

Itria Ventures LLC, v Mitsubishi Motors N. Am., Inc.

2020 NY Slip Op 30053(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 157411/2018

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

ITRIA VENTURES LLC,

Petitioner,

- v -

mitsubishi motors north america, inc.,

Respondent,

-and-

nextgear capital, inc.,

Intervenor-Respondent.

INDEX NO. 157411/2018
MOTION DATE 01/11/2019
MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 9, 10, 34, 35, 37, 40, 47

were read on this motion to/for TURNOVER PROCEEDING

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 38, 44, 45, 48, 50

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31, 32, 33, 39, 41, 42, 43, 46

were read on this motion to/for MISC. SPECIAL PROCEEDINGS

ORDER

Upon the foregoing documents, it is

ADJUDGED that motion of Nextgear Capital Inc. (Motion Sequence Number 003) is granted to the extent that such party is permitted to intervene as a respondent in this proceeding, and such motion is otherwise denied; and it is further

ADJUDGED that motion to dismiss the turnover petition (Motion Sequence Number 001) is granted and the proceeding is dismissed, with cost and disbursements to respondent; and it is further

ADJUDGED that the motion of respondent that seeks leave to answer the petition and implead competing creditors is denied as moot.

DECISION

Motions designated 001, 002, and 003 are consolidated for disposition.

In Motion Sequence Number 001, petitioner, Itria Ventures, LLC ("Itria") moves, by petition, pursuant to CPLR 5225(b), for an order directing respondent, Mitsubishi Motors North America, Inc. ("Mitsubishi"), to immediately turn over to New York City Marshal Stephen W. Biegel ("Marshal Beigel") certain restrained funds to satisfy judgments in favor of Itria against non-party Reliance Cars Group Inc. ("Reliance").

In Motion Sequence Number 002, respondent moves, pursuant to CPLR 401, 404(a), 3211(a)(1) and 5232(a), to dismiss the petition, or for leave to answer the petition and implead competing creditors, NextGear Capital, Inc. ("NextGear"), World Global Capital LLC ("World Global"), Yes Funding, and Yellowstone Capital, LLC. ("Yellowstone").

In Motion Sequence Number 003, NextGear moves to intervene, pursuant to CPLR 5239 and 1012.

BACKGROUND

Itria is a Delaware limited liability company with offices in New York. Mitsubishi, a car manufacturer, is a California company that conducts business in New York. Reliance is a Mitsubishi dealership. NextGear extended floor plan financing to Reliance in the amount of \$9,380,957.78 to enable Reliance to purchase motor vehicles from Mitsubishi.

On November 9, 2017 and March 28, 2018, Itria and Reliance entered into Future Receivables Sale Agreements ("FRSAs"). On July 31, 2018, Itria filed a UCC Financing Statement with the Texas Secretary of State, covering the following collateral: "All of Debtor's present and future accounts, chattel paper, deposit accounts, documents, personal property, general intangibles, instruments, equipment (including assets and fixtures), inventory and proceeds".

On August 1, 2018, after Reliance breached the FRSAs, Itria obtained judgments in two proceedings, Itria Ventures LLC v Reliance Cars Group Inc., Sup Ct, Richmond County, Index No. 151981/2018 and Itria Ventures LLC v Reliance Cars Group Inc., Sup Ct, Richmond County, Index No. 151978/2018, in the amounts of \$538,427.98 and \$311,141.27, respectively.

By levies and demand on Mitsubishi, dated August 3, 2018, Marshal Biegel directed Mitsubishi, pursuant to CPLR 5232, to turn over to him all property of Itria currently in its possession, not to exceed and \$565,746.26 and \$327,036.27, the amounts of the judgments, plus interest, statutory fees, and poundage. Each levy further states "[a]ny monies paid to the judgment debtor after receipt of this levy is a violation of certain New York State laws". The levies and demand were addressed to Mitsubishi care of CT Corporation System ("CT Corp"), Mitsubishi's registered agent in New York upon whom process against it may be served.

On August 3, 2018, Reliance informed Itria that Mitsubishi was in possession of approximately \$900,000.00 belonging to Reliance. On August 5, 2018, Mitsubishi confirmed that it was in possession of funds belonging to Reliance.

Petitioner now seeks an order directing Mitsubishi to turn over to Marshal Biegel funds held by it, to satisfy the judgments.

Mitsubishi seeks to dismiss the petition based on improper service. Alternatively, Mitsubishi seeks leave to answer the petition and implead other creditors.

NextGear seeks to intervene in this proceeding and, among other things, submits a UCC Financing Statement, filed on December 6, 2017, covering the following collateral:

"All Debtors assets and properties wherever located, including without limitation all equipment of any kind or nature, all vehicles, vehicle parts and inventory, the purchase of which was financed or floor-planned by NextGear Capital, Inc. for Debtor of whatever kind or nature, and all returns, repossessions, exchanges, substitutions, attachments, additions, accessions, accessories, replacements, and proceeds thereof; all accounts, accounts receivable, chattel paper, and general intangibles now owned or hereafter acquired by Debtor together with the proceeds thereof, all of Debtors documents, books and records relating to the forgoing". NextGear asserts that Reliance owes it more than \$9.3 million.

DISCUSSION

At oral argument held on December 18, 2018, this Court (James, J.S.C.) granted NextGear's motion to intervene and deemed NextGear as a party respondent in this proceeding, based on NextGear's status as a creditor and in the absence of any objection from Itria or Mitsubishi.

Turning to the sufficiency of the petition, "CPLR article 52 governs the enforcement of money judgments and orders directing the payment of money" (Koehler v Bank of Bermuda Ltd., 12 NY3d 533, 537 [2009]). "Article 52 authorizes a judgment creditor to file a motion against a judgment debtor to compel turnover of assets or, when the property sought is not in the possession of

the judgment debtor ..., to commence a special proceeding against a garnishee who holds the assets" (id.).

With respect to garnishees, CPLR 5225(b) allows a New York court to issue a judgment ordering a party to deliver the property in which the judgment debtor has an interest, or to convert it to money for payment of a debt" (id.).

In particular, for property not in the possession of a judgment debtor, CPLR 5225(b) states:

"Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is sufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff"

Itria asserts that, as a judgment creditor, it is entitled to have funds held in Reliance's account with Mitsubishi turned over to Marshal Biegel.

Mitsubishi argues that the turnover petition should be dismissed because service of the levies and demand on CT Corp. was ineffective under CPLR 5232(a), which states, in part:

"(a) Levy by service of execution. The sheriff or support collection unit designated by the appropriate social services district shall levy upon any interest of the

judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made a delivery to a person authorized to receive service of the summons solely by the designation filed pursuant to a provision of law other than rule 318."

Mitsubishi essentially asserts that CT Corp. is not an authorized agent for service pursuant to 318, which permits service on "a person designated by a natural person, corporation or partnership as an agent for service in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon." Mitsubishi also argues that Itria is not entitled to a turnover since, at the very least, the funds which Mitsubishi owes to Itria are subject to a prior lien by NextGear. In the alternative, Mitsubishi seeks leave to answer the petition and implead other creditors.

However, Itria argues that it commenced this turnover proceeding pursuant to CPLR 5225(b) which, it asserts, does not require a levy for the judgment creditor to be awarded a turnover. Itria also disputes the assertion that NextGear has a prior security interest that has priority over its interest.

In determining the scope of CPLR 5225(b), the starting point is "the language itself, giving effect to the plain meaning thereof" (Majewski v Broadalbin-Perth Cent. Sch. Dist., 91 NY2d 577, 583 [1998]). "Where the statutory language is

clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (Patrolmen's Benevolent Assn. of the City of N.Y. v City of New York, 41 NY2d 205, 208 [1976]). Moreover, "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (Majewski v Broadalbin-Perth Cent. Sch. Dist., supra).

The plain language of section 5225(b) requires that "[n]otice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested". The statute does not refer to service of a levy. "The absence of this word is meaningful and intentional as ... the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended" (Commonwealth of N. Mariana Is. v Canadian Imperial Bank of Commerce, 21 NY3d 55, 60-61 [2013]). "[T]he failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (People v Finnegan, 85 NY2d 53, 58 [1995]).

Here, it is beyond dispute that Itria caused the two levies and demand to be served upon CT Corp., Mitsubishi's agent for service of process. Furthermore, to obtain a turnover order, a petitioner must establish the existence of personal jurisdiction

over the respondent (Koehler v Bank of Bermuda Ltd., supra), and Mitsubishi does not dispute that the Court has jurisdiction over it. Thus, the Court determines that Mitsubishi's challenge to service upon CT Corp. must fail.

However, the Court also determines that the petition for the immediate turnover of funds to satisfy Itria judgments against Reliance must also be denied. The submissions clearly establish that NextGear filed its UCC Financing Statement before Itria. In both New York and Texas, where NextGear filed its UCC Financing Statement, priority under the UCC is generally determined by priority in the filing date (see UCC 9-322[a][1]; Tex. Bus. Comm. Code §UCC9-322[a][1]; see also Blue Heron Constr., LLC v Fiberglass Structures & Tank Co., Inc., 49 AD3d 1225, 1226 [4th Dept. 2008]).

Itria's argument that even if NextGear filed its UCC-1 financing statement before Itria, NextGear failed to implement any legal procedure to entitle it to a turnover of the funds at issue, is unavailing. Contrary to Itria's position, "[n]either the commencement of an Article 52 proceeding, the service or an information subpoena on the garnishee, nor the service of a restraining order will afford priority" (County Natl. Bank v Inter-County Farmers Co-op. Assn., 65 Misc 2d 446, 449 [Sup Ct, NY County 1970]).

Furthermore, Itria's assertions that since NextGear holds collateral that Itria does not hold, namely Reliance's motor vehicles, NextGear's enforcement rights, if any, are subject to marshaling, also lacks merit. The equitable doctrine of marshaling rests upon the principle that a creditor having two funds to satisfy a debt may not, by the application of them to a demand, defeat another creditor, who may resort to only one of the funds (In re Stein's Estate, 26 Misc d 329, 330-331 [Sur Ct, NY County 1960]). NextGear contends that it is owed more than \$9.3 million and the value of the motor vehicles do not add up to \$1 million. Application of the marshaling doctrine in this proceeding may impermissibly "trench upon the rights, or operate to the prejudice, of the party entitled to the double fund" (Womans Hosp. in State of N. Y. v Sixty-Seventh St. Realty Co., 265 NY 226, 234 [1934]).

1/6/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE