

Foster v CapCall, LLC
2023 NY Slip Op 30152(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 154577/2022
Judge: Lyle E. Frank
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

JEREMIAH FOSTER

Plaintiff,

- v -

CAPCALL, LLC, A DELAWARE LIMITED LIABILITY
COMPANY,

Defendant.

-----X

INDEX NO. 154577/2022

MOTION DATE 10/24/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 56, 57, 58, 59, 60

were read on this motion to/for MISCELLANEOUS.

The present case concerns the execution by Plaintiff of a Montana judgment against Defendant. Plaintiff moves for the appointment of a receiver and Defendant opposes, arguing that this Court does not have jurisdiction to appoint a receiver for a Delaware company. There appears to be no dispute that the defendant is no longer an active business. For the reasons set forth below, the motion is granted.

Defendants cite *Marion v. Brit. Type Invs.*, 94 F. Supp. 755 (S.D.N.Y. 1950) which held that “Federal District Court had no jurisdiction to appoint a receiver of corporation organized under laws of another state to wind up its affairs and distribute its assets, even though all such assets were within court's jurisdiction.” That case is distinguishable here because it did not concern a post-judgment receiver.

“Supreme Court did not abuse its discretion in appointing a post judgment receiver to administer guarantors' intangible personal property for purposes of satisfying lender's outstanding \$52 million judgment in guaranty enforcement action; guarantors' intangible ownership interests

in 23 out-of-state entities was complex, guarantor had disregarded Supreme Court's discovery orders with respect to their finances, and there appeared to be a danger of insolvency if a receiver was not appointed.” *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 926 N.E.2d 1202 (2010).

As in *Hotel*, this Court feels that there is in this case a danger of insolvency, that the property is intangible, and that appointing a receiver is appropriate given the circumstances. Accordingly, it is hereby

ORDERED that:

1. The Court finds that CapCall has been properly served with the OSC and good cause exists to appoint a receiver pursuant to CPLR § 5228;
2. Foster’s motion to appoint a receiver pursuant to CPLR § 5228 is granted;
3. HEIDI LIPTON is appointed as the receiver (the “Receiver”) for CapCall;
4. *Receivership Property*. The Receiver shall take immediate possession and control, to the exclusion of all others, over all of the tangible and intangible assets of CapCall of any kind, nature, or description whatsoever, wherever located (the “Receivership Property”), including more specifically and without limitation:
 - a. All real property owned or leased by CapCall;
 - b. All cash;
 - c. All checking, deposit, escrow, certificates of deposit, trade, brokerage, financial institutional, commercial depositories, or other accounts maintained by or on behalf of CapCall at any bank, credit union, or other financial institution or intermediary;
 - d. All accounts, notes, contract rights, or other payment obligations arising from or relating to the payment of monies due and owing or that may

become due and owing to CapCall from its customers, shareholders, or any other individual, entity, or government agency;

- e. All proceeds of accounts, notes, contract rights, and other payment obligations arising from or relating to the payment of monies due and owing or that may become due and owing to CapCall from its customers, shareholders, or any other individual, entity, or government agency regardless of whether such proceeds are in the form of check, cash, electronic transfer, credit, debit card, line of credit withdrawal, ACH payment, or other means;
- f. All claims, causes of action, any judgments (including unfiled confessions of judgment in favor of CapCall), and choses of action of any kind or nature, and rights to any instruments, stocks, documents, chattel paper, intellectual property, and letter-of-credit rights, or rights in and to collateral held by any individual or party on behalf of CapCall, whether existing now or that may arise in the future in favor of CapCall;
- g. All computers, software, licenses, or equipment whether owned or leased by CapCall;
- h. All stocks, memberships, or other interests of CapCall in any corporation, partnership, or other form of business, and all agreements, certificates, or other documents relating thereto;
- i. All keys or access codes to any real property leased, owned, or possessed by CapCall, and any safe deposit boxes, safes, file cabinets, or other storage

units or devices, and all usernames and passwords to any computers, any and all software, bank or other accounts, or other assets of CapCall;

j. All cellular telephones, email accounts, and any other communication devices or mediums that are owned, paid for by, or used by CapCall.

5. *Automatic Expansion of Receivership Property.* If the Receiver reasonably determines in good faith that the assets of CapCall have been fraudulently transferred to another entity or person (each, a “CapCall Transferee”), then the Receivership Property shall automatically expand to include the assets of a CapCall Transferee to the same extent described in paragraph 4 of the Order after the Receiver files notice of said expansion with the Court and personally serves, in a manner proscribed by law, a copy of said notice and this Order upon the CapCall Transferee. A party in interest may thereafter challenge the expansion of the Receivership Property by appropriate motion, on notice, filed in this proceeding within seven days of service of the notice required by this paragraph (the “Objection Period”). During the Objection Period, the Receiver is authorized and instructed to do his best to preserve the status quo of said expanded Receivership Property.

6. *Powers of the Receiver.* The Receiver is authorized to administer, collect, improve, lease, repair, or sell any of the Receivership Property or do any other acts necessary to satisfy the Judgment in accordance with CPLR § 5228 including, without limitation, the following:

- a. Take possession and control over the Receivership Property;
- b. To issue demands for the freezing and turnover of funds upon any financial institution, which the Receiver has determined is a depository of funds

belonging to, or arising from, one or more of CapCall or a CapCall Transferee, whether such accounts be titled in the name of CapCall or a CapCall Transferee or not, and to, if necessary, indemnify the institution upon whom such demand is made on behalf of the receivership estate;

- c. To, in her business judgment, operate, manage, control, and conduct in the ordinary and usual course of business, and do all things and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar businesses, and no such risks or obligations so incurred shall be the personal risk or obligation of Receiver, but shall be a risk or obligation of the receivership estate only;
- d. Open a new bank account on behalf of CapCall in order to control all cash revenue and disbursements of CapCall, into which the Receiver shall deposit any cash which may currently be held by or on behalf of CapCall in any existing accounts, and to make all payments and disbursements from the new bank account;
- e. To take possession and control of all of the books, records, correspondence, and other accounting documents of CapCall and any CapCall Transferee, whether paper or electronic, whether in the possession and control of CapCall, a CapCall Transferee, or in possession of their members, principals, affiliates, agents, accountants, servants, or employees;
- f. Market, sell, or otherwise dispose of some or all of the Receivership Property free and clear of all liens, claims, encumbrances, and interests (with such liens, claims, encumbrances, and interests to attach to the

proceeds of such sales in the same priority and extent); provided, however, that all sales or other dispositions outside the ordinary course of business shall be upon motion with notice to all parties that have appeared in this action and an opportunity to be hearing, and further provided that Foster retains his rights to credit bid as a judgment creditor;

- g. Investigate the extent and location of CapCall's assets, including asking the Court or retained counsel to issue subpoenas to obtain documents and records pertaining to the Receivership Property, ongoing business of CapCall, or both, if the Receiver believes in good faith that such actions will allow for a greater recovery to satisfy the Judgment;
- h. Collect any accounts, notes, contract rights, judgments, investment income, rents, payments, or other payment obligations arising from or relating to the payment of monies due and owing or that may become due and owing to CapCall from its customers, shareholders, or any other individual, entity, or government agency, including the right, without limitation, to endorse or otherwise negotiate any check or other instrument of payment and deposit the proceeds thereof in the account established pursuant to Paragraph 6.c.;
- i. Collect, review, and act upon if necessary, all mail addressed to CapCall or related to the Receivership Property;
- j. Defend or institute suits or proceedings on behalf of CapCall, including but not limited to instituting proceedings that may be necessary or advisable to collect upon judgments, investments, accounts, notes, receivables, or payment obligations due and owing or that may become due and owing to

CapCall from its customers, shareholders, or any other individual, entity, or government agency;

- k. Employ such professionals as the Receiver deems reasonably necessary to assist the Receiver in diligently executing the duties imposed on the Receiver by this Order, including the employment of counsel;
- l. Pay or negotiate all expenses, bills, taxes, salaries, and insurance as the Receiver deems reasonably necessary to preserve and maximize the value of the Receivership Property;
- m. To, after notice and a hearing, request and borrow such funds from Foster as may be necessary to satisfy the costs and expenses of the Receivership Estate. If Foster declines to lend funds to the Receiver, the Receiver, after notice and a hearing, may request and borrow such funds from other persons or entities as may be necessary to satisfy the costs and expenses of the receivership estate;
- n. Only to the extent Foster is unwilling to make advances pursuant to paragraph 6.m. above, the Receiver is authorized to borrow funds for the purpose of funding the operation of the receivership estate where the revenues are not sufficient for the Receiver to perform all of the tasks and duties set forth in this Order;
- o. To request assistance of law enforcement officials when taking possession of the Receivership Property, or at any other time during the term of the receivership, if, in the opinion of the Receiver, such assistance is necessary to preserve the peace;

- p. To do any acts which the Receiver, in her sole discretion and business judgment, deems appropriate or desirable to protect the value of the Receivership Property; to use such measures, legal or equitable, as the Receiver deems desirable, necessary, or appropriate in her business judgment to protect and preserve the value of the Receivership Property; and to generally do such other things as may be necessary or incidental to the foregoing specific powers, directions, and general authorities and to take actions relating to the Receivership Property beyond the scope contemplated by the provisions set forth above, provided the Receiver first obtains the approval from this Court for any actions beyond the scope contemplated herein; and
- q. Apply to the Court on motion, with notice to all parties that have appeared in the action and an opportunity to be heard, for amendments to this Order or for such further directions or powers as the Receiver may deem necessary to carry out the purpose of maximizing the value of the Receivership Property.

7. *Turnover.* To the extent they have not done so already, CapCall and any CapCall Transferee, and all other persons or entities with actual or constructive knowledge of this Order, and each of their agents, officers, employees, members, representatives, affiliates, parents, and subsidiaries, and anyone acting in concert with any of the foregoing, shall immediately:

- a. Turnover all records, books of account, ledgers, privileges, and all business records relating to the Receivership Property, wherever located and in

whatever mode maintained (including, without limitation, information contained on computers, as well as all banking records, statements, and canceled checks), and all passwords needed to access information related to the Receivership Property;

- b. Turn over to the Receiver all bank accounts used or controlled by CapCall and any CapCall Transferee, or including any Receivership Property;
- c. Turn over to the Receiver all documents which constitute or pertain to all licenses, permits, development plans, surveys, reports, or governmental approvals utilized by CapCall and any CapCall Transferee;
- d. Turn over to the Receiver all documents which constitute or pertain to insurance policies related to the Receivership Property, whether currently in effect or lapsed;
- e. Turn over to the Receiver all contracts, leases and subleases, royalty agreements, licenses, assignments, or other agreements of any kind whatsoever, whether currently in effect or lapsed, which affect the Receivership Property;
- f. Turn over to the Receiver all revenues or proceeds derived from the Receivership Property, wherever and whatsoever mode maintained; and
- g. Turnover to the Receiver all passwords needed to access all records and files maintained on any computer, server, or other electronic device used by CapCall and any CapCall Transferee, or any other computers, servers, or other electronic devices on which information relevant to the Receivership Property is stored.

8. *Cooperation by Third Parties.*

- a. The Receiver is authorized to exercise legal or equitable rights that CapCall has in any bank account wherever located, regardless of whether the rights are in CapCall's individual capacity or in a representative capacity. The Receiver may exercise CapCall's signatory rights, access any and all such bank accounts, freeze, transfer, or seize any funds in any such accounts, and obtain documents related to such accounts as if the Receiver were CapCall. Any bank or financial institution presented with a copy of this Order shall immediately cooperate with the Receiver to transfer immediate control of any such bank account away from CapCall to the Receiver as if the Receiver were the owner of the account.
- b. The Receiver is authorized to exercise legal or equitable rights that any CapCall Transferee has in any bank account wherever located, regardless of whether the rights are in a CapCall Transferee's individual capacity or in a representative capacity. The Receiver may exercise CapCall Transferee's signatory rights, access any and all such bank accounts, freeze, transfer, or seize any funds in any such accounts, and obtain documents related to such accounts as if the Receiver were the Transferee CapCall. Any bank or financial institution presented with a copy of this Order shall immediately cooperate with the Receiver to transfer immediate control of any such bank account away from the CapCall Transferee to the Receiver as if the Receiver were the owner of the account.

9. *Duration.* The duration of the Receiver's appointment shall be one year from the entry of this order or until the Receiver sells the Receivership Property, which period may be extended upon application by the Receiver.
10. *Injunction.* During the term of the Receiver's appointment, CapCall and any CapCall Transferee, their agents, officers, employees, members, representatives, affiliates, parents, and subsidiaries, and anyone acting in concert with any of the foregoing, are ordered to immediately surrender the Receivership Property, including all books and records (including but not limited to all keys, computer files, computer programs, usernames and passwords, access codes, and the like constituting Receivership Property), to the Receiver and are enjoined and restrained from interfering with the Receiver's operation of CapCall's business or the business of any Cap Call Transferee, or the sale of the Receivership Property.
11. *Litigation Stay.* No person or entity shall file suit against the Receiver, or take other legal action against the Receiver, without an order of this Court permitting the suit or action; provided, however, no prior Court order is required to enforce the provisions of this Order or any other order of this Court in this action. In any event, no such suit shall be brought against the Receiver personally, but only against the receivership estate.
12. *Limitation of Liability.* The Receivership Property, the Receiver, and her employees, agents, attorneys, and all professionals and management companies retained by the Receiver shall have no liability for any obligations or debts incurred by the parties to this action. The Receiver and her employees, agents, attorneys, and all professionals and management companies retained by the Receiver shall have

no personal liability, and they shall have no claim asserted against them relating to the Receiver's duties under this Order, without prior authority from this Court as stated in Paragraph 11 above. In any event, no suit shall be maintained against the Receiver unless the Receiver has acted outside the scope of her authority and committed fraud or gross negligence in the administration of her duties. The Receiver is acting solely in her capacity as a Receiver and the debts of the Receiver incurred in regard to this litigation are solely the debts of the receivership estate.

13. *Indemnification.* The Receiver's liability for any action taken in the course of her duties shall be limited to the receivership estate. The receivership estate shall indemnify and hold harmless the Receiver, and any affiliate, member, officer, representative, employee, counsel, or agent of the Receiver from any claims, liability, loss, cost, or expense (including reasonable attorneys' fees and costs) arising out of or related to this receivership, unless the Receiver has acted outside the scope of her authority and committed fraud or gross negligence in the administration of her duties. In the event the Receiver prevails in any suit filed against the Receiver, her agents, contractors, employees, and/or representatives over the Receiver's performance of his duties and responsibilities set forth in this Order, the reasonable fees and costs of defending such action (including any appeals thereof to final resolution and award of judgment) not ordered be paid by and recovered from the non-prevailing party(ies) shall be reimbursed as a receivership expense pursuant to the terms of this Order.

14. *Undertaking.* Pursuant to CPLR § 6403, upon accepting her duties, the Receiver shall give an undertaking in the amount \$1000.

15. *Periodic Reports.* The Receiver shall file quarterly reports with the Court commencing three months after the appointment and continuing for the duration of the Receivership with respect to the discharge of her duties, with a copy sent to the parties.

16. *Periodic Payments to Foster.* During the duration of the Receiver's appointment, the Receiver may make monthly disbursements to Foster on account of the Judgment in an amount equal to ten percent (10%) of the proceeds of the monthly revenues collected by the Receiver with respect to her administration of the Receivership Property.

17. *Final Accounting.* Once the purposes of the Receiver's appointment have been accomplished and the Receivership Property has been reduced to cash, the Receiver shall submit a final accounting to the Court with a copy served on the parties, as part of her request to terminate her appointment and, upon approval from the Court, all remaining proceeds of the Receivership Property shall be applied first to satisfy any remaining obligations incurred by the Receiver in the discharge of her obligations under this Order, and then to satisfy the Judgment.

1/13/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

☐

REFERENCE

20230117115115LFRANK24EF077543A41CEACF8B0B52D71C1D1

LYLE E. FRANK, J.S.C.