

**Dontzin Nagy & Fleissig LLP v HC2 Holdings Inc.**

2021 NY Slip Op 30488(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 156889/2020

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.



CPLR 5225(b) states, in pertinent part, the following:

Property not in the possession of judgment debtor. 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. . . .

CPLR 5227 states, in pertinent part, the following:

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. . . .

On December 1, 2020, HC2 asserted that it “supports the entry of a Court Order that directs to whom, when, and pursuant to what circumstances and instructions HC2 should deliver the subject property in its possession, and then be discharged from any further obligations or potential liability to any person or entity on notice of the Court’s actions.” HC2 also outlined pertinent facts about the categories of property that Dontzin’s application mentions, which this Court will address below. (NYSCEF Doc. 32).

This Court agrees with Dontzin that “it is of course no defense to this turnover order proceeding that HC2, which admits owing a debt to Falcone, is for reasons unexplained ‘not in a position’ presently to pay its debt” (NYSCEF Doc. 36).

#### The Requested Fine Art

This Court denies, without prejudice, Dontzin’s instant request to the extent that it seeks to recover fine art that Falcone may own, as Dontzin accepts as true HC2’s claim that it does not possess any of Falcone’s fine art (NYSCEF Doc. 36).

#### The Requested Investment Securities

This Court denies, without prejudice, Dontzin’s instant request to the extent that it seeks to recover “investment securities,” as HC2 claims that it does not possess any such items (NYSCEF Doc. 32, at 2-3).

#### The Requested Stock, Stock Options, and Restricted Stock Units

This Court grants Dontzin's instant request to the extent that it seeks to recover stock, stock options, and restricted stock units. HC2 has raised a whole host of objections and/or conditions to turning over the subject items, including tax implications, internal rules and/or protocols, etc. (NYSCEF Doc. 32). However, as Dontzin argues, none of these complications is an impediment to this Court's ordering that HC2 relinquish to the Marshal and/or Dontzin any or all of these items, which are owned by or owed to Falcone, which HC2 possesses or controls, and which have value and therefore are subject to be used to satisfy or pay down the Dontzin Judgment. Although this Court is sympathetic to HC2's plight, it has charted its own course vis-à-vis Dontzin and will have to abide the consequences.

#### The Requested Cash

This Court grants Dontzin's instant request to the extent that it seeks to compel HC2 to pay any cash owned by or owed to Falcone in HC2's possession within fourteen days of the date of this Decision and Order.

#### The City of New York's Instant Motion – Motion Seq. No. 003

The City of New York ("the City") now moves [1], pursuant to CPLR 1013 (completely unnecessary here), 5225(b), and 5227, to intervene in the instant special proceeding, on the ground that "the City is an adverse claimant [to the debts and] property in the possession of [HC2] in which [Falcone] has an interest" and [2], pursuant to CPLR 5234 and 5239, to have this Court determine the priority of rights to the immediately aforesaid items as between the City and Dontzin (NYSCEF Doc. 22).

The City asserts that it has priority over Dontzin to all property and all debts that HC2 owes in which Falcone has an interest pursuant to the "execution and levy" that the Sheriff of the City of New York ("the Sheriff") served on May 10, 2019, "more than a year before the City Marshal served the execution and levy on HC2 with respect to the same property and debts and upon which" Dontzin makes its instant request (Motion Seq. No. 001) for a turnover order (NYSCEF Doc. 23, at 2-3).

The City notes that on June 5, 2020 it commenced a special proceeding captioned The City of New York v Harbinger Capital Offshore Manager LLC et al., Index No. 451347/2020, seeking, pursuant to CPLR 5225(b) and (c), a turnover order against Falcone and HC2, "with respect to stock, stock options, and restricted stock units" that Falcone owned in HC2 (NYSCEF Doc. 23, at 3). (This Court notes that it granted that motion on February 18, 2021.)

The City also notes that on December 23, 2020 it commenced another special proceeding captioned The City of New York v HC2 Holdings Inc., Index No. 452635/2020, to extend to and including December 31, 2021 the subject "execution and levy," which the Hon. W. Franc Perry had previously extended to and including December 31, 2020. (This Court notes that while on February 4, 2021, this Court denied the City's motion to extend the subject "execution and levy" to and including December 31, 2021, on February 18, 2021, the City moved to reargue and renew its application to extend the subject "execution and levy" through and including December 31, 2021, which motion is currently returnable on March 1, 2021.)

This Court previously indicated that it would allow the City to intervene in the instant special proceeding.

CPLR 5234(b), “Priority among execution creditors,” states, in pertinent part, the following:

Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to the same enforcement officer... they shall be satisfied out of the proceeds of personal property or debt levied upon by the officer... in the order in which they were delivered... Where two or more executions or orders of attachment are issued against the same judgment debtor or obligor and delivered to different enforcement officers, and personal property or debt is levied upon within the jurisdiction of all of the officers, the proceeds shall be first applied in satisfaction of the execution or order of attachment delivered to the officer who levied, and thereafter shall be applied in satisfaction of the executions or orders of attachment delivered to those of the other officers who, before the proceeds are distributed, make a demand upon the officer who levied, in the order of such demands... Nothing herein shall be deemed to defeat or impair the rights of any secured party as such term is defined in paragraph seventy-two of subsection (a) of section 9-102 of the uniform commercial code. An execution or order of attachment returned by an officer before a levy or delivered to him after the proceeds of the levy have been distributed shall not be satisfied out of those proceeds.

CPLR 5239 states, in pertinent part, the following:

Prior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt... The court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give... The court may permit any interested person to intervene in the proceeding.

The City’s motion to intervene is hereby granted on the law, without opposition, and as previously indicated.

This Court determines that, pursuant to CPLR 5234 and 5239, Dontzin has priority over the City to all property and all debts that HC2 owes in which Falcone has an interest. The “execution and levy” on which the City relies expired on December 31, 2020, and, to date, neither this Court nor any other court has extended it. In dueling emails to the Court dated February 22, 2021, Dontzin and the City vehemently disagreed as to whether the City ever told Dontzin that the City had directed the Sheriff not to sell the subject shares. However, the City never claims that it directed the Sheriff to sell the shares, at least not until the City filed Motion Seq. No. 003 in a related

matter captioned City of New York v HC Holdings Inc., Index No. 452635/2020. However, as Dontzin argues, an “execution and levy” is not intended to work as an indefinite lien on property. The City asserts that it had not previously directed the Sheriff to sell the subject HC2 stock “because of the low stock price, which was expected to rebound over time.” The stock market in general, and, presumably, the price of HC2 shares in particular, are volatile and unpredictable. The City had no right to wait for a hoped-for-but-uncertain rise in the stock price while keeping other creditors at bay. Thus, this Court finds that the “execution and levy” has become dormant. See Metro Burak, Inc. v Rosenthal & Rosenthal Inc., 83 Misc. 2d 637 (Sup Ct. Richmond County 1975); Vance Boiler Works Inc. v Co-operative Feed Dealers Inc., 46 Misc. 2d 654 (Sup Ct. Wayne County 1965); In re Monarch Acetylene Co., 229 F. 474 (WDNY 1916). See Weinstein-Korn-Miller, New York Civil Practice ¶ 5234.11 (“an execution creditor will lose his priority if he permits his execution to become ‘dormant.’”).

If any other CPLR 5234 and/or 5239 issues exist or arise, the Court will determine them upon request of any party.

Conclusion

Thus, for the reasons stated herein, the instant motion (Seq. No. 001) by Dontzin Nagy & Fleissig LLP (“Dontzin”) is hereby granted only to the following extent: (1) respondent HC2 Holdings, Inc. (“HC2”) is hereby ordered to deliver and/or pay over to New York City Marshal Martin A. Bienstock (“the Marshal”), as soon as possible, all stock, stock options, and restricted stock units, to be held by him until further court order; (2) HC2 is also hereby ordered to pay to Dontzin, within fourteen days of this Decision and Order, any cash in which non-party Philip Falcone (“Falcone”) has an interest, which are in HC2’s possession or under its control, to be applied toward satisfying Dontzin’s March 2020 judgment against Falcone. The instant motion (Seq. No. 003) by the City of New York (“the City”) is hereby granted to the extent of allowing the City to intervene in the instant special proceeding; and is hereby granted to the extent that it asks the Court to determine priority, and the Court hereby determines Dontzin to have priority over the City as to all of Falcone’s property, or property in which Falcone has an interest, that HC2 possesses, and all debts that HC2 owes to Falcone. The Clerk is hereby directed to amend the file to reflect that the City of New York is now a respondent party in the instant special proceeding.

  
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2/22/2021  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>		<input checked="" 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

