

Som v Peter Som, Inc.
2017 NY Slip Op 32052(U)
September 29, 2017
Supreme Court, New York County
Docket Number: 653193/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PETER SOM,

Plaintiff,

Index No.: 653193/2016

DECISION & ORDER

-against-

PETER SOM, INC.,

Defendant.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff Peter Som moves, pursuant to CPLR 5225 and CPLR 5228(a), for appointment of a receiver and turnover of the remaining assets of defendant and judgment debtor Peter Som, Inc. (PSI) to such appointed receiver. The motion is unopposed despite having been served upon the other shareholder of defendant. Dkt. 20 (Aff. of Service) at 1. For the reasons discussed below, plaintiff’s motion is granted.

The court assumes familiarity with its prior decisions in this matter, including a decision and order denying plaintiff’s motion for summary judgment in lieu of complaint (Dkt. 11)¹ and a decision and order granting plaintiff’s renewed motion for summary judgment in lieu of complaint (Dkt. 21). The facts set forth below are drawn from plaintiff’s affidavits submitted in support of his motion, the prior proceedings in the action, and oral argument.

Plaintiff is a fashion designer. Defendant is a New York corporation formed to conduct business in the fashion and apparel industry. Dkt. 27 (Som Aff.) ¶¶ 5-6. Defendant has two shareholders: plaintiff and Elana Nathan. *Id.* ¶ 6. Plaintiff and Nathan entered a shareholders’ agreement, dated February 14, 2007, regarding the operation and governance of defendant. Dkt.

¹ References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

14 (Pl.'s Aff. In Supp. of Renewed Summ. J. Mot.) ¶ 6; Dkt. 15 (Agreement). The Agreement appointed plaintiff and Nathan as members of the Board. Dkt. 15 at 10. Plaintiff has served and continues to serve as CEO of defendant. Dkt. 27 (Som Aff.) ¶ 6. Nathan remains a shareholder but is "no longer actively involved" with defendant's operations. *Id.* Defendant has no other employees, operates out of plaintiff's residence, and presently conducts "very limited" activities and operations. *Id.* At oral argument, plaintiff stated that there are no creditors, other than himself, of defendant.²

This action was filed to recover on loans from plaintiff to defendant, which defendant failed to repay upon their maturity. *Id.* ¶ 7. On October 28, 2016, this court granted plaintiff's motion for summary judgment in lieu of complaint, directing the Clerk to enter judgment in the amount of \$808,000 with interest of 4% running from August 31, 2014 to the date of entry of judgment. Dkt. 21 (Order) at 5. Judgment was entered in plaintiff's favor on December 5, 2016, in the amount of \$881,879.15. Dkt. 25 (Judgment) at 2.

To date, plaintiff has recovered \$121,654.05 of the judgment by levying the remaining funds in defendant's bank account. Dkt. 27 (Som Aff.) ¶ 4. The balance owed is \$793,295.57 as of April 27, 2017, with interest continuing to accrue at the statutory rate. *Id.* Defendant's remaining assets are mainly intangible. *Id.* ¶ 8. The most valuable remaining assets are its intellectual property and trademarks in domestic and foreign jurisdictions, most of which bear plaintiff's name. *Id.*; Dkt. 27 at 8 (Som Aff. Ex. A). Plaintiff's affidavit lists the assets of defendant for which plaintiff seeks turnover and appointment of a receiver. *Id.* ¶ 10; Dkt. 27 at 6-9 (Som Aff. Ex. A). The asset list includes elements of defendant's virtual presence, such as internet domain names and social media accounts, as well as physical manifestations of

² Plaintiff is to file an affidavit to this effect on the New York State Courts Electronic Filing system (NYSCEF).

defendant's business such as clothing samples, patterns, and sketches. Dkt. 27 at 6-9. Plaintiff anticipates bidding on all of defendant's remaining assets, and using a credit bid of all or part of the unsatisfied judgment. Dkt. 29 (Pl.'s Br.) at 8.

Under CPLR 5225, when a judgment creditor has insufficient money to satisfy a judgment against it, "[u]pon motion of the judgment creditor, ... where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor ... deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff." Under CPLR 5228, "[u]pon 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." The receiver is entitled to commissions as allowed by the court and payment of necessary expenses; however, a judgment creditor, if appointed receiver, is not entitled to compensation. *Id.* Appointment of a receiver is left to the discretion of the court. *See Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 (2010); *Galen Tech. Sols., Inc. v VectorMAX Corp.*, 107 AD3d 435, 435 (1st Dept 2013). In determining whether to appoint a receiver, courts have considered alternative remedies available to the creditor, how much receivership will increase the likelihood of satisfaction of the judgment, and the risk of fraud or insolvency if a receiver is not appointed. *Hotel 71*, 14 NY3d at 317, quoting *U.S. v Zitron*, No. 80-cv-6535, 1990 WL 13278, *1 (SDNY Feb. 2, 1990). Receivership is especially appropriate for intangible property that lacks a ready market and cannot be sold at sheriff's auction. *See id.*

Plaintiff's brief submitted in support of his motion primarily discusses the intangible nature of defendant's trademarks, which cannot typically be transferred without the

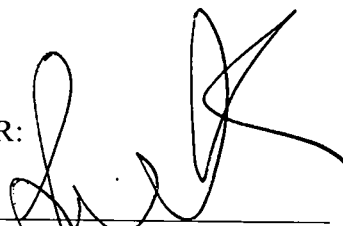
accompanying goodwill, *see Marshak v. Green*, 746 F 2d 927, 929-30 (2d Cir 1984), and thus cannot be sold at a sheriff's sale. Plaintiff also argues that defendant is presently in danger of insolvency. However, (i) defendant's inability to pay its debt to plaintiff suggests defendant is already insolvent; (ii) defendant's inability to carry on its business likely resulted from plaintiff seizing defendant's bank account; and (iii) a sale of defendant's remaining assets would likely extinguish its ability to operate. Consequently, a major concern of the court is whether other creditors exist and avoiding granting plaintiff a preference. Obviously, Ms. Nathan, who has been served both on this motion and the prior default motion and has failed to appear, has no interest in perpetuating her involvement in defendant business.

Given the intangibility of certain of defendant's assets, the large loans plaintiff has extended to the business, and the lack of involvement or interest of anyone other than plaintiff Som in Peter Som, Inc., the court sees no reason to deny plaintiff's motion and his request to be appointed receiver. Accordingly, it is

ORDERED that plaintiff Peter Som shall be appointed receiver for defendant, Peter Som, Inc., to administer and dispose of defendant's remaining assets and defendant's assets shall be turned over to plaintiff as receiver upon filing an affidavit from plaintiff on the NYSCEF system averring that Peter Som, Inc. has no outstanding debts and no creditors exist other than plaintiff and that plaintiff submit an order encompassing the appointment and turnover to the court for signature.

Dated: September 29, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C