

856 Eighth, LLC v Pizza Pasta Etc., Corp

2020 NY Slip Op 32005(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 161413/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

856 EIGHTH, LLC,

Petitioner,

- v -

**PIZZA PASTA ETC., CORP, and AMADEUS
MANATA,**

Respondents.

**INDEX NO. 161413/2019
MOTION DATE
MOTION SEQ. NO. 1 & 2
MOTION CAL. NO.**

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits _____

Replying Affidavits

PAPERS NUMBERED

█
█
█
█
█

Cross-Motion: Yes X No

Under Motion Sequence 1, Petitioner 856 Eighth, LLC (“Petitioner”), as Judgment Creditor, commences this special proceeding of an Order pursuant to CPLR § 5225(c) directing Respondent Amadeus Manata (“Manata”) to turn over all of his interest in the pizza restaurants operated under the trade name of “Famous Pizza” and under the corporate entity names of Arrancada Food Group, Inc. (“Arrancada”) and Rays at the Garden, Inc. d/b/a Rays Pizza (“Rays Pizza”) to Petitioner or, in the alternative, to deliver such interests to a receiver for the purposes of transferring those shares to the New York County Sheriff for sale. Additionally, Petitioner seeks the Court to award costs of the special proceeding.

Under Motion Sequence 2, Respondents Pizza Pasta Etc. Corp and Manata (collectively, “Respondents”) move for an Order pursuant to CPLR §5240, granting a protective order precluding Petitioner from compelling the transfer of Manata’s owner interest in Arrancada and Rays Pizza. Petitioner opposes.

Background/Factual Allegations

Petitioner contends from approximately 1990 until 2011, Respondent Pizza Pasta, Etc. Corp. (“Pizza Pasta, Corp.”) was a corporate tenant operating an “iconic pizzeria” at the commercial premises owned by Petitioner. Petitioner contends that in August 2011, Respondents vacated the premises after prolonged negotiations and repeated failures to cure arrears.

On April 17, 2013, Petitioner brought an action in New York Supreme Court, New York County, against Respondents for breach of contract, Index Number 110546/2011, captioned *856 Eighth, LLC, v. Pizza, Pasta, Etc., Corp., and Amadeus Manata*. Judgment was entered in the office of the New York County Clerk against Manata and in favor of Petitioner in the principal amount of \$388,064.71 (the “Judgment”). Petitioner contends that to date, the Judgment remains wholly unsatisfied.

Petitioner contends that following the closure of Pizza Pasta, Corp., Manata opened a new pizzeria a few store-front locations away at 840 Eighth Avenue, which Petitioner believes is operated under the name Famous Amadeus Pizza. Petitioner believes that Famous Amadeus Pizza is held and operated under the corporate entity name of Arracada.

On June 12, 2018, Manata appeared for a debtor’s deposition. Petitioner contends that during the deposition Manata testified “that he does not own any property, does not have any assets and that he derives his income in cash from the operation of his two pizzeria restaurants.” (Petition at 4). Petitioner contends that Manata provided documents and records, including, personal and corporate tax returns. Specifically, Manata provided: (1) Form 1120S for the year 2016 for Arracada; (2) Form 1120S for the Year 2014 for Rays Pizza; and (3) Form 1040 for the Year 2014 for the personal tax returns of Manata. Petitioner contends that “the respective Schedule K-1’s included within each of the Corporate Tax returns identify Amadeus Manata as 100% shareholder.” (*Id.*).

Manata prepared and executed a response to an Information Subpoena. Petitioner contends that Manata’s response was “incomplete and inaccurate,” requiring Petitioner to send to Manata’s counsel a correspondence seeking further clarification and supplemental responses.

Petitioner contends that based on the documents and records provided, Manata is the sole owner/shareholder of Arracanda and Rays Pizza.

Arrancada is a New York Domestic Business Corporation that operates a pizzeria in the building located at 840 Eighth Avenue, New York, New York pursuant to a Lease dated July 22, 2010.

Rays Pizza is a New York Domestic Business Corporation that operates a pizzeria in the building located at 408 Eighth Avenue, New York, New York pursuant to a Lease dated October 17, 2017.

Parties' Contentions

Petitioner contends that corporate shares are personal property which are subject to the enforcement procedures of Article 52. Petitioner asserts that the Court may appoint a receiver to manage or sell property that the judgment debtor has an interest in order to satisfy an outstanding judgment pursuant to CPLR § 5228(a). Petitioner contends that “a money judgment may be enforced against any property which could be assigned or transferred” pursuant to CPLR § 5201. Petitioner further contends that “any debt or property against which a money judgment may be enforced as provided in section §5201 is subject to attachment” pursuant to CPLR § 6202. Therefore, Petitioner argues that it “is entitled to enforce the Judgment by levy on Manata’s Ownership Interest in Arrancada, Rays [Pizza] and Famous Pizza and assignment of that interest to Petitioner.” (Petition at 7).

Respondents assert that “Petitioner must demonstrate that the enforcement procedure sought would increase the likelihood that the money judgment will be satisfied.” (Respondents’ Memorandum of Law at 2). Respondents argue that Petitioner’s application should be denied because Petitioner “has not demonstrated the value or marketability” of the ownership interests in Arrancada and Rays Pizza. Respondent asserts that there are tax liens on each entity, totaling to over \$138,000.00, which would further diminish the value of the ownership interests. Respondents argue that “transferring Manata’s ownership interest in Arrancada and Rays Pizza to a receiver, without the landlord’s consent, constitutes a leasehold violation” and would “likely lead to the closure of the pizza shops.” (*Id.*). Respondents assert that the closure of the pizza shops would be “highly prejudicial” to the employees and Manata who would be unemployed as a result. Respondents further assert that if Arrancada and Rays Pizza were evicted the ownership interests would be completely valueless, therefore appointing a receiver and transferring ownership interest would “create a risk of insolvency, which receivership is designed to avoid.” (*Id.*). Respondents argue that a receiver is only appointed when there is a “special reason” and when the creditor has exhausted all alternative remedies and here, Petitioner has not satisfied this showing.

In opposition to Respondents' motion seeking a protective order, Petitioner argues that it has "taken and made extensive efforts to exhaust other collection remedies before bringing this instant turnover Petition." (Petitioner's Memorandum in Law at 4). Petitioner asserts that Manata was deposed and served with an information subpoena, and Manata has stated repeatedly that he "owes substantial sums to other parties and that he has no bank accounts and no assets to speak of." (*Id.*). Petitioner contends that Manta resides in a home valued over a million dollars and claims an annual salary of more than \$100,000.00. Petitioner argues that Manata has "taken excessive steps to prevent the enforcement of judgments against him, seemingly transferring any meaningful assets and bank accounts into the names of others, and drawing his annual earnings in cash or some other manner which makes the garnishment of such wages impractical if not impossible." (*Id.*). Petitioner argues that the speculative assumptions on what the landlord might do if the businesses were transferred or put into a receivership is not a defense against the Petition and does not provide a basis for a protective order. Petitioner further argues that Respondents' speculation about the value of the businesses also provides no basis for a protective order.

Moreover, Petitioner argues that a protective order should not be granted. Petitioner argues that a protective order would allow Manata "to continue to hide his income and avoid the consequences of having wrongfully evaded taxes, violated state laws and abandoning his legal obligations." (Petitioner's Memorandum in Law at 5). Petitioner asserts that the Court may order that the businesses be placed in a receivership based on Respondents' speculative concerns, such as: "1) the impact of a transfer and/or sale of the business negatively impacting the businesses' values and/or 2) that the priority of other creditors have some weight or bearing as to Petitioner's rights to enforce its Judgment." (Petitioner's Memorandum in Law at 6). Petitioner further asserts that it would not be opposed to Respondents "being called before the Court to account for the whereabouts of his income and/or being caused to produce the documents and records demonstrating the values of his respective business interests." (*Id.*). Additionally, Petitioner does not object to alternative relief directing Manata to garnish his own wages and submit payment to the Petitioner.

Legal Standard

"Article 52 authorizes a judgment creditor to file a motion against a judgment debtor to compel turnover of assets ..." *Koehler v. Bank of Bermuda Ltd* 12 NY3d 533, 537 [2009].

CPLR 5225 provides, in relevant part:

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...where it is shown that the judgment debtor is entitled to the possession of such property...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.

“An order for execution or delivery of documents under CPLR 5225(c) may only be issued against a party whose debt liability has been established, or against that party’s garnishee or transferee.” *Muhl v. Ardra Ins. Co., Ltd.*, 246 AD2d 413, 413 [1st Dept 1998].

A plaintiff can attach intangible property, including defendant’s ownership interests in companies is subject to attachment and levy. *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 314 [2010] (“the intangible property plaintiff sought to attach-defendants’ ownership/membership interests in 22 out-of-state limited liability companies-is akin to intangible contract rights and is clearly assignable and transferable. Thus, the interests in question are ‘property’ for purposes of CPLR 6202.”). “Corporate shares are personal property subject to CPLR Article 52’s enforcement procedures.” *Kissin v. Good*, 2008 N.Y. Misc. Lexis 7945, *5 (Sup. Ct., New York County, 2008).

CPLR 5201(c)(1) provides:

Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

“A ‘garnishee’ is a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in

which a judgment debtor has an interest.” *Hotel 71 Mezz Lender LLC*, 14 NY3d at 309 (see CPLR 105(i)).

“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 (CPLR 5228 [a]; see *Matter of Chlopecki v. Chlopecki*, 296 A.D.2d 640, 641, 745 N.Y.S.2d 228 [3d Dept.2002]).” *Id.* at 317. “The appointment of a receiver pursuant to section 5228(a) is a matter within the court’s discretion .” *Id.* “A motion to appoint a receiver should only be granted ... when a special reason appears to justify one.” *Id.* (citation omitted). “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’ (*United States v. Zitron*, 1990 WL 13278, *1, 1990 U.S. Dist LEXIS 1049, *2 [S.D.N.Y., Feb. 2, 1990] [citations omitted]).” *Id.* “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 [] judgment debtor in a professional corporation of which he is a member.” *Id.* (citation omitted).

“CPLR § 5240 is generally utilized to protect the debtor from abuse of the collection process.” *AB v. GH*, 31 Misc 3d 945, 950. “However, the statute grants the courts broad discretionary power 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.” *Id.* (citation omitted) (see also *Guardian Loan Co. v. Early*, 47 N.Y.2d 515 [1979]).

The First Department in *Galen Tech Sols., Inc.* affirmed the lower court’s decision declining to appoint a receiver, stating that:

The motion court properly exercised its discretion in declining to appoint a receiver to take possession... [where] Plaintiff failed to demonstrate a “special reason” to justify the appointment of a receiver... Plaintiff failed to show that it had exhausted all its alternative remedies, since it took no action to collect its judgment, other than serving restraining notices and information subpoenas. There was no showing that a receivership would increase the likelihood that the judgment would be satisfied, since

plaintiff has not demonstrated the value or marketability of the four patents and whether their sale would be sufficient to cover the remainder of its judgment. Moreover, the sale of the four patents would likely jeopardize defendant's operations, run the risk of insolvency, thereby preventing it from paying any of its creditors, including plaintiff. Finally, plaintiff did not show a risk of fraud or insolvency if a receiver is not appointed, since there was no showing that defendant acted fraudulently. Further, appointing a receiver and selling the four patents could create a risk of insolvency, which receivership was designed to avoid (*see Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d at 317, 900 N.Y.S.2d 698, 926 N.E.2d 1202).

Galen Tech. Sols., Inc. v VectorMAX Corp., 107 AD3d 435, 435-36 [1st Dept 2013].

Discussion

During this unprecedented period of lockdown as a result of the pandemic, it is unclear what if any value the pizzerias will retain. Indeed, it may be fruitless to order a sale of the stock of the corporations. Within the Court's discretion, and in an effort to preserve whatever vitality the restaurants have after this lengthy period of shut down, Petitioner's petition is denied. However, Petitioner is entitled to pursue collection, and Respondent is directed to account for the whereabouts of his income and produce documents and records to date demonstrating the values of his respective business interests. The judgment itself remains valid, and this petition is denied without prejudice to a new application should Petitioner be able to demonstrate assets sufficient to justify a sale of the businesses.

Wherefore it is hereby

ORDERED that Motion Sequence 1 and Motion Sequence 2 are denied; and it is further

ORDERED that Respondent is directed to account for the whereabouts of his income and produce the documents and records demonstrating the values of his respective business interests within 30 days.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 24, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**