

City of New York v Pershing LLC
2021 NY Slip Op 30814(U)
March 16, 2021
Supreme Court, New York County
Docket Number: 450306/2021
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

INDEX NO. 450306/2021

CITY OF NEW YORK,

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

PERSHING LLC, PHILIP FALCONE, DONTZIN NAGY & FLEISSIG, LLP, FIELDPOINT PRIVATE SECURITIES LLC, MELODY BUSINESS FINANCE LLC, STATE OF NEW YORK, SUMMITBRIDGE NATIONAL INVESTMENTS VII, LLC

DECISION + ORDER ON MOTION

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for TURNOVER PROCEEDING

Upon the foregoing documents, it is Upon the foregoing documents and for the reasons stated herein, the CPLR 5225(b) request contained within the instant motion by petitioner-judgment creditor, the City of New York ("the City"), is granted to the extent of (1) directing respondent-garnishee Pershing LLC ("Pershing") to transfer all of the shares of non-party HC2 Holdings Inc. ("HC2") in its possession to respondent Fieldpoint Private Securities LLC ("Fieldpoint"), which then must (1) retain the 540,000 shares as to which respondent Melody Business Finance LLC ("Melody") has priority over the City; and (2) transfer the remaining shares to a New York City Sheriff to sell in an orderly manner on a publicly-traded exchange in one or more lots over time and to pay the proceeds thereof to the City up to an amount that would satisfy the City's March 25, 2019 Judgment ("the City's Judgment"), which, according to the City (NYSCEF Doc. 1), as of February 4, 2021 remained unsatisfied to the extent of \$2,690,100.00. This Court declares that after Pershing transfers the subject HC2 shares to Fieldpoint, Pershing shall have no further obligations as to the matters addressed herein. This Court denies, without prejudice and solely as moot, Pershing's request for a CPLR 2601 order authorizing Pershing to deposit the subject HC2 securities into court.

Background

The City, respondent the State of New York ("the State"), respondent Dontzin Nagy & Fleissig, LLP ("Dontzin"), and respondent SummitBridge National Investments VII, LLC ("SummitBridge") are all judgment-creditors of respondent-judgment debtor Philip Falcone ("Falcone"). The judgment creditors each have an interest in Falcone's property, which, as here relevant, consists of stock in HC2 that Pershing apparently currently possesses. Melody and

Fieldpoint each assert an interest in the subject HC2 stock pursuant to their respective pledge and security agreements with Falcone. (NYSCEF Doc. 1.) Falcone owned (at least some of) the subject HC2 shares through Eighth Street LLC (“Eighth Street”) and Global Opportunities Breakaway MM, LLC (“Global Opportunities”), both of which had pledged shares to Melody (NYSCEF Doc. 16, at 8). Falcone deposited 540,000 HC2 shares that Global Opportunities owned, and in which Melody had a security interest, with Fieldpoint. Not surprisingly, Melody has moved to intervene and seeks CPLR 5239 relief in the related turnover proceeding captioned Dontzin Nagy & Fleissig LLP v Fieldpoint Private Securities LLC, Index No. 157365/2020. (NYSCEF Documents 16-17.)

On March 25, 2019, the City’s Judgment was entered in favor of the City and against Falcone and non-party judgment-creditor Harbinger Capital Partners Offshore Manager, LLC (“Harbinger”), jointly and severally, which, according to the City (NYSCEF Doc. 1), as of February 4, 2021, remained unsatisfied to the extent of \$2,690,100.00 (NYSCEF Doc. 3).

In or around early February 2021, the City learned that Fieldpoint delivered HC2 stock that it had previously possessed to Pershing, which, as of February 4, 2021, apparently possessed 1,306,375 HC2 shares in which Falcone has an interest. On January 26, 2021, the City delivered an execution to a sheriff (“the Sheriff”) “for service on Pershing as Garnishee with respect to the HC2 stock in Pershing’s possession in which Falcone has an interest.” On January 27, 2021, the Sheriff served that execution and levy on Pershing, “which [the City claims] remains in effect and restrains Pershing from transferring or disposing of said stock.” (NYSCEF Doc. 1.)

By petition dated February 4, 2021, the City commenced the instant special proceeding, requesting that this Court (1), pursuant to CPLR 5234 and 5239, determine that the City has priority over Dontzin and “all other respondents” as to HC2 stock that Falcone owns that Pershing possesses, “with the exception only of any pre-existing properly perfected security interests” that Fieldpoint and/or Melody possesses; or, alternatively, (2), pursuant to CPLR 5240, authorize and direct Pershing to sell the HC2 stock that it possesses “in one or more lots in an orderly manner that will not disrupt the market for such stock, and pay the proceeds of such sales directly to the City in an amount sufficient to fully satisfy” the City’s Judgment. (NYSCEF Doc. 1, at 8.)

The City cites to DLJ Mtge. Capital, Inc. v Kontogiannis, 41 Misc 3d 1237(a), 983 NYS2d 202 (Sup Ct, NY County 2013) and 2014 NY Slip Op 30042(U), 2014 NY Misc LEXIS 90 (Sup Ct, NY County 2014), in which the court held as follows: “Under CPLR 5234(b), where two or more executions or orders of attachment are issued against the same judgment debtor’s personal property ... priority is determined in the order of the execution or order of attachment levied upon. First in time prevails.” Pershing apparently possesses the subject HC2 stock that Falcone previously delivered to Fieldpoint. (NYSCEF Doc. 2.)

On February 18, 2021, in a related turnover proceeding captioned The City of New York v Harbinger Capital Partners Offshore Manager LLC, Index No. 451347/2020, this Court granted the City’s CPLR Article 52 motion and ordered as follows:

[1] [Falcone] shall either pay money to the City to satisfy the [the City's 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 [HC2] to the City or the Sheriff of the City of New York, or such lesser amount sufficient to fully satisfy the [City's 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.

The City asserts the following: "The fact that Falcone delivered the HC2 stock that he owns to Fieldpoint should not affect the City's rights in said stock because Falcone owns the stock and has control over it. It should make no difference where he put the stock." The City further asserts that in the event that "actual possession of the stock is the proper determinant with respect to a turnover order against a third-party garnishee, then Pershing is the only proper garnishee because Fieldpoint transferred possession of all of the HC2 stock that was in its possession to Pershing, which is now holding the stock." (NYSCEF Doc. 1, at 6.)

The City now moves, pursuant to CPLR 5225(b) and/or 5227, to direct Pershing (1) to deliver to the New York City Sheriff all stock in HC2 in which Falcone has an interest that is presently in its custody, possession, or under its control ("except as indicated in petitioner's moving affirmation"), or (2) to sell that stock ("ditto") in an orderly manner on a publicly-traded exchange in one or more lots over time and to pay the proceeds thereof to the City directly up to an amount to satisfy the City's Judgment (pursuant to CPLR 5240) (NYSCEF Doc. 9).

In opposition, Dontzin asserts, inter alia, the following: (1) the City's application lacks an evidentiary basis and cites to hearsay from the City; (2) "the claim that the HC2 securities can be levied at Pershing is factually and legally baseless," as [a] Fieldpoint stated that it possesses or is in custody of said securities; and [b] Fieldpoint has executed a Stipulation resolving a related turnover proceeding captioned Dontzin Nagy & Fleissig LLP v Fieldpoint Private Securities LLC, Index No. 157365/2020, stating that it would deliver HC2 securities to the Marshal to satisfy Dontzin's judgment; and (3) "a judgment debtor's interest in securities held by a clearing broker cannot be attached or levied upon by serving process on the clearing broker, as the City has tried to do." (NYSCEF Doc. 12.)

Also in opposition, Melody asserts, inter alia, the following: (1) the HC2 shares at issue here are also subject to the aforementioned related special proceeding captioned Dontzin Nagy & Fleissig LLP v Fieldpoint Private Securities LLC, Index No. 157365/2020; (2) Melody's security interest in the subject 540,000 HC2 shares is "superior to the interest of [Dontzin]—or any other judgment creditor of [Falcone]," including the City; (3) the City has not contested Melody's assertion of priority to the subject HC2 shares and proceeds; and (4) the City's assertion that the relief that it currently seeks would be "without prejudice to Melody's prior security interests" "is

not accurate,” as it would “undermine” Melody’s priority. Melody requests that this Court either deny the City’s instant application or consolidate its decision herein with its decision on Melody’s request to intervene and for CPLR 5239 relief in Dontzin Nagy & Fleissig LLP v Fieldpoint Private Securities LLC, Index No. 157365/2020. (NYSCEF Documents 16-17.)

On February 26, 2021, Pershing submitted a Notice of Cross-Petition for alternative relief “in the event that [Pershing] is not given immediate turnover direction and discharge, pursuant to [CPLR 2601], authorizing [Pershing] to deposit into Court the subject HC2 securities; discharging [Pershing] from any further liability or obligation” (NYSCEF Doc. 21). In a February 26, 2021 affidavit in response to the City’s instant request for a turnover order, Pershing stated that it “takes no position in this or any related proceedings involving HC2 Securities, other than a request to be discharged from further entanglement in this dispute among judgment creditors” (NYSCEF Doc. 22).

On March 10, 2021, this Court issued an order in related special proceedings captioned The City of New York v HC2 Holdings Inc., Index No. 452635/2020, and 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.

Discussion

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 ...

As Dontzin notes, UCC-8-112 states, in part, as follows: “the interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor’s security account is maintained ...” Dontzin also quotes from Comment 3 thereof, which states as follows: “If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor’s property interest is a security entitlement against Broker. Accordingly, Debtor’s creditor cannot reach Debtor’s interest by legal process directed to the Clearing Corporation.” Pershing noted that it serves as said “Clearing Corporation” for Fieldpoint (NYSCEF Doc. 22). Thus, the City cannot levy upon the subject securities by serving process upon Pershing, as the City has done in the instant special proceeding. This Court will direct (or allow) Pershing to turn over all of the HC2 shares in its possession to Fieldpoint, after which Pershing shall have no further obligations as to the matters addressed herein.

This Court finds that Melody has priority over the City to the subject 540,000 HC2 shares that Global Opportunities deposited with Fieldpoint in which Melody has a security interest (NYSCEF Doc. 16, at 7). Therefore, the City may not require that Fieldpoint turn these shares over to the Sheriff for sale for the benefit of the City.

This Court will deny, without prejudice and solely as moot, Pershing’s request for a CPLR 2601 order, as this Court will direct Pershing to turn over the subject HC2 shares to Fieldpoint.

Finally, this Court will grant the City’s CPLR 5225(b) request contained in its instant motion to the extent of (1) directing Pershing to transfer all of the HC2 shares in its possession to Fieldpoint, which then must (1) retain the 540,000 shares as to which Melody has priority over the City; and (2) transfer the remaining shares to a New York City Sheriff to sell in an orderly manner on a publicly-traded exchange in one or more lots over time and to pay the proceeds of thereof to the City up to an amount that would satisfy the City’s Judgment.

Conclusion

Thus, for the reasons stated herein, the CPLR 5225(b) request contained within the instant motion by petitioner-judgment creditor, the City of New York (“the City”), is granted to the extent of (1) directing respondent-garnishee Pershing LLC (“Pershing”) to transfer all of the shares of non-party HC2 Holdings Inc. (“HC2”) in its possession to respondent Fieldpoint Private Securities LLC (“Fieldpoint”), which then must (1) retain the 540,000 shares as to which respondent Melody Business Finance LLC (“Melody”) has priority over the City; and (2) transfer the remaining shares to a New York City Sheriff to sell in an orderly manner on a publicly-traded exchange in one or more lots over time and to pay the proceeds thereof to the City, up to an amount that would satisfy the City’s March 25, 2019 Judgment, which, according to the City (NYSCEF Doc. 1), as of February 4, 2021 remained unsatisfied to the extent of \$2,690,100.00. This Court declares that after Pershing transfers the subject HC2 shares to Fieldpoint, Pershing shall have no further obligations as to the matters addressed herein. This Court hereby denies, without prejudice and solely as moot, Pershing’s request for a CPLR 2601 order authorizing Pershing to deposit the subject HC2 securities into court.

20210316111126AENGORONFE2BB55403C848C5A9E06371B195EBBB

3/16/2021
DATE

ARTHUR F. ENGORON, J.S.C.

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