

**Community Natl. Bank v Hollis Care Group, Inc.**

2014 NY Slip Op 33954(U)

August 12, 2014

Supreme Court, Nassau County

Docket Number: 602124/14

Judge: Anthony L. Parga

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER  
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 6  
COMMUNITY NATIONAL BANK,

Plaintiff,  
-against-

INDEX NO. 602124/14

MOTION DATE: 6/19/14  
SEQUENCE NO. 001

HOLLIS CARE GROUP, INC., MEDI-SYSTEM  
RENAL CARE MANAGEMENT, SERVICES LLC  
d/b/a HOLLIS DIALYSIS CENTER, JACQUES  
C. ANTOINE, and JUANITO CAGUIAT, JR.,

Defendants.

-----X  
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Affirmation in Opposition, Affs. & Exs..... 3  
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Motion by plaintiff for an order authorizing it to enter the property at 182-30 Jamaica Avenue, Jamaica, New York (“the subject property”), for the purpose of inspecting and taking possession of the collateral securing plaintiff’s loan to defendant Hollis Care Group, Inc. (“Hollis”), and obtaining a locksmith to secure the subject property, is granted.

This action arises out of a default on a note and guaranties. On July 13, 2012, the plaintiff (“the Bank”) loaned defendant Hollis the sum of \$3,075,000, and Hollis executed a note (Exhibit A to the complaint) in that amount. Unconditional guaranties (Exhibit B to the complaint) of repayment of the loan were executed by defendant Medi-System Renal Care Management Services LLC d/b/a Hollis Dialysis Center (“Medi-System”), defendant Jacques Antoine, and defendant Juanito Caguiat. According to defendants, the loan was for the construction of “a facility for administering renal care (dialysis)”(Antoine affidavit, par.5).

Hollis and Medi-System also executed Security Agreements (Exhibit C to the complaint), pursuant to which they granted the Bank a security interest in their collateral (Security

Agreement, par. 2(A)), and a right to possession of the collateral following a default (Security Agreement, par. 9(A)). Collateral is broadly defined as follows:

“Collateral” shall mean collectively all assets of the Debtor, and including without limitation, Books and Records, Chattel Paper including Electronic Chattel Paper, Commercial Tort Claims, Consignments, Contracts, Copyrights, Copyright Licenses, Deposit Accounts, Documents, Encumbrances, Equipment, Fixtures, Goods, General Intangibles, Instruments, Investment Property, Letter-of-Credit Rights, Letters of Credit, Motor Vehicles, Patents, Patent Licenses, Payment Intangibles, Promissory Notes, Software, Supporting Obligations, Tangible Chattel Paper, Trademarks and Trademark Licenses, whether now owned or hereafter acquired, together with all proceeds (including insurance and condemnation proceeds) and products thereof, additions and accessions thereof, and all replacements and substitutions therefor.

Security Agreement, Par. 1(E). The Bank filed a UCC financing statement covering the collateral (Exhibit F to the complaint). The Bank believes that the collateral is located at the subject property (O’Brien affidavit sworn May 9, 2014, par. 3).

The subject property is owned by the Gottesman Family Partnership and Gottesman Family Properties LLC (collectively “the Landlord”), and governed by a Lease dated December 21, 2011, between the Landlord and Medi-System (Exhibit E to the complaint). According to the complaint there is a Sublease between Medi-System and Hollis (complaint, par. 12). Pursuant to a Partial Settlement and Recognition Agreement (“the Recognition Agreement”) (Exhibit D to the complaint), executed in January, 2014, Medi-System and Hollis conditionally assigned their rights under the Lease and Sublease to the Bank.

The Bank commenced this action by filing the summons and complaint on May 9, 2014. The Bank alleges five causes of action, including a cause of action for replevin of the collateral. Defendants deny the allegations of the complaint in their answer, and allege seven affirmative defenses and four counterclaims.

At this time the Bank seeks access to the subject property where it believes the collateral

is located, possession of the collateral, and the right to secure the subject property. The moving papers include affidavits of Ms. O'Brien, on behalf of the Bank, and Ms. Donatucci, on half of the Landlord. Ms. O'Brien states that "[t]he Property is currently vacant, as construction of the Property is not yet complete. However, upon information and belief, the Collateral, which consists of fixtures, equipment and inventory of Borrower and Guarantor No.1 is located at the Property" (Obrien affidavit sworn May 9, 2014, at par. 14). Ms. Donatucci asserts that the Landlord agrees to the relief sought by the Bank, on the condition that the Landlord is provided with a set of keys for any new locks installed at the subject property by the Bank.

Defendants object and insist that the Bank's motion be denied. They argue that the Bank's conduct is the cause of the default, because the it placed improper conditions on the approval of the loan, and waived various requirements that were for their benefit. Defendants do not deny that they are in default, and they do not deny that the collateral is located at the subject premises.

The relief sought by the Bank is a quasi-provisional remedy, as it grants access to and possession of the collateral prior to judgment. The Bank bases its request for this relief on the Security Agreement, its perfected security interest in the collateral, the Recognition Agreement, and UCC §9-609 and §9-610. The latter statutory provisions govern a secured party's right to take possession after default and dispose of the collateral in a commercially reasonable way.

A cause of action for replevin is essentially possessory in nature, and the proponent must make a showing of a superior right in the chattel it seeks to possess (see *Americredit Fin. Servs., Inc. v. Decoteau*, 103 A.D.3d 761 [2<sup>nd</sup> Dept. 2013]). On this record, the Bank has established its *prima facie* entitlement to an order of possession (see *Merchants Bank of N.Y. v. Itzkoff*, 1 A.D.3d 178, 179 [1<sup>st</sup> Dept. 2003]), as it will likely succeed on the merits on its claim for replevin (see generally *Merrill Lynch Commercial Finance Corp. v. American Standard Testing and Consulting Laboratories, Inc.*, 2010 WL 114280 [E.D.N.Y. 2010] and *Greystone Equip. Fin. Corp. v. Motion Imaging, Inc.*, 27 Misc.3d 1213(A), 910 N.Y.S.2d 405 [Sup. Ct, Nassau Cty, 2010]).

In opposition, defendants do not deny that they are in default. Their objection on the grounds of alleged improper conduct by the Bank does not suffice because the plain language of

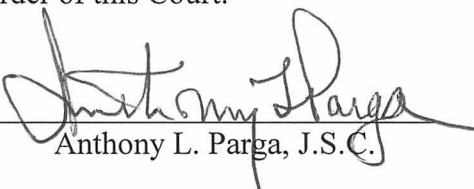
the parties' agreements determines whether defendants are in default (see generally *Merrill Lynch Commercial Fin. Corp., supra*), and the Bank's remedies. As defendants have failed to raise any triable issue of fact as to a bona fide or good faith defense, the order of possession must be granted (see *Merchants Bank of N.Y., supra* at 179). The Bank may take possession of the collateral in which it has a security interest (*Checkspring Bank v. L&E Donuts*, 2011 WL 6738744 [Sup. Ct., Queens Cty., 2011]; see also *East West Bank v. Jung Sun Laundry Group Corp.*, 2010 WL 5252848 and 2011 WL 8000676 [Sup Ct., Queens Cty., 2011]), and secure that collateral, on the condition that a new set of keys is provided to the Landlord.

Based on the foregoing, the Bank's motion is granted. Submit Order of Possession.

To insure that this case does not languish plaintiff is directed to serve a copy of this decision and order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within thirty (30) days of the date hereof. The parties shall appear for a Preliminary Conference on **October 15, 2014, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

This shall constitute the decision and order of this Court.

Dated: August 12, 2014

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
AUG 14 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE