Matter of CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.
2017 NY Slip Op 30370(U)
February 28, 2017
Supreme Court, New York County
Docket Number: 150583/2014
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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In the Matter of the Application of
CDR CRÉANCES S.A.S.,

Petitioner-Judgment Creditor,

-against- Index No. 150583/2014

FIRST HOTELS & RESORTS INVESTMENTS, INC. (a/k/a LES PREMIERS INVESTISSEMENTS HOTELIERS & VILLEGIATURE, INC.), STEWART TITLE INSURANCE COMPANY and UNITED STATES OF AMERICA,

Respondents,

MAURICE COHEN, LEON COHEN, ROBERT MARABOEUF, ALLEGRIA ACHOUR AICH,

Judgment Debtors,

For a judgment and order pursuant to Civil Practice Law & Rules § 5225(b).

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LAWRENCE K. MARKS, J.

Respondent Stewart Title Insurance Company ("Stewart Title") moves to dismiss the petition against it, pursuant to CPLR 3211(a)(10), which provides for dismissal in the absence of one who should be a party.

BACKGROUND

This is one of a number of related cases that has been before this Court, familiarity with which is presumed. *See* Index Nos. 600448/2006, 650084/2009.

Briefly, among the issues pertinent to the instant motion, this special proceeding was commenced under CPLR 5225(b) by CDR Creances S.A.S. ("CDR"). Through this

proceeding, CDR sought to obtain a judgment and order that respondent First Hotels & Resorts Investments, Inc. ("First Hotels") was jointly and severally liable for funds owed by the judgment debtors, Maurice Cohen, Leon Cohen, Robert Maraboeuf and Allegria Aich. Am Pet, ¶ 1. CDR pled its entitlement through a veil piercing theory, seeking to connect First Hotels to the judgment debtors. *Id.*, ¶¶ 2-3. CDR alleged that First Hotels is the alter ego of the judgment debtors. *Id.*, ¶ 156.

CDR named Stewart Title in this proceeding because Stewart Title is holding funds in escrow that were the proceeds of the sale, by First Hotels, of a condominium. *Id.*, ¶ 8. This sale, and the placement of the funds into escrow, occurred in one of the related proceedings. *Id. See also* King Aff, Exh 1 (the Order, dated June 25, 2009, regarding the sale and the placement of the funds in escrow, in Index No. 650084/2009). CDR seeks an order directing Stewart Title to turn over to CDR all funds held in escrow that are the proceeds of the sale of the condominium unit. Am Pet, at p. 56.

Stewart Title received a Notice of Levy ("the levy"), dated April 20, 2010, from the United States Internal Revenue Service ("the IRS") seeking to collect, on behalf of Canada, certain tax liabilities allegedly owed by First Hotels. King Aff, ¶ 6; King Aff, Exh 3. By letter dated June 3, 2010, Stewart Title was instructed to suspend compliance with the levy until the 2009 action is concluded, and was directed to contact the IRS at that time "to determine the next appropriate action." King Aff, ¶ 7; King Aff, Exh 4. After this proceeding was commenced, Stewart Title received another letter, dated March 17, 2014, which instructed Stewart Title to suspend its compliance with the levy until both the 2009 action and this proceeding are concluded and then to contact the IRS to

"determine the next appropriate action." King Aff, ¶ 8; King Aff, Exh 5. That letter also noted that the levy had been amended to reflect that as of the last tax period included on that document, ending December 31, 2008 and with interest and late payment penalty to January 10, 2010, the corrected and total tax amount due is $3,740,050.88. *Id.* In this proceeding, the United States of America ("the United States")[1] took the position that once the litigation between CDR and First Hotels concludes, Stewart Title will be obligated to turn the funds at issue over to the IRS. Truitt Aff, Exh 12, at 5 n2 (statement within the United States' reply brief to its motion to dismiss).

This Court previously addressed dismissal of this petition, in separate motions from the United States and First Hotels. With regard to the motion by the United States, this Court granted the motion to dismiss, finding a lack subject matter jurisdiction because, *inter alia*, the challenge to the IRS's levy can only be brought in federal court. Truitt Aff, Exh 11 (the Decision and Order dated February 29, 2016). With regard to the motion to dismiss by First Hotels, the motion was denied by this Court, but that denial was reversed by the Appellate Division. *In re CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 140 A.D.3d 558 (1st Dep't 2016).[2]

Stewart Title is the sole remaining respondent in this proceeding.

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[1] CDR did not initially name the United States as a respondent in this proceeding. Opp Br at 4. The United States was named in the amended petition because of its notice of levy on the funds held in escrow by Stewart Title. Am Pet, ¶ 9.

[2] The Appellate Division's decision was issued between the submission of opposition and reply papers in this motion. CDR sought the opportunity to address its impact and Stewart Title's arguments regarding same, which were already in the reply briefing. *See* edoc #115. Both parties were permitted sur-reply briefs.

DISCUSSION

CPLR 1003, which provides for dismissal in the event joinder of a necessary party is not possible, applies to special proceedings, including CPLR 5225 turnover proceedings." *Swezey v. Merrill Lynch*, 87 A.D.3d 119, 126 n5 (1st Dep't 2011), *aff'd* 19 N.Y.3d. 543 (2012).

Stewart Title argues that it is "nonsensical to permit CDR to continue this turnover proceeding against [it], while the two parties who object to the turnover that CDR seeks cannot be joined." Reply Br at 8.

CDR argues that the United States is not a necessary party. Opp Br at 5. It argues that the letters from the IRS to Stewart Title show that the IRS is deferring to this Court's "adjudication of the rights between CDR and First Hotels." *Id.* at 6. Following dismissal of First Hotels, CDR does not address whether First Hotels is a necessary party, but merely states that the Appellate Division's decision does not address dismissal of this proceeding against Stewart Title and that dismissal of First Hotels is not automatically applicable to Stewart Title. CDR Sur-Reply Br at 1.

In assessing whether an entity is a necessary party, the Court of Appeals has found that, if a turnover proceeding continued and if the petitioner prevailed on the merits, the assets at issue would be liquidated and the non-party's claim would be "inequitably affected." *Swezey v. Merrill Lynch*, 19 N.Y.3d 543, 551-52 (2012). The Court of Appeals determined that the non-party was therefore necessary in the context of that proceeding. *Id.* That is precisely the situation in the instant matter, where the claims of both First Hotels and the United States would be impacted if the asset to which they each lay a

competing claim was turned over to CDR -- which also lays claim to those same funds. First Hotels and the United States are, therefore, necessary parties.

The question then, is the merits of Stewart Title's motion to dismiss, now that First Hotels and the United States have both been dismissed.

CPLR 1001(b) addresses necessary joinder of parties and when joinder is excused:

> In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether plaintiff has another effective remedy . . . [if] the action is dismissed on account of nonjoinder;
> 2. the prejudice which may accrue from nonjoinder to the defendant or to the person not joined;
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
> 4. the feasibility of a protective provision . . . ; and
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Although a court "must consider all five criteria, no single factor is determinative in the *discretionary* analysis of whether an action may proceed in the absence of a necessary party who is not subject to mandatory jurisdiction." *Swezey*, 19 N.Y.3d at 551 (emphasis added).

Stewart Title argues that the first factor favors dismissal, as CDR can pursue a remedy in federal court. This Court has already concluded that, as addressed in the United States' motion to dismiss, a challenge to the United States' levy must be addressed in federal court, if at all.[3] As to the second factor, Stewart Title argues that

[3] This Court cannot say with certainty whether the competing claims to the funds at issue will be addressed in federal court. However, certainty on that issue is not required. *Horwitz v. Sax*, 16 A.D.3d 161, 161 (1st Dep't 2005) (finding dismissal was warranted where the court lacked

non-dismissal puts it at risk of substantial prejudice, as any order from this Court compelling it to release funds to CDR could be deemed a violation of the levy. Mov Br at 6. It is clear that both of the non-joined parties, First Hotels and the United States, will be "inequitably" impacted and prejudiced if this matter proceeds in this Court without them. Further, Stewart Title is convincing in its argument that it may be prejudiced by being put in an untenable position between this Court and federal law regarding the levy. As to the third factor, Stewart Title argues that it faces prejudice that could have been avoided by CDR challenging in federal court the levy and the right to the funds at issue. It also argues that prejudice to the United States could have been avoided, again by CDR bringing its claims in federal court. *Id.* at 6. It is the Court's view that this prejudice might be avoided in the future by petitioner attempting to challenge in federal court the funds at issue in the escrow and the levy.

As to the fourth factor, Stewart Title argues that a protective provision is not more feasible than dismissal, as only dismissal would permit it to comply with the United States' instructions as to the levy. To this, the Court merely notes that no party remaining in this case has offered a clear view of what such a protective provision would look like. As to the fifth factor, Stewart Title argues that this Court cannot render an effective judgment in the absence of First Hotels and the United States, as they are the entities asserting competing claims for the funds CDR seeks. *Id.* at 7; Reply Br at 8. In this, the

jurisdiction over a necessary party and there was an alternative forum where the court had reason to believe all indispensable parties could be joined).

Court agrees. Two of the three known entities seeking the funds in the escrow account are no longer parties to this proceeding, and "[t]hus it is evident that continuation of the turnover action would not further the public interest in settling the ownership dispute as a whole." *Swezey*, 19 N.Y.3d. at 554.

CDR has not addressed the five factors one by one. Instead, CDR has raised three main points. CDR contends that Stewart Title has not addressed how the federal court would have jurisdiction over First Hotels to resolve the underlying claim to pierce the corporate veil. Opp Br at 7. This Court notes, however, that after First Hotels was dismissed from this proceeding, CDR did not address how this Court could do so either, in this proceeding. CDR also argues it would be prejudiced if First Hotels is allowed to recover the funds at issue without an adjudication of the merits. *Id.* However, as both First Hotels and the United States have been dismissed as parties to this proceeding, no adjudication of competing claims can occur in this proceeding. Finally, CDR asserts that it is unclear how Stewart Title benefits from dismissal of this proceeding, as it still must hold the funds in escrow. *Id.* The Court disagrees with this as, convincing or not, Stewart Title has clearly stated that it finds its instant position both highly prejudicial and illogical.

Once First Hotels was dismissed from this proceeding, CDR did not address the impact of that significant development on these factors, but chose to argue that this Court still has jurisdiction over Stewart Title. *See generally* CDR Sur-Reply Br. Stewart Title takes the position that CDR confuses the issues by focusing on the Court's jurisdiction. Stewart Title's Sur-Reply Br at 1. Stewart Title asserts that this Court's jurisdiction over

it is not in dispute, and that it has never contested jurisdiction. *Id.* at 1-2 It does argue, however, that it is an innocent stakeholder that makes no claim of ownership over the funds in escrow. *Id.* at 1.

The *Swezey* case is strongly analogous. There, the Republic of the Philippines made claim to the same funds sought by the petitioner, but it was not a party to the proceeding, and it invoked its sovereign immunity and could not be joined without its consent or voluntary appearance. The First Department reversed the denial of a motion to dismiss, stating that "conflicting claims to a common [fund] present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Swezey v. Merrill Lynch*, 87 A.D.3d 119, 126 n5 (1st Dep't 2011), *aff'd* 19 N.Y.3d 543 (2012).

Here, the same logic has even greater weight. This Court knows of three claims to the funds at issue – by CDR, First Hotel and the United States. Both of the respondents have competing claims with CDR to those funds and are no longer part of this proceeding. As such, both could be severely prejudiced by a decision in their absence.

Moreover, in balancing the five factors delineated in CPLR 1001(b), this Court concludes that the equities cut overwhelmingly in favor of dismissal. The underlying dispute cannot be decided without the presence of First Hotel and the United States. It would not be possible for this Court to make determinations regarding the known competing claims without First Hotels' and the United States' participation. Additionally, they would be prejudiced if this case proceeded without them. Finally, this

Court agrees with Stewart Title that, absent all those who actually have a claim on the asset at issue, it is irrational to require Stewart Title to remain in this proceeding.

Thus, the Stewart Title's motion is granted, to the extent of dismissing the amended petition against it.[4]

The Court has considered the parties' other arguments and finds them to be unavailing.[5]

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[4] To the extent that Stewart Title is also seeking a directive from this Court that it must "comply with the Notice of Levy or other instruction by the United States of America Internal Revenue Service," Stewart Title has referenced that request, but not supported it. *See* Mov Br at 10; Reply Br at 7; Stewart Title Sur-Reply Br at 5. That Stewart Title merely "seeks such an order by way of this motion," (Mov Br at 6), without more, is an insufficient application, and is not addressed by this Court further. The Court does note, however, that this request is contradictory to Stewart Title's general argument that there are competing claims to the funds at issue, and that this Court should not assess those claims without two necessary parties, the United States and First Hotels.

[5] For example, Stewart Title also argues that, following the dismissal of First Hotels, CDR now lacks standing to pursue this turnover proceeding under CPLR 5225. Stewart Title argues that CDR's standing in this proceeding was available only to a judgment creditor, under CPLR 5225. Reply Br at 8; Stewart Title's Sur-Reply Br at 2. It asserts that CDR cannot obtain a money judgment against First Hotels in this proceeding, now that First Hotels has been dismissed. Reply Br at 2. Stewart Title argues that any judgment CDR hopes to obtain against First Hotels must now come from the related 2009 action, and not this proceeding. *Id.* at 8. Stewart Title argues that CDR cannot maintain this post-judgment turnover proceeding against it, based on the hopes that CDR will eventually become a judgment creditor of First Hotels in another action. *Id.* at 9; Stewart Title Sur-Reply Br at 2.

On its face, this seems like a strong argument. It is correct that CDR is not currently a judgment creditor of First Hotels, and it cannot become so in this action, as First Hotels is no longer a respondent. CDR did not address this argument in its requested sur-reply brief. *See generally*, CDR Sur-Reply Br. Notably, however, Stewart Title did not provide any support for this argument. This includes whether or not there is relevant case law, and whether any of those cases address a situation involving related proceedings. As such, and because Stewart Title's dismissal on other grounds renders it moot, the Court declines to address this argument.

Accordingly, it is

ORDERED that the motion of Stewart Title Insurance Company is granted to the extent that the amended petition is dismissed.

Dated: February 28, 2017

ENTER:

J.S.C.

HON. LAWRENCE K. MARKS