

Lucero v Kahn

2020 NY Slip Op 33019(U)

September 14, 2020

Supreme Court, New York County

Docket Number: 158585/2017

Judge: Paul A. Goetz

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

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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GREGORIO LUCERO

Petitioner,

- v -

HOWARD KAHN,

Respondent.

-----X

INDEX NO. 158585/2017

MOTION DATE N/A

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123 were read on this motion to/for STAY.

In this special proceeding pursuant to CPLR 5225 (b) and 5227 seeking the turnover of funds, respondent Howard L. Kahn moves by order to show cause to stay the sale at public auction of ownership interest in Polaris Properties, Inc. (Polaris Properties) by City Marshal Martin A. Bienstock. By decision and order dated August 28, 2019 and filed on October 10, 2019, the petition was granted and petitioner Gregorio Lucero was awarded a judgment in the amount of \$964,273.47 with interest, costs and disbursements for a total of \$1,210,010.28.

By attorney affirmation, respondent argues that the Marshal has no authority to sell any interest in Polaris Properties because CPLR 5225 requires that he possess the shares of stock and he is not in possession of them. Respondent further argues that petitioner is required to bring another special proceeding pursuant to CPLR 5239 to determine respondent's interest in Polaris Properties as well as the interest of any creditors and pursuant to CPLR 5225 to compel the turnover of the shares of stock. Respondent did not submit an affidavit in support of the order to show cause.

Petitioner argues that while a judgment creditor may elect to commence a turnover proceeding, there is nothing in Article 52 of the CPLR requiring the judgment creditor to file a special proceeding before seeking to sell personal property. Petitioner posits that intangible property such as an ownership interest in a corporation is subject to levy and an execution sale. Petitioner submits an “Income and Expense Certification” affidavit from Kahn dated December 17, 2019, pertaining to a mortgage loan by Dime Community Bank wherein Kahn states that he is the president and sole shareholder of Polaris Properties (Dime affidavit). Petitioner also submits an affidavit from Marshal Bienstock attesting that he has been a City Marshal for 43 years and he has sold judgment debtors’ interests in corporations dozens of times without having physical possession of share certificates. Marshal Bienstock was retained by virtue of a Property Execution directing levy upon and sale of all right, title and interest of judgment debtor Kahn as shareholder or otherwise in an entity known as Polaris Properties. Marshal Beinstock levied upon Kahn’s interest in Polaris Properties by serving him with the Property Execution. Marshal Bienstock states that he will sell at public auction the right, title and interest Kahn has in Polaris Properties and that these terms are made clear to bidders in the Notice of Sale and Terms of Sale.

Uncertificated ownership interests in a corporation are subject to levy and an execution sale (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 315 - 316 [2010]). And, while the general rule is that the personal property being sold at an execution sale must be on hand for inspection by bidders, there are certain exceptions. One such exception applicable here is when inspection may be pointless because the sale involves bonds or shares of stock (*id.*). Therefore, there is not merit to respondent’s argument that Marshal Bienstock must have possession of the shares of stock because there is nothing that could be displayed by the Marshal to potential bidders because Kahn’s interest in Polaris Properties is uncertificated as evidenced by the Dime

affidavit and as noted, even if stock certificates exist, there is no requirement that the Marshal have possession of them. Nor is there merit to respondent's argument that petitioner must bring a separate turnover proceeding pursuant to CPLR 5225 because Kahn not Polaris Properties is the proper garnishee (CPLR 5201 [c] [1]; *cf Payne v Garnett McKeen Lab.*, 232 AD2d 419, 420 [2nd Dept 1996] [service of execution upon the corporation to garnish shares of stock improper pursuant to CPLR 5201 [c]). Respondent's assertion that petitioner must bring a special proceeding pursuant to CPLR 5239 is also without merit because 5239 permits a special proceeding against a *judgment creditor*, petitioner here, by interested persons in the property the sheriff or marshal has noticed to sell to determine their rights to the property.

In his reply, respondent argues in sum that the facts he attested to in the Dime affidavit were not true at the time the affidavit was signed and are not true now. Kahn submits on reply an affidavit stating that (notwithstanding what he attested to in the Dime affidavit) he does not own and never has owned 100% interest in Polaris Properties. Kahn explains that the purpose of the Dime affidavit was to refinance a loan Polaris Properties had with Dime which was secured by a mortgage. Kahn alleges in his reply affidavit that the Dime affidavit was prepared by Dime's counsel and that he did not read it before he signed it. Kahn further explains that he thought he was signing an affidavit stating that each of his two sons were 20% owners in Polaris Properties even though he admits that this also was not true because they owned 30% each. Kahn argues that this further supports his position that that the interest he holds in Polaris Properties is uncertain (an uncertainty that he himself attempts to create) and therefore the economic value of the stock must be determined prior to the Marshal's sale.

While Kahn's ready willingness to submit a misleading affidavit to a bank in support of an application to refinance a mortgage is certainly noteworthy, whether Kahn owns 100%, 60%,

40% or some other percentage in Polaris Properties is of no moment because “the lack of specific value [has] no legal effect on the validity of the attachment” (*Hotel 71*, 14 NY3d at 313).

Rather, “the operative fact [is] whether the property interest [has] potential economic value that [is] worthy of pursuit by the [judgment] creditor” (*id.*). Whether Kahn’s ownership interest in Polaris Properties is encumbered, subject to other liens or claims or is contingent and speculative in value is not an impediment to the Marshal’s execution sale because whoever purchases the ownership interest does so subject to any superior interests (*cf Sigmoid Resources, NV v Pan Ocean Oil Corp.*, 234 AD2d 103, 105 [1st Dept 1996] [observing “the plaintiff’s right to attach a given item of property is only the same as the defendant’s own interest in it”]).

Accordingly, respondent is not entitled to an order staying the sale of his ownership interest in Polaris Properties and vacating the Marshal’s levy and sale of that same interest.

Accordingly, based on the foregoing, it is

ORDERED that respondent’s order to show cause (Mot. Seq. No. 7) is **DENIED** in its entirety; and it is further

ORDERED that the temporary restraining order issued on August 15, 2020 is vacated and all stays are lifted.

9/14/20

DATE


PAUL A. GOETZ, J.S.C.

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