

HFH Capital LLC v Simon
2022 NY Slip Op 34421(U)
December 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 511913/2022
Judge: Ingrid Joseph
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 20th day of ~~December~~ 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
HFH CAPITAL LLC,

Index No: 511913/2022

Petitioner(s)

-against-

ORDER

PAUL JOSEPH SIMON, FRANK JOHN ZINNA, LISA J.
ZINNA, and BANK OF AMERICA, N.A.,

Respondents(s)

-----X

The following e-filed papers considered herein:

NYSCEF E-filed docs

Petition/Affirmation in Support/Exhibits Annexed
Reply/.....
Answer/Affirmation in Opposition/Exhibits Annexed.....

1-8; 11-12;18-20
9-10; 13-16

In this matter, HFH Capital LLC (“Petitioner”), moves pursuant to CPLR §§ 5225 and 5227 for an Order directing Bank of America to turnover to the Petitioner, the funds held in an account at Bank of America in the name of Paul Joseph Simon and/or Frank John Zinna and/or Liza J. Zinna (“Respondents”) pursuant to a judgment entered on or about November 16, 2021 including interest at a rate of 9% per annum from the date of the judgment. Respondents have opposed this Petition on the grounds that funds held in the bank account are exempt pursuant to CPLR § 5205(d)(2) and additionally that because Respondents are Florida residents, the New York State Separate Entity Rule precludes assets held in an out-of-state bank from being retained.

This action arises out of a judgment entered in the Civil Court of the City of New York on or about November 16, 2021, in the amount of \$22, 405.30 against Respondents. In support of its Petition, Petitioner states that upon entry of the judgment, Petitioner served Bank of America with two restraining notices along with the requisite exemption notice and two Exemption Claim Forms and an information subpoena. Petitioner states that it also served notice to Respondents with copies of the restraining notices, exemption notice, and Exemption Claim Forms. Additionally, Petitioner submits a letter from Bank of America, dated March 31, 2022, in which Bank of America states that there is one account belonging to Paul Joseph Simon and/or Frank John Zinna and/or Liza J. Zinna with \$10, 121.59 on hold.

In opposition, Respondents argue that pursuant to CPLR § 5205(d)(2), the money in the Bank of America account is exempt because it contains 90% of personal income that was earned within 60 days of

the restraint on the account and thus are exempt from execution towards the satisfaction of the judgment. In support of their opposition, Respondents submit an affidavit of Frank Zinna, and copies of Frank Zinna's bank statements and paystubs stating that the funds are personal income. Additionally, Respondents argue that under the New York State Separate Entity Rule, a judgment creditor's service of a restraining notice on a garnishee's bank account in a New York branch is ineffective to restrain assets held in that bank's out-of-state branch.

CPLR § 5225(b) permits a judgment creditor to commence a special proceeding against a person in possession or custody of money in which the judgment debtor has an interest seeking to compel the person who is in possession of the money in which the judgment debtor has an interest to pay the money over to the judgment creditor in full or partial satisfaction of the judgment. CPLR § 5222-a requires an attorney who serves a restraining notice on a bank to serve upon the bank together with the restraining notice, an Exemption Notice and two Exemption Claims Forms titled "Address A" and "Address B." The Exemption Notice and Exemption Claim Form must be in the statutorily prescribed form set forth in CPLR 5222-a(b)(4). Within two days of receipt of the restraining notice, Exemption Notice, and Exemption Claim Forms, the bank must mail a copy of the restraining notice, the Exemption Notice and two copies of the Exemption Claim Form to the judgment debtor by first class mail addressed to the judgment debtor at the judgment debtor's last known address pursuant to CPLR § 5222-a(b)(3). Subdivision (b)(3) further provides that the inadvertent failure of a depository institution to provide the required notice to the judgment debtor shall not give rise to liability on the party of the depository institution (see CPLR § 5222-a[b][3]).

The Exemption Notice advises the judgment debtor that his or her bank account is being restrained or "frozen." The Exemption Notice also advises the judgment debtor that if the funds on deposit in the restrained bank account contain including other things, income earned in the last 60 days (90% of which is exempt), the money is exempt from restraint and cannot be taken by the judgment creditor to satisfy the judgment. The Exemption Notice advises the judgment debtor that to claim the exemption, the judgment debtor should complete the Exemption Claim Form and deliver or mail it to the bank in which the restrained account is maintained and the judgment creditor or the judgment creditor's attorney within 20 days of the postmark date on the envelope holding the Exemption Notice (CPLR 5222-a[b][4][a]). The Exemption Claim Notice advises a judgment debtor that providing written or documentary proof of the claimed exemption to the judgment creditor's attorney with the Exemption Claim Form may result in the funds be unfrozen faster (CPLR 5222-a[b][4)(a)). The Exemption Notice advises the judgment debtor that if he or she sends the judgment creditor's attorney proof the funds are exempt, the judgment creditor's attorney must release or unfreeze the account. *Id.*

If the judgment debtor mails a copy of the Exemption Claim Form to the judgment creditor or the judgment creditor's attorney within the twenty days of the postmark date on the envelope containing the Exemption Notice and Exemption Claim Form (CPLR 5222-a[c][1]) together with proof establishing the funds in the bank account are exempt from execution, the judgment creditor shall, within seven days of the postmark date on the envelope containing the Exemption Claim Form, advise the bank to release the account (CPLR 5222-a[c][4]) If the Exemption Claim Form and proof establish the restrained account contains exempt and non-exempt funds, the judgment creditor shall advise the bank to release the exempt funds. *Id.*

If the judgment debtor does not claim the exemption within 25 days after the Exemption Notice and Exemption Claim Form are mailed to the judgment debtor, the funds remain subject to restraint and execution (CPLR 5222-a[c][5]). However, failure of the judgment debtor to deliver an executed Exemption Claim Form to the bank does not prevent the judgment debtor from claiming the restrained funds are exempt from execution in any subsequent judgment enforcement proceeding (*Id.*; and CPLR 5222-a[h]).

The Separate Entity Rule holds that each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office (*B & M Kingstone, LLC. V Mega Intern. Commercial Bank Co., Ltd.*, 131 A.D.3d 259 [2015]; citing *Therm-x-Chem. & Oil Corp. v Extebank* 84 A.D.2d 787 [2d Dept. 1981]; *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa v Advanced Emp. Concepts*, 269 A.D.2d 101 [1st Dept. 2000]). Even in instances when a bank garnishee with a New York Branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for purposes of CPLR § Article 62 prejudgment attachments and Article 52 post judgment restraining notices and turnover orders (*Motorola Credit Corp. v Standard Chartered Bank*, 24 NY3d 149 [2014]; *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa* at 102; *Allied Mar., Inc v Descatrade SA*, 620 F.3d 70 2d Cir. 2010)).

Petitioner cites several cases¹ that rely on the interpretation of *Koehler v Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009) to support its proposition that a court with general personal jurisdiction over a bank could issue an order to an international bank to turnover assets held by that bank at branches outside of New York. In *Koehler* a judgment creditor secured a CPLR § 5225 turnover order directing a garnishee bank in Bermuda to deliver stock certificates belonging to the judgment debtor (*id.*). The bank in that action consented to personal jurisdiction based on the presence of a subsidiary in New York (*id.*). The Court in *Motorola Credit Corp.*, however, explains that the issue in *Koehler* did not deal with the

¹ *JW Oilfield Equipment v Commerzbank AG*, 764 F.Supp. 2d 587 (S.D.N.Y 2011); *Eitzen Bulk v Bank of India*, NO. 09 Civ. 10118, 2011 U.S. Dis. LEXIS 115002 (S.D.N.Y. Oct. 5, 2011); *Amaprop Limited v ICICI Bank Limited*, NO. 1:11-cv-020001-PGG, Order at Docket NO. 46 and Transcript of Oral Ruling at Docket No. 79 (S.D.N.Y. Feb 16, 2012).

Separate Entity Rule as it did not involve bank branches nor asserts held in bank accounts (*Motorola Credit Corp.* at 161). Moreover, in a similar case *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa.*, the petitioner sought to attach bank accounts held by respondent in Florida by serving a New York branch of respondents' 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 accounts of the Florida branch (see also *Silver Cup Funding LLC v Horizon Health Center, Inc.*, 2020 Slip Op. 51529(U) [Sup Ct Ontario County]; *Lease Finance Group, LLC v Fische* 2014 N.Y. Slip Op. 24377 [Civ Ct, New York]).

While Petitioner properly complied with CPLR §§ 5222 (d) and 5222-a, and served Bank of America with two restraining notices along with the requisite exemption notice and two exemption claim forms as well as an information subpoena on or about March 23, 2022, Bank of America has failed to show compliance with CPLR § 5222-a(b)(3) with respect to service upon the Respondents of the required documents within two days as required by statute. Instead, Bank of America requested an extension for time to serve but has not proffered evidence as to if or when the documents were served upon Respondents. Under these circumstances, we find that Bank of America did not comply with its obligation. Nonetheless, Petitioner served the necessary documents on Respondents in compliance with CPLR 5222(d) to which Respondents in turn did not fill out or mail the Exemption Claim Form with proof of exempt funds within the requisite twenty-five days, nor have Respondents argued that they did not receive these documents. Consequently, Respondents had the opportunity to claim exemptions in accordance with the procedures outlined in CPLR § 5222-a but failed to do so. As a result, the Court finds that the Respondents have not been deprived of due process by having the funds in the account restrained.


However, in this matter, it is also clear that the account which Petitioner seeks to attach is in Florida. The mere fact that a restraining notice was served on a branch of a Bank of America within New York is insufficient to render accounts outside of New York subject to attachment.

Accordingly, it is hereby

ORDERED, that Petitioner's Order directing Bank of America to pay over to the Petitioner, the funds held in an account at Bank of America in the name of Paul Joseph Simon and/or Frank John Zinna and/or Liza J. Zinna is denied; and it is further

ORDERED, that the stay on Respondents' account is lifted.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice