

Market Meats, Inc. v Butchery NYC Inc.

2015 NY Slip Op 30216(U)

January 9, 2015

Supreme Court, Bronx County

Docket Number: 303966/2014

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MARKET MEATS, INC. d/b/a MARKET
DISTRIBUTORS,

Plaintiff,

DECISION AND ORDER

Index No. 303966/2014

- against -

BUTCHERY NYC INC. and PT BEEF, INC.,
individually and d/b/a MY FAMOUS BUTCHER,

Defendants.
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PRESENT: Hon. Lucindo Suarez

Upon the order to show cause signed December 5, 2014 and the affirmations (2), affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated December 12, 2014 and the affidavits (2) and exhibits submitted therewith; movant's affirmation in opposition dated December 22, 2014 and the affidavit submitted therewith; movant's supplemental affirmation dated December 23, 2014; and due deliberation; the court finds:

Plaintiff obtained a clerk's judgment of default pursuant to CPLR 3215(a) against defendants for goods sold and delivered to defendants from June 12, 2014 to July 8, 2014. Non-party movant My Favorite Souvlaki Inc. d/b/a My Famous Butcher Shoppe ("MFS") argues that in collection of the judgment, plaintiff has restrained its bank accounts, although it is not and never has been affiliated with defendants, nor has it transacted business with plaintiff. MFS moves to vacate the restraining notice.

MFS incorporated on June 11, 2014 and filed its assumed-name application on July 24, 2014. It is apparent that each defendant has done business at the same location under the name "My Famous Butcher" and that movant now does business at that location under the name "My Famous

Butcher Shoppe.” MFS’s president and sole shareholder avers that the funds in its bank accounts are solely its own, and that he has never been a shareholder, member, officer or owner of defendants. He further avers that MFS and defendants do not share any common shareholders, members, officers or owners, nor is there a subsidiary or parent relationship between MFS and any of the defendants. Furthermore, MFS has never ordered products from plaintiff and owes no debt to plaintiff

Plaintiff counters that movant’s principal signed for goods delivered to defendant PT Beef, Inc. per invoices dated June 16, 2014, June 18, 2014 and June 19, 2014. However, movant’s principal admits that he was previously employed by My Famous Butcher as a manager. Plaintiff further counters that MFS wrote checks to it on June 19, 2014, July 1, 2014 and July 3, 2014 for goods delivered to the location. However, movant’s principal avers that it purchased goods from My Famous Butcher prior to receiving authorization to itself do business under that name, and that My Famous Butcher requested that payment be made directly to plaintiff. Indeed, the June 19, 2014 check states “My Famous Butcher” on the memo line, and the other two checks are endorsed on the back with notations including “My Famous Butcher” and “PT Beef.”

Plaintiff further counters that as the only entity currently in possession of a license to operate a food processing establishment at the location is defendant Butchery NYC Inc. d/b/a My Famous Butcher (“Butchery”),¹ MFS must be conducting its business as a benefit to Butchery.

A restraining notice may be served upon any person. *See* CPLR 5222(a). However,

A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he

¹ Pursuant to Agriculture and Markets Law § 251-z-3, “[n]o person shall maintain or operate a food processing establishment unless licensed biennially by the commissioner.”

or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served.

CPLR 5222(b). “A party seeking to enforce a judgment may seek to restrain or prohibit the transfer of a judgment debtor’s property in the hands of a third party pursuant to CPLR 5222 (b) . . . All such property or debt which thereafter comes into the possession or custody of such person is subject to the restraining notice.” *Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.*, 21 N.Y.3d 66, 70, 990 N.E.2d 121, 123, 967 N.Y.S.2d 883, 885 (2013). “Where . . . the evidence demonstrates that a judgment debtor regularly has used another’s bank account as a ‘recipient’ of the debtor’s personal assets or as a source for payment of the debtor’s expenses, the account may be restrained under the statute.” *Bingham v. Zolt*, 231 A.D.2d 479, 479, 647 N.Y.S.2d 220, 221 (1st Dep’t 1996). Plaintiff’s argument is speculative and fails to rebut movant’s principal’s multiple averments that no entity other than MFS possesses an interest in the funds contained in its bank accounts.

Furthermore, “[a]lthough the plaintiff may attempt to prove the alter ego liability of [MFS] as part of a judgment enforcement proceeding, [its] assets may not be restrained pursuant to § 5222 until [its] alleged alter ego status has been adjudicated and [its] liability for the previous judgment determined.” *JSC Foreign Econ. Ass’n Technostroyexport v. Int’l Dev. & Trade Servs.*, 295 F. Supp.2d 366, 393 (S.D.N.Y. 2003) (emphasis added). To proceed otherwise would violate due process. *See id.*

Movant’s application for damages is denied. Although “[a] judgment creditor . . . shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint,” CPLR 5222(b), movant did not demonstrate that any such damages were incurred.

Accordingly, it is

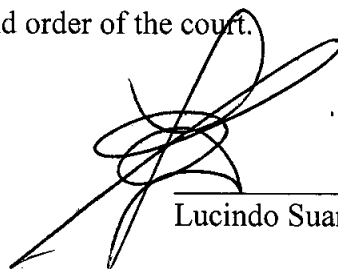
ORDERED, that the application of non-party My Favorite Souvlaki Inc. d/b/a My Famous Butcher Shoppe to vacate the August 27, 2014 restraining notice is granted; and it is further

ORDERED, that the August 27, 2014 restraining notice served upon Alma Bank in this action is vacated; and it is further

ORDERED, that the application of non-party My Favorite Souvlaki Inc. d/b/a My Famous Butcher Shoppe for damages is denied.

This constitutes the decision and order of the court.

Dated: January 9, 2015



Lucindo Suarez, J.S.C.