Matter of Avigdor v Avigdor
2023 NY Slip Op 31890(U)
May 31, 2023
Supreme Court, Kings County
Docket Number: Index No. 508238/2022
Judge: Carl J. Landicino
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At an IAS Part Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of May, 2023.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

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In The Matter of a Proceeding Pursuant To CPLR 5239 and CPLR 5240
DAVID AVIGDOR and MERRILL AVIGDOR,

Petitioners,

-against-

MORTON AVIGDOR, CHOICE ABSTRACT CORP., as Escrowee, ESTATE OF ELIAS GELBWACHS, MOSHE TWERSKY, individually and as EXECUTOR OF THE ESTATE OF ELIAS GELBWACHS, NEW YORK CITY DEPARTMENT OF FINANCE, OFFICE OF THE SHERIFF, JOHN DOE 1 through 6, said fictitious names Intended to designate persons whose identities are unknown to Petitioners including persons having or claiming an interest in or a lien upon the property constituting the subject matter of this action as Judgment Creditors or otherwise,

Respondents.

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Index No.: 508238/2022

DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	1-12, 15, 18, 50-51, 69, 71, 74
Opposing Affidavits (Affirmations)	45-46, 54, 82-103
Reply Affidavits (Affirmations)	48, 56

Petitioners David Avigdor (David) and Merrill Avigdor (Merrill) (collectively, petitioners) move by order to show cause (motion sequence #1) for an order, pursuant to

CPLR 5239 and 5240, determining that the escrow funds held pursuant to the so-ordered stipulation dated February 5, 2020, under Index No. 2707/19, must be applied to satisfy Respondent Morton Avigdor's (Morton) obligation to them; directing that the escrow funds be released to them; awarding legal fees in their favor and against Morton; and temporarily enjoining Respondents Morton, Choice Abstract Corp, as Escrowee (Choice), Estate of Elias Gelbwachs (Gelbwachs Estate), Moshe Twersky, individually and as Executor of the Estate of Elias Gelbwachs (Twersky), New York City Department of Finance (DOF), Office of the Sheriff (Sheriff's Office) and "John Doe 1-6" from releasing or distributing the escrow funds pending further court order.[1]

Petitioners also separately move (motion sequence #2) for an order permitting the mistake, omission, defect or irregularity regarding their service of the order dated November 19, 2022 to be corrected *nunc pro tunc* or disregarded, pursuant to CPLR 2001; extending their time to serve the order dated November 19, 2022; and deeming their service of the order as timely, pursuant to CPLR 2004 and 2005.

Background

On January 24, 2014, a judgment in the amount of $750,000.00 was issued in Kings County Surrogates' Court against Morton and in favor of Moshe Twersky, as Executor of the Gelbwachs Estate (Twersky Judgment), resulting from a claim of theft or mishandling by Morton, a New York licensed attorney. The Twersky Judgment was docketed in the Kings County Clerk's Office on September 29, 2014, with Morton, whose address is noted

[1] Petitioners' request for a temporary injunction was granted by the signed order to show cause dated April 12, 2022.

as "957 East 10th St," listed as the debtor, and "Moshe Twersky," listed as the creditor (*see* NYSCEF Doc No. 6).[2]

Thereafter, in or about 2017, petitioners asserted claims of conversion, embezzlement and misappropriation of funds against Morton, their brother, relating to their late mother Esther Avigdor's estate (Avigdor Estate). By written agreement dated May 17, 2017, the parties agreed to arbitrate the claims. After a series of five arbitration hearings conducted during the period of May 11, 2017 through June 18, 2019, a final arbitration decision was issued on June 27, 2019, awarding the sum of $615,000.00 in favor of petitioners and against Morton (arbitration award) (*see* NYSCEF Doc No. 7).

Upon learning that Morton had contracted to sell his home located at 957 East 10th Street, Brooklyn, New York (property) to Joseph and Cecilia Sasson (the Sassons), David commenced a proceeding in this court under Index No. 2707/2019, to confirm the arbitration award and enjoin Morton from selling the property. By so-ordered stipulation dated February 5, 2020 (settlement stipulation), the parties[3] resolved the proceeding by agreeing that Morton could sell the property - - which transpired on February 12, 2020[4]- - and that, upon closing, Morton would deposit into escrow the sum of $700,000.00 (escrow

[2] The Kings County Clerk's Office "Judgment Docket & Lien Book Search Summary" printed on November 16, 2021, and annexed to the petition, also reveals two other judgments docketed against Motion: a judgment in the amount of $19,651.85 in favor of "NY State Dep't of Tax," docketed on March 20, 2007; and a judgment in the amount of $76,330.25 in favor of "Smart Telecom Inc," docketed on November 16, 2007.

[3] The stipulation was signed by Morton, Morton's attorney, David individually and on behalf of the Avigdor Estate, David's attorney, Merrill and the petitioners' other brother Jacob Avigdor (Jacob). Merrill and Jacob were non-party signees.

[4] Petitioners allege in their petition that Morton received more than $1,000,000.00 in sales proceeds after the escrow funds were withheld and two mortgages paid (*see* NYSCEF Doc No. 1, petition at 4 n 5).

funds) to be held by Choice, as escrow agent. Further, such funds would be held until, in sum, a final non-appealable court order confirming or vacating the arbitration award was issued in a proceeding to be commenced on or before June 27, 2020 (*see* NYSCEF Doc No. 4, settlement stipulation at ¶¶ 1, 5 and 8).

Thereafter, in March 2020, petitioners commenced a proceeding by order to show cause, under Index No. 506214/2020, to confirm the arbitration award. Morton cross moved to dismiss the petition and vacate the award on the grounds that Jacob was a necessary party in the underlying arbitration. By decision and order dated September 17, 2020, the court adjourned the cross motion, but denied petitioners' motion with leave to renew upon proof that Jacob declined to participate in the arbitration and authorized David to pursue his interest thereat. Petitioners then moved for leave to renew their petition with a supporting affirmation from Jacob, which the court considered together with Morton's cross motion.

By decision and order dated July 30, 2021, the court granted petitioners' application to renew their petition and denied Morton's request for dismissal. Upon renewal, the court found that petitioners established entitlement to confirmation of the arbitration award and that Morton failed to establish a basis for its vacatur. As a result, the court issued a judgment confirming the award, together with costs, disbursements and attorney fees (Avigdor Judgment) (*see* NYSCEF Doc No. 3). Morton subsequently filed a notice of his intent to appeal the Avigdor Judgment, which he later withdrew by application (*see* NYSCEF Doc No. 9, Second Department Appellate Division Decision and Order on Application dated December 8, 2021, at 2).

On November 25, 2021, a letter was sent to Choice, on Morton's letterhead and signed by Morton, petitioners, and Jacob, in which said signees jointly requested that Choice release the escrow funds based upon the Avigdor Judgment and in accordance with the settlement stipulation,[5] as follows: $631,000.00 to David and the balance of $69,000.00 to Morton. The letter advised that the Avigdor Judgment was a final order; and that it was not going to be appealed (*see* NYSCEF Doc No. 10).

By letter dated January 5, 2022, Jacob Feinzeig, attorney for the Gelbwachs Estate and Twersky (collectively, Twersky respondents), advised Choice of the Twersky Judgment and directed Choice not to release the escrow funds pending resolution of his clients' claim to the funds. Counsel advised that approximately $640,000.00 remained due under the Twersky Judgment and that a restraining notice would be sent to Choice (*see* NYSCEF Doc No. 12).

Procedural History

Petitioners' First Order to Show Cause

On March 21, 2022, petitioners commenced this proceeding pursuant to CPLR 5239 and 5240, by the filing of a petition via the instant order to show cause. Petitioners argue that the Twersky respondents have no legal or equitable claim to the escrow funds, in that they contend that the Twersky Judgment is only attached to the property and that the

[5] The settlement stipulation provided that "[u]pon a final, non-appealable order . . . related to confirmation or vacatur of Arbitration Award as set forth above in paragraph (8)(c), the escrow agent shall promptly pay the escrow funds to the prevailing party(ies) in the amount that will satisfy the judgment . . . and the remaining balance, if any, shall be paid to Morton Avigdor . . . " (*see* NYSCEF Doc No. 4, settlement stipulation at ¶ 8 [d]).

Twersky respondents' lien on the real property did not follow the sale proceeds, which, they claim, is personal property. Notwithstanding, petitioners aver that the settlement stipulation and the Avigdor Judgment combined constitute a judicial finding, which puts the sale proceeds out of the Twersky respondents' reach and conclusively determines that the sales proceeds belong to them.

Petitioners' Second Order to Show Cause

Petitioners also separately move for an order correcting or disregarding their mistake, omission, defect or irregularity in the service of the order dated November 19, 2022 *nunc pro tunc*, pursuant to CPLR 2001; extending their time to serve the order; and deeming their service of the order as timely, pursuant to CPLR 2004 and 2005.

By the order dated November 19, 2022, the court scheduled oral argument of petitioners' first order to show cause and directed that service of a copy of the order be made by petitioners upon Morton, DOF and the Sheriff's Office by certified mail and upon Choice and the Twersky respondents by e-filing on or before December 2, 2022 (*see* NYSCEF Doc No. 61). Petitioners state that, although the Sheriff's Office, DOF and Morton were timely served with the order by certified mail on December 2, 2022 (*see* NYSCEF Doc No. 62), Morton was mistakenly served at the wrong address and that Choice and the Twersky respondents were inadvertently served by e-filing on December 6, 2022, instead of December 2, 2022. As to Morton, petitioners assert that the mistake in service upon him was effectively corrected by his confirmation of receipt of the mailing on December 5, 2022 by email to the court dated December 5, 2022 (see NYSCEF Doc No. 66). Given this, and since petitioners claim that these mistakes were "inadvertent,

unintentional, not made in bad faith and non-prejudicial and any delay non-prejudicial and very brief," they ask that the mistakes be corrected or disregarded *nunc pro tunc*, pursuant to CPLR 2001, 2004 and 2005.

Choice's Opposition

In opposition, Choice argues that petitioners' first order to show cause should be denied, since they lack standing to seek relief under CPLR 5239 or 5240. According to Choice, petitioners are neither judgment creditors nor interested persons under the statutes, given their failure to submit a proposed judgment for signature after the decision and order dated July 30, 2021. As a result, Choice argues that a judgment never issued in the proceeding under Index No. 506214/20.

Regarding petitioners' second order to show cause, Choice points out that service of the November 19, 2022 order upon Morton was not made by certified mail but by a standard United States Postal Service mailing and tracking method. Given this, and the untimely service upon it and Morton, Choice argues that petitioners' failure to properly and timely serve the November 19, 2022 order cannot be excused, as it divested the court of jurisdiction to hear the first order to show cause and resulted in prejudice to them.

Twersky Respondents' Opposition

In addition to arguing lack of standing to under CPLR 5239 or 5240, the Twersky respondents also argue that the court lacks jurisdiction to hear petitioners' first order to show cause. However, they base their argument upon petitioners' failure to submit an affidavit demonstrating timely service of their first order to show cause upon Morton by April 22, 2022, as directed in the signed order to show cause.

Petitioners' Reply

In reply, petitioners assert that they have standing to maintain this proceeding under CPLR 5239 and 5240, as they are interested persons based upon the settlement stipulation and the Avigdor Judgment. Petitioners further argue that the Twersky respondents' opposition papers should not be considered since they are in default[6] and an order vacating their default has not been issued. Notwithstanding, they argue that the Twersky respondents' jurisdictional argument fails, since Morton later acknowledged proper service of the first order to show cause upon him in a stipulation dated April 25, 2022 by which he was also given additional time to respond to the order show cause (*see* NYSCEF Doc No. 43). Given this, they argue that the court has jurisdiction to hear their orders to show cause. Petitioners assert that, although they disputed Morton's unilateral extension of their agreed time to respond to the order to show cause within the stipulation, that dispute did not affect Morton's signed acknowledgment of service.

Discussion

Standing

CPLR 5239 allows any interested person to commence a proceeding to determine the rights to property or debt, if brought prior to a sheriff's enforcement of a judgment relating to such property or debt.

Additionally, CPLR 5240 provides, in pertinent part, that

> "[t]he court may at any time, on its own initiative or the motion of any interested person . . . make an order denying, limiting,

[6] Although Choice filed its answer to the petition on April 28, 2022, neither Morton nor the Twersky respondents have filed an answer. Notwithstanding, contrary to petitioners' contentions, the Twersky respondents' opposition papers are properly considered, as petitioners never moved for the entry of a default judgment against them.

> conditioning, regulating, extending or modifying the use of any enforcement procedure."

Here, petitioners commenced this proceeding under CPLR 5239 and 5240, seeking a determination as to the rights to the escrow funds, prior to any sheriff enforcement. Nevertheless, Choice and the Twersky respondents contend that petitioners lack standing to maintain this proceeding, as they are neither judgment creditors nor interested persons. However, contrary to said respondents' contentions, petitioners are, in fact, interested persons given the arbitration award granting $700,000.00 in their favor and against Morton; and the settlement stipulation, by which petitioners and Morton agreed that $700,000.00 would be held in escrow. In addition, petitioners are also judgment creditors, given the Avigdor Judgment, which confirmed the arbitration award and issued a money judgment in favor of petitioners and against Morton. Notably, upon issuing the Avigdor Judgment in the decision and order dated July 30, 2021, the court did not direct petitioners to settle the judgment on notice, as argued by Choice and the Twersky respondents. Instead, the decision and order dated July 30, 2021 unambiguously states that "judgment is hereby entered confirming the final award . . ." (*see* NYSCEF Doc No. 3, Avigdor Judgment at 6). As a result, petitioners have standing to maintain this proceeding under CPLR 5239 and CPLR 5240, as both interested persons and judgment creditors.

Jurisdiction

Contrary to Choice and the Twersky respondents' contentions, this court has jurisdiction to hear petitioners' first order to show cause. Although petitioners admittedly failed to serve Morton by April 22, 2022 as directed in the signed order to show cause, Morton expressly acknowledged proper service of the order to show cause in the stipulation

dated April 25, 2022.[7] Although petitioners subsequently disputed that portion of the stipulation wherein Morton extended his time to answer the petition, petitioners' rejection of that portion of the stipulation did not vitiate Morton's waiver of jurisdictional issues.

Turning to petitioners' mistakes in failing to timely serve Morton with the November 19, 2022 order by certified mail and at the correct address as well as their service of the order, by e-filing, upon Choice and the Twersky respondents four days beyond the service deadline, this court finds that these mistakes are excusable under CPLR 2001, 2004 and 2005. The court finds that the mistakes are minor and did not result in substantial prejudice to said respondents, particularly in light of Morton's confirmation of receipt by email to the court dated December 5, 2022, three days after the service deadline, and the order's e-filing by the court on November 22, 2022 (*see* NYSCEF Doc No. 60), which would have been received by said respondents' attorneys, as NYSCEF registrants, on that date. In any event, the Court's scheduling order was made in order to give the parties an opportunity to appear in person for oral argument pursuant to part rules. The Court has authority to modify the order. Unlike the order to show cause, the scheduling order is not jurisdictional. Therefore, the court grants petitioners' second order to show cause to correct said mistakes, extend the November 19, 2022 order's service deadline date to December 6, 2022 and deem its service on December 5, 2022 and December 6, 2022, respectively, as proper and timely, *nunc pro tunc*, pursuant to CPLR 2001, 2004 and 2005.

[7] Significantly, Morton did not file opposition to the orders to show cause to challenge his signed acknowledgment of proper service.

Priority of Interests

A money judgment becomes a lien upon real property when the judgment is docketed "with the clerk of the county in which the property is located" (CPLR 5203 [a]; *see also Charles v Berman,* 191 AD3d 632 [2d Dept 2021]*; Valley Nat'l Bank v Levy*, 45 AD2d 771 [2d Dept 1974]; *Musso v Ostashko*, 468 F3d 99 [2d Cir 2006]). Pursuant to CPLR 5018 (c), a judgment is docketed when the clerk makes an entry "under the surname of the judgment debtor . . . consist[ing] of . . . the name and last known address of [the] judgment debtor . . ." (CPLR 5018 [c] [1] [i]; *see Matter of Accounts Retrievable Sys., LLC v Conway,* 83 AD3d 1052, 1053 [2d Dept 2011]). "'Once docketed, a judgment becomes a lien on the real property of the debtor in that county'" (*Matter of Accounts Retrievable Sys., LLC v Conway,* 83 AD3d at 1053, quoting *Matter of Soressi v SWF, L.P.*, 81 AD3d 1143, 1144 [3d Dept 2011]; *see also Charles v Berman*, 191 AD3d at 634. "'A judgment is not docketed against any particular property, but solely against a name'" (*We Buy Now, LLC v Cadlerock Joint Venture, LP*, 46 AD3d 549, 549 [2d Dept 2007] [citation omitted]).

If a judgment is obtained in the supreme court of the county in which the property is located, no further action is required to docket the lien. However, if a judgment is obtained in a court other than supreme, county or family court (such as surrogates' court), the judgment creditor must obtain a transcript of judgment, also known as a judgment roll, from the issuing court and then file same with the clerk's office in the county where the property is located to effectuate the lien (*see* CPLR 5018 [a]).

"CPLR 5203 (a) gives priority to a judgment creditor over subsequent transferees with regard to the debtor's real property in a county where the judgment has been docketed with the clerk of that county" (*Matter of Accounts Retrievable Sys., LLC v Conway*, 83 AD3d at 1053; *see also* CPLR 5203 [a]; *Matter of Fischer v Chabbott*, 178 AD3d 923 [2d Dept 2019]; *Charles v Berman*, 191 AD3d at 634).

Here, the Avigdor Judgment was granted by the July 30, 2021 order issued in Kings County Supreme Court (*see* NYSCEF Doc No. 3). Thus, it was docketed upon entry of that order without further action by petitioners. However, the Twersky Judgment was issued by Kings County Surrogates' Court on January 24, 2014. Furthermore, in accordance with CPLR 5018, the Twersky respondents docketed the judgment by filing a transcript of the judgment with the Kings County Clerk's Office (*see* NYSCEF Doc No. 5 and 6), whereupon the Twersky Judgment was docketed by the clerk's office on September 29, 2014, over 6 years prior to the docketing of the Avigdor Judgment.

In light of the foregoing, the Twersky respondents' interest is apparently superior to petitioners' interest, since the Twersky Judgment was docketed under Morton's full and proper name prior to the Avigdor Judgment. As such, the Twersky respondents had the options of seeking execution of their judgment by sheriff levy or leaving the lien against the property until Morton sold it and then seeking to satisfy the judgment from the sales proceeds (*see We Buy Now, LLC v Cadlerock Joint Venture, LP*, 46 AD3d at 549; and *Freedman v Hason*, 155 AD3d 831, 832 [2d Dept 2017] [where the court held that, "when a plaintiff cannot follow the land because it was sold to a bona fide purchased for value, the plaintiff may follow the money to assert a claim against the proceeds of the sale."].

Additionally, "[w]here a debtor places funds in escrow for the payment of specific creditors, as long as those funds remain subject to the debtor's 'present or future control,' those funds are subject to claims brought by other creditors who know about the escrow funds" (*Freedman v Hason*, 155 AD3d at 832, citing *Potter v MacLean*, 75 AD3d 686 [3d Dept 2010] and *Koroleski v Badler*, 32 AD2d 810 [2d Dept 1969]). Here, the escrow funds remained in escrow with Choice and have not been transferred to petitioners. However, it is not clear whether, on these papers, Morton demonstrated that he retained control over the proceeds of the sale in light of the "So Ordered" stipulation dated February 5, 2020 that provided for him to place the sum of $700,000.00 in escrow (*see Freedman v Hason*, 155 AD3d at 832-833). Moreover, it is not clear whether the issue of the existence of the Twersky judgment was addressed at the time of closing of title, and if it was why the funds were placed in escrow in relation to the Avigdor judgment and not first paid to Twersky.

Therefore, petitioners' arguments that the Avigdor Judgment and settlement stipulation put the escrow funds beyond the Twersky respondents' reach and constitute a judicial finding that the funds belong to petitioners cannot be resolved on these facts. Accordingly, the matter is converted to a plenary action whereby the Petition shall serve as the complaint and any answer or opposition papers shall be deemed the responsive pleadings. The Court also notes that cross-claims and counter-claims were asserted. The action concerns claims for declaratory judgment, breach of contract, and indemnification (see *Yaeger v. Educ. Testing Serv.,* 158 A.D.2d 602, 551 N.Y.S.2d 574 [2d Dept 1990]). Accordingly, the initial application (motion sequence #1) is denied as academic, insofar as

the matter has been converted, there is no request for further interim relief, and the ultimate relief sought cannot be determined on these papers.

Conclusion

Accordingly, it is hereby

ORDERED that petitioners' order to show cause (motion sequence #2) is granted to the extent stated herein; the service deadline date of the order dated November 19, 2022 is hereby extended to December 6, 2022, *nunc pro tunc* and said order deemed timely and properly served; and it is further

ORDERED that petitioners' application (motion sequence #1) is denied as academic in accordance with this decision and order. The temporary restraining order shall be deemed vacated 30 days after the date of entry of this decision and order.

This constitutes the decision and order of the court.

E N T E R,

Carl J. Landicino, J.S.C.