

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

2021 NY Slip Op 30886(U)

March 22, 2021

Supreme Court, New York County

Docket Number: 157365/2020

Judge: Arthur F. Engoron

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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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DONTZIN NAGY & FLEISSIG LLP,
Petitioner,

INDEX NO. 157365/2020
MOTION DATE N/A
MOTION SEQ. NO. 002

- 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 002) 17, 18, 19, 20, 21, 22, 23, 24, 46, 53

were read on this motion to/for PARTIES - INTERVENE

Upon the foregoing documents and for the reasons set forth hereinbelow, this Court grants the instant motion (Seq. No. 002) by non-party SummitBridge National Investments VII, LLC ("SummitBridge") to the following extent: (1), pursuant to CPLR 5225(b) and/or 5227, permitting SummitBridge to intervene in the instant special proceeding; and (2), pursuant to CPLR 5239, declaring that petitioner, Dontzin Nagy & Fleissig LLP ("Dontzin"), has priority over SummitBridge to the property of non-party Philip Falcone ("Falcone") that respondent, Fieldpoint Private Securities, Inc. ("Fieldpoint"), possesses.

Background

On June 21, 2019, the Internal Revenue Service ("the IRS") executed a Notice of Federal Tax Lien ("the IRS Lien") against Falcone for \$7,698,752.13 in unpaid taxes for the tax period ending on December 31, 2017. On July 16, 2019, the IRS recorded the IRS Lien in New York County, New York (NYSCEF Doc. 21), and on September 4, 2019, the IRS recorded the IRS Lien in Suffolk County, New York (NYSCEF Doc. 22). (NYSCEF Doc. 23.)

On September 12, 2019, non-party Wilmington Trust Company ("Wilmington," hereafter "SummitBridge" pursuant to an assignment as of September 28, 2020), not in its individual capacity but solely as Owner Trustee under an April 3, 2006 Trust Agreement ("the Wilmington Trust") obtained a \$4,500,000.00 judgment ("the SummitBridge Judgment," NYSCEF Doc. 19) in its favor and against non-parties Falcone, Lisa Falcone, and Falcone V, LLC. SummitBridge has apparently engaged in various measures to attempt to enforce the SummitBridge Judgment, among which were sending a restraining notice to Falcone and, on October 28, 2019, sending a restraining notice to Fieldpoint, which is in effect until October 28, 2021. SummitBridge also issued an Information Subpoena and Subpoena for Inspection to Falcone. SummitBridge has apparently "uncovered a number of Falcone's assets, including bank accounts, real property, and

entities owned by Falcone” through said Information Subpoena and other investigation(s). Despite said attempts, SummitBridge asserts that the IRS Lien has interfered with SummitBridge’s ability to enforce the SummitBridge Judgment. (NYSCEF Documents 23 and 24.)

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, the Court has declined to sign.

SummitBridge asserts that Dontzin, which is “also in a junior position to the IRS’s lien,” has prejudiced SummitBridge, which is a judgment creditor of Falcone and an adverse claimant to Dontzin, by proceeding with its judgment collection (NYSCEF Doc. 23).

SummitBridge now moves, pursuant to CPLR 5225 and/or 5227, to intervene as an adverse claimant in the instant special proceeding (NYSCEF Doc. 53). SummitBridge asserts that it seeks to intervene, essentially, to (1) determine its rights; (2) protect its interest; (3) inform the Court of “significant information related to Falcone’s assets notably omitted from Dontzin’s court submissions”; and (4) “ensure proper priority of creditors is maintained” (NYSCEF Doc. 24). SummitBridge emphasizes that it seeks to notify the Court of issues of fact, namely the IRS Lien and the SummitBridge Judgment, that Dontzin has failed to raise in its instant special proceeding (NYSCEF Doc. 24, at 9).

By correspondence to the Court dated December 11, 2020, SummitBridge requested that this Court decide SummitBridge's instant motion to intervene prior to addressing the Proposed Stipulation (NYSCEF Doc. 26).

By correspondence to the Court dated December 11, 2020, Dontzin asserted the following:

SummitBridge makes no claim to priority over [Dontzin] to any of the Fieldpoint assets. Rather, the basis of the intervention claim is that judgment enforcement is supposedly stayed by [the IRS Lien] against [Falcone]. As we explained in [Dontzin's] opposition (copy attached) to SummitBridge's motion for reargument of its motion to intervene in [Dontzin v Falcone], Index No. 650535/2020, this argument is unsupported by precedent and is belied by the facts, including SummitBridge's own ongoing efforts to enforce [the SummitBridge Judgment] without regard to [the IRS Lien]. Moreover, the IRS has not appeared in these proceedings and SummitBridge has no standing to assert a claim for other creditors.

(NYSCEF Doc. 26). This Court notes that, on February 3, 2021, in a related special proceeding captioned Dontzin Nagy & Fleissig LLP v Philip Falcone, Index No. 650535/2020, Motion Seq. No. 008 (NYSCEF Doc. 232), this Court denied SummitBridge's motion to reargue the Court's prior, October 26, 2020 joint decision of Motion Sequence Numbers 006 and 007, which denied a request to intervene. That Decision and Order stated, in pertinent part, the following: "the existence of a tax lien is irrelevant to the issue of the right, or lack thereof, of a party seeking to intervene in a collection proceeding who has no standing to make the claim and no right to intervene."

In further opposition to SummitBridge's instant motion, Dontzin asserts, inter alia, the following: (1) the restraining notices that SummitBridge references do not provide a lien or priority; (2) SummitBridge has failed to assert and/or demonstrate "that it has levied on the Fieldpoint assets, which is the requisite for obtaining priority to a judgment debtor's personal property," whereas Dontzin directed the Marshal to levy on Fieldpoint and then filed the instant garnishee proceeding; (3) it is "irrelevant that [the SummitBridge Judgment] was entered first"; (4) the IRS has not appeared; "SummitBridge cites no authority to show that judgment enforcement is stayed by a tax lien filing"; and SummitBridge has failed to cite any authority requiring Dontzin to notify the Court of the IRS Lien; and (5) in the aforementioned February 3, 2021 Decision and Order in a related special proceeding, this Court rejected SummitBridge's assertions about the IRS Lien (NYSCEF Doc. 55).

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, Fieldpoint requested that this Court not address the Proposed Stipulation prior to resolving issues of priority in the instant special proceeding. Also by email to this Court dated January 21, 2021, Dontzin requested that this Court decline to sign SummitBridge's proposed Order to Show Cause to intervene.

Discussion

SummitBridge's Request to Intervene

CPLR 5225(b) states, in pertinent part, as follows (CPLR 5227 states the same): “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 (1st 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).

SummitBridge has established that it is an adverse claimant to the subject property of Falcone that Fieldpoint possesses, and, thus, pursuant to CPLR 5225(b), is entitled to intervene in the instant special proceeding.

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

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

SummitBridge'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.

The court in Aspen Indus. Inc. v Marine Midland Bank, 52 NY2d 575, 579-80 (1981), held, in pertinent part, as follows:

Service of a CPLR 5222 restraining notice confers no priority upon the judgment creditor in the form of a lien on the judgment debtor's property ... Therefore, a judgment creditor serving a restraining notice ordinarily is required to take further steps in enforcing his judgment, such as an execution or levy upon the judgment debtor's property, in order to prevent the intervening rights of third parties from taking precedence over his claim against the judgment debtor ...

Weinstein-Korn-Miller, New York Civil Practice ¶ 5222.21, states that “the service of a restraining notice no longer creates a lien.”

Pursuant to the aforementioned CPLR provision, case law, and commentary, this Court determines that Dontzin has priority over SummitBridge to the property of Falcone that Fieldpoint possesses. The restraining notice that SummitBridge served upon Fieldpoint on October 28, 2019 neither constitutes a lien nor confers priority upon SummitBridge over Dontzin to the subject property of Falcone that Fieldpoint possesses.

Therefore, this Court will determine adverse claims to the extent of declaring that Dontzin has priority over SummitBridge to the property of Falcone that Fieldpoint currently possesses.

Conclusion

Thus, for the reasons stated herein, this Court grants the instant motion (Seq. No. 002) by non-party SummitBridge National Investments VII, LLC (“SummitBridge”) to the following extent: (1), pursuant to CPLR 5225(b) and/or 5227, permitting SummitBridge to intervene in the instant special proceeding; and (2), pursuant to CPLR 5239, declaring that petitioner, Dontzin Nagy & Fleissig LLP (“Dontzin”), has priority over SummitBridge to the property of non-party Philip Falcone that respondent, Fieldpoint Private Securities, Inc. (“Fieldpoint”), possesses. The Clerk is hereby directed to amend the file to reflect SummitBridge’s intervention and to enter provisional judgment declaring as set forth in this paragraph.

Arthur
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Engoron
Digitally signed by Arthur F. Engoron
DN: C=US, OU=NY County Supreme Court, O=New York State Courts, CN=Arthur F. Engoron, E=AENGORON@NYCOURTS.GOV
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ARTHUR F. ENGORON, J.S.C.

3/22/2021
DATE

CHECK ONE:

CASE DISPOSED
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 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

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