

Newburgh Commercial Dev. Corp. v Cappelletti

2020 NY Slip Op 35475(U)

July 23, 2020

Supreme Court, Orange County

Docket Number: Index No. EF008749-2019

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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NEWBURGH COMMERCIAL DEVELOPMENT CORP.; REAL HOLDING CORP.; REAL MANAGEMENT CORP. N.Y., VICTOR CAPPELLETTI; CHRISTINE CAPPELLETTI; JEANMARIE CAPPELLETTI; CAITLYN RYAN; and WILLIAM CAPPELLETTI,
Plaintiffs,

**DECISION AND ORDER
INDEX NO.: EF008749-2019
Motion Date: 07/6/2020**

Sequence No. 3

-against-

VINCENT CAPPELLETTI,
Defendant.

-----X

SCIORTINO, J.

The following papers numbered 1 to 16 were read on plaintiffs’ motion to discharge and vacate a restraining order issued by defendant against certain bank accounts owned by plaintiffs:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Gobetz)/Plaintiff’s Affidavit/ Exhibits 1-9/Plaintiff’s Memorandum of Law	1 - 13
Supporting Affirmation (Jones)	14
Affirmation in Opposition (Centone)/Defendant’s Affidavit	15 - 16 ¹

Background and Procedural History

Pursuant to the Decision and Order of this Court dated April 27, 2020 (Exhibit 2), judgment was entered by the Clerk of Orange County on May 29, 2020 in favor of defendant and against

¹This motion was initially made returnable on July 3, 2020, a day on which the Courts were closed for the Independence Day legal holiday. On July 2, 2020, plaintiffs purported to file reply papers. However, by letter filed the same day, defendant objected to such submission, as the motion was not filed by the sixteen days required for the right to reply. Civ. Prac. Law & Rules §2214(b) Plaintiffs replied that the Court may consider papers if the Court “for good cause shall otherwise direct.” No application was made for such direction. The reply papers were not considered by the Court.

plaintiffs² in the sum of \$257,000, including statutory interest from April 15, 2019. (Exhibit 1) Plaintiffs filed Notices of Appeal of the Decision and Order on May 29, 2020 (Exhibit 3) and of the judgment on June 16, 2020. (Exhibit 4)

On June 12, 2020, plaintiffs learned that certain of their bank accounts had been frozen pursuant to a restraining order issued by defendant. Thereafter, pursuant to Civil Practice Law & Rules §5519(d), plaintiffs filed an Appeal Bond (Exhibit 5), in the maximum amount of \$257,000, for the purpose of staying all collection activity pending the appeal. Plaintiffs sent a letter to defendant, with a copy of the filed undertaking, and requesting the withdrawal of the restraining order. (Exhibit 6) Defendant, through counsel, declined to do so.

Motion to Vacate Restraining Notice

By Notice of Motion filed June 23, 2020, plaintiffs, seeking to vacate the restraining notice, claim the accounts contain funds used for payroll, vendors, property taxes and tenants' security deposits. They argue that Civil Practice Law & Rules §5204 requires the release of a levy upon motion of a judgment debtor who has provided an undertaking sufficient to secure the judgment creditor. It is asserted that the restraining order, if not lifted, may prevent timely return of tenants' security deposits and payments of vendors, payroll and property taxes. Plaintiffs assert that they have fully complied with the requirements of section 5204, and, in the face of defendant's refusal, the Court must release the lien and vacate the restraining order.

Supporting Affidavit

The motion is further supported by the affidavit of plaintiff/judgment debtor, Jeanmarie Cappelletti.

²Plaintiff Jeanmarie Cappelletti was not included among the judgment debtors.

Opposition

Defendant (judgment-creditor) responds that the money judgment entered against plaintiffs was settled on notice and signed without objection. Since that time, not only have plaintiffs failed to make payment against the judgment, they have similarly failed to present a revised Promissory Note and Mortgage as directed by the Decision and Order. In response to plaintiffs' appeals, defendant directed his attorney to serve the restraining notices on banks where the corporations do business. He specifically declined to restrain plaintiffs' individually-held accounts. Plaintiffs' appeal bond secures only the principal amount of the judgment and does not cover interest, which continues to accrue at 9% annually. As of the date of his affidavit, approximately \$5,000 had already accrued, an amount not covered by the appeal bond. As such, defendant asserts the bond is insufficient to cover the amounts which will be due to him by the time an appeal is heard and decided. Moreover, the appeal bond does not cover the declaratory judgment portion of the Decision and Order dated April 15, 2020 and defendant should be entitled to continue efforts to enforce that portion of the Decision.

The Court has fully considered the properly-filed submissions of the parties.

Discussion

For the reasons which follow, the plaintiffs' motion is denied without prejudice.

Section 5519(a)(2) of the Civil Practice Law & Rules provides that a stay of execution of a money judgment is available, without court order, if

the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given, that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed.

The Court notes that plaintiffs did not attempt to file an appeal bond until learning of defendant's attempt to restrain the bank accounts. An "undertaking must provide sufficient collateral to pay the judgment....taking into consideration the interest on such judgment. It is in this Court's discretion to order defendants to procure and file an amendment to the existing bond to provide for such interest. [Plaintiff] is entitled to have 'victory secured so that [if] the stay of enforcement resulting from the appeal is vacated by affirmance, a ready fund with which to satisfy the judgment shall be available.'" (*HGCD Retail Services, LLC v. 44-45 Broadway Realty Co.*, 12 Misc.3d 1166(A) hn 2 [New York Co. 2006]; quoting, *Robert Stigwood Organisation, Inc. v. Devon Company*, 91 Misc. 2d 723, 724 [New York Co. 1977]) The undertaking should provide for all interest that accrues on appeal. (*id.*, citing, *Dwyer v. Nicholson*, 154 Misc. 2d 123 [Kings Co. 1991])

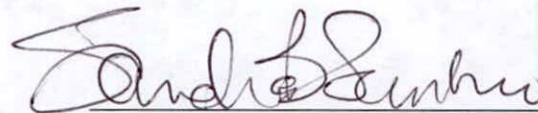
The Court is not convinced that the appeal bond must cover the monthly payments owed to defendant under the Decision and Order. While those payments may be enforced by other means, they are not included in the Judgment as it was submitted to the Court and may not be enforced by restraint on the bank accounts.

However, the appeal bond is inadequate as it currently exists and, upon such a finding, the plaintiffs' motion is denied without prejudice to move upon submission of an appeal bond sufficient to cover costs and damages which may be awarded on appeal, as well as interest.

The foregoing constitutes the Decision and Order of the court.

Dated: July 23, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*