SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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RENASANT BANK

Plaintiff

Index No. 157024/2016

v

GOM BUILDERS, LLC, BARRY N. STRAUS, DENISE STRAUS, H. THOMAS CARTLEDGE, and JIM HUTCHINS

MOT SEQ 001

Defendant.

----------X DECISION AND ORDER

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IN THE MATTER OF BARRY NEIL STRAUS and DENISE HUTCHINSON STRAUS

Petitioners

Index No. 157638/2016

v

RENASANT BANK, CRESCENT BANK & TRUST CO., and RONALD MOSES

MOT SEQ 001

Defendant.

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BANNON, J.:

I. INTRODUCTION

In connection with a Georgia judgment domesticated in New York, judgment creditor Renasant Bank (the Bank), moves pursuant to CPLR 5240 and 5222-a(d) for an order sustaining its objections to exemptions from execution and levy claimed by Barry N. Straus and Denise Straus (the Strauses) with respect to certain of their individual retirement accounts (IRAs) that were restrained by the Bank, and, in a related proceeding, the Strauses petition to turn over the restrained assets to them.

II. BACKGROUND

The Bank secured three judgments against the Strauses in the State of Georgia totaling approximately $10.5 million, based on their default in repaying seven promissory notes. One of the judgments, awarded in connection with an action commenced in the Superior Court of Cherokee County, Georgia, under docket number 10-CV-3294 (the promissory note action), was entered against the Strauses, among others, in the total sum of $4,141,456.37. In a separate Georgia action commenced in the Superior Court of Fulton County, Georgia (the fraudulent conveyance action), the Bank thereafter secured a judgment in the sum of $1,059,029 jointly and severally against the Strauses and Straus Family Limited Partnership (SFLP) for fraudulently conveying the Strauses' assets in order to avoid repaying the notes and the judgments entered in connection therewith.

SFLP thereafter filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code, the trustee in bankruptcy took possession of the SFLP's assets, and plaintiff filed a proof of claim in the United States Bankruptcy Court in connection with the judgment it obtained against SFLP. Based on information provided to plaintiff by the trustee, plaintiff estimates that approximately $755,000 in SFLP's assets are available to satisfy the judgment in the Georgia fraudulent conveyance action, leaving a significant sum to be satisfied from

the Strauses' personal assets.

On December 12, 2014, the judgment in the fraudulent conveyance action was domesticated in New York upon its filing with the Clerk of the Supreme Court, New York County (the Clerk). On April 19, 2016, after the Strauses exhausted the appeal process in Georgia, the Bank served a restraining notice on Bishop Rosen & Co. (BRC) and National Financial Services (NFS), which was then BRC's clearinghouse, directing them to restrain the funds they held in the Strauses' IRAs so that the funds would be made available for levy to satisfy all or a part of the judgment in the fraudulent conveyance action. On September 7, 2016, the Strauses each served the Bank and the entities holding the assets with an exemption claim form, asserting that the assets restrained by the Bank were IRAs, and hence exempt from levy and seizure for the payment of a judgment debt.

On August 22, 2016, the Bank domesticated the judgment in the promissory note action by filing it with the Clerk. On September 1, 2016, and September 21, 2016, respectively, the Bank issued restraining notices in New York to Empire Asset Management (Empire) and RBC Capital Markets (RBC), as clearinghouse for Bishop Rosen & Co., directing it to restrain the funds it held in the Strauses' IRAs so that the funds could be made available for levy to satisfy all or a part of the judgment in the promissory note action. On September 26, 2016, the Strauses each served the

Bank and the entities holding the assets with an exemption claim form, asserting that the assets restrained by the Bank were IRAs, and hence exempt from levy and seizure for the payment of a judgment debt.

On September 13, 2016, the Strauses commenced the instant proceeding pursuant to CPLR 5222-a to turn over the assets restrained by the Bank. The Bank opposed the petition. The parties, however, stipulated that, in lieu of requiring the Bank to move within the eight-day statutory period for an order sustaining its objections to the exemptions claimed by the Strauses in connection with the initial restraining notices (see CPLR 5222-a[d]), the assets would be held in escrow by the Bank's attorney, pending and subject to the court's disposition of the petition. On October 5, 2016, under the index number pursuant to which the judgment in the promissory note action was domesticated, the Bank moved to sustain those objections, including with its motion papers written objections to the claimed exemptions, and effectively seek a determination that the assets were, at least in part, not subject to the exemptions claimed by the Strauses. The Strauses opposed the motion. In an interim order dated October 26, 2016, this court directed that the restraints on the accounts are to remain in effect until further order of the court. See CPLR 5222-a(e). The court recognizes that it is obligated, within five days of the hearing

on the motion, to "issue an order stating whether or not funds in the account are exempt and ordering the appropriate relief." CPLR 5222-a(d). The court grants the Bank's motion to the extent of sustaining its objections to exemptions claimed by the Strauses in connection with additions made to the corpus of the Empire/RBC IRAs prior to September 1, 2010, and additions made to the corpus of the BRC/NFS IRAs prior to June 6, 2013, and grants the Strauses' petition to the extent of directing the escrowee to turn over to the Strauses the corpus of the respective IRAs as they existed prior to those dates and any additions to the corpus of those IRAs made prior to those dates.

III. DISCUSSION

The Strauses contend that Georgia law, which completely exempts IRAs from levy and seizure for the payment of judgment debts, is applicable to the instant matter, since the underlying notes were executed in Georgia, the parties litigated the matter in Georgia, and none of the parties reside or do business in New York. They also argue that the restrained assets are not actually located in New York, since only the brokers that manage the accounts are in New York. The Bank counters that a proceeding to enforce a judgment is independent of any substantive choice-of-law limitations that may have been applicable to the underlying dispute that resulted in the entry

of the judgments in Georgia. It further asserts that, under New York choice-of-law principles, the law of the state in which assets are located is applicable to proceedings to levy on or collect those assets. The Bank argues that the assets are located in New York and that, as such, the court must apply the substantive law of New York, which provides limited exemptions from execution and levy upon IRAs.

In the first instance, there is no dispute that, in a proceeding pursuant to CPLR 5222-a commenced in a New York court, New York procedural law is applicable. Pursuant to CPLR 5222-a(c)(5), "[i]f no claim of exemption is received by the banking institution [holding the disputed funds] within twenty-five days after the notice and forms are mailed to the judgment debtor, the funds remain subject to the restraining notice or execution." Here, the Strauses did not claim an exemption in connection with the restraining notices served on April 19, 2016, until long after the 25-day period had lapsed, and not until almost three months after those notices were delivered to the institutions holding the subject assets. Thus, although "[f]ailure of the judgment debtor to deliver the executed exemption claim form does not constitute a waiver of any right to an exemption" (CPLR 5222-a[c][5]), the Bank was not required to serve a written objection to the claimed exemption within that 8-day period lest the restraint automatically expire

by operation of law 21 days after service of the objection (see CPLR 5222-a[e]), and the Bank was not required to move for an order sustaining an objection to the exemption within 8 days after such delivery of an exemption claim form to the relevant financial institutions. See CPLR 5222-a(d).

Regardless of the timing of the Strauses' service of their claims of exemption, however, the claim is nonetheless limited by New York law.

Contrary to the Strauses' contention, the brokers holding the IRA accounts are located in New York, and essentially hold the assets in New York. The accounts were opened in their New York offices, documents were forwarded to them in New York, deposits into the accounts were made in New York, and any out-of-state entities that provided accounting management services were mere clearinghouses for the New York brokers, which maintain offices in New York in any event. The physical presence of a garnishee in New York, as is the case with the Strauses' brokers and their clearinghouses, fixes New York as the situs of the debt. See Hotel 71 Mezz Lender LLC v Falor, 14 NY3d 303, 316 (2010), quoting Siegel, NY Prac § 491, at 835 [4th ed]. "The general rule is that questions of garnishment and attachment are decided by the law of the forum since they deal with remedies." Morris Plan Indus. Bank v Gunning, 295 NY 324, 331-332 (1946); see Harris v Balk, 198 US 215 (1905); Oppenheimer v Dresdner Bank

A. G., 50 AD2d 434, 439 (2nd Dept 1975). "Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment . . . ; such measures remain subject to the . . . control of forum law." Baker v General Motors Corp., 522 US 222, 235 (1998). The limited exemptions under New York law, rather than the complete exemption provided for by Georgia law, are thus applicable to the instant dispute. CPLR 5025(c)(2), (c)(5), and (d)(1) articulate the exemptions applicable to IRAs in connection with a judgment creditor's right to execute or levy upon the assets of a judgment debtor. The Bank relies on CPLR 5025(c)(5), which creates a "lookback" period for additions made to IRA funds at any time subsequent to 90 days prior to the interposition of the judgment creditor's claim; those additions are excepted from the IRA exemption, and may be levied upon. Accordingly, subject to those exemptions, the Bank has the right to execute or levy upon the subject IRAs and, hence, has a right to restrain them for the purpose of effectuating an execution or levy.

The Strauses correctly argue that they are entitled to the release and turnover of any IRA assets that were wrongfully restrained. They contend that the "interposition of the claim on which the judgment was based" occurred on September 4, 2013, when the fraudulent conveyance action was commenced, and that only

those additions to the IRAs made after June 6, 2013, are subject to execution and levy. However, this contention is only true with respect to the restraining notices served upon BRC and NFS. Since the restraining notices issued by the Bank to Empire and RBC are referable to the judgment entered in the promissory note action, and that action was commenced on December 1, 2010, any additions to the IRAs that were or are held or managed by Empire or RBC which were made after September 1, 2010, are subject to execution and levy in connection with that action and, hence, remain subject to the restraining notices. Since the Strauses concede that additions were made to the IRAs after September 1, 2010, the Bank has established its right to restrain, and ultimately execute and levy upon, those additions.

IV. CONCLUSION

Accordingly, it is it is hereby

ORDERED that the motion of Renasant Bank for an order sustaining its objections to the claims for exemption from levy and execution asserted by Barry N. Straus and Denise Straus is granted to the extent that the exemption (a) shall not apply to any additions to IRAs that were or are held or managed by Empire Asset Management or RBC Capital Assets, in its capacity as clearinghouse for Bishop Rosen & Co., which were made by or for the benefit of Barry N. Straus and Denise Straus on or after

September 1, 2010, and (b) shall not apply to any additions to IRAs that were or are held or managed solely by Bishop Rosen & Co. or by National Financial Services on or after June 6, 2013, the restraining notices served by Renasant Bank shall remain in effect to that extent, and the motion is otherwise denied; and it is further,

ORDERED that the petition is granted to the extent that the restraining notices are vacated (a) as to the corpus of the IRAs that were or are held or managed by Empire Asset Management or RBC Capital Assets, in its capacity as clearinghouse for Bishop Rosen & Co., as those IRAs existed before September 1, 2010, and any additions to those IRAs that were made by or for the benefit of Barry N. Straus and Denise Straus before that date, and (b)as to the corpus of the IRAs that were or are held or managed solely by Bishop Rosen & Co. and by National Financial Services, as those IRAs existed before June 6, 2013, and any additions to those IRAs that were made by or for the benefit of Barry N. Straus and Denise Straus before that date, the petition is otherwise denied, and the escrowee shall forthwith turn over to Barry N. Straus and Denise Straus the funds subject to the vacatur.

This constitutes the Decision and Order of the court.

Dated: 10/27/16

ENTER: _____
J.S.C.
HON. NANCY M. BANNON