Kaplan v Kaplan
2018 NY Slip Op 33687(U)
June 11, 2018
Supreme Court, Rockland County
Docket Number: 033759/2015
Judge: Paul I. Marx

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

----------x

RONALD P. KAPLAN,

Plaintiff,

-against-

STEVEN R. KAPLAN,

Defendant.

----------x

DECISION AND ORDER

Index No.: 033759/2015

Motion Date: March 14, 2018
Motion Sequence # 9

The following papers numbered 1 to 6 were read on Plaintiff's application, brought by Order to Show Cause, for an order directing Defendant to turn over his shares in various closely held companies to satisfy a Judgment that Plaintiff obtained against him in 2015; directing the partition and sale of the real properties owned by Defendant's companies, if appropriate, and payment to Plaintiff of Defendant's share of the proceeds of the sales; and appointing a receiver to supervise and conduct the turnover of shares, partition and sale and payment to Plaintiff, if appropriate, pursuant to CPLR §5225(a):

Order to Show Cause/Plaintiff's Memorandum of Law/Affirmation of Joseph I. Terkell, Esq./Affidavit of Ronald P. Kaplan/Exhibits A-D 1-4
Affirmation of Ronald V. De Caprio, Esq. in Response/Exhibits A-D 5
Reply Affirmation of Joseph I. Terkell, Esq. 6

Upon the foregoing papers, it is ORDERED that the application is disposed as follows:

BACKGROUND

Plaintiff Ronald P. Kaplan obtained a Judgment by confession against Defendant Steven R. Kaplan, his brother, in the sum of $207,225.00, which was entered on August 10, 2015. Plaintiff was able to recover only a portion of the Judgment when Defendant later sold one of his properties. The rest remains unpaid. As of January 18, 2018, Plaintiff avers that he is still owed approximately $175,532, with interest continuing to accrue at the rate of about $51 per day. Order to Show Cause, Affidavit of Ronald P. Kaplan at ¶ 2.

On February 18, 2016, Plaintiff filed a separate action against Defendant, Ellen Kaplan, Defendant's spouse, and Defendant's closely held companies,[1] alleging that Defendant made fraudulent conveyances of his assets to the other defendants in the action ostensibly to defeat Plaintiff's efforts to collect on his Judgment in this action. *Ronald P. Kaplan v Steven R. Kaplan, et al.*, Index No. 030538/2016.

On January 24, 2018, Plaintiff moved by the instant Order to Show Cause in this action and in the fraudulent conveyance action for an order directing Defendant to turn over his shares in the closely held companies to satisfy the Judgment; ordering the partition and sale of the real properties owned by those companies, if appropriate, with payment to Plaintiff of Defendant's share of the proceeds of the sales; and appointment of a receiver to supervise and conduct the turnover of shares and the partition and sale as well as payment to Plaintiff, if appropriate.

As a result of conferences held before this Court, a number of other motions that were made in the instant action were withdrawn and the fraudulent conveyance action was discontinued with prejudice. Only the instant turnover application remains for disposition.

DISCUSSION

Plaintiff moves pursuant to CPLR §5225(a) for an order requiring Defendant to turn over his 50% ownership interests in his closely-held companies, thereby making Plaintiff a co-owner with Defendant's wife Ellen Kaplan. Plaintiff proposes that he and Ellen Kaplan manage the properties owned by the companies and that he retain the income from the properties to pay off the balance owed to him on the Judgment. In the alternative, Plaintiff proposes that if Ellen Kaplan declines to manage the properties with him, one or more of the properties be sold by agreement or pursuant to a partition action and the proceeds used to satisfy the Judgment, with any overage going to Defendant. As a further alternative, Plaintiff requests that this Court order the transfer of Defendant's interests to Plaintiff and simultaneously order the immediate partition and sale of one or more of the properties to satisfy the Judgment. Plaintiff asserts that he "is now 69 years old and needs this money

---

[1] The companies sued in the other action were: 144 Ramapo Road Corp.; 397 Smith Ridge Road LLC; 31 Tobey Road, Ltd.; S & E Management LLC; Kaplan Holding Corp; Fisher-Kaplan Holding Corp.; and Fisher & Kaplan Holding Corp. Plaintiff lists the real property for which each of the companies holds, and was created for the purpose of holding, title. Order to Show Cause, Memorandum of Law in Support at 6.

to live on", because the loan he made to Defendant which gave rise to the Judgment "was the entire proceeds from the sale of [his] condominium residence" and he "has never been able to purchase a 'replacement' residence." Order to Show Cause, Memorandum of Law in Support at 3; Affidavit of Ronald P. Kaplan at ¶ 2. Plaintiff states that the properties are Defendant's "only assets" but they are "substantial" and they are the only available means to pay the Judgment. Order to Show Cause, Memorandum of Law in Support at 3. Plaintiff requests transfer of Defendant's interests in the companies in lieu of transfer of stock certificates, which "may not have been issued, and may not exist" because "these are closely-held companies". *Id.* at n2. Plaintiff states that the properties held by Defendant's companies should be sufficient to satisfy the balance of the Judgment. *Id.* at 7.

Plaintiff contends that this Court has the authority to direct Defendant's companies, which are operated by him as alter egos, "to turn over their leviable assets" to Plaintiff, a receiver or the sheriff, pursuant to CPLR §5225. *Id.* at 8. Plaintiff relies on *Hirtenstein v Largotta*, 2011 WL 3565811, 2011 NY Slip Op 32177(U) [Sup Ct, New York County 2011],[2] wherein the court directed the judgment debtor to turn over documents to the sheriff which represented his ownership interests in several limited liability companies "so that [plaintiff] may effectuate the turnover of defendant's property and ultimately enforce its Judgment." Plaintiff herein argues that *Hirtenstein* is analogous to the instant case because it sought transfer of a judgment debtor's ownership interests in limited liability companies pursuant to CPLR §5225(a).

Defendant opposes Plaintiff's application, claiming that Plaintiff cannot seek relief against Defendants' companies by way of motion in this action pursuant to CPLR §5225(a), but must instead commence a special proceeding against the companies pursuant to Article 4 of the CPLR and CPLR §5225(b). Defendant contends that there is no question that he possesses interests in the companies but "exactly how these interests have been fixed in the records of the [companies] and what rights do or do not attach to those interests are questions that have never been asked by [Plaintiff]."

---

[2] Plaintiff also relies on *Wagner Ziv Plumbing & Heating Corp. v Tsabari*, 36 Misc 3d 1242 [Civil Ct, Queens County 2012], which is inapposite, because the Civil Court held that the plaintiff in that action had to proceed by plenary action or by special proceeding pursuant to CPLR §5225(b) against the transferees to recover stocks allegedly fraudulently transferred to them by the judgment debtor. Any language in the decision regarding the rights of the judgment creditor relative to the transferees was dicta.

Affirmation of Ronald V. De Caprio, Esq. at ¶ 12. Defendant argues that this Court "may not even direct a turnover of a judgment debtor's membership interest ... but may issue a charging order against [his] membership interest in the limited liability company." *Id.* at ¶ 13 (citing *Sirotkin v Jordan, LLC, et al.*, 141 AD3d 670 [2nd Dept 2016]). Defendant contends that Plaintiff cannot obtain any relief against him because Plaintiff "has not established that [Defendant] is in possession of actual, physical stock certificates or paper of any kind pursuant to which relief may be granted at this moment." *Id.* at ¶ 15. Defendant states that his "interests [in the companies] may be less formalized", thereby precluding the relief Plaintiff seeks pursuant to CPLR §5225(a). *Id.* Defendant contends that Plaintiff's motion must be denied because he has not met his burden under that provision. Defendant argues further that "[t]he proper garnishee of a stock certificate is not a judgment debtor, but the corporation that has issued the stock certificate." *Id.* (citing CPLR §5201(c) and *Sirotkin, supra*). Defendant circles back to his argument that "[t]he [appropriate] process of turnover is by special proceeding." *Id.* (citing *Koehler v The Bank of Bermuda Limited*, 12 NY3d 533 [2009]). Thus, he argues, the instant application should be denied.

Plaintiff strenuously opposes Defendant's argument that the instant motion pursuant to CPLR §5225(a) is not a proper vehicle for the relief he seeks because the stock certificates, to the extent they exist, are in the possession of the companies and not Defendant. Plaintiff contends that a special proceeding, which he states is necessary when the personal property sought to be turned over is in the possession of a third party who is not before the Court, is not required here because all of the companies are already before the Court and have appeared on the application, through Defendant's counsel, Ronald V. De Caprio, Esq. Plaintiff points to counsel's representation in his affirmation that he submits his affirmation on behalf of Defendant and "the Non-Judgment Debtor Defendants in response to [Plaintiff's] application." Affirmation of Ronald V. De Caprio, Esq. in Response at ¶ 3.

Plaintiff also contends that Defendant's claim that the stock certificates are in the possession of the companies is a fallacy because the companies operate out of Defendant's home and do not have separate offices. Plaintiff asserts that the companies are alter egos of Defendant. Plaintiff argues that, as a matter of equity, Defendant should not profit from his own malfeasance in failing to issue stock certificates or to maintain adequate corporate records which show the existence and location of the stock certificates. In addition, Plaintiff asserts that the stock certificates are irrelevant because

Defendant has already admitted to all of the information that is generally provided in a stock certificate, which in this case is that he owns 50% of the companies (except Fisher & Kaplan Holding Corp., of which he owns 30%). Plaintiff attempts to distinguish the stock certificates at issue in this case from stock certificates for Apple or IBM, which are required to show proof of ownership and number of shares owned in order to determine their value. Plaintiff cites *Gallant v Kanterman*, 249 AD2d 59 [1st Dept 1998], also cited by Defendant, to support the contention that the physical certificates are unnecessary. As stated in *Gallant*, Plaintiff too asserts that "possession or non-possession of a stock certificate is not always dispositive of shareholder status". 249 AD2d at 62.

Plaintiff also relies on *Matter of Estate of Purnell v LH Radiologists*, 90 NY2d 524 [1997], which was cited in *Gallant, supra*, to support the general proposition that shareholder status may be established by evidence other than stock certificates. In *Purnell*, the Court of Appeals held that shareholder status could be "evidenced by the filed certificate of incorporation, the certified records of the State of New York, the substantial financial contributions toward the incipient enterprise, and the various shareholder meetings and memoranda among the parties." 90 NY2d at 532. "The omission of issuance of stock certificates to petitioners does not displace that array of evidence which supports shareholder status for these purposes." *Id.* (citations omitted). The Court of Appeals also held that the conduct among the parties could reflect shareholder status, as it had in that case, showing that the shareholders held equal status. *Id.*

Further support for Plaintiff's general proposition is found in *Kun v Fulop*, 71 AD3d 832 [2nd Dept 2010]. The Appellate Division stated in *Kun* that "[t]he mere fact that the corporation did not issue any stock certificates [to an individual] does not preclude a finding that [the individual] has the rights of a shareholder". 71 AD3d at 833 (quoting *French v French*, 288 AD2d 256, 256 [2nd Dept 2001]; *see also Matter of Benincasa v Garrubbo*, 141 AD2d 636, 638 [2nd Dept 1988]). "In the absence of a share certificate ... a court must determine from other available evidence whether a putative shareholder in fact and law enjoys that status". *Id.* (quoting *Matter of Pappas v Corfian Enters., Ltd.*, 22 Misc.3d 1113[A] [Sup Ct., Kings County 2009]).

In the instant case, Defendant indisputably holds the status of shareholder in his closely held companies. In fact, Defendant testified during his depositions to being a 50% owner of all but one of the companies. Order to Show Cause, Exhibits A-C, Depositions of Steven Kaplan taken on May

9, 2016; May 19, 2016 and November 8, 2016. *Purnell* and *Kun* establish that other indicia of ownership may serve as a proxy for stock certificates for some purposes. Certainly, Defendant's failure to clarify whether his companies issued any stock certificates favors utilizing other indicia of ownership as a proxy for the stock certificates.

Pursuant to CPLR §5225(a), "[u]pon motion of the judgment creditor, upon notice to the judgment debtor, 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 ... personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff." This Court has personal jurisdiction over Defendant and can order him to turnover "personal property" in his possession to satisfy the Judgment.

In *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 540–41 [2009], the Court of Appeals explained the difference between CPLR 5225(a) and (b) as follows:

> Both CPLR 5225(a) and (b) provide that a judgment creditor may obtain an order from a New York court, requiring a defendant who is in possession or custody of money or other personal property in which a judgment debtor has an interest to turn over the property or pay the money to the judgment creditor. CPLR 5225(a) applies when the property sought is in the possession of the judgment debtor himself. CPLR 5225(b) applies when the property is not in the judgment debtor's possession. The most significant difference between the subdivisions is that CPLR 5225(a) is invoked by a *motion* made by the judgment creditor, whereas CPLR 5225(b) requires a *special proceeding* brought by the judgment creditor against the garnishee. The reason for this procedural distinction is that the garnishee, not being a party to the main action, has to be independently subjected to the court's jurisdiction. But both CPLR 5225(a) and (b) contemplate an order, directed at a defendant who is amenable to the personal jurisdiction of the court, requiring him to pay money or deliver property.

The stock certificates of Defendant's companies are personal property, which if they exist, are likely in his personal possession since he runs the companies out of his residence. The Court declines to engage in the shell game Defendant proffers to Plaintiff of refusing to admit to the existence or non existence of the certificates while suggesting that Plaintiff must bring a special proceeding against the companies to obtain them. If they do not exist, other indicia of Defendant's ownership interest may be turned over to Plaintiff in lieu of the stock certificates.

Moreover, as provided in Limited Liability Company Law § 601, "[a] membership interest in the limited liability company is personal property." The Appellate Division held in *Sirotkin* that "[a] membership interest in a limited liability company is 'clearly assignable and transferrable,' and, therefore, such interest is 'property' for purposes of CPLR article 52." *Sirotkin, supra*, 141 AD3d 670, 671 (citing *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 313-314 [2010] ("the intangible property plaintiff sought to attach—defendants' ownership/membership interests in 22 out-of-state limited liability companies—is akin to intangible contract rights, and is clearly assignable and transferable"); *see ABKCO Indus. v Apple Films*, 39 NY2d 670, 674 [1976]). Indeed,"Limited Liability Company Law § 603 expressly acknowledges that '[e]xcept as provided in the operating agreement . . . a membership interest is assignable in whole or in part'." *Id.* (citing Limited Liability Company Law § 603 [a] [1]); *but see Born to Build, L.L.C. v Saleh*, 43 Misc 3d 1213(A) [Sup Ct, Nassau County 2014] ("[A]t best, a creditor, such as the plaintiff, may only obtain an interest in a member's share of the profits and losses of a limited liability company, not the membership interest itself.").

Because the stock certificates and other indicia of ownership interests in the companies are personal property of Defendant, Plaintiff may properly request that they be turned over to him pursuant to CPLR §5225(a) and the Court may order their turnover to Plaintiff under that provision.

In addition, subject to the limitations, if any, contained in the operating agreements, the Court could order the transfer of Defendant's membership interests to Plaintiff pursuant to CPLR §5225(a). The Court may not grant that relief, however, because neither party provided the Court with a copy of the operating agreements for Defendant's companies. Therefore, the Court cannot ascertain whether Defendant's membership interests are assignable and transferrable.

Although the Court has broad discretion pursuant to CPLR §5240 "to alter the use of procedures set forth in CPLR article 52",[3] *Sirotkin*, the 141 AD3d at 672 (citing *Guardian Loan Co. v Early*, 47 NY2d 515, 519–520 [1979]), the Court is hampered by the limited evidentiary record before it and the absence of the companies as parties.

---

[3] CPLR §5240 provides, in relevant part, that a court "may at any time, *on its own initiative* or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure". (emphasis added).

Accordingly, under these circumstances, the Court grants Plaintiff's motion only to the extent that Defendant shall turnover his stock certificates or other indicia of his ownership interests in the subject companies,[4] including copies of the operating agreement for each company, to Plaintiff within 20 days of the date of this Decision and Order. In addition, Defendant is enjoined from receiving any profits or other distributions of any kind issued to him by any of the companies in the usual course until further order of the Court in a plenary action pursuant to CPLR §5225(b). Defendant is further enjoined from transferring or encumbering ownership of all or any portion of the companies until such order.

The rest of the relief sought by Plaintiff is denied. Plaintiff must bring a special proceeding against Defendant and his companies pursuant to CPLR §5225(b) to obtain further relief, such as a charging order against Defendant's membership interests. *Sirotkin, supra* at 671. "Limited Liability Company Law § 607 expressly provides that, on an application by a judgment creditor of a member of an LLC, 'the court may charge' the debtor's membership interest 'with payment of the unsatisfied amount of the judgment with interest,' and '[t]o the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest.'" *Id.* at 672; *see also Hirtenstein, supra* 2011 WL 3565811 ("while the member of a limited liability company does not have interest in the company's specific property, the membership interest itself is personal property that the court can charge, with interest, to satisfy the creditor's judgment." (citing Limited Liability Company Law §§ 601, 607(a)).

The Court cannot order partition and sale of the real properties owned by the companies, which are not before the Court in any event, as Plaintiff discontinued the action against them with prejudice. Pursuant to CPLR §5225(b), Plaintiff must commence a special proceeding against the companies to reach assets belonging to him which are held by the companies. Thus, there is no

---

[4] The Court of Appeals, in *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 316–17 [2010], acknowledged that ownership/membership interests in various limited liability companies may not be analogized to shares of corporate stock. As the Court noted, "[a]lthough both represent ownership interests, the relevant dividing line, under the CPLR's attachment provisions, is not ownership versus non-ownership, or whether the interests are tangible or intangible. It is whether the interests are evidenced by written instruments, such as certificates, or not. Corporate shares are typically evidenced by stock certificates. Defendants' interests, on the other hand, are not evidenced by 'ownership' certificates or any other written instrument." Arguably, that may be this case here as well.

reason to appoint a receiver.[5] Limited Liability Company Law § 601 provides that "[a] member has no interest in specific property of the limited liability company." Limited Liability Company Law § 607(b) expressly states that "[n]o creditor of a member shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company."

The foregoing constitutes the Decision and Order of the Court.

Dated: June 11, 2018
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.

[5] "A motion to appoint a receiver should only be 'granted ... when a special reason appears to justify one'." *Hotel 71 Mezz Lender LLC, supra* at 317-18 (citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5228:l, at 324).