

Librizzi v DiBenedetto
2008 NY Slip Op 30967(U)
March 24, 2008
Supreme Court, Nassau County
Docket Number: 8452-06/
Judge: Leonard B. Austin
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**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

**Motion R/D: 12-4-07
Submission Date: 12-4-07
Motion Sequence No.: 003/MOT D**

GERI LIBRIZZI,

Plaintiff,

**COUNSEL FOR PLAINTIFF
Smith Dornan & Dehn, P.C.
110 East 42nd Street - Suite 1303
New York, New York 10017**

- against -

**ROSARIO DIBENEDETTO and RUSSO
GALERIES, INC.,**

Defendants.

**COUNSEL FOR DEFENDANT
LaReddola, Lester & Associates, LLP
600 Old Country Road - Suite 224
Garden City, New York 11530**

x

ORDER

The following papers were read on Plaintiff's motion for the appointment of a receiver:

- Order to Show Cause dated November 19, 2007;
- Affirmation of Francis X. Dehn, Esq. dated November 16, 2007;
- Affidavit of Rosario DiBenedetto sworn to on December 3, 2007;
- Defendant's Memorandum of Law.

Plaintiff, Geri Librizzi ("Librizzi"), moves for the appointment of a receiver for the antiques, artwork, securities, receivables and other personal property of the Defendant Rosario DiBenedetto ("DiBenedetto") and two corporations, Russo Galleries, Inc. ("Russo") and Collectible Express, Inc. ("Express") of which DiBenedetto is the sole shareholder and for such receiver to administer and sell such property and to use the

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proceeds of sale to satisfy the judgment obtained by Plaintiff against DiBenedetto and Russo.

Librizzi also seeks her appointment as receiver of an untitled sculpture by Harry Bertoia currently in the possession of Christie's, Inc. ("Christie's), a third party garnishee, and to sell the sculpture and apply the proceeds of sale towards the satisfaction of judgment obtained by Librizzi against DiBenedetto and Russo.

BACKGROUND

On June 27, 2007, a judgment in the sum of \$764,750.51 was entered in favor of Librizzi and against DiBenedetto and Russo. The judgment remains wholly unsatisfied.

Librizzi has served information subpoenas upon DiBenedetto and Russo. In response to his information subpoena, DiBenedetto stated he is the sole shareholder and president of Russo and Express.

DiBenedetto stated Russo and Express presently have no assets or accounts receivable. DiBenedetto further stated he has three (3) safe deposit boxes at the Astoria Federal Savings Bank, 229 Merrick Road, Rockville Centre, New York.

In response to an information subpoena issued to Christies, Chrstie's stated it was in possession of a untitled sculpture by Harry Bertoia in which DiBenedetto or Russo has an interest. Christie estimates the value of the Bertoia sculpture to be between \$7,000 and \$9,000 at auction.

Librizzi seeks an order pursuant to CPLR 5228 appointing her as receiver of the Bertoia sculpture, Russo and Express and the safe deposit boxes maintained by

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DiBenedetto. She then seeks permission to take such action with regard to this property including its sale and to apply the proceeds of sale towards the satisfaction of the judgment she has against Judgment Debtors.

DiBenedetto consents to have Librizzi appointed receiver for the purposes of the sale of the Bertoia sculpture. He further consents to permit Librizzi to open the safe deposit boxes he has at Astoria Federal Savings Bank in Rockville Centre, He asserts that these safe deposit boxes contain miscellaneous personal papers and documents that have no value.

He opposes the appointment of a receiver for Russo and Express. He asserts the appointment of a receiver for these entities is unnecessary since neither have any assets or accounts receivable.

Russo was in the business of selling artwork and sculpture on consignment. DiBenedetto claims that once word got out in the industry that a substantial judgment had been entered against Russo, its business dried up. No one will consign artwork or sculpture to Russo for fear that the artwork or sculpture would be subject to the judgment enforcement proceedings. Stated more simply, the entry of the judgment put Russo out of business.

DiBenedetto also avers that Express has no assets. DiBenedetto claims that Express took artwork, sculpture and antiques on consignment and sold it through on-line auctions such as e-Bay. DiBenedetto claims that Express does not own inventory.

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DiBenedetto asserts all of his personal bank accounts and the bank accounts maintained by Russo have been restrained.

Reduced to its simplest terms, DiBenedetto, Russo and Express assert there is no reason to appoint a receiver since Russo, Express and he have no assets, property, accounts receivable or the right to receive any property in the future.

DISCUSSION

CPLR 5228 permits the court to appoint a receiver of property "...in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment."

A receiver should be appointed only when special reasons appear to justify one. Siegel, *Practice Commentaries*, CPLR C5228:1.

In determining whether to appoint a receiver "...courts have considered the '(1) alternative remedies available to the creditor* * *; (2) the degree to which receivership will increase the likelihood of satisfaction* * *; and (3) the risk of fraud or insolvency if a receiver is not appointed. (citations omitted)." Chlopecki v. Chlopecki, 296 A.D.2d 640, 641 (3rd Dept. 2002).

A receiver will be appointed when a judgment creditor establishes "...that a private sale of some item of the debtor's property, real or personal, will likely bring a substantially higher price than would the public auction that a sheriff is required to conduct when levying an execution." Siegel, *New York Practice 4th* §512 at p. 872.

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A receiver will not be appointed when the judgment debtor does not have any property or property rights or where there is no expectation that the judgment debtor will receive property or property rights in the future. 11 New York Civil Practice CPLR ¶5228.04.

The judgment creditor may be appointed as the receiver. Vitale v. City of New York, 183 A.D.2d 502 (1st Dept. 1992); and Aquavella v. Equivision, Inc., 181 Misc.2d 322 (Sup. Ct., Monroe Co. 1999)

In this case, DiBenedetto and Russo acknowledge that they have an interest in a Bertoia sculpture that is presently in the possession of Christie's. The sculpture supposedly has a value of between \$7,000 and \$9,000 at auction.

However, the precise interest Russo or DiBenedetto has in this sculpture is not established. If Russo and/or DiBenedetto owns this sculpture, then it should be sold at auction. The distribution of the proceeds of the sale can be restrained (CPLR 5222) and paid over to Librizzi pursuant to a turn over order. CPLR 5225.

However, Russo generally did not own the items it sold. Russo would usually enter into a consignment agreement with the owner of the artwork. Russo would make arrangements for the sale of the artwork for which it would receive a commission on the sale.

"A true consignment sale is merely an 'agency with a bailment' and basically governed by the law of agency and service contracts (see, 3A Anderson, Uniform Commercial Code §2-326:44 at 429 [3d ed. 1990]." Rahanian v. Ahdout, 258 A.D.2d

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156 (1st Dept. 1999). The consignor is the principal and the consignee is the agent. *Id.*

If Russo had the sculpture on consignment, then the owner is entitled to its share of the proceeds of sale. Russo would only be entitled to a commission on the sale. Since it is unclear whether Russo or DiBenedetto own the Bertioia sculpture or have placed it with Christie's for sale on consignment, the appointment of a receiver to take possession of and sell the sculpture is inappropriate.

The appointment of a receiver for safe deposit boxes is unnecessary. Librizzi does not establish any reason why the sheriff cannot seize the contents of the safe deposit boxes and sell anything of value at a public auction. CPLR 5232(a). If the sheriff levies upon the safe deposit box and discovers property which might bring a greater price if sold at private sale, Librizzi can apply for the appointment of a receiver at that time.

Librizzi has not conducted a deposition of the judgment debtors. CPLR 5224(a)(1).

On the present record, Librizzi has not established that either DiBenedetto or Russo, as judgment debtors, Express have any property or property rights other than bank accounts that have been restrained and a sculpture that can be sold or that they have any expectation of receiving property or property rights in the future. Under such circumstances, the appointment of a receiver is unnecessary. Court Square Building, Inc. v. Frankel, 150 Misc. 296 (App. Term 1st Dept. 1934).

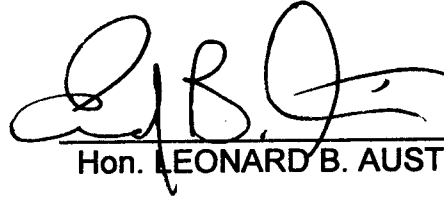
Accordingly, it is,

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ORDERED, that Plaintiff's motion for the appointment of a receiver is **denied**
without prejudice to renewal in accordance herewith.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 24, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**