

<b>Emerita Urban Renewal, LLC v NJ Court Servs. LLC</b>
2014 NY Slip Op 32775(U)
October 23, 2014
Supreme Court, New York County
Docket Number: 158019/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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EMERITA URBAN RENEWAL, LLC,

Index No.: 158019/2014

Plaintiff,

Motion Seq. No. 001

-against-

NJ COURT SERVICES LLC and JAY ITKOWITZ,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to enforce a domesticated New Jersey judgment in favor of plaintiff Emerita Urban Renewal, LLC (“plaintiff”), defendant NJ Court Services LLC (“NJ Court Services”) and its member, defendant Jay Itkowitz (“Itkowitz”) move pursuant to CPLR 2201, 5404(b) and/or 5519(c) for an order granting a stay of the enforcement of said judgment without the requirement of posting a bond.

*Factual Background*

On May 27, 2014, the Superior Court of New Jersey granted summary judgment in plaintiff’s favor against defendants, jointly and severally, for \$1,911,877.12 (the “New Jersey Judgment”) for rent arrears pursuant to a commercial lease between plaintiff’s predecessor and NJ Court Services (the “Lease”). The Lease was personally guaranteed by Itkowitz.<sup>1</sup>

In support of their application for a stay, defendants contend that under the applicable section of Article 54 of the CPLR, that is, CPLR 5404(b), the court may stay the enforcement of

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<sup>1</sup> The Lease was initially entered into between NJ Court Services and 744 Elroy Investors, LLC (“744 Elroy”). During the pendency of the New Jersey action, plaintiff purchased the subject building where the leased premises was located and was assigned the Lease.

the judgement herein, without the requirement of a bond and/or undertaking.<sup>2</sup> Further, CPLR 5519(c) provides an alternative ground for a stay of the judgement without the posting of any bond pending the appeal. Under this section, the court must consider the merit or lack of merit of the appeal, the harm that might result if the stay is denied, and the potential prejudice if the stay is granted.

Defendants contend that the appeal is meritorious and will likely result in a vacatur of the judgment. On appeal, defendants argue that the Trial Court erred in finding an absence of an issue of fact concerning the rent amount due, and in declining to preclude plaintiff's claims on various grounds including waiver, estoppel, laches, and unclean hands.

Defendants claim that they will suffer hardship if the stay is not granted. The information subpoenas served upon defendants containing 25 document demands, are lengthy and oppressive, will lead to further motion practice, and are overburdensome to complete. And, Itkowitz will suffer harm if a stay is not granted, as the amount of the judgment is overwhelming and unexpected.

It is also argued that plaintiff will not suffer any prejudice from the stay because any stay would be short. Defendants filed their briefs ahead of schedule, and there is no danger that Itkowitz is going to leave the state, as he has significant family and work ties here. Further, plaintiff did not move expeditiously to domesticate the New Jersey Judgment, but waited almost three months to do so.

In opposition, plaintiff argues that New Jersey Rule of the Court 2.9-5(a), in conjunction

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<sup>2</sup> Although defendants cite to CPLR 2201, they concede that CPLR 5404 is "more appropriate" and do not assert any arguments pursuant to CPLR 2201. Therefore, the Court does not address this section further.

with 2.9-5(b), requires a bond to be posted during any stay of a judgment pending an appeal, and thus, defendants must pose a bond pursuant to CPLR 5404(a).<sup>3</sup> Further, defendants failed to move for a stay before the Court which entered the judgment as required under 2.9-5(b).

Additionally, defendants' reliance on caselaw holding that a party may be relieved from posting a bond under CPLR 5404(b) is misplaced, because defendants do not attack the circumstances of the manner in which the New Jersey Judgment was obtained, but only its validity. And, the actions of defendants have delayed the appeal, as opposed to the expeditious appeal appearing in the caselaw applying CPLR 5404(b).

Even if such caselaw applied, defendants' appeal lacks merit, and, defendants' appeal is currently at risk of dismissal because of deficiencies in their brief and appendix.

Further, plaintiff would be harmed if the defendants' motion is granted in that there is a risk that defendants will dispose of their assets prior to enforcement of the Judgment. Itkowitz never states that he will not transfer any assets to defeat the Judgment, and the New Jersey Court granted summary judgment in plaintiff's favor after finding that although defendants received rents, they failed to tender payments to plaintiff. Therefore, since defendants collected rent and must have disbursed its rental income without paying plaintiff, plaintiff should not be placed in such peril again. Without the posting of a bond, there is no security that plaintiff will be able to collect on the New Jersey Judgment. Nor do defendants allege any harm from posting security. In the alternative, defendants should be precluded from disbursing or transferring any funds except in the ordinary course of business.

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<sup>3</sup> As plaintiffs did not seek a stay under this specific subsection, and states that this subsection is "not applicable," (Memorandum of Law, p. 8), the Court does not address defendants' argument in this regard further.

And, defendants' alleged harm in the absence of a stay is speculative. It is unreasonable for an attorney such as Itkowitz, familiar with real estate, would not understand his obligation to pay rent under the Lease. Nor do defendants allege any harm from posting security.

Moreover, there should be no limitation to post judgment document discovery.

In reply, defendants maintain that the deficiencies were caused by the appellate printing company they hired, and that such deficiencies were corrected.

And, CPLR commentary initially cited by defendants support the position that a stay may be imposed without the posting of security. According to such commentary, if there is any doubt "as to whether the court has the power to grant a stay without security" under CPLR 5404(a), the court "would seem" to have the discretionary power to issue the stay in such an instance under CPLR 5404(b), "by analogy to the stay without security authorized by CPLR 5519(c)." Such commentary should be given greater weight in light of the absence of any caselaw directly on point. Plaintiff, a business created to purchase property in receivership, will not suffer the types of hardships that warrant the posting of a bond.

#### *Discussion*

CPLR 5404(b) provides for a stay "Based upon other grounds" under the following circumstances:

If the judgment debtor shows the supreme court any ground upon which enforcement of a judgment of the supreme court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, *upon requiring the same security for satisfaction of the judgment which is required in this state.* (Emphasis added).

"CPLR 5404(b) permits the court to stay enforcement of a properly docketed foreign judgment on equitable grounds without much further explanation required (*Evoy v Amandio* (34

Misc 3d 410, 932 NYS2d 874 [Supreme Court, New York County, 2011]; *citing Pickwick Intern., Inc. v Tomato Music Co., Ltd.*, 119 Misc 2d 227, 232, 462 NYS2d 781 [Supreme Court, Kings County 1983] (granting a discretionary stay based on “sufficient grounds to warrant relief under CPLR 5404 (subd. [b])” without requiring debtor to post bond pending the appeal in the foreign state) and CPLR 5519(c)).

CPLR 5519(c), also relied upon by defendants, provides:

The court . . . of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b) . . . .

As “Siegel, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C5519:4) explains ‘In considering whether to grant a stay under subdivision (c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party’” (*Navy Yard Housing Development Fund, Inc. v Carr*, Not Reported in NYS2d, 2002 WL 1174711 [N.Y. City Civ. Ct. 2002]).

It is noted that defendants have not delayed the litigation between the parties. The record indicates that defendants filed their notice of appeal on June 6, 2014 less than two weeks after the New Jersey Judgment was entered, but could not proceed until the New Jersey Court entered a scheduling order on July 29, 2014. Further, while defendants' brief was due on September 12, 2014, defendants filed their brief ahead of time on August 29, 2014. And, defendants have rectified the alleged deficiencies in the appellate filings. However, the crux of the motion is whether security under the circumstances herein are required under New York Law.

Defendants' reliance on *Pickwick* for the proposition that the Court need not require the

posting of security in granting a stay, is misplaced.

In *Pickwick Intern., Inc. v Tomato Music Co., Ltd.* (119 Misc 2d 227, 462 NYS2d 781 [Supreme Court, Kings County 1983]), a Minnesota trial court entered a money judgment against the defendants based on, *inter alia*, plaintiff's attorney's *ex parte* conversation with the Court, and without the defendants appearing on the hearing date. Upon defendants' motion, the trial court vacated the judgment on condition that defendants post a bond for a certain amount. Instead of posting bond, defendant filed a notice of appeal of the judgment and sought a stay of enforcement of the judgement from the appellate court without the necessity of posting bond. The appellate court denied defendants' request for the stay. After the Minnesota judgment was domesticated in New York, defendants moved to stay the enforcement proceedings under CPLR 5404(a) and (b). The New York noted that the Minnesota judgment was not issued on default and was thus a "bona fide" foreign judgment enforceable in this state. Further, the Court noted that CPLR 5404(a) was "headed 'Based upon security in foreign jurisdiction' and CPLR 5404(b) is headed 'Based upon the other grounds,'" and as such, "the appropriate construction would allow a court to determine eligibility under subdivision (b) whether or not a party meets the eligibility requirements (to wit, furnishing a bond) under subdivision (a)." The Court held that the fact that the foreign jurisdiction requires a bond, did not preclude relief under CPLR 5404(b), and since the defendants "raised sufficient grounds to warrant relief under CPLR 5404(b), *without attacking the validity of the underlying Minnesota judgment*, the Court granted a stay and "dispense[d] with the posting of any bond pending the outcome of the appeal in Minnesota." (Emphasis added).

As pointed out in *Evoy v. Amandio (supra)*, *Pickwick* was the "only one case in which a

New York court issued a stay of a proceeding to enforce a foreign judgment while an appeal was pending in the foreign state without requiring the debtor to post security.”

Thus, in *Evoy*, the Court (Supreme Court, New York County) declined to follow *Pickwick*, noting that “the Illinois judgments [in *Evoy*] were entered . . . against an apparently culpable party.” In distinguishing *Pickwick*, the *Evoy* Court noted that defendant was found by the Illinois Court to have

engaged in a course of conduct in which he has made the litigation difficult and contentious,” “tendered false and fraudulent documents throughout discovery,” “tendered false and fraudulent tax returns to counsel for Wendy [the plaintiff] with the intent that Wendy would rely on the same,” and “failed to supply any accurate personal or corporate tax returns.” Then . . . the court noted that defendant “had the opportunity to be present and be heard [prior to issuance of the judgments] and chose to not appear.”

In conclusion, the *Evoy* Court held that defendant's “dilatory tactics,” “general bad faith identified by the Illinois court” and failure to seek a stay from the Illinois court, did not merit a stay of enforcement pursuant to CPLR 5404(b), especially where defendant had “chosen to forgo available remedies in Illinois.” Nonetheless, the *Evoy* Court stayed plaintiff's enforcement action only for thirty (30) days to permit defendant to either file security or obtain a stay in Illinois.

Here, unlike the defendants in *Pickwick*, defendants herein attack the validity and merits of the New Jersey Judgment. Defendants argue on appeal that the plaintiff's affidavit in support of its summary judgment motion was not based on personal knowledge, but on “information and belief,” and records provided by a third party. The numerous charges were not based on personal knowledge, or justified by the lease, and differed from the charge amounts set forth in prior bills. The trial court also erred in failing to find that the parties modified the lease by their conduct, in that plaintiff's predecessor accepted the growing arrears over 10 years with the implicit

understanding that the tenant was paying above market for office space to reflect the declining real estate market and the after affects of the events of September 11. Consequently, plaintiff waived it's rights to collect the alleged arrears, or was precluded from collecting same under the doctrine of laches or equitable estoppel. Defendants also assert that plaintiff's claims were precluded by it's unclean hands, in that plaintiff's predecessor lured defendants subtenants into direct deals and offered lower rents, thereby damaging defendants' ability to pay rent.

Nor can it be said that the New Jersey Judgment was entered against "innocent" parties, such as the parties in *Pickwick*. It is undisputed the Lease and guaranty under which defendants herein were held liable, was entered into by NJ Court Services and Itkowitz, respectively. It appears that the main issue is the amount for which said defendants may held liable, and it cannot be said that defendants herein are *not* culpable. Inasmuch as defendants' liability under the Lease and guaranty is concerned, the merits of such appeal is questionable.

Further, plaintiff would be prejudiced in the event a stay is granted in the absence of a posting of the bond. As the New Jersey Court indicated, defendants continued to receive rents from its subtenants, but failed to tender payment to plaintiff. And, defendants, especially Itkowitz, an attorney knowledgeable in real estate matters, failed to sufficiently establish how he did not expect to be held liable under the guaranty he undisputedly executed. Further, the possibility of motion practice to address the viability of the information subpoenas served upon defendants does not overcome the showing of prejudice plaintiff would suffer in the event a stay is granted without the posting of security.

And, defendants have not established any prejudice it will suffer by posting a bond as security. Defendants' conclusory claim that they cannot afford to post a bond is insufficient, and

does not merit a stay of enforcement of the New Jersey Judgment at issue herein in the absence of an undertaking.

*Conclusion*

Therefore, based on the foregoing, it is hereby

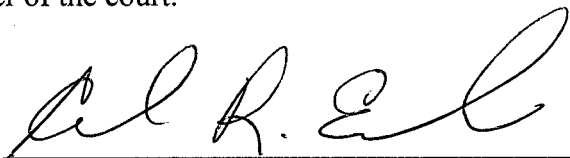
ORDERED that defendants' motion for an order granting a stay of the enforcement of the foreign judgment domesticated by plaintiff Emerita Urban Renewal, LLC pursuant to CPLR 2201, 5404(b) and/or 5519(c) is granted solely pursuant to 5404(b) and/or 5519(c) to the extent of staying plaintiff's enforcement action for fifteen (15) days from the date of this order so as to allow defendants to file security for the total amount of the New Jersey Judgment; and it is further

ORDERED that counsel are to appear before this court on November 12, 2014 at 10:00 a.m. for the purposes of ascertaining whether defendants have complied with the requirement of posting security, and in the event they have failed to do so, then for the purposes of scheduling further proceedings on plaintiff's enforcement action; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants within 5 days of entry.

This constitutes the decision and order of the court.

Dated: October 23, 2014



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**