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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 116359/2009

JP MORGAN CHASE BANK N.A.

INDEX NO. _____

VS

MOTION DATE _____

FARRELL FRITZ P.C.

Sequence Number : 001

MOTION SEQ. NO. _____

TURNOVER PROCEEDINGS

MOTION CAL. NO. _____

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____ PAPERS NUMBERED _____

Answering Affidavits — Exhibits _____ _____

Replying Affidavits _____ _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition for the turnover of certain escrow funds is denied without prejudice to renewal following the completion of discovery, and the matter is referred to a Special Referee to supervise discovery pursuant to the accompanying memorandum decision.

Dated: MAY 10 2010

ALICE SCHLESINGER J.S.C.

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

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

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JP MORGAN CHASE BANK, N.A.

Petitioner,

Index No. 116359/09
Motion Seq. Nos. 001 & 002

-against-

FARRELL FRITZ, P.C.,

Respondent,

-and-

GERALD S. KAUFMAN,

Intervenor.

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SCHLESINGER, J.:

Before this Court is a petition brought pursuant to CPLR §§5225(b) and/or 5227 for the release of $1,177,093.24 from an escrow account held by the respondent law firm Farrell Fritz, PC. This money is being held pursuant to a Stipulation of Settlement, dated February 9, 2009, in an action wherein Gerald Kaufman and Stuart Seigel, individuals and partners in SIG Partners, sued Irwin B. Cohen (Index No. 128119/95).

Cohen agreed to pay the plaintiffs a total amount of $3,500,000 in two installments on March 11 and April 10, 2009. When petitioner herein JP Morgan Chase Bank (JP Morgan) learned of this fact, it served a restraining order on Cohen. Justice Judith Gische, who presided over that action, then directed Cohen to pay Kaufman's part of the proceeds to his counsel, Farrell Fritz, who was directed to retain the money in an escrow account.

JP Morgan in this proceeding now wants this money. Its straightforward position is that Kaufman owes the bank much more than that sum, as evidenced by a judgment entered against Kaufman in favor of the bank's predecessor, Chemical Bank, in New York

County Supreme Court on November 27, 1995. The amount of that judgment was $2,068,968.65. JP Morgan says that, although some part of that amount has been paid, the bank is still owed most of it, and the remaining principal plus accrued interest comes to considerably more than the amount in escrow.

Kaufman is an intervenor here and in that capacity has moved for summary judgment dismissing the proceeding. He supports the motion with an affidavit detailing the long history of his financial dealings with petitioner JP Morgan, its predecessor bank, and another bank, Bank Leumi. Those dealings began in 1986-87 when his partnership SIG borrowed over $2.4 million from Chemical. In 1990, according to Kaufman, SIG needed additional capital and it therefore took out a loan from Bank Leumi in the form of two notes totaling $1,150,000. As security for the guarantees to Leumi, Kaufman executed an agreement assigning to that bank a portion of his 22% share in a limited partnership, 401 North Associates, a Chicago entity. At that time, 1990-1992, Kaufman says, he dealt exclusively with Bank Leumi, as they were both in Chicago, and Cohen dealt with JP Morgan in New York.

In July of 1993 SIG owed JP Morgan almost $2 million and Leumi over $1 million. So the partnership entered into a Restructure Agreement whereby SIG agreed to pay JP Morgan $2,083,046.18 and Leumi $1,245,213.28 for a total of $3,328,259.46. At the same time, on July 29, 1993, the two banks executed an Inter-Creditor Agreement ("ICA") wherein JP Morgan would receive 62.5867% and Leumi would receive 37.4133% of all payments made on the restructured debt,. Also on that same date, Kaufman states he executed a separate agreement assigning his share of interest in the 401 North property to both banks. He also signed a personal guarantee, as did his partners Cohen and Seigel.

In March of 1994, the SIG partners were once more in default on their notes. The three men then entered into negotiations with their creditor banks. Seigel and Cohen were able to agree on terms and made various substantial payments to the banks, but Kaufman was not successful in reaching an agreement. This led to JP Morgan's entry of Kaufman's confession of judgment in November 1995, which Kaufman says he does not "recall ever being served with".[1] He also says he never had any communications with JP Morgan about the confession of judgment at any time between November of 1995 and February of 2009. (See Kaufman Aff. In Support of Motion at ¶18-19).

In January of 1996, again according to Kaufman, Leumi informed him that it intended to sell the two notes, and on October 15, 1996, Leumi assigned these notes to third parties for $385,000. Kaufman says that from that time on he made payments to the assignees and that by 2003 he had paid off the debt in its entirety, with payments of $1.35 million in principal and $1 million in interest.

Therefore, Kaufman's position is that he has paid his debt to JP Morgan and had every reason to believe that the bank had received from Leumi or its assignee the 62% of his payments pursuant to the ICA. Kaufman further supports his position that JP Morgan was paid because in 2008 and in 2009 the bank extended him two revolving lines of credit in the total amount of $750,000. He says the bank had told him then that these lines of credit had been given to him after credit checks had shown no negative information.

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[1]In a Supplemental Affirmation by petitioner in further opposition to Kaufman's motion, JP Morgan does include an affidavit of service showing service was made on Kaufman on December 5, 1995 with a copy of this judgment sent to him by mail in Chicago.

The problem with Kaufman's motion is that it includes no documentary proof of many of its material assertions, a fact emphatically pointed out by JP Morgan in its opposition to the motion. While he has provided copies of the Agreements (the Restructure Agreement, the ICA, and Leumi's October 1996 Purchase Agreement with the Martin A. Fischer Profit Sharing Plan and Earl Kramer of the Kaufman notes), there is nothing of a formal nature to show that payments in the amount of $2.35 million were actually made[2] or that the assignees ever knew of and fulfilled their obligations to pay 62% of such payments to JP Morgan.

In JP Morgan's papers in opposition and in further support of its request for the escrow money, there are problems as well. Those papers are supported by an affidavit from Philip Merriss, Jr, Managing Director of JP Morgan. He has reviewed the bank's records and has helped to put together a spreadsheet showing the moneys allegedly received on the debt. This spreadsheet does show more than the amount in the escrow account as still being owed.

Merriss says JP Morgan never received any money from Leumi's assignees. But significantly, he makes two statements which arguably put the issue of the debt and the efficacy of the bank's records in serious question. First he says, in explaining how he prepared the spreadsheet based on certain documents, that "JP Morgan does not possess any one record evidencing all of those payments, given that the judgment is now more than 14 years old" (¶5). Then in discussing the payment of its share of the $385,000 that Bank

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[2]There is a handwritten letter of January 9, 2003 to "Gerry" from "Marty" acknowledging receipt of an $810,000 wire transfer with $800,000 of that as a full and final payment, but this informal correspondence certainly does not conclusively prove the fact of actual payment.

Leumi "apparently received for its assignment in October 1996 of its interest in the restated notes...", he says: "Although JP Morgan has no record that it received any part of that payment, it has assumed for purposes of this opposition that it received its pro rata share of the payment ... and has credited that amount toward the balance of Kaufman's indebtedness" (¶7).

Therefore, the Court's query is: If for whatever purpose JP Morgan is prepared to concede they received a substantial sum of money from Bank Leumi in 1996, though they have no record of it, how can they say with certainty that they did not similarly receive substantial sums of money from the Chicago assignee?

Also, JP Morgan's acknowledgment of not having "any one record" evidencing the indebtedness is a failure of proof. When taken together with Kaufman's sworn statement, JP Morgan's papers certainly reveal that issues of fact exist as to what money, if any, is still owed despite the 1995 entry of judgment. Counsel also argues that Kaufman's assertions lack credibility, but such considerations cannot be resolved here in this forum. Finally, as to the legal aspects of who had the obligation to pay, petitioner does not succeed in defeating Kaufman's argument that it was Bank Leumi via the ICA who should ultimately be responsible for the debt.

Thus, at this time both the petition and the motion to dismiss are denied. Discovery is necessary here before the issues can be finally determined. Such discovery shall be supervised by a Special Referee in this courthouse so that it may be completed expeditiously.

Accordingly, it is hereby

ORDERED AND ADJUDGED that both the request by petitioner JP Morgan Chase for judgment on the petition and the motion to dismiss by intervenor Gerald S. Kaufman are denied without prejudice to renewal following the completion of discovery; and it is further

ORDERED that this proceeding is referred to a Special Referee to supervise discovery so that it may be completed efficiently and expeditiously; and it is further

ORDERED that petitioner's counsel shall serve a copy of this order with notice of entry on all counsel and the Clerk of the Judicial Support Office (Room 119M) within twenty days hereof to arrange for the reference to the Special Referee.

This constitutes the decision and order of this Court.

Dated: May 10, 2010

MAY 10 2010

ALICE SCHLESINGER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).