SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

SHAUL KOPELOWITZ,
Petitioner,

-against-

TOBY MOSKOWITZ a/k/a TOBY MOSKOVITS and MICHAEL a/k/a YECHIEL LICHTENSTEIN,
Respondents.

-and-

GRAND LIVING LLC, 96 WYTHE ACQUISITION LLC, 19 KENT DEVELOPMENT LLC, 215 MOORE ST ACQUISITION LLC, 232 SEIGEN ACQUISITION LLC, and 564 ST. JOHNS ACQUISITION LLC,
Necessary Party Respondents.

INDEX NO. 150418/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Petitioner Shaul Kopelowitz ("Petitioner" or "Kopelowitz" or "Judgment Creditor") filed a Petition for turnover, charging order, the appointment of a receiver, and for injunctive and other relief against respondents Toby Moskowitz a/k/a Toby Moskovits ("Moskowitz") and Michael a/k/a Yechiel Lichtenstein ("Lichtenstein")(collectively, "Respondents" or the "Judgment Debtors"), in order to affect Petitioner's enforcement of a $6,350,225.00 judgment entered December 13, 2019 which Petitioner claims has a remaining balance in the sum of $3,258,850.83.

Specifically, Petitioner, as Judgment Creditor, seeks, among other relief, an order directing the turnover of assets of or debts owed to the Judgment Debtors, including, but not limited to, all shares of stock or membership interest maintained by or on behalf of Moskowitz and/or Lichtenstein (or by any entity in which either Moskowitz and/or Lichtenstein is an owner or member) in necessary-party respondents Grand Living LLC, 96 Wythe Acquisition LLC, 19 Kent Development LLC, 215 Moore Acquisition LLC, 232 Seigel Acquisition LLC, and 564 St. Johns Acquisition LLC (collectively, the "LLCs") as well as the turnover of funds maintained by the LLCs, and requiring Respondents to disclose the location of all sums and property maintained by them and the LLCs, sufficient to satisfy the balance of the Judgment entered on December 13, 2019 in Petitioner's favor in Judgment plus interest. Respondents oppose the Petition.

Factual Background

Petition

Petitioner is a Judgment Creditor of Judgment Debtors Moskowitz and Lichtenstein by virtue of a judgment by confession entered on December 13, 2019 in the amount of $6,350,225.00 (the "Confession of Judgment" or "Judgment") plus interest. (Verified Petition at 1). Petitioner contends that the Judgment has been partially satisfied in the sum of $3,091,374.17. (*Id.* at 2). There remains due and owing to Petitioner the balance of $3,258,850.83, plus interest accruing at the statutory rate. (*Id.* at 3).

Petitioner contends that "[b]ased on, *inter alia*, a personal financial statement given by Moskovitz to petitioner in connection with the loan given by petitioner to respondents, petitioner learned that Moskowitz is the owner of the real property located at and known as 136-02 76th Road, Kew Gardens Hills, New York (the '76th Road Property')." (Verified Petition at 26). Petitioner contends that according to that statement, in July 2018, the 76th Road Property had a fair market value of $1,350,000. (*Id.* at 27).

Petitioner states that he learned that "Moskovitz, he and/or Lichtenstein are members of the following entities, all of which are holding companies for real properties owned by each: Grand Living LLC [,] 96 Wythe Acquisition LLC [,] 19 Kent Development LLC [,] 215 Moore Acquisition LLC [,] 232 Seigel Acquisition LLC [and] 564 St. Johns Acquisition LLC." (Verified Petition at 28). Petitioner contends that "[s]uch memberships are in their individual capacities and/or as members of other entities." (*Id.* at 29). Petitioner further states, "Upon information and belief, based on financial disclosures given by Moskovitz to petitioner, the fair market value of the real properties owned and maintained by the above referenced LLCs total $585,000,000.00," and "the fair market value of Moskowitz's ownership interest in the above-referenced real properties is not less than $178,260,000." (*Id.* at 31). Petitioner further states, "Upon information and belief, Lichtenstein also maintains a membership interest in the above-referenced LLCs and, therefore, has an ownership interest in the real properties that are respectively held and maintained by each." (*Id.*at 32). Petitioner contends that "[s]uch assets are subject to petitioner's collection efforts in connection with the Judgment." (*Id.*at 33).

Respondents oppose the Petition. Respondents state after the Petition was filed, Moskovitz and Lichtenstein moved by way of Order to Show Cause in Kings County to vacate the Confession of Judgment. Respondents claimed that Petitioner

did not have a basis upon which to file the Confession of Judgment. By Decision and Order dated January 28, 2020, the Honorable Leon Ruchelson held there "is no basis upon which to vacate the confession of judgment." The court further held:

> However, an analysis of the actual amounts being confessed require further consideration. As noted, there is no dispute Kopelowitz received $4,886,808.22. Kopelowitz deducted $1,036,000 based upon another loan that occurred after the confession of judgement was signed. As noted by Kopelowitz's counsel "Kopelowitz agreed to accept the repayment of the $1,036,000 loan out of the $4,886,808.22 received as proceeds from the sale of the property" (see, Affirmation of Jeffrey Fleischmann, 80). This was permitted, argues Kopelowitz because "(sic) that obligation was also secured by the Property, so of course, it needed to be repaid to [sic] in order for the parties to close on the sale of the Property (Id at 179). However, the confession of judgement pre-dated the mortgage and note concerning this later loan in the amount of $1,036,000. Thus, there are questions of fact whether that amount should have been deducted from the $4,886,808.22 reducing the amount of the confession of judgement. Further, in Paragraph 84 of the Fleischmann affidavit, it states that a further $360,833.33 was reduced to pay interest on the loan without providing any documentary support concerning that amount or why that amount should reduce the amount of the confession of judgement.

The court held, "Moreover, even considering these amounts the court could not determine the precise amount confessed and the underlying evidence supporting the amount confessed." The court continued the stay of enforcement of the Confession of Judgment and appointed a referee to conduct a hearing regarding the "noted issues concerning the precise amount of the confession." The court ordered the hearing to "take place within two weeks of receipt of this order unless consented to by all parties." The court required the defendants to place a bond in the amount of one million dollars or place one million dollars in escrow. The court stated, "Upon receipt of a report by the referee the court will remove the stay and allow enforcement of the confession of judgment for the amount to be determined."

On January 31, 2020, Judge Ruchelson amended the January 28, 2020 Order to the extent of directing that "[t]he defendant must post a bond or place one

million dollars in escrow by Friday February 7, 2020 and provide proof of such to plaintiff's counsel by 5:00 PM." The order provided, "If such proof is not received by plaintiffs' counsel by that time the plaintiff may enforce the confession of judgment in the amount of up to one million dollars."

Respondents state that on February 10, 2020, Petitioner provided sworn testimony to the referee. Petitioner's attorney, Eli Fink, Esq., was directed to testify on February 25, 2020. In this proceeding, Respondents request that since "the actual amounts owed is unclear" and because the Respondents had not been provided with Kopelowitz's testimony from the hearing before the Referee, the Petition should be denied or held in abeyance pending a determination as to the amounts that may be owed to Kopelowitz.

Petitioner contends, in his reply, that "Respondents failed to post a required $1 million bond by the deadline imposed by Justice Ruchelsman to continue a temporary stay granted when the motion to vacate was initially filed … [and] the temporary stay is no longer in effect." Petitioner contends, "Therefore, notwithstanding the issues outstanding respecting the amounts owed on the Judgment, petitioner certainly is entitled to an order of turnover, a charging order and the other requested relief in an amount not less than $1 million that can be immediately obtained by petitioner through the enforcement means sought herein."

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]

"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 AD2d 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 [SDNY., 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).

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

Here, based on the January 28, 2020 Kings County Order, as amended by the January 31, 2020 Kings County Order, Petitioner may enforce the judgment up to one million dollars. Petitioner has already collected over one million dollars. Therefore, while the determination as to the amount of the judgment is *sub judice* before Honorable Leon Ruchelsman, this court declines to grant the relief sought.

Wherefore, it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed, and the Clerk is directed to enter judgment accordingly.

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

Dated: June 29, 2020

ENTER:

J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION