

<b>Bernstein-Deitcher v Gurwitz</b>
2022 NY Slip Op 33863(U)
November 15, 2022
Supreme Court, New York County
Docket Number: Index No. 652513/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ROCHEL LEAH BERNSTEIN-DEITCHER,	<b>INDEX NO.</b>	<u>652513/2020</u>
Plaintiff,	<b>MOTION DATE</b>	<u>N/A</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>004</u>
YEHUDA GURWITZ,	<b>DECISION + ORDER ON MOTION</b>	
Defendant.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116 were read on this motion to/for TURNOVER PROCEEDING.

Upon the foregoing documents, it is

For the reasons stated on the record on November 7, 2022, plaintiff's motion is granted to the extent that defendant is directed to turnover shares in Charidy, Inc. (Charidy) to a receiver to be named by the court.

Plaintiff obtained a judgment against defendant for \$760,808.35 when he failed to repay in full a \$1 million loan as promised by February 1, 2020. (NYSCEF Doc. No. [NYSCEF] 25, Decision and Order dated December 15, 2020 [mot. seq. no. 001]; NYSCEF 26, Notice of Entry of Order dated December 16, 2020; NYSCEF 30, Judgment; NYSCEF 3, Bernstein-Deitcher aff., ¶¶ 10, 17.) The promissory note, dated April 16, 2019 (the Promissory Note) provides that "[defendant] can take out the million dollars from Charidy to pay off [the Rochel Leah Bernstein] loan" and "[i]f the loan is not fully repaid by then [plaintiff] will own 50% of [defendant's] diluted shares." (NYSCEF 4, Promissory Note.) Defendant reaffirmed his debt in a Statement of Amount Due dated November 6, 2019 (Statement of Amount Due), in which he states: "[b]ased on the

previous agreement of the 1 million dollar loan of which \$50,000 was repaid in [M]ay 2019, with a remainder balance of \$950,000 [plaintiff] has extended the loan term ... [i]f the loan is not paid in full by then [plaintiff] will get 50% of [Y]ehuda[’s] stake in [C]haridy to sell and recoup her loan.” (NYSCEF 5, Statement of Amount Due.)

“CPLR 5225(a) ... contemplate[s] an order, directed at a defendant who is amenable to the personal jurisdiction of the court, requiring him to pay money or deliver property.” (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 541 [2009].)

Plaintiff has demonstrated that defendant possesses personal property in which he has an interest.

Plaintiff’s post-judgment discovery has revealed that defendant owns 2,720,000 out of 3,900,000 shares issued and outstanding or 69.74% of Charidy. (NYSCEF 97, Responses of Raviv Shefet, CFO of Charidy, to Information Subpoena [Shefet Responses], ¶¶ 1-3, 16.)<sup>1</sup> Plaintiff also learned that in 2021, Charidy received a \$30 million purchase offer. (*Id.* ¶ 2.) Defendant’s shares are held electronically on the Carta platform. (*Id.* ¶ 17.) Defendant is the founder. (NYSCEF 112, Charidy About Page at 3.)<sup>2</sup> Defendant is also employed by Charidy for which he was compensated \$309,166.73 in 2021 and has an annual base salary of \$280,000 in 2022. (NYSCEF 97, Shefet Responses ¶ 8; NYSCEF 93, Gurwitz Responses ¶ 2.) But for one payment mailed to plaintiff’s counsel in July 2022, Charidy has not complied with plaintiff’s

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<sup>1</sup> Contrary to the Shefet Responses, discovery responses from defendant and the Charidy Shareholders’ Agreement provide that defendant has a 54.40% interest in Charidy, or 2,720,000 shares out of a total of 5,000,000. (NYSCEF 93, Responses of Yehuda Gurwitz to Information Subpoena ¶ 42 [stating an “[a]pproximately 54%” interest]; NYSCEF 94, Shareholders[’] Agreement [Charidy Shareholders’ Agreement] at 20.) This inconsistency presents another reason for the court to require the appointment of a receiver.

<sup>2</sup> Page numbers refer to the NYSCEF generated page numbers.

income execution. (NYSCEF 109, Sterling-Jackson aff. ¶ 10.) The Charidy Shareholders' Agreement provides for an involuntary transfer of defendant's shares by operation of law (e.g., a court order compelling turnover of the shares). (NYSCEF 94, Shareholders' Agreement § 8[b].) However, Charidy and the remaining Charidy shareholders have rights of first and second refusal (collectively ROFR). (*Id.* §8[d], [f].)

Plaintiff's request for a receiver pursuant to CPLR 5228 is also granted. CPLR 5228 provides that:

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.

A receiver is appropriate in this case because of defendant's lack of candor, Charidy's lack of cooperation with the income execution, and limits on marketability of the Charidy shares. (*See Colfin Bulls Funding B, LLC v Ampton Invs.*, 62 Misc3d 1208[A] [Sup Ct, NY County, 2018] ["A receivership is 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 professional corporation of which the debtor is a member."] [internal quotation marks and citation omitted]); *see also Udel v Udel*, 82 Misc 2d 882 [Civ Ct, NY County 1975] [ordering that stock be turned over to a receiver rather than a sheriff due to the stock's "lack of marketability" and "difficulty in determining its true value."]). The determination of the fair market value of the Charidy shares presents another issue; if the parties cannot agree on their value, they must agree to an appraiser and payout takes three years. (NYSCEF 94, Shareholders' Agreement § 8[d], [e], [f].)

Plaintiff's motion for attorneys' fees under Rule 130 is held in abeyance pending a hearing. Plaintiff shall contact the Part 48 Clerk by email, copying opposing counsel, by November 23, 2022, to schedule a Rule 130 hearing; otherwise waived.

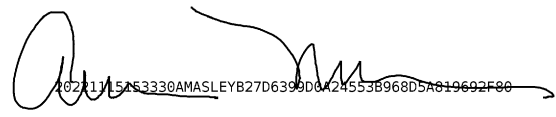
Accordingly, it is

ORDERED that the motion is granted in part as to the turnover and receiver and otherwise held in abeyance as to the attorneys' fees; and it is further

ORDERED that Hope Kelly Plasha, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, N.Y., N.Y.10036 is selected as a receiver. Plaintiff shall notify the receiver of her appointment by serving her with a copy of this order by November 18, 2022; and it is further

ORDERED that the receiver shall submit a proposed order of appointment within ten days of receipt of this order copying all parties and filing in NYSEF; and it is further

ORDERED and ADJUDGED that defendant is directed, upon receipt of a certified copy of this order and judgment and the order appointing the receiver, to turn over to the receiver, 50% of his shares of Charidy, Inc., or control of those shares, whether held in Carta or any other electronic database, which are to be sold pursuant to the Charidy Shareholder Agreement's ROFR or if the ROFR is not exercised, on the market. The receiver shall sell the shares necessary to satisfy plaintiff's judgment and pay all fees and costs in this action including the Receiver's fee and return the remaining shares to defendant, if any.



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11/15/2022  
DATE

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ANDREA MASLEY, J.S.C.

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

652513/2020 BERNSTEIN-DEITCHER, ROCHEL vs. GURWITZ, YEHUDA  
Motion No. 004

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