

Mikhlov v Festinger
2017 NY Slip Op 33083(U)
December 7, 2017
Supreme Court, New York County
Docket Number: 156960/16
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE

Justice

PART 12

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ILYA MIKHLOV a/k/a M. MIKHAILOV, ON HIS
BEHALF AND AS A REPRESENTATIVE OF A
CLASS OF JUDGMENT CREDITORS OF
SAMUEL FESTINGER,

Petitioner,

INDEX NO. 156960/16

MOTION DATE _____

MOTION SEQ. NO. 001, 002

- v -

DECISION AND JUDGMENT

SAMUEL FESTINGER and CHARNIE
ROSENBAUM,

Respondents.
-----X

By notice of petition and petition (sequence 001), petitioner seeks: (1) pursuant to CPLR 5225, a writ of execution and turnover order directing respondents to turnover to him and/or the Sheriff of New York County, the principal sum of \$1,835,936, plus interest and penalties pursuant to 18 USC 3612 as of April 18, 1995, less any payments made, along with costs and disbursements of this proceeding from the proceeds of the contemplated sale of real property located at 1150 East 4th Street in Brooklyn, New York, remaining after satisfaction of the mortgage held by Bank of America, NA, in an amount sufficient to satisfy the remaining balance due on the judgment and order of restitution in favor of petitioner and the class of judgment creditors represented in this proceeding, on the grounds that petitioner and the class have a valid lien on respondent Festinger's assets, and that their rights are superior to the interests of respondents; (2) a judgment declaring that Festinger is the record owner of the above-mentioned

real property; (3) a judgment declaring that the transfer of funds from Festinger to Rosenbaum for the purchase and improvements of the real property and for the mortgage payments on the property was fraudulent under Debtor and Creditor Law (DCL) §§ 273, 275, and 276; and (4) an order and judgment awarding petitioner and the class all appropriate relief under DCL §§ 278 and/or 279, including setting aside the fraudulent conveyance, and a judgment against respondents jointly and severally. (NYSCEF 2). On September 13, 2016, Festinger opposed the petition by filing his answer. (NYSCEF 17).

By notice of motion, respondent Rosenbaum moves pre-answer pursuant to CPLR 3211(a)(1), (3), (5), and (7) and 3016(b) for an order dismissing the petition (sequence 002). Petitioner opposes and, by notice of cross motion, moves pursuant to CPLR 3025(b) for an order granting him leave to file and serve an amended verified petition. Rosenbaum opposes the cross motion.

The motions are consolidated for decision.

I. ROSENBAUM'S MOTION TO DISMISS

As the motion to dismiss is potentially dispositive, I address it first.

A. Petitioner's standing

Pursuant to 18 USC § 3664(m)(1)(b), a victim named in a restitution order may obtain an abstract of the judgment rendered in his or her favor, which constitutes a lien on the property of the judgment debtor. Before it was repealed and replaced (Mandatory Victims Restitution Act of 1996 [Pub L 104-132, 110 US Stat 1227-1241] [Restitution Act]), the statute permitted a victim named in a restitution order to enforce the order in the same manner as a judgment in a civil action. (18 USC § 3663[h]). The statute as repealed and replaced provides that the Attorney General is solely responsible for collecting restitution, and that only the United States may

enforce a restitution order “in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law.” (18 USC § 3612; 3613). The omission of the prior provision permitting a victim to enforce the order in the same manner as a judgment, as a matter of statutory construction, was deliberate (McKinney’s Statutes § 240 [“where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded”]) and intended to permit such a victim to enforce the order only to the extent of obtaining a lien on the judgment debtor’s property. (*See e.g., In re Grooms*, 561 BR 372 [WD Penn 2016] [United States charged with enforcement of restitution orders issued pursuant to Restitution Act]; *Davis v MacDonald*, 2016 WL 5791452 [ED Mich 2016], *appeal dismissed* 2016 WL 10519121 [6th Cir] [crime victim cannot affirmatively enforce restitution order in court]).

The statute thus provides no authority for the proposition that a crime victim has standing to enforce a restitution order in any manner other than by obtaining a lien on property, and petitioner cites no authority which applies section 3664 rather than the now-repealed section 3663. (*See e.g., Thomas v Bostwick*, 2014 WL 4364816 [ND Calif 2014], *app dismissed* [9th Cir 2015] [rejecting attempt by defendant to garnish plaintiff’s pension benefits to satisfy restitution order; only United States may enforce restitution order]; *see also US v Witham*, 648 F3d 40 [1st Cir 2011] [Restitution Act authorizes United States to use debt collection practices to enforce restitution orders for benefit of private victims]).

To the extent that petitioner argues that the Restitution Act became effective after the restitution order was entered and is thus inapplicable, the record reflects that an amended

judgment including the restitution order was entered in 2000, thereby superseding the original judgment (*see US v Ryan*, 806 F3d 691 [2d Cir 2015] [amended judgment supersedes original]).

Rosenbaum thereby establishes that petitioner has no standing to enforce the restitution order in the instant proceeding. In light of this result, I need not address the parties' remaining contentions. As the proposed amendment to the petition would have no impact on petitioner's standing, it likewise, need not be addressed.

II. CROSS MOTION TO AMEND

Petitioner's cross motion to amend the petition is denied as academic.

III. CONCLUSION

'Accordingly, it is hereby

ORDERED and ADJUDGED, that respondent Rosenbaum's motion to dismiss is granted, and the petition is denied and dismissed in its entirety, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that petitioner's cross motion for leave to amend the petition is denied.

12/7/17

DATE

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

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DO NOT POST

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE

BARBARA JAFFE, J.S.C.

CLERK

FILED

DEC 18 2017

COUNTY CLERK'S OFFICE
NEW YORK

156960/16

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Judgment

FILED
DEC 18 2017
AT 11:48 A M
N.Y., CO. CLK'S OFFICE