

SCR Joint Venture, L.P. v 309 Realty, LLC
2008 NY Slip Op 32268(U)
August 12, 2008
Supreme Court, New York County
Docket Number: 0101580/2008
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **SHIRLEY WERNER KORNREICH**
Justice J.S.C.

PART **54**

SCR Joint Venture, L.P.

INDEX NO. 101580/08

MOTION DATE 8/5/08

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

309 Realty, LLC, et al.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>
<u>4</u>

Cross-Motion: Yes No

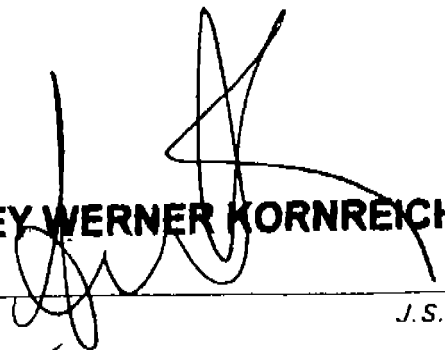
Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

AUG 14 2008
NEW YORK COUNTY CLERK'S OFFICE

FOR THE FOLLOWING REASON(S):

Dated: 8/12/08

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SCR JOINT VENTURE, L.P.,

Petitioner,

Index No.: 101580/08

-against-

DECISION
and ORDER

309 REALTY, LLC, ARI WARSHAWSKY and
JEROME WARSHAWSKY,

Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action arises out of a judgment entered in United States District Court for the Eastern District of New York on September 21, 2007, in favor of petitioner SCR Joint Venture, L.P. (SCR) against respondents Ari Warshawsky and Jerome Warshawsky in the amount of \$3,047,171.24 (the "Federal Judgment"). Here, SCR seeks an order: 1) pursuant to CPLR § 306, severing this action against respondents 309 Realty, LLC (309 Realty) and Ari Warshawsky; and 2) rendering a decision on its petition for a turnover of funds currently being held by 309 Realty pursuant to CPLR §§ 5225, 5227 and Limited Liability Law § 607. 309 Realty and Ari Warshawsky do not oppose severance, but do oppose SCR's turnover petition.

I. Background

Respondents Ari and Jerome Warshawsky were both members of I.W. Industries (I.W.) a family run business which sold plumbing fixtures. In 2004, I.W. filed a Chapter 11 Bankruptcy Petition in the Eastern District of New York seeking to reorganize so it could stay in business. As part of its reorganization, I.W. received new financing and restructured its debt. Several entities which loaned I.W. money to refinance, including Summitbridge National Investments

LLC (Summitbridge), required the Warshawsky's to personally guarantee the loans. As part of this refinancing, the Warshawsky's executed three promissory notes to Summitbridge for \$2,737,574.22, personally guaranteeing the loans made to I.W. In the summer of 2005, Summitbridge assigned all three notes to SCR. In March 2006, SCR commenced an action in the Eastern District of New York seeking to recover the full amount due under each note. On June 6, 2007, the Eastern District granted summary judgment in favor of SCR and held the Warshawsky's liable for the full amount due on each note. The Federal Judgment thereafter was awarded and entered in September 2007.

Ari and Jerome Warshawsky each own a membership interest in 309 Realty. On or about October 17, 2007, following entry of the Federal Judgment, petitioner served 309 Realty with a post-judgment subpoena requesting certain documentation regarding its finances. Included in 309 Realty's response were its 2006 K1 and a document entitled "Partners' Allocation Percentages" for the year 2006. These documents indicate, *inter alia*, that Ari and Jerome Warshawsky have a 2.22899% and 10.7692% respective membership interests in 309 Realty. On or about January 23, 2008, petitioner commenced this action before Justice Carol Edmead seeking an order: 1) pursuant to CPLR § 5225, directing 309 Realty to turn over any funds it holds on behalf of Ari and Jerome Warshawsky in satisfaction of the Federal Judgment; 2) pursuant to Limited Liability Company Law § 607, charging the membership interests of Ari and Jerome Warshawsky in 309 Realty; and 3) pursuant to CPLR § 5227, directing 309 Realty to pay SCR any debt it owed to Ari and Jerome Warshawsky in satisfaction of the Federal Judgment.

On or about April 7, 2008, respondent Jerome Warshawsky filed for bankruptcy in United States Bankruptcy Court for the Eastern District of New York. On May 7, 2008, Justice Edmead stayed the proceedings pending a further determination in Mr. Warshawsky's bankruptcy

petition. On or about June 5, 2008, petitioner sent a letter to Justice Edmead indicating that Jerome Warshawsky's bankruptcy filing did not serve to automatically stay the action against 309 Realty and Ari Warshawsky. On June 26, 2008, all parties appeared before Justice Edmead for a conference. At the conference, Justice Edmead directed SCR to file an Order to Show Cause to sever the action if it wished to pursue the turnover petition against 309 Realty and Ari Warshawsky. Consequently, petitioner filed the instant motion, by Order to Show Cause, on or about July 11, 2008. Justice Edmead recused herself, and the matter was transferred to this court. The motion was argued and submitted on August 5, 2008.

II. *Conclusions of Law*

A. *Severance*

CPLR § 603 provides in pertinent part: “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim or of any separate issue.” Since no statutory criteria exists for determining “convenience” or “prejudice,” the court has broad discretion in making a decision on whether to order severance or separate trials of a particular action. 3-6 New York Civil Practice: CPLR P 603.01; *see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C603, at 6 (court has discretion under CPLR 603 to order severance or separate trial to avoid confusion delay or prejudice).

It is well settled that “the automatic stay provisions of the Federal bankruptcy laws...do not extend to nonbankrupt codefendants.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Oxford Venture Partners, LLC*, 13 AD3d 89 (1st Dept 2004) quoting *Maynard v. George A. Fuller Co.*, 236 AD2d 300 (1st Dept 1997). The balance of equities lies with a plaintiff where one defendant receives an automatic stay pursuant to 11 USC § 362(a) and the remaining codefendants request a stay of the entire action. *Rosenbaum v. Dane & Murphy Inc.*, 189 AD2d 760 (2nd Dept 1993).

The automatic stay may be extended to non-debtor defendants only in limited, “unusual circumstances.” *Merrill Lynch*, 13 AD3d at 300; *Gray v. Hirsch*, 230 BR 239, 242 (SDNY 1999). Unusual circumstances exist where “there is such identity between the debtor and [non-debtor] that the debtor may be said to be the real party defendant and that a judgment against the [non-debtor] will in effect be a judgment...against the debtor.” *Gray*, 230 BR at 242 quoting *A.H. Robbins Co. v. Piccinin*, 788 F2d 994, 999 (4th Cir 1986). Courts applying this criteria will stay actions against non-debtor officers and principals of debtor corporations only where the stayed action poses a serious threat to the debtor’s reorganization efforts. *Gray*, 230 BR at 242 (broader rule is a debtor’s stay will be extended to a non-debtor only where necessary to protect debtor’s efforts at reorganization).

Here, severance of this action is warranted. Neither 309 Realty nor Ari Warshawsky oppose severance. In addition, unusual circumstances here do not exist to extend the automatic stay. There is no evidence to suggest that there is such an identity among the three respondents that severing this action will have any effect on Jerome Warshawsky’s assets or pose a serious threat to his reorganization efforts. As a result, petitioner’s motion to sever and continue its claims against 309 Realty and Ari Warshawsky is granted. *Centrust Services, Inc. v. Guterman*, 160 AD2d 416 (1st Dept 1990) (bankruptcy stay did not prevent plaintiff from proceeding on causes of action against non-bankrupt defendants which did not involve debtor’s property); *Rosenbaum*, 189 AD2d 760.

B. SCR’s Turnover Petition

A turnover proceeding is the procedural device provided by Article 52 of the CPLR for enforcement of a judgment against an asset of the judgment debtor in the possession or custody of a third person. *JPMorgan Chase Bank, N.A. v. Motorola Inc.*, 47 A.D.3d 293, 301 (1st Dept 2007). Limited Liability Law § 607(a) provides “[o]n application to a court of competent

jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor only has the rights of an assignee of the membership interest.” Limited Liability Law § 603(a)(3) states that except as provided in the LLC’s operating agreement, the only effect of an assignment of a member’s LLC interest will be to entitle the assignee to receive any distribution or allocation of the member’s profits and losses. Limited Liability Law 603(a)(3). In addition, Limited Liability Law § 607(b) states “[n]o creditor of a member shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.”

With regard to 309 Realty, petitioner’s motion for a turnover and charge of assets is denied. The law on this subject is clear. The assets of an LLC cannot be levied upon by the creditor of one of its members. Pursuant to Limited Liability Law § 607(b), the creditor of a member may not obtain possession of any property of the LLC or exercise any legal or equitable remedies against the LLC’s property. Limited Liability Law 607(b); 5-6 White, New York Business Entities P L607.01.

With regard to Ari Warshawsky, pursuant to Limited Liability Law §§ 607(a) and 603(a)(3), SCR is only entitled to obtain rights, as an assignee, to the distribution of any profits pursuant to Ari Warshawsky’s 2.22899% membership interest in 309 Realty. The law on this issue is also clear. Petitioner is not entitled to a turnover of any funds or debts being held or owed by 309 Realty on behalf of Ari Warshawsky. These two sections of the limited liability law articulate that the creditor of a member can only obtain rights, as an assignee, to the debtor/member’s receipt of profits pursuant to his allocated membership interest. Accordingly, it is

ORDERED that SCR’s motion to sever as to 309 Realty, LLC and Ari Warshawsky is

granted and this action is severed as to respondent Jerome Warshawsky and is continued as to the remaining respondents; and it is further

ORDERED that further prosecution of and proceedings in this action are stayed as to respondent Jerome Warshawsky, except for an application to vacate or modify the stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur of the stay issued by the Bankruptcy Court in the proceeding pending before the United States Bankruptcy Court for the Eastern District of New York, Docket No. 1-08-42049; and it is further

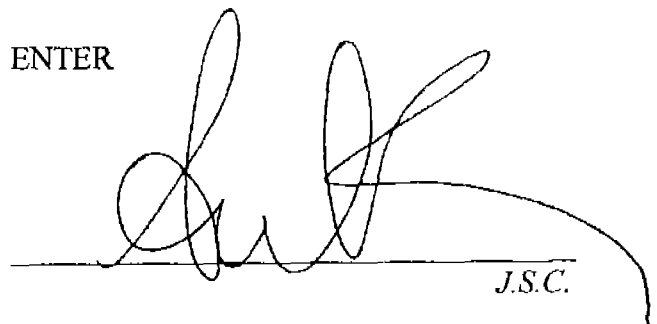
ORDERED that SCR's petition for a turnover and charge of assets against 309 Realty, LLC is denied; and it is further

ORDERED that SCR's petition for a turnover against Ari Warshawsky seeking his assets in 309 Realty, LLC is denied; and it is further

ORDERED that SCR's petition to charge Ari Warshawsky's membership interest in 309 Realty, LLC is granted to the extent that SCR shall only be entitled, as an assignee, to Ari Warshawsky's 2.22899% membership interest in any profits made by 309 Realty, LLC; and it is further

ORDERED that Ari Warshawsky's request that any profits distributed pursuant to his interest in 309 Realty, LLC be held in escrow pending a decision by the Second Circuit Court of Appeals regarding the Federal Judgment is denied.

ENTER


J.S.C.

DATE: August 12, 2008
New York, NY