

<b>Capital Advance Servs., LLC v Zomongo.tv USA Inc.</b>
2022 NY Slip Op 31486(U)
May 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 1229/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
CAPITAL ADVANCE SERVICES, LLC,

Plaintiff,  
-against-

Index No.: 1229/2018  
Motion No.: 01

ZOMONGO.TV USA INC. D/B/A ZOMONGO.TV  
USA, and JEREMY GENE OSTROWSKI and  
JOCELYNE LISA HUGHES-OSTROWSKI,

**DECISION AND ORDER**

Defendants.

-----X  
Recitation, as required by CPLR § 2219(a), of the papers considered in the review of  
the defendants' motion.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 5-54, 56-60, and 62-72 were read on the defendants' motion.

The defendants, Zomongo.tv USA Inc. D/B/A Zomongo.Tv USA (Zomongo), Jeremy Gene Ostrowski and Jocelyne Lisa Hughes-Ostrowski, seek an order striking an execution and levy served upon non-party BMO Harris Bank (Harris Bank) by or at the direction of the plaintiff, Capital Advance Services, LLC (Capital), pursuant to CPLR §§ 5015(a) and 5240, and for restitution under CPLR § 5015(d).

The defendant, Zomongo, was in the business of purchasing bulk advertising segments for a discounted price and would in turn sell the advertising spots for a profit. In order to finance its business Zomongo accepted financing and cash infusions from Capital. Two cash advances from Capital to Zomongo are at issue here, which were memorialized in two written agreements. The defendants allege that Capital breached the agreements by failing to deliver the amount of cash promised, withdrew unauthorized amounts from Zomongo's bank account, refused reconciliation, and collected payments at an accelerated rate that was not authorized by the agreements, and filed for judgment by confession when the defendants were not in default.

The gravamen of the defendants' claim is that Capital collected \$953,349.70, which Capital alleged it was owed by the defendants via execution and levy from Harris Bank, which was served by a New York City Marshal, Stephen Biegel. The defendants assert that the execution and levy were served outside the scope of Marshal Biegel's authority under New York City Civil Court Act (NYCCA) § 1609 which, inter alia, only permits a Marshal to serve entities within the City of New York, in person. The execution and levy at issue was served by facsimile to Harris Bank, which is located in Illinois, and does not have a branch in New York. It restrained Zomongo's bank account, which was opened and maintained in Arizona.

The defendants further argue that the execution and levy also violated New York's separate entity rule which requires that in order to be valid, restraining notices, levies and other judgment enforcement devices must be served upon the branch where the judgment-debtor's accounts were opened and maintained. The defendants argue that Marshal Biegel did not have the authority or the jurisdiction to issue the execution and levy, and it was void ab initio, requiring vacatur and restitution to the defendants in the sum of \$953, 349.70 plus interest from May 30, 2018, including costs and disbursements and attorneys' fees for the instant motion.

The plaintiff opposes the motion, arguing that the defendants' claim is time-barred because it was not made within a reasonable time after service of the post-adjustment execution device. It further argues that the defendants' assertion that Marshal Biegel did not properly serve the execution and levy on Harris Bank must fail because the defendants lack standing to object to when, where or how Harris Bank was served because the bank alone has standing to make such objections. It asserts that Harris Bank waived its objections, and that in any event Harris Bank's deposit account terms included a waiver of such objections by the defendants. Capital argues that Zomongo lacks capacity to seek any type of redress in court under Delaware Law and N.Y. BCL § 1301(a) because its corporate charter was forfeited. Finally, Capital contends that the individual defendants, Jeremy Gene Ostrowski and Jocelyne Lisa Hughes-Ostrowski, lack standing to file a motion seeking vacatur of the execution on Zomongo's bank account or for restitution of funds belonging to Zomongo, and that even assuming that the defendant had the standing and capacity, and made the motion in a timely manner, their request for restitution must fail because CPLR § 5015(d) does not apply to judgments by confession or to executions and levies. According to Capital, absent a prior order vacating the underlying judgment by confession in a plenary action, the funds collected post-judgment are still due and owing by the defendants to Capital.

Capital is a limited liability company principally doing business in New York, and its business consists of purchasing future accounts receivables from other businesses for an upfront lump sum. Zomongo was a Delaware corporation doing business in the United States, with its headquarters located in Arizona. Jeremy Gene Ostrowski and Jocelyne Lisa Hughes-Ostrowski were the owners and operators of Zomongo. According to the parties' submissions, the plaintiff and Zomongo entered into an agreement on February 12, 2018, to sell a portion of future receivables in the amount of \$449,700.00 for an upfront lump sum of \$300,000.00 from Capital. On April 11, 2018, Capital and Zomongo entered into a second agreement wherein Capital purchased \$861,925.00 in future receivables for the sum of \$575,000.00. Capital alleges that it was agreed that \$369,558.00 of the balance outstanding from the February agreement would be applied to pay a portion of the purchase price, and that the February agreement would be superseded by the April agreement. Mr. Ostrowski and Ms. Hughes-Ostrowski each executed confessions of judgement in the event of a default by the defendants under the terms of the April

agreement. Capital alleges that Zomongo subsequently breached the agreement, and thereafter, Capital filed a judgment by confession in the sum of \$908,358.99 in its favor, inclusive of attorneys' fees, interest and costs. A writ of execution was issued to the New York City Marshal to execute the judgment on any bank holding assets belonging to Zomongo.

In reply to the plaintiff's arguments, the defendants contend that a legal nullity by statute, i.e. CPLR § 5232 and NYCCA § 1609, can never be overcome by consent, waiver or otherwise; that a judgement-debtor, as interested parties, always have standing to object to post-judgment enforcement mechanisms; that a motion based on CPLR § 5015(4) for lack of jurisdiction has no time limitation; that the separate entity rule applies; that defendants have legal capacity to bring the instant motion; that Capital is required to pay restitution if the execution and levy are vacated; and that Capital would not be entitled to a turnover order by the court directing the funds to be paid to Capital nunc pro tunc for sums due and owing, because Capital never conferred jurisdiction over the garnishee or the property.

"CPLR Article 52 sets forth procedures for the enforcement of money judgments in New York, which may include the imposition of a restraining notice against a judgment debtor's bank account to secure funds for later transfer to the judgment creditor through a sheriff's execution or turnover proceeding." *See Cruz v TD Bank, N.A.*, 22 NY3d 61, 66 (2013). Specifically, CPLR § 5240 provides that the court may "at any time, on its own initiative or the motion of any interested person...make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure," and grants the court substantial authority to order equitable relief. *See Cruz*, 22 NY3d at 75. In *Cruz*, the Court held that relief under CPLR § 5240 may be available "even after the assets have been transferred to the judgment creditor," and "the court could reverse the transfer by issuing an order denying the execution and directing restitution by the judgment creditor." *Id.* at 75-76 (internal quotation marks omitted).

Although CPLR § 5240 does not mention the separate entity rule, New York courts employ the rule in circumstances where a bank is served with a restraining notice relating to a judgment debtor's assets held by the bank. According to the rule, even when a bank garnishee is subject to personal jurisdiction, its other branches are to be treated as separate entities with respect to Article 52 post-judgment restraining notices. *See Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149 (2014). As noted in *Motorola*, "[the separate entity rule] is a firmly established principle of New York law" that "a restraining notice or turnover order served on a New York branch will be effective for assets held in accounts at that branch but will have no impact on assets in other branches." *See Motorola*, 24 NY3d at 159,160. In *Motorola*, the Court of Appeals affirmed the viability of the separate entity rule in the international context, but left open the question whether it was applicable to domestic banking, and left undisturbed lower court rulings holding that the separate entity rule could be employed in domestic banking situations. In particular, the Court left in place the holding by the Appellate Division, First

Department in *National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 (1<sup>st</sup> Dept 2000), setting aside the trial court's order vacating a restraining order and order of attachment because the petitioner sought to attach the judgment debtor's assets held in a Florida account by serving a New York branch of the bank. The Court held that the New York courts were without jurisdiction over the Florida bank branch, and service on the New York branch was ineffective to reach the Florida branch accounts.

The issue presented in the instant case is analogous to *National Union* and *Silver Cup Funding LLC v Horizon Health Center, Inc.*, 70 Misc.3d 1201(A) (Sup Ct, Ontario County 2020). In *Silver Cup*, the New York City Marshal filed an execution and levy on a New York City branch of plaintiff's bank. However, the account in question was maintained in a branch located in Hoboken, New Jersey. The funds were collected from the defendant post-judgment. The court took judicial notice that the bank was headquartered in Cherry Hill, New Jersey. The court held that the separate entity rule applied in the domestic context, relying in part on *National Union*, finding that "an execution in levy served on TD Bank's New York City branch is ineffective to reach funds held in its Hoboken, New Jersey branch." *Silver Cup Funding LLC*, 70 Misc.3d at \*3. Further, in *Motorola*, the Court firmly rejected the notion that technological advancements and centralized banking have ameliorated the need for the separate entity rule, citing to *Samsun Logix Corp. v Bank of China*, 31 Misc.3d 1226(A) (Sup Ct, New York County 2011). However, courts have recognized one limited exception to the separate entity rule, finding that service of a restraining notice on a bank's main branch will satisfy the separate entity rule where the bank's main office and the branches where the accounts are located are within the same jurisdiction and the branches are connected to the main office by high-speed computers, which are under the main office's centralized control. See *Therm-X Chemical & Oil Corp. v Extebank*, 84 AD2d 787 (2d Dept 1981); see also *Global Technology, Inc. v Royal Bank of Canada*, 34 Misc3d 1209(A) (Sup Ct, New York County 2012); *National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101.

Applying the foregoing principles to the case at bar, the execution by Capital was improperly issued, as the parties' submissions demonstrate that the execution was served on Harris Bank in Illinois, and the judgment debtors' accounts were located at the Peoria, Arizona branch of Harris Bank, in violation of the separate entity rule. Therefore, the levy based on the improper execution is void. The plaintiff's argument that the separate entity rule is a waivable defense belonging only to the bank, which has not raised an objection, is unavailing. The plaintiff's reliance on *Motorola* in support of its argument is misplaced, as the Court did not hold that the separate entity is a waivable defense. Rather, in responding to *Motorola's* argument that the Court's holding in *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533 (2009) abrogated the separate entity rule, the Court flatly rejected the argument, and distinguished *Koehler*, noting that the facts of *Koehler* were different from those presented in *Motorola* because the case involved delivery of stock certificates, and did not involve bank branches or accounts. The Court also

noted that its decision in *Koehler* was silent on the subject of the separate entity rule because it was not raised as an issue by the bank. The plaintiff does not point to any binding legal authority that stands for the proposition that the separate entity rule is a waivable affirmative defense that precludes the court from considering it.

Likewise, Capital's argument that vacatur of an execution and levy may not be sought under CPLR § 5015(a) because it does not apply to judgments by confession, as it is neither a judgment or order rendered by the court, nor a default judgment, is without merit. CPLR § 5015(a) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct..." The plaintiff relies on *Scheckter v Ryan*, 161 AD2d 344 (1<sup>st</sup> Dept 1990), in support of its argument, however in that case the court made no such pronouncement. It left open the question whether the language of CPLR § 5015 permits the court to relieve a party from a judgment in certain circumstances. In any event, according to the holding of *Cruz v TD Bank, N.A.*, 22 NY3d 61, a judgment debtor may be considered an "interested party," and in the event that the funds were improperly restrained, CPLR § 5240 permits the court to "reverse the transfer by issuing an order denying the execution and directing restitution by the judgment creditor." *Id.* at 76 (internal quotation marks omitted).

Capital's assertion that the defendants' motion is untimely must also be rejected. In support of its argument Capital relies on the recent Court of Appeals decision in *Plymouth Venture Partners, II L.P. v GTR Source, LLC*, 37 NY3d 591 (2021). In *Plymouth*, the Court held that an Article 52 proceeding must be brought within a "reasonable time", however no temporal limitation relating to bringing such a proceeding was set by the court. *Id.* at 604. As the defendants correctly point out, the Court in *Cruz* specifically noted that there is no "concrete temporal limitation for initiation of a CPLR § 5240 proceeding", which is mostly "equitable in nature," and reiterated that such relief should be pursued "within a reasonable time after the injury is incurred..." See *Cruz*, 22 NY3d 61 n 4. The Court in *Plymouth* did not expound upon the issue of what constitutes "a reasonable time," as the plaintiff seems to suggest.

That prong of the defendants' motion seeking attorneys' fees relating to the making of this motion must be denied, as it requires the initiation of a plenary action. See *Siegel v Northern Blvd. & 80<sup>th</sup> St. Corp.*, 31 AD2d 182 (1<sup>st</sup> Dept 1968).

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the defendants' motion is granted to the extent that the plaintiff shall provide restitution of all funds removed from the bank accounts maintained by the defendants at BMO

Harris Bank under the execution and levy served on or about May 29, 2018, within thirty (30) days of the filing of this decision with notice of entry of the order; and it is further

**ORDERED**, that the prong of the defendants' motion seeking attorneys' fees is denied.

The defendants are directed to settle an order on notice.

This constitutes the decision and order of the Court.

Dated: May 4, 2022

*Lillian Wan*

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HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.