

Ron King Corp. v Corcoran

2014 NY Slip Op 32915(U)

November 12, 2014

Supreme Court, Suffolk County

Docket Number: 10211/06

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

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PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
RON KING CORP.,

Plaintiff,

-against-

JESSICA CORCORAN,

Defendant.
-----X

INDEX NO.: 10211/06

MOTION DATE: 5/29/14

MOTION NO.: 003 MD

PLAINTIFF'S ATTORNEY:

FREDRICK P. STERN, P.C.

2163 Sunrise Highway

Islip, New York 11751

DEFENDANT'S ATTORNEY:

SIMONETTI & ASSOCIATES

144 Woodbury Road

Woodbury, New York 11797

Upon the following papers numbered 1 to 39 read on this motion to appoint receiver; Notice of Motion/ Order to Show Cause and supporting papers 1-17; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 18-30; Replying Affidavits and supporting papers 31-39; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 003) of plaintiff/judgment creditor Ron King Corp., brought on by order to show cause (PASTORESSA, J.) dated February 14, 2011, and re-dated May 29, 2014 (EMERSON, J.), for an order (a) pursuant to CPLR §5228 appointing plaintiff receiver of the real and/or personal property owned by defendant/judgment debtor Jessica Corcoran, or in which she has an interest, including but not limited to (i) American K-9 Club of New York, LLC, (ii) The Savishane, LLC, (iii) all motor vehicles, (iv) real property located at 10 Holtzman Drive, Hampton Bays, New York; (b) directing the turnover of defendant's property, whether in her possession or in the possession of third parties, including but not limited to any membership shares in which she hold an interest in American K-9 Club of New York, LLC and The Savishane, LLC, to the receiver pursuant to CPLR §5225 and §5227; (c) authorizing the receiver to sell at auction all real and/or personal property in which defendant Jessica Corcoran has an interest including but not limited to any membership shares in which she holds an interest in American K-9 Club of New York, LLC and The Savishane, LLC; (d) satisfying the outstanding indebtedness to plaintiff Ron King Corp. from the proceeds of said auction; (e) retaining counsel for the purpose of auctioning said real and/or personal property; (f) holding defendant Jessica Corcoran in contempt for her failure to fully comply with the subpoena duces tecum and information subpoena dated July 17, 2010; (g) obtaining leave to receive, pursuant to CPLR §408, disclosure of the defendant's assets, including but not limited to all personal and/or corporate/limited liability company bank accounts in any entity in which defendant holds an interest, copies of title to all automobiles owned by defendant or in which she holds an interest including but not limited to all assets currently titled in the Estate of Scott Kaphan or any entity in which he held an interest at the time of his death; (h) directing defendant Jessica Corcoran to appear for deposition on February 26, 2014 at 2:00 p.m. at the Supreme Court, Suffolk County, 1 Court Street, Riverhead, New York; (i) restraining and preventing the transfer of any assets of the defendant Jessica Corcoran, either personally or by any entity in which she owns an interest, including but not limited to the transfer of any assets from the accounts of American K-9 Club of

America, LLC and The Savishane, LLC not in the ordinary course of business; (j) awarding plaintiff Ron King Corp. counsel fees in the amount of \$25,000.00 incurred in these enforcement proceedings; and (k) directing the Sheriff of Suffolk County to undertake any actions necessary to fully comply with the provisions of this Court's order appointing plaintiff Ron King Corp. as receiver, is denied in all respects.

The submissions and the Court's records reflect that on April 13, 2006, plaintiff Ron King Corp. commenced this action against defendant Jessica Corcoran to recover the sum of \$25,000.00 allegedly owed to plaintiff pursuant to a contract for the construction of a single-family residence at 10 Holtzman Drive, Hampton Bays, New York. On November 20, 2007, after an inquest held upon defendant's default in appearance at a preliminary conference, this Court (BAISLEY, J.) granted plaintiff judgment against defendant in the principal amount of \$37,000.00, together with interest, costs and disbursements, and judgment in the amount of \$58,743.88 was thereafter entered against defendant on December 21, 2007. The submissions reflect that in January 2008, plaintiff served defendant with an information subpoena pursuant to CPLR §5224(a)(3) to which defendant failed to respond. Plaintiff's subsequent motion to hold defendant in contempt was denied on the ground that the information subpoena was improperly served, as was the order to show cause by which plaintiff brought on the contempt motion (short-form order [BAISLEY, J.] dated June 24, 2008).¹¹ The submissions further reflect that a sheriff's execution dated January 8, 2009 was returned unsatisfied on May 13, 2010 as the sheriff was unable to locate assets in the debtor's name and the debtor failed to reply to the sheriff's letter dated March 9, 2010.

On February 14, 2014, the plaintiff/judgment creditor obtained the instant order to show cause seeking the omnibus relief specified above. Plaintiff's motion is supported solely by the affirmation of plaintiff's attorney, Frederick P. Stern, Esq., dated February 2, 2014, and exhibits "A" through "O" annexed thereto. The affirmation reflects that plaintiff seeks to reach not only the assets of the defendant/judgment debtor, including the defendant's Hampton Bays home, but those of the defendant's recently deceased husband, Scott Kaphan, and/or of the several limited liability corporations allegedly controlled by him, including "American K-9 Club of New York LLC," "American K-9 Club of America LLC" and "The Savishane LLC." Plaintiff's attorney alleges that defendant and her husband, who died on July 20, 2013, "engaged in a systematic scheme to defraud their creditors by running a lucrative business, earning significant income and then paying their expenses through their business accounts to prevent their assets from being restrained to satisfy numerous and substantial judgments against them."

The Court notes in the first instance that plaintiff has offered no proof to substantiate plaintiff's bare claim for any relief with respect to the assets of the estate of Scott Kaphan. Defendant's husband was not a party to this action and he was never liable on the debt. Neither

¹¹ The Court notes that "Exhibit E," which plaintiff's attorney's affirmation represents is the March 2008 order to show cause to hold defendant in contempt, is actually an order to show cause and supporting papers in an unrelated Kings County action entitled *Deutsche Bank National Trust Company, et al. v. Dramane Brown and Lisa D. Brown, et al.*, Index No. 33645/2007.

Scott Kaphan's estate nor the administrator is a party to this action.² Accordingly the Court is without jurisdiction to grant any of the requested relief, even if it were otherwise warranted. In any event, any relief with respect to such third parties would have to be sought in a special proceeding commenced pursuant to CPLR §5225(b).

Plaintiff's sweeping application for the remainder of the relief sought herein is predicated in substantial part on the allegation of plaintiff's counsel that the defendant "has failed and/or knowingly refused at each and every juncture of this case to comply with legal process and then with each of several Court orders" despite "[having] been served repeatedly with post-judgment process since January 2008 when plaintiff served an information subpoena on her." Notwithstanding the foregoing assertion, the only attempt to obtain post-judgment discovery from the defendant/judgment debtor that is documented in plaintiff's otherwise voluminous submissions is the January 2008 information subpoena referenced above, which this Court previously determined to be defectively served.

Plaintiff's submissions reflect that on May 20, 2011, the debtor appeared for a deposition, assertedly pursuant to a previously issued subpoena duces tecum, although no copy of the subpoena was provided to the Court. Although plaintiff's counsel asserts that defendant's deposition testimony was "consistently untruthful," his affirmation fails to specify in what manner her testimony was untruthful or how he determined that it was untruthful, and counsel provides no proof to contradict any of the testimony given by the judgment debtor. Although counsel alleges that the defendant "failed to provide any of the information demanded in the subpoena," he acknowledges that defendant thereafter produced copies of her and her husband's joint income tax returns for 2008 and 2009. Plaintiff's counsel has not identified any other documents that were to have been produced pursuant to the subpoena, and it appears that plaintiff did not then seek relief from the Court with respect to defendant's alleged noncompliance.

Pursuant to CPLR §5224, a judgment creditor may obtain a deposition of the judgment debtor once a year. Although plaintiff's attorney correctly asserts that plaintiff is entitled to disclosure of defendant's assets, including those she may have inherited from her deceased husband's estate, plaintiff's submissions are devoid of any evidence reflecting that plaintiff sought a further deposition of the judgment debtor after May 20, 2011. It also does not appear from plaintiff's submissions that plaintiff has sought disclosure from defendant pursuant to CPLR §5223, either individually or in her capacity as administrator of her husband's estate, regarding any assets she may have inherited from her husband. Accordingly, there is no factual basis for plaintiff's request that this Court direct defendant to appear for a deposition and, in the event she fails to appear, direct the Sheriff of Suffolk County to locate her and compel her to appear. To the extent plaintiff claims to be entitled to disclosure pursuant to CPLR §408, the Court notes that that provision is applicable only to special proceedings, which this is not.

Plaintiff's motion also seeks to hold the judgment debtor in contempt for failure to "fully comply" with the subpoena duces tecum and information subpoena dated July 17, 2010. The movant has not provided the Court with a copy of that subpoena, proof of service thereof, or any

² Although plaintiff's submissions reflect that defendant petitioned the Surrogate's Court of Suffolk County for letters of administration with respect to her deceased husband's estate, there is no showing therein whether or when letters of administration were granted, or to whom (although it appears from defendant's submissions in opposition that defendant was in fact appointed administrator of the Kaphan estate).

proof beyond the bare allegation of counsel that the debtor did not comply with it (assuming that it was properly noticed and served).³ In any event, the warning required by Judiciary Law §756 was not set forth on the face of the application as required by the statute (*Matter of P&N Tiffany Properties, Inc. v. Williams*, 302 AD2d 466 [2d Dept 2003]). Accordingly, the application is jurisdictionally defective as well as factually deficient.

To the extent plaintiff's motion seeks the appointment of a receiver, plaintiff has failed to establish that the drastic remedy of appointing a receiver is necessary and appropriate in these circumstances (*Rogers v Rogers*, 190 AD2d 720 [2 Dept 1993]). Plaintiff's submissions consist entirely of conclusory assertions that are unsupported by facts or admissible evidence, which is insufficient to meet its burden of proof (*Booth v Ling-Shan Li*, 36 Misc. 3d 1212(A) [Sup Ct 2012]). Moreover, plaintiff's application for the appointment of a receiver fails to comply with CPLR §5228. That statute requires that, as far as practicable, notice of the motion of a judgment creditor to appoint a receiver must be given to the judgment debtor as well as any other judgment creditors of the judgment debtor. Although the judgment creditor's submissions establish the existence of other judgments against the judgment debtor, those creditors were not served with the instant order to show cause.

With regard to the judgment debtor's real property, plaintiff has proffered no proof that the value of the subject property, exclusive of liens and encumbrances, exceeds the \$150,000.00 homestead exemption (CPLR §5206(a)). The only proof contained in the submissions is defendant's "evidence" that the value of the home is \$606,500.00 and that it is encumbered by a \$462,000.00 mortgage, leaving equity of only \$144,500.00. Plaintiff's submissions thus do not establish that defendant's home is not exempt from application to the satisfaction of plaintiff's judgment.

Even if CPLR §5206 were otherwise applicable, plaintiff's application is procedurally defective. Pursuant to CPLR §5206(e), a judgment creditor seeking to compel the sale of a judgment debtor's principal residence must commence a special proceeding. Plaintiff's instant application was brought under the index number of the action that resulted in the judgment the plaintiff/judgment creditor is seeking to enforce. Because plaintiff failed to file a petition, pay the filing fee and secure a new index number as required by CPLR §304(a) and §306-a, this application is defective (*Gershel v Porr*, 89 NY2d 327 (1996); *Pal v Aponte*, 237 AD2d 443 [2d Dept 1997]).

Plaintiff's counsel also alleges that defendant has defrauded plaintiff by secreting her assets, and that such actions are fraudulent as to plaintiff pursuant to Debtor and Creditor Law §§273, 273-a, 274, 275 and 276. Counsel further alleges that as a result of defendant's allegedly fraudulent conduct, plaintiff is entitled to recover attorney's fees in the amount of \$25,000.00. The bare, conclusory assertions of plaintiff's counsel regarding defendant's alleged actions are legally and factually insufficient to give rise to any remedy sought herein. To the extent that plaintiff is attempting to assert claims to set aside a fraudulent conveyance, such claims may not

³ The only subpoena duces tecum and information subpoena contained in plaintiff's submissions is that dated January 25, 2008 (Exhibit D), which this Court (BAISLEY, J.) has previously determined was unenforceable as it was improperly served (as was the prior order to show cause seeking to hold defendant in contempt).

be brought on by mere motion in supplementary proceedings such as this but must be set forth in a proper pleading in a properly commenced plenary action or special proceeding (*see*, Debtor and Creditor Law Article 10).

In sum, the affirmation of plaintiff's attorney, the hyperbolic, conclusory and unsubstantiated statements contained therein, and the largely unauthenticated and inadmissible documents annexed thereto, are insufficient to establish a factual or legal basis for any of the multiple items of relief sought in the instant motion. Accordingly, the motion is denied in its entirety.

Dated: November 12, 2014

HON. PAUL J. BAISLEY, JR.

J.S.C.