

Wimbledon Fin. Master Fund, Ltd. v Bergstein

2023 NY Slip Op 32717(U)

August 7, 2023

Supreme Court, New York County

Docket Number: Index No. 150584/2016

Judge: Jennifer G. Schecter

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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: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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INDEX NO. 150584/2016

WIMBLEDON FINANCING MASTER FUND, LTD.,

MOTION SEQ. NO. 034

Petitioner,

- v -

DAVID BERGSTEIN, GRAYBOX LLC, ISKRA
ENTERPRISES LLC, WESTON CAPITAL ASSET
MANAGEMENT LLC, ASIA CAPITAL MARKETS LIMITED
LLC, GEROVA MANAGEMENT INC., K JAM MEDIA, INC.,
HENRY N JANNOL, SPILLANE WEINGARTEN LLP,
VENABLE, LLP,

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 034) 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1240, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276

were read on this motion to/for POST JUDGMENT OTHER.

Petitioner seeks (1) an order charging respondent David Bergstein's membership interests in certain LLCs; (2) an order charging LLC membership interests held by certain trusts where either Bergstein or a family member is a settlor, trustee or beneficiary; (3) to "enforce" restraining notices; (4) an injunction prohibiting Bergstein or anyone acting on his behalf from transferring assets held in the name of certain companies and trusts; and (5) an accounting of any distributions owed to Bergstein and family members by any company and of all funds held by themselves, their companies and certain trusts (*see* Dkt. 1215 at 5). Bergstein consents to an order charging his interests in 10 LLCs in which he is a member (Dkt. 1228 at 9). He also consents to service of restraining notices on six corporations for which he is an officer or director (*id.*). Bergstein, however, objects to the other relief sought by petitioner. In reply, petitioner withdrew "its request for an accounting from parties other than Bergstein" (Dkt. 1276 at 6 n 1). For the reasons that follow, all of the relief to which Bergstein objects is denied.

Petitioner correctly avers that jurisdiction over the LLCs in which the membership interests of a judgment debtor are sought to be charged is unnecessary. Jurisdiction over the judgment debtor is all that is required (*Wright v Shenandoah Investors, LLC*, 2023 WL 3147158, at *2 [Sup Ct, NY County Apr. 28, 2023], citing *Hotel 71 Mezz Lender LLC v*

Falor, 14 NY3d 303, 307 [2010]; see *Sutton 58 Assocs. LLC v Beninati*, 2017 WL 2828694, at *1 n 2 [Sup Ct, NY County June 30, 2017]; see also *245 Park Member LLC v HNA Group (Intl.) Co.*, 2023 WL 3738888, at *2 [SDNY May 30, 2023]). As noted, Bergstein consents to charging orders for his own membership interests. However, the relief sought with respect to membership interests held by other parties presents both jurisdictional and substantive problems.

To be entitled to a charging order, petitioner has the burden of proving that the judgment debtor is a member of the LLC (*79 Madison LLC v Ebrahimzadeh*, 203 AD3d 589 [1st Dept 2022]; see *Astraea NYC LLC v Rivada Networks, Inc.*, 2023 WL 3862671, at *2-3 [SDNY June 7, 2023]). There is no such evidence for the LLCs in which Bergstein claims to lack a membership interest (see Dkt. 1219). In reply, petitioner does not present any evidence that the information in Bergstein's affidavit about the ownership structure of the LLCs is incorrect. Unlike when a charging order is sought against a judgment debtor's interests--where jurisdiction over the debtor is a nonissue--the court cannot issue a charging order against another party's membership interests or directly enjoin that party from doing anything absent jurisdiction over it.

Moreover, the LLCs and trusts that actually own the membership interests that petitioner seeks to charge are necessary parties to proceedings that affect their rights. A motion seeking relief from Bergstein is not a procedurally proper substitute for an action to enforce the judgment by piercing the LLCs' corporate veils and declaring the trusts to be shams (see *Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020]). Thus, the court cannot charge the LLC interests that are not owned directly by Bergstein. Likewise, if Bergstein has an interest in the parent of an LLC rather than in the LLC itself, the court could only charge Bergstein's interest in that parent entity rather than the parent's interest in the LLC.

While petitioner complains that some of these LLCs and trusts have been paying Bergstein's expenses or providing him with benefits, and that Bergstein has influence and/or control over them or those that do control them, that does not mean Bergstein actually has an interest that can be charged. Bergstein's alleged "control" is not enough under article 52 (*Commonwealth of N. Mariana Islands v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 61-63 [2013]).

The court recognizes that petitioner is continuing to obtain new information about Bergstein's interests, some of which it was only able to address for the first time in reply. If petitioner obtains evidence that the information in Bergstein's affidavit is inaccurate, or if petitioner obtains information about other LLCs in which Bergstein has membership interests, petitioner may file a new motion that more precisely addresses those interests. Perhaps a focused article 52 deposition may first be warranted (though Bergstein's deposition is apparently scheduled for August 10 in the California action).

To be sure, while Bergstein's affidavit focuses on whether he directly owns and controls the LLCs, corporations and trusts identified in the moving brief, that is not the limit of petitioner's legitimate iniquity. Petitioner is entitled to fully understand the ownership and control structure of all companies in which Bergstein has any beneficial interest or that make payments or own assets from which he derives benefit. It is only with the benefit of complete transparency that petitioner can be in a position to make the targeted and focused applications necessary to enforce the judgment.

As noted, while there are several methods of addressing payments made by LLCs that benefit a judgment debtor or interests held for the benefit of a judgment debtor as a means of avoiding satisfaction of a judgment, most of them are not currently before the court. Many would need to be (and it appears that some have been) pursued in other jurisdictions. But notwithstanding petitioner's papers being rife with complaints about Bergstein's judgment avoidance tactics and restraining notice violations, petitioner is not actually moving to hold him in contempt or even to compel compliance with any article 52 discovery request.

Instead, petitioner asks the court to "enforce" its restraining notices. The court does not understand what that means. Setting aside the motion's lack of clarity about the restraining notices sought to be enforced (which is a problem, for instance, since the court cannot determine if each restraining notice is valid and remains in effect), if a restraining notice is violated, "enforcement" would be through resolution of a proper contempt motion (*see Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 173 AD3d 401, 402 [1st Dept 2019]).

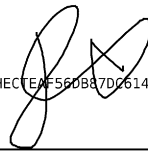
Likewise, petitioner has not justified its request for an injunction "prohibiting Bergstein (or anyone acting on his behalf) from moving, transferring, dissipating, or distributing any assets or funds under his control or in which he has an interest including, without limitation, the assets and/or funds held in the name of the companies and trusts listed in Exhibit B" (*see* Dkt. 1215 at 23). The record on this motion is insufficient to assess the alleged issues with particular transfers that have occurred or are likely to occur. The court will not generally declare that Bergstein cannot transfer any money since that could include payments exempt from execution and could adversely affect other parties' rights.

In reality, petitioner does not seem to think that mere enforcement against Bergstein will accomplish much since he purportedly does not directly own significant assets. Rather, petitioner claims that assets are being held by other people and through various entities so he can maintain them without subjecting them to execution. If so, petitioner must actually take the necessary steps to adjudicate those issues; the court cannot enjoin his family members or LLCs that are not actually before the court. Petitioner does not explain why those people and entities are not necessary parties to its motion such that issuing an injunction against them would not violate their due process rights, nor has petitioner explained how the court would have jurisdiction over them.

Finally, the court does not understand why petitioner's request for an accounting is denominated as such. The moving brief does not cite authority for this request (see Dkt. 1215 at 23-26). Of course, if petitioner wants information regarding Bergstein's distributions, right to distributions, or frankly any insight into the financial arrangements addressed in the motion, all of that information is capable of being sought through article 52 subpoenas and depositions. If petitioner takes issue with the information provided, it can seek court intervention in the ordinary course. For instance, in a footnote in reply, petitioner complains that Bergstein has not produced documents related to one of the trusts (Dkt. 1276 at 11 n 6). But petitioner has not moved for relief based on his failure to produce those documents in response to an article 52 subpoena. Seeking an accounting without explaining the legal basis for the request when ordinary, broad article 52 discovery is available, is unwarranted.

Accordingly, it is ORDERED that petitioner's motion is GRANTED IN PART to the extent that (1) the membership interests of respondent David Bergstein in Boson, LLC, Capco Group, LLC, Capitol Films Development, LLC, CT-1 Holdings, LLC, DPRE Enterprises, LLC, Graybox, LLC, Pangea Media Group, LLC, R2D2, LLC, Steambox, LLC, and ThinkFilm, LLC, are hereby charged with the unsatisfied balance of the judgment entered against him in this action, with interest thereon and less any recoveries obtained, until such judgment is satisfied in full, and pending such satisfaction petitioner Wimbledon Financing Master Fund, Ltd. shall have all rights as assignee of Bergstein's membership interests charged herein; and (2) petitioner may serve restraining notices on Cyrano Group, Inc., Gion Funding Settlements, Inc., Kambe Asset Management Group, Inc., Owari Opus, Inc., Swartz IP Services, Inc., and WGH Holdings, Inc.; and the motion is otherwise DENIED. And it is further ORDERED that petitioner shall promptly serve a copy of this order on the LLCs in which Bergstein's interests are charged.

8/7/2023
DATE


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JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
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