

BNB Bank v HealthFirst PHSP, Inc.

2020 NY Slip Op 32006(U)

June 23, 2020

Supreme Court, New York County

Docket Number: 161416/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 161416/2019

BNB BANK, F/K/A THE BRIDGEHAMPTON NATIONAL BANK, S/B/M COMMUNITY NATIONAL BANK,

MOTION DATE 01/09/2020

Petitioner,

MOTION SEQ. NO. 001

- v -

HEALTHFIRST PHSP, INC., JACQUES ANTOINE

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for TURNOVER PROCEEDING

In this special proceeding commenced by Order to Show Cause, Petitioners, BNB Bank, f/k/a The Bridgehampton National Bank, s/b/m Community National Bank ("petitioners") seek relief pursuant to CPLR §§ 5225(b) and/or 5227. Respondent, Jacques Antoine has not appeared in the action or answered the Petition, however, opposes the motion through his attorney claiming that Antoine has not been served; respondent HealthFirst PHSP, Inc., ("HealthFirst") has not appeared in the action, has not answered the Petition and has not submitted papers in opposition to the motion.

Petitioner commenced this special proceeding to enforce a judgment entered in Supreme Court, County of Nassau on or around January 30, 2015, in favor of petitioner BNB and against respondent Antoine and other defendants, in the amount of \$3,148,112.84. (NYSCEF Doc. No. 2). Petitioner alleges that it is a judgment creditor of debtor/respondent Antoine and that Antoine has failed and refused to satisfy the Judgment, which remains unsatisfied. (Id. at ¶¶ 5, 6).

Petitioner alleges that in response to an Information Subpoena served upon respondent

HealthFirst, it learned that HealthFirst “is currently holding approximately \$93,000.00 of funds in which the Debtor has an interest. HealthFirst requires that an Order of the Court be issued in order for HealthFirst to release these funds.” (*Id.* at ¶ 7).

In signing the order to show cause, this court directed “personal service of a copy of this order to show cause and the papers upon which it is based on respondent, HealthFirst PHSP, Inc. and Jacques Antoine, on or before the 6th day of December 2019”. (NYSCEF Doc. No. 11).¹ Petitioner has submitted an affidavit of service indicating that service upon respondent HealthFirst was made on December 5, 2019 through the Secretary of State. (NYSCEF Doc. No. 13). Petitioner has submitted an affidavit of service indicating that service upon respondent Antoine was attempted on four separate occasions and that service of the documents was made on December 6, 2019, at 8:21 a.m., by “affixing a true copy of each to the door of said premises” and mailing the documents to Antoine’s last known residence. (NYSCEF Doc. No. 12). Petitioner submits an additional affidavit of service indicating that service of the documents was also made on December 6, 2019, at 3:24 p.m. to respondent Antoine’s place of business, by delivering the documents to a co-worker, who indicated that he was authorized to accept service. (NYSCEF Doc. No. 14).

As noted, respondent Antoine has not appeared in this proceeding but has opposed the application through counsel claiming that he was not personally served and because the petition is not verified. The court finds that service on respondent Antoine was properly made in accordance with CPLR 308 [4] as petitioner has demonstrated that it has diligently attempted to

¹ Two prior applications for the relief requested herein were made by petitioner. The first application was made under Index No. 154409/2019. By Order dated August 1, 2019, the prior application was denied for failure to personally serve the debtor in hand in accordance with this court’s directive on June 5, 2019. The second application was made under Index No. 158257/2019. By Order of this court, dated October 10, 2019, petitioner’s second application was denied as abandoned.

give notice through the usual service provisions of CPLR 308 and in accordance with this court's directive. (NYSCEF Doc. No. 12). Indeed, the court finds that notice of the proceeding was adequately provided to respondent Antoine as his attorney submitted opposition submitting the affidavit of service demonstrating that petitioner had also effected service upon Antoine at his place of business by leaving the documents with a co-worker authorized to accept service on his behalf. (NYSCEF Doc. No. 14). Accordingly, the court finds that CPLR 308 [4]'s "due diligence" requirement has been met and that Antoine was properly served.

Similarly, the court finds respondent Antoine's claim that the relief requested should be denied because the petition is not verified, unavailing. CPLR §3026 provides "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." In interpreting this mandate the First Department has consistently held that, "[W]e must literally apply the mandate [to construe pleadings liberally] as directed and thus make the test of prejudice one of primary importance" (see *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 81, 8 NYS3d 143 [1st Dept 2015] [where the court noted that it would be an "excessively severe result" to treat the statute of limitations defense as waived where the prejudice claimed by plaintiff can be cured by allowing defendant to amend its pleading and then allowing plaintiff to conduct discovery on the statute of limitations issue]; see also *Foley v D'Agostino*, 21 AD2d 60, 66, 248 NYS2d 121 [1st Dept 1964]).

Respondent Antoine has failed to demonstrate any prejudice resulting from petitioner's failure to verify the petition seeking relief under CPLR 5225(b) and 5227, to enforce its judgement secured against respondent in 2015. Indeed, the court believes that it would be an excessively severe result to deny petitioner the relief sought, when petitioner has demonstrated that it has properly served Antoine and provided notice of the proceeding. As such, there is no

prejudice that can result from this court granting petitioner’s application. As this court finds that no prejudice will result to respondent Antoine, it will construe the petition liberally and ignore the defect that the petition is not verified. Accordingly, it is hereby,

ADJUDGED that the petition and application (motion sequence number 001) is granted, and it is further

ORDERED and ADJUDGED that respondent HealthFirst PHSP, Inc., is directed, upon receipt of a certified copy of this order and judgment, to turn over to the petitioner, BNB Bank, f/k/a The Bridgehampton National Bank, s/b/m to Community National Bank, funds held by HealthFirst PHSP, Inc. in which judgment debtor, Jacques Antoine has an interest and being held by HealthFirst PHSP, Inc., up to a maximum amount of \$ 93,000.00; and it is further

ADJUDGED that upon such turn-over of funds, the respondent by HealthFirst PHSP, Inc., shall be discharged of all liability with respect to said funds to the extent of payment made as herein provided.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this Court.

6/23/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER

- SUBMIT ORDER

CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN

- FIDUCIARY APPOINTMENT REFERENCE