

RSB Bedford Assoc. LLC v Ricky's Williamsburg, Inc.

2022 NY Slip Op 30230(U)

January 10, 2022

Supreme Court, New York County

Docket Number: Index No. 653647/2018

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

RSB BEDFORD ASSOCIATES LLC,
Plaintiff,

- v -

RICKY'S WILLIAMSBURG, INC., RICKY'S HOLDINGS,
INC., RICKY'S GROUP, INC., and GLENN NUSSDORF

Defendants.

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INDEX NO. 653647/2018
MOTION DATE 03/24/2021
MOTION SEQ. NO. 003

DECISION, ORDER +
JUDGMENT ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58,
59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86,
87, 88, 89, 90, 91, 92

were read on this motion to/for SUMMARY JUDGMENT/DEFAULT JUDGMENT .

I. INTRODUCTION

This is an action to enforce a judgment entered on July 20, 2012, in favor of the plaintiff
in the action captioned RSB Bedford Associates, LLC v Ricky's Williamsburg, Inc d/b/a/
Ricky's NYC and Ricky's Holdings, Inc., Index No. 602303/2009 (the underlying action),
against defendants Ricky's Williamsburg, Inc. (Ricky's Williamsburg), and Ricky's Holdings,
Inc. (Ricky's Holdings, and together with Ricky's Williamsburg, the judgment debtors), jointly
and severally, for the total sum of \$1,048,708.97. The defendant Glenn Nussdorf (Nussdorf)
moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as against him.
The plaintiff opposes the motion and cross-moves pursuant to CPLR 3215 for leave to enter a
default judgment against defendant Ricky's Group, Inc. (Ricky's Group), in the principal sum of
\$1,048,708.97 on the first, second, and third causes of action of the complaint. The plaintiff

further seeks an order pursuant to CPLR 603 and CPLR 3215(a) severing the claims against defendant Ricky's Group. No opposition is submitted to the plaintiff's cross-motion.

For the following reasons, defendant Nussdorf's motion is denied and the plaintiff's cross-motion is granted.

II. BACKGROUND

A. The Underlying Action and Judgment

Ricky's is a chain of beauty supply stores that operates in New York City. One Ricky's store, Ricky's Williamsburg, previously leased property from the plaintiff in Brooklyn pursuant to a commercial lease agreement (the lease). Ricky's Holdings guaranteed the lease pursuant to a guaranty agreement (the guaranty). The guaranty executed by Ricky's Holdings provides that it shall be binding upon the guarantor's "heirs, personal representatives, successors, and assigns, as the case may be."

The plaintiff brought the underlying action to recover damages for the alleged breach of the subject lease and guaranty. By order dated April 12, 2010, the court (Fried, J.) granted the plaintiff summary judgment on the issue of liability as against Ricky's Williamsburg and Ricky's Holdings. The court referred the issue of damages to a special referee to hear and report. On July 20, 2012, a judgment in the sum of \$1,048,708.97 (the judgment) was entered against the judgment debtors. On December 24, 2013, the Appellate Division, First Department unanimously affirmed the judgment. The judgment was never satisfied.

In an effort to enforce the judgment, the plaintiff served the judgment debtors with information subpoenas and subpoenas *duces tecum* in December 2014. In response, the plaintiff received information about an HSBC bank account belonging to Ricky's Holdings (the HSBC

account). As of January 2010, that bank account had a balance of more than \$1.3 million. By January 2011, the account was depleted to only \$374.03. Within the year between January 2010 and January 2011, on March 31, 2010, Ricky's Group was formed.

No further enforcement proceedings were taken until October 26, 2017, when the plaintiff served supplemental subpoenas to ascertain further details regarding the nature of the relationship between Ricky's Holdings and Ricky's Group. Ricky's Holdings did not respond. Ricky's Group provided no documents and categorically objected to virtually every question. Consequently, the plaintiff moved to compel Ricky's Holdings and Ricky's Group to comply with the subpoenas. While Ricky's Holdings did not respond to the motion, Ricky's Group opposed it, arguing it was a third-party that should not be compelled to participate in post-judgment disclosure. The court (Friedman, J.) denied the plaintiff's application without prejudice to its commencing a special proceeding to enforce the judgment pursuant to article 52 of the CPLR.

B. Allegations of Judgment Evasion

The plaintiff states that, at the time it commenced the underlying action, millions of dollars flowed through Ricky's Holding's bank account each month. However, just before the judgment was issued, all assets were siphoned out of Ricky's Holdings and the company ceased operations. Based on information it acquired in the course of post-judgment enforcement proceedings, the plaintiff contends that Ricky's Group stepped into the shoes of Ricky's Holdings and carried out the operations of Ricky's Holdings under the name Ricky's Group. The plaintiff described this conduct as a game of "asset whack-o-mole." Accordingly, the plaintiff asserts that Ricky's Group is liable for the judgment debt of Ricky's Holding as its successor in interest.

The record demonstrates that prior to the entry of judgment, the HSBC account served as an operating account for various Ricky's stores, which generally maintained a substantial balance. To be sure, prior to the court granting the plaintiff summary judgment in the underlying action, the average monthly closing balance for the HSBC account was about \$500,000.00. Further, between January and June 2010, approximately \$3,000,000.00 – \$3,500,00.00 flowed through the HSBC account each month. However, by July 29, 2010, only \$36,957.17 remained in the HSBC account. The plaintiff submits that Ricky's "cleaned out" the HSBC account via atypical transactions. For example, the record demonstrates that in July 2010 alone Ricky's Holdings issued 300 checks, for a total sum in excess of \$2,000,000.00. The HSBC account continued to dwindle over the course of 2010 and had a balance of merely \$6,799.03 as of December 13, 2010. At such time, according to the plaintiff, Ricky's stores continued to operate throughout New York City.

Ricky's Group, an entity with the same chief executive officer and principal executive office as Ricky's Holdings, was formed on March 31, 2010. In an affidavit submitted in the underlying action, the president of Ricky's Group confirmed that two payments were made from Ricky's Holdings to Ricky's Group during the pendency of the underlying litigation. However, the president failed to provide any explanation or further detail with regard to the payments. Ricky's Group also funded the judgment debtors' legal expenses in connection with the underlying litigation.

On January 13, 2014, and January 14, 2014, weeks after the Appellate Division, First Department affirmed the judgment, the three corporate defendants in this action filed UCC Financing Statements (UCC-1 filings or liens) naming defendant Nussdorf as the secured party. Nussdorf is the CEO of Ricky's Holdings and, until recently, was the CEO of Ricky's Group.

The plaintiff avers that the subject UCC-1 filings were “intended to frustrate [its] ability to collect the [j]udgment.”

C. The Instant Action

The plaintiff commenced this action on July 20, 2018, by filing of a summons with notice. On January 11, 2019, the plaintiff filed the complaint, alleging, in sum, that the defendants participated in a scheme to evade the judgment entered against the judgment debtors. The complaint asserts seven causes of action: (1) a declaration that Ricky’s Group is the successor-in-interest to Ricky’s Holdings and is liable for the subject judgment, plus statutory interest (the first cause of action); (2) successor liability/*de facto* merger as against Ricky’s Group, finding it liable for the debts of its predecessor, Ricky’s Holdings, including the subject judgment (the second cause of action); (3) alter ego liability as against Ricky’s Group (the third cause of action); (4) fraudulent conveyance pursuant to Debtor and Creditor Law (DCL) § 273-a as against Ricky’s Group (the fourth cause of action); (5) fraudulent conveyance pursuant to DCL § 273-a as against Nussdorf (the fifth cause of action); (6) fraudulent conveyance pursuant to DCL § 276 as against Ricky’s Group (the sixth cause of action); and (7) fraudulent conveyance pursuant to DCL § 276 as against Nussdorf (the seventh cause of action).

In lieu of filing an answer, on March 15, 2019, defendants Ricky’s Group and Nussdorf moved pursuant to CPLR 3211 to dismiss the complaint. By order dated May 1, 2020, the court denied the pre-answer motion to dismiss and directed the movants to file an answer within 45 days. On June 15, 2020, defendant Nussdorf filed an answer in which he denies or disputes the plaintiff’s claims and asserts five affirmative defenses. As relevant to the instant motions, Nussdorf’s second affirmative defense is that the plaintiff’s fifth and second causes of action are

moot because the subject UCC liens are not currently in force and effect. Defendant Ricky's Group did not file an answer.

By amended order dated September 10, 2020, the court granted the application of counsel for Ricky's Group to be relieved on the grounds that Ricky's Group was no longer in business and had no assets. The court further advised that "any corporation or limited liability company must appear by an attorney (see CPLR 321[a])." The court also imposed a 30-day stay as against Ricky's Group. No notice of appearance was filed. The instant motion and cross-motion ensued.

III. DISCUSSION

A. Defendant Nussdorf's Motion

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-

Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) (quoting Nesbitt v Nimmich, 34 AD2d 958, 959 [2nd Dept. 1970] [internal citations omitted]).

In support of his motion, defendant Nussdorf submits an attorney's affirmation, the relevant pleadings, the UCC-1 filings of Ricky's Williamsburg, Ricky's Holdings, and Ricky's Group, a series of UCC-3 filings continuing and then terminating the effectiveness of the UCC-1 filing with respect to Ricky's Group, and copies of search results generated on the Department of State's UCC Online Database. Nussdorf submits that the foregoing evidence demonstrates that all UCC-1 filings either lapsed or were terminated between January 13, 2019, and May 13, 2020. He contends that because all liens have either lapsed or terminated, the fifth and seventh causes of action of the complaint are rendered moot. Thus, he argues, the complaint fails to state a cause of action as against him and the plaintiff already received any and all relief it requested as against him.

Defendant Nussdorf does not meet his initial burden on a motion for summary judgment. He fails to support his application "with an affidavit . . . by a person having knowledge of the facts," as expressly required by CPLR 3212(b). This defect is not cured by the affidavit he submits for the first time on reply. To be sure, it is well-settled that a reply affidavit "may not be considered for the purpose of showing *prima facie* entitlement to summary judgment." Batista v Santiago, 25 AD3d 326 (1st Dept. 2006) (citing Azzopardi v Am. Blower Corp., 192 AD2d 453 [1st Dept. 1993]). Nor is the foregoing defect cured by the affirmation of counsel insofar as counsel claims no personal knowledge of the underlying facts. Thus, the affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

Further, where, as here it appears that the facts essential to oppose a motion for summary judgment “exist but cannot then be stated” (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.” Wesolowski v St. Francis Hospital, *supra* at 526 (internal quotation marks omitted); see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012). It is even more the case where the plaintiff establishes a sufficient evidentiary basis supporting the need for further discovery. See Vukel v Joan DiGirolomo Irrevocable Tr., 172 AD3d 951 (2nd Dept. 2019); Glob. Mins. & Metals Corp. v Holme, 35 AD3d 93 (1st Dept. 2006) (citing Ruttura & Sons Constr. Co. v Petrocelli Constr., 257 AD2d 614 [2nd Dept. 1999]; Jones v New York City Tr. Auth., 166 AD2d 293 [1st Dept. 1990]).

As of the date of this order, no discovery has been completed and no preliminary conference has taken place. Further, while the court does not condone the plaintiff’s failure to serve any discovery demands in this action after issue had been joined, the record makes plain that the plaintiff has been met with, at minimum, some degree of recalcitrance in its efforts to obtain information pertaining to the relationship between Ricky’s Holdings and Ricky’s Group in the underlying action. The plaintiff establishes a sufficient evidentiary basis supporting the need for further discovery insofar as its submissions raise the questions of, *inter alia*, whether Nussdorf ever foreclosed on the liens and whether such foreclosure stripped Ricky’s Group of its assets. Such information is relevant to the plaintiff’s fraudulent conveyance claims.

For these reasons, defendant Nussdorf’s motion pursuant to CPLR 3212 must be denied on the papers submitted.

The parties are reminded that summary judgment motions do not stay disclosure and the plaintiff is cautioned that the failure to proceed expeditiously with discovery may subject it to sanctions, including striking of the complaint. See CPLR 3216.

B. The Plaintiff's Cross-Motion

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). While the “quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

The plaintiff submits in support of its cross-motion, *inter alia*, the complaint, an affirmation pursuant to CPLR 2106(b) of Jonathan Bernstein, a member of plaintiff, an attorney’s affirmation, the guaranty, the judgment and related orders in the underlying action, subpoenas sent in the underlying action, excerpts of document production by the judgment debtors in the underlying action, UCC-1 filing statements, and a copy of the New York State Department of State (DOS) Division of Corporations entity information page for Ricky’s Group.

The proof submitted is sufficient to demonstrate entitlement to relief on the first cause of action seeking a declaration that Ricky’s Group is the successor in interest to Ricky’s Holdings and is liable for the full amount of the subject judgment, plus statutory interest. Pursuant to

CPLR 3001, the court may “render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed,” (CPLR 3001), for the “primary purpose” of “stabiliz[ing] an uncertain or disputed jural relationship with respect to present or prospective obligations” (Chanos v MADAC, LLC, 74 AD3d 1007, 1008 [2nd Dept. 2010] [citing Goodman v Reisch, 220 AD2d 383 (2nd Dept. 1995)]; see Touro Coll. v Novus Univ. Corp., 146 AD3d 679 [1st Dept. 2017]).

The subject guaranty, dated August 18, 2008, and executed by Ricky’s Holdings provides, in pertinent part, that Ricky’s Holdings, as guarantor, “unconditionally and irrevocably guarantees . . . prompt payment of the rent . . . whether by acceleration or otherwise, together with all interest thereon, any other sums that become due and owing to [the] [plaintiff] under the [l]ease . . . [and] the full and complete discharge and performance” of all the obligations of Ricky’s Williamsburg under the lease. Further, it expressly binds any “heirs, personal representatives, successors, and assigns” of Ricky’s Holdings. The plaintiff presents evidence including financial statements related to the HSBC account, UCC filings, DOS filings, and sworn pleadings in the underlying action indicating that when Ricky’s Holdings became insolvent, its assets and operations were transferred to Ricky’s Group, which shared the same principal place of business and CEO with Ricky’s Holdings and continued to pay the judgment debtors’ legal fees in the underlying action. The proof establishes, *prima facie*, that Ricky’s Group is the successor in interest to Ricky’s Holdings inasmuch as it sufficiently demonstrates, *inter alia*, continuity of ownership, management, assets, and general business operations. See Fitzgerald v Fahnestock & Co., 286 AD2d 573 (1st Dept. 2001) (citing Sweatland v Park Corp., 181 AD2d 243 [4th Dept. 1992]); Cargo Partner AG v Albatrans, Inc., 352 F3d 41 (2d Cir. 2003) (citations

omitted). As successor in interest of Ricky's Holdings, Ricky's Group is bound by the subject guaranty and is liable for the judgment in the sum of \$1,048,708.97, plus costs and statutory interests from July 20, 2012. Having failed to answer, Ricky's Group is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70–71 (2003).

For identical reasons, the plaintiff is also entitled to judgment on the second cause of action, which seeks to enforce the judgment as against Ricky's Group on the theory of successor liability/*de facto* merger.

Finally, the plaintiff is entitled to judgment on the third cause of action, which seeks to enforce the judgment as against Ricky's Group on the theory of alter ego liability. Such liability exists "when any abuse of the corporate form is exercised for the purpose of working an inequity on another." Tap Holdings, LLC v Orix Finance Corp., 109 AD3d 167, 175 (1st Dept. 2013). The plaintiff's assertion, supported by evidence, that Ricky's Group was formed specifically to evade the judgment by siphoning the assets of Ricky's Holdings so that there would be nothing for the plaintiff to collect is sufficient in this regard.

As in this case, CPLR 3215(a) requires that when a default judgment is taken against fewer than all the defendants, the action is severed as against the remaining defendants. See Woodson v Mendon Leasing Corp., *supra*; see also Balanta v Stanline Taxi Corp., 307 AD2d 1017 (2nd Dept. 2003); Holt v Holt, 262 AD2d 530 (2nd Dept. 1999). Thus, the action is severed as against defendants Nussdorf, Ricky's Williamsburg, Inc., and Ricky's Holdings, Inc.

Additionally, CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims." The decision to sever claims is left to the discretion of the trial court. See Haber v Cohen, 74 AD3d 1281 (2nd Dept. 2010). The court

deems severance of the plaintiff's first cause of action against defendant Ricky's Group pursuant to CPLR 603 appropriate to avoid prejudice to the plaintiff.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Glenn Nussdorf pursuant to CPLR 3212 for summary judgment dismissing the complaint as against him is denied; and it is further

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment as against defendant Ricky's Group, Inc., is granted, without opposition; and it is further

ADJUDGED AND DECLARED that defendant Ricky's Group, Inc., is the successor in interest of defendant Ricky's Holding, Inc., and is liable for the judgment entered against Ricky's Holding, Inc., in the sum of \$1,048,708.97, plus costs and statutory interests from July 20, 2012; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendant Ricky's Group, Inc., in the sum of \$1,048,708.97, plus costs and statutory interests from July 20, 2012; and it is further

ORDERED that the action is severed and shall continue as against the remaining defendants; and it is further

ORDERED that so much of the first cause of action as seeks relief against the remaining defendants is severed and shall continue; and it is further

ORDERED that the remaining parties shall immediately confer, commence discovery, and appear for a preliminary conference on March 17, 2022, at 12:30 pm, to be conducted via

Microsoft Teams, the instructions and access information for which will be provided by the Part
42 Clerk; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision, Order, and Judgment of the court.

DATED: January 10, 2022



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON