

**City of New York v Harbinger Capital Partners
Offshore Mgr. LLC**

2021 NY Slip Op 30467(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 451347/2020

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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INDEX NO. 451347/2020

THE CITY OF NEW YORK,

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

HARBINGER CAPITAL PARTNERS OFFSHORE
MANAGER LLC, PHILIP FALCONE, HC2 HOLDINGS,
INC., AMERICAN STOCK TRANSFER & TRUST COMPANY

DECISION + ORDER ON
MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21
were read on this motion to/for TURNOVER PROCEEDING

Upon the foregoing documents, the City of New York's instant motion, pursuant to CPLR
Article 52, is granted, on the merits and without written opposition filed on the New York State
Courts Electronic Filing system, for the reasons stated hereinbelow.

Background

The September 2018 Settlement Agreement

On September 7, 2018, petitioner, The City of New York ("the City"), and non-party the State of
New York ("the State") entered into a settlement agreement ("the Settlement") with respondents
Harbinger Capital Partners Offshore ("Harbinger") and Philip Falcone ("Falcone"). Pursuant to
the Settlement and CPLR 3218(a), as relevant to the instant special proceeding, Harbinger and
Falcone confessed judgment, jointly and severally, in the amount of \$13,500,000.00 in favor of
the City and authorized the City to enter judgment against him (or them?) in the aforesaid
amount, "less any payments made to the City, plus collection fees of twenty-two percent of the
unpaid amount and statutory costs of \$15.00 in the event [Harbinger] failed to pay the City"
under the Settlement. Harbinger failed to pay the remaining \$2,205,000.00 that became due on
January 9, 2019. (NYSCEF Doc. 1, at 1-4).

The March 2019 Judgment and the City's Attempts to Collect Thereon

On March 25, 2019, pursuant to the Settlement, a judgment was entered under Index No.
450328/2019 in the New York County Clerk's Office in favor of the City and against Harbinger
and Falcone, jointly and severally, in the amount of \$2,690,100.00 ("the Judgment"). The City
asserts that it has "acted diligently" to collect on the Judgment and that the Sheriff "has collected
and made payments to the City periodically, pursuant to an income execution that was served
on" respondent HC2 Holdings, Inc. ("HC2"). According to the City, a \$2,796,624.00 balance
remains due on the Judgment as of June 4, 2020. (NYSCEF Doc. 1.)

On May 10, 2019, the City delivered to the Sheriff an execution that consisted of a notice to HC2 as garnishee “with respect to all property in which Falcone has an interest, including cash incentive payments and bonuses, HC2 common stock and stock options that may become due to Falcone, which the Sheriff levied on HC2 the same day by service of the execution.” On October 3, 2019, an order and judgment in City of New York v HC2 Holdings, Inc., Index No. 451275/2019, extended the execution and levy on HC2 to and including December 31, 2020. (NYSCEF Doc. 1.)

On March 20, 2020, pursuant to the subject execution and levy on HC2, the Sheriff “took possession of a stock certificate dated March 13, 2020, which certifies that Falcone is the owner of 298,461 shares of HC2 common stock that is transferable to the holder of the certificate.” On May 12, 2020, the City delivered another execution to the Sheriff that consisted of notices to Falcone, as the judgment debtor, as well as to HC2 and respondent American Stock Transfer & Trust Company, LLC (“AST”), as garnishees, “with respect to all property in their possession or custody of [sic] property not capable of delivery in which the judgment debtor Falcone has an interest, including but not limited to stock in HC2” that Falcone owns. (NYSCEF Doc. 1.)

The City claims that it “has reason to believe that Falcone presently owns other property that may be used to satisfy the City’s Judgment, namely, the stock, stock options and [restricted stock units, “RSUs”] that are the subject of this application” (NYSCEF Doc. 1, at 6). The City cites to the “Schedule 13D” that Falcone filed with the U.S. Securities and Exchange Commission on February 14, 2020, which notes that Falcone owns 1,277,711 shares of HC2 stock (NYSCEF Doc. 12, at 3). Additionally, the City asserts that Falcone is the CEO of and employed by HC2 (NYSCEF Doc. 13, at 5).

The City’s Instant Motion

On or about July 24, 2020, the City moved [1] to compel Falcone either to pay money to the City to satisfy the Judgment; or [2], pursuant to CPLR 5225(a), to direct Falcone to turnover and deliver all shares of stock, stock options, and RSUs that he owns in HC2 to the City or the Sheriff of the City of New York, or such lesser amount sufficient to fully satisfy the Judgment; or [3], alternatively, pursuant to CPLR 5225(b) and (c) and 5227, in the event that such shares, options, and RSUs are not in Falcone’s possession or custody, or in the event that Falcone fails to turnover such shares, options, and RSUs that he owns in HC2 to the City or to the Sheriff, then to direct HC2 and AST to issue and deliver to the City or the Sheriff substitute certificate(s) for all stock, options, and RSUs that Falcone owns in HC2, with such further documents as may be necessary to transfer, assign, and sell such stock, options, and RSUs (NYSCEF Doc. 19).

Email Correspondence to this Court

By email to the Court dated January 21, 2021, the City requested that this Court grant the instant motion.

By email to the Court also dated January 21, 2021, Bernard D’Orazio, counsel for non-party Dontzin Nagy & Fleissig LLP, asked the Court to deny the instant motion.

Discussion

CPLR 5225(a), “Property in the possession of judgment debtor,” states the following, in pertinent part:

Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor 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.

CPLR 5225(b), “Property not in the possession of judgment debtor,” states the following, in pertinent 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, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor’s rights to the property are superior to those of the transferee, 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. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor’s interest or right to possession.

CPLR 5225(c), “Documents to effect payment or delivery,” states the following, in pertinent part: “the court may order any person to execute and deliver any document necessary to effect payment or delivery.”

CPLR 5227, “Payment of debts owed to judgment debtor,” states the following, in pertinent part:

Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness.

CPLR 5201(c)(4) states the following: “Where property. . . is evidenced by. . . a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee” (NYSCEF Doc. 13, at 8).

To date, respondents have failed to file written opposition in the New York State Courts Electronic Filing system.

Therefore, the City has established that it is entitled to the requested relief.

Conclusion

Thus, for the reasons stated herein, the instant motion of petitioner, the City of New York (the "City"), pursuant to CPLR Article 52, is hereby granted, on the merits and without written opposition filed on the New York State Courts Electronic Filing system, and this Court hereby orders as follows: [1] respondent Philp Falcone ("Falcone") shall either pay money to the City to satisfy the subject March 25, 2019 Judgment (the "Judgment"); or [2], pursuant to CPLR 5225(a), Falcone shall turnover and deliver all shares of stock, stock options, and restricted stock units ("RSUs") that he owns in respondent HC2 Holdings, Inc. ("HC2") to the City or the Sheriff of the City of New York, or such lesser amount sufficient to fully satisfy the Judgment; or [3] alternatively, pursuant to CPLR 5225(b) and (c) and 5227, in the event that such shares, options, and RSUs are not in Falcone's possession or custody, or in the event that Falcone fails to turnover such shares, options, and RSUs that he owns in HC2 to the City or to the Sheriff, HC2 and respondent American Stock Transfer & Trust Company, LLC ("AST") shall issue and deliver to the City or the Sheriff substitute certificate(s) for all stock, options, and RSUs that Falcone owns in HC2, with such further documents as may be necessary to transfer, assign, and sell such stock, options, and RSUs.

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2/18/2021
DATE

ARTHUR F. ENGORON, J.S.C.

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