SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PATTERSON BELKNAP WEBB & TYLER LLP,

Plaintiff,

Index No.
158524/2012

DECISION and ORDER

- against -

BARBARA STEWART,

Mot. Seq. 003

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Patterson Belknap Webb & Tyler LLP ("Patterson" or "plaintiff") moves, by order to show cause, for an order appointing Daniel A. Lowenthal, Esq., a partner of Patterson, as receiver of intangible property interests of defendant Barbara Stewart ("Stewart" or "defendant") pursuant to CPLR 5228. Defendant does not oppose.

Plaintiff seeks the appointment of a receiver to assist in collecting on a default judgment against Stewart, entered on July 22, 2013, for the unpaid balance of Patterson's legal fees plus pre-judgment interest, totaling $2,056,160.14. Plaintiff submits the affirmation of David Kleban, Esq., annexing the following exhibits: (a) the July 22, 2013 judgment in favor of Patterson; (b) Stewart's memorandum of law seeking a declaration that her notice of appeal was timely and requesting additional time to perfect her appeal; (c) Patterson's memorandum of law in opposition to Stewart's motion and in support of its cross-motion to dismiss the appeal; (d) an order, dated December 29, 2015, granting Stewart's request to enlarge the time to perfect her appeal, but denying the parties' respective motions with respect to the timeliness of the notice of appeal, without prejudice to raising those issues in their briefs; (e) copies of emails from Stewart to Patterson, dated September 4, 2013 and September, 6, 2013, demanding that Patterson release a restraint on Stewart's checking account with a balance of $7,040.30; (f) an exemption claim form Stewart submitted to the bank, dated September 24, 2013; (g) excerpts from Stewart's deposition transcript; and (h) the Referee's Report in

In re Gregory Stewart Trust, et al., File Nos. 2005-3822, 2005-4776, 2005-4775, 2005-4777 (Sur. Ct. N.Y. Cnty. May 1, 2011).

On April 30, 2014, judgment was entered in Stewart's divorce action ("Index No. 350054/2007). Affirming the judgment, the First Department described the terms of the equitable distribution award as follows: "The award to plaintiff is not 'cashless'; rather, it includes many valuable assets that will be sold (including luxury vehicles, a Swiss chalet and its contents, and a Bermuda estate and its contents), with the net proceeds equally divided by the parties." *Stewart v.* Stewart, 133 A.D.3d 493, 493 (1st Dept. 2015), *lv. denied*, 2016 N.Y. LEXIS 261 (N.Y. Feb. 23, 2016). The First Department further noted that the court had awarded Stewart "$4,207.775 in Agravina stock", "jewelry valued at $8,520,000", and "two Swiss chalets worth a total of nearly $4 million." *Id.*

In Stewart's deposition testimony, Stewart testified that her stake in Agravina, a Vietnamese flower farm partnership, has already been sold, with the proceeds going to pay legal bills. Stewart Dep. Tr. 182–86. Stewart testified that the jewelry is in the possession of her former daughter-in-law, a Belgian citizen who resides in Switzerland. *Id.* at 216–17, 222, 226–27. With respect to the two Swiss chalets, Stewart testified that her name has never been on the deed for one of the chalets, and that she conveyed the other chalet to her grandchildren before the court's Order in the Divorce Action. *Id.* at 235–37.

Plaintiff argues that Stewart's interest in the remaining "valuable assets" that will be sold pursuant to the court's equitable distribution order—including "luxury vehicles, a [third] Swiss chalet and its contents, and a Bermuda estate and its contents"—presents the only opportunity for Patterson to satisfy its judgment and that the appointment of a receiver is the most appropriate mechanism by which to do so. Detailing Patterson's unsuccessful collection efforts, plaintiff asserts that Stewart has no reachable assets sufficient to satisfy the judgment other than her interest in half of the net proceeds from the sale of marital property ordered in the divorce action. That interest, plaintiff contends, is "intangible, complex, and not readily marketable" due to the assets' overseas locations and that they have been adjudged marital property rather than Stewart's personal property. Plaintiff also claims that failing to appoint a receiver would create a "risk of fraud [and] insolvency," *Hotel 71 Mezz Lender*, 14 N.Y.3d 303, 317 (2010), because Stewart's credibility and reliability have been put into doubt by her conduct. *See Stewart*, 133 A.D.3d at 494 (citing Stewart's "egregious economic fault in claiming to have given away jewelry and property worth over $10 million, failing to disclose her offshore and foreign accounts, and secreting millions more in assets" as relevant factors in the court's distribution of marital property).

"Upon motion of a judgment creditor . . . the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment." CPLR § 5228(a). While a judgment creditor may be appointed receiver, "he shall not be entitled to compensation." *See id.*; *Chlopecki v. Chlopecki*, 296 A.D.2d 640, 641 (3d Dept. 2002) (remanding to Supreme Court for appointment of judgment creditor as receiver).

The appointment of a receiver pursuant to CPLR 5228(a) is "entirely a matter of discretion." *Drucker v. Drucker*, 53 Misc.2d 446, 278 N.Y.2d 645 (Sup. Ct. 1967). A receiver should only be appointed "when a special reason appears to justify one." *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 317 (2010). In deciding whether the appointment of a receiver is justified, courts have considered the "(1) alternative remedies available to the creditor …; (2) the degree to which receivership will increase the likelihood of satisfaction …; and (3) the risk of fraud or insolvency if a receiver is not appointed." *Id.* (internal citation omitted). "A receivership has been held especially appropriate when the property interest involved is intangible, lacks a ready market, and presents nothing that a sheriff can work with at an auction, such as the interest of a psychiatrist/judgment debtor in a professional corporation of which he is a member." Siegel, N.Y. Prac. § 512 (5th ed.); *Udel v. Udel*, 82 Misc. 2d 882, 884 (N.Y. City Civ. Ct. 1975).

Plaintiff relies on *Hotel 71*, asserting that the factors enunciated in that case apply with equal force here. In *Hotel 71*, the Court of Appeals held that the Supreme Court did not abuse its discretion in appointing a receiver to administer defendants' "intangible personal property" consisting of "defendants' ownership/membership interests in various out-of-state business entities." *Hotel 71*, 14 N.Y.3d at 307. Plaintiff's attempt to characterize Stewart's interest in the equitable distribution award as "intangible personal property" is unavailing. The valuable assets to be sold pursuant to the court's equitable distribution order include luxury vehicles, a Swiss chalet and its contents, and a Bermuda estate and its contents. Unlike "ownership/membership interests in various out-of-state business entities," the assets subject to the equitable division award are not intangible, complex, and not readily marketable. *Id.* at 317 (concluding that the "complexity of defendants' intangible ownership interests" and "lack of marketability of defendants' intangible property interests" warranted the appointment of a receiver).

Furthermore, in *Hotel 71*, the Court of Appeals noted that there was concern about the defendants' "precarious financial condition" and an "identifiable risk" that defendants would "be unable to satisfy a future judgment." Based on the

record here, this court cannot similarly find a "a danger of insolvency if a receiver is not appointed," *id.*, as such a finding would be too speculative. As the First Department noted in *Stewart*, the net proceeds of the sale of "many valuable assets" will be equally divided by Stewart and her former husband pursuant to the equitable distribution order and Stewart is thus entitled to receive "millions of dollars of assets." *Stewart v. Stewart*, 133 A.D.3d 493 (1st Dept. 2015), *lv. denied*, 2016 N.Y. LEXIS 261 (N.Y. Feb. 23, 2016).

Nor has plaintiff shown that there is a substantial "risk of fraud" in the absence of the appointment of a receiver. References to Stewart's "egregious economic fault," "fail[ure] to disclose her offshore and foreign accounts," and possible "improper dissipation of marital asset[s]" in the First Department's account of the divorce action are insufficient to support a finding that the appointment of a receiver is appropriate and necessary to recover plaintiff's judgment. At this juncture, given the intrusive nature of receivership, plaintiff has not sufficiently demonstrated that appointing a receiver is the best available remedy to satisfy its judgment.

Accordingly, in the absence of a "special reason" to justify the appointment of a receiver, plaintiff's motion is denied.

Wherefore, it is hereby

ORDERED that plaintiff's motion for the appointment of a receiver pursuant to CPLR 5228 is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 29, 2016

AUG 29 2016

EILEEN A. RAKOWER, J.S.C.