

30 Carmine LLC v Chong

2016 NY Slip Op 30803(U)

April 29, 2016

Supreme Court, New York County

Docket Number: 153247/2014

Judge: Robert D. Kalish

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[* 1]
HON. ROBERT D. KALISH

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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30 Carmine LLC

Petitioner,

Index No. 153247/2014

-against-

Lab Chong et al.

Respondent Judgment Debtor

and

JP Morgan Chase & Co.; Chase Paymentech a/k/a
Paymentech LLC

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KALISH, J.:

Upon the foregoing submitted papers, the Respondents JP Morgan Chase Bank, N.A. and Paymentech LLC's (collectively "Chase")¹ motion to dismiss the underlying special proceeding pursuant to CPLR §§ 3211(a)(5), (e) & 214(2) on the basis that the Petitioner was outside of the statute of limitations to bring the underlying special proceeding is hereby denied as follows:

Background and Procedural History

On March 11, 2010, in a separate action under docket number 602287/2009, the Supreme Court of the State of New York, County of New York entered a judgment in favor of 30 Carmine LLC ("30 Carmine") against, Lab Chong individually and d/b/a Kawaii Optical (the "Debtor"), in the amount of \$187,020.05.

¹ The Respondent JP Morgan Chase Bank, N.A. claims that it is improperly named in the underlying special proceeding as JP Morgan Chase & Co. However, neither the Petitioner nor the Respondents have moved the Court to amend the caption in the underlying special proceeding.

On or about April 4, 2014 the Petitioner commenced a special proceeding against Chase and a prior co-Respondent First Data Corporation ("First Data") alleging that Chase and First Data failed to comply with restraining notices that the Petitioner served upon them "in or around the mid-June of 2010". The Petitioner claimed that said restraining notices directed First Data and Chase to restrain the Debtor's bank accounts being held therein, and that First Data and Chase failed to do so. The Petitioner claimed that due to First Data and Chase's failures to comply with the restraining notices, the Petitioner was unable to recover on its judgment against the Debtor. The Petitioner claims that First Data and Chase are liable to the Petitioner for the prior judgment amount of \$187,020.05.

On July 2, 2014, Justice Tingling conducted a hearing on the Petitioner's special proceeding, and following said hearing dismissed the Petitioner's special proceeding against First Data as indicated on the record. At the same time, Justice Tingling also dismissed the Petitioner's special proceeding against Chase, although Chase had not appeared in the special proceeding, had not submitted an Answer to the Petitioner's petition or in fact participated in the hearing.

The Petitioner thereafter moved to vacate the dismissal of the prior special proceeding as per Justice Tingling's July 2, 2014 decision. By so-ordered stipulation dated May 20, 2015, the prior dismissal was vacated solely as to the Respondent Chase and the matter was restored to the calender as to Chase. Pursuant to said stipulation, the Petitioner was given leave to serve and file an amended petition as to the Respondent Chase, and Chase was given the opportunity to respond.

Subsequently, Chase moved to dismiss the Petitioner's special proceeding on the basis that the Petitioner failed to file the amended petition as required by the so-ordered stipulation dated May 20, 2015. By decision dated October 27, 2015, the Court denied Chase's motion and indicated that the Petitioner had filed an amended petition. The Court further directed Chase to file an Answer to the Petitioner's amended petition.

In lieu of filing an Answer to the Petitioner's amended petition, Chase made the instant motion to dismiss the underlying special proceeding pursuant to CPLR §§ 3211(a)(5), (e) & 214(2) on the basis that the Petitioner was outside of the statute of limitations in bringing the underlying special proceeding.

Analysis

Parties' contentions

Chase argues in sum and substance that the Petitioner commenced the underlying special proceeding after the three-year statute of limitations had already expired. Specifically, Chase argues that the Petitioner's underlying special proceeding fell within the three-year statute of limitations pursuant to CPLR §214(2) for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215". Chase argues that the Petitioner's cause of action is created and/or imposed by CPLR §§ 5222(b), 5222 and 5227. Chase indicates that the Petitioner served Chase with the restraining notice and information subpoena on or about June 15, 2010. Chase further indicates that it responded to the information subpoena on or about June 29, 2010 by letter advising that "Account(s) located. Present balance falls below statutory exemption." Chase indicates that on July 19, 2010, the Petitioner wrote to Chase and returned the original Information Subpoena seeking a further response, and that on or about August 16, 2010, Chase sent a further response to the Petitioner in the form of a completed questionnaire in response to the Information Subpoena. Chase claims that on or about November 4, 2013, the Petitioner served Chase with a Subpoena in an Adversary Proceeding in connection with the Debtor's Chapter 7 Bankruptcy proceeding.

Chase characterizes the Petitioner's cause of action as follows: "30 Carmine contends that Chase is liable for damages because it did not properly respond to the Information Subpoena, namely, Chase 'only identified a single account' for Chong and 'Chase advised that it could not restrain this account because '\$0.01' balance fell below the statutory minimum'" (Chase memorandum citing Petitioner's First Amended Petition). Chase argues that the Petitioner's cause of action on these grounds arose, at the latest on or about August 16, 2010, the date that Chase completed a questionnaire in response to the

Petitioner's Information Subpoena. Chase further argues that since the Petitioner's right to recovery was created by CPLR §§ 5222(b), 5222 and 5227, the Petitioner had until August 16, 2013 (three years later) to commence the underlying special proceeding against Chase. As the Petitioner did not file its original petition until April 4, 2014, Chase argues that the underlying special proceeding should be dismissed as untimely pursuant to CPLR §§ 3211(a)(5) & 214(2).

Chase further argues that the applicable three-year statute of limitations was not tolled by the fact that the Debtor filed for Chapter 7 bankruptcy. Chase argues that the automatic stay was only applicable to the Debtor and that the Petitioner's underlying claim is against Chase. Chase argues that regardless of the Debtor's bankruptcy filing on July 20, 2010, the Petitioner was free to pursue any claims against Chase directly within the applicable three-year statute of limitations period from August 16, 2010 through August 16, 2013.

In opposition, the Petitioner argues in sum and substance that the underlying special proceeding is a "turnover proceeding" and is therefore subject to a twenty year statute of limitations pursuant to CPLR §211(b). On said grounds, the Petitioner argues that it brought the underlying special proceeding within the statutory time period.

The Petitioner further argues that even assuming that CPLR §214(2) applies, the underlying special proceeding is timely since the duty imposed by CPLR §5222(b) not only applies to those assets existing at the time the restraining notice was served, but also any assets "thereafter coming into the possession or custody" or to any debts "thereafter coming due....until the expiration of one year after the notice is served ..., or until the judgment or order is satisfied or vacated, whichever event first occurs" (CPLR §5222). The Petitioner argues that since it served the restraining notice upon Chase on June 28, 2010, Chase's duty to restrain the Debtor's accounts did not expire until June 28, 2011. The Petitioner argues that its cause of action did not accrue until June 28, 2011, and the three year statute of limitations ran from June 28, 2011 to June 28, 2014. Therefore, since the Petition was filed on April 4, 2014, it was timely.

The Petitioner further argues that it did not become aware that Chase neither restrained nor chose to advise the Petitioner that there were active accounts in which the Debtor had an interest until after February of 2014. Specifically, the Petitioner argues that it did not become aware of said unrestrained accounts until after February of 2014, when Chase complied with Petitioner's "Bankruptcy Subpoena in an Adversary Proceeding". The Petitioner argues that based upon Chase's false response to the Petitioner's restraining notice and information subpoena, Chase should be equitably estopped from raising a Statute of Limitations Defense.

The Petitioner further argues that after it served Chase with the Order to Show Cause and Verified Petition on or about April 9, 2014, Chase issued an "Attorney Response Letter" dated April 15, 2014. Petitioner argues that said "Attorney Response Letter" did not assert any affirmation defenses, and as such Chase is barred from raising the issue of timeliness in the instant motion.

Finally, the Petitioner argues that any applicable statute of limitations as to the Petitioner's underlying special proceeding against Chase was automatically stayed upon the Debtor filing for bankruptcy.

In reply to the Petitioner's opposition, Chase reiterates the arguments presented in its moving papers. Specifically, Chase argues that in the underlying special proceeding the Petitioner is not seeking to enforce a money judgment against Chase, but is instead seeking money damages based upon Chase's alleged failure to restrain certain bank accounts belonging to the Debtor. Chase reiterates that said right to seek damages stems from CPLR §§ 5222 & 5224, and as such is subject to a three year statute of limitation pursuant to CPLR §214(2).

Chase further argues that the doctrine of equitable estoppel is inapplicable to the underlying special proceeding as there is no basis to conclude that Chase engaged in "affirmed wrongdoing" that contributed to the delay between the accrual of the Petitioner's cause of action and the commencement of the legal proceeding.

Chase further argues that it is not barred from moving to dismiss on the basis that the Petitioner's special proceeding is untimely. Specifically, Chase argues that the 2014 letter was sent from Chase's Court Order and Levies Department and does not constitute a responsive pleading or pre-answer motion. Chase argues that there was no requirement that Chase had to include any affirmative defenses in said letter or otherwise waive any such affirmative defenses.

Chase also reiterates its arguments that the Debtor's bankruptcy did not stay that statute of limitation as to the Petitioner's underlying special proceeding against Chase.

On April 12, 2016, the Parties appeared before the Court for oral argument on the instant motion. At oral argument, the Parties reiterated their arguments as presented in their moving papers. Chase confirmed that they were moving to dismiss the Plaintiff's action pursuant to CPLR § 3211(a)(5) & (e) on the basis that the Plaintiff made their petition for a special hearing outside of the statute of limitations. The Parties further confirmed that Chase had made the instant motion to dismiss in lieu of filing an answer to the Plaintiff's amended petition.

At oral argument, Chase emphasized that the restraining notice and information subpoena issued by the Plaintiff are "creatures of statute" and that CPLR §214 specifically provides a three-year statute of limitations for causes of action arising from statutes. Chase further argued that the Plaintiff had no cause of action in "common law" absent the statute (CPLR §5222). Chase recognized that the Plaintiff was bringing a plenary action, arguing that said plenary action is based upon CPLR §5222, and not upon any common law right of recovery. Chase further argued that prior to the existence of CPLR §5222, which allowed for the issuance restraining notices, banks did not have any obligation at common law to restrain accounts.

Chase further argued that since Chase responded to the Plaintiff's restraining notice on June 29, 2010 indicating that Chong's account balance fell below the statutory minimum (for restraining an account), Chase had no obligation under the restraining notice as of the date that it responded to the Plaintiff. As such, Chase argued that the Plaintiff's action accrued on June 29, 2010 and the three year

statute of limitation to bring the underlying special proceeding expired on June 29, 2013.

At oral argument, the Plaintiff reiterated its argument that the statute of limitation did not begin to run until one year after it had served Chase with the restraining notice. Specifically, the Plaintiff argued that Chase's obligation under the restraining notice did not end until a year after the restraining notice was served. Therefore, the Plaintiff argued that its cause of action did not accrue until one year after the service of the restraining notice. The Plaintiff further argued that even if the Court were to find that the Plaintiff's cause of action was subject to a three year statute of limitation, the Plaintiff brought the underlying action within said time period measured from a date one year after the Plaintiff served Chase with the restraining notice.

During the course of oral argument, both Parties made arguments as to the merits of the underlying action. However, the Court emphasized that the only issue before the Court on the instant motion was whether or not the Petitioner's special proceeding against Chase was timely. Specifically, the Court clarified that Chase was moving to dismiss the Petitioner's special proceeding as untimely pursuant to CPLR §3211, and not for summary judgment pursuant to CPLR §3212. As such, the Court would not reach the issue of the ultimate merits of the Petitioner's special proceeding against Chase, but would only decide the issue of timeliness.

The only issue before the Court on the instant motion is whether or not the Petitioner's underlying special proceeding is timely.

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a)(5) on the ground that it is barred by the statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (West Chelsea Bldg. LLC v Guttman, 2014 NY Slip Op 32261U (NY Sup Ct NY Cnty 2014) affmd 2016 NY Slip Op 02548 (NY App Div 1st Dept Mar. 31, 2016) citing Hoatson v New York Archdiocese, 25 Misc 3d 1218(A) (NY Sup Ct NY County 2009); Brignoli v Balch, Hardy & Scheinman, Inc., 178 AD2d 290 (NY App Div 1st Dept 1991).

In the instant motion, the sole issue before the Court is determining whether or not the Petitioner commenced the underlying special proceeding withing the applicable statute of limitations. As such, the Court will only consider the Parties' arguments as to the "merits" of the underlying special proceeding as they relate to the limited issue before this Court, and will take the allegations in the Petitioner's First Amended Petition as true in determining the timeliness of the Petitioner's underlying special proceeding.

In order to determine the instant decision, this Court must answer two questions: 1) What is the applicable statute of limitations that should be applied to a plenary action arising from a bank's alleged violation of a restraining notice served pursuant to CPLR §5222, and 2) when did the Petitioner's cause of action accrue.

The Petitioner's underlying special proceeding against Chase is a plenary action stemming from Chase's alleged violation of a restraining notice issued pursuant to CPLR §5222. It is not a "turnover proceeding"

"[V]iolation of the restraining notice by the party served is punishable by contempt and subjects the garnishee to personal liability in a separate plenary action or special proceeding under CPLR article 52 brought by the aggrieved judgment creditor" (Cruz v TD Bank, N.A., 22 N.Y.3d 61, 77-78 (NY 2013) quoting Aspen Industries, Inc. v. Marine Midland Bank, 52 NY2d 575, 580 (NY 1981)). "A judgment creditor's specification of debt or property in a restraining notice is binding on the person served to the extent of forbidding payment or transfer except pursuant to an order of the court. If such person does make payment or transfer in disregard of the restraining notice, he takes the risk of liability for damages and contempt if the judgment creditor can establish that the debt was owed to the judgment debtor or that he had an interest in such property" (Mazzuka v Bank of North America, 53 Misc. 2d 1053, 1058 (NY Civ Ct 1967) quoting Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co., 47 Misc. 2d 741 (NY Sup Ct. 1965) affmd 25 A.D.2d 499 (NY App Div 1st Dept 1966)).

In the underlying special proceeding, the Petitioner is not pursuing a “turnover proceeding” against Chase in that the Petitioner is not now seeking to compel Chase to turn over to the Petitioner the contents of any bank account that the Debtor may have an interest in (See CPLR §5225(b)). In point of fact, the Petitioner’s underlying special proceeding against Chase hinges in part upon the argument that Chase’s failure to comply with the restraining notice resulted in the “loss” of the monies in said bank accounts (i.e. that the Debtor or an entity acting on the Debtor’s behalf was able to withdraw his funds from said unrestrained accounts). The Petitioner is not seeking to recover against Chase on the “money judgement” that the Petitioner has against the Debtor, but is instead commencing a plenary action against Chase for money damages, which it claimed it incurred as a result of Chase’s failure to obey the restraining notice.

As such, the Court finds that the underlying special proceeding does not fall within the twenty year statute of limitation for an action to recover on a money judgment pursuant to CPLR §211(b).

A plenary action based upon a Bank’s alleged violation of restraining notice served pursuant to CPLR §5222 arises solely from the statute and is therefore subject to a three year statute of limitation

CPLR § 214(2) reads as follows:

Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud.

The following actions must be commenced within three years:

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;

Upon review of the relevant case-law, this Court could find no authoritative decisions determining the specific statute of limitations that should be applied to plenary actions seeking money damages against banks for violating a restraining order issued pursuant to CPLR §5222. Though one court has recognized that “such an action would logically be governed either by CPLR 213 (six years; applicable to actions for which no limitation is stated and implied contract) or CPLR 214 (three years; applicable to actions to recover on statutory liability)”, said Court did not make a ruling as to which of

the two applied (Remo Drug Corp. v State, 145 Misc 2d 300, 301 fn 1 (NY Ct Cl 1989)). This Court agrees that the statute of limitations for a plenary action against a bank for failing to obey a restraining notice issued pursuant to CPLR §5222 would either fall under CPLR §213 or CPLR §214.

For a claim to fall within the confines of CPLR § 214(2), the statute must impose a liability “for wrongs not recognized in the common or decisional law” (State v Stewart’s Ice Cream Co., 64 NY2d 83, 88 (NY 1984) quoting State v Cortelle Corp., 38 N.Y.2d 83, 86 (NY 1975); Aetna Life & Casualty Co. v Nelson, 67 NY2d 169, 174 (NY 1986)). CPLR § 214(2) only governs liabilities “which would not exist but for a statute. It does not apply to liabilities existing at common law which have been recognized or implemented by statute. Thus, if the [applicable statute] merely codifies or implements an existing liability, the three-year statute [of limitations] would be inapplicable.” (Aetna Life & Casualty Co. v Nelson, 67 NY2d 169, 174 (NY 1986) citing (State v Stewart’s Ice Cream Co., 64 NY2d 83, 88 (NY 1984); State v Cortelle Corp., 38 NY2d 83 (NY 1975); Koerner v State, 62 NY2d 442 (NY 1984); Murphy v. Am. Home Prods. Corp., 58 NY2d 293 (NY 1983)).

In determining if a cause of action is subject to a three year statute of limitations under CPLR § 214(2), the pertinent inquiry is whether or not the specific cause of action existed in common law and/or case-law prior to the statute (See Melcher v Greenberg Traurig, LLP, 23 N.Y.3d 10 (NY 2014) [A cause of action for attorney deceit existed as part of New York’s common law before the first New York statute governing attorney deceit was enacted in 1787. The 1787 statute enhanced the penalties for attorney deceit by adding an award for treble damages, but did not create the cause of action. As such a cause of action under Judiciary Law § 487 does not fall within CPLR §214 (2)]; Aetna Life & Casualty Co. v Nelson, 67 NY2d 169 (NY 1986) [the three year statute of limitations applied to causes of action brought under Insurance Law §673(2) as said statute created new liabilities]; State v Stewart’s Ice Cream Co., 64 NY2d 83 (NY 1984) [finding that the three year statute of limitations did not apply as “[i]t cannot be said that liability for damage to land caused by an oil spill would not exist but for the statute”]; Municipal Credit Union v Integrated Payment Sys., Inc., 2013 NY Slip Op 33246(U) (NY Sup Ct 2013) [“liabilities

imposed by UCC §§ 3-116 and 4-401(1) existed in common law, making CPLR § 214(2)'s three-year statute of limitations inapplicable. Courts have consistently recognized that prior to the enactment of the UCC, a drawee of a check was liable in contract to the drawer for paying on a check bearing an improper endorsement of the payee.”). In particular, in Melcher v Greenberg Traurig, LLP, the Court of Appeals conducted a detailed historical analysis, including references to a 181 year-old-case (Bogardus v. Trinity Church, 4 Paige Ch. 178 (NY City Ct 1833) and the “colonial-era incorporation or ‘reception’ of English law into New York law” in order to determine if the a cause of action for attorney deceit, as codified under Judiciary Law § 487, existed prior to said statute for the purpose of determining the applicable statute of limitations.

Upon examination of the statutory history of CPLR §5222 and the relevant case law, the Court finds that the Petitioner’s cause of action against Chase for money damages stemming from the Chase’s alleged violation of the restraining notice is subject to a three year statute of limitations pursuant to CPLR § 214(2). Specifically, any right the Petitioner has to bring a plenary action against Chase for failing to comply with the restraining notice “arises from the fact that the legislature has declared this type of noncompliance with a restraining notice to constitute contempt; the dictum is consistent with the general proposition that a party injured as a consequence of a contempt of court can sue to secure money damages” (Cruz v TD Bank, N.A., 22 NY3d 61, 78 (NY 2013) citing CPLR §§ 5222 & 5251; Judiciary Law § 773). Further, the Petitioner has created no basis in the submitted papers nor at oral argument for this Court to find that the Petitioner’s right to recover against a bank that allegedly failed to comply with a restraining notice existed at common law or otherwise prior/apart from CPLR §5222.

As such, this Court finds that a cause of action by a claimant, such as the Petitioner, against a bank, such as Chase, based upon the bank’s alleged failure to comply with a restraining notice served upon the bank pursuant to CPLR §5222 falls within the CPLR §214 (2) three year statute of limitations as an action to recover upon a liability created or imposed by statute.

The Petitioner served the Respondents JP Morgan Chase and Paymentech LLC with restraining notices on different dates. Therefore the Petitioner's cause of action against each of the Respondents also accrued on different dates.

The Court notes that the underlying special proceeding involves two Respondents JP Morgan Chase and Paymentech LLC, who both appear to be under common control and are represented by the same attorney. However, the Petitioner served each of these Respondents with substantively identical restraining notices on different dates. The Petitioner attaches as Exhibit 4 to its First Amended Petition a Certified Mail, Return Receipt Requested Post card showing that Petitioner served Paymentech LLC with a restraining notice on June 22, 2010. The Petitioner also attaches as Exhibit 6 to their First Amended Petition a Certified Mail, Return Receipt Requested Post card showing that Petitioner served JP Morgan Chase with a restraining notice on June 28, 2010. The Court notes that Chase did not specifically address the issue that the Petitioner served JP Morgan Chase and Paymentech LLC on different dates in the instant motion to dismiss the underlying special proceeding as untimely. Similarly, the Petitioner does not address this fact in his opposition to the motion.

Chase, in effect, treats both the Respondents JP Morgan Chase and Paymentech LLC as the same entity in arguing that the Petitioner commenced the underlying special proceeding outside of the three year statute of limitations. Further, Chase indicates in its moving papers that the Petitioner served the restraining notice on Chase "on or about June 15, 2010" presumably relying upon the Petitioner's allegation in the First Amended Petition that the Petitioner served the restraining notice upon Paymentech LLC and JP Morgan Chase "in and around the middle of June of 2010". However, as the Petitioner served the Respondents JP Morgan Chase and Paymentech LLC with restraining notices on different dates, the Petitioner's cause of action against each of the Respondents also accrued on different dates.

The Petitioner's cause of action against each of the Respondents JP Morgan Chase and Paymentech LLC accrued one year from the date the Petitioner served each of the Respondents with the restraining notice.

“As a general principle, the statute of limitations begins to run when a cause of action accrues (see CPLR 203 [a]), that is, ‘when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court’” Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770 (NY 2012) citing CPLR §203(a); Aetna Life & Casualty Co. v Nelson, 67 NY2d 169 (NY 1986). Further in considering the motion to dismiss an action as untimely, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (West Chelsea Bldg. LLC v Guttman, 2014 NY Slip Op 32261U affmd 2016 NY Slip Op 02548 (NY App Div 1st Dept Mar. 31, 2016) citing Hoatson v New York Archdiocese, 25 Misc 3d 1218(A) (NY Sup Ct NY County 2009); Brignoli v Balch, Hardy & Scheinman, Inc., 178 AD2d 290 (NY App Div 1st Dept 1991).

In the instant special proceeding the Petitioner is claiming that Chase did not adequately comply with the restraining notice. Specifically, the Petitioner argues that given the information provided on the restraining notice, which included the Debtor's social security number, date of birth and address, the Respondent should have been able to locate and restrain multiple accounts that the Debtor had an interest in. The Petitioner further argues that Chase's failure to do so resulted in the Petitioner being unable to recover the funds held in the unidentified accounts.²

As such, in order to determine when the Petitioner's cause of action accrued, the Court must assume the truth of the Petitioner's allegations and determine when JP Morgan Chase and Paymentech LLC each allegedly “breached” their duty under CPLR §5222 as alleged in the Petition.

² Said accounts were later identified by Chase in response to a bankruptcy subpoena that the Petitioner served upon chase in connection with the Debtor's bankruptcy filing in 2014.

“A CPLR 5222 (b) restraining notice ‘may be served on either the judgment debtor himself or . . . upon a third-party ‘garnishee’--a person who owes a debt to the judgment debtor or who is in possession of property in which the judgment debtor has an interest’. Whereas a restraining notice served upon the judgment debtor is effective ‘until the judgment . . . is satisfied or vacated’, the injunctive effect of a notice served upon a garnishee ‘continues for one year [after service] or until such time as the judgment is satisfied or vacated, whichever occurs first’. Leave of court is required to serve more than one restraining notice upon the same person, and a restraining notice may be extended by motion pursuant to CPLR 5240” (Briarpatch Ltd., L.P. v Briarpatch Film Corp., 89 AD3d 425, 426 (NY App Div 1st Dept 2011) citing CPLR §5222; Aspen Industries, Inc. v Marine Midland Bank, 52 NY2d 575 (NY 1981); Kitson & Kitson v City of Yonkers, 10 AD3d 21 (NY App Div 2d Dept 2004)).

The instant special proceeding addresses the one year “injunctive effect” that the restraining notice had upon Chase and the duty imposed upon Chase during said one year period to comply with the restraining notice. The Petitioner argues in sum and substance that Chase’s failure to conduct a minimal level of investigation based upon the information that the Petitioner included in the restraining notice constituted a violation of the duty imposed upon Chase pursuant to CPLR §5222. Said duty ran for a year from the date that the Petitioner served Chase with the restraining notices, and at any point during that year Chase could have taken actions to satisfy their duty under the restraining notice. Without making any determination as to what Chase was required to do in order to “comply” with the restraining notice, at any point during the year in which the restraining notice was active Chase could have taken actions to discover/restrain other accounts that the Debtor had an interest in. Further, as Chase had a year to discover/restrain any such accounts based upon the information in the restraining notice, the Petitioner could not have commenced an action based upon a theory that the Petitioner made inadequate efforts to discover/restrain any accounts in which the Debtor held an interest until after said year was up.

As such, the Petitioner did not have the facts necessary to commence the underlying special proceeding against JP Morgan Chase and/or Paymentech LLC until the restraining notices it served upon each of them had respectively expired, one year after they were issued.

As the Petitioner served the Respondent Paymentech LLC with a restraining notice on June 22, 2010, the Petitioner's special proceeding against Paymentech LLC accrued on June 22, 2011 and was timely as of June 22, 2014 pursuant to CPLR §214 (2). Further, as the Petitioner served the Respondent JP Morgan Chase with a restraining notice on June 28, 2010, the Petitioner's special proceeding against JP Morgan Chase accrued on June 28, 2011 and was timely as of June 28, 2014 pursuant to CPLR §214 (2).

As the Petitioner brought the underlying special proceeding against both of the Respondents by filing the original petition on or about April 9, 2014, it is within the three year statute of limitations pursuant to CPLR §214 (2).

Further, as the Petitioner brought the underlying special proceeding against Chase within the three year statute of limitation, the Court need not address the Parties' remaining arguments as presented in their papers and at oral argument.

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that Chase's motion to dismiss the underlying special proceeding pursuant to CPLR §§ 3211(a)(5) & 214(2) on the basis that the Petitioner was outside of the statute of limitations to bring the underlying special proceeding is hereby denied. It is further

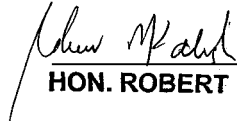
ORDERED that Chase shall serve and file an Answer to the Petitioner's First Amended Petition within 20 days from service of the order with notice of entry. It is further

ORDERED that the Parties will appear before this Court for a status conference on the underlying special proceeding on May 16, 2016.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: April 29, 2016

ENTER:

 , JSC
HON. ROBERT D. KALISH
J.S.C.