

**Matter of 140 W. 57th St. Bldg. LLC v Russ, Teddy
Bear Invs., LLC**

2016 NY Slip Op 30076(U)

January 13, 2016

Supreme Court, New York County

Docket Number: 162424/2014

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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In the Matter of the Application of 140 W. 57TH
STREET BUILDING LLC, for Judgment Pursuant to
CPLR 5225 and 5227 to Compel Turnover of Funds,

Index Number: 162424/2014

Decision and Order

Petitioner,

Motion Sequence No.: 001

- against -

TD BANK,

Respondent,

- and -

RUSS, TEDDY BEAR INVESTMENTS, LLC,

Intervening Party.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on the Petition for a turnover order pursuant to CPLR 5225, 5227, and Intervenor's cross-motion to consolidate this turnover proceeding with a related special proceeding:

Papers Numbered:

Order to Show Cause - Petition - Affirmations - Exhibits	1
Notice of Cross-Motion - Affirmation - Affidavits - Exhibits (memo of law)	2
Reply Affirmation in Opposition to Cross-Motion - Affidavit - Exhibits (memo of law)	3
Affirmation in Further Opposition to Petition - Exhibits (memo of law)	4

Upon the foregoing papers, the Petition is granted in part and denied in part, the cross-motion is denied as moot.

Background

This is the second special proceeding arising out of Petitioner 140 W. 57th Street Building LLC's ("140") attempts to enforce a \$2,156,165.17 Judgment (the "Judgment"), entered on October 14, 2015 in its favor and against non-party Kate's Paperie, LLC, Kate's Paperie Ltd. and K.P. LLC ("Kate's") (under the caption 140 W. 57th Street Building, LLC v Kate's Paperie, LLC, Kate's Paperie Ltd. and K.P. LLC, Index No. 107833/2011). The Court will assume that the reader of this opinion is familiar with the background and procedural history of this proceeding and the related special proceeding, pursuant to CPLR 5239, entitled Russ, Teddy Bear Investments, LLC v 140 W. 57th Street Building, LLC, Index No. 160841/2014. If not, a reading of this Court's Decision and Order of December 15, 2014 will provide a basic background.

In aid of enforcement of the Judgment, 140 took certain actions, to wit: (1) it delivered to City Marshal Martin Bienstock ("the Marshal") an Execution and directed the Marshal to levy upon and conduct a sale of Kate's assets; and (2) it served a Restraining Notice, Information Subpoena and Execution upon respondent TD Bank. In response to the Marshal's levy upon Kate's assets, Russ Teddy Bear Investments LLC ("Russ") commenced the related special proceeding, by way of Petition and Order to Show Cause, for an order pursuant to CPLR 5239 vacating the Marshal's levy and declaring that Russ has priority over 140 with respect to all of Kate's collateral. Russ's claim to priority is premised upon a security interest granted by Kate in April 2012 and a UCC-1 Financing Statement (the "UCC-1") that Russ filed against Kate's on May 23, 2012, which covers "[a]ll of [Kate's] assets of any nature whatsoever, now owned or hereafter acquired, fixed or contingent, and wherever located ...". By Decision and Order dated December 15, 2014, this Court denied Russ's motion preliminarily to enjoin the Marshal from selling Kate's collateral during the pendency of the first special proceeding, finding, *inter alia*, that there is a "sharp question of fact" on the issue of Russ's alleged priority. The Court lifted the temporary stay of the Marshal's levy (issued upon signing the Order to Show Cause), permitted the Marshal to "proceed to levy upon and sell" Kate's collateral at public auction and, if such sale occurred, to deposit into Court the proceeds of sale pending final determination of this matter and further Order of this Court.

Meanwhile, on November 6, 2014, TD Bank responded to 140's Information Subpoena, advising that it held a deposit account in the name of Kate's, bearing account number 4256316823, which contained a balance of \$40,147.22 (the "account"). TD Bank also restrained the account. On December 23, 2014, 140 commenced the instant special proceeding, for an order, pursuant to CPLR 5225 and 5227, directing TD Bank to turnover the funds in the account "or any other account in the name of [Kate's], plus all additions thereto" and extending priority of 140's judgment throughout this proceeding. In support of the petition, 140 argues that its status as a judgment-creditor, with an unpaid judgment, entitles it to attach and collect the funds in the account. With 140's consent and the approval of this Court, Russ intervenes in the instant proceeding and now cross-moves to consolidate it with Russ' CPLR 5239 proceeding to vacate the Marshal's levy. See CPLR 5225(b) ("court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.").

Russ argues herein that it has a perfected security interest in Kate's collateral and that the funds in the TD Bank account are "identifiable proceeds from the sale" of such collateral, thereby giving Russ priority over the account, and, at the very least, there are common questions of fact and law in both proceedings as to whether the account contains "direct proceeds" of Kate's collateral. In support of its argument, Russ submits the affidavit of Angelica Berrie, Russ' president (and also a principal of Kate's) (the "Berrie Affidavit"), in which Ms. Berrie states that: Russ has a perfected security interest in Kate's collateral to secure payment of over \$5 million in loans; prior to entry of the Judgment and the Marshal levy in October 2014, and in order "to protect the value of its investment in the Collateral," Russ "had taken over control of Kate's property, pursuant to a plan of orderly liquidation agreed to" by Kate's and Russ; at Russ' direction, Kate's liquidated its collateral at "highly reduced prices" "during the Christmas buying season" and "duly deposited" the sales proceeds into Kate's bank account at TD Bank...Account Number 4256316823"; and "all of the funds" in the account are "identifiable proceeds from the sale of the Collateral." Russ also submits the affidavit of Maria Angela Robello, Kate's Vice

President and Chief Operating Officer, who reiterates Ms. Berrie's statement that the account "consists solely" of the proceeds of sale of Kate's collateral.

In reply, 140 argues that Russ does not have a perfected security interest in the deposit account because it did not take possession and control of the account as required by UCC §§ 104 and 314. Additionally, 140 challenges the validity of Russ' security interest in Kate's collateral in the first instance, arguing that the security interest constitutes a fraudulent conveyance under Debtor and Creditor Law § 270 and 273(a).

The Court notes in passing that during the pendency of the two special proceedings a new party surfaced: Charles Lahti, an artist whose work is being shown and offered for sale at Kate's store at 188 Lafayette Street in downtown Manhattan. Mr. Lahti has moved to intervene in the underlying action between 140 and Kate's which resulted in the Judgment (Index No. 107833/2011) in order to prevent the Marshal's sale of his artwork and other property. In addition, 140 commenced an action to vacate Russ' security interest upon the grounds of common law fraud and fraudulent conveyance under various provisions of the Debtor and Creditor Law, and for other relief, entitled 140 W. 57th Street Building, LLC v Angelica Berrie, et al, Index No. 652757/2015 (in which there are pending motions to consolidate with the special proceedings, as well as to dismiss). As of the September 10, 2015 oral argument of the instant petition and cross-motion, and upon the specific consent of the parties, the Marshal had not sold any of Kate's collateral or Mr. Lahti's artwork.

Discussion

Pursuant to CPLR 5225(b), a judgment-creditor may commence a special proceeding against

a person in possession or custody of money ... in which the judgment debtor has an interest, ... where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, [in which case] the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor...

Similarly, CPLR 5227 permits a judgment-creditor to commence a special proceeding against "any person who it is shown is or will become indebted to the judgment debtor." There is "overlap" between CPLR 5225(b) and 5227 when a judgment-creditor is seeking to attach money. See David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5227:1, C5227:3. Special Proceedings under CPLR 5225(b) and 5227 are governed by Article 4 of the CPLR, for which summary relief may be granted only where the submissions of the parties show that there is no genuine dispute as to any material fact and that the petitioner is entitled to judgment as a matter of law. CPLR 409(b) ("The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment."); see also Karr v Black, 55 AD3d 82, 86 (1st Dep't 2008) ("it is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment,

requiring the court to decide the matter ‘upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised.’”).

This proceeding turns upon whether Russ has a security interest in the account superior to Kate’s right of possession and to 140’s right to attach the account partially to satisfy its Judgment, which involves application of various provisions of the UCC. To start, under UCC § 9-314(a), a security interest in a deposit account “may be perfected by control ... under Section[] 9-104...”. Under UCC § 9-104(a)

A secured party has control of a deposit account if: (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the bank’s customer with respect to the deposit account.

Here, the party’s submissions show, as a matter of law, that Russ did not perfect a security interest in the TD Bank account by control. Russ is not the bank; Russ offered no evidence of any “authenticated record” between itself, Kate’s and TD Bank respecting Kate’s consent to Russ’ disposition of funds in the account; and there is no evidence that Russ became TD Bank’s customer with respect to the account. Indeed, Russ failed to submit a copy of the alleged “plan of orderly liquidation” of Kate’s collateral or any other evidence tending to show that Russ exercised control over *any* of Kate’s collateral and assets; to the contrary, as noted by this Court in the December 15, 2014 Decision and Order, Russ failed to foreclose upon its purported security interest or take possession of Kate’s assets prior to October 2014.

Alternatively, a security interest in a deposit account may also arise where a security interest in collateral has attached, and the secured party shows that such deposit account contains “identifiable proceeds of [such] collateral.” See UCC § 9-203(f) (“The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315...); UCC § 9-315(a)(2) (“a security interest attaches to any identifiable proceeds of collateral”). Where proceeds are commingled with other property, the secured party must “identify[] the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.” UCC § 9-315(b)(2).

As found by this Court in its December 15, 2014 decision, there is a sharp question of fact on the threshold issue of whether Russ has a valid and enforceable security interest in and to Kate’s collateral in the first instance. Thus, the Court does not need to, and will not, consider 140’s arguments that the security interest constitutes a fraudulent conveyance under the Debtor and Credit Law, which were improperly raised for the first time in reply. See Gonzalez v City of New York, 127 AD3d 632, 633 (1st Dep’t 2015) (“As a matter of procedure, the motion court erred in entertaining arguments advanced for the first time in petitioners’ reply papers and in accepting their offer of new proof, unnecessarily protracting summary proceedings.”). All of the

parties' arguments as to the validity of Russ' security interest will be addressed in Russ' pending proceeding to vacate the Marshal's levy pursuant to CPLR 5239 and 140's pending action to vacate Russ' security interest.

However, the existence of a disputed issue as to whether Russ' purported security interest attached to Kate's collateral does not prevent summary determination of *this* proceeding for a turnover order against TD Bank pursuant to CPLR 5225(b) and/or 5227. Even assuming, arguendo, that Russ' security interest is valid, enforceable and gives Russ priority over Kate's *collateral*, Russ has failed to demonstrate here that the TD Bank account contains "*identifiable proceeds*" of sale of such collateral. The affidavits of Berrie and Robello are insufficient to establish, as a matter of law, that the account contains only "identifiable proceeds" of sale of Kate's collateral, or even create a question of fact on the issue, as they contain nothing more than bare and conclusory assertions about the genesis of the funds in the account. Russ failed to submit any evidence, such as bank statements, deposit tickets, credit card receipts, or other documents, tending to show that the funds in the account are in fact "Christmas buying season" sales proceeds and nothing else. Indeed, Russ failed to submit details about the alleged Christmas sale, or any evidence of the sale of Kate's goods at "highly reduced prices" prior to November 6, 2014, the date of TD Bank's response to the Information Subpoena (in order to accept Russ' claim that the account contained Christmas sale funds, the Court would need to accept that such sales occurred in mid-to-late October 2014; possible but not likely, and certainly requiring more than a self-serving allegation in an affidavit). Nor did Russ submit evidence of the purported "plan of orderly liquidation" of Kate's collateral, entered into by Russ and Kate's at some, vague and unspecified time prior to October 2014 (one would expect that a "liquidation plan" would be in writing and easily attached as an exhibit to an affidavit, and would have been submitted by Russ in support of its CPLR 5239 proceeding). Finally, even if it could be reasonably inferred from a basic understanding of common business practices, that at least some part of the account contained proceeds from the sale of Kate's collateral, neither Ms. Berrie nor Ms. Robello identify, by accounting or tracing methodology, which part, if any, of the funds in the account constitute the proceeds of sale of Kate's collateral, as required under UCC § 9-315 (b)(2). In other words, there is no basis on this record for the Court to reasonably connect any part of the \$40,147.22 in cash held in the account to the collateral secured by the UCC-1. See generally RDLF Fin. Serv., LLC v Esquire Capital Corp., 34 Misc3d 1235(A) (Supreme Ct, Kings County 2012), quoting Square Mile Structured Debt (One) LLC v Swig, 2010 NY Slip Op 32937[U] (Supreme Ct, New York County 2010) ("proceeds are identifiable so long as there is a reasonable connection between the proceeds and the collateral secured by the security interest").

Accordingly, the party's submissions show, and this Court finds, that Russ does not have a perfected security interest in Kate's TD Bank deposit account bearing account number 4256316823. Therefore, Russ does not have priority over 140 as to the funds; or, stated otherwise, Kate's is entitled to possession of the funds in the account. Consequently, pursuant to CPLR 5225(b), 140 may attach the account in partial satisfaction of its Judgment.

Although the Petition seeks an turnover order as to account number 4256316823 and "any other accounts" in the name of Kate's held at TD Bank, over one year has passed since 140 commenced this proceeding and it has not identified any other or further accounts at TD Bank for which it seeks a turnover order. Because each account must be examined separately and Russ

afforded the opportunity to demonstrate, as it did not do here, that funds in any other TD Bank account contains "identifiable proceeds" of sale of Kate's collateral, this Court cannot now issue a blanket order granting 140 relief to which it may not be entitled. Assuming other TD Bank accounts are identified and restrained in the future, 140 may bring a turnover proceeding as to those accounts upon a proper set of papers.

Conclusion

The Petition is granted in part and denied in part and the cross-motion denied as moot. The Clerk is directed to enter judgment directing Respondent TD Bank to deliver the funds in account number 4256316823, held in the name Kate's Paperie LLC, plus all additions thereto from November 6, 2014, to Petitioner 140 W. 57th Street Building, LLC.

Dated: January 13, 2016



Arthur F. Engoron, J.S.C.