

Grinshpun v Borokhovich

2017 NY Slip Op 30068(U)

January 11, 2017

Supreme Court, New York County

Docket Number: 158141/2016

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ARON GRINSHPUN, SAM ZELTSER, ZELIG ZELTSER
and THREE STAR CAPITAL, LLC,

Petitioners/Judgment Creditors,

Index No. 158141/2016

-against-

Seq. No. 001

ELENA BOROKHOVICH,

Respondent

PINCZEWSKI & SHPELFOGEL, P.C., and
MITCHELL B. SHPELFOGEL, Stakeholders

GENNADY (a/k/a Eugene) BOROKHOVICH,

Judgment Debtor.

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Kelly O'Neill Levy, J.:

In this turnover special proceeding brought pursuant to CPLR 5225 and 5227, petitioners/judgment creditors Aron Grinshpun, Sam Zeltser, Zelig Zeltser and Three Star Capital, LLC ("Petitioners") seek to recover home insurance proceeds collected after fire damage at the residence of judgment debtor, Gennady (a/k/a Eugene) Borokhovich ("Gennady"). Petitioners seek an order directing respondent Elena Borokhovich ("Elena"), wife of Gennady, to turn over payments made by Bankers Standard Insurance Company and Bankers Standard Insurance Company d/b/a Ace Group a/k/a Ace Private Risk Services (together, "Bankers"), in connection with Bankers' home insurance policy number 268-01-15-51H (the "Policy"). Bankers and the Borokhoviches entered into a formal settlement agreement dated August 30, 2016, granting the sum of \$179,000 to Elena for contents and additional living expenses as insurance proceeds resulting from the fire damage to the house located at 1310 Seawane Drive,

Hewlett Harbour, New York (the "House"). Petitioners contend that they are entitled to a hearing as to which contents of the House belonged to Gennady at the time of the fire. The Borokhoviches cross-move for an order dismissing the proceeding, or, in the alternative, for an order directing a trial of the issues raised in this proceeding, and for legal fees, costs, and disbursements incurred on the cross motion.

An application was made to this court on September 15, 2015 requesting that the court grant Petitioners the insurance proceeds in Elena's possession because her interest in the House and in the insurance proceeds arises from the fraudulent transfer of Gennady's interest in the House. There had not been an adjudication that the transfer of the House was fraudulent and the issue was pending before this court. Additionally, Bankers and the Borokhoviches had not yet entered into a formal settlement agreement regarding the insurance proceeds. Accordingly, this court deemed claims against Elena and Bankers premature and denied the petition without prejudice with respect to those claims.

On or about August 30, 2016, the Federal Action was settled. Petition, exhibit G. The settlement agreement provides that Bankers will pay Elena the sum of \$179,000 for contents and additional living expenses as proceeds from the insurance policy. *Id.* The proceeds are currently held in escrow by Elena's counsel. Affirmation in Opposition to Turnover Petition, ¶ 20. On September 29, 2016, this court ordered that Elena and her counsel be restrained from selling, transferring, paying, adjusting and/or otherwise disposing in any manner the payment for contents and additional living expenses arising out of the settlement agreement.

Analysis

Petitioners claim that they are entitled to a hearing to determine what portion of the insurance proceeds in Elena's possession belongs to Gennady. According to Petitioners,

discontinuance of Gennady's insurance claim was made less than one month before the settlement agreement was entered and after the parties had already reached an agreement on the settlement amount. Petition, ¶ 21. Petitioners argue that Gennady discontinued his right to a portion of his insurance proceeds without due consideration, instead allowing Elena to assume the entirety of the proceeds, in order to avoid having to pay any sum to his judgment creditors.

In Pensmore Investments, LLC v. Gruppo, Levey & Co., the First Department held that a wife was entitled to a hearing to determine whether the personal property in her possession is her sole separate property or marital property. 137 A.D.3d 558, 559–60 (1st Dep't 2016). In that case, the judgment creditor obtained a turnover order against a husband. Said order included property in former residences he once shared with his wife, against whom there was a pending divorce action. Pensmore at 558, 559. The appellate court reasoned that the wife, who had occupied the residences, should have been allowed to intervene and a hearing should have been held to determine whether the property in the turnover order was her sole separate property. Pensmore at 558, 559. *See also* In Cadle Co. v. Satrap, 302 A.D.2d 381, 381–82 (2d Dep't 2003) (holding that the trial court improperly directed a husband and wife to turn over an automobile without first conducting a hearing to determine the wife's interest in the vehicle) (citing CPLR 409[b]; 410; Triangle Pacific Bldg. Prods. Corp. v. National Bank of North Amer., 62 A.D.2d 1017 (2d Dep't 1978)). While in Pensmore it was not a judgment creditor who sought a hearing to determine ownership of property, but rather a non-debtor wife, the court's ruling was clearly based on ensuring rightful determination as to ownership of property, be it with respect to creditors, debtors, or other non-debtors. Here, Gennady lived in the House and owned at least some its contents. He was a named insured on the policy and, along with Elena, made a claim against the insurance company until, without consideration, his portion of the claim was

discontinued less than one month before entering into the settlement agreement. Furthermore, the circumstances, while not conclusive of fraud, point to “badges of fraud,” specifically, a close relationship between the parties to the transaction, inadequacy of consideration, and knowledge of the creditor’s claim. Piccarreto v. Mura, 51 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2016).

For the reasons stated above, Petitioners’ motion is granted to the extent that it seeks a hearing to determine what portion of the insurance proceeds is from contents that were owned by Gennady. Nevertheless, the burden will be on Petitioners to show Gennady’s ownership rights with respect to any contents of the House. *See* Pensmore Investments, LLC v. Gruppo, Levey & Co., 137 A.D.3d 558, 559 (1st Dep’t 2016) Petitioner, however, is entitled to a broad discovery since the evidence is largely within the possession of the respondents. *See* Petrocelli v. Petrocelli Elec. Co., 121 A.D.3d 596 (1st Dep’t 2014); National Communications Corp. v. Bloch, 259 A.D.2d 427 (1st Dep’t 1999).

Accordingly, it is

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the following issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of what portion of the contents of the house, located at 1310 Seawane Drive, Hewlett Harbour, New York that make up the \$179,000 sum to Elena Borokhovich pursuant to the settlement agreement dated August 30, 2016, was owned by judgement debtor Gennady Borokhovich
- (2) the issue of the monetary value with respect to the contents of the house determined to be owned by Gennady Borokhovich; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that counsel are directed to the Rules of the Special Referees' Part¹ and shall immediately consult one another and counsel for Plaintiff shall, within 30 days from completed discovery, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk who is directed to place this matter on the calendar of the Special Referees' Part for the earliest convenient date and advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees' Part in accordance with the rules of that part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day-to-day until completion; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the

¹ Available at www.nycourts.gov/courts/1jd/suptctmanh/SR-JHO/Rules-SRP.pdf

² Available at www.nycourts.gov/suptctmanh

Report of the JHO/Special Referee and the determination of this Court thereon.

This constitutes the decision and order of the court.

DATED: January 11, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.