

**Wimbledon Fin. Master Fund, Ltd. v Wimbledon
Fund, SPC (Class TT)**

2019 NY Slip Op 33202(U)

October 28, 2019

Supreme Court, New York County

Docket Number: 651376/2019

Judge: Jennifer G. Schechter

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

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WIMBLEDON FINANCING MASTER FUND, LTD.,

Index No.: 651376/2019

Petitioner,

DECISION & ORDER

-against-

THE WIMBLEDON FUND, SPC (CLASS TT),

Respondent.

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JENNIFER G. SCHECTER, J.:

On March 7, 2019, Wimbledon Financing Master Fund, Ltd. (Wimbledon) filed yet another petition to set aside a conveyance for the purpose of enforcing its judgment against Arius Libra, Inc. (Arius Libra). This time, however, the subject conveyance was not a pre-litigation transfer of Arius Libra’s loan proceeds to David Bergstein (*see, e.g., Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496 [1st Dept 2018]), but rather money Bergstein used to satisfy claims brought by another fund he victimized, respondent The Wimbledon Fund, SPC (Class TT). Indeed, this is not the first time that the fallout from Bergstein’s fraud has, unfortunately, pitted his victims against each other (*see Wimbledon Fin. Master Fund, Ltd. v Wimbledon Fund, SPC*, 162 AD3d 433 [1st Dept 2018]).

The facts giving rise to the alleged fraudulent conveyance that is the subject of this proceeding were addressed in a May 2018 decision in which Bergstein and his California-based attorney (who was admitted pro hac vice in New York) were held in contempt for violating Wimbledon’s restraining notices (*see Wimbledon Fin. Master*

Fund, Ltd. v Bergstein, 2018 WL 2163586, at *1 [Sup Ct, NY County May 10, 2018] [the Contempt Decision], *affd as mod* 173 AD3d 401 [1st Dept 2019]). In short, though on notice that all funds in which he had an interest were restrained, Bergstein used funds belonging to his entities to pay millions of dollars to Class TT to settle litigation against him that had been pending in the United States District Court for the Central District of California (the California Action) (*see id.* at *1-2). Here, Wimbledon claims that Bergstein's bad faith along with its supposed priority are grounds to set aside \$5 million of the settlement funds received by Class TT. Wimbledon relies on CPLR 5202(b), which gives judgment creditors who have obtained a turnover order priority over subsequent creditors and permits the imposition of liability on subsequent creditors who receive assets of the judgment debtor in bad faith and while on notice of the other creditor's priority.

On March 27, 2019, Class TT moved to dismiss the petition, principally arguing that Wimbledon lacks priority. Wimbledon opposes. Class TT's motion is granted and the petition is dismissed.

Background

The material facts are not in dispute.

In 2011, Advisory IP Services, Inc. f/k/a Swartz IP Services Group, Inc. (SIP) entered into a Note Purchase Agreement with Class TT. In February 2013, Class TT sued SIP in this court for breach of that agreement (*Wimbledon Fund, SPC v Advisory IP*

Servs., Inc., Index No. 650446/2013 [Sup Ct, NY County], Dkt. 2). In November 2015, a judgment in excess of \$23 million was entered in Class TT's favor (*see id.*, Dkt. 190).

In July 2015, Class TT commenced an action in a Texas federal court, claiming that Bergstein and others are SIP's alter egos and should be held liable for SIP's judgment (the Texas Action). In August 2015, Class TT commenced the California Action, asserting fraudulent conveyance claims against, among others, one of Bergstein's companies, Graybox LLC (Graybox). In September 2015, Class TT moved in the California Action to freeze \$2.412 million of Graybox's assets, which the California court granted in October 2015.¹ In April 2016, the Texas Action was consolidated with the California Action. In January 2017, the California Action was stayed pending resolution of Bergstein's criminal proceedings.²

While Class TT was busy litigating with Bergstein, so was Wimbledon. In January 2016, Wimbledon sued Bergstein and others for pilfering Arius Libra's loan proceeds (*Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, Index No. 150584/2016 [*Wimbledon Proceeding*]). Wimbledon did so in a proceeding under article 52 to enforce a \$6.6 million judgment entered in 2013 in an action brought by Arius Libra's lender (Partners II) to enforce Arius Libra's default on a loan, which had occurred in December 2011 (*see generally Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 2017 WL 3024259, at *12 [Sup Ct, NY County July 17, 2017], *affd as mod*

¹ The injunction was affirmed by the Ninth Circuit (*Wimbledon Fund, SPC Class TT v Graybox, LLC*, 648 FAppx 701 [9th Cir 2016]).

² In 2018, Bergstein was convicted and sentenced to eight years in prison.

160 AD3d 596 [1st Dept 2018]).³ The court ruled in Wimbledon's favor, holding that such transfers are fraudulent conveyances and held Bergstein personally liable for all of them by piercing Arius Libra's corporate veil. While the California Action's stay was still in effect, on July 21, 2017, this court entered a judgment against Bergstein in an amount exceeding \$8 million (Dkt. 7 [the July 2017 Judgment]; see *Matter of Wimbledon Fin. Master Fund, Ltd.*, 166 AD3d 496 [affirming judgment]).

What happened next is explained in the Contempt Decision:

On July 25, 2017, four days after the Judgment was entered, the Bergstein Parties were served with virtually identical restraining notices forbidding them from making or suffering any sale, assignment, transfer, or interference with any property in which [they had] an interest. . . . The Restraining Notices also were served on SCG (Bergstein's New York counsel). Indeed, prior to formally serving the Bergstein Parties, on July 21, 2017, at 6:03 pm, Wimbledon's counsel emailed the Restraining Notices to SCG. Six minutes later, at 6:09 pm, SCG forward the email to Bergstein. Four minutes later, at 6:13 pm, SCG forwarded the email (including the full chain indicating it had been forward to Bergstein) to Katzman and another attorney at BMK (Bergstein's California counsel). Katzman admits that he was made aware of the Restraining Notices through this email.

...

BMK represented the Bergstein Parties in the California Action, in which (Class TT) sued the Bergstein Parties and obtained a pre-judgment attachment of their funds. The attached funds were maintained in a client trust account of BMK. They remained frozen in January 2017, at which time the California Action was stayed pending Bergstein's criminal trial in New York. While the stay was in effect, on August 16, 2017, BMK filed a stipulation in the California Action to lift the stay and modify the attachment order to permit BMK to distribute the attached funds, which totaled \$2,412,000, to Class TT as part of a settlement. The California court approved the stipulation on August 17, 2017.

³ The court's July 17, 2017 decision in that plenary action contains an extensive discussion of Wimbledon's travails. As relevant here, Partners II assigned its judgment to Wimbledon.

It turns out, however, that Class TT and the Bergstein Parties did not enter into a formal settlement agreement until three months later, on November 16, 2017. The Settlement Agreement provides for \$9,412,000 to be paid to Class TT, which was partially funded by the \$2,412,000 that had been attached. Section A.1 provides that this money was to come from Graybox, an LLC that is (as discussed in prior decisions) owned and controlled by Bergstein. In consideration for the payments, Bergstein received a personal release. Moreover, in a recent submission to the federal court (Castel, J.) overseeing his sentencing and forfeiture, Bergstein admits the \$2,412,000 was paid for his benefit, and sought a reduction of his forfeiture based on this payment. Hence, there is no question that the \$2,412,000 paid by Graybox is property in which Bergstein had an interest. Consequently, the Bergstein Parties violated the Restraining Notices when they transferred this money to Class TT. That the California court lifted the attachment to permit the transfer is of no moment, as the Bergstein Parties defrauded the California court by seeking permission to make the transfers without disclosing that the subject funds were encumbered by the Restraining Notices (Contempt Decision, 2018 WL 2163586, at *1-2 [emphasis added; citations omitted]).

Thus, it was adjudicated that Bergstein acted in bad faith in causing the \$2.412 million to be transferred to Class TT to settle the California Action (*see id.* at *3 [“There simply is no question of fact that the Bergstein Parties knowingly and willfully violated the Restraining Notices. It is undisputed that the Bergstein Parties were validly served with the Restraining Notices, but nonetheless used restrained funds to pay other creditors. The court, therefore, holds them in civil contempt”]).

As noted above, the Settlement Agreement (Dkt. 13) was executed in November 2017. At that time, it is not clear whether Class TT was aware of the July 2017 Judgment or Wimbledon’s restraining notices. However, there is no question that Class TT became aware of the July 2017 Judgment and restraining notices by letter from Wimbledon dated

December 13, 2017 (*see* Dkt. 14). Upon receipt of the December 13 letter, Class TT had yet to be paid all of the funds due under the Settlement Agreement – which, it should be noted, had not yet been disclosed to Wimbledon or this court (that only occurred in May 2018 after this court ordered its disclosure) (*see* Contempt Decision, at *2 n 7). The settlement payments were supposed to be made in three installments: (1) the \$2.412 million was supposed to be paid in August 2017, months before the Settlement Agreement actually was executed; (2) \$5 million was to be sent within 30 days of the Settlement Agreement’s execution – *that deadline being December 21, 2017*; and (3) \$2 million was due within one year of the Settlement Agreement’s execution.

Class TT’s counsel responded in a letter dated December 20, 2017, disputing having violated Wimbledon’s restraining notices because Class TT did not obtain settlement funds in violation of the restraining notices and because the California court authorized the release of the \$2.412 million (*see* Dkt. 15). One day before Class TT sent this letter, on December 19, Bergstein caused a company he controlled, Xanadu Media Group, Inc., to transfer the \$5 million, second settlement payment installment to Class TT’s counsel, who, after keeping a \$500,000 retainer payment, transferred the money to Class TT. Thus, at the time of the \$5 million transfer, Class TT was aware of the restraining notices (having been notified on December 13), yet waited until after the money was transferred, on December 20, to respond to Wimbledon. As explained in the Contempt Decision (and as affirmed by the Appellate Division), an attorney with knowledge of a restraining notice – regardless of whether the restraining notice was

formally served upon him or his client – cannot take actions causing a violation of the restraining notice and, upon doing so, he will be held in contempt (*see Wimbledon*, 173 AD3d at 401-02).

Analysis

CPLR 5202(b) provides:

Where a judgment creditor has secured an order for delivery of, payment of, or appointment of a receiver of, a debt owed to the judgment debtor or an interest of the judgment debtor in personal property, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except a transferee who acquired the debt or property for fair consideration and without notice of such order.

The statute sets forth that once a judgment creditor secures certain orders issued pursuant to article 52, such as a delivery order or an order directing an appointed receiver to take possession of specified property, the judgment creditor will obtain priority and prevail over any transferee except for one who does not know of the order and has paid fair consideration for the property (Richard C. Reilly, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C:5202:3; *see also P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1st Dept 2002] [“petitioner’s status as a creditor with a turnover order from the Supreme Court gives it priority over appellant, since appellant did not obtain the property for fair consideration”]).

Class TT argues that since Wimbledon’s petition is based on CPLR 5202(b)--and not based on fraudulent conveyance law or violation of restraining notices--its priority over Wimbledon is an absolute defense, regardless of its own good faith. It maintains that

despite resulting from a turnover petition, the July 2017 Judgment is merely a monetary judgment and is not an “order for delivery ... or payment of ... a debt owed to the judgment debtor” within the meaning of CPLR 5202(b).

Wimbledon does not dispute that the July 2017 Judgment is simply an ordinary monetary judgment. It contends that the July 2017 Judgment should be construed as a turnover order since it was issued in a turnover proceeding.

Wimbledon’s petition is dismissed because CPLR 5202(b) is the only basis on which Wimbledon challenges the \$5 million transfer to Class TT. CPLR 5202(b), by its terms, does not support even potentially granting the relief sought (*see Cook v H. R. H. Const. Corp.*, 32 AD2d 806, 807-08 [2d Dept 1969] [where judgment was based on veil piercing, “appellant achieved no greater rights by the stipulation and order, since the priority requirements of article 52 had to be satisfied for him to achieve priority”]), citing *City of New York v Panzirer*, 23 AD2d 158, 162 [1st Dept 1965] [“in order for a judgment to attain status in the ranking of priorities there must either be a levy, an order directing delivery of property, or the appointment of a receiver. Any other measures taken by the judgment creditor, no matter how diligent, on an absolute or comparative basis, do not suffice to qualify for priority. In given situations, as in this case, the effect may be that a less diligent creditor may prevail over a more diligent one, but the values of certainty and ease of determination of priorities are better achieved”]).

Significantly, there is no statutory authority in CPLR 5202(b) for awarding Wimbledon priority on the basis of the July 2017 Judgment, which did not direct

delivery, turnover or any other article 52 relief and simply constituted an ordinary judgment awarding money along with interest.⁴

There can be no dispute that the July 2017 Judgment is solely a monetary judgment and was affirmed as such by the Appellate Division (*see Matter of Wimbleton Fin. Master Fund, Ltd.*, 166 AD3d at 496 [“Judgment **awarding petitioner sums of money** as against (Bergstein)] [emphasis added]). It is too late for Wimbleton to complain that a turnover order was not entered instead. Indeed, at the time the court issued the judgment in July 2017, Wimbleton was well aware that Bergstein’s other creditors were seeking to recover from him. If Wimbleton was concerned that the court’s issuance of a monetary judgment would prejudice it due to the lack of priority afforded to it under CPLR 5202(b), it could have requested that the court vacate or amend the judgment and instead enter a turnover order. It did not (*Wimbleton Proceeding*, Dkt. 776; *cf. Colfin Bulls Funding B, LLC v Ampton Invs., Inc.*, 62 Misc 3d 1208[A], at *4 [Sup Ct, NY County 2018] [“A judgment creditor who ... serves only a restraining notice, is ‘required to take further steps in enforcing his judgment, such as the execution or levy upon the judgment debtor’s property, in order to prevent the intervening rights of

⁴ It is unclear whether the arguments raised here were asserted in *P.A. Bldg. Co.* (298 AD2d at 328). The issue was not addressed by the Appellate Division. The Appellate Division did state that Supreme Court “ordered appellant to turn over [funds] to petitioner” and that petitioner was a creditor “with a turnover order” (*id.* at 327-28). There was no such order or judgment here. Additionally, though turnover orders and judgments often result from turnover proceedings, sometimes ordinary monetary judgments are entered (*see Federal Deposit Ins. Corp. v Heilburn*, 167 AD2d 294 [1st Dept 1990] [“A personal judgment against the transferee of a fraudulent conveyance may be obtained where the transferee has made it impossible to return the property to the creditor by, for example, disposing of wrongfully conveyed property or depreciating it”]). While, unlike in *Heilburn*, turnover relief may have been available in the underlying proceeding, it ultimately was not obtained.

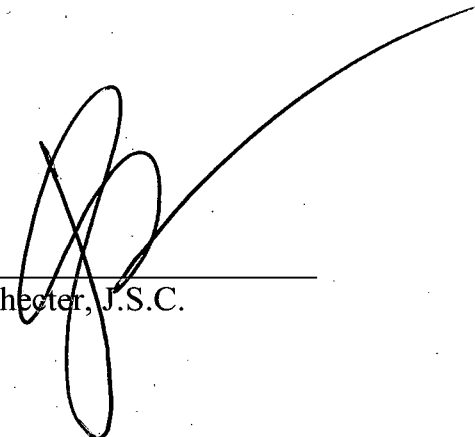
third parties from taking precedence over his claim against the judgment debtor”], quoting *Aspen Indus., Inc. v Marine Midland Bank*, 52 NY2d 575, 580 [1981]). To be sure, respondent may well have had notice of the July 2017 Judgment prior to receiving the funds. That monetary judgment, however, was not a turnover order or judgment sufficient to give Wimbledon priority regardless of what Wimbledon may have sought in the underlying 2016 proceeding.

Accordingly, it is

ORDERED that Class TT’s motion to dismiss Wimbledon’s petition is granted, and the Clerk is directed to enter judgment accordingly.

Dated: October 28, 2019

ENTER:



Jennifer G. Schecter, J.S.C.