

<b>1515 Broadway Fee Owner LLC v Allstar Capital, Inc.</b>
2010 NY Slip Op 31629(U)
July 1, 2010
Supreme Court, New York County
Docket Number: 100567/10
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
*Justice*

PART 1A PART 16

1515 Broadway Fee Curor

INDEX NO.

100567/10

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

Allstar Capital, Inc.

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

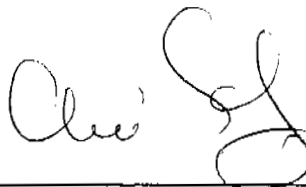
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is

granted in accordance with the accompanying memorandum decision. Petitioner is directed to settle a judgment on notice.

Dated: \_\_\_\_\_

JUL 01 2010



**ALICE SCHLESINGER** *J.S.C.*

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 16

-----X  
1515 BROADWAY FEE OWNER LLC,

Petitioner,

- against -

Index No. 100567/10  
Motion Seq. Nos. 001  
& 002

ALLSTAR CAPITAL, INC.,

Respondent.

-----X  
SCHLESINGER, J:

In this proceeding, the petitioner 1515 Broadway Fee Owner LLC, the owner of the premises located at 1515 Broadway, New York, NY (1515), is asking for a judgment pursuant to CPLR §5225(b) to invalidate a purported UCC-1 lien filed by respondent Allstar Capital, Inc. (Allstar) on the ground that the lien constitutes an actual and/or fraudulent conveyance pursuant to the Debtor and Creditor Law §§273, 273(a), 274 and/or 275. The dispute relates to a lease between 1515 Broadway as the owner and WURK-Times Square, LLC as the tenant (WURK) for two floors, eleven and twelve, at the premises. WURK was going to be contracting with other companies to use parts of those two floors for their own businesses.

Petitioner Allstar, a Nevada corporation, contends that it has a purported security interest in certain personal property belonging to WURK. It should be noted that Daniel Gordon is an officer of Allstar, whose shareholders are two family trusts. Gordon is also the principal at WURK, a New York corporation.

The above-referenced commercial lease was signed on September 30, 2008. By its terms, WURK would have free rent through April 15, 2009. However, as of May 1, 2009, WURK paid no rent at all to 1515 Broadway. Therefore, on July 20, 2009, 1515 commenced a summary nonpayment proceeding against WURK in Civil Court under index number 77016/09, seeking both a possessory and a money judgment.

On December 2, 2009, based on an admission by WURK, the tenant here, that it owed \$3,423,518.80, a stipulation was entered into between the parties, settling the proceeding for both a money and a possessory judgment. On December 11, 2009, 1515 transmitted a copy of this money judgment to the City Marshal and then served a notice of levy and sale against the furnishings found on the 11<sup>th</sup> and 12<sup>th</sup> floors. However, on December 21, 2009, counsel for Allstar wrote to the Marshal asserting that it was a secured creditor of WURK based on the filing of a UCC-1 lien on November 25, 2009.

Counsel for 1515 then wrote to Allstar's attorney on December 23, 2009, asking for proof of the legitimacy of this lien and further details about the alleged loan to WURK. In response, counsel for Allstar sent a copy of a note and a security agreement dated May 15, 2009 for \$350,000.00 between Allstar and WURK.

As stated earlier, the UCC filing was not made with the Secretary of State until November 25, 2009, more than six months after the loan was purportedly made. By that time, various subcontractors had filed mechanic's liens totaling over \$1.3 million dollars based on monies that WURK allegedly owed them. Finally, it should be noted that the summary proceeding was commenced in July 2009, and negotiations ended in a stipulation on December 2, 2009, one week after the UCC filing had been completed.

Petitioner argues that Allstar's actions here vis-a-vis its lien are marked by "badges of fraud". Through its various causes of action, all brought pursuant to the Debtor and Creditor Law, petitioner contends that the UCC filing is clearly a fraudulent conveyance that should be invalidated. Counsel points out that there has been no documentation showing any consideration for this alleged loan, that both Allstar and WURK are controlled by the same individual Daniel Gordon, that the filing occurred after the commencement of the

summary proceeding, and finally that this alleged loan was made to an insolvent corporation, WURK, which knew that it had no money and huge debts.

The opposition at first appeared to consist of an affidavit from Daniel Gordon, again the principal of both WURK and Allstar. The affidavit merely stated that a promissory note dated May 15, 2009 had been executed for \$350,000.00 with a security agreement in favor of Allstar and that the note says that upon default Allstar can take possession of the furnishings at the premises leased by WURK. In reply to this meaningless affidavit, counsel for petitioner asserted that the affidavit failed to address anything of a material nature and essentially conceded all the allegations. He pointed out again that there was no corroboration that any loan had actually been made.

At oral argument, counsel for Allstar brought to the attention of both the Court and counsel for petitioner that, in fact, it was not Mr. Gordon's affidavit which was opposing the petition, an affidavit that Mr. Gordon himself had written; rather, the opposition consisted of a Verified Answer, verified by Gordon, which had been filed by another attorney who had represented Allstar for a short period of time immediately after the petition was served. Although the Court was dubious and petitioner's lawyer was extremely unhappy, I did accept that the Answer was the opposition. I then gave petitioner 1515 an opportunity to respond to it.

It should be noted that after reviewing the petition and the original Gordon affidavit submitted on behalf of respondent, this Court was prepared to grant the relief sought in the petition. I made it clear in my interim decision of May 5, 2010, that no additional papers could be filed by Allstar. Despite that admonition, while this Court was away for ten days, Allstar's counsel brought an Order to Show Cause to a different justice, without attaching my interim decision, seeking permission to amend its answer pursuant to CPLR §3025(b).

What the amendment sought to do with still another Gordon affidavit was once again attempt to explain the \$350,000.00 loan. This time Mr. Gordon's recollection seems to have been refreshed by sworn testimony that he gave in a bankruptcy proceeding on May 6, 2010. As the story went this time, Citadel Corporation, a third corporation controlled by Gordon, allegedly did work for WURK for which WURK owed Citadel \$350,000.00. So according to Gordon, in May 2009 Gordon withdrew \$1,350,000.00 from his bank and paid it over to Citadel. How was this money allocated? Gordon states that he owed Citadel \$2 million dollars; this was a company he controlled and he was paying back \$1 million plus an additional \$350,000.00 to enable Allstar to pay off WURK's alleged debt to Citadel for the work that Citadel had supposedly done for WURK. It must be emphasized that there is no serious documentation of any of these claims, i.e., that work had actually been performed by Citadel for WURK, that WURK actually owed anything to Citadel, or that the money Allstar allegedly paid to Citadel was for the benefit of WURK.

Not surprisingly, I have strenuous opposition from petitioner to the proposed amendment. Counsel points out, and this Court readily agrees, that the amendment is without any discernable merit. All it consists of is Gordon's self-serving recollections with documentation of payment to Citadel attached. Therefore, the motion by Allstar for leave to serve an amended answer is denied.

Interestingly, in a final strategy, counsel for petitioner cross-moves to amend the petition to seek to pierce Allstar's corporate veil and hold Allstar responsible for the almost \$3.5 million judgment that 1515 holds against WURK based on the stipulation in the nonpayment proceeding. However, as pointed out in opposition and in a fourth affidavit from Gordon, the necessary parties were not joined, the proposed amended petition was

[\* 6]  
not attached, and finally, if this relief were to be entertained by the Court, then Allstar would be allowed to answer again. When I pointed out these deficiencies to petitioner's counsel, he decided to withdraw his cross-motion to amend the petition. Permission to withdraw 1515's cross-motion is granted.

Therefore, based on my denial of the motion by Allstar to amend its Answer, and because Gordon and Allstar have repeatedly failed to show that there was any fair consideration for the alleged \$350,000.00 loan to WURK that resulted in the UCC filing six months later, I am finding that Allstar has violated the sections of the Debtor and Creditor Law cited in the petition and that the alleged loan was a fraudulent conveyance entered into to frustrate a judgment creditor. Therefore, this Court is vacating the UCC-1 lien filed by Allstar.

Accordingly, it is hereby

ADJUDGED that the petition (sequence 001) is granted and the subject UCC-1 lien shall be vacated; and it is further

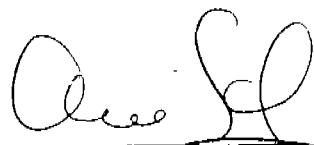
ORDERED that the motion by respondent to amend its answer (sequence 002) is denied; and it is further

ORDERED that the cross-motion by petitioner to amend the petition (sequence 002) is deemed withdrawn.

Petitioner is directed to settle a judgment on notice.

Dated: July 1, 2010

JUL 01 2010

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**