

Sage Realty Corp. v Walsh

2022 NY Slip Op 30597(U)

February 17, 2022

Supreme Court, New York County

Docket Number: Index No. 158983/2021

Judge: Nancy M. Bannon

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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. NANCY BANNON PART 42

Justice

-----X

SAGE REALTY CORPORATION

Petitioner,

- v -

ANDREW WALSH,

Respondent.

-----X

INDEX NO. 158983/2021
MOTION DATE 12/15/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23

were read on this motion to/for TURNOVER PROCEEDING

On July 28, 2020, the petitioner, Sage Realty Corporation, entered a judgment in the principal sum of \$2,752,763.25 against non-party ERG Property Advisors, LLC (the judgment debtor). No part of the judgment has been satisfied. The petitioner brings this proceeding pursuant to CPLR 5225 and 5227 to satisfy the judgment by means of a directive that the respondent, Andrew Walsh, pay to it a debt he allegedly owes to the judgment debtor upon maturity. The respondent opposes the petition. For the following reasons, the petition is granted.

On December 10, 2020, the judgment debtor and an entity named ERG Capital Advisors, LLC (ERGCA), commenced an action against the respondent in the Supreme Court of the State of New York, County of Nassau, under Index No. 614326/2020 (the Nassau County action). In the Nassau County action, the judgment debtor alleged that the respondent breached two promissory notes (the notes) with the judgment debtor and ERGCA, respectively, in the aggregate sum of \$400,000.00. The notes were purportedly issued in connection with the respondent's acquisition of a 20% interest in the judgment debtor in or around January 1, 2017. According to the judgment debtor and ERGCA, the respondent defaulted in making payments under the notes and owed them \$150,000.00 under each note. The respondent denied the allegations.

On September 30, 2021, the petitioner commenced this proceeding, claiming that any payment of any debt owed by the respondent to the judgment debtor in the Nassau County action must be made to the petitioner instead. On or about October 1, 2021, the respondent indicates that he entered into a settlement agreement with the judgment debtor resolving the judgment debtor's claims in the Nassau County action. Pursuant to the terms of the settlement,

the respondent purportedly agreed to relinquish his 20% equity interest in the judgment debtor and abandon any claim to repayment of funds he had paid towards such interest. The court notes that the respondent has belatedly submitted only disparate portions of the relevant settlement agreement and that such portions do not reveal the consideration exchanged by the respondent and the judgment debtor. The judgment debtor discontinued the Nassau County action with prejudice on November 2, 2021.

CPLR 5225(b) provides, in relevant part, that

“[u]pon 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.”

CPLR 5527 similarly provides, in relevant part, that

“[u]pon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor.”

A cause of action in favor of a judgment debtor against a third party is an asset leviable by a judgment creditor by means of a proceeding under CPLR 5525 or 5527. See ABKCO Industries, Inc. v Apple Films, Inc., 39 NY2d 670 (1976); Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V., 41 AD3d 25 (1st Dept. 2007). Contrary to the respondent’s contentions, there is no requirement under the applicable caselaw that a cause of action have concluded in a money judgment in the judgment debtor’s favor before the judgment creditor can avail itself of such a proceeding. See, e.g., CSX Transportation, Inc. v Island Rail Terminal, Inc., 879 F3d 462 (2nd Cir. 2018) (applying New York law) (directing third party garnishees who settled claims brought against them by judgment debtor to turn over funds paid in settlement to judgment creditor); see also Ray v Jama Productions, Inc., 74 AD2d 845 (2nd Dept. 1980) (fact that judgment debtor would directly benefit from payment of sum under an entertainment contract sufficient to require party to contract served with restraining notice to comply with its provisions). The petitioner was within its rights as the judgment creditor to pursue assignment

for its own benefit of the judgment debtor's claims against the respondent under the notes when it commenced this proceeding.

Further, shares of stock in a corporation or certificates evidencing an ownership interest in a limited liability company are included in the statutory definition of personal property that a judgment creditor can recover under CPLR 5525(b). The court may direct the current holder of such shares or certificates to execute appropriate instruments to enable the sheriff or a city marshal to liquidate the shares or certificates, and deliver shares or certificates to the sheriff or city marshal for sale, in order that the proceeds of sale are applied to the satisfaction of the judgment. See Samuels v Samuels, 99 AD2d 986 (1st Dept. 1984); Jack London Prods. v Samuel Bronston Prods., 22 AD2d 870 (1st Dept. 1964); see also Greene Major Holdings, LLC v Trailside At Hunter, LLC, 148 AD3d 1317 (3rd Dept. 2017). Accordingly, insofar as the judgment debtor demanded, and the respondent agreed to, the return of the respondent's equity stake to satisfy his alleged debt, such equity stake is properly recoverable by the petitioner.

To the extent that the respondent did turn over his shares and any other consideration to the judgment debtor, the timeline of events presented by the parties raises questions as to whether the respondent did so in violation of a restraining notice the petitioner served on him on October 14, 2021. The court notes that a garnishee that violates a restraining notice may be liable to an aggrieved judgment creditor if the creditor establishes that it "sustained damages as a result of the garnishee's disobedience of the notice." Aspen Industries, Inc. v Marine Midland Bank, 52 NY2d 575, 581 (1981). At this juncture, however, no application for damages for violation of the subject restraining notice has been properly made. Nor is it apparent from the parties' submissions whether the respondent actually turned over all consideration it agreed to transfer to the judgment debtor under the settlement agreement. Thus, the court does not pass on the issue of the respondent's liability, if any, on the basis of any alleged violation of the restraining notice.

If the consideration agreed to under the settlement agreement has, in fact, been transferred to the judgment debtor in its entirety, the petitioner may make an application for a further judgment against the respondent as the proof on the issue of the respondent's alleged violation of the restraining notice would justify.

Accordingly, and upon the foregoing papers, it is

ORDERED that the petition is granted, and the respondent, Andrew Walsh, is directed, within 45 days of this order, (1) to deliver to the Sheriff of the City of New York or to a City Marshal, all of the shares or certificates representing, evidencing, or reflecting any and all ownership interest of ERG Capital Advisors, LLC, and (2) to deliver to the petitioner the value of any other consideration he agreed to transfer to ERG Capital Advisors, LLC, pursuant to the settlement agreement dated October 1, 2021, each in order to satisfy the judgment dated July 28, 2020, up to the sum of \$2,752,763.25; and it is further

ORDERED that if such shares or certificates representing, evidencing, or reflecting any and all ownership interest of Andrew Walsh in ERG Capital Advisors, LLC, are delivered to a City Marshal, Andrew Walsh and ERG Capital Advisors, LLC, shall immediately notify the petitioner, in writing, of the identity and contact information of that City Marshal; and it is further

ORDERED that Andrew Walsh and ERG Capital Advisors, LLC, are restrained and enjoined from transferring or encumbering the subject shares and certificates pending their delivery to Sheriff of the City of New York or to a City Marshal; and it is further

ORDERED that the petitioner shall serve a copy of this order upon Andrew Walsh and ERG Capital Advisors, LLC, by regular and certified mail, return receipt requested, within 10 days of this order.

This constitutes the Decision and Order of the court.


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

2/17/2022
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE