

Stathis v Karas

2013 NY Slip Op 34024(U)

June 27, 2013

Supreme Court, Orange County

Docket Number: 4364/2007

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X

SAM STATHIS,

Plaintiff,

- against -

THE ESTATE OF DONALD KARAS, by and through its
Executors, NANCY BLOOM, Individually, CHARLES
KARAS, Individually, NATALIE KARAS, Individually,
NATALIE KARAS, as beneficiary of the MARITAL
TRUST UNDER THE WILL OF DONALD KARAS, THE
MARITAL TRUST UNDER THE WILL OF DONALD
KARAS, by and through its Trustees, NANCY BLOOM and
CHARLES KARAS and CHARLES KARAS, HOPE
ASSETS, LLC, and JOHN DOES 1-20,

Defendants.

-----X

THE ESTATE OF DONALD KARAS, by and through its
Executors, NANCY BLOOM and CHARLES KARAS,,

Plaintiff,

- against -

ARIES, LLC and CONNIE ANTZOULIS,

Defendants.

-----X

To commence the statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised
to serve a copy of this order, with
notice of entry, upon all parties.

Index No. 4364/2007

DECISION AND ORDER

Motion Dates: April 1, 2013, and
April 22, 2013

The following papers numbered 1 to 9 were read and considered on: (1) a motion by Plaintiff, pursuant to CPLR §§ 5225, 5236 and 5240, to, *inter alia*, compel the turnover of assets to satisfy his judgment; and (2) a cross-motion by Defendants, pursuant to CPLR §§5240 and 5519 to stay enforcement of the Judgment pending determination of an appeal, and to modify a constructive trust to allow the use of cash assets therein to pay certain litigation expenses.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied; and it is further,

ORDERED, that the branch of the cross motion which is to stay enforcement of the judgment pending determination of an appeal is granted to the extent and upon the conditions set forth herein, and that the cross motion is otherwise denied.

Introduction

Plaintiff, Sam Stathis, commenced this action to recover monetary damages allegedly sustained from, and arising out of, a Joint Venture embarked upon between Plaintiff, Donald Karas (now deceased) and Karas' Estate. After a trial, the jury rendered a verdict in which it: (1) sustained Plaintiff's breach of contract claim and awarded him compensatory damages of \$785,000.00; (2) sustained Plaintiff's breach of fiduciary duty claim, but awarded no damages; (3) sustained Plaintiff's fraud claim, but awarded no damages; (4) sustained Plaintiff's tortious interference with contractual or economic rights claim, but awarded no damages; and (5) sustained Plaintiff's conversion claim and awarded compensatory damages of \$602,500.00.

By Order dated July 23, 2012, this court, upon a post-verdict motion by Defendants, pursuant to CPLR §4404 (a), (1) sustained the jury's findings as to liability and damages on Plaintiff's breach of contract claim; and (2) sustained the jury's finding as to liability on Plaintiff's conversion claim, but reduced the damages to \$50,000.00.

By Judgment dated November 13, 2012, Plaintiff was awarded damages in the amount of \$1,397,348.15. The Judgment imposed a constructive trust on the assets of the Defendant Estate.

Plaintiff now moves to enforce the Judgment.

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In response, Defendants cross move to not only stay enforcement of the Judgment, pending their appeal, but to modify the constructive trust to allow them the use of cash assets of the Estate to pay litigation expenses. The requested stay is granted to the extent and upon the conditions set forth herein.

Factual/Procedural Background

Plaintiff moves for an order enforcing the judgment *supra* by compelling Defendants to pay to him all liquid assets in the estate and, if insufficient, to liquidate non-liquid assets sufficient to satisfy the judgment.

Plaintiff asserts that it is not disputed that the Defendant Estate has assets worth approximately \$3.7 million, to wit: almost \$3 million in property; almost \$450,000.00 in stocks and bonds; and almost \$320,000.000 in mortgages, notes and cash. These assets, he notes, which are subject to the constructive trust imposed by the Judgment *supra*, are more than sufficient to pay the same. Further, he contends, pursuant to CPLR §5225, the court may order the Estate to “turnover” these assets to him. Thus, Plaintiff argues, the court should “unlock” the constructive trust and order the Estate assets turned-over to him, to the extent that they are liquid. To the extent they are not, the court should order the asserts “turned over to a designated party for sale.”

Defendants cross move to stay enforcement of the Judgment pending determination of an appeal or, alternatively, for an order fixing an undertaking and/or confirming that the annexed undertaking satisfies CPLR §§5519(a)(2) and 2503. Defendants further request that the court to modify the constructive trust [in effect invade the corpus on a limited basis] to permit them to use cash assets of the Estate to pay the costs and fees of the appeal.

In so moving, Defendants note that this case has been pending for six years, that Donald

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Karas has been dead for eight years and that the initial Aries letter agreement was signed almost sixteen years ago. Thus, they argue, any “small incremental additional delay” that will be occasioned by a stay pending determination of an appeal will be neither significant nor prejudicial to Plaintiff. Indeed, they note, it took Plaintiff four months to submit a proposed Order and Judgment after the issuance of the July 23, 2012, order *supra* modifying the verdict. Moreover, Defendants note, there is no possibility that Plaintiff will be unable to collect on his Judgment at the conclusion of the appeal, should it prove unsuccessful. Rather, the assets of the Estate are subject to the constructive trust *supra*, and it is not disputed that the value of the same is more than sufficient to satisfy the judgment. Defendants further note that the most valuable asset of the Estate is its real property. Indeed, according to Plaintiff, there is dolomite and/or shale in the property worth at least \$5.5 million. Defendants assert that they have and will continue to pay all expenses for such property, including maintenance and taxes, and have and will maintain insurance on the property. In addition, Defendants argue, title to some of the property is subject to a further *de facto* restraint, to wit: All property formerly held by Aries, LLC continues to be nominally held by Aries, LLC, which was dissolved without authorization. Thus, unless and until Aries, LCC is reinstated, that property is, in effect, restrained from alienation. Defendants argue that denying them a stay will compel the sale of the real property, which, if the Judgment is reversed or modified, will result in a waste of time and expense, and will possibly subject them to irreparable harm if the property is irretrievably lost. By contrast, they argue, if a stay is granted, Plaintiff will suffer no harm, as the Judgment is secured and he is earning interest on his award. Moreover, they note, the property is currently for sale and, if sold for greater than the Judgment amount, the balance should go to Defendants. Otherwise, they note, Plaintiff has no right to obtain possession of the real property. Rather, he is only entitled to

compel the sale of the property by executing on the Judgment. Indeed, they note, by its terms, CPLR §5225 applies to money and personal property only. Thus, the real property in the Estate is not subject to a turnover order. Moreover, Defendants argue, upon the filing of an undertaking, they are entitled to an automatic stay of the Judgment, pursuant to CPLR §5519(a)(6), which concerns judgments and orders that direct the conveyance or delivery of real property. Here, they assert, the constructive trust *supra* and the appended surety affidavits are sufficient to satisfy the requirement of an undertaking. If not, they argue, the court should set the amount of an undertaking. Finally, Defendants assert, they have used personal funds, not estate assets, to pay for transcripts of the trial, and they intend on diligently prosecuting their appeal, which is already filed. Thus, Defendants argue, the court should modify the constructive trust to allow them to use the \$51,923.31 in cash held in the Estate's bank account to pay the costs and fees of the appeal. Defendants note that Plaintiff filed a cross appeal, which means that he is responsible for one-half of the cost of the appellate record. Defendants assert that, subject to later reapportionment, they will pay all of the whole cost of the appellate record if Plaintiff will consent to release the \$51,923.31 in cash held in the Estate's bank account.

In further support of their cross motion, Defendants proffer an "Affidavit of Surety" from Defendant Nancy Markoff (Bloom). Markoff notes that she is a trustee of the trust which holds the property Plaintiff seeks to have turned-over. She avers that the property consists of four parcels of undeveloped land totaling approximately 43 acres assessed at \$660,700.00. Markoff avers that there are no delinquent or outstanding taxes on the property, and that it is insured. Finally, she asserts, according to an appraisal submitted at trial, the value of the property is \$2,905,000.00.

Defendants also proffer an Affidavit of Surety from Defendant Charles Karas to the same

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effect.

In opposition to the cross motion, Plaintiff argues that the court's authority to issue a turnover order extends to real property. Here, he notes, the main asset of the Estate is real property, none of which is "homestead" property or subject to any other exemption under article 52 of the CPLR. Thus, he argues, the court may order the sale of the property to satisfy the Judgment. Indeed, he asserts, a turnover proceeding is particularly appropriate where, as here, there has been fraud. Plaintiff argues that the affidavits of Markoff and Karas *supra* are valueless because they did not offer any statement of net worth, and therefore, in effect, pledged nothing. Plaintiff asserts that a surety must pledge property worth at least the value of the judgment. Here, he notes, Markoff and Karas are, in effect, offering to do nothing more than pledge property already subject to the constructive trust *supra*. In addition, he notes, Karas is not even a resident of this state, which is a requirement for a surety, but lives in Connecticut. Plaintiff argues that Defendants are not entitled to an automatic stay pending appeal, pursuant to CPLR §5519(a)(6), because that section applies only to orders and judgments which direct property to be delivered or conveyed, which is not the case here.

Discussion/Legal Analysis

In relevant part, Article 52 of the CPLR provides that a money judgment may be enforced against "any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment" *CPLR § 5201(b)*. Exempt personal property includes, *inter alia*, religious texts, family pictures and portraits, etc. *CPLR § 5205*. Exempt real property includes, *inter alia*, qualified homestead properties. *CPLR § 5206*. Depending on the nature of the property and

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the person holding the same, enforcement may be accomplished in a variety of ways.

Here, Plaintiff seeks to enforce his judgment by obtaining a so-called “turnover” order pursuant to CPLR §5225(a). That section provides that, if a judgment debtor is in possession or custody of “money or other personal property” in which he or she has an interest, the judgment creditor may make a motion on notice seeking an order directing the judgment debtor to pay so much of the money as is sufficient to satisfy the judgment and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. However, as correctly noted by Defendants, this section does not apply to real property, which is the main asset of the Estate. *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 A.D.3d 25, 836 N.Y.S.2d 4 [1stDept. 2007]. Further, as also correctly noted by Defendants, Plaintiff, in any event, would not be entitled to a “turnover” of the real property in the Estate. Rather, he would only be entitled to compel the sale of same to the extent required to satisfy his Judgment. This could be accomplished by obtaining a court order appointing a receiver pursuant to CPLR §5228, or without a court order, pursuant to CPLR §5230. Thus, any turnover order issued in this case would apply only to certain Estate assets (*e.g.*, the stocks and bonds, and mortgages, notes, cash, etc.). However, as discussed *infra*, a stay of execution of the judgment pending determination of an appeal is warranted. Thus, Plaintiff’s motion is denied.

Initially, it is noted, Defendants are entitled to an automatic stay of the Judgment, although not under the subsection cited. Pursuant to CPLR §5519(a)(3), a party may obtain an automatic stay of a Judgment for a sum of money only by serving the other party with a notice of appeal and filing an undertaking in the amount of the judgment.

Here, although Defendants have served Plaintiff with a notice of appeal, they have not filed

such an undertaking (*see* Article 25 of the CPLR). However, on the facts presented, the filing of an undertaking is not ordered. Rather, the court exercises its discretionary authority pursuant to CPLR §5519(c) to “vacate, limit or modify” an automatic stay as follows:

The purpose of an undertaking is at least two fold. It protects the judgment creditor by assuring payment of the judgment to the extent an appeal is unsuccessful, and it protects the judgment debtor by assuring that any victory on appeal will not be rendered meaningless by the interim enforcement of the judgment by a judgment creditor who subsequently becomes unable to provide reimbursement. *Robert Stigwood Organisation, Inc. v. Devon Corp.*, 91 Misc.2d 723, 398 N.Y.S.2d 463 (N.Y.Sup. 1977); *Book 7A, McKinney’s Consolidated Laws of NY, CPLR, Siegel Prac. Commentaries, C5519:1*. Here, it is not disputed that the assets of the Estate are more than sufficient to pay the judgment. Further, such assets are currently subject to a constructive trust. Thus, rather than ordering Defendants to file an undertaking in the amount of the judgment, the court orders as follows: Absent further order of the court, the constructive trust is to remain in place pending determination of the appeal. During that period, Defendants are ordered to pay all expenses related to the real property (*e.g.*, any required maintenance, real estate taxes, etc.) and to keep the property insured. Save and except for the aforementioned authorized payments and disbursements, Defendants are prohibited and restrained from withdrawing, invading, expending and/or dissipating any of the trust assets, such prohibition to apply to both the corpus and/or any income derived therefrom.

In light of the holding *supra*, that branch of Defendants’ motion which is for an order granting a discretionary stay of the judgment pending appeal is denied as academic.

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Finally, that branch of Defendants' motion which is to invade the constructive trust to the extent of removing cash deposits to pay litigation expenses is denied.

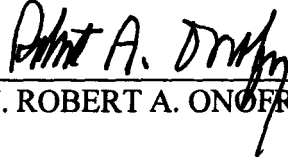
Accordingly, for the reasons stated herein, it is hereby,
ORDERED, that the motion is denied; and it is further,

ORDERED, that the branch of the cross motion which is to stay enforcement of the judgment pending determination of an appeal is granted to the extent and upon the conditions set forth herein, and the cross motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: June 27, 2013
Goshen, New York

ENTER


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