

Rosenstein v Woods Oviatt Gilman, LLP

2011 NY Slip Op 32507(U)

September 19, 2011

Supreme Court, New York County

Docket Number: 105929/11

Judge: Barbara Jaffe

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SCANNED ON 9/22/2011

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

PRESENT: BARBARA JAFFE
Justice J.S.C.

PART 5

ROSENSTEIN, ALAN H.

INDEX NO.

105929/11

MOTION DATE

- v -

MOTION SEQ. NO.

001

WOODS OVIATT GILMAN, LLP

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for turnover

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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).

Dated: 9/19/11
SEP 19 2011

BARBARA JAFFE J.S.C.
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 : PART 5

-----X
 ALAN H. ROSENSTEIN,

Petitioner,

-against-

WOODS OVIATT GILMAN, LLP,

Respondent.

 BARBARA JAFFE, JSC:

For petitioner:
 Avram Solomon Turkel, Esq.
 Borstein & Sheinbaum
 420 Lexington Ave., Ste. 2920
 New York, NY 10170
 212-687-1600

For respondent:
 Woods Oviatt Gilman LLP
 700 Crossroads Bldg.
 2 State St.
 Rochester, NY 14614

For proposed intervenors:
 Leo V. Leyva, Esq.
 Cole Schotz *et al.*
 900 Third Ave., 16th Fl.
 New York, NY 10022-4728
 212-752-8000

Index No. 105929/11

Argued: 7/5/11
 Motion Seq. Nos.: 001,

DECISION & JUDGMENT

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).

By order to show cause and verified petition dated May 18, 2011, petitioner moves pursuant to CPLR 5225(b) for an order directing respondent to turn over and deliver to petitioner all money being held by respondent in escrow in a bank account at M&T Bank on behalf of Kravetz Realty Group, LLC (Kravetz) in order to satisfy a judgment against Kravetz and awarding petitioner attorney fees and costs. Respondent opposes.

By order to show cause dated June 29, 2011 and submitted on default, East Avon-HRCF II, LLC (East Avon) and HRCF-Avon, LLC (HRCF) move pursuant to CPLR 5225(b) for an order permitting them to intervene in the proceeding.

I. BACKGROUND

A. The instant proceeding

By decision and order dated June 28, 2010, I granted petitioner's application to confirm

an arbitration award rendered against Kravetz, East Avon, and KRG-CB II, LLC (KRG) (collectively, judgment debtors) and awarded plaintiff a judgment against them. (Verified Petition, dated May 18, 2011 [Pet.], Exh. A). On or about April 20, 2011, petitioner served an execution with notice to garnishee on respondent. (Affirmation of Avram Solomon Turkel, Esq., dated July 1, 2011 [Turkel Aff.], Exhs. 3).

Petitioner also served respondent with an information subpoena, and in its response, respondent affirmed that it was holding money in escrow received from or for the benefit of the judgment debtors in a trust account at M&T Bank. (Pet., Exh. B). Respondent stated that it was also holding \$26,000 in escrow for Kravetz pursuant to an order of another justice of this court, dated January 2009, which “by agreement of counsel was converted to an order *pendente lite* . . . [whereby respondent] agreed not to release the escrowed funds pending further order of the Court.” (*Id.*). Respondent further stated that upon information and belief, a Bank of America certificate of deposit in Kravetz’s name (Kravetz CD) was being held in an unknown amount “subject to a preliminary injunction dated December 17, 2008.” (*Id.*).

B. Other proceeding

In a separate proceeding commenced by HRCF-IV Butte LLC, KRG, HRCF, and East Avon against Brad Kuskin, Joya LLC, East Avon LLC, and Kravetz (HRCF action), and by order to show cause dated December 17, 2008, the other justice granted a preliminary restraining order prohibiting the defendants from taking any actions related to the Kravetz CD. (Pet., Exh. B).

And by order to show cause dated January 28, 2009, the same justice, pending a hearing on a motion by the plaintiffs for an order directing Kuskin to return \$26,000, temporarily restrained Kuskin from taking any action to transfer \$26,000 from the Kravetz account and

directed him to deposit \$26,000 in respondent's escrow account. (Affirmation of Donald W. O'Brien, Esq., dated June 17, 2011 [O'Brien Aff.], Exh. 1).

By decision and order dated May 3, 2011, HRCF and East Avon were awarded a default judgment against the defendants in the HRCF action and an inquest is impending. (Affirmation of Leo V. Leyva, Esq., dated June 22, 2011 [Leyva Aff.], Exh. F).

II. CONTENTIONS

Petitioner asserts that as respondent concedes that it possesses money in which Kravetz has an interest, respondent must turn it over to satisfy his judgment against Kravetz. (Pet.). Respondent maintains that as the funds sought by petitioner have been temporarily restrained, it may not release them to petitioner, and that as it does not deny dispute Kravetz's interest in the funds, petitioner is not entitled to attorney fees and costs. (O'Brien Aff.).

The proposed intervenors argue that it is premature to direct a turnover here as it has not yet been determined in the HRCF action whether the funds in respondent's possession rightfully belong to Kravetz. (Leyva Aff.).

In reply, petitioner contends that as he has a judgment against the judgment debtors, his rights as a judgment creditor are superior to the rights of any other potential creditors, especially as a judgment has not yet been entered in the HRCF action. (Turler Aff.).

III. ANALYSIS

Here, petitioner seeks only the turn over of monies held by respondent in Kravetz's name in the M&T Bank account. Thus, the fact that there exist restraining orders relating to the Kravetz CD and the \$26,000 escrow account is irrelevant, and in any event, respondent has not established that it, rather than Kuskin, has been restrained from taking any action related to the

\$26,000 in escrow.

Moreover, as petitioner has already received a judgment in his favor and served an execution, and as no judgment has been entered in the HRCF action, petitioner has priority over Kravetz's funds. (CPLR 5202[a] [where judgment debtor has delivered execution, its rights are superior to extent of judgment amount to rights of any transferee]; *see eg Seider v Koehler*, 177 AD2d 1050 [4th Dept 1991] [judgment creditors who were first to execute judgment entitled to satisfy judgment from proceeds of insurance policy]).

In any event, respondent's affirmation in support of its opposition is not considered as it is a party to the action. (CPLR 2106; *see Harris v Krauss*, 87 AD3d 469 [1st Dept 2011] [attorney could not rely on affirmation as he was defendant in action]; *Nazario v Ciafone*, 65 AD3d 1240 [2d Dept 2009] [as defendant was party in action, affirmation insufficient to oppose petition as not in admissible form]; *LaRusso v Katz*, 30 AD3d 240 [1st Dept 2006] [as attorney improperly submitted affirmation instead of affidavit in opposition to motion, court should have disregarded its contents]).

It is thus undisputed that respondent possesses money in which Kravetz has an interest. However, petitioner submits no authority in support of his application for attorney fees, and costs may not be assessed against a person or entity that does not dispute the judgment debtor's interest. (CPLR 5225[b]).

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is granted; it is further

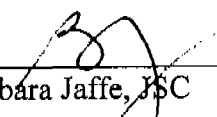
ADJUDGED and ORDERED, that respondent is directed, upon receipt of a certified copy

of this order and judgment, to turn over to the petitioner, Alan Rosenstein, funds being held in escrow in a bank account at M&T Bank on behalf of Kravetz Realty Group, LLC, judgment debtor, up to a maximum amount of \$667,958.81; it is further

ADJUDGED and ORDERED, that upon such turn-over of funds, respondent shall be discharged of all liability to the extent of payment made; and it is further

ORDERED, that the motion of East Avon-HRCF II, LLC and HRCF-Avon, LLC to intervene is granted.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 19, 2011
New York, New York

SEP 19 2011

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