Galen Tech. Solutions, Inc. v Vectormax Corp.
2012 NY Slip Op 31235(U)
May 11, 2012
Supreme Court, New York County
Docket Number: 102397/2008
Judge: Eileen Bransten
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SCANNED ON 5/11/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **EILEEN BRANSTEN** — *Justice*

PART 3

Index Number : 102397/2008
GALEN TECHNOLOGY SOLUTIONS INC
vs.
VECTORMAX CORP.
SEQUENCE NUMBER : 004
ENFORCE/EXEC JUDGMENT OR ORDER

INDEX NO. 102397/08
MOTION DATE 12/06/11
MOTION SEQ. NO. 004

The following papers, numbered 1 to 4 **, were read on this motion to/for** ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2, 3
Replying Affidavits	**No(s).** 4

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAY 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-11-12

, J.S.C.

EILEEN BRANSTEN

1. **CHECK ONE:** .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** ....**MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
---X

GALEN TECHNOLOGY SOLUTIONS, INC.,

Plaintiff,

-against-

VECTORMAX CORPORATION,

Defendant.
---X

Index No. 102397/2008
Motion Date: 12/06/2011
Motion Seq. No.: 004

FILED
MAY 11 2012
NEW YORK
COUNTY CLERK'S OFFICE

BRANSTEN, J.

Plaintiff Galen Technology Solutions, Inc. ("Galen"), moves pursuant to CPLR § 5228 to appoint a receiver to take possession of and sell certain of Defendant VectorMAX Corporation's ("VectorMAX") assets in satisfaction of Galen's judgment against VectorMAX. VectorMAX opposes.

Non-party Hector Torres ("Torres") moves to intervene. Torres also opposes Galen's motion to appoint a receiver. Galen opposes.

I. Background

On October 13, 2009, Galen obtained a judgment against VectorMAX for $278,167 plus prejudgment interest and costs (the "Galen Judgment"). VectorMAX has paid Galen $103,191.76, leaving an outstanding principal of $174,975.24. Galen claims that it has not received any payments from VectorMAX since May 23, 2011.

Non-party Hector Torres obtained a judgment against VectorMAX on November 19, 2008 for $324,316.40 in the federal district court for the southern district of New York (the

"Torres Judgment"). Affirmation of Dorothy M. Weber in Opposition and Support ("Weber Affirm."), Ex. A, p. 1.

Galen, Torres and VectorMAX all claim that Time Warner Cable, Inc. ("Time Warner"), owes VectorMAX for work it completed for Time Warner. VectorMAX claims that Time Warner owes it "in excess of $150,000. Affirmation of Thomas W. Pragias in Support of Memorandum of Law in Opposition to Motion to Appoint a Receiver ("Pragias Affirm."), ¶ 6. VectorMAX further claims that Time Warner will soon pay the money owed, although Time Warner disputes the amount due. *Id.*

On November 16, 2010, Galen issued a restraining notice to Craig Goldberg, Esq., an employee of Time Warner Cable, in an effort to collect on the balance of the Judgment. Reply Affirmation of Christle R. Garvey in Support of Galen's Application for Appointment of a Special Receiver in Aid of Execution ("Garvey Reply Affirm."), Ex. E. The restraining notice prohibited Time Warner from transferring any of the money it allegedly owed to VectorMAX to anyone other than Galen. *Id.*

On September 12, 2011, Torres delivered an Execution with Notice to Garnishee to the New York County Sheriff. Weber Affirm., Ex. C. The Garnishee named therein was Time Warner. *Id.* The Execution stated that $109,316.40 of Torres' judgment award remained outstanding at that time. *Id.* The sheriff then levied upon $4,884.35 that Time Warner owed to VectorMAX and remitted the payment to Torres on October 5, 2011. Weber Affirm., Ex. D. Torres then issued a second Execution with Notice to Garnishee on

November 7, 2011 with a balance adjusted to reflect the $4,884.35 payment. Weber Affirm., Ex. E.

Galen brought the instant motion on October 18, 2011. Galen asks this court to appoint a receiver to take possession of and sell four patents owned by VectorMAX (the "Patents") and to use the proceeds of the sale to pay the remainder of the Galen Judgment.

On November 1, 2011, Torres filed a UCC Financing Statement (the "Statement") on the Patents. Weber Affirm., Ex. F. Torres claims that the filing of this Statement created a lien against the Patents. Weber Affirm., p. 3.

II. Analysis

A. Appointment of a Receiver

Galen moves to appoint a receiver to take possession of and sell the Patents. VectorMAX claims that the appointment of a receiver would severely impact VectorMAX's ability to do business and would hinder, rather than assist, Galen in recovering the balance of its judgment.

CPLR § 5228(a) provides that, "[u]pon motion of a judgment creditor . . . the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment."

> The appointment of a receiver pursuant to [CPLR §] 5228(a) is a matter within the court's discretion. A motion to appoint a receiver should only be granted when a special reason appears to justify one. In deciding whether the appointment of receiver is justified, courts have considered the (1) alternative remedies available to the creditor; (2) the degree to which receivership will

> increase the likelihood of satisfaction; and (3) the risk of fraud or insolvency if a receiver is not appointed.

Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 317 (2010) (internal citations omitted).

Galen has not demonstrated a special reason to appoint a receiver. First, Galen has failed to show that the receivership will increase the likelihood of satisfaction. To the contrary, VectorMAX reasonably claims that it is less likely to pay the Galen Judgment if the court appoints a receiver. VectorMAX argues that the sale of the Patents, a major component of the company's income, may lead to VectorMAX's insolvency. Pragias Affirm., p. 1. VectorMAX claims that its patents are its most valuable asset, and that the technologies they protect function in conjunction with one another. *Id.* at p. 2. Consequently, selling four of its patents would severely impede its ability to conduct its business. *Id.* Galen does not refute this assertion.

Furthermore, while VectorMAX has alleged that the Patents are valuable to the company, it is unclear what the market value of those Patents would be. Because the Patents function in conjunction with the company's other patents, their value may be limited if they are sold independently of the other patents with which they are interdependent. If the sale of the Patents did not produce sufficient income to satisfy the judgment, and if VectorMAX's business were impaired or non-existent because of the sale, then Galen would not be able to collect the remainder of the judgment. Galen does not show that the appointment of a receiver and sale of the Patents is an effective method to recover its judgment.

Second, Galen has not shown that a receivership is necessary for it to recover the remainder of its judgment award. VectorMAX has already paid a large portion of the Galen

Judgment, and has averred that it will make a sizeable payment to Galen once VectorMAX and Time Warner reach an agreement about the amount of Time Warner's outstanding debt. Pragias Affirm., p. 3. Galen has already issued a restraining notice to Time Warner. Garvey Reply Affirm., Ex. E. Once Time Warner and VectorMAX reach an agreement as to the amount Time Warner owes, then Time Warner will be a debtor of VectorMAX. Galen can then seek payment directly from Time Warner as a garnishee pursuant to Galen's restraining notice.

Galen is, however, only entitled to receive the amount of the Time Warner payment that remains after the Torres Judgment is satisfied.[1] While Galen issued a restraining notice to Time Warner, it did not execute its judgment. "[S]ervice of a restraining notice pursuant to CPLR 5222 gives no priority over other creditors." *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 25 (2d Dep't 2004). A judgment creditor must "take further steps in enforcing his judgment, such as an execution or levy upon the judgment debtor's property, in order to prevent the intervening rights of third parties from taking precedence over his claim against the judgment debtor." *Aspen Industries, Inc., v. Marine Midland Bank*, 52 N.Y.2d 575, 580 (1981).

Unlike Galen, which merely issued a restraining notice, Torres executed and levied upon the Time Warner debt. As Torres effected a levy on the Time Warner payment before Galen, Torres is the priority judgment creditor as to that VectorMAX asset.

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[1] VectorMAX estimates this amount to be between fifty and sixty thousand dollars. Pragias Aff., p. 4.

Finally, Galen has not shown that there is a risk of a fraud if the court declines to appoint a receiver. Galen alleges that a risk of fraud exists because VectorMAX is colluding with Torres to ensure the Torres Judgment is paid first. Garvey Reply Affirm., 3.

Galen argues that VectorMAX fraudulently transferred an interest in the Patents to Torres on November 1, 2011, in violation of the restraining notice Galen issued to VectorMAX. Galen also, however, makes the contradictory argument that "Torres took unilateral action, namely, by filing a patently invalid and ineffective UCC-1 [financing] statement to give Galen, and other creditors and the Court, the impression that he had a lien on the patents." Garvey Reply Affirm., p. 6. The Financing Statements that Torres filed were not signed by VectorMAX and Galen presents no evidence that VectorMAX was in any way complicit with Torres's filing thereof. Weber Aff., Exs. B, F. Galen's allegations and the record show that Torres, not VectorMAX, attempted to place a lien on the Patents after Galen initiated the instant motion. Galen does not provide any evidence that VectorMAX committed fraud or otherwise violated Galen's restraining notice.

Galen has not demonstrated a special reason to appoint a receiver in this case. *Hotel 71 Mezz Lender LLC*, 14 N.Y.3d at 317. Galen's motion to appoint a receiver is therefore denied.

B. Intervention

Torres moves to intervene in the instant action to protect his interests as a prior judgment creditor. Torres claims that he should be permitted to intervene because he "has a substantial interest in these proceedings." Weber Aff., p. 7. He further argues that "[t]he

[* 8]

appointment of a receiver to dispose of these assets will directly affect Torres and prejudice his rights as a judgment creditor." *Id.* at p. 8. CPLR § 1013, which governs permissive intervention, provides that:

> [u]pon timely motion, any person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact. In 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.

While Torres meets the standard for permissive intervention under CPLR § 1013, the reason for his proposed intervention is moot in light of this court's decision not to appoint a receiver. Should the court's denial of Galen's motion to appoint a receiver be reversed on appeal, Torres may resubmit his motion to intervene at that time.

III. Conclusion

For the reasons set forth above, it is hereby

Ordered that Galen Technology Solutions, Inc.'s motion to appoint a receiver, motion sequence number 004, is denied; and it is further

Ordered that Hector Torres's motion to intervene is denied as moot, without prejudice and with leave to replead as Mr. Torres deems necessary.

Dated: New York, New York
May 11, 2012

FILED

MAY 11 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Eileen Bransten, J.S.C.