

City of New York v HC2 Holdings Inc.

2021 NY Slip Op 30745(U)

March 11, 2021

Supreme Court, New York County

Docket Number: 452635/2020

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

-----X

THE CITY OF NEW YORK,

Petitioner,

- v -

HC2 HOLDINGS INC.,

Respondent.

-----X

INDEX NO. 452635/2020
MOTION DATE 03/01/2021
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 45, 47, 48, 49, 50, 51

were read on this motion to/for POST JUDGMENT - OTHER

Upon the foregoing documents and for the reasons set forth herein, the instant request in Motion Seq. No. 003 by the City of New York ("the City"), pursuant to CPLR 5238, to direct a New York City sheriff to sell stock and securities in HC2 Holdings Inc. is hereby granted.

Background

On March 25, 2019, a judgment in the original amount of \$13,500,000.00 ("the Judgment") was entered in favor the City and against Harbinger Capital Partners Offshore Manager, LLC ("Harbinger") and Philip Falcone ("Falcone") in an action captioned The City of New York v Harbinger Capital Partners Offshore Mgr., LLC, Index No. 450328/2019 (NYSCEF Doc. 4). The City, asserts that it has "acted diligently to collect" on the Judgment and that a \$2,907,085.51 balance remains (NYSCEF Doc. 1, at 2).

On May 10, 2019, the City delivered an execution and levy ("the 2019 Execution and Levy") to a New York City sheriff ("the Sheriff") with a notice to respondent, HC2 Holdings Inc. ("HC2") "as garnishee, with respect to all property in which [Falcone] has an interest, including annual cash incentive payments and the stock options or other rights to purchase shares of common stock of [HC2]." The Sheriff then served HC2 with the 2019 Execution and Levy. (NYSCEF Doc. 1, at 2.)

By Decision and Order dated October 3, 2019 in a special proceeding captioned The City of New York v HC2 Holdings Inc., Index No. 451275/2019, the Hon. W. Franc Perry extended the 2019 Execution and Levy to and including December 31, 2020 (the "October 2019 Extension") (NYSCEF Doc. 7).

On May 14, 2020, pursuant to the subject levy, HC2 apparently delivered to the Sheriff a stock certificate "representing 298,617 shares of HC2 stock" that Falcone owns or owned. According

to the City, HC2 asserted that “nothing else was presently due and payable to Falcone in 2020, but it provided information to the Court and the City showing that it would pay \$2.2 million on or before March 15, 2021, representing an incentive cash bonus,” that it owes to Falcone pursuant to a company bonus plan. (NYSCEF Doc. 19.)

By petition dated December 23, 2020 (approximately one week prior to the expiration of the October 2019 Extension), the City commenced the instant special proceeding to extend the 2019 Execution and Levy to and including December 31, 2021 (NYSCEF Doc. 1).

On January 25, 2021 (when HC2’s stock price had risen) Falcone apparently contacted the City to “offer his assistance in facilitating a sale” of the HC2 stock that the Sheriff possessed. The City then emailed a proposed order to the Court, pursuant to which the Sheriff could sell the subject stock with a stock broker’s services “in one or more lots over time” to “get the best price and maximize the proceeds of the sale of all stock.” By email to the Court on that same day, non-party judgment-creditor Dontzin Nagy & Fleissig, LLP (“Dontzin”) objected to said proposed order, asserting, inter alia, that the City had not yet moved pursuant to CPLR 5238, and alleging that the “dormancy doctrine” vitiated the City’s priority to the subject stock (NYSCEF Documents 33 and 35).

By Decision and Order dated February 4, 2021, this Court denied the City’s motion to extend the 2019 Execution and Levy to and including December 31, 2021 (NYSCEF Doc. 15).

By Decision and Order dated February 18, 2021 in a related special proceeding captioned The City of New York v Harbinger Capital Partners Offshore Mgr., LLC., Index No. 451347/2020, this Court ordered, essentially, as follows: [1] Falcone must either pay money to the City to satisfy the remainder of the Judgment; or [2] pursuant to CPLR 5225(a), Falcone must turn over and deliver all shares of stock, stock options, and restricted stock units (“RSUs”) that he owns in HC2 to the City or the Sheriff, or such lesser amount sufficient to satisfy the Judgment fully; 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 turn over 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”) must 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. The City asserts that Falcone “owns approximately 1.3 million shares of HC2 stock which is subject to the aforesaid turnover order” (NYSCEF Doc. 33).

On March 1, 2021, this Court heard an omnibus oral argument (“the March 1 Appearance”), during which the City noted that Dontzin had not yet moved to intervene in the instant special proceeding. Dontzin still has not done so.

By Decision and Order dated March 8, 2021, this Court (1) granted the City’s CPLR 2221 motion (Seq. No. 002) for leave to reargue its application for a CPLR 5232 order extending the 2019 Execution and Levy; and (2), upon reargument (and renewal), granted the City’s motion to extend the 2019 Execution and Levy to the extent of extending it to and including June 30, 2021,

without prejudice to the City's seeking further extensions ("the March 8 2021 Decision and Order," NYSCEF Doc. 52).

On March 10, 2021, this Court issued an order in the instant special proceeding and in a related special proceeding captioned Dontzin Nagy & Fleissig LLP v HC2 Holdings Inc., Index No. 156889/2020, finding, holding, and declaring that the City has priority over Dontzin to all property, debts, etc. that HC2 holds or controls in which Falcone has an interest on the ground that the City filed its execution and levy prior to Dontzin (NYSCEF Doc. 55).

Discussion of the City's Instant Motion (Seq. No. 003)

The City now moves (Seq. No. 003), pursuant to CPLR 5238 and 5240, to direct the Sheriff to sell stock and securities in HC2 as follows:

now or hereafter coming into his possession pursuant to execution and levy or turnover order, by means of sales in one or more lots over time, using the services of a stock broker to make sales on a publicly traded exchange, as in his judgment will bring the highest price, subject to the payment of the Sheriff's fees and expenses.

(NYSCEF Doc. 32.)

CPLR 5238, "Directions to the sheriff," states, in pertinent part, as follows:

Upon motion of any party, on notice to the Sheriff and all other parties, the court may direct the sheriff to dispose of, account for, assign, return or release all or any part of any property of debt, or the proceeds thereof, or to file additional returns, subject to the payment of the sheriff's fees and expenses. As far as practicable, the court shall direct that notice of the motion be given to any other judgment creditors ... and to any other persons who have secured orders of attachment affecting any property or debt ...

CPLR 5240, "Modification or protective order; supervision of enforcement," states as follows:

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article.

The City notes that CPLR 5233, "Sale of personal property," does not provide a time limit on said sale. During the March 1 Appearance and in its moving papers, the City emphasized that the COVID-19 pandemic paused public auctions between March and September 2020 (NYSCEF Doc. 33). The City further asserts, inter alia, that (1) the City did not instruct the Sheriff not to sell the subject HC2 stock; (2) neither the City nor the Sheriff delayed in "pursuing its enforcement rights" in the instant special proceeding; and (3) auction is "not the most efficient means" of selling the subject stock, and, thus, said stock must "be sold in lots over time to maximize the proceeds from a sale of all of the stock" (NYSCEF Doc. 33).

In opposition, Dontzin cites to a document titled "Sheriff's Directions to Garnishee and Judgment Debtor," dated March 11, 2020 (NYSCEF Doc. 50). At the March 1 Appearance, the City asserted that it had never seen that document. As this Court stated in the March 8, 2021 Decision and Order, "(1) simply and obviously, said document does not tell the Sheriff not to sell the subject stock or not to do anything; and (2) there is no evidence that the City actually directed the Sheriff in any way, other than this mere unsubstantiated and uncorroborated (and inadmissible) hearsay" (NYSCEF Doc. 52, at 6). Additionally, the Court's finding that the City's interactions (and/or lack thereof) with the Sheriff did not "demonstrate the 'fraud' required to implicate the dormancy doctrine," militates against Dontzin's aforementioned objection (NSYCEF Doc. 52, at 6).

Neither Falcone nor HC2 have submitted written opposition to the instant request on the New York State Courts Electronic Filing system.

This Court has considered Dontzin's other arguments against the City's instant request and finds them to be unavailing and/or non-dispositive.

Therefore, the City has established that it is entitled to the requested CPLR 5238 order.

Conclusion

Thus, for the reasons stated herein, the instant request in Motion Seq. No. 003 by the City of New York, pursuant to CPLR 5238, to direct a New York City sheriff ("the Sheriff") to sell stock and securities in HC2 Holdings Inc. "now or hereafter coming into his possession pursuant to execution and levy or turnover order, by means of sales in one or more lots over time" with a stock broker's services "to make sales on a publicly traded exchange, as in his judgment will bring the highest price, subject to the payment of the Sheriff's fees and expenses" is hereby granted.

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3/11/2021
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 type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE