

**Lincoln Sq. Synagogue, Inc. v Lexington Strategies, LLC**

2020 NY Slip Op 32793(U)

August 26, 2020

Supreme Court, New York County

Docket Number: 152140/2019

Judge: W. Franc Perry

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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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LINCOLN SQUARE SYNAGOGUE, INC

Petitioner,

- v -

LEXINGTON STRATEGIES, LLC,

Respondent.

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INDEX NO. 152140/2019
MOTION DATE 01/09/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 12, 13, 14, 15, 16, 17, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50 were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

In this post-judgment, special proceeding, petitioner Lincoln Square Synagogue, LLC (Synagogue) is seeking a turnover order, pursuant to CPLR 5225 (b) and 5227, directing respondent Lexington Strategies, LLC (Lexington), as third-party garnishee, to deliver money or property purportedly owned by judgment debtor Joseph Allaham to petitioner. On August 19, 2016, Synagogue recovered a judgment against Allaham in the amount of \$1,473,881.00 (NYSCEF Doc. No. 18, amended petition, para. 1). The judgment is final, enforcement has not been stayed, and Allaham has not made any payments in satisfaction of the judgment (id., paras. 2-3). The focus of this turnover proceeding is Allaham's ownership interest in Lexington as a member of the limited liability corporation (id., para. 4). Simultaneous with this petition, Synagogue served Lexington with a restraining notice with respect to distributions due and/or coming due to Allaham from Lexington (the Restraining Notice) (NYSCEF Doc. No. 22). The Restraining Notice provides the underlying basis for this special proceeding.

CPLR article 52 sets forth the procedural requirements for enforcement mechanisms that judgment creditors, such as petitioner here, may use in collecting on a money judgment (*Jackson v Bank of Am., N.A.*, 149 AD3d 815, 818 [2d Dept 2017]). These mechanisms may include the imposition of a restraining notice against a judgment debtor or a third-party garnishee (*id.*). CPLR 5225 allows a judgment creditor to initiate a special proceeding directing a person in possession of money or property in which the judgment debtor has an interest to turn the money or property over to the judgment creditor. CPLR 5227 allows a special proceeding commenced by the judgment creditor “against any person who it is shown is or will become indebted to the judgment debtor,” and the court may require that person to pay the judgment creditor that debt upon maturity.

CPLR 5222 provides the procedures for service of a restraining notice on the judgment debtor and the garnishee. That statute unequivocally requires the service of a copy of the restraining notice and a Notice to Judgment Debtor in accordance with CPLR 5222 (d) and (e), within four days of the service of the restraining notice if not already served within one year prior to the service of the restraining notice (CPLR 5222; see *Weinstein v Gitters*, 119 Misc 2d 122, 123 [Sup Ct, Suffolk County 1983]). The Notice to Judgment Debtor is “designed to inform the judgment debtor, if he be a natural person, that certain monies are exempt from application to the satisfaction of the judgment” (*Chemical Bank v Flaherty*, 121 Misc 2d 509, 510 [Civ Ct, Queens County 1983]), and sets forth the availability of procedures for asserting exemptions (CPLR 5222). The judgment creditor has the burden of proving compliance with this statute (*Chemical Bank v Flaherty*, 121 Misc 2d at 510).

The Restraining Notice, here, is an adjunct of this special proceeding under CPLR 5225 and 5227. In reviewing the Restraining Notice and the amended petition, this court finds no

proof or any assertion that Synagogue complied with CPLR 5222 (d) or (e) with respect to providing notice to Allaham (see NYSCEF Doc. No. 30). Synagogue submits only a copy of the Restraining Notice served on Lexington (NYSCEF Doc. No. 22).

When a restraining notice is served on a third-party garnishee, as here, the turnover proceeding may not be maintained if the judgment creditor fails to comply with CPLR 5222 (d) and (e) governing notice to the judgment debtor regarding that restraining notice (see *Matter of Kitson & Kitson v City of Yonkers*, 40 AD3d 758 [2d Dept 2007] [failure to serve a CPLR 5222 (d) notice to judgment debtor rendered execution ineffective]; *Friedman v Mayerhoff*, 156 Misc 2d 295, 296 [Civ Ct, Kings County 1992] [failure to comply with CPLR 5222 notice to debtor involves a fundamental due process right and necessitates vacating the restraining notice]; *Weinstein v Gitters*, 119 Misc 2d at 123-124 [in CPLR 5227 proceeding, restraining notice dismissed without prejudice for failure to serve judgment debtor in accordance with CPLR 5222]; *Chemical Bank v Flaherty*, 121 Misc 2d at 511 [same]; *Lincoln Fin. Servs., Inc. v Miceli*, 17 Misc 3d 1109 [A], 2007 NY Slip Op 51893 [U] [Dist Ct, Nassau County 2007] [vacating restraining order]).

Synagogue's response that a motion to serve an additional restraining notice must be made in the underlying action (i.e. where the judgment was obtained), fails to address the defect. Lexington's cross motion is not seeking service of an additional restraining notice under CPLR 5222 (c). Rather, it is requesting that Synagogue provide the statutorily required notice to Allaham to satisfy his due process rights. Therefore, the cross motion is granted and the petition is dismissed for failure to comply with CPLR 5222 (d) and (e), and petitioner is granted leave to serve a new restraining notice complying with CPLR 5222 (d) and (e).

Accordingly, it is

ORDERED that the cross motion to dismiss is granted and the petition is dismissed for failure to comply with CPLR 5222 (d) and (e) regarding notice to the judgment debtor Joseph Allaham.

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 the Court.

8/26/2020  
DATE

  
W. FRANC PERRY, J.S.C.

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