

Birch Hill Real Estate, LLC v Khawly
2022 NY Slip Op 33102(U)
September 15, 2022
Supreme Court, New York County
Docket Number: Index No. 156022/2022
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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BIRCH HILL REAL ESTATE, LLC, ELLSWORTH REAL ESTATE, LLC, EG REAL ESTATE, LLC, TR REAL ESTATE LLC, NH REAL ESTATE LLC, KEWAUNEE REAL ESTATE LLC, LANCASTER REAL ESTATE LLC, MAPLE LANE REAL ESTATE, LLC, M REAL ESTATE, LLC, MENOMINEE REAL ESTATE, LLC, MINERAL POINT REAL ESTATE LLC, PARKSIDE REAL ESTATE LLC, MOUTH REAL ESTATE, LLC, WILLIAMS BAY ASSISTED LIVING, LLC, TNIOP REAL ESTATE, LLC, WILLIAMS BAY REAL ESTATE LLC, WISCONSIN RAPIDS REAL ESTATE, LLC, RICE HEALTHCARE FACILITIES OF WISCONSIN, INC., RHCF, INC., RHCF TWO, INC., RICE HOUSING FACILITIES, INC., and RICE HOUSING FACILITIES TWO, INC.,

INDEX NO. 156022/2022MOTION DATE 09/15/2022MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Petitioners,

- v -

MARY THERESA KHAWLY, ROOSEY KHAWLY, and
MISTRAL AVIATION, LLC,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for

STAY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of respondent Roosey Khawly to vacate the Order dated August 9, 2022 entered against respondents Roosey Khawly, Mary Theresa Khawly and Mistral Aviation, LLC, is DENIED.

DECISION

Respondent Roosey Khawly's argument that this court lacks subject matter jurisdiction over the instant special proceeding is without merit. Petitioner is correct that established precedent from the highest appeals court in this state, holds that

"Although attachment always serves a security function, it can also be used to obtain "quasi in rem" jurisdiction over a defendant not amenable to personal jurisdiction, but with tangible or intangible property in the state (see id.; Douglass v Phenix Ins. Co. of Brooklyn, N. Y., 138 NY 209, 219 [1893] ["(I)t is a fundamental rule that in attachment proceedings the res must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction"]).⁶ "This quasi in rem jurisdiction is subject to the due process restrictions outlined by the United States Supreme Court in Shaffer v Heitner (433 US 186 [1977]);⁷ see generally Siegel, NY Prac §§ 104, 313, 314 [4th ed]" (Koehler, 12 NY3d at 538). In short, when attachment is used to serve as a jurisdictional predicate, the following black letter principle must be adhered to: "where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction" (id.).

"On the other hand, where 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. at 539). In the case at bar, defendants (the guarantors of the debt under the mezzanine loan) voluntarily submitted to the personal jurisdiction of the court by executing the personal guaranty. This is not a case where attachment was used to confer quasi in rem jurisdiction over a nondomiciliary based on his/her in-state property. This attachment only served a security function (to ensure there would be sufficient money to satisfy a judgment if plaintiff prevailed).

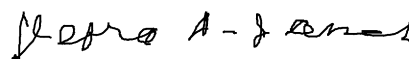
"Based on the foregoing, a court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York."

Hotel 71 Mezz Lender LLC v Falor, 14 NY3d 303, 311-312 (2010).

With respect to whether respondent Rosey Khawly may raise the defense of lack of personal jurisdiction over his co-respondents Mary Theresa Khawly or Mistral Aviation, LLC, this court concurs with petitioner that he cannot. His lawyer has appeared on his behalf alone, and Mistral Aviation, LLC may make such challenge only when represented by counsel. See CPLR 321(a) and People ex rel. Spitzer v Park Ave. Plastic Surgery, P.C., 48 AD3d 367 (1st Dept 2008). Nor may defenses on behalf of respondent Mary Theresa Khawly, who has never appeared either on her own behalf or by an attorney, be made by an attorney who has appeared only on her husband's behalf, as such attorney owes no duty to respondent-wife, with whom he is not in privity. See Agkira v Julien & Schlesinger, P.C., 214 AD2d 178, 183 (1st Dept 1995).

Finally, the assertion of respondent Rosey Khawly that this court lacks personal jurisdiction over him because he resided in Florida at the time of service of process also fails. His allegations that, as of August 20, 2022, he is domiciled in Florida, files his federal taxes as a resident of the State of Florida, has a Florida driver's license (since the year 2000),

and has been a registered voter in Florida (since 2000) is belied by his admission at a deposition held on July 8, 2021, approximately one year before service of process in this action, that he currently resides at 15 West 53rd Street, New York, New York 10019. See Ortiz v Santiago, 303 AD2d 1, 3 (1st Dept 2003) ("[defendant] conceded that he lives at the stated address [where process was served]").



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9/15/2022

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

DEBRA A. JAMES, J.S.C.