

AP MA Funding, LLC v Wells Fargo Clearing Servs., LLC
2020 NY Slip Op 31242(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 150755/2020
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with 2 columns: Case details (AP MA FUNDING, LLC, Petitioner/ Judgment Creditor, - v -, WELLS FARGO CLEARING SERVICES, LLC d/b/a WELLS FARGO ADVISORS, Respondent.) and Motion details (INDEX NO. 150755/2020, MOTION DATE, MOTION SEQ. NO. 001). Includes 'DECISION, ORDER & JUDGMENT ON PETITION'.

HON. BARRY R. OSTRAGER

Petitioner/Judgment Creditor AP MA Funding, LLC ("AP MA") commenced this special proceeding against respondent Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors ("Wells Fargo") for an order pursuant to CPLR § 5225(b) directing Wells Fargo to turn over to Judgment Creditor AP MA monies in its possession or custody in which the Judgment Debtor Larry H. Lipschutz ("Lipschutz") has an interest in order to satisfy the Judgment of \$932,340.62 in favor of AP MA against Lipschutz. Wells Fargo has not submitted any papers in this case. However, Lipschutz, who was served but not named in the proceeding, has opposed the petition. For the reasons stated below, the petition is granted.

Background Facts

The facts are set forth in the Petition verified by Travis Moore, a Managing Director at AP MA, and they are not disputed in any meaningful way by Lipschutz in his affidavit in opposition. This proceeding relates to an action entitled AP MA Funding, LLC v Avi "Zisha" Lipschutz and Larry H. Lipschutz, Index No. 651570/18 ("the Action"). In that Action, after a one day bench trial, a judgment was entered in favor of AP MA against Larry Lipschutz on October 29, 2019 in the amount of \$932,340.62 (NYSCEF Doc. No. 2).

To enforce the judgment, AP MA served an Information Subpoena with Restraining Notice on Wells Fargo Advisors, dated December 5, 2019, inquiring whether Wells Fargo was holding any assets in an account for Lipschutz and directing that any such assets be restrained (NYSCEF Doc. No. 5). A copy was also served on Lipschutz (NYSCEF Doc. No. 6). Wells Fargo responded that it maintained an account for the benefit of Lipschutz that was holding shares valued in excess of \$18M (the “Stock Holdings”) (NYSCEF Doc. No. 7). AP MA in this proceeding seeks an order directing Wells Fargo to turn over the value of those shares in the amount of the \$932,340.62 Judgment.

Discussion

This proceeding is governed by CPLR § 5225(b), which provides in relevant part that:

Upon a special proceeding commenced by the judgment creditor [AP MA], against a person in possession or custody of money or other personal property [Wells Fargo] in which the judgment debtor [Lipschutz] 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 insufficient 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.

The First Department has explicitly held that CPLR § 5225(b) extends to shares of stock, as well as money. *See Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25 (1st Dep’t 2007).

Lipschutz in opposition submits an affidavit giving some background about the Wells Fargo account (NYSCEF Doc. No. 14). He explains that, in July 2018, more than a year before the Judgment was entered against him in the underlying Action, Lipschutz entered into an \$15M revolving loan agreement with Wells Fargo Bank N.A. (“WF

Bank”) (a copy of the Revolving Line of Credit Note is attached to the Affidavit at NYSCEF Doc. No. 15). Lipschutz claims he has borrowed monies under the Line of Credit so that the balance now exceeds \$10M. He further asserts that the Line of Credit is “subject to a possessory lien and security interest held by WF Bank, as secured party against the Stock Holdings, with [petitioner] WF Clearing serving only as an intermediary.” As alleged proof of the lien and security interest, Lipschutz submits a copy of the Securities Account Control Agreement, which he claims gives WF Bank a “superior claim” to the Stock Holdings (NYSCEF Doc. No. 16).

As to the law, counsel for Lipschutz cites *Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149, 159 (2014), to argue that the Stock Holdings held in the collateral investment account were delivered to respondent Wells Fargo Clearing in Florida and are therefore beyond the reach of this CPLR § 5225(b) turnover proceeding in New York. He further argues that Lipschutz has no possessory rights over the Stock Holdings to make them subject to a turnover because of the security interest held by WF Bank. Citing *Leumi Fin. Corp. v Wydler, Balin, Pares & Soloway*, 60 Misc. 2d 1021, 1026 (S.Ct., Nassau Co. 1969), he adds that any interest Lipschutz may have had in the Stock Holdings was extinguished when the Judgment in the underlying Action was entered against him, as that was an event of default under the Note.

In reply, counsel for AP MA urges this Court to ignore the Lipschutz opposition in its entirety because Lipschutz failed to formally move to intervene pursuant to CPLR § 5225(b). As to the merits, AP MA asserts that New York courts distinguish between enforcement proceedings, where only personal jurisdiction is required, and attachment proceedings, where in-rem jurisdiction related to the property is required. Along those

lines, AP MA cites *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 541 (2009), wherein the Court of Appeals expressly held that “a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 5225 (b).” As counsel correctly notes, the *Motorola* court in its decision five years later discussed *Koehler*, reaffirming the *Koehler* holding and distinguishing it from *Motorola*.

This Court in its discretion will consider the Lipschutz opposition papers, despite a formal intervention motion, as permissive intervention surely would have been granted pursuant to CPLR § 1013. Having reviewed all the papers, the Court finds that AP MA has established its entitlement to the requested turnover, and Lipschutz has failed to assert a meritorious defense.

The *Koehler* case applies here to empower this Court to direct Wells Fargo to turn over the out-of state Stock Holdings, as this Court has personal jurisdiction over Wells Fargo as a company registered to do business in New York. AP MA has also successfully rebutted the Lipschutz claim that Wells Fargo Bank has superior rights to the Stock Holdings based on its lien and security interest. In his reply to that claim, petitioner’s counsel has provided a copy of an email exchange with Wells Fargo from January 2020 when this proceeding was commenced wherein Wells Fargo confirmed that “at least the \$7,182,524 [of the Stock Holdings] is unencumbered and is available for release to the judgment holders [AP MA] upon entry of an order for turnover from the appropriate court.”(NYSCEF Doc. No. 19). Therefore, AP MA is entitled to the requested turnover order. However, the Court in its discretion declines to award AP MA counsel fees based on the claim that the Lipschutz opposition is frivolous.

Accordingly, it is hereby

ADJUDGED that the petition is granted as provided herein; and it is further

ORDERED that respondent Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors, is directed to turn over to petitioner AP MA Funding, LLC, as Judgment Creditor, the portion of the Stock Holdings held in the account maintained for the Judgment Debtor Larry H. Lipschutz, or the equivalent value, in the amount of \$932,340.62 to satisfy the Judgment in the underlying Action, upon proper service of a copy of this Decision and Order with Notice of Entry.

Dated: May 7, 2020



BARRY R. OSTRAGER, J.S.C.

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