BMO Harris Bank N.A. v DLJ Private Equity Partners Fund II, L.P.
2012 NY Slip Op 33942(U)
June 15, 2012
Supreme Court, New York County
Docket Number: 112067/2011E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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BMO HARRIS BANK N.A. (f/k/a HARRIS N.A.),

Petitioner,

against

DLJ PRIVATE EQUITY PARTNERS FUND II, L.P.,

Respondent,

and

LOREN W. HERSHEY,

Proposed Intervenor.

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Index Number 112067/2011E
Mot. Seq. No. 002

DECISION, ORDER AND JUDGMENT

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E-filed papers considered in review of this motion to vacate and to grant intervention:

Papers	E-file Document Number:
Order to Show Cause	9, 16
Affirmation, exhibits, Affidavit, Memo of Law in Support	9-1 - 9-8, 10, 11
Affidavits of Service, exhibit	12, 13, 13-1
Memo of Law, Affidavits, exhibits in Opposition	21 - 45
Affidavit, Affirmation, exhibit in Opposition	46 - 47
Memo of Law, Affidavit, Affirmation in Reply	49 -51
Transcript of hearing on Jan. 25, 2012	53
Letter dated Apr. 10, 2012 from petitioner's counsel	54
Letter dated June 1, 2012 from proposed intervenor	68
Letter dated June 13, 2012 from petitioner's counsel	69
Letter dated June 14, 2012 from proposed intervenor	70

[1]Subsequent to the filing of this motion, movant's attorneys were relieved as counsel and movant, an attorney, is now representing himself.

PAUL G. FEINMAN, J.:

Non-party proposed intervenor Loren W. Hershey, the judgment-debtor to petitioner judgment-creditor BMO Harris Bank N.A., moves by order to show cause pursuant to CPLR 2221 and 5015, to vacate the court's November 30, 2011 decision and order which granted the petition "on default," and for leave to intervene and assert an answer as a party respondent, as well as to set aside the proposed judgment that the petitioner and respondent were directed to submit to the court pursuant to CPLR 5225, 5227, 5238 and 5240. He also seeks a stay of this proceeding pending the outcome of his motion currently in the United States Bankruptcy Court, Eastern District of Virginia or, alternatively, pending the outcome of the appeal pending in the United States Court of Appeals for the Seventh Circuit. For the reasons which follow, the motion is granted in part and otherwise denied.

BACKGROUND

Hershey is a part owner and former Managing Member of Acadia Investments, a family investment company based in Virginia (Doc. 10, Hershey Aff. in Supp. ¶ 3).[2] In October 2009, petitioner BMO Harris Bank, N.A., then known as Harris Bank, filed a lawsuit in Illinois federal court against Acadia and Hershey seeking to recover sums due under a credit agreement to which Hershey had signed as guarantor (Doc. 10, Hershey Affid. in Supp. ¶¶ 3-4). Harris Bank won a more than $15,000,000 judgment against both Acadia and Hershey in February 2011 (Doc. 1, Pet. ¶¶ 2, 7-8). The judgment remains unsatisfied (Doc. 1, Pet.¶ 11).

[2]According to petitioner's counsel, Hershey was removed as the Manager by consent and has been replaced with an attorney at the behest of Hershey's children (Doc. 22, Audley Affid. in Opp. ¶¶ 14-15; Doc. 45).

Acadia and Hershey have appealed the judgment to the United States Court of Appeals for the Seventh Circuit (Doc. 10, Hershey Affid. in Supp. ¶ 6; Doc. 22, Audley Affid. in Opp. ¶ 6). In July 2011, the Seventh Circuit issued an order clarifying that the appeal of the foreign judgment was stayed solely as to Acadia, and "will proceed with respect to appellant Loren W. Hershey" (Doc. 22, Audley Affid. in Opp. ¶ 5, citing Doc. 24 ex. 2, Order of 07/15/2011, U.S. Court of Appeals for the Seventh Circuit).

Acadia has also filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court for the Eastern District of Virginia (Doc. 10, Hershey Affid. in Supp. ¶ 15). Because of the bankruptcy proceeding, the judgment against Acadia has been stayed. After submission of this motion, Hershey filed a motion in the Bankruptcy Court dated April 30, 2012, seeking to extend the automatic stay in the bankruptcy motion (Doc. 64 pp. 9-28 [ex. B and C to Hershey's previously filed Response in Opposition to Counsel's Motion to Withdraw]). That motion was denied on June 12, 2012 (Doc. 69, Letter of Chapman & Cutler, LLP 06/13/2012; Doc. 70, Letter of Hershey, 06/14/2012).[3]

Respondent DLJ Private Equity Partners Fund II, L.P. is a Delaware limited partnership with offices in New York, New York, and holds an interest bearing account for Hershey's benefit, and makes periodic monetary distributions (Doc. 1, Pet.¶¶ 3, 12). Petitioner learned of this fund's existence and in March 2011, notified it of the Illinois Judgment against Hershey and provided it with a Citation to Discover Assets for the purpose of locating Hershey's assets that could be applied toward that Judgment; thereafter DLJ Private Equity contacted Hershey to

[3]According to Hershey's letter of June 14, 2012, he has informed the Debtor Estate Counsel in the Bankruptcy proceeding that he will be "compelled" to file a motin to vacate the order, based on certain material evidence not properly put on the record (Doc. 70, Letter of Hershey, 06/14/2012).

inform him that distributions of funds would not be made to him directly because of the outstanding Judgment (Doc. 28 pp. 15 *et seq.*, Pet. ex. B, correspondence between Harris Bank, DLJ Private Equity, and Hershey).

In October 2011, petitioner judgment-creditor Harris Bank domesticated its Illinois judgment in New York's Supreme Court, pursuant to CPLR 5402 (Doc. 1, Pet.¶ 9). It commenced this turnover proceeding against DLJ Private Equity pursuant to CPLR 5225 (b) and 5227, seeking judgment against respondent so as to obtain the funds held by respondent that otherwise would have been distributed to Hershey, in order to partially settle its judgment against him. According to the petition, there have been two monetary distributions recently which, on advice of counsel for DLJ Private Equity, were not distributed to Hershey but placed in an interest bearing account where they will remain "until the federal litigation is resolved " (Doc. 1, Pet.¶¶ 13-14). As of the filing of the verified petition, DLJ Private Equity is holding at least $1,182,857 on behalf of Hershey (Doc. 1, Pet.¶ 15).[4]

According to petitioner, Hershey was properly served with a copy of the notice of petition and petition, but did not appear or move to intervene, and thus the petition was granted "on default" on November 30, 2011, with the parties ordered to settle judgment (Mot. ex. A, decision of Nov. 30, 2011). The proposed Judgment, noticed for December 19, 2011, states in part that the judgment-debtor had been served with a copy of the notice of petition and petition but had not appeared, that the court had entered an order granting the petition on December 2, 2011, that the parties had agreed that respondent was permitted to withhold $25,000 from the monies at

[4]It appears DLJ Private Equity has held aside a third distribution from Hershey (see Doc. 46, Henigan Affid. ¶ 9). The Equity Fund proffers an affidavit and an attorney affirmation explaining its actions pursuant to the federal litigations (see Doc. 46, Henigan Affid.; ex. A [Limited Partnership Agreement]; Doc. 47 Weigel Affirm.).

issue in order to pay for its legal fees and expenses associated with managing these monies for Hershey and for which the Fund is contractually entitled to reimbursement, and that compliance with this order would discharge DLJ Private Equity from its obligations to the judgment- debtor pursuant to CPLR 5209 (Doc. 5, Proposed Judgment).

Non-party Hershey moves to vacate the proposed judgment and seeks permission to intervene on the grounds of insufficient notice and a meritorious defense and reasonable excuse.

MOTION TO VACATE AND INTERVENE

The issue always in any proceeding before the court is whether the persons of interest received sufficient notice to satisfy due process. The Due Process Clause states that the State may not "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend, § 1). "Due process is flexible and calls for such procedural protections as the particular situation demands." (*Weeks Marine Inc. v City of New York*, 291 AD2d 277, 278 [1st Dept. 2002], citing *Mathews v Eldridge*, 424 US 319, 333-335 [1976]). Procedural due process, "[r]educed to its most elemental terms . . . requires notice and an opportunity to be heard." (*Sanford v Rockefeller*, 35 NY2d 547, 567 [1974] [dissent, Wachtler, J.], *app. dismissed* 421 U.S. 973 [1975]).

In New York, the law requires that notice of a turnover proceeding or motion is to be served on the judgment-debtor "in the same manner as a summons or by registered or certified mail, return receipt requested" (*Oil City Petroleum Co. v Fabac Realty Corp.*, 70 AD2d 859 [1st Dept 1979], *affd* 50 NY2d 853 [1980]; CPLR 5225 [a], [b]; CPLR 5227). Although Hershey attempts to argue, in essence, that petitioner did not properly upload the proof of service into the supreme court's efiling system (NYSCEF), petitioner's attorney provides copies of the papers

that he originally filed in the Motion Support Office, including an affidavit of service upon Hershey dated October 26, 2011; petitioner additionally provides proof that Hershey did in fact receive the papers, namely a signed US Postal System certified mail return receipt (Doc. 31, Gagion Affid. ¶¶ 5-7; Doc. 40, ex. I, copy of hard copy documents filed in court; see Doc. 12, Affid. of Service; Doc. 13, Supp. Affid. of Service; Doc. 13-1, certified mail return receipt requested). It is clear that petitioner comported with the statutory provisions for giving Hershey notice of the proceeding. To the extent that the affidavits of service were not initially uploaded into the NYSCEF system, it appears to have been a court-related error deriving from the interplay between supreme court's Motion Support Office and the E-Filing Office. There was no due process violation, and the court has personal jurisdiction over Hershey. Moreover, Hershey admits that he received the petition (Doc. 10, Hershey Affid. in Supp. ¶ 11). Accordingly, Hershey's motion to vacate the decision of November 30, 2011 on the ground that petitioner did not establish proof of service on him, is denied.

Hershey seeks leave to intervene and assert an answer, and to have set aside the proposed Judgment. He concedes that as a judgment-debtor he has no absolute right to intervene (Doc. 53, Tr. of Oral Argument 01/25/2012 at 3:21-26). He argues that the court must take cognizance of his recent diagnosis of chronic sleep deficit, a condition brought about by stress-related insomnia and sleep apnea, for which he began receiving treatment as of about November 2011 (Doc. 10, Hershey Affid. in Supp. ¶¶ 8-10). He claims that this long-term chronic sleep deficit has negatively affected his cognitive functions, including reasoning ability and judgment (Doc. 10, Hersey Affid. in Supp. ¶ 9). He thus explains that he recalls receiving "at some point in October or early November 2011," a copy of the petition, but because of the untreated chronic sleep

deficit, he "failed to perceive and appreciate the urgency of seeking to intervene and assert [his] rights in this proceeding" (Doc. 10, Hershey Affid. in Support ¶ 11).

In addition to the absence of a letter from his doctor or other documentation to support this statement of medical condition, the claim of diminished cognitive capacity is challenged by petitioner's attorney who states that Hershey, an attorney licensed in the District of Columbia, was actively involved in the federal litigation during this same time period and at one point represented himself (Doc. 22, Audley Affirm. in Opp. ¶ 8, citing Doc. 25, ex. 3, Hershey's Motion for Leave to Appear *Pro Hac Vice*, dated February 25, 2011). Also, according to petitioner's counsel, he himself appeared, along with Hershey's then-new counsel, before the federal judge in October 2011 and again in November 2011, and on both occasions the filing of this turnover proceeding was discussed (Doc. 22, Audley Affirm. in Opp. ¶¶ 9-11). In sum, movant's explanation for his inaction is insufficiently persuasive, and therefore his motion for leave to intervene and assert an answer, and to set aside the parties' proposed Judgment, is denied.[5]

Hershey also seeks to have this turnover proceeding stayed based on the existence of the Acadia Investments bankruptcy proceeding, and the appeal of the Illinois Judgment. Hershey claims that, as concerns the bankruptcy proceeding, he is committed to contributing "substantial amounts to fund Acadia's ultimate plan of reorganization" (Doc. 9-1, Giordano Affirm. in Supp. ¶ 23; Doc. 9-7, ex. F, Notice of Hearing and of Motion of Loren W. Hershey to Extend the Automatic Stay ¶¶ 25, 37). Enforcement of a judgment against his personal funds will, he

[5]Although this motion is not technically a motion to vacate pursuant to CPLR 3215, in that respondent did not default, the analysis applied is based on the statute's requirement that the movant establish a reasonable excuse for the default as well as a meritorious defense (*see Barasch v Micucci*, 49 NY2d 549 [1980]).

argues, impair the rights of Acadia's creditors by reducing his ability to contribute funds to Acadia's reorganization plan (Doc. 10, Hershey Affid. in Supp. ¶ 18). However, Acadia moved to dismiss Hershey's first motion to extend to him the automatic stay under bankruptcy, and petitioner's counsel states that he was informed by Acadia's new Manager that Hershey will have no role in the reorganization (Doc. 22, Audley Affid. in Opp. ¶¶ 14-15; Doc. 45, Gagion Affid. ex. N , Debtor's Motion to Dismiss or Strike Motion of Loren W. Hershey ¶ 4). As noted above, Hershey brought a second motion to extend the automatic stay to him (see Doc. 64 pp. 9 *et seq.*, Motion to Extend Automatic Stay, United States Bankruptcy Court for the Eastern District of Virginia), a motion which was denied on June 12, 2012 (Doc. 70, Letter of Chapman & Cutler, LLP, 06/13/2012).[6] As to the appeal currently pending in the United States Court of Appeals for the Seventh Circuit, this concerns the denial by the United States District Court, Northern District of Illinois District Court of Hershey's oral application for a stay of enforcement of the Judgment (Doc. 23, Audley Affid. in Opp. ex. 1, U.S. Dist. Ct., No. Distr. of Illinois, Docket Entry Text, 2/22/2011).

Petitioner Harris Bank argues in opposition that it will be prejudiced if it is unable to acquire the funds currently set aside by DLJ Private Equity, in part because it believes that Hershey is likely to attempt to gain control of the funds prior to the resolution of these litigations (see Doc. 22, Audley Affid. in Opp. ¶ 17; Doc. 21, Memo of Law in Opp. pp. 24-27). It also

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[6]Because Acadia had objected to Hershey's posture in the bankruptcy proceeding, Hershey also had commenced an adversary proceeding against Harris Bank in that proceeding, seeking in part to determine whether the funds at issue in this turnover proceeding should be available in the Acadia reorganization (Doc. 53, Tr. of Oral Argument 01/25/2012 at 4-6). Hershey voluntarily dismissed his proceeding pursuant to Rule 41 of the Federal Rules of Civil Procedure and Rule 7041 of the Federal Bankruptcy Rules (Doc. 54, Chapman & Cutler LLP letter of Apr. 10, 2012, and attached "Notice of Dismissal of Adversary Action," *Matter of Acadia Investment L.C., Debtor; Loren W. Hershey v BMO Harris Bank, N.A.*, Case No. 11-12591-RGM (Bankr. E.D. Va.).

argues that there is no merit to this branch of Hershey's motion, pointing to his so far unsuccessful efforts to stay enforcement of the Judgment as against him personally. In addition, DLJ Private Equity opposes the motion only because it is a "mere stakeholder" in this turnover proceeding which only seeks to comply with the court's order as to the payment of the funds at issue, less the legal fees Hershey is obligated to pay (Doc. 46, Henigan Aff. ¶¶ 10-11; Doc. 53, Tr. of Oral Arg. 1/25/2012 at 21). It desires to be discharged by making payment of the funds, as if to its Member, movant Hershey (Doc. 53, Tr. of Oral Arg. 1/25/2012 at 21).

Currently there is no stay in place as to Hershey issued by either the U.S. Bankruptcy Court in Virginia or the Seventh Circuit court. The CPLR provides that a court may grant a stay "in a proper case, upon such terms as may be just" (CPLR 2201). Hershey notably does not assert that the Judgment in favor of Harris Bank lacks merit, and he does not provide anything to support his claim that Acadia seeks or requires the funds at issue in this proceeding. He contends only that in the meantime the funds held by DLJ Private Equity are protected and earning interest (Doc. 10, Hershey Affid. in Supp. ¶¶ 19-20; Doc. 11, Memo. in Supp. p. 9; Doc. 49, Reply Memo. of Law pp. 7-8). Nonetheless, in an exercise of caution, this branch of movant's motion is granted to the extent that the monies currently held by DLJ Private Equity Fund II, L.P., the subject of this turnover proceeding, along with the accrued interest, shall be deposited into the court, with $25,000 withheld, and shall remain there pending the ruling by the Seventh Circuit; after its ruling is issued, upon motion on notice, the turnover of the funds will again be addressed.

MOVANT'S CLAIMS AGAINST RESPONDENT

Movant claims to have a breach of contract claim against DLJ Private Equity because it

withheld two distributions due him prior to petitioner domesticating the foreign Judgment in New York (Doc. 10, Hershey Affid. in Supp. ¶ 22). He appears to suggest that because the foreign Judgment was not domesticated in New York until October 2011, DLJ Private Equity was under no obligation to acknowledge the Citation to Discover Assets served on it in February 2011 by Harris Bank as judgment-creditor, which gave notice of the Judgment entered in favor of Harris Bank and against Hershey totaling more than $16,000,000, and prohibited the DLJ Private Equity from transferring or otherwise disposing of any of Hershey's funds that might be subject to the garnishment (Doc. 46, Henigan Affid. ¶¶ 6-8). Movant offers no legal basis for this assertion, and it is therefore deemed to lack merit.

To the extent that Hershey seeks to challenge the parties' agreement set forth in the proposed Judgment that $25,000[7] of the funds currently aside by DLJ Private Equity in compliance with the Citation to Discover Assets and the domesticated Judgment, will be withheld from Harris Bank so as to reimburse DLJ Private Equity for its legal fees, this should be brought against DLJ Private Equity as a separate plenary action. This is because pursuant to CPLR 5209, the discharge as to DLJ Private Equity pertains solely to the funds that it pays or delivers to Harris Bank as the judgment-creditor, and thus, the Equity Fund remains liable for the funds not turned over. Therefore, it is

ORDERED that the motion is granted only to the extent set forth below, and is otherwise denied; and it is further

ORDERED and ADJUDGED that DLJ Private Equity Partners Fund II, L.P. is directed,

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[7]DLJ Private Equity's Henigan asks that the amount to be withheld to cover legal fees be increased to $35,000 (Doc. 46, Henigan Aff. ¶ 16), and its attorney explains that the amount of legal fees has now increased to at least $35,000, because of the need to defend this motion (Doc. 47, Weigel Affirm. ¶ 17). There is no motion or cross motion to amend the proposed Judgment to increase the amount of fees.

upon receipt of a certified copy of this order and judgment, to turn over to the Court, on behalf of BMO Harris Bank N.A. all monies, plus accrued interest, presently held by the Fund on behalf of Loren W. Hershey, less $25,000.00 which will be used by the Fund to reimburse itself for legal fees and expenses, up to a maximum amount of $16,000,000.00 and it is further

ADJUDGED that upon such turn-over of funds to the Court, the respondent DLJ Private Equity Partners Fund II, L.P. shall be discharged of all liability on this account to the extent of payment made and that the Fund shall not be responsible for any costs in this matter.

This constitutes the decision, order, and judgment of the court.

Dated: June 15, 2012
New York, New York

J.S.C.

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

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