6th Cir. 2005]). A "security interest" in personal property or fixtures is an interest which secures payment or performance of an obligation(UCC §

1-201[37]). Whether an agreement creates a security interest depends upon the nature of the transaction itself rather than the stated or subjective intention of the parties(Official Comment 3 to UCC § 9-102; *State v. Avco Financial Service*, 50 NY2d 383, 387 [1980]). An assignment of the right to receive sums of money due under a contract or lease may create a security interest, even though the obligor is not immediately notified of the assignment(UCC § 9-406; *Berkowitz v. Chavo International, Inc.*, 74 NY2d 144 [1989]).

While the assignment agreement speaks of each guarantor's assigning to the lender "guarantor's right, title, and interest" to the rent payments, it is clear that the transaction created a security interest in the rent payable under the sublease. Since the guarantors owned and controlled 1085 Restaurant, they may be deemed to have been acting on behalf of the corporation. Moreover, 1085 Restaurant agreed that upon lender's serving notice of default, it would forward the excess rent payments due the guarantors directly to Irwin. Furthermore, under paragraph 10 of the assignment agreement, each guarantor authorized the lender to file a UCC financing statement evidencing the assignment agreement. Under UCC § 9-204, a security agreement may create or provide for a security interest in "after-acquired collateral." The court concludes that pursuant to the assignment agreement, Irwin obtained a security interest in the excess rent payments as they were received by 1085 Restaurant Corp.

As a general matter, after a security interest is perfected, a secured party is protected against judgment creditors and transferees of the debtor(UCC § 9-308 and Official Comment 2). UCC § 9-310(a) provides that with certain exceptions not relevant to this case, a financing statement must be filed to perfect all security interests. The financing statement must contain the names of the debtor and the secured party and indicate the collateral covered by the financing statement(UCC § 9-502). The identification of the collateral need be only reasonably specific (*G.E. Capital Finance v. Spartan Motors*, 246 AD2d 41, 52 [2d Dep't 1998]). Normally, the designation of the "generic" type of collateral covered by the security agreement, e.g. accounts, chattel paper, or payment intangibles, is sufficient(Id; see also UCC § 9-109).

The financing statement filed by Irwin Franchise properly named the debtor and secured

party and sufficiently identified the collateral covered by the security agreement. The court concludes that Irwin had a perfected security interest in the excess rents payable under the sublease as of the date the financing statement was filed, October 22, 2004.

Every conveyance, including that of a mortgage or security interest, incurred with actual intent to hinder, delay, or defraud creditors, is fraudulent as to both present and future creditors(Debtor and Creditor Law § 276; *Putnam Nursing & Rehabilitation Center*, 239 AD2d 479 [2d Dep't 1997]). Under § 273 of the Debtor and Creditor Law, a conveyance may be voided by a creditor, irrespective of the debtor's actual intent, if the debtor is or will be thereby rendered insolvent and if the conveyance is made or the obligation incurred without a fair consideration. A person is "insolvent" under the Debtor and Creditor Law when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on existing debts as they become absolute and matured(Debtor and Creditor Law § 271[1]). Under this definition, a debtor is not insolvent if the fair salable value of his assets is sufficient to pay the debtor's probable liability on existing debts, even though the debtor does not immediately have the cash to do so. Although book value is not controlling as a measure of fair salable value of assets, it is admissible evidence on the issue of insolvency(*Greene v. Ellis*, 335 F. Supp. 981 [SDNY 1971]). Fair consideration is given for property or an obligation when a "fair equivalent" is conveyed in exchange or an antecedent debt is satisfied(Debtor and Creditor Law § 272). If made by an insolvent debtor for less than fair consideration, the granting of a mortgage or security interest may constitute a fraudulent conveyance(*BSL Development Corp.* v. Aquabogue Cove Partners, 212 AD2d 694 [2d Dep't 1995]).

Because a special proceeding seeking the turn-over of a judgment debtor's property is plenary, the court may set aside a fraudulent conveyance within the context of the turn-over proceeding(*Garland D. Cox & Associates v. Koffman*, 48 NY2d 878 [1979]). The court concludes that a hearing is necessary to determine whether the granting by 1085 Restaurant of a security interest in the excess rent payments constituted a fraudulent conveyance. Although Irwin's credit approval memo indicates that the Zavidows had substantial net worth, it refers to a 1999 tax judgment against Jerome as well as several past due accounts. The memo also indicates

that both Jerome and Steven had debt in excess of their liquid assets and that Steven's credit score was "poor."[8] Thus, there is clearly an issue as to whether the Zavidow corporations, including 1085 Restaurant, were insolvent at the time of the security agreement.

While an "antecedent debt" can be fair consideration, it is unclear whether the security agreement was a fair equivalent for the credit which Irwin actually extended. Furthermore, the affidavit of Michael Baronio, Irwin's Assistant Secretary, states that a loan in the principal amount of $750,000 was made on or about July 18, 2002. However, the credit approval memo, which is undated, contains an expiration date of September 30, 2002. Thus, the approval memo suggests that loan may actually have been made after July 18 and the documents backdated. All of the circumstances surrounding execution of the security agreement are relevant to the issue of fraudulent intent. Thus, the issue of whether the security agreement is a fraudulent conveyance cannot be resolved on the papers before the court.

Accordingly, the court's order of May 7, 2007 is modified only to the extent of ordering a hearing to determine adverse claims to the excess rent payable under the sublease. The matter is respectfully referred to special referee, Hon. Frank N. Schellace, who heard and determined the issue of damages in the underlying action, to hear and report as to adverse claims to the rent payments. Oceanside Restaurant Associates shall continue to pay rent to the attorney for the prime landlord pending determination of the present motion.

This shall constitute the Order of the Court.

Dated: 9/1/2007

ENTER:

J.S.C

[8]CIT Group's Ex. 1.