

Medallion Fin. Corp. v Jeffery Hacking Corp.

2018 NY Slip Op 32794(U)

August 19, 2018

Supreme Court, New York County

Docket Number: 651618/17

Judge: Gerald Lebovits

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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

HON. GERALD LEOVITS

PRESENT: _____ J.S.C.
Justice

PART 7

Medallion Financial Corp. et al.

INDEX NO. 651618/17

Jeffery Hacking Corp et al.

MOTION DATE _____

MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided according to the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/19/18


HON. GERALD LEOVITS J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MEDALLION FINANCIAL CORP.
and MEDALLION BANK,

Plaintiff,

-against-

JEFFERY HACKING CORP.,
and SYMON GARBER,

Defendants.

Index No: 651618/17
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs motion for an order extending time.

Papers	Numbered
Plaintiffs' Notice of Motion.....	1
Plaintiffs' Affirmation in Support of Motion.....	2
Defendant Memorandum of law in Opposition to Plaintiffs' Motion	3
Defendants' Affirmation in Opposition to Plaintiffs' Motion	4
Plaintiffs' Affirmation in Reply	5
Plaintiffs' Memorandum of law in Reply	6
Defendants' Confession of Judgment	7

Vedder Price P.C., New York (Fleming Ware of counsel), for plaintiffs Medallion Financial Corp. and Medallion Bank.

Fox Rothschild LLP, New York (Brett Berman of counsel), for defendants Jeffery Hacking Corp. and Symon Garber

Gerald Lebovits, J.

Plaintiffs, Medallion Bank and Medallion Financial Corp.(collectively Medallion), bring this motion under CPLR 5232(a) for an order extending the 90-day period to perfect the levies of Medallion's various executions of a judgment entered in plaintiff's favor against defendant, judgment debtors Jeffery Hacking corp. and Symon Garber on March 28, 2017.

This action was commenced by Medallion's filing on March 9, 2017, of a confession of judgment signed by Garber, in his individual capacity, as guarantor. Garber also signed the confession of judgment in his representative capacity as President of Jeffery Hacking Corp., the borrower under a Note dated March 12, 2014, for \$1,842,375 (NYSCEF Doc. No. 4.) Based on the confession of judgment and supporting papers, the clerk entered judgment on March 28, 2017, in favor of plaintiffs against defendants, jointly and severally, for \$1,738,206.01 (NYSCEF

Doc No. 10.) On January 16, 2018, Medallion served an execution on a New York City Marshal regarding Garber's personal property and interest in 11 specified companies. (NYSCEF Doc. No. 15.) On January 23, 2018, plaintiff served the execution on Garber and the Garber Entities: 401 East 60th Street LLC, 25D 200 Chambers St. LLC, 845 United Nations Plaza LLC, SLSJETS Technologies Corp., SLSJETS Polo Farm Corp., SLS Jets Funding Group Corp., SLSJETS Management Corp., SLSJETS Media Corp., 3210 101 Warren Street LLC, 3240 101 Warren Street LLC, and 22-05 43rd Ave Realty Corp. (NYSCEF Doc. No. 15.)

Medallion filed this motion on April 23, 2018, precisely 90 days after plaintiff served the execution on Garber and the Garber entities. The motion asserts that the marshal has been unable to execute on the judgment, despite diligent efforts by Medallion and the marshal to identify property subject to the execution. (NYCEF Doc. No. 12, 13.)

Medallion asks this court to extend for an additional 180 days Medallion's time to perfect the levy. Garber opposes the motion on the grounds that under CLPR 5232 (a) and *New York State Commr. of Taxation & Fin. v Bank of New York* (275 AD2d 287, 288-289 [1st Dep't 2000]), Medallion's levy expired after 90 days. (Garber's Memorandum of Law in Opposition to motion for an Order Extending the 90-Day Period to Perfect Levies of Judgment at 3.)

Medallion argues that Garber's reliance on the First Department's *Bank of New York* is misplaced. (See Medallion Reply Brief at 4.) The Second Department in *Kitson & Kitson v City of Yonkers* (10 AD3d 21 [2d Dep't 2004]) held that a motion to extend the 90-day period may be made after a levy has expired. (*Id.* at 26.) No provision in the CLPR prohibits an extension after a levy has expired. The Second Department reasoned, therefore, that extensions should be allowed. (*Id.*)

This court finds Garber's position persuasive. Under *Bank of New York*, CPLR 5232 (a) voids a levy 90 days after the levy is made by service of execution unless a court grants an extension or a special proceeding under CPLR 5225 or CPLR 5227 has been commenced. (See *Bank of New York*, 275 AD2d at 288-289.) Medallion did not receive an extension order or commence special proceedings under CLPR 5225 or CPLR 5227 within the 90-day period. Because Medallion did not receive an extension order or commence a special proceeding under CLPR 5225 or CPLR 5227, its levy is void as a matter of law, and its motion for an extension of the 90-day period is denied.

Medallion relies on *Kitson* (10 AD3d 21) to support its position that this court may grant an extension of their now-expired levy. The *Kitson* Court held that "a motion to extend a levy may be made after the motion has expired." (*Id.* at 26.) There is a split in authority between the First Department and the Second Department on how to interpret CPLR 5232 (a).

In *Bank of New York*, the First Department held that the unambiguous terms of CPLR 5232 (a) provide that a levy becomes void 90 days after service unless a proceeding under CPLR 5225 or CPLR 5227 has been commenced or an order of extension has been obtained. (*Id.* at 289.) The Court then allowed for the service of a second levy after the first had expired.

The Second Department's position in *Kitson* is that the First Department's decision to authorize a new levy after the first levy expires is incorrect given "there is no statutory basis for such a procedure." (AD3d at 26.) The Second Department held that nothing in the CPLR prevents a motion for an extension of a levy after that levy expired and that a creditor's proper remedy in a situation where a levy expired is to extend the expired levy rather than issue a new levy. (*Id.*) These decisions represent two different solutions to the same problem of what to do when enforcement under CPLR 5232 (a) of a levy is sought after the levy has become void. The First Department's solution is to allow for a new levy. The Second Department's solution is to resurrect an expired levy. This court, situated in the First Department, is bound by *Bank of New York*.

This court notes a similar proceeding, *Medallion Bank v Papa of 5 Hacking Corp* (2018 NY Slip Op 31261 [U] [Sup Ct, NY County 2018]). Supreme Court in that action found that "although Medallion has moved here pursuant to CPLR 5232 (a) rather than having commenced a special proceeding pursuant to section 5225 or 5227, the statutes offer comparable means of enforcing a money judgment and the same rationale applies here to allow the extension." (*Id.* at *3). The only way to extend a levy under CPLR 5232 (a) in the First Department is by motion. (*Id.*) The holding in *Medallion Bank v Papa of 5 Hacking Corp* conflicts with First Department precedent that CPLR 5232 (a) is unambiguous and does not warrant judicial construction. (*See Bank of New York*, 275 AD2d at 289.). This court may not offer plaintiffs similar relief despite the factual similarities between the instant case and *Papa of 5 Hacking Corp*.

Accordingly, it is hereby

ORDERED that defendants' motion for an extension of time to perfect their expired levy is denied.

Dated: August 19, 2018


HON. GERALD LEBOVITS
J.S.C.