

**Eastrich Savoy LLC v DMG Savoy, LLC**

2023 NY Slip Op 31267(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 653030/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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EASTRICH SAVOY LLC,

Plaintiff,

- v -

DMG SAVOY, LLC, DMG INVESTMENTS LLC

Defendant.

-----X

INDEX NO. 653030/2022

MOTION DATE 03/23/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for MODIFY ORDER/JUDGMENT

This dispute concerns a failed transaction between plaintiff Eastrich Savoy LLC ("Eastrich") and defendants DMG Savoy, LLC ("DMG Savoy") and DMG Investments LLC ("DMG Investments") (together, the "DMG Defendants"). Eastrich and DMG Savoy were involved with a project to finance, manage, improve, and sell a student apartment community in Texas (Doc 49 [Eastrich MOL] at 4). Ultimately, on April 11, 2022, the parties entered into a Forbearance Agreement (Doc 51 [Forbearance Agreement]). Under Section 4(f) of that agreement, the DMG Defendants agreed to pay \$9,220,000 to Eastrich by wire transfer on the earlier of: (a) the property's sale; or (b) July 11, 2022 (Doc 51 [Forbearance Agreement] § 4[f]). Under Section 4(b), the DMG Defendants also agreed that "[u]pon the closing of the sale of the Property, unless the same has already been paid to Eastrich, [the DMG Defendants] shall cause the First Payment . . . to be paid to Eastrich directly out of the closing escrow account with respect to such sale" (id. § 4[b]).

The DMG Defendants did not tender the First Payment, for \$9,220,000, by the July 11, 2022 deadline (Doc 49 [Eastrich MOL] at 5). Eastrich commenced this action, by CPLR 3213 motion, in August 2022 [MS 1] (Docs 1-2 [Summons and Notice of Motion]). The court granted the motion and entered judgment against defendants in the amount of \$9,446,364.79 (Doc 53 [2/2/23 Judgment]).

On October 31, 2022, the sale of the property closed (Doc 49 [Eastrich MOL] at 5). The DMG Defendants received \$6,102,971.44 from the sale but refused to tender the proceeds to Eastrich in accordance with the Forbearance Agreement (Doc 50 [Guan Aff.] ¶ 7). As a result, in Motion Seq. No. 2, Eastrich moved, by Order to Show Cause, for a temporary restraining order and preliminary injunction restraining and enjoining DMG from dissipating, encumbering, or diverting the proceeds from the sale during the pendency of this case (Doc 24 [Proposed OSC]). The parties entered into a stipulation, that the court so-ordered on December 5, 2022 (Doc 54 [12/5/22 So-Ordered Stip.]). Under the so-ordered stipulation, Eastrich withdrew the order to show cause (MS 02) and the DMG Defendants agreed to maintain the funds from the sale in an account they controlled and to not “voluntarily directly or indirectly cause or permit the Proceeds to be transferred, alienated, encumbered, pledged, or dissipated in any way until further order of the Court, or as the Parties may agree in a written instrument” (*id.*).

Afterwards, between March 7, 2023, and March 13, 2023, the DMG defendants wired five (5) payments to Eastrich (Doc 55 [Wire Transfers]). These payments totaled \$2,500,000 and had notations indicating that they were for the “return of principal per agreement between DMG and Eastrich” (*id.*). Eastrich credited these payments to the outstanding judgment, leaving about \$6,946,364.79 of the Judgment unpaid as of March 15, 2023, excluding any interest accrued since February 2, 2023 (Doc 50 [Guan Aff.] ¶ 11).

In light of the unsatisfied judgment, counsel for Eastrich served restraining notices and information subpoenas, pursuant to CPLR 5222, on the DMG Defendants and several financial institutions (*id.*, ¶ 9). The DMG Defendants did not respond to the subpoenas (*id.*).

Eastrich now moves, in Motion Sequence No. 3: (a) for an order pursuant to CPLR 5225, requiring the DMG Defendants to pay Eastrich the sale amount of \$6,102,971.44 held in defendants' Texas bank account pursuant to the parties' so-ordered stipulation, plus accrued interest, if any, to satisfy the judgment. Plaintiff also moves for an order vacating or modifying the court's December 5, 2022 so-ordered stipulation that prevents the DMG Defendants from transferring the sale proceeds out of their Cathay Bank account in Texas (*see* Doc 40).

#### Discussion

Plaintiff has established that the judgment has not been satisfied completely and that it is entitled to the \$6,102,971.44 that that defendants are maintaining in their Cathay Bank account in Texas (*see* Doc 40 [so-ordered stipulation resolving MS 02]; *see also* Doc 50 [Guan Aff], Doc 53 [Judgment], Doc 55 [wire transfers]). CPLR 5225 (a) provides that the court can order a judgment debtor to turnover assets in its possession to the judgment creditor, even if the assets are located outside of New York State (*see e.g. Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 41 AD3d 25 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]). Here, the court has jurisdiction over the defendants-judgment debtors.

The DMG Defendants have not opposed this motion.

Nevertheless, the court is constrained to deny the motion. A judgment creditor that seeks a turnover order pursuant to CPLR 5225 (a) must serve the notice of motion "on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested" (CPLR 5225 [a]). There is no affidavit of service accompanying this motion.


“[A] failure to properly serve notice upon a defendant of the plaintiff’s motion pursuant to CPLR 5225(a) to compel the defendant to turn over . . . certain personal property in his possession deprive[s] the court of jurisdiction to entertain the motion” (*Buckeye Retirement Co., LLC, Ltd. v Quattrocchi*, 67 AD3d 848, 849 [2d Dept 2009] [citations omitted]).

Plaintiff has not submitted any affidavit of service for this motion. Thus, the motion must be denied without prejudice.

The court has considered Eastrich’s remaining arguments and finds them unavailing.

Accordingly, it is

**ORDERED** that Motion Seq. No. 03 is denied without prejudice to a new motion.

<u>4/19/2023</u> DATE	 MELISSA A. CRANE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE