

Pangea Capital Mgt., LLC v Wells Fargo Bank

2017 NY Slip Op 31610(U)

July 31, 2017

Supreme Court, New York County

Docket Number: 150882/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

-----X

PANGEA CAPITAL MANAGEMENT, LLC,
Plaintiff,

INDEX NO. 150882/2017

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

WELLS FARGO BANK, JOHN LAKIAN, DIANE LAMM,
Defendants.

INTERIM DECISION AND
ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 2, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this application to/for Turnover of funds

Upon the foregoing documents, it is

Ordered that the petition is **granted** to the extent stated below.

In this proceeding, petitioner Pangea Capital Management, LLC (Pangea) requests that this court issue an order requiring respondent Wells Fargo Bank, N.A. (Wells Fargo) to turn over to Pangea, pursuant to CPLR 5225 (b), all sums of money that are in the Wells Fargo bank accounts of respondents John R. Lakian (Lakian) and Diane W. Lamm (Lamm). Wells Fargo opposes the petition; Lakian and Lamm have not answered. For the reasons stated below, Wells Fargo's request to dismiss Pangea's petition is denied, and the relief sought in the petition is granted to the extent, and subject to the conditions, set forth herein.

BACKGROUND

On or about February 3, 2016, Pangea commenced a proceeding in federal court against Lakian seeking, inter alia, an order and judgment confirming an arbitration award, dated January 15, 2016, issued by Judge Stephen Crane in an arbitration proceeding. Petition, ¶ 5. By order dated November 9, 2016, the arbitration award was confirmed, and on November 16, 2016, a judgment was entered against Lakian in the amount of \$14,452,193.22 (the judgment). *Id.*, ¶¶ 6-7. On November 30, 2016, an abstract of judgment was entered by the Clerk's Office of the United States District Court for the Southern District of New York. *Id.*, ¶ 8. As of the date hereof, no part of the judgment has been paid or satisfied by Lakian, the judgment debtor. *Id.*, ¶ 9.

On December 20, 2016, Pangea, by its counsel, issued a "restraining notice to garnishee" directed to Wells Fargo in an attempt to satisfy the judgment. Petition, ¶ 10; exh. C (Restraining Notice). On January 18, 2017, in response to the Restraining Notice, Wells Fargo forwarded to Pangea an exemption claim form completed by Lakian or his counsel, McLaughlin & Stern LLP, which indicated that some or all of the funds in Lakian's bank account at Wells Fargo contained social security benefits and/or were jointly held with others. *Id.*, ¶ 11; exhibit D (Exemption Claim Form). Other than the Exemption Claim Form, Wells Fargo did not, at that time, provide any information to Pangea regarding the bank account, the name of the joint account holder, and/or the amount of funds in the bank account. *Id.*, ¶ 12. On January 11, 2017, on behalf of Pangea, City Marshal Martin Bienstock served upon Wells Fargo a "levy and demand," dated January 10, 2017, seeking to execute upon Lakian's bank account. *Id.*; exhibit G (Marshal Levy). On January 19, 21 and 25, 2017, Pangea, by its counsel, attempted to contact Wells Fargo to discuss the Restraining Notice and to obtain information regarding Lakian's bank account, but Wells Fargo did not respond to Pangea's inquiries. *Id.*, ¶ 14.

On January 26, 2017, Sandra McKeiver of Wells Fargo called Pangea to state that, because Pangea failed to timely object to Lakian's exemption claim, funds in Lakian's bank account would be released from restraint. *Id.*, ¶ 15. Apparently, McKeiver's statement was based upon a letter, sent to Wells Fargo by Lakian's counsel on January 26, 2017, which stated that the deadline for Pangea to object to Lakian's claimed exemption had expired. Wells Fargo opposition, exhibit 5 (McLaughlin Letter). Pangea, orally and in writing, advised McKeiver that it was objecting to Lakian's claimed exemption, and to any release of funds from the bank account. Petition, ¶ 16; exhibit E (Objection Letter). On the same day, Pangea served, via email, an information subpoena upon Wells Fargo, seeking information regarding Lakian's claimed exemption and the relevant bank account. *Id.*, ¶ 17; exhibit F (Information Subpoena).

One day later, on January 27, 2017, Wells Fargo released the restraint upon the joint account that was maintained in the names of Lakian and Lamm at Wells Fargo,¹ designated by account number ###5726 (Joint Account). Wells Fargo opposition, ¶ 9; Pangea reply, ¶ 11. Funds from the Joint Account, in the amount of \$48,000, were transferred on January 30, 2017 to Lamm's checking account at Wells Fargo, designated by account number ###9623 (Lamm Account). Pangea reply, ¶ 12; exhibit B (bank statement evidencing fund transfer to the Lamm Account). One day prior to the transfer of funds to the Lamm Account, Pangea had advised Wells Fargo that it intended to present an "order to show cause" (OSC) to this court for signature on January 30, 2017 seeking to restrain all transfers of non-exempt funds in any Lakian bank account at Wells Fargo. *Id.*, ¶ 13; exhibit C (January 29, 2017 Pangea letter to Wells Fargo with proposed OSC).

¹ Notably, the United States Attorney's Office issued a news release on February 5, 2016 stating that Lakian and Lamm had "each pleaded guilty to two counts of securities fraud for defrauding investors out of millions of dollars." Pangea's reply, exhibit A.

On January 30, 2017, this Court signed the OSC, which stated, inter alia, that Wells Fargo, Lakian and Lamm (collectively respondents) would be restrained from transferring and/or withdrawing “any non-exempt funds maintained in any account by the Judgment Debtor with respondent Wells Fargo.” OSC at 2; NYSCEF Doc. No. 5. By stipulation of the parties, the hearing to consider the OSC for the turnover of funds, which was originally scheduled for March 14, 2017, was adjourned until April 25, 2017. NYSCEF Doc. No. 24. At the conclusion of the April 25th hearing, this court stated that the restraint imposed under the Restraint Notice would remain in place. Hearing transcript at 14.

DISCUSSION

Whereas CPLR 5222 sets forth, among other things, the law governing the issuance of a restraining notice and the effect of the restraint, CPLR 5222-a provides the procedures for the service of notices and forms, as well as the procedures for a claim of exemption by a person whose bank account has been affected by a restraining notice. Notably, Respondents do not argue that they did not receive copies of the Restraining Notice and the Exemption Claim Form. Instead, in opposing Pangea’s petition for a turnover of funds pursuant to CPLR 5225 (b), Wells Fargo argues that Pangea is attempting to “circumvent” CPLR 5222-a’s requirement that it should have timely objected to Lakian’s claimed exemption through a CPLR 5240 motion. Wells Fargo opposition brief at 2. In particular, Wells Fargo argues that, pursuant to CPLR 5222-a (c) (3), when a judgment debtor (such as Lakian) asserts a claim of exemption after receipt of the Restraining Notice by delivering a completed Exemption Claim Form, the bank garnishee (such as Wells Fargo) is required to release to the debtor the restrained funds in the debtor’s account after eight days, unless the judgment creditor (such as Pangea) objects to the exemption claim by serving and

filing a CPLR 5240 motion. *Id.* at 4, citing CPLR 5222-a (c) (3) and 5222-a (d). Wells Fargo further argues that “strict, literal compliance” with the statute is required for a turnover order. *Id.* at 4-5, quoting *LR Credit 21, LLC v Burnett*, 40 Misc 3d 854, 857 (Dist Ct Nassau County, 2013).

Wells Fargo’s arguments are unpersuasive. First, as a condition to a bank’s release of the funds in a debtor’s account eight days after the debtor returns the exemption claim form pursuant to CPLR 5222-a (c) (3), the statute requires the bank to “notify the judgment creditor forthwith of the date on which the funds will be released pursuant to paragraph three of this subdivision.” CPLR 5222-a (c) (2). In this case, Wells Fargo failed to offer any evidentiary proof that it notified Pangea prior to its release of the funds from the Joint Account. Because Wells Fargo violated the requirement of CPLR 5222-a, it cannot now be heard to complain that Pangea also failed to comply with the statute, particularly in light of the fact that it (Wells Fargo) released non-exempt funds (as discussed below) after it was notified by Pangea on January 26, 2017, via the Objection Letter, that Pangea objected to Lakian’s claimed exemption, and to Wells Fargo’s release of the funds from Lakian’s bank account. Moreover, notwithstanding Pangea’s notice, dated January 29, 2017, which informed Wells Fargo that Pangea intended to present an OSC to this court on January 30, 2017 to restrain all transfers of non-exempt funds in Lakian’s bank account, Wells Fargo transferred \$48,000 from the Joint Account to the Lamm Account on January 30, 2017, in obvious disregard of the restrictions stated in the Restraining Notice and the Marshal Levy.

Wells Fargo’s reliance upon *LR Credit* is also misplaced. Importantly, that decision concluded that a judgment creditor must plead and prove strict and literal compliance with CPLR 5222-a (b) (2) and (b) (3) -- the notice provisions -- as a requirement for a turnover proceeding commenced by the creditor. Whereas subsection (b) (2) requires the sheriff to provide an exemption notice and two exemption claim forms when serving an execution by levy upon the

garnishee bank, subsection (b) (3) requires the bank to serve the notice and claims forms on the judgment debtor by first-class mail within two business days after receiving them. Here, there is no allegation by any party of noncompliance with subsections (b) (2) and (b) (3), or that the Restraining Notice or Marshal Levy was improperly served. Therefore, Wells Fargo's allegation, that Pangea failed to strictly comply with CPLR 5222-a (c) (3) by failing to file and serve a CPLR 5240 motion, misapprehends and misapplies the specific holding and rationale stated in the *LR Credit* decision. Moreover, it is noteworthy that, in response to the Marshal Levy, Wells Fargo placed a notation therein that "Wells Fargo requires for joint acct turnover order or conditional release with signatures of acct owners." Petition, exhibit G. Hence, Wells Fargo's argument that, Pangea is using this turnover proceeding to "circumvent" the requirement of filing a CPLR 5240 motion, is disingenuous, because it instructed or informed Pangea to obtain a turnover order, on the pretext that a turnover of the funds in the Joint Account affects both account owners.

Wells Fargo also argues that, although CPLR 5222-a imposes significant obligations on the banks, by requiring them to forward the exemption and claim notices to the judgment debtor, the legislature "did not intend this role to subject banks to a new type of liability." Wells Fargo opposition brief at 6, quoting *Cruz v TD Bank, N.A.*, 22 NY3d 61, 76 (2013). This argument is unavailing because it fails to emphasize the more important portion of the *Cruz* decision. In particular, the *Cruz* decision stated that "the legislature intended to use banks as a conduit for information . . . [and that] . . . [t]he point of the legislation was to help debtors notify banks of the presence of exempt funds in their accounts in order to prevent those funds from being restrained . . ." *Id.* (emphasis added). In dicta, the *Cruz* decision noted that, if a bank willfully failed to comply with a restraining notice, and permitted the judgment debtor to continue to access a restrained account to fulfill the bank's business interests at the expense of the judgment creditor,

violation of the restraining notice by the garnishee bank would subject “the garnishee to personal liability in a separate plenary action or special proceeding under CPLR article 52 by the aggrieved judgment creditor.” *Id.* at 77-78, quoting *Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 580 (1981).²

In this case, there is no allegation that Wells Fargo failed to serve its role as a conduit of information. Rather, Pangea’s contentions are: (1) Wells Fargo failed to notify it of the date when funds would be released from the Joint Account, in violation of CPLR 5222-a (c) (2); and (2) Wells Fargo released non-exempt funds, because the bank records indicated that, as of January 12, 2017, there was \$49,157.86 in the Joint Account (as indicated by Wells Fargo in the Marshal Levy), and only \$2,160 “was rightfully entitled to an exemption.” Pangea reply, ¶ 50. At oral argument held on April 25, 2017, Wells Fargo did not refute Pangea’s contentions. Indeed, during oral argument, Wells Fargo conceded that “there is currently about \$12,000 still retained in the Lakian-Lamm accounts.” Hearing transcript at 5. Based on the hearing record, it can be reasonably inferred and concluded, and neither Wells Fargo nor Lakian refuted, that at least a portion of the \$48,000 transferred from the Joint Account to the Lamm Account consisted of non-exempt funds, as contended by Pangea. *Id.* at 13. Because the intent of the legislation at issue is to enable judgment debtors to access only exempt funds, as noted in *Cruz*, Wells Fargo’s transfer of non-exempt funds from the Joint Account violated and overstepped the intent of the legislation. *In the Matter of*

² The Court of Appeals in *Aspen Indus.*, however, noted that, because the bank in that case had retained twice the amount due on the judgment to ensure payment of all costs and interest owing to the judgment creditor on the judgment, the bank was then free to dispose of the remainder of the judgment debtor’s funds in excess of the retained amount, without regard to the restraining notice. *Id.* at 581. Here, the Judgment against Lakian was in excess of \$14 million, and the Joint Account clearly did not have sufficient funds to satisfy the Judgment.

Shannon, 25 NY3d 345, 351 (2015) (it is “fundamental” that a court attempt to “effectuate the intent” of the legislature).

Based on the foregoing, Wells Fargo’s opposition to Pangea’s petition for a turnover of the funds in its possession is without merit, and its request to dismiss the petition is denied. *Leon v Martinez*, 84 NY2d 83, 87 (1994) (on a motion to dismiss, the court affords the pleading a liberal construction and accords the petitioner the benefit of every possible favorable inference).

Notably, the Joint Account is in the names of Lakian and Lamm while the Lamm Account is in Lamm’s name only. However, the parties fail to address a judgment creditor’s right in such accounts and its legal effect in a turnover proceeding pursuant to CPLR 5225 (b). Therefore, the following highlights the legal and factual issues that must be addressed in a turnover proceeding.

CPLR 5225 (b) states, in relevant part, that, where a judgment creditor commences a turnover proceeding against a person in possession or custody of money in which the judgment debtor has an interest, or against a person who is a transferee of money from the judgment debtor, and “where it is shown that the judgment debtor is entitled to the possession of such [money] or that the judgment creditor’s rights to the [money] are superior to those of the transferee,” the court shall require such person to pay the money to the judgment creditor. *Id.*

The courts have held that “jointly owned assets are vulnerable to levy by a judgment creditor pursuant to CPLR 5225,” and that “the deposit of funds into a joint account constitutes prima facie evidence of an intent to create a joint tenancy.” *In the Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 (2d Dept 2009) (internal quotation marks and citations omitted; Banking Law § 675). Also, a joint account creates a “rebuttable presumption that each named tenant is possessed of the whole of the account so as to make the account vulnerable to levy of a money judgment by a judgment creditor of one of the joint tenants.” *Id.* (internal quotation

marks and citations omitted). Further, “[t]he presumption created by Banking Law § 675 can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only.” *Id.* (internal quotation marks and citations omitted). Where the presumption is rebutted, “the judgment creditor’s levy on the jointly owned bank account is effective only up to the actual interest of the judgment debtor in the account.” *Id.* In *Signature Bank*, the Appellate Division observed that, because the judgment debtor’s daughters, who were named on the joint bank accounts with the debtor, did not appear or answer in the turnover proceedings, and did not “in any manner challenge[] the petition’s allegations to claim any portion of the joint bank accounts,” the debtor’s conclusory assertions were “insufficient to rebut her ownership of the funds in the bank accounts for purposes of the turnover proceedings.” *Id.* at 919. Under such facts and circumstances, the Appellate Division upheld the trial court’s decision, concluding that “the petitioner was entitled to the turnover of the funds contained in the two joint bank accounts.” *Id.* See also *Matter of JRP Old Riverhead, Ltd. v Hudson City Sav. Bank*, 106 AD3d 914, 915 (2d Dept 2013) (“petitioner was not required to establish that the judgment debtor was the sole contributor of funds to the [joint bank] account”; because the account owners failed to rebut the presumption, as neither appeared or answered in the proceeding, the bank was required to turnover funds in the joint account to the petitioner judgment creditor).

In this case, it is undisputed that respondent Lamm did not answer or appear in these proceedings, nor did she in any manner challenge Pangea’s petition to claim any portion of the Joint Account. It is also undisputed that respondent Lakian did not answer or object to the petition, and that, although he appeared at the oral argument held on April 27, 2017, the only substantive assertion he made was that a portion of the Joint Account contained exempt funds (i.e. social

security deposits). Moreover, neither Wells Fargo nor Lakian has refuted Pangea's allegation that, based on the bank records, the sum of \$48,000 was transferred from the Joint Account to the Lamm Account on January 30, 2017. Further, based upon the notation made by Wells Fargo in response to the Marshal Levy, an amount equal to \$49,157.86 remained in the Joint Account as of January 12, 2017, a date after Wells Fargo was served with the Restraining Notice and Marshal's Levy. Under these facts and circumstances, and subject to the compliance and completion of the conditions stated below, Pangea shall be entitled to the turnover of non-exempt funds, pursuant to CPLR 5225 (b), as requested in the petition.

Specifically, within twenty (20) days after the service of a copy of this interim decision and order with notice of entry, Pangea shall, consistent with the rulings stated herein and based upon the information received from Wells Fargo in response to the Information Subpoena, submit to this court a proposed order and judgment, and serve a copy of same upon Respondents, setting forth the amount of non-exempt funds to be turned over by Wells Fargo, and the factual evidence in support of same. Any counter proposed order and judgment, along with supporting affidavit(s), shall be filed and served within thirty (30) days after the service of a copy of this decision and order with notice of entry. If a counter proposed order and judgment is timely filed and served, this Court shall appoint a special referee for the purpose of conducting a hearing pursuant to CPLR 5239.

CONCLUSION

In light of the foregoing, it is hereby:

ORDERED that the request to dismiss the petition by respondent Wells Fargo Bank is denied; and it is further

ORDERED that the petitioner's request for a turnover of the money in Wells Fargo's bank accounts of respondents John Lakian and Diane Lamm is granted to the extent, and subject to the conditions, set forth hereinabove; and it is further

ORDERED that the provisions of the Order to Show Cause for Turnover Pursuant to CPLR 5225(b), dated January 30, 2017, restraining and prohibiting the respondents and their agents from encumbering, removing, transferring or withdrawing any non-exempt funds from the bank accounts that John Lakian and Diane Lamm maintained in Wells Fargo Bank, shall remain in full force and effect until the final resolution of all issues in this turnover proceeding; and it is further

ORDERED that within twenty (20) days after the service of a copy of this interim decision and order with notice of entry, Pangea shall, consistent with the rulings stated herein and based upon the information received from Wells Fargo in response to the Information Subpoena, submit to this court a proposed order and judgment, and serve a copy of same upon Respondents, setting forth the amount of non-exempt funds to be turned over by Wells Fargo, and the factual evidence in support of same; and it is further

ORDERED that any counter proposed order and judgment, along with supporting affidavit(s), shall be filed and served within 20 days after the service of the proposed order and judgment; and it is further

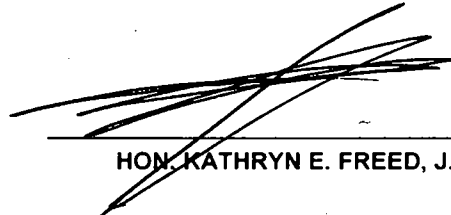
ORDERED that, in the event such counter proposed order and judgment is timely filed and served, this Court shall appoint a special referee for the purpose of conducting a hearing pursuant to CPLR 5239; and it is further

ORDERED that the parties are to appear for a status conference at 80 Centre Street, Room 280, on January 16, 2018, at 2:30 p.m., if necessary; and it is further

ORDERED that is such status conference is not necessary, the parties are to advise the court of that fact in writing prior to the date of the scheduled conference; and it is further

ORDERED that this constitutes the interim decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT



7/31/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE