

Rhein v NYC 36th LLC
2013 NY Slip Op 34196(U)
March 4, 2013
Supreme Court, New York County
Docket Number: 109862/2011
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

ANN RHEIN,

Plaintiff,

- against -

NYC 36th LLC,

Defendant.

Index No.
109862/2011

FILED

MAR 07 2013

DECISION
and ORDER

Mot. Seq. 05
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Plaintiff Ann Rhein commenced this action by way of summons and notice of motion in lieu of complaint on August 25, 2011. This is an action by plaintiff to enforce a written promissory note executed by defendant NYC 36th LLC on April 12, 2010 in the amount of \$50,000 ("the Promissory Note"). The Promissory Note was executed by Damian Distasio, defendant's manager, on behalf of the defendant, and was signed by plaintiff. By Decision and Order dated June 19, 2012, the Court granted Plaintiff's motion for summary judgment in the sum of \$50,000, together with interest at the rate of 9% per annum from the date of August 25, 2011

Plaintiff thereafter obtained a money judgment in the amount of \$54,313.28 ("the Judgment") against Defendant.

Plaintiff now moves by way of Order to Show Cause for an Order:

(a) pursuant to Judiciary Law 753 and/or CPLR 5210, adjudging Judgment Debtor in civil contempt of court based on its failure to comply with a duly served deposition subpoena with restraining notice and information subpoena, and fining Judgment Debtor in an amount to be determined by the Court;

(b) pursuant to Judiciary Law 753 and/or CPLR 5210, adjudging Mr. Distasio in civil contempt of court based on its failure to comply with a duly served deposition subpoena with restraining notice and information subpoena, and fining Mr. Distasio in an amount to be determined by the Court;

[* 2]

(c) appointing a receiver to marshal and administer the sale, assignment and/or transfer of any non-exempt assets of Judgment Debtor, including, but not limited to its nightclub known as District 36; and

(d) directing Judgment Debtor to deliver, to the appointed receiver, all cash receipts, income and assets of Judgment Debtor, up to the Judgment amount, along with an accounting thereof.

No opposition has been submitted.

Plaintiff previously moved by way of Order to Show Cause to appoint a receiver, and the motion was denied by Decision and Order dated July 17, 2012. The Order stated that "Movant has frozen bank accounts but has not deposed judgment debtor or issued subpoenas for tax records and has not exhausted tax efforts to collect this judgment."

Plaintiff states that this renewed application is based (i) on its subsequent efforts to exhaust other avenues to enforce the Judgment and (ii) recently obtained information suggesting that Judgment Debtor and Mr. DiStasio are actively trying to sell, assign and/or transfer Judgment Debtors assets in direct violation of previously served restraining notices.

Plaintiff served a deposition notice with restraining notice and information subpoena, dated June 27, 2012, on Judgment Debtor. The notice barred Judgment Debtor from selling, assigning, transferring and/or interfering with property in which it has an interest, directed Judgment Debtor to produce a representative for deposition and documents. Plaintiff provides a copy of the notice and information subpoena, with affidavits of service.

Plaintiff states that, in violation of the notice, it has learned that Judgment Debtor is actively trying to sell, assign, and/or transfer its assets. In support, Plaintiff provides a copy of two online articles.

Plaintiff states that despite its repeated demands, Judgment Debtor has failed and refused to produce a representative for a deposition or any documents in response to the demands in the deposition subpoena or any response to the information subpoena.

"To sustain a finding of civil contempt based on alleged violation of a court

[* 3]

order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate” (*Gryphon Dom. VI, LLC v. APP Intl. Fin. Co.*, 58 A.D.3d 498, 499 [1st Dept. 2009], citing *Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 240 [1987]). The court must express by clear and convincing evidence that the alleged contemnors actions were calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of a party to a civil proceeding. (See, *Clinton Corner HDFC v. Lavergne*, 279 AD2d 339 [1st Dept 1985]).

Upon motion by a judgment creditor, the court may appoint a receiver to manage or sell property in which the judgment debtor has an interest for the purpose of satisfying an outstanding judgment. CPLR 5228(a). See *Chlopecki v. Chlopecki*, 296 A.D. 2d 650 (3d Dept 2001); Siegel, *New York Practice 3rd*, Section 512, 835-36. Significantly, in determining whether the appointment of a receiver constitutes a provident exercise of discretion, “courts have considered the ‘alternative remedies available to the creditor * * *; [and] (2) the degree to which receivership will increase the likelihood of satisfaction* * *.” *Chlopecki v. Chlopecki, supra* at 641, quoting from, *United States v. Zitron*, 1990 WL 13278 (S.D.N.Y.). It is settled that “[t]he appointment of a receiver pursuant to CPLR 5228 (subd. [a]), is entirely a matter of discretion.” *Drucker v. Drucker*, 53 Misc.2d 446, 447, 278 N.Y.S.2d 645 (Sup.Ct., Queens Co.1967).

The Court directs that a hearing to be held, upon notice to Defendant and Mr. DiStasio, at which time Plaintiff will be afforded the opportunity to present evidence in admissible form that Defendant and Mr. Damien DiStasio are attempting to sell, assign, transfer and/or interfere with property in which Plaintiff has an interest.

Wherefore, it is hereby

ORDERED that Plaintiff serve a copy of this order with notice of entry upon Defendant and Damien Distasio; and it is further,

ORDERED that the parties are to appear for a hearing on April 16, 2013 at 2:00 p.m. in room 327 of 80 Centre Street, New York, NY.

DATED: 3/4/13



A handwritten signature in black ink, appearing to read 'Eileen A. Rakower', is written over a horizontal line.

EILEEN A. RAKOWER, J.S.C.

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