

Matter of Rafferty v Taylor Rafferty Assoc., Inc.

2010 NY Slip Op 31580(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 115671/08

Judge: Emily Jane Goodman

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6-23-10
EJG

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

PRESENT: GOODMAN
Justice

PART 17

Brian RAPPAPORT
- v -

INDEX NO. 115871/08
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

Taylor RAPPAPORT ASSOCIATES

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 is decided in accord with attached memorandum decision.

FILED
JUN 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/2/10

EJG
EMILY JANE GOODMAN, 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 17

-----X
In the Matter of the Application

-of-

BRIAN J. RAFFERTY,

Petitioner,

-against-

TAYLOR RAFFERTY ASSOCIATES, INC.,
XINHUA FINANCE LIMITED,

Respondents.

-----X
EMILY JANE GOODMAN, J.:

The petitioner Brian J. Rafferty (petitioner) moves, pursuant to CPLR Article 52, and sections 6201, 6301, 6311 and 6313, for an order: (i) punishing the respondents Taylor Rafferty Associates, Inc. (Taylor Rafferty) and Xinhua Finance Limited (Xinhua) (together respondents) for contempt, on the ground that they have refused to obey the order of this court dated November 25, 2008; (ii) ordering the respondents to pay the sum of \$471,012.33 in satisfaction of the court's judgment; (iii) directing the sheriff to levy upon respondents' property; and (iv) preliminarily enjoining the respondents from transferring assets.

The respondents cross move, pursuant to 22 NYCRR 130-1.1 (c), for an order sanctioning the petitioner.

The respondent Taylor Rafferty is in the investor relations business. The petitioner was the principal of Taylor Rafferty until 2005, when Taylor Rafferty merged with the respondent Xinhua. Xinhua is a Cayman Islands corporation headquartered in Shanghai, China. Pursuant to a written agreement, the petitioner continued working for Taylor Rafferty until he was terminated

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from employment on October 13, 2008.

In November 2008, the petitioner commenced an arbitration against Taylor Rafferty, seeking salary due under the agreement. Taylor Rafferty did not appear at the arbitration hearing. The arbitrators awarded petitioner the sums of \$343,833.34 in salary, plus \$292.70 in unreimbursed business expenses, \$25,000 in health insurance premiums, \$134,989.17 in attorney's fees, and \$12,250.00 in administrative fees and expenses, for a total amount of \$514,840.21. The counterclaims were dismissed by the arbitrators. Subsequently, on July 27, 2009, the award was confirmed by this court.

Also in November 2008, the petitioner commenced a proceeding against both Taylor Rafferty and Xinhua, in this court under the above index number. Despite the volume of the papers submitted to the court on this contempt motion, no copy of an original petition has ever been submitted. In addition, despite moving for dispositive relief, the petitioner does not attach a copy of the amended petition to the motion. It is only in a document entitled "Affirmation in Further Support" that the petitioner attaches a copy of an amended petition dated November 11, 2009. It is not known whether the amendment was made as of right, or required a court order. There is no court order granting leave to serve an amended petition. Furthermore, no answer appears in the papers.

In late 2008, apparently, Xinhua was contemplating selling the assets of Taylor Rafferty to an entity D.F. King & Co., Inc. (D.F. King). The petitioner commenced the instant proceeding which was then marked by this court as finally disposed pursuant to a so-ordered stipulation entered into between the parties. The November 25, 2008 stipulation sets forth the following five numbered provisions, and one footnote:

(1) Respondents shall establish an escrow account with Brune & Richard LLP for the benefit of TRA and Petitioner (the "Escrow Account"). (2) Respondents shall cause D.F. King/Sage Holdings to deposit into the Escrow Account any monies received as "primary consideration" * for the asset sale transaction. Any such monies shall be deposited into the Escrow Account as and when they are received up to the amount of \$233,000. (3) The Escrow Account shall be maintained until further order of a Court (confirmation or vacatur) or the order of the arbitral panel, and then released pursuant thereto. (4) In the event that the proposed transaction between D.F. King/Sage Holdings and XFL/TRA does not close by Dec. 31, 2008, this stipulation is null and void and has no effect. (5) This stipulation is without prejudice to rights or positions of the parties hereto and D.F. King/Sage Holdings. * Primary Consideration in connection with sale of TRA's assets is not on a going forward basis, D.F. King will remit to Respondents 10 % of all revenues collected in connection with the servicing of former TRA's clients

In January 2009, the buyer D.F. King closed on its purchase of the assets of Taylor Rafferty from Xinhua. As part of the purchase, the purchaser D.F. King is obligated to make periodic payments to Xinhua. According to a December 2, 2009 letter from D.F. King's legal counsel, Jason Otto, to petitioner's counsel, Steven Castaldo, D.F. King is holding the sum of \$119,464.91 in commissions owing to Xinhua. In accordance with the terms of the purchase agreement, and the so-ordered stipulation, D.F. King continues to hold the money, although it takes the position that the escrow no longer exists, and that the restraining notice served on D.F. King identifies the judgment debtor as Taylor Rafferty, not Xinhua.

The amended petition sets forth the following seven causes of action: fraudulent conveyance under Debtor and Creditor Law § 270 against Xinhua and Taylor Rafferty (first); shareholder liability against Xinhua (second); piercing the corporate veil against Xinhua (third); breach of the court order against Xinhua (fourth); breach of contract against Xinhua (fifth); contribution against Xinhua and Taylor Rafferty (sixth); and unjust enrichment against Xinhua and Taylor Rafferty (seventh).

At the present moment, there is a judgment against Taylor Rafferty, but there is no judgment against Xinhua. There is an amended petition naming Xinhua as a respondent, but there is no answer, and there is no court order granting leave to amend the petition.

In support of the motion, the petitioner makes the following arguments. The petitioner is entitled to an order pursuant to CPLR Article 52 compelling the turnover of assets to satisfy the judgment. The respondents should be sanctioned for their contempt and violation of the court order. The petitioner is entitled to a preliminary injunction. The petitioner is entitled to an order of attachment pursuant to CPLR 6201.

In opposition to the motion, and in support of the cross motion, the respondents make the following arguments. The respondents caused the escrow account to be funded in accordance with the so-ordered stipulation and are not in contempt of court. The petitioner has not satisfied the requirements for a turnover order under CPLR 5225 from either Taylor Rafferty or Xinhua. The petitioner's purported reliance on Articles 62 and 63 of the CPLR is entirely misplaced and without merit in law. The petitioner's application is frivolous and warrants imposition of sanctions.

CPLR 5104 provides for the enforcement of a judgment or order by contempt, which is not enforceable by execution under either Article 52 or CPLR 5102. Therefore, excluded from the contempt category is the ordinary money judgment. Although contempt can serve as the indirect enforcement tool for the money judgment by enforcing the restraining notice (CPLR 5222) and the subpoena (CPLR 5224), it is not to be invoked directly merely upon a showing that the judgment has not been paid (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5104:1). Therefore, the motion for contempt must be denied.

Moreover, there is insufficient evidence to establish violations of an unequivocal mandate to a reasonable degree of certainty (*Matter of Department of Envtl. Protection of City of N.Y. v Conservation Department of State of New York*, 70 NY2d 233 [1987]; *Usina Costa Pinto S.A. v Sanco Sav. Company Ltd.*, 174 AD2d 487 [1st Dept 1991]) so as to warrant the finding of civil contempt. It appears to this court that the respondents have complied fully with the terms of the so-ordered stipulation. Additionally, it is clear that far more money than the \$12.04 as alleged by the petitioner, was deposited into the escrow account and forwarded to the petitioner. It is also clear that, by the terms of the so-ordered stipulation, the escrow agreement has expired.

To obtain an order of attachment under CPLR 6201 (3), the plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of the enumerated ways, and has acted or will act with the intent to defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff. The proper purpose of attachment is to obtain either quasi in rem jurisdiction, or security for a money judgment. If neither is needed, no attachment should be granted. Giving a priority of other creditors is not the purpose of the statute (*J.V.W. Investment Ltd. v Kelleher*, 41 AD3d 233 [1st Dept 2007]). The moving papers must contain facts, not conclusions (*Societe Generale Alsacienne De Banque, Zurich v Flemingdon Development Corp.*, 118 AD2d 769 [2d Dept 1986]).

Here, there are no facts demonstrating that the respondent Xinhua, with intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in the petitioner's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state, or is about to do any of these acts. Therefore, the motion for an order of attachment must be denied.

CPLR 6301 provides, in relevant part:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual

In order to be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and a balance of the equities in favor of injunctive relief (*W.T. Grant Co. v Srogel*, 52 NY2d 496 [1981]). Here, the assets sought to be restrained are not specific funds which can rightly be regarded as the subject of the action (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]). Furthermore, the petitioner's request for money damages undercuts the claim of irreparable harm (*Matos v City of New York*, 21 AD3d 936 [2d Dept 2005]). Therefore, the motion for a preliminary injunction must be denied. The court specifically declines to make any order regarding the \$119,464.91 in commissions currently being held by a non-party D.F. King.

Article 52 of the CPLR supplies the governing procedural rules for the enforcement of money judgments. CPLR 5201 determines what property is available to apply to the satisfaction of a judgment. A judgment creditor can pursue for enforcement any property interest that the judgment debtor has and can assign. The rest of the Article is devoted to supplying the devices used to reach the property. For personal property, the priorities among creditors are governed by CPLR 5202 and 5234. Disputes among creditors are brought to court by a special proceeding pursuant to CPLR 5239 (*Wallace v Union Bank of Switzerland*, 289 AD2d 15 [1st Dept 2001]).

The court will treat this matter, pursuant to CPLR 5239, as a special proceeding, to determine adverse claims. This will bring all of the rivals to court, where the court, applying the

relevant statutes, decisional law and equitable principles will decide the priorities (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5239:1).

Accordingly, it is

ORDERED that the motion for contempt, and for related relief, is granted only to the extent that the petitioner is directed, within 20 days of the date of entry of this order, to serve and file a second amended petition naming as an additional respondent D.F. King & Co., Inc., and that the respondents are ordered, within 20 days of service upon them of the second amended petition, together with a copy of this order with notice of entry, to serve and file a responsive pleading; and it is further

ORDERED that the petitioner may thereafter re-notice the proceeding for submission on 20 days' notice; and it is further

ORDERED that the cross motion for sanctions is denied.

Dated: 6/21/10

ENTERED
J.S.C.
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JUN 23 2010
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