

Darling Capital, LLC v Oncologix Tech Inc.
2019 NY Slip Op 30415(U)
February 19, 2019
Supreme Court, New York County
Docket Number: 656068/2017
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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DARLING CAPITAL, LLC,

Petitioner,

Index No. 656068/2017
Motion Seq. No. 001

-against-

ONCOLOGIX TECH INC.,

Respondent.

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Tanya R. Kennedy, J.

Petitioner Darling Capital, LLC (Darling Capital) commenced this proceeding by Order to Show Cause (OSC), *inter alia*, pursuant to CPLR 5225 and 5227, for an order directing the turnover of all sums and property due to and/or belonging to Darling Capital and in the possession of respondent Oncologix Tech Inc. (Oncologix) to the Sheriff of New York County, sufficient to satisfy a judgment in the sum of \$143,309.19, plus interest, and for other related relief.

Nonparty TCA Global Credit Master Fund, L.P. (TCA) cross-moves for an order denying the OSC and for an order, pursuant to CPLR 1012, 1013 and 5239, granting it leave to intervene in this action; recognizing TCA as the senior secured creditor; restraining Darling Capital from satisfying its judgment until TCA's secured interest is satisfied; or, in the alternative, requiring that any monies Darling Capital collects from Oncologix is paid to TCA, until Oncologix's debt to TCA is satisfied.

In the underlying CPLR 3213 summary proceeding, Darling Capital obtained a judgment against Oncologix, following an inquest held on April 4, 2017 (*see Darling Capital LLC v*

Oncologix Tech Inc., Supreme Court, NY County, index No. 654101/2015). During the inquest, Darling Capital established Oncologix's admitted failure to pay in accordance with the terms of three promissory notes that Oncologix executed in 2015 in favor of Darling Capital (Darling Capital notes). The judgment was issued on May 9, 2017, and is in the total amount of \$143,309.19, consisting of \$134,653.33 in compensatory damages, \$7,620.86 in attorney's fees, and \$1,035.00 in costs and disbursements, together with interest from the date of entry of the judgment. Darling Capital filed a notice of entry of the judgment on May 9, 2017 and commenced this special proceeding on September 27, 2017.

Prior to executing the Darling Capital notes, Oncologix entered into a Senior Secured Revolving Credit Facility Agreement (Facility Agreement) with TCA in the amount of \$4,000,000.00 on November 30, 2013. Oncologix also executed a Senior Secured Revolving Convertible Promissory Note (TCA note) bearing the face amount of \$500,000 and a Security Agreement, both in favor of TCA, to induce TCA to enter into the Facility Agreement.

On January 31, 2014, TCA secured the Facility Agreement and TCA note by filing a UCC-1 Financing Statement with the Office of the Secretary of State for the State of Nevada, Oncologix's state of incorporation. Thereafter, on February 10, 2014, TCA filed a UCC-1 Financing Statement with the State of Louisiana, the state of incorporation of the Facility Agreement and TCA note guarantors, nonparties Angels of Mercy, Inc. and Dotolo Research Corporation.

On September 25, 2014, Oncologix and TCA executed a First Amendment to Credit Agreement (Amended Credit Agreement) to provide Oncologix with additional funds. Oncologix also executed additional loan documents, including a Guaranty Agreement, Use of

Proceeds Confirmation and Subordination Agreement on that same date.

Darling Capital now seeks an order granting the turnover of assets, without a bond; appointing a receiver; granting a temporary restraining order (TRO) restraining Oncologix and its representatives and successors from encumbering, transferring, or disposing of Oncologix's property and interests; compelling Oncologix to respond to the information subpoena served upon it; or, in the alternative, granting discovery pursuant to CPLR 408.

In partial opposition, Oncologix does not dispute the validity of the judgment, but contends that TCA holds a priority interest in Oncologix's assets. Oncologix maintains that the TCA notes were executed prior to the Darling Capital notes and that the TCA notes are secured, while the Darling Capital notes are unsecured.

Cross-Motion by TCA

TCA cross-moves for leave to intervene in this proceeding, maintaining that Darling Capital seeks relief which will affect TCA's documented secured claim to Oncologix's assets. However, the cross-motion for leave to intervene is without merit.

In this proceeding, Darling Capital seeks to enforce a judgment against Oncologix. Oncologix did not oppose issuance of the judgment in the underlying action and does not raise any affirmative defenses to enforcement of the judgment in this proceeding. TCA's secured lien is not a defense to the turnover petition, and, therefore, does not mandate intervention (*see Gladstein v Martorella*, 75 AD3d 465, 466 [1st Dept 2010] [denying a secured creditor the right to intervene where the creditor's legal rights would not be adversely affected by the enforcement of the plaintiff's judgment]). Here, TCA does not seek to intervene to test the validity of the judgment, but rather to reach Oncologix's assets before Darling Capital.

“CPLR article 52 has been described as contemplat[ing] a race of diligence among creditors” [and] “adverse claimants are not necessary parties to the proceeding” (*Matter of Northeast Heating Cooling Refrig. Co. Inc. v Potter*, 40 Misc 3d 1242[A], 2013 NY Slip Op 51535[U], *1 [Sup Ct, Albany County 2013] [internal quotation marks and citation omitted]). Thus, pursuant to CPLR 5225(b), “a judgment creditor is obliged to give notice of a turnover proceeding to the judgment debtor, but there is no requirement that notice be given to adverse claimants, including other judgment creditors or lienholders” (*id.*).

A cross-motion to intervene is properly denied where, as here, the arguments raised by the cross-movant are without merit, and “intervention would merely serve to unduly delay the determination of a summary proceeding and prejudice a substantial right of the judgment creditor to receive payment” (*Matter of Centerpointe Corporate Park Partnership 350 v MONY*, 96 AD3d 1401, 1402 [4th Dept 2012] [internal quotation marks and citation omitted]).

Accordingly, the cross-motion to intervene is denied.

Petition for a Turnover Order and Other Relief

Pursuant to CPLR article 52, a judgment creditor may commence an expedited special proceeding to recover money or personal property belonging to a judgment debtor against that debtor or a person in possession of such property in order to satisfy a judgment (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept 2009]; *see* CPLR 5225, 5227). “A court in a turnover proceeding will apply summary judgment analysis and [,] absent a factual issue requiring a trial, the matter will be summarily determined on the papers presented” (*Matter of Centerpointe Corporate Park Partnership 350 v MONY*, *supra* at 1402 [internal quotation marks and citation omitted]).

The Court notes that Oncologix did not appear or answer, nor did it contest entry of the judgment against it in the underlying CPLR 3213 proceeding. In this proceeding, Darling Capital alleges that Oncologix has paid no portion of the judgment or accrued interest and has submitted a valid and enforceable judgment against Oncologix upon which it seeks to collect. Oncologix has not set forth any defense to the relief Darling Capital seeks in the petition, but merely disputes the priority of collection. As such, the request for an order directing the turnover is granted.

Inasmuch as Oncologix maintains that TCA holds a priority interest in its assets rather than Darling Capital, a TRO is warranted restraining Oncologix, its agents, representatives, and those acting in concert with them from disposing, dissipating, or otherwise encumbering any tangible or intangible property in which Oncologix holds an interest, until the judgment is satisfied or vacated (*see Cruz v TD Bank, N.A.*, 22 NY3d 61, 74-76 [2013]; *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 33 AD3d 785, 787 [2d Dept 2006]; *see also* CPLR 5240).

Oncologix does not oppose Darling Capital's request that no bond or undertaking requirement be imposed. In addition, the enforcement remedies available under CPLR article 52 do not require that the judgment creditor post a bond or undertaking, and provide a means for Oncologix to protect itself, if necessary (*see M.M. v T.M.*, 50 Misc 3d 565, 595 [Sup Ct, Monroe County 2015]). Therefore, Darling Capital is not required to post any bond or undertaking.

Darling Capital has also demonstrated that appointment of a receiver over Oncologix's assets is warranted.

“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. The appointment of a receiver pursuant to [CPLR] section 5228(a) is a matter within the court's discretion. A

motion to appoint a receiver should only be granted . . . when a special reason appears to justify one. In deciding whether the appointment of 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. A receivership has been held especially appropriate when the property interest involved is intangible, lacks a ready market, and presents nothing that a sheriff can work with at an auction, such as the interest of a psychiatrist/judgment debtor in a professional corporation of which he is a member”

(*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010] [internal quotation marks and citations omitted]; CPLR 5106, 5228).

Here, Darling Capital seeks tangible and intangible property, including liquid funds, real and personal property, and stock shares possessed by Oncologix or due it, sufficient to satisfy the May 9, 2017 judgment in the amount of \$143,309.19, together with interest. A receiver is authorized to marshal and, if necessary, liquidate Oncologix’s interests. Further, given the existence of the TCA notes, it appears that Oncologix is in danger of insolvency, if a receiver is not appointed.

Darling Capital has further demonstrated its entitlement to an award of attorneys’ fees, costs, and expenses, in accordance with the terms of the Darling Capital notes. “[A]ttorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule” (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Each of the Darling Capital notes provides that, upon Oncologix’s default under the note, Oncologix shall pay the holder of the note the costs of collection, including reasonable attorneys’ fees (*see* Exh. B to Petition, Aug. 10, 2015 Darling Capital replacement note, § 7; Aug. 10, 2015 Darling Capital note,

§ 4.5; May 22, 2015 Darling Capital note, § 4.5).

Settle order and judgment on notice.

Dated: New York, New York
February 19, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

TANYA R. KENNEDY
J.S.C.