[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 021820/09

MOTION DATE: August 5, 2010
Motion Sequence # 002

STONERIDGE ORGANIZATION, INC.,

Plaintiff,

-against-

THE TOWN OF HEMPSTEAD, THE NASSAU HEALTH CARE CORPORATION and ROBERT BENRUBI, ESQ.,

Defendants,

-against-

THE BANK OF NEW YORK MELLON,

Defendant-Intervener,
Crossclaim Plaintiff,
Counterclaim Plaintiff,
and Third-Party Plaintiff,

-against-

RANJAN BATHEJA,

Third-Party Defendant.

The following papers read on this motion:

STONERIDGE ORGANIZATION, INC. **Index no. 021820/09**

Notice of Motion..... X
Affirmation in Opposition..... XX
Affirmation in Support..... X
Sur-Reply Affirmation in further Opposition..... X
Reply Affirmation..... X
Memorandum of Law..... XX

Motion pursuant to CPLR 5225, 5227 by non-party Chandra Prabha for an order: (1) declaring that she is the legal and rightful owner of proceeds in the sum of $2,865,052 currently held in escrow by defendant Nassau Health Care Corporation; and (2) directing that the Nassau Health Care Corporation pay over the proceeds to her is **denied**.

In November of 2004, plaintiff Stoneridge Organization, Inc., ["Stoneridge"] and the Town of Hempstead, entered into a "Contract for the Sale and Redevelopment of Land," pursuant to which Stoneridge was to renovate and/or construct an office building located at 380 Nassau Road, Roosevelt, New York; ["the 380 Nassau Road" or "Roosevelt Project"](Weinstein Aff., Exh., "1"; Collelouri Aff., ¶¶ 11-12).

In December of 2008, prior to the project's completion, Stoneridge executed an "Assignment and Assumption Agreement," under which Stoneridge agreed to assign all of its "rights, title and interest" in the original, 2004 contract to codefendant Nassau Health Care Corporation ["NHCC"] for the sum of $3,800,000.00 (Assignment Agreement,¶ 4, at 2; Exh., "C" to Mellon TPC/Ans ["Mellon TPC"]). The assignment and assumption agreement was signed by Stoneridge's then-president and sole shareholder, third-party defendant Ranjan Batheja ["Batheja"].

Commencing in 2004, and continuing through 2007, The Bank of New York Mellon ("Mellon") made unrelated building loans in excess of $27 million to various companies allegedly owned or controlled by Batheja, including an April, 2005 loan to Cobblestone Estates, Inc. ["Cobblestone"]. Notably, Batheja personally guaranteed the Cobblestone loan obligation (Weinstein Aff.,¶¶ 30-31 *see also*, Order of Bransten, J., dated August 17, 2009, at 3-5, issued in ***Bank of New York Mellon v. Cobblestone Estates and Ranjan Batheja, et. al.***, ___Misc3d___ [Supreme Court, New York County](Index Nos. 111251-08; 601156-08)["the Cobblestone actions"]).

The various Mellon loans were made to fund the construction of several projects throughout the New York Metropolitan area, including the Cobblestone residential housing

project located in Queens, New York (Weinstein Aff., ¶¶ 30-31; Mellon TPC, ¶¶ 42-46).

Non-party Chandra Prabha – a resident of New Delhi, India (Prabha Exh., "E") – claims to have loaned Batheja $519,733.00 in June of 2005, some two months after the Cobblestone/Mellon loan documents were executed (Collelouri Aff., ¶¶ 4-6; Exh., "E"). The Prabha loan is memorialized by a "Pledge and Security Agreement" dated June 30, 2005 (*see*, Agreement, "Recitals," ¶ C [Prabha Mot., Exh., "F"). The pledge agreement provides, *inter alia*, that the 2005 loan debt was based, in part, upon a prior debt evidenced by two previously-executed notes, both dated June 2003, bearing face amounts of $168,250.00 and $351,483.00 (Pledge Agreement, "Recitals," ¶ B). Significantly, neither of these prior notes have been annexed to Prabha's moving papers.

Pursuant to the 2005 pledge agreement, and as collateral for the alleged loan, Batheja granted Prabha a continuing, irrevocable security interest in his "right, title and interest" in all of Stoneridge's outstanding stock, including any and all rights "appurtenant thereto," as further detailed in the ensuing provisions of the agreement (*e.g.*, Agreement, "Recitals," ¶ C; "Pledge," ¶ 1[a], [b]; 2[d]).

The Pledge agreement – which mentions the Roosevelt project by name – identifies Batheja as the contact "pledgor" and sole shareholder of Stoneridge (Pledge Agreement, at 1). Subsequently, however, the Agreement states in partially bolded type that, in fact, the "Pledgor is a [New York] corporation" (Agreement, ¶ 2[a]), and also refers to Batheja on several occasions as a "mortgagor" – even though the Pledge agreement makes no express reference to a mortgage transaction or a mortgage-based security device (*e.g.*, Agreement, 1, "Pledge" ¶¶ a [I], [iii], [iv], d [vii])(Collelouri Aff., Exh., "F").

Prabha further claims that in 2007, some two years after the pledge agreement was executed, she and Batheja struck a new agreement by which, in substance, she became the owner of 90% of Stoneridge's outstanding stock (Collelouri Aff., Exh., "E"). More particularly, and pursuant to a "Stock Transfer/Purchase" agreement dated April 10, 2007, Prabha acquired the Stoneridge stock which had been pledged as security for her 2005 loan. In return, she agreed that the prior, 2005 loan in the sum of $519,000.00 would be "converted into the Purchase Price for this Stock Purchase Agreement", *i.e.*, Prabha effectively forgave the loan debt in exchange for her stock interest (Collelouri Aff., Exh., "E" [Stock Transfer Agreement, §2, ¶ 2.1, at 3 *see also*, § 1, ¶ 1.1[c]).

The 2007 transfer agreement again mentions the Roosevelt project, and in particular,

recites that the "Seller" – defined as Batheja personally – "does not have the Monetary funds to complete the Acquisition of the [Roosevelt] property * * *" and has also been unable to secure the required letter of credit and performance, mandated under the original, 2004 Town of Hempstead contract (Stock Transfer Agreement, § 1, ¶¶ 1[f]-[h], at 2).

The agreement states that Batheja "shall continue to act as Manager of the [Roosevelt] Property for completing the construction" and retain "responsibility for conducting and operating the day-to-day business of Stoneridge," (Stock Transfer Agreement, § 1, ¶¶ [I]-[k]; 1.1[a]), and recites that Prabha was to assist Batheja in obtaining the contract performance bond and letter of credit (Stock Transfer Agreement, § 1, ¶ 1.1[e], at 3).

Prabha's counsel contends that even prior to becoming a 90% shareholder of Stoneridge in June of 2007, Prabha had assisted Batheja with certain financing difficulties he was experiencing with the 380 Nassau Road Project. Later, Prabha "actively participated in the development and management" of Stoneridge (Collelouri Aff., ¶ 10).

However, at approximately the time the 2007 Prabha/Batheja stock transfer was completed, Cobblestone defaulted on its repayment obligations under the Mellon building loan. Batheja similarly defaulted on his personal guarantee of Cobblestone's outstanding debt (*see*, Cobblestone Action, Order of Bransten, J., dated August 17, 2009, at 6, 16; Mellon Cmplt. in Cobblestone Action, ¶¶ 4-14; 19-33).

Upon Cobblestone's default, Mellon commenced two, related actions in the Supreme Court, New York County alleging, *inter alia*, that: (1) Cobblestone and Batheja were in breach of the loan agreement since they had failed to repay the outstanding amounts (NY County Index No. 601156-08); and (2) that Batheja fraudulently transferred and diverted the Cobblestone loan proceeds for his own personal use and/or to pay for construction costs incurred in the 380 Nassau Road Project, thereby entitling Mellon to the imposition of a constructive trust (NY County Index No. 111251-08)(*see*, Order of Bransten, J., dated August 17, 2009, at 28).

Thereafter, in August of 2009, Justice Branstein granted summary judgment to Mellon as against Cobblestone and Batheja in Mellon's contract-based action. In September of 2009, Mellon entered judgment as against Batheja in the sum of $17,472,924.36 based on the Court's prior award of summary judgment (Weinstein Aff. Exh., "1" [*see*, Exh., "A" to Mellon TPC]; Mellon TPC, ¶¶ 43-44). Mellon advises that to date, the foregoing judgment

remains unsatisfied and unpaid (Mellon TPC, ¶ 44).

Significantly, after the foregoing summary judgment order was entered, Justice Bransten issued a separate order imposing sanctions on Batheja and his counsel in the respective sums $6,000.00 and $10,000.00. The sanction award was based on the Court's finding that, *inter alia*: (1) Batheja and his counsel submitted altered loan documents in an attempt to defeat Mellon's motion; and (2) that during oral argument on Mellon's summary judgment motion, Batheja made misleading statements which minimized his involvement in the Stoneridge/Nassau Road assignment agreement (*see*, Bransten Order of October 15, 2009, at 10-12; 18-19; *see also*, Bransten, J., dated Aug 17, 2009 at 25-26; Mellon TPC, ¶¶ 102-107).

In the interim, the closing on the subject, 380 Nassau Road Project assignment agreement was scheduled to be held on October 26, 2009 (Stoneridge Cmplt.,¶¶ 19-20). Prior thereto, NHCC informed Stoneridge that it intended to deduct at least $800,000.00 from any monies due Stoneridge based upon alleged construction deficiencies and repairs it contends it was required to make (Donoghue Main Aff., ¶¶ 5-9; Surr Reply Aff.,¶ 4; NHCC, Ans.,¶¶ 51-61 *see also*, Assignment, ¶ 5).

On or about October 24, 2009, Stoneridge commenced the present action for fraud and breach of contract. Plaintiff alleges, among other things, that NHCC was improperly attempting to deduct the above-referenced sum, from the amounts due and owing (Stoneridge Cmplt., ¶¶ 22-31; Mellon TPC, ¶¶ 57-58). At approximately the same time (*i.e.*, in October of 2009), counsel for Stoneridge moved by order to show cause for a stay of the October 26, 2009 closing and for additional relief prohibiting NHCC from deducting amounts from the contract sums allegedly due Stoneridge at the closing.

The Stoneridge application was ultimately resolved by Stipulation and Order dated October 26, 2009, pursuant to which, in sum: (1) the closing was to *proceed as scheduled; (2) NHCC would be permitted* to *deduct $616,608.84* from money due Stoneridge at closing; and (3) the remaining sums payable to Stoneridge – some $3.1 million – would be held in escrow by NHCC pending resolution of this action.

Notably, Mellon was also permitted to intervene in the within action so as to assert claims against Batheja deriving from, and based upon, Mellon's unsatisfied $17 million judgment (Weinstein Aff., ¶¶ 59-61 *see generally*, CPLR 5201).

After being accorded intervenor status, Mellon filed a third-party summons, verified answer/third-party complaint containing several affirmative defenses, a cross claim against NHCC, and various counterclaims against Stoneridge. Batheja was added as a third-party defendant.

Although Mellon's New York County judgment was obtained as against Batheja – not Stoneridge – Mellon contends that Batheja is the "alter ego" of, *inter alia*, Stoneridge and that Stoneridge is therefore personally answerable for Batheja's misconduct on a "reverse veil piercing" theory (*see,* ***Spinnell v. JP Morgan Chase Bank, N.A.***, 59 AD3d 361; ***State v. Easton***, 169 Misc.2d 282, 288-289 [Supreme Court, Albany County 1995] *see also,* ***Sweeney, Cohn, Stahl & Vaccaro v. Kane***, 6 AD3d 72, 75-76; ***Monteleone v. The Leverage Group***, ___F.Supp2d___, 2009 WL 249801 at 3 [E.D.N.Y. 2009]). Mellon alleges that Batheja exercised complete domination and control over Stoneridge (and various other entities), and then diverted the loan proceeds he received by, *inter alia*, transferring those proceeds among the corporate entities he dominated without regard to corporate formalities and/or exclusively for his own, personal benefit (Mellon TPC, ¶¶ 43-44, 51; Weinstein Aff., ¶¶ 27-28; 31-33, 45-46; 70-94).

More specifically, Mellon claims that Batheja improperly utilized the loan proceeds by drawing checks on various accounts to defray costs and expenses associated with non-loan projects – including various improper diversions to the 380 Nassau Road Project (Helt Aff., ¶¶ 3-5 [Mellon Exh., "2"]; Mellon TPC, ¶¶ 70-71; 83-94 *see also*, Mellon Exh., "3").

By notice of motion dated March 2010, non-party Prabha now moves for an order pursuant to CPLR 5225, 5227, declaring that she is the legal owner of escrowed proceeds in the sum of $2,865,052, currently held by defendant NHHC.

Preliminarily, although Prabha is not a party to the subject action, neither her notice of motion nor her principal moving papers expressly requests permission to intervene. "Regardless of whether intervention is sought as a matter of right or in the court's discretion, the proposed intervenor must make a motion on notice, thereby insuring judicial oversight and an opportunity for the original parties to be heard on the issue" (*Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B*, CPLR 1012). Nevertheless, the Court will construe Prabha's application as impliedly requesting leave to intervene (***Malankara Archdiocese of Syrian Orthodox Church in North America v. Thomas***, 33 AD3d 887, 889; CPLR 401, 1012).

Prabha's notice of motion and principal submissions rely on CPLR 5225, 5227 – two post-judgment enforcement devices contained in CPLR article 52, which generally governs the enforcement of money judgments (***Koehler v. Bank of Bermuda Ltd.***, 12 NY3d 533, 537-538 [2009]).

Pursuant to CPLR 5225[a], a judgment creditor may file a motion against a judgment debtor to compel turnover of assets, while CPLR 5222[b] is the applicable remedy when the property sought is not in the possession of the judgment debtor (***Koehler v. Bank of Bermuda Ltd.***, ***supra***, 12 NY3d at 537-538). To invoke CPLR 5222[b] and CPLR 5227, however, a judgment creditor must commence "a special proceeding against a garnishee who holds the assets" (***Koehler v. Bank of Bermuda Ltd.***, 12 NY3d 533, 537-538 [2009]; ***Signature Bank v. HSBC Bank USA, N.A.***, 67 AD3d 917; ***Gryphon Dom. VI, LLC v. APP Intl. Fin. Co. B.V.***, 41 AD3d 25, 31, 37 *see generally*, Siegel, New York Practice, § 510, *Delivery order or judgment*, at 866 [4th ed. 2005] *see also*, CPLR 5227).

In general, to succeed under either CPLR 5225 [a], or CPLR 522[b], a "judgment creditor" must first establish "that the judgment debtor is in possession or custody of money or other personal property in which he has an interest" (CPLR 5222[a]; ***Key Lease Corp. v. Manufacturers Hanover Trust Co.***, 117 AD2d 560, 563-3; ***Flame S.A. v. Primera Maritime (Hellas) Ltd.***, ___ F.Supp2d ___, 2010 WL 481075, at 3 [S.D.N.Y. 2010] *see also*, ***Beauvais v. Allegiance Securities, Inc.***, 942 F.2d 838, 840-841 [2nd Cir. 1991]; ***Dorchester Financial Securities v. Banco BRJ, S.A.***, ___ F.Supp2d ___, 2009 WL 5033954, at 2 [S.D.N.Y. 2009] *see*, ***Koehler v. Bank of Bermuda Ltd.***, ***supra***). Similarly, "[w]henever it is shown that some third person (garnishee) is 'indebted' to the judgment debtor, whether the debt is payable at present or will not become due until a later time, CPLR 5227 permits the judgment creditor to enforce the judgment against the debt" through commencement of a special proceeding "governed by Article 4 of the CPLR" (Siegel, *Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B*, CPLR 5227; CPLR 5225[b] *see*, ***Koehler v. Bank of Bermuda Ltd.***, ***supra***).

Here, however, Prabha is not a "judgment creditor" with respect to the escrowed funds or the entities currently named as parties to the action. Moreover, NHCC and Stoneridge are not judgment debtors relative to Prabha or the subject proceeds. Nor has Prabha commenced a special proceeding within the meaning of CPLR 5225[b]/5227 or CPLR Article 4. Rather, she is merely an individual who has asserted an unresolved claim to the Stoneridge contract proceeds, based on her alleged status as a Stonerigde shareholder

(*e.g.*, Collelouri [main] Aff.,¶ 33; Collelouri [July 29] Reply Aff.,¶¶ 6-8). Accordingly, Prabha's attempt to cast herself as a "judgment creditor" within the meaning of CPLR sections 5225, 5227, is misplaced.

Prabha's alternative reliance on CPLR 5239 is similarly lacking in merit. Pursuant to CPLR 5239 – raised by Prabha for the first time in reply – "any person" may commence a special proceeding against a judgment creditor or any other interested person, in order to resolve disputed rights in property (***Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA***, 100 AD2d 544, 546; ***Travelers Cas. and Sur. Company of America v. Target Mechanical Systems, Inc.***, ___Misc3d___, 2004 WL 3050798 at 2-3 [Supreme Court, Kings County 2004]; ***Pappas v. Freund***, 172 Misc.2d 466 [Supreme Court, Kings County 1997 *see also*, Siegel, *Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B*, CPLR 5239; Siegel, New York Practice, § 521 [4th ed. 2005]).

Although CPLR 5239 is indeed versatile and broadly worded (Siegel, *Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B*, CPLR 5239; Siegel, New York Practice, § 521 [4th ed. 2005), Prabha has not commenced a "special proceeding" in accord with the provisions of CPLR 5239 (*e.g.*, ***Buckeye Retirement Co., LLC, Ltd. v. Quattrocchi***, 67 AD3d 848 *cf.*, ***Norstar Bank Nat. Ass'n v. Davis***, ***supra***, 238 AD2d 892, 893). Even if she had, Prabha's current submissions still fail to demonstrate that she possesses a sufficient interest in the escrowed proceeds entitling her to utilize an article 52 enforcement procedure (*see,* CPLR 5225; ***Beauvais v. Allegiance Securities, Inc.***, ***supra***; ***Gabor v. Renaissance Associates***, 170 AD2d 390).

It is undisputed that Prabha is not a party to the contract with the Town of North Hempstead, and, if plaintiff prevails in the present action, the funds currently held in escrow would be payable in the first instance to Stoneridge. Prabha relies on her purported status as a majority shareholder of Stoneridge (*e.g.*, Collelouri [July 29] Reply Aff.,¶ 7-8).

It is settled, however, that a shareholder's ownership of stock in a corporation by itself does not create any individual rights to property owned by the corporation, since "the property interests of a shareholder and the corporation are distinct" (***5303 Realty Corp. v. O & Y Equity Corp.***, 64 NY2d 313, 323 [1984] *see also*, ***Matter of Fontana D'Oro Foods, Inc.***, 65 NY2d 886, 888 [1985]; ***Brock v. Poor***, 216 NY 387 [1915]; ***Power Test Petroleum Distributors, Inc. v. Baker-Tripi Realty Corp.***, 190 AD2d 845; ***First Nat. Bank & Trust Co. of Ellenville v. Hyman Novick Realty Corp.***, 68 AD2d 191).

Counsel's theory in reply, that Prabha possesses standing and/or entitlement to the proceeds because shareholders are permitted, in general, to commence derivative actions, is miscast (Collelouri [July 29] Reply Aff., ¶ 8). The instant application is not a derivative action, but merely an attempt by Prabha, in her individual capacity, to recover the funds exclusively for her own personal benefit (*see*, Collelouri [Main] Aff., ¶ 33). Counsel's supporting affirmation plainly confirms that Prabha is claiming entitlement to the proceeds in her individual capacity (Collelouri [main] Aff., ¶¶ 1, 29, 33, 36). Shareholders, however, are not entitled to individual recoveries in derivative actions, since they are suing exclusively on behalf of the corporation (*see generally,* ***Glenn v. Hoteltron Systems, Inc.***, 74 NY2d 386, 392 [1989]; ***Abrams v. Donati***, 66 NY2d 951, 953 [1985]; ***Wolff v. Wolff***, 67 NY2d 638, 641 [1986]; ***Breiterman v. Elmar Properties, Inc.***, 123 AD2d 735, 736).

Even assuming that Prabha's claims could be viewed as derivative in nature, and/or made on Stoneridge's behalf, Prabha has failed to show "that * * * [her] interests are not being adequately represented" by Stoneridge in the main action, which Stoneridge itself has commenced (***Breiterman v. Elmar Properties, Inc.***, ***supra***, 123 AD2d at 736; CPLR 1012[a][2], 1013). Indeed, Stoneridge is now pursuing its various claims of entitlement to the subject proceeds. Finally, the court notes that if plaintiff does not prevail in the main action, pursuant to the assignment agreement the proceeds would be payable to NHCC, in which Prabha claims no interest.

The Court has considered the remaining contentions advanced by non-party Chandra Prabha and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the motion by non-party Chandra Prabha for an order: (1) declaring that she is the legal and rightful owner of proceeds in the sum of $2,865,052 currently held in escrow by defendant Nassau Health Care Corporation; and (2) directing that the Nassau Health Care Corporation pay over the proceeds to her, is **denied**.

The foregoing constitutes the decision and order of the Court.

Dated 13 September 2010

Stephen A. Bucaria
J.S.C.