Herman v Herman
2018 NY Slip Op 32652(U)
October 15, 2018
Supreme Court, New York County
Docket Number: 650205/2011
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

ROSEMARIE HERMAN et al., Index No.: 650205/2011

Plaintiffs, **DECISION & ORDER**

-against-

JULIAN MAURICE HERMAN et al.,

Defendants.

----------X

JENNIFER G. SCHECTER, J.:

In this action, a judgment was entered against defendant Julian Maurice Herman (Maurice) that provides for: (1) monetary damages in excess of $100 million; and (2) an order directing Maurice to cause Windsor Plaza, LLC (Windsor) to convey the building located at 952 Fifth Avenue in Manhattan (the Property) to himself and the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991 (the 1991 Trust), as tenants in common (Dkt. 1695; *see Herman v Herman*, 162 AD3d 459 [1st Dept 2018]).[1] After Maurice refused to transfer the Property (and after Maurice frivolously caused Windsor to file for bankruptcy),[2] in March 2018, the Sheriff executed a deed transferring the Property to Maurice and the 1991 Trust.

---

[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). Familiarity with this action is assumed.

[2] The bankruptcy court (Garrity, J.) made it quite clear that the bankruptcy filing was frivolous (*see* Dkt. 1756 [2/22/18 Tr. at 4] ["What the debtor (i.e., Windsor) is in existence for is to hold Maurice's 100 percent ownership interest in the building. That's the sole reason that entity exists. It has no creditors outside of those that are providing services, et. cetera to the building. ... No creditor in this case sought any relief. The relief that was sought here was by Maurice because he wanted to hold onto his 100 percent ownership interest in the building. That's why this case is here. There's no other reason. There's no, as I found – there's no objective likelihood that there can be a reorganization here. And ***there was subjective bad faith***"] [emphasis added]; *see also*

The monetary damages portion of the judgment, however, remains unsatisfied. On March 16, 2018, the court (Kornreich, J.) decided that Maurice's 50% ownership interest in the Property should be transferred to the 1991 Trust to partially satisfy the judgment (Dkt. 1769 [3/16/18 Tr.]). The court expressly rejected the possibility that the Property would be sold at auction, and instead held that the Property would be appraised, and that Maurice would get a credit against the judgment in the amount of 50% of the Property's value (*see id.* at 20 ["I am not going to order an auction sale of a valuable building like this. I do think that there does have to be a hearing as to how much the building is worth"]). The court ordered the parties to exchange expert appraisal reports (*see id.* at 43-45), and they did so on May 16, 2018 (*see* Dkts. 1778, 1779). Ironically, plaintiffs' appraisal concluded that the Property is worth approximately $6 million more than Maurice's appraisal. However, to avoid the need for a valuation hearing, the parties stipulated to adopt plaintiffs' appraisal and agreed that the Property is worth $47.5 million (*see* Dkt. 1786 at 3).[3] Hence, upon the transfer of the Property, Maurice will get a $23.75 million credit against the judgment (minus taxes, addressed herein).

Plaintiffs now move, pursuant to CPLR 5228, to appoint the Hon. Ariel E. Belen (Ret.), the 1991 Trust's temporary trustee, as judgment-creditor receiver so he can (1) execute a deed transferring Maurice's interest in the Property to the 1991 Trust; (2) collect from Maurice the New York City and New York State transfer taxes owed on the

---

Dkt. 1811 at 9 n 6 [sanctions were not issued in the bankruptcy proceeding only because Maurice voluntarily agreed "to disgorge the fees paid to him back to the Debtor In Possession Account"]).

[3] It should be noted that the appraisals are consistent with those procured during Windsor's bankruptcy proceedings (*see* Dkt. 1811 at 7).

transfer; and (3) "to perform all tasks necessary and proper with respect thereto, including, but not limited to, the filing of transfer tax returns" (*see* Dkt. 1792 at 5). Maurice opposes the motion. Plaintiffs' motion is granted in part.

CPLR 5228(a) provides that upon "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" (emphasis added).[4] "The appointment of a receiver pursuant to section 5228(a) is a matter within the court's discretion" (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010]). "In deciding whether the appointment of a receiver is justified, courts have considered the "(1) alternative remedies available to the creditor ...; (2) the degree to which receivership will increase the likelihood of satisfaction ...; and (3) the risk of fraud or insolvency if a receiver is not appointed" (*id.* [citation omitted]). The court may appoint a receiver to sell real property to satisfy a judgment where, as here, the judgment-debtor owns the property as a tenant in common (*see Levitt & Kaizer v Charles*, 150 AD3d 478 [1st Dept 2017] [affirming receivership order and modifying on an unrelated issue]).

Maurice has taken various steps to frustrate plaintiffs' ability to enforce the judgment, including encumbering his real property and filing a frivolous bankruptcy action (*see* Dkt. 1792 at 10-11). A receivership will indisputably increase the likelihood of satisfaction; nearly a quarter of the judgment will be satisfied by the transfer of

[4] Plaintiffs confirmed that Belen, acting as a judgment-creditor receiver, will not be entitled to any compensation under CPLR 5228(a) (*see* Dkt. 1792 at 18 n 13). There is no dispute that if a receiver is to be appointed, Belen makes the most sense as he already is the 1991 Trust's trustee.

Maurice's interest in the Property. Aside from Maurice having tens of millions of dollars in liquid assets, the transfer is the only conceivable way to make a meaningful dent in the judgment. Indeed, Maurice's counsel allegedly "stated to one of Plaintiffs' attorneys that 'Maurice has hidden his assets and Plaintiffs will never find them,'" and that "Maurice also has a history of avoiding judgment enforcement" (Dkt. 1792 at 12). Finally, there is real risk of fraud absent appointment of a receiver as Maurice has already permitted the property to accrue substantial tax liabilities and caused Windsor to enter into a 99-year lease for a duplex apartment for no rent (*see id.* at 13 n 10). The appointment of a receiver is necessary to stop Maurice's improper frustration of collection of the judgment.

Maurice's arguments in opposition are unpersuasive. That plaintiffs have alternative judgment enforcement remedies is not dispositive (*see United States v Vulpis*, 967 F2d 734, 736-37 [2d Cir 1992] [court may appoint receiver under CPLR 5228 instead of ordering sheriff's sale], *accord Gen. Elec. Capital Bus. Asset Funding Corp. v Hakakian*, 300 AD2d 486, 487 [2d Dept 2002] [affirming order appointing receiver to sell property).[5] Given the size of the judgment, such remedies will be cumulative, and not in the alternative to, the transfer of Maurice's interest in the Property. Unless Maurice has more than $100 million of liquid assess, it is apparent that his interest in the Property will necessarily be a significant means of satisfying the judgment. It is illogical to force plaintiffs to wait years until some portion of the judgment is satisfied before

[5] *See also* Siegel, NY Prac. § 485 at 924 (6th ed 2018) ("The moment as of which the judgment becomes enforceable is the moment of its entry. As a general rule, the judgment creditor may then dive into Article 52 and extract whichever devices suit her particular purpose. There is no priority in the use of the devices. ***No device is a condition precedent to the use of any other***; the sequence of their use is for the judgment creditor to decide" [emphasis added]).

seeking transfer of the Property. Indeed, if Maurice really has the means of satisfying the judgment and does not wish to part with the Property, he can, and has always been able to, simply voluntarily satisfy the judgment. He has chosen to avoid doing so, requiring the appointment of a receiver here (*see* Dkt. 1799 at 16 [Maurice arguing that it is irrelevant that he has not satisfied that judgment because "there is no case law, statute, rule or other legal authority that requires (him) to voluntarily satisfy the Judgment"]).

Maurice's contention that the Property should be sold is once again rejected. Maurice, moreover, has already agreed that the property is worth $47.5 million--approximately $6 million more than his own appraiser said it is worth--and he is bound by his stipulation as to the Property's value.

The court will not, however, order Maurice to pay the outstanding taxes or the taxes associated with the transfer of the Property. Such amounts shall instead be deducted from the judgment credit Maurice receives and, upon transfer of the Property, plaintiffs shall file a partial satisfaction of judgment in the amount of $23.75 million minus half the outstanding property taxes and half of the transfer taxes. Deducting such amount is proper since those taxes reduce the value of the property and, thus, must reduce the amount of the credit against the judgment.

Finally, the court will not waive the oath requirement or the applicable regulations under Part 36; the undertaking shall be $10,000 and Belen shall submit a proposed receivership order in conformity with this decision. Accordingly, it is

ORDERED that plaintiffs' motion to appoint Belen as a receiver is granted to the extent set forth herein and plaintiffs shall promptly submit a proposed order in conformity with this decision; and it is further

ORDERED that after the transfer of the Property occurs, plaintiffs shall promptly file a partial satisfaction of judgment in the amount of $23.75 million minus half the outstanding property taxes and half of the transfer taxes.

Dated: October 15, 2018

ENTER:

Jennifer G. Schecter, J.S.C.