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| Kissin v Lawrence Good, M.D. |
| 2008 NY Slip Op 31154(U) |
| April 18, 2008 |
| Supreme Court, New York County |
| Docket Number: 0114757/1998 |
| Judge: Martin Shulman |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
MARTIN SHULMAN

PRESENT: J.S.C.
Justice

PART 1

Roger Kissin

INDEX NO. 114757/898

- v -

Lawrence Dood, M.D.

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for _____

| | PAPERS NUMBERED |
|--|-----------------|
| Notice of Motion/ Order to Show Cause – Affidavits – Exhibits <u>1-58</u> | <u>1, 2</u> |
| Answering Affidavits – Exhibits <u>A-C</u> | <u>3, 4</u> |
| Replying Affidavits _____ | |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
APR 22 2008
COUNTY CLERK'S OFFICE

Dated: APR 18 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
ROGER KISSIN as Administrator of the Estate of
FLORENCE KISSIN, Deceased and
ROGER KISSIN, Individually,

Plaintiffs/Judgment Creditors,

- against -

LAWRENCE GOOD, M.D., et al,

Defendant/Judgment Debtor.
-----X

Index No.: 114757/98

FILED
Decision & Order

APR 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs Roger Kissin, as Administrator of the Estate of Florence Kissin, Deceased and Roger Kissin, Individually (collectively "plaintiff" or "Kissin") move by order to show cause ("OSC") pursuant to CPLR §5225(a) for an order directing defendant judgment debtor Lawrence Good, M.D. ("defendant" or "Dr. Good") to turn over his shares of stock in Larry I. Good, M.D., P.C. (the "PC")¹ to satisfy the \$209,452.00 judgment (the "judgment") entered in plaintiff's favor against defendant in this medical malpractice action. Alternatively, to the extent such shares are not capable of being delivered to plaintiff or a designated sheriff, Kissin moves to appoint a receiver pursuant to CPLR §5228 to administer the disposition of Dr. Good's shares of stock in the PC. Defendant opposes the OSC.

Background

The court is well versed with Kissin's many frustrated attempts at enforcing the judgment. For example, this court observed in a prior decision and order dated April 8, 2005 that Dr. Good appeared to exhibit a pattern of behavior designed to frustrate

¹ Dr. Good is the sole shareholder of the PC and conducts his medical practice through the PC.

plaintiff's enforcement attempts.² The court also presided over a special proceeding (N.Y. County Index No. 106448/06) plaintiff commenced against several medical insurers pursuant to CPLR §§ 5225(b) and 5227 for the turn over of funds owed to defendant.

Plaintiff contends the PC is merely a subterfuge based on Dr. Good's June 19, 2002 deposition testimony and subpoenaed documents such as defendant's personal income tax returns and the PC's bank statements, which plaintiff claims reveal *inter alia* that Dr. Good:

- Used the PC's bank accounts to pay off undisclosed credit cards, at least one of which may have been used by or for the benefit of Good's wife in July 2003 (Kalina Aff. in Support of OSC at ¶62; Exh. 55);
- Used PC bank accounts to pay undisclosed loans in August 2005 (*Id.* at ¶63; Exh. 57);
- Made ATM withdrawals and/or card purchases for personal expenses (*Id.* at ¶64);
- Used PC accounts to pay his personal insurance premiums (*Id.* at ¶65; Exhs. 53 & 54);
- Payed personal medical expenses with PC accounts in January 2006 (*Id.* at ¶66; Exh. 58);
- Funded out of state travel with PC funds from at least July 2004 through May 2006 (*Id.* at ¶67; Exhs. 56-58);

² The court based its observation on the following testimony, gleaned from Dr. Good's June 19, 2002 deposition transcript, which plaintiff again raises in this OSC: 1) in the year preceding entry of the judgment, Dr. Good earned approximately \$200,000.00; 2) he continues to practice medicine as an employee of the PC; 3) he takes a draw of "a few thousand dollars" on a weekly basis; 4) the PC employs only Dr. Good and a non-physician employee; 4) defendant and his wife live in a house owned by their son for which Dr. Good pays in excess of \$5,000.00 per month in mortgage payments; 6) Dr. Good does not maintain a checking account; 7) defendant's wife is not employed outside of the home but maintains a checking account with funds provided by Dr. Good.

- Charged expensive meals from at least November 2004 through May 2006 (*Id.* at ¶¶68; Exhs. 56-58);
- Used PC account funds to purchase personal luxury items such as designer shoes, clothing, food and liquor from at least July 2003 through December 2005 (*Id.* at ¶¶69; Exhs. 55-57);
- Paid luxury car expenses through the PC in August 2004 and August 2005 (*Id.* at ¶¶70; Exhs. 56 & 57);
- Charged personal gasoline, sundry and household items to the PC from at least June 2004 through May 2006 (*Id.* at ¶¶71; Exhs. 56-58); and
- Constantly depleted the PC's business checking account, which often had a negative balance, as evidenced by numerous overdraft and returned check fees being charged to the account (*Id.* at ¶¶ 72, 73; Exhs. 54-58).

Kissin thus argues defendant maintains a luxury lifestyle using PC funds without taking such funds in his own name, placing such income beyond the reach of creditors such as plaintiff.

In opposition, Dr. Good counters that: 1) he has entered into an installment agreement with the Internal Revenue Service ("IRS") to pay tax liabilities exceeding \$1,000,000.00,³ which he pays for with his salary drawn from the PC (*Id.* at ¶8); 2) if his shares in the PC are sold or a receiver appointed as Kissin requests, the IRS would be entitled to the proceeds by virtue of its tax lien, which has priority over plaintiff's judgment⁴ (*Id.*); 3) plaintiff has never served him with a property execution or income execution and if he had served an income execution in 2002, his income from the PC

³ Dr. Good submits proof of four federal tax liens totaling \$857,616.00 having been filed in the Nassau County Clerk's office.

⁴ Defendant claims plaintiff filed the judgment in Nassau County in November 2006 after the IRS perfected its tax lien by filing same in Nassau County.

would have been attached (*Id.* at ¶¶ 9, 13); 4) the travel expenses referenced in the PC's account statements were for medical conventions and seminars⁵ (*Id.* at ¶14); 5) granting plaintiff's OSC will only serve to punish Dr. Good by forcing him to abandon the PC or have it shut down (*Id.* at ¶16); and 6) the PC has no value without Dr. Good's skills and good will (*Id.* at ¶18). Essentially, defendant contends that granting the OSC will decrease plaintiff's likelihood of recovering its judgment.

Analysis

CPLR §5225(a) provides in relevant part:

Upon motion of the judgment creditor . . . where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money . . . to the judgment creditor, and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property . . . to a designated sheriff.

Dr. Good does not deny that he is the PC's sole shareholder. Corporate shares are personal property subject to CPLR Article 52's enforcement procedures.

However, the Business Corporation Law ("BCL") prohibits Kissin, who is not authorized by law to practice medicine, from owning shares in a professional corporation. See generally, BCL §1507. Nonetheless, while stock ownership in a professional corporation may be restricted, under CPLR §5225(a), the court may direct a turnover of a professional corporation's shares of stock to satisfy a judgment. *Udel v. Udel*, 82 Misc.2d 882, 884, 370 N.Y.S.2d 426 (Civ. Ct., N.Y. Cty., 1975) (turnover of psychiatrist's shares of stock in the professional corporation through which he

⁵ Dr. Good concedes that one trip to Hawaii for his 35th wedding anniversary was not business related but, to the extent they may have been paid in part with PC funds, such funds were declared as income on defendant's tax returns.

practiced). "This is in keeping with the traditional power of courts to disregard a corporate entity where it is used improperly. And a professional corporation, like any other corporation cannot be used as a subterfuge to avoid payment of a personal judgment (citations omitted)." *Id.*

In *Udel*, the judgment creditor alleged that the judgment debtor's professional corporation paid rent for the judgment debtor's residence, and paid for motor vehicles, travel, entertainment and medical expenses. Dr. Good does not effectively dispute plaintiff's allegations enumerated above, which closely parallel those in *Udel*.

Ultimately, the court recognized in *Udel* that because of the lack of marketability of the stock and the difficulty in determining its true value, it was unlikely that a turnover to the sheriff would result in satisfying the judgment. As a result, the court directed that the stock be turned over to a receiver pursuant to CPLR §5228 to do any act designed to satisfy the judgment including dissolution of the corporation as provided in BCL §§ 1511 and 1001. As in *Udel*, turning the shares of the PC over to a sheriff is not likely to satisfy Kissin's judgment.

The court now addresses plaintiff's request for alternative relief in the form of the appointment of a receiver to administer the disposition of the PC's shares. Upon motion by a judgment creditor, the court may appoint a receiver to manage or sell property in which the judgment debtor has an interest for the purpose of satisfying an outstanding judgment. CPLR §5228(a); *Chlopecki v. Chlopecki*, 296 A.D.2d 640, 641, 745 N.Y.S.2d 228 (3rd Dept., 2001). "The remedy will be denied where there is no property of the judgment debtor which is properly amenable to a receivership (citations

omitted), or where the appointment would be effectively futile." *Harbor Footware Group, Ltd. v. ASA Trading, Inc.*, 1 Misc.3d 911(A), 781 N.Y.S.2d 624 (Sup. Ct., Nassau Cty., 2004).


The appointment of a receiver pursuant to CPLR §5228(a) is discretionary. *Drucker v. Drucker*, 53 Misc.2d 446, 447 (Sup. Ct., Queens Cty., 1967). In determining whether the appointment of a receiver constitutes a provident exercise of discretion, courts have considered the alternative remedies available to the creditor, the degree to which receivership will increase the likelihood of satisfying the judgment and the risk of fraud or insolvency if a receiver is not appointed. *Chlopecki v. Chlopecki, supra*, 296 A.D.2d at 641, 745 N.Y.S.2d at 229.

Without submitting any proof as to the value of his shares in the PC, Dr. Good's opposition contains only unsupported speculation that appointing a receiver to administer the shares would be futile. For the same reasons set forth in *Udel v. Udel*, the court finds that the facts presented warrant appointment of a receiver of defendant's shares of stock in the PC. However, a court appointed receiver would be obligated to recognize prior liens. See *U.S. v. Mr. Hamburg Bronx Corp.*, 228 F.Supp. 115, 121 (S.D.N.Y. 1964). Here, the court can make no determination as to the priority of the federal tax liens *vis a vis* the judgment since the Internal Revenue Service, as well as Dr. Good's other judgment creditors, are not before the court. Such issues should be resolved prior to appointing a receiver on appropriate notice to all interested parties. At this time, Kissin's OSC must be denied without prejudice. Accordingly, it is hereby

ORDERED that the OSC is denied.

This constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
April 18, 2008


Hon. Martin Shulman, J.S.C.

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