

Matter of 624 W. 47th St., LLC v Morgan Stanley

2022 NY Slip Op 31307(U)

April 22, 2022

Supreme Court, New York County

Docket Number: Index No. 153114/2021

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

Justice

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In the Matter of

624 WEST 47TH STREET, LLC

Petitioner,

- v -

MORGAN STANLEY,

Respondent.

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INDEX NO. 153114/2021

MOTION DATE 04/19/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26 were read on this motion to/for POST JUDGMENT OTHER/APPOINT RECEIVER.

This is a proceeding pursuant to CPLR 5225(b), pursuant to which the petitioner, 624 West 47th Street, LLC, sought to compel the respondent, Morgan Stanley, to turn over funds that it holds in accounts maintained in the name of Selvant Investing Group, Ltd. (Selvant). By order and judgment dated January 21, 2022, this court granted the petition, and directed Morgan Stanley to turn over the sum of \$306,902.03, plus simple interest at 9% per annum from September 10, 2020, from accounts maintained at Morgan Stanley in the name of Selvant, including, but not limited to, accounts ending in the numbers 163, 254, and 128. Moreover, the court also directed Morgan Stanley to restrain the additional amount of \$83,650.30, pending further order of the court, to protect the petitioner's right to collect an award of attorneys' fees and disbursements that was likely to be approved by this court.

The petitioner now moves pursuant to CPLR 5228 for the court to appoint it as a receiver over those accounts, with authority to liquidate a portion of one or more of those accounts so that the proceeds of liquidation can be allocated to satisfying its judgment against Alexander Boyko in a related action. No party or other person opposes the motion. The motion is granted.

The facts of this dispute are set forth in some detail in this court's January 21, 2022 order and judgment. In short, on September 10, 2020, the petitioner obtained a money judgment against Boyko in the Supreme Court, New York County, in the principal sum of \$306,902.03 in an action entitled *624 West 47th Street, LLC v Flom*, under Index No. 653320/2017 (the underlying action). On October 21, 2021, a referee appointed by this court in that action recommended that the petitioner be awarded the sum of \$83,650.30 in attorneys' fees. The petitioner learned that Boyko had been an owner, and remains an officer and signatory, of Selvant, that he paid personal debts from Selvant's accounts, and that Selvant held three accounts with Morgan Stanley. Hence, this court restrained the transfer of those accounts, and authorized the petitioner to satisfy its judgment against Boyko from those accounts.

After this court issued its January 21, 2022 order and judgment directing Morgan Stanley to turn over Selvant's assets to the petitioner, Morgan Stanley informed the petitioner that Selvant's accounts were not cash accounts that simply could be turned over. Morgan Stanley explained that Selvant's assets were held in three hedge fund accounts that Selvant maintained with Alkeon Growth Offshore Ltd. (\$706,656.76), Coatue Offshore (\$795,327.17), and Shannon River, Ltd. (\$648,359.59). Consequently, to be able to satisfy the judgment in the underlying action, a portion of one or more of those hedge funds must be liquidated. Morgan Stanley cannot unilaterally liquidate those accounts. Hence, the appointment of a receiver is necessary to effectuate the liquidation and consequent turnover of the proceeds.

The underlying action was one to recover on a personal guaranty of a commercial lease of real property in Manhattan. By executing the guaranty in New York, Boyko voluntarily submitted to personal jurisdiction of this court, including jurisdiction over assets he holds, or over which he has control, in New York (*see Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 312 [2010]). Where, as here, "a court acquires jurisdiction over the person of one who owns or controls property, it is equally well settled that the court[] can compel observance of its decrees

by proceedings *in personam* against the owner within the jurisdiction” (*id.* [citation and internal quotation marks omitted]).

Upon motion of a judgment creditor,

“the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment”

(CPLR 5228[a]). “While a judgment creditor may be appointed receiver, ‘he shall not be entitled to compensation’” (*Patterson Belknap Webb & Tyler LLP v Stewart*, 2016 NY Slip Op 31645[U], *3, 2016 NY Misc LEXIS 3155, *4-5 [Sup Ct, N.Y. County, Aug. 29, 2016], quoting CPLR 5228[a]; see *Chlopecki v Chlopecki*, 296 AD2d 640, 641 [3d Dept 2002] [remitting to Supreme Court for appointment of judgment creditor as receiver]; *Franklin Natl. Bank v Hall*, 51 Misc 2d 736, 737 [Sup Ct, Queens County 1966] [judgment creditor may be appointed as receiver of judgment debtor’s property]).

“The appointment of a receiver pursuant to CPLR 5228(a) is ‘entirely a matter of discretion.’ *Drucker v Drucker*, 53 Misc 2d 446 (Sup. Ct. 1967). A receiver should only be appointed ‘when a special reason appears to justify one.’ *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 (2010). In deciding whether the appointment of a receiver is justified, courts have considered the ‘(1) alternative remedies available to the creditor . . . ; (2) the degree to which receivership will increase the likelihood of satisfaction . . . ; and (3) the risk of fraud or insolvency if a receiver is not appointed.’ *Id.* (internal citation omitted). ‘A receivership has been held especially appropriate when the property interest involved is intangible, lacks a ready market, and presents nothing that a sheriff can work with at an auction, such as the interest of a psychiatrist/judgment debtor in a professional corporation of which he is a member.’ Siegel, N.Y. Prac. § 512 (5th ed.); *Udel v Udel*, 82 Misc 2d 882, 884 (NY City Civ Ct 1975)”

(*Patterson Belknap Webb & Tyler LLP v Stewart*, 2016 NY Slip Op 31645[U], *3, 2016 NY Misc LEXIS 3155, *5).

The petitioner established that the three hedge funds in which Selvant maintains its accounts at Morgan Stanley cannot easily or readily be liquidated or converted into cash by a sheriff at an asset sale or by Morgan Stanley itself. It has demonstrated that it would be appropriate for the court to appoint it as the receiver of those funds. Moreover, “with the appointment of [the petitioner] as receiver, there can be no viable claim that additional funds will

be dissipated because [it] will not be entitled to any compensation for [its] role since [it] is also a judgment creditor” (*Chlopecki v Chlopecki*, 296 AD2d at 642).

The petitioner has informed the court that the sum of \$287,586.01 remains due and owing on the \$306,902.03 judgment. The court notes that the attorneys’ fee award of \$83,650.30 has yet to be confirmed, but that it is likely to confirm the award shortly. The court further notes that, by order dated April 22, 2022, it imposed a sanction on Boyko in the sum of \$10,533.34 in the underlying action to punish him for his contempt. Those additional sums must be accounted for in both the continued restraint upon Selvant’s accounts and the final order appointing the petitioner as receiver and describing the scope of its authority.

Accordingly, it is

ORDERED that the petitioner’s motion is granted; and it is further,

ORDERED that a total restraint upon transferring or encumbering the subject accounts held by Morgan Stanley remains in full force and effect.

Settle order appointing 624 West 47th Street, LLC, as receiver and enumerating the nature and scope of its authority over the subject accounts.

This constitutes the Decision and Order of the court.

4/22/2022
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE