

Nexxar Group, Inc. v Envios Rd Corp.

2008 NY Slip Op 33598(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 109060/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

NEXXAR GROUP, INC.

INDEX NO. 109060/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 2

ENVIOS RD CORP., ET AL.

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.
FILED

JAN 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/7/10

Ley
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 2**

-----x
NEXXAR GROUP, INC.

Plaintiff,

Index No. 109060/09

-against-

**ENVIOS RD CORPORATION, and DOMINICAN/
COMMUNICATIONS CORPORATION,**

Defendants.
-----x

ORDER

FILED

JAN 15 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Louis B. York, J.S.C.:

Motion Sequences 001 and 002 in this case are consolidated for disposition.

In Motion Sequence 001, defendants sought emergency relief to vacate judgment and restraints on its bank accounts. In addition, defendants moved for and briefed a protective order under C.P.L.R. 5240. This Court issued an Interim Order on September 9, 2009 adjourning the motions to vacate and for a protective order if defendants make specified payments to the Marti A. Meyerson EDS Trust ("Trust"). Defendants complied with this Interim Order.

In Motion Sequence 002, defendants renewed their motions to vacate and for a protective order. Therefore, the Court now addresses defendants' motion to vacate judgment and, alternatively, for a protective order pursuant to C.P.L.R. 5240. Nexxar Group, Inc. ("Nexxar") brought the underlying enforcement action against Envios RD Corporation and Dominican Communications Corporation ("Envios").

[* 3]

The dispute stems from an Amended Note between defendants as debtor and Nexxar as creditor on December 31, 2007. In connection with this Amended Note, defendants also executed affidavits of confession of judgment in favor of Nexxar in case of default. By a consent agreement dated March 26, 2008, Nexxar assigned its whole interest in the Amended Note to The Marti A. Meyerson EDS Trust ("Trust"). Nexxar notified defendants of this assignment on June 18, 2008. By February 2009, the Trust claimed defendants to be in default under the terms of the Amended Note and sent them notification to this effect.

In June 2009, the Trust orally assigned its interest in the Amended Note back to Nexxar for the purpose of entering judgment against defendants via the executed consent agreements. On June 25, 2009, Nexxar entered judgment against defendants for the total outstanding principal plus interest due at that time. The next day, Nexxar assigned all its interest in the judgment to the Trust by written instrument, dated June 26, 2009. The Trust, through Nexxar, now seeks to enforce this judgment against defendants. Defendants assert that the judgment entered is invalid because Nexxar did not have a sufficient interest in the Amended Note to establish standing at that time. Specifically, defendants argue that the intermediate oral assignment from the Trust to Nexxar was invalid pursuant to the original Nexxar/Trust contract, rendering the judgment itself invalid. Alternatively, defendants argue that, balancing the equities, they are entitled to a protective order under C.P.L.R. 5240 to create a structured payment schedule.

For the reasons that follow, the Court denies defendants' motion to vacate judgment and for a protective order.

"An assignment does not have to be supported by consideration and it may be made by an oral communication." American Banana Co. Inc. v. Venezolana Internacional de Aviacion.

[* 4]

S.A., 67 A.D.2d 613, 614, 411 N.Y.S.2d 889, 890 (1st Dept. 1979). Here, the Trust orally assigned the Amended Note to Nexxar in June 2009. Contrary to defendants' arguments, whether the contract between Nexxar and the Trust contains a clause limiting oral modification is irrelevant to the legitimacy of the assignment. The clause defendants point to forbids oral modification or amendment of the Nexxar-Trust contract itself. (Aff. of Ian Trumpower, Ex. D, p. 5.) In fact, the Nexxar-Trust contract explicitly gave the Trust the right to "foreclose upon, sell, assign, pledge, alienate or otherwise transfer the [Amended] Note. . . ." (Id., p. 2.) Therefore, defendants' argument that Nexxar's judgment is defective fails.

Alternatively, defendants move for judicial management of the judgment's enforcement via a protective order under C.P.L.R. 5240. That section gives the court discretion to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The court has broad discretionary power under C.P.L.R. 5240, but a protective order should be issued with caution. Gryphon Domestic IV, LLC, v. APP Int'l Finance Company, 871 N.Y.S.2d 115, 117 (1st Dept. 2009); Fiore v. Oakwood Plaza Shopping Center, Inc., 576 N.Y.S.2d 793, 794 (1st Dept. 1991). While C.P.L.R. Article 52 generally seeks to provide efficiency in enforcement of judgments, C.P.L.R. 5240 bestows the court with limited judicial discretion to protect the due process rights of judgment debtors. For the purposes of resolving a prior restraining order, this Court has ordered defendants to make several payments to Nexxar during the pendency of this motion for a protective order. Now, defendants have not demonstrated that the balance of equities falls in favor of any further judicial manipulation of the judgment entered.

For the reasons given above, the motion to vacate and for a protective order is denied.

Dated: 1/7/10

ENTER:

Levy
Louis B. York, J.S.C.

FILED
JAN 15 2010
NEW YORK
COUNTY CLERKS OFFICE