

Rosenstein v Kravetz Realty Group, LLC

2011 NY Slip Op 30867(U)

April 8, 2011

Supreme Court, New York County

Docket Number: 103684/2010

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 103684/2010

ROSENSTEIN, ALAN H.

vs

KRAVETZ REALTY GROUP, LLC

Sequence Number : 005

VACATE

CAC # 96

INDEX NO. _____

MOTION DATE 2/8/11

MOTION SEQ. NO. 005

MOTION CAL. NO. 96

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/8/11

APR 0 - 2011

[Signature]
BARBARA JAFFE J.S.C.

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 : PART 5

-----X
ALAN H. ROSENSTEIN,

Petitioner,

-against-

Index No. 103684/10

Motion Date: 2/8/10

Motion Seq. No.: 005

Calendar No.: 96

DECISION & ORDER

KRAVETZ REALTY GROUP, LLC,
EAST AVON-HRCF II, LLC,
and KRG-CB II, LLC

Respondents.

-----X
BARBARA JAFFE, JSC:

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FILED

APR 11 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

By notice of motion dated November 1, 2010, respondent East Avon-HRCF II, LLC (East Avon-HRCF II) moves pursuant to CPLR 5240 for an order vacating the restraining notice served on Cole, Schotz, Meisel, Forman & Leonard, PA (Cole Schotz), dated October 21, 2010. Petitioner Alan H. Rosenstein opposes.

I. UNDISPUTED FACTS AND PERTINENT PROCEDURAL BACKGROUND

East Avon-HRCF II was formed as a joint venture of HRCF-Avon, LLC (HRCF-Avon) and East Avon, LLC, for the purpose of developing and operating real estate properties in Avon, Colorado (Avon properties). The joint venture was managed by East Avon, LLC's owner through his entity Kravetz Realty Group LLC (Kravetz). (Affirmation of James T. Kim, Esq., (dated Nov. 1, 2010 [Kim Aff.]).

On November 24, 2008, East Avon-HRCF II and other parties sought, by order show cause, an order temporarily restraining East Avon, LLC and Kravetz from interfering with East Avon-HRCF II's management of the Avon properties, alleging that these parties had perpetrated a fraudulent scheme and misappropriated assets (East Avon action). (*Id.*). On November 25, 2008, another justice of this court signed the temporary restraining order. (*id.*, Exh. E), and on December 17, 2008, converted it to a preliminary restraining order (*id.*, Exh. F). By order dated October 26, 2010, the parties were directed to settle judgment. (Affidavit of Alan H. Rosenstein, dated Nov. 19, 2010 [Rosenstein Affid.], Exh. 2). As a result of this action, asset management fees due to East Avon, LLC were placed into an escrow account maintained by Cole Schotz pending final adjudication. (Kim Aff.).

On January 11, 2010, petitioner and respondents East Avon and KRG-CB II, LLC (KRG), participated in an arbitration hearing as to petitioner's entitlement to fees pursuant to a brokerage agreement. (Kim Aff., Exh. A). Respondent Kravetz did not appear and by decision dated March 2, 2010, Kravetz and East Avon-HRCF II were ordered to pay to petitioner \$324,573 plus interest, Kravetz and KRG were ordered to pay to petitioner \$243,200 plus interest, and all three respondents were severally ordered to pay to petitioner \$81,964.19, plus interest. (*Id.*, Exh. B). By decision and order dated June 28, 2010, I granted petitioner's motion pursuant to CPLR 7510 for an order confirming the award. (*Id.*, Exh. C).

On or about October 21, 2010, petitioner served a subpoena and restraining notice on Cole Schotz enjoining it from assigning or transferring any assets of respondents, including assets designated "HRCF Avon LLC Asset Mgmt Fee" and "East Avon LLC Asset Mgmt Fee." (*Id.*, Exh. D).

II. CONTENTIONS

East Avon-HRCF II argues that the restraining notice should be vacated because the funds are being held in escrow for East Avon, LLC and HRCF-Avon, non-parties to petitioner's action, that East Avon-HRCF II has no direct interest in the funds, and that if East Avon-HRCF II is awarded an interest in any of the escrowed funds, it may be required to turn it over to its secured creditors. (Kim Aff., Exh. G).

In opposition, petitioner argues that the monies are properly restrained, as East Avon-HRCF II is a plaintiff seeking damages in the East Avon action, and Cole Schotz has acknowledged that East Avon-HRCF II has a claim of entitlement to the funds being held in escrow. (Rosenstein Affid.).

III. ANALYSIS

Where a restraining notice is issued pursuant to CPLR 5222, "all property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any property specified in the notice then due and thereafter coming due to the judgment debtor or obligor, shall be subject to a restraining notice." A court may, on the motion of an interested party pursuant to CPLR 5240, modify or vacate a restraining notice.

East Avon-HRCF II is a plaintiff in the East Avon action, and it is undisputed that it may be awarded an interest in the settlement. (*Fiore v Oakwood Plaza Shopping Ctr.*, 178 AD2d 311 [1st Dept 1991], *lv denied* 80 NY2d 826 [1992]). This is sufficient under CPLR 5222 which requires only that the judgment debtor or obligor "is known or believed to have an interest" in the property. That the monies it may receive are to be distributed to another creditor does not negate

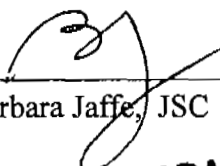
this interest. (See *Ray v Jama Productions, Inc.*, 74 AD2d 845 [2d Dept 1980], *lv denied* 29 NY2d 709 [restraining notice valid; judgment debtor has interest where monies are to be used to satisfy debts and expenses]; see also *ERA Mgmt., Inc. v Morrison Cohen Singer & Weinstein*, 199 AD2d 179 [1st Dept 1993] [accounts used to pay judgment debtor's personal expenses]). To the extent that East Avon-HRCF II seeks to restrain assets that are the property of other parties, it is unclear what right it has to seek such relief. Thus, the restraining order was properly noticed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to vacate the restraining notice is denied.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 8, 2011
New York, New York

APR 0 8 2011

FILED
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