

LG Capital Funding, LLC v Bank of Am., N.A.

2017 NY Slip Op 33167(U)

October 11, 2017

Supreme Court, Kings County

Docket Number: 501368/17

Judge: Pamela L. Fisher

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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of October, 2017.

MEMORANDUM

P R E S E N T:

HON. PAMELA L. FISHER,

Justice.

-----X
LG CAPITAL FUNDING, LLC,

Petitioner,

- against -

Index No. 501368/17

BANK OF AMERICA, N.A.,

Respondent.

-----X

Petitioner LG Capital Funding, LLC, petitions, pursuant to CPLR 5225 and 5227, for a judgment requiring respondent Bank of America, N.A., to deliver funds and/or assets contained in the accounts held in the name of Artec Global Media, Inc., (Artec) including, but not limited to the \$67,618.61 held in the account referred to in respondent's answers to petitioner's subpoena questionnaire. Intervener TCA Global Credit Master Fund (TCA) cross-moves for an order recognizing it as the senior secured lender; restraining petitioner from collecting on its judgment; or in the alternative requiring that any monies collected by petitioner be paid to TCA as the senior secured lender.

The petition is granted,¹ and petitioner is directed to settle judgment. The cross motion of TCA is denied.

Petitioner has entered two judgments against the judgment debtor Artec based on confessions of judgments filed against Artec as the result of Artec's defaults with respect to five promissary notes executed by petitioner and Artec dated October 30, 2014, January 30, 2015, February 29, 2016, April 3, 2016 and July 7, 2016, respectively. In response to an information subpoena, respondent states that it holds \$67,618.61 in a checking account belonging to Artec. Petitioner commenced the instant proceeding to obtain judgment requiring respondent to turn over those funds held by respondent to petitioner. After this proceeding was commenced, TCA moved to intervene in this proceeding and also cross-moved requesting that it be deemed the senior secured lender. By way of a so-ordered stipulation filed with the county clerk on May 31, 2017, the court granted TCA leave to intervene in this proceeding and TCA agreed to withdraw its motion to intervene. Respondent has not answered the petition and has not submitted an papers with respect to TCA's cross motion.

In its cross motion, TCA asserts that it is entitled to the funds held by respondent because it has a perfected security interest in all of Artec's assets. In support of its cross motion, TCA has provided copies of various loan agreements between it and Artec, including promissary notes, a credit agreement and a security agreement with effective dates of December 24, 2015. The security agreement, among other things, states that it gives TCA a first priority security interest in all of Artec's property, including tangible and intangible property. TCA has also provided a copy of a UCC-1 financing statement filed in Nevada

¹ Any proposed judgment may not request the delivery of more than the amount due under the judgments obtained against Artec.

stating that the collateral included all of Artec's property, a copy of a UCC search conducted in Nevada and dated November 6, 2015, showing no prior liens, a copy of a Form 8K filed with the United States Securities and Exchange Commission (SEC) dated December 24, 2015, indicating that, among other things, TCA and Artec had entered into a credit agreement under which TCA had made an initial advance of \$150,000 to Artec and a copy of a Form 10K filed with the SEC dated May 17, 2016.

Of note, schedule 7.4 (b) of the credit agreement references petitioner's promissory notes with Artec entered into on October 30, 2014 and January 30, 2015, each in the principal amount of \$55,125. In addition, the May 17, 2016 Form 10K filed with the SEC includes a Note 3 in which Artec states that it was in default on petitioner's October 30, 2014 and January 30, 2015 notes, but also that petitioner had converted \$28,569 of the principal and interest on those notes to shares of common stock.² Finally, in the memorandum of law submitted with TCA's cross motion, counsel for TCA states that TCA has not declared Artec to be in default on its obligations to TCA.

The competing contentions of petitioner and TCA in this turnover proceeding pursuant to CPLR 5225 (b) and CPLR 5227 are determined under the rules for summary proceedings. In such a proceeding, "a court is authorized to 'make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' " (*Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 72 AD3d 694, 695 [2d Dept 2010], quoting CPLR 409 [b]; *see also Matter of Centerpointe Corporate Park Partnership 350 v MONY*, 96 AD3d 1401, 1402 [3d Dept 2012], *lv dismissed* 19 NY3d 1097 [2012]). A court in a turnover proceeding "will apply summary judgment analysis and[,] absent a factual

² In examining the court's computer records, as shown by the affidavit in support of the confession of judgment, the amount of the principal and interest converted to common stock has been accounted for by petitioner in the amounts it claims due in the judgment.

issue requiring a trial,” the matter will be summarily determined on the papers presented (*Matter of Trustco Bank, N.A. v Strong*, 261 AD2d 25, 27 [3d Dept 1999]; see *Matter of TNT Petroleum, Inc.*, 72 AD3d at 695]). Thus, a petitioner or an adverse claimant intervener, such as TCA, must submit papers accompanied by competent evidence raising a material issue of fact (see *Matter of Centerpointe Corporate Park Partnership 350*, 96 AD3d at 1402; *Matter of Trustco Bank, N.A.*, 161 AD2d at 27).

TCA’s assertion that it is entitled to the funds in Artec’s account with respondent turns on whether it has a perfected security interest with respect to the funds held in the account under the Uniform Commercial Code (UCC).³ Artec’s checking account with respondent is deemed a deposit account under the UCC (see UCC 9-102 [29]; *LOL Finance Co. v Paul Johnson & Sons Cattle Co., Inc.*, 758 F Supp2d 871, 894 [D Neb 2010]; *In re Omni Enterprises, Inc.*, 2016 WL 3213562, *7 [Bankr D Alaska 2016], *revd on other grounds sub nom. Jipping v First Nat. Bank Alaska*, 568 BR 321 [D Alaska 2017]), and a secured party can only perfect an interest in a deposit account as original collateral by control

³ The parties have not provided any detailed analysis of choice of law issues relevant to the determination of the UCC issue in this proceeding. The court, however, notes that generally UCC 9-301 provides that the local law of the jurisdiction where the debtor is located (UCC 9-301 [a]) governs perfection, the effect of perfection or nonperfection and of priority. Here, the location of the debtor would appear to be Nevada given that Nevada is identified in the papers before this court as the state where Artec is incorporated (see *In re Motors Liquidation Co.*, 755 F3d 78, 82 [2d Cir 2014]). However, with respect to deposit accounts, UCC 9-304 (a) provides that the law of a bank’s jurisdiction governs perfection, the effect of perfection or nonperfection and priority. UCC 9-304 provides several possible locations for the bank’s jurisdiction that depend on the terms of an agreement between the bank and customer, the location provided for in the customer’s account statement, or the location of the chief executive office of the bank (UCC 9-304 [b]). The petition states that respondent is incorporated in Delaware, but has a principal place of business in Charlotte, North Carolina. The petition does not identify the branch location of the account or the existence or terms of any agreement governing the account. Ultimately, however, there does not appear to be any real choice of law issue in any event as the UCC provisions of New York, Nevada, Delaware and North Carolina relevant to perfection of TCA’s interest in the money held in Artec’s account with respondent contain no material differences, the parties have not identified any conflicts of case law amongst these states and the court has found no such conflict in its own research. The citations relating to the UCC are to New York’s UCC.

over the account (UCC 9-104, 9-312 [b] [1], and 9-314 [a]; *Stierwalt v Associated Third Party Adm 'rs*, 2016 WL 2996936, *3 [ND Cal 2016]; *Joseph Stephens & Co., Inc. v Cikanek*, 588 F Supp2d 870, 874-875 [D Ill 2008]; *In re Jesup & Lamont, Inc.*, 507 BR 452, 462 [Bankr SDNY 2014]; *Counciller v Ecenbarger, Inc.*, 834 NE2d 1018, 1022-1023 [Ind App 2005]). The UCC-1 financing statement filed by TCA in Nevada thus cannot serve to perfect an interest in the Artec's account as original collateral (*see In re Delano Retail Partners, LLC*, 2017 WL 3500391, *7 [Bankr ED Cal 2017]) and TCA has submitted no evidence suggesting that it took any of the steps required by UCC 9-104 to obtain control over Artec's checking account with respondent (UCC 9-104 [a] [1-5]; *In re Delano Retail Partners, LLC*, 2017 WL 3500391, *7).⁴

Absent control over the bank account, the only other means by which TCA may be found to have a secured interest in the funds held in the account by respondent is if it can show that those funds, or a portion thereof, are identifiable proceeds of properly perfected primary collateral (*see In re Delco Oil, Inc.*, 599 F3d 1255, 1261 [11th Cir 2010]; *Stierwalt*, 2016 WL 2996936, *4-5; *In re Delano Retail Partners, LLC*, 2017 WL 3500391, *7; *In re NETtel Corp., Inc.*, 2011 WL 5330785, *11 [Bankr D DC 2011]; UCC 9-315 [b]).⁵ The

⁴ Under UCC 9-104, a secured party can obtain control over a deposit account by entering into an agreement with the bank, by becoming the bank's customer with respect to the account, by having its name appear on the account, or by controlling the account through another person (UCC 9-104 [a][1-5]).

⁵ The UCC definition of proceeds is broad. UCC 9-102 (64) states:
"Proceeds", except as used in Section 9-609(b), means the following property:
(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
(B) whatever is collected on, or distributed on account of, collateral;
(C) rights arising out of collateral;
(D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or
(E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of,

burden of tracing proceeds of collateral is on the party claiming the security interest in the proceeds (*see Arixson v Frontier Asset Mgt., LLC (In re Skagit Pacific Corp.)*, 316 BR 330, 338 [BAP 9th Cir. 2004]; *Stoumbos v. Kilimnik*, 988 F.2d 949, 957 [9th Cir.1993]; *In re Residential Capital, LLC*, 501 BR 599, 616-617 [Bankr SDNY 2013]; UCC 9-315 [b] [2]). TCA's security agreement with Artec and its UCC-1 financing statement are broadly worded, and, as such, it is certainly theoretically possible that the proceeds of any exchange or transfer of perfected collateral could have ended up in the checking account at issue (*see Stierwalt*, 2016 WL2996936, *4-5; *Counciller*, 834 NE2d at 1023). On the other hand, any funds held in the account possessed by Artec at the time it entered into the financing agreement (*see Counciller*, 834 NE2d at 1023), or any funds obtained from loans such as the loans from petitioner that were made without a transfer or exchange of collateral (*see In re NETtel Corp., Inc.*, 2011 WL 5330785, *13), would not have constituted proceeds of perfected collateral.⁶

To the extent that TCA may be deemed to argue that the funds in the account are proceeds of collateral, TCA has failed to provide any evidentiary proof addressing the actual source of the funds held by respondent. TCA has thus failed to demonstrate, prima facie, that any of the funds held in the account are proceeds of properly perfected collateral (*see Arixson v Frontier Asset Mgt., LLC (In re Skagit Pacific Corp.)*, 316 BR at 338-340; *Stoumbos*, 988 F3d at 957; *In re Delano Retail Partners, LLC*, 2017 WL 3500391, *10; *Counciller*, 834 NE2d at 1023; *see also Matter of Centerpointe Corporate Park Partnership 350*, 96 AD3d

defects or infringement of rights in, or damage to, the collateral.”

⁶ In other words, while any funds coming to Artec and deposited into the account might be deemed collateral as between TCA and Artec pursuant to the terms of the security agreement and financing statement, TCA would have no perfected interest in such funds in the account unless the funds could, in some way, be deemed proceeds of collateral.

at 1402-1403; *Matter of TNT Petroleum, Inc.*, 72 AD3d at 695; *but see In re Delco Oil, Inc.*, 599 F3d at 1261-1262).


Accordingly, in the absence of evidentiary proof demonstrating its control over the account or that the funds held in the account are proceeds of perfected collateral, TCA has failed to demonstrate that it had a perfected security interest in the funds held by respondent.⁷

Petitioner asserts that it obtained a priority lien on the account with respondent by directing that the sheriff levy by serving an execution on respondent on July 7, 2017 (CPLR 5234; *see also Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 580 [1981]; *Matter of Kitson & Kitson v City of Yonkers*, 10 AD3d 21, 25 [2d Dept 2004]; *Burstin Invs. v K.N. Invs.*, 255 AD2d 478, 480 [2d Dept 1998]; *City of New York v Panzirer*, 23 AD2d 158, 160-163 [1st Dept 1965]).⁸ Even absent a levy entitling it to statutory priority under CPLR 5234, petitioner has priority over TCA's unperfected security interest in the account under the common-law rule of "first in time, first in right" by virtue of its having obtained the judgments against Artec (*see Roberson v Roberson*, 45 AD3d 1494, 1495 [4th Dept 2007]; *Matter of Sanford v Bennett*, 11 AD3d 758, 759-760 [3d Dept 2004], *lv denied* 4 NY3d 702

⁷ As TCA has failed to demonstrate that it has a perfected interest in the account, the court need not address petitioner's additional contention that TCA has no claim to the funds under the security agreement at this time because it has not declared Artec to be in default (*see American Home Assur. Co. v Weaver Aggregate Transport, Inc.*, 84 F Supp3d 1314, 1326-1327 [MD Fla 2015]; *S.E.I.U. Local No. 4 Pension Fund v Pinnacle Health Care of Berwin LLC*, 560 F Supp2d 647, 649 [ND Ill 2008]; *but see Myers v Christensen*, 278 Neb 989, 994-997, 776 NW2d 201, 205-208 [2009]).

⁸ The parties make no arguments regarding which states' law governs the priorities here where TCA has been found to have no perfected interest in the account. It would appear that New York's law would govern the priorities involved in the enforcement of a New York judgment arising out of promissory notes containing a New York choice of law provision (*see Tosapratt LLC v Sunset Courts Props., Inc.*, 86 AD3d 768, 770-771 [3d Dept 2011]; General Obligations Law § 5-1401 [1]). In any event, as the parties have not addressed the issue, they are deemed to have acquiesced to the application of the law of the forum (*see Trionics Research Sales Corp. v Nautec Corp.*, 21 NY2d 574, 578 [1968]; *Matter of Giles*, 74 AD3d 1499, 1502-1503 [3d Dept 2010]; *Knieriemen v Bache Halsey Stuart Shields*, 74 AD2d 290, 296 [1st Dept 1980]).

[2005]; Siegel, NY Prac § 520 [5th ed 2011] [Note: online version]; *cf. Boris v Flaherty*, 242 AD2d 9, 13 [4th Dept 1998]). As such, petitioner has demonstrated its entitlement to the funds held by respondent, and TCA has failed to demonstrate that it has an interest in those funds superior to that of petitioner. The cross motion is denied, the petition is granted, and petitioner is directed to settle a judgment directing the turnover of the funds held in Artec's account with respondent.



J. S. C.
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