

AC Prestige Corp. v Cross Lake Partners LP

2023 NY Slip Op 33109(U)

September 7, 2023

Supreme Court, New York County

Docket Number: Index No. 158270/2022

Judge: Lisa S. Headley

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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. LISA S. HEADLEY PART 28M

Justice

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AC PRESTIGE CORP.,

Plaintiff,

- v -

CROSS LAKE PARTNERS LP, PAULSON REAL ESTATE
RECOVERY FUND, LP, PAULSON REAL ESTATE FUND
II, L.P.,

Defendant.

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INDEX NO. 158270/2022

MOTION DATE 08/11/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 78, 79, 80, 81, 83, 84, 85

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Before the Court is the motion by the attorneys for the Proposed Intervenor, Stephanie Schulman (“Intervenor Schulman” or “intervenor”), for an Order, 1) pursuant to *CPLR* §§5225, 1012 and 1013, granting Intervenor Schulman leave to intervene in this proceeding; and 2) pursuant to *CPLR* §3211(a)(7), dismissing the proceeding in its entirety and/or denying the Petition in its entirety; and 2) granting such other and further relief as the Court deems just and proper. The attorneys for petitioner, AC Penguin Prestige Corp. (“petitioner”), filed opposition, and Intervenor Schulman filed a reply.

In support of the motion, Intervenor Schulman argues, *inter alia*, that she entitled for leave to intervene because she has a real and substantial interest in this proceeding. Intervenor Schulman contends the petitioner seeks to confiscate the restricted real property interests from the respondents, and she has property rights to certain restricted interests held by the respondents, Cross Lakes Partners LP, Paulson Real Estates Recovery Fund, LP or Paulson Real Estate Fund II, L.P. In addition, Intervenor Schulman argues that upon intervention, the proceeding must be dismissed because it is defective in that the prior third-party practice in the proceeding was without leave of the Court, and thus is null, pursuant to *CPLR* §401.

As to the arguments that the proceeding should be dismissed, the intervenor claims, *inter alia*, that petitioner bears the burden of proof in seeking to confiscate the property interests of another, and failed to meet that burden by providing hearsay demands and conclusory statements of its counsel. The intervenor argues that the petitioner fails to set forth competent proof all of the intervenor’s supposed interest in the restricted real property interests, and the affirmation submitted in support by its counsel lacks personal knowledge and probative value.

In opposition, petitioner argues that the petition seeks a Charging Order against Limited Partnership interests, and does not seek turnover of “real property” interests as the intervenor stated in her moving papers. Petitioner argues that Intervenor Schulman does not challenge its right to charging lien order and the characterization of her restricted “real property” interests in the respondents is false and misleading. Petitioner points out inconsistencies in the motion, in that Intervenor Schulman identifies herself as managing member of respondents and that she owns the assets in question; however, she made an admission in her proposed answer that she is a limited partner holding illiquid real estate investments. Petitioner claims that the intervenor’s application was made in bad faith, and seeks attorneys’ fees for opposition to this motion.

In addition, petitioner agrees with the intervenor’s argument that the third-party action is improper and should be dismissed. Lastly, the petitioner argues that the proposed answer is unverified, and simply recites inapplicable affirmative defenses without support, such as an affidavit by the intervenor. Therefore, the petitioner argues that the motion should be denied in its entirety.

In reply, Intervenor Schulman argues that the opposition papers should be disregarded as it was untimely filed after two months. Intervenor Schulman also argues that her motion should be granted as the petitioner conceded that all third-party practice was never authorized by the Court and thus, is null. In addition, the intervenor contends that the parties agreed that Intervenor Schulman should be permitted to intervene and oppose this proceeding because petitioner did not make a coherent argument in opposition to the intervention, and the only argument raised was in opposition to dismiss the petition for a charging order. The intervenor argues that the petition fails to establish entitlement to the relief sought, and that petitioner failed to offer any sworn statement in support of the petition, including that petitioner has not explained or established what assets the charging lien would attach to, their value or whether the Court has jurisdiction.

Moreover, the intervenor argues that petitioner submitted an affidavit that did not explain what her assets are, other than that she has a limited partnership interest in “illiquid and non-publicly traded real estate assets located outside of New York.” The intervenor further argues that since this not a plenary action but a special proceeding, petitioner’s defective petition leaves the court with the option of dismissing the petition under *CPLR §408* or ordering an evidentiary hearing under *CPLR §409*.

Discussion

First, the Court will permit the opposition filed by petitioner. The Court received and so-ordered an “Affirmation in support of adjournment request of motion seq. 5 in motion submission part” filed by the petitioner on May 22, 2023. (See, NYSCEF Doc. No. 78). In the request, the petitioner sought a 30-day adjournment to review, analyze and prepare responsive papers for the instant motion. On May 24, 2023, this Court granted petitioner’s request, and adjourned the instant motion until August 11, 2023. The petitioner’s opposition was subsequently filed on August 4, 2023, and the intervenor’s reply was filed on August 11, 2023. Here, the Court retains the discretion to accept late opposition papers upon a showing of a valid excuse. *See, Wilcox v.*

Newark Val. Cent. Sch. Dist., 107 A.D.3d 1127, 1130, 967 N.Y.S.2d 432 [2013]; *see generally*, *CPLR §2004*.

Moving on to the crux of the arguments made in the motion papers, the Court finds as follows. Leave to intervene is granted as of right pursuant to *CPLR §1012*, which provides, in relevant part, that “any person shall be permitted to intervene in any action...when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.” *CPLR §1012(a)(3)*. Leave to intervene may also be granted as a matter of discretion pursuant to *CPLR §1013*, which states in relevant part, that “[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” *CPLR §1013*. Likewise, “intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings. Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a *bona fide* interest in an issue involved in that action.” *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dept 2010)).

The intervenor argues that pursuant to *CPLR §5225*, the court may permit the judgment debtor to intervene in a proceeding for the turnover of his or her assets. To the contrary, the petitioner claims that this instant proceeding is not seeking a turnover, however, the petition seeks a Charging Order against Limited Partnership interests. It is undisputed that the petitioner seeks a charging lien on assets of judgment debtor Stephanie Schulman. (See, Verified Petition, NYSCEF Doc. No. 1).

Here, the intervenor has demonstrated that she has a *bona fide* interest in the issues in this proceeding given that she maintains that she has property rights to certain restricted interests held by the respondents, Cross Lakes Partners LP, Paulson Real Estates Recovery Fund, LP or Paulson Real Estate Fund II, L.P. It should be noted that the petitioner undeniably served Intervenor Schulman in a separate motion (seq. no. 002) seeking a Charging Lien and/or Charging Order against certain shares in Paulson Real Estate Recovery Funds L.P. and Paulson Real Estate Fund II, L.P. As such, there is no dispute that the intervenor has an interest in this proceeding, whether as a managing member or as a limited partner in the respondents. Accordingly, as interventions are liberally allowed and here, the intervenor has demonstrated an interest in this proceeding, the portion of the motion seeking intervention shall be granted.

The intervenor next argues that the third-party petition should be dismissed because it is defective since the prior third-party practice in the proceeding was without leave of the Court, and thus is null pursuant to *CPLR §401*. Here, the third-party summons was filed on November 21, 2022, whereby the third-party plaintiff, Cross Lake Partners, LP filed a claim against third-party defendant, OIE Family Trust.(See, NYSCEF Doc. No. 26).

CPLR §401 states: “[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of the court.” Here, the petitioner, in the opposition papers, agreed with the intervenor’s argument that the third-party action is improper and should be dismissed. Based upon all the foregoing,

the Court finds that third party petition was filed without leave of the Court in violation of *CPLR §401*, and is therefore a nullity. Accordingly, the third-party action shall be dismissed.

Lastly, the intervenor moves this Court to dismiss the petition pursuant to *CPLR §3211(a)(7)* because the petitioner failed to meet that burden by providing hearsay demands and conclusory statements of its counsel. The intervenor also argues that the petitioner failed to set forth competent proof all of the intervenor's supposed interest in the restricted real property interests. On a motion to dismiss brought under *CPLR §3211(a)(7)*, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff benefit of every possible favorable inference, and determine only whether the complaint as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Here, the Court finds that dismissal is not warranted because the petitioner states a cognizable cause of action for a charging lien in that the petition states that petitioner obtained a judgment in the underlying action against respondents in the amount of \$253,392.59 and seeks to obtain the current amount due and owing \$275,000.00 plus interest. More specifically, the petition states that petitioner conducted a post-judgment deposition of Intervenor Schulman in October 2019 where she failed to disclose her interests in the funds, and submits an affidavit of Jonathan Shumaker, the managing partner of co-respondent, Cross Lake Partners, L.P., where he states that Cross Lake manages Paulson Real Estates Recovery Fund, LP and Paulson Real Estate Fund II, L.P., and their record reflects that Intervenor Schulman became a limited partner of the funds.

The Court must accord the "plaintiff the benefit of every possible favorable inference" and "the court must determine only whether the facts alleged fit within any cognizable legal theory." *Id.* Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017). Here, petitioner has set forth facts to support a cognizable claim. As such, the Court finds that intervenor's motion to dismiss must be denied.

Lastly, the Court, within its discretion, denies the petitioner's application for attorneys' fees and costs as it pertains to this motion.

Accordingly, it is hereby

ORDERED that the portion of the motion filed by the Proposed Intervenor, Stephanie Schulman ("Intervenor Schulman"), for an Order, pursuant to *CPLR §§1012* and *1013*, for leave to intervene in this proceeding is **GRANTED**; and it is further

ORDERED that movant/intervenor shall serve their proposed verified answer with counterclaim, if any, by e-filing it as a separate NYSCEF document within 14 days; and it is further

ORDERED that the proposed intervention pleading setting forth the defenses of the movant that accompanied the motion shall be deemed to have been served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the portion of the motion seeking dismissal of the third-party petitioner, pursuant to *CPLR §401*, for failure to seek leave from the Court, is GRANTED, and the third-party petition is hereby DISMISSED; and it is further

ORDERED that the portion of the motion seeking dismissal of the proceeding pursuant to *CPLR §3211(a)(7)* is DENIED; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

9/7/2023
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE