

**Dontzin Nagy & Fleissig LLP v Fieldpoint Private  
Sec. LLC**

2021 NY Slip Op 30861(U)

March 19, 2021

Supreme Court, New York County

Docket Number: 157365/2020

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

DONTZIN NAGY & FLEISSIG LLP,
Petitioner,

INDEX NO. 157365/2020

MOTION DATE N/A

MOTION SEQ. NO. 004

- v -

FIELDPOINT PRIVATE SECURITIES LLC,
Respondent.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 54, 57, 58

were read on this motion to/for PARTIES - INTERVENE

Upon the foregoing documents and for the reasons set forth herein, the instant motion (Seq. No. 004) by non-party Melody Business Finance LLC ("Melody") to intervene in the instant special proceeding is granted to the following extent: this Court (1) permits Melody to intervene in the instant special proceeding; (2) declares that Melody's interest in the subject HC2 Holdings Inc. ("HC2") shares and/or the proceeds of any prospective sale thereof is prior and superior to the interest of petitioner, Dontzin Nagy & Fleissig LLP ("Dontzin"), and any other judgment creditor of Philip Falcone ("Falcone"); (3) declares that Melody's interest in the subject fine art and/or the proceeds of any sale thereof is "prior and superior to" the interest of respondent, Fieldpoint Private Securities LLC ("Fieldpoint"), Dontzin, and any other judgment creditor of Falcone's; and (4) forbids Fieldpoint from delivering the subject HC2 Holdings Inc. ("HC2") shares and/or the proceeds of any prospective sale thereof and the subject fine art and/or the proceeds of any sale thereof to anyone other than Melody.

Background

On February 21, 2020, Melody commenced litigation captioned Melody Business Finance, LLC v Philip A. Falcone, Index No. 651155/2020, against non-party Philip Falcone ("Falcone") and his wife Lisa M. Falcone (together with Falcone, "the Falcones"), among other defendants, claiming that defendants had failed to repay loans and had dissipated collateral (NYSCEF Doc. 37, at 7).

On March 19, 2020, Dontzin obtained a \$13,929,649.00 (plus interest from the date of entry) judgment ("the Dontzin Judgment") in its favor and against Falcone, whom Dontzin represented in prior litigation. Dontzin contends that, as of September 11, 2020, "no part of the [Dontzin Judgment] has been paid, except for \$88,934.11 ... which is less than the post-judgment interest that has accrued to date." Falcone claims that he is illiquid and unable to satisfy the Dontzin

Judgment. Dontzin asserts that Fieldpoint possesses (1) stock and other investment securities of HC2 Holdings Inc. (“HC2”) in which Falcone has an interest as well as (2) “cash, cash balances, and cash equivalents that Falcone owns and/or controls.” (NYSCEF Doc. 1.)

By petition dated September 11, 2020, Dontzin commenced the instant special proceeding, seeking an order (1), pursuant to CPLR 5225(b) and 5227, directing Fieldpoint to turn over and deliver to New York City Marshal Martin A. Bienstock (“the Marshal”) all stocks/options, securities, and any other property—except cash, cash balances, or cash equivalents—that it possesses or that is subject to its control, in which Falcone has an interest; and (2), pursuant to CPLR 5225(b) and 5227, directing Fieldpoint to turn over and deliver to Dontzin all cash, cash balances, or cash equivalents in which Falcone has an interest (NYSCEF Doc. 1).

On November 6, 2020, Dontzin moved, pursuant to CPLR 5225(b) and/or 5227, for an order directing Fieldpoint (1) to deliver and/or pay to the Marshal all stock, options, investment securities, and any and all other property in which Falcone has an interest that Fieldpoint possesses or has under its control except for cash and cash equivalents; and (2) to deliver and/or pay to Dontzin all cash and cash equivalents that it possesses or is subject to its control, in which Falcone has an interest or controls (NYSCEF Doc. 10).

On December 7, 2020, Dontzin and Fieldpoint submitted a “Consent Order and Stipulation of Agreement” (“the Proposed Stipulation,” NYSCEF Doc. 25), which, to date, this Court has declined to sign.

Between December 2020 and January 2021, Melody learned that (apparently without Melody’s authorization) Falcone (1) deposited 540,000 HC2 shares in which Melody has an interest “and pledged [said HC2 shares] to Fieldpoint as collateral for a[n] \$800,000 loan”; and (2) directed Christie’s Inc. to deliver proceeds to Fieldpoint from the sale of fine art that Falcone had pledged to Melody as collateral (NYSCEF Doc. 37). Specifically, as this Court noted in its March 16, 2021 Decision and Order in Motion Seq. No. 001 in the related special proceeding captioned The City of New York v Pershing LLC, Index No. 450306/2021:

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.

Melody asserts that it “has perfected its security interest in all the assets pledged as collateral, including the equity interests in Eighth Street and Global Opportunities, and the Fine Art and its proceeds, either by virtue of delivery or control (in the case of certificated securities), or by virtue of UCC-1 filings” (NYSCEF Doc. 39, at 6). No other party has contested these assertions.

#### Melody’s Instant Motion (Seq. No. 004)

Melody asserts that certain property that Dontzin seeks in the instant special proceeding “includes, or its disposition would affect, collateral [that Falcone] pledged to Melody (“the

Contested Property”), among which are: (1) proceeds of the prospective sale of 540,000 shares of HC2; and (2) \$30,000.00 in cash, “which are the sale proceeds of certain works of fine art pledged to Melody as collateral.” Melody further asserts that its claim to the aforementioned HC2 shares and/or the proceeds of any prospective sale thereof is superior to that of Dontzin or any judgment creditor of Falcone, and its claim to the aforementioned fine art proceeds is superior to that of Fieldpoint, Dontzin, and any person. (NYSCEF Doc. 37.)

Additionally, Melody claims that the Proposed Stipulation would prejudice Melody’s priority interest in the Contested Property, as the Proposed Stipulation “calls for the sale of the 540,000 HC2 shares held at Fieldpoint ... and the distribution of [aforementioned HC2] Proceeds, along with the [aforementioned fine art] Proceeds to [Dontzin], rather than to Melody” (NYSCEF Doc. 37, at 5). Melody notes the following:

While Melody does not contest the sale of the HC2 Shares by the NYC Marshal, or Fieldpoint’s entitlement to be repaid first from the HC2 Proceeds, Melody does object to the distribution of the balance of the HC2 Proceeds—potentially more than \$1 million—to [Dontzin], or to any other unsecured judgment creditor of [Falcone]. To Melody’s knowledge, [Dontzin] has no interest in the HC2 Proceeds beyond [Falcone’s] personal interest in them. For example, it is not a judgment creditor of Global Opportunities, the entity that owns the HC2 Shares; and, unlike Fieldpoint, [Dontzin] does not have a security interest in the HC2 Shares, or the proceeds of their sale ... So [Dontzin’s] interests as [Falcone’s] judgment creditor can be no greater than [Falcone’s] own interest.

(NYSCEF Doc. 37, at 8-9.)

Melody now moves, pursuant to CPLR 1012, 1013, 5225 and 5227, to intervene in the instant special proceeding (NYSCEF Doc. 54). In its petition and memorandum of law, Melody also requests that this Court (1) declare that Melody’s interest in the subject HC2 shares and/or the proceeds of any prospective sale thereof is “prior and superior to” the interest of Dontzin and any other judgment creditor of Falcone; (2) declare that Melody’s interest in the subject fine art and/or the proceeds of any sale thereof is “prior and superior to” the interest of Fieldpoint, Dontzin, and any other judgment creditor of Falcone’s; and (3) direct that the Contested Property be delivered to Melody or, in the alternative, forbid Fieldpoint from delivering the Contested Property to anyone other than Melody (NYSCEF Documents 37 and 39).

By correspondence to the Court dated January 19, 2021, Fieldpoint stated that it does not oppose intervention (NYSCEF Doc. 46).

By email to this Court dated January 21, 2021, Dontzin noted that it did not oppose this Court’s signing Melody’s proposed OSC to intervene.

On March 1, 2021, this Court heard an omnibus oral argument on this and related special proceedings, and Melody appeared.

### Discussion

To date, no written opposition to Melody's requests to intervene and/or for a CPLR 5239 order has been e-filed on the New York State Courts Electronic Filing system.

#### Melody's Request to Intervene

CPLR 1012, "Intervention as of right ..." states, in pertinent part, as follows:

Upon timely motion, any person shall be permitted to intervene in any action:

1. when a statute of the state confers an absolute right to intervene; or
2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or
3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

CPLR 1013, "Intervention by permission," states as follows:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

CPLR 5225(b) and 5227 states, in pertinent part, as follows: "The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239."

"Intervention is liberally allowed by courts." Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC, 77 AD3d 197, 201 (1<sup>st</sup> Dept. 2010). "[R]ival claimants to the assets or funds may be joined in [CPLR 5225(b)] proceeding so that the court may prioritize the competing interests." Natl. Union Fire Ins. Co. v Eland Motor Car Co., 85 NY2d 725, 729 (1995).

By Decision and Order dated March 16, 2021 in a related special proceeding captioned The City of New York v Pershing LLC, Index No. 450306/2021, Motion Seq. No. 001 (NYSCEF Doc. 23), this Court, in part and simply put, directed (1) Pershing LLC ("Pershing") to transfer all of the HC2 shares that it possesses to Fieldpoint; and (2) Fieldpoint to retain the 540,000 HC2 shares as to which respondent [Melody] has priority over the City.

Melody has established that, pursuant to CPLR 1012, 1013, 5225(b), and 5227, it is entitled to intervene in the instant special proceeding. The "disposition or distribution of" the subject HC2 shares and/or the proceeds of any prospective sale thereof and of the subject fine art and/or the proceeds of any sale thereof, in which Melody has an interest, that the Proposed Settlement

references would prejudice Melody. This Court finds that Melody's intervention in the instant special proceeding would neither unduly delay the determination in the instant special proceeding nor prejudice any party's substantial rights.

This Court will grant Melody's request to intervene in the instant special proceeding.

Melody's Request that this Court Determine Adverse Claims

CPLR 5239, "Proceeding to determine adverse claims," states, in pertinent part, as follows:

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.

UCC § 9- 315(a)(2), provides, in part, as follows: "a security interest attaches to any identifiable proceeds of collateral."

This Court has determined that, pursuant to CPLR 5239, (1) Melody has priority over Dontzin and any other judgment creditor of Falcone to the subject HC2 shares and/or the proceeds of any prospective sale thereof; and (2) Melody has priority over Fieldpoint, Dontzin, and any other judgment creditor of Falcone's to the subject fine art and/or the proceeds of any sale thereof. Melody has demonstrated that it has liens on property owned by or in the possession or control of Eighth Street and Global Opportunities, which had pledged HC2 shares to Melody and which indicate Melody's priority and superiority of interest in the subject HC2 shares and/or the proceeds of any prospective sale thereof over Dontzin's interests. Melody has also demonstrated that it has a lien on the subject fine art and/or the proceeds of any sale thereof that establishes Melody's priority. (NYSCEF Doc. 39).

Pursuant to CPLR 5239, based on the nature and timing of Melody's interest, as set forth herein, this Court will (1) declare that Melody's interest in the subject HC2 shares and/or the proceeds of any prospective sale thereof is "prior and superior to" the interest of Dontzin and any other judgment creditor of Falcone; (2) declare that Melody's interest in the subject fine art and/or the proceeds of any sale thereof is "prior and superior to" the interest of Fieldpoint, Dontzin, and any other judgment creditor of Falcone's; and (3) forbid Fieldpoint from delivering the Contested Property to anyone other than Melody.

Conclusion

Thus, for the reasons stated herein, the instant motion (Seq. No. 004) by non-party Melody Business Finance LLC ("Melody") to intervene in the instant special proceeding is hereby

granted as follows: this Court (1) permits Melody to intervene in the instant special proceeding; (2) declares that Melody’s interest in the subject HC2 Holdings Inc. (“HC2”) shares and/or the proceeds of any prospective sale thereof is prior and superior to the interest of petitioner, Dontzin Nagy & Fleissig LLP (“Dontzin”), and any other judgment creditor of Philip Falcone (“Falcone”); (3) declares that Melody’s interest in the subject fine art and/or the proceeds of any sale thereof is “prior and superior to” the interest of respondent, Fieldpoint Private Securities LLC (“Fieldpoint”), Dontzin, and any other judgment creditor of Falcone’s; and (4) forbids Fieldpoint from delivering the subject HC2 Holdings Inc. (“HC2”) shares and/or the proceeds of any prospective sale thereof and the subject fine art and/or the proceeds of any sale thereof to anyone other than Melody. The Clerk is hereby directed to amend the file to reflect Melody’s intervention and to enter provisional judgment declaring as set forth in this paragraph.

At this time, this Court declines to so-order the purported stipulation between Dontzin and Fieldpoint (NYSCEF Doc. 25).

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3/19/2021  
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: