

World Global Capital, LLC v Sahara Rest. Corp.

2019 NY Slip Op 33820(U)

December 13, 2019

Supreme Court, Kings County

Docket Number: 504732/18

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of December 2019.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X
WORLD GLOBAL CAPITAL, LLC D/B/A
FORTRESS ADVANCE,

Plaintiff,

- against -

Index No. 504732/18

SAHARA RESTAURANT CORP. D/B/A
SAHARA RESTAURANT AND JOHN C.
ISIKLI,

Defendants.

-----X
The following e-filed papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	7-16, 23
Opposing Affidavits (Affirmations) _____	28
Reply Affidavits (Affirmations) _____	32-34
Supplemental Affidavit of John Isikli _____	35
Memoranda of Law _____	17 29 31

Upon the foregoing papers, non-party judgment creditor movant, Capital Stack, LLC (Capital Stack) moves pursuant to CPLR 5240, for an order: (1) enjoining plaintiff World Global Capital (“WGC”) from freezing, restraining, executing upon, seizing, or levying any assets, accounts, or property, including accounts already frozen and restrained of Sahara Restaurant Corp. (“Sahara”) and John C. Isikli’s (“Isikli”), and (2) requiring WGC to send rescission letters and releases to any and all account receivables and banks belonging to Sahara and Isikli immediately. WGC opposes the application.

Factual and Procedural Background

In this action WGC, a merchant lender, seeks to enforce its judgment against judgment debtors Sahara and, Isikli, owner of Sahara. Capital Stack, a judgment creditor, contends that WGC does not have the right to freeze or execute any assets of Sahara and Isikli because its judgment has priority over WGC's judgment. Sahara and Isikli entered into two separate agreements for the purchase and sale of future receivables with Capital Stack. In the first agreement, which was executed on August 24, 2017, Capital Stack purchased \$284,000 worth of receivables. In the second agreement, which was executed on September 13, 2017, Capital Stack purchased \$145,000 worth of receivables. Both agreements contained a personal guaranty of performance by Isikli. Affidavits of confession of judgment, in favor of Capital Stack, were also executed by Isikli, on behalf of Sahara, and as guarantor. On February 7, 2018, Capital Stack filed a UCC-1 financing statement which named Capital Stack as the secured party and Sahara as the debtor based on the purchase of its receivables.

On December 7, 2017, Sahara entered into a secured merchant agreement with WGC, whereby WGC agreed to buy all rights of Sahara's accounts receivable. These were the same receivables that had been previously sold to Capital Stack. Isikli also personally guaranteed performance under this agreement, and, on behalf of Sahara, executed an affidavit of confession of judgment in favor of WGC, authorizing WGC to enter judgment against Sahara and him, jointly and severally, in the event of default under the agreement.

Sahara defaulted on both of its purchase and sale agreements with Capital Stack on February 15, 2018. Subsequently, the affidavits of confession of judgment signed by Isikli were filed. A judgment was entered against Sahara and Isikli on March 6, 2018.¹ Thereafter, a second judgment² was entered against Sahara and Isikli on March 7, 2018. Subsequently, pursuant to CPLR 5202(a) Capital Stack served a restraining notice and seized and levied upon Sahara's business bank account at HSBC bank ("HSBC account"). Capital Stack delivered an execution to the City Marshal for enforcement and the City Marshal served the execution on HSBC.

On March 20, 2018, Capital Stack and Sahara executed a forbearance and settlement agreement ("the forbearance agreement"). The forbearance agreement stated that Capital Stack and Sahara would settle both judgments for \$290,000, and that Capital Stack was "willing to forbear from pursuing or exercising the rights and remedies" to which it had become entitled, in order to give Sahara an opportunity to pay the \$290,000 settlement amount in full, "*but only if, and only for so long as [Sahara and Isikli] shall agree to and abide by each of the covenants and undertakings as set forth in this Agreement*" (emphasis added). The forbearance agreement provided, among other things, as follows:

"There are no actions, suits or proceedings pending or threatened against or affecting the Debtors in any court . . . in which there is a reasonable possibility of an adverse decision which could materially affect the business, financial position

¹ *Capital Stack, LLC v Sahara Restaurant Corp.*, Index No. 504505/18, judgment entered in the amount of \$303,537.91.

² *Capital Stack, LLC v Sahara Restaurant Corp.*, Index No 504652/18, judgment entered in the amount of \$27,604.75.

or results of operation of the Debtors or which in any manner raises any question affecting the validity of this Agreement.”

The forbearance agreement also provided that, on or before March 21, 2018, the City Marshall shall send HSBC a conditional release signed by Isikli and Anna Rubin, Esq., Capital Stack’s attorney. The sum of \$40,000 was remitted and released from Sahara’s HSBC bank account. Capital Stack released its judgment lien in reliance upon Sahara’s representations in the forbearance agreement.

Sahara complied with its agreement with WGC, but on March 6, 2018, defaulted under the terms of the agreement, by its failure to remit payment. Consequently, on March 7, 2018, WGC, as the plaintiff herein, filed Sahara’s confession of judgment in this court, pursuant to CPLR 3218. WGC entered its judgment on March 8, 2018, after both of Capital Stack’s judgments by confession against Sahara and Isikli had already been entered. Sahara and Isikli were served with notice of entry of this judgment on March 12, 2018, prior to their execution of the forbearance agreement with Capital Stack on March 20, 2018.

In conjunction with the entry of the respective judgments, a UCC-1 financing statement was filed by WGC which named WGC as the secured party and Sahara as the debtor on March 9, 2018; Capital Stack’s UCC-1 lien had already been filed on February 7, 2018.

Thereafter, WGC commenced judgment enforcement efforts by serving restraining notices, which restrained Sahara’s HSBC account, the same account from which Sahara

was to remit payments to Capital Stack under the forbearance agreement. WGC delivered an execution to the City Marshal and the City Marshal served the execution on HSBC. When Capital Stack attempted to make a payment from Sahara's HSBC account on March 26, 2018 pursuant to the forbearance agreement, the payment was rejected because the HSBC account had been frozen by WGC.

On April 10, 2018, Capital Stack filed the within instant order to show cause, seeking injunctive relief. The Court granted a temporary restraining order, which enjoined WGC from freezing, restraining, executing upon, seizing, or levying any of Sahara and Isikli's assets, accounts, or property, including accounts already frozen, restrained, or levied, pending the hearing of Capital Stack's order to show cause. By an amended order dated July 6, 2018, the court amended the temporary restraining order to extend the stay, pending the final determination of Capital Stack's order to show cause. WGC opposes Capital Stack's order to show cause.

Discussion

CPLR 5240 permits the court to, "at any time, on its own initiative or the motion of *any interested person*...make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure". CPLR 5240 "grants the court substantial authority to order equitable relief" (*Cruz v TD Bank, N.A.*, 22 NY3d 61, 75 [2013]; *see also Distressed Holdings, LLC v Ehrler*, 113 AD3d 111, 120 [2d Dept 2013]). The courts may exercise their broad discretionary powers pursuant to CPLR 5240 "to control and regulate the enforcement of a money judgment under article 52 to prevent

“unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (*Guardian Loan Co., Inc.*, 47 NY2d at 519 [internal quotation marks omitted]); *see also Fishler v Fishler*, 154 AD3d 917, 920 [2d Dept 2017]).

Here, Capital Stack is an “interested person” since its forbearance agreement with Sahara and Isikli has been frustrated by WGC’s restraint on the HSBC account. WGC’s contention that Capital Stack was required to bring a motion to intervene in this action or that Capital Stack is precluded from intervening because WGC’s judgment has already been entered, lacks merit. Capital Stack could not have moved to intervene in this action prior to WGC’s obtaining judgment because Capital Stack had no notice of this action, since the underlying confession of judgment was entered without the commencement of an action.

CPLR 5239 provides that “[p]rior to the application of property or debt by a sheriff . . . to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt.” Thus, under CPLR 5239, Capital Stack can seek relief against WGC to determine the priority of their competing claims with respect to the HSBC account. Service of process in such a proceeding may “be made by service of a notice of petition upon the respondent, the sheriff or receiver, and such other person as the court directs, in the same manner as a notice of motion.” Pursuant to this requirement, Capital Stack has served its order to show cause upon WGC and the New York City Marshal. As a result, this Court hereby converts Capital Stack’s motion to a proceeding

under CPLR 5239. In reliance on this statutory provision, the Court declares that Capital Stack's judgment has priority over WGC's judgment with respect to the HSBC account since Capital Stack filed its UCC-1 financing statement before WGC which establishes its priority over WGC's security interest.

The Court now analyzes plaintiff's request for injunctive relief.

In order to obtain a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Arcamone-Makinano v. Britton Prop., Inc.*, 83 A.D.3d 623, 624, 920 N.Y.S.2d 362). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Reichman v. Reichman*, 88 A.D.3d 680, 681, 930 N.Y.S.2d 262). Here, the plaintiff has demonstrated a likelihood of success on the merits, since it is well established that the secured party who first perfects its security interest by the filing of a UCC-1 financing statement takes priority (*see* UCC 9-322 [a] [1]). Here, Capital Stack is a secured party who first perfected its interest, by the filing of its UCC-1 financing statement. (*see Martin Weiszberger in Trust v. Husarsky*, 114 A.D.3d at 731-732, 979 N.Y.S.2d 851).

Plaintiff has also made a showing of irreparable injury warranting a preliminary injunction. Isikli's affidavit in support of his order to show cause asserts that if the HSBC account is restrained, he and Sahara will become insolvent and would be unable to pay its vendors or employees, resulting in the closure of Sahara's business. Further, plaintiff contends that equity warrants the Court to permit Sahara and Isikli perform under the

forbearance agreement to satisfy their obligations to Capital Stack, since \$40,000 of the \$290,000 judgment has already been paid. Additionally, the Court finds that the relief of enjoining WGC from freezing Sahara's HSBC bank account would not prevent WGC from utilizing enforcement devices with respect to Sahara's other assets which do not impair performance of the forbearance agreement.

Based on the foregoing, it is hereby,

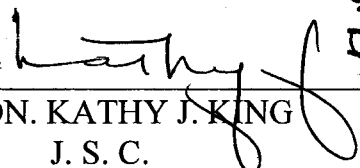
ORDERED that non-party Capital Stack's order to show cause is granted to the extent of enjoining WGC from freezing, restraining, executing upon, seizing, or levying the HSBC bank account until Capital Stack has received the remaining sum of \$250,000 as provided in the forbearance agreement; and it is further

ORDERED that Capital Stack has priority over WGC with respect to the HSBC bank account; and it is further

ORDERED the HSBC bank account shall be released from any freeze, restraint, execution, or levy heretofore asserted by WGC, and WGC is directed to send such a release to HSBC forthwith.

This constitutes the decision and order of the court.

E N T E R,


HON. KATHY J. KING
J. S. C.

HON. KATHY J. KING

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KINGS COUNTY CLERK
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