Law Firm of Alexander D. Tripp, P.C. v Citigroup Global Mkts. Inc.
2022 NY Slip Op 31263(U)
April 14, 2022
Supreme Court, New York County
Docket Number: Index No. 159953/2020
Judge: Kathy J. King
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. Kathy J King** **PART6**

Justice

----------X

LAW FIRM OF ALEXANDER D. TRIPP, P.C.,

Petitioner-Judgment Creditor,

- v -

CITIGROUP GLOBAL MARKETS INC.,

and

JOHN FIORILLA

Respondents.

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INDEX NO. 159953/2020

MOTION DATE

MOTION SEQ. NO. 001 002 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 11, 14, 16
were read on this motion to/for TURNOVER PROCEEDING.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 65, 66, 67, 68, 69, 70
were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 87, 88
were read on this motion to/for DISMISS.

Upon the foregoing papers, the Motion Sequence Numbers 1, 2, and 3 are hereby consolidated for purposes of disposition:

1) Petitioner The Law Firm of Alexander D. Tripp, P.C. ("The Tripp Firm") seeks an order pursuant to CPLR 5227 for the turnover of funds held by Citigroup Global Markets, Inc. ("CGMI") for John Leopoldo Fiorilla ("Fiorilla"), in order to satisfy a debt owed to The Tripp Firm by Fiorilla.

CGMI answers and counterclaims, *inter alia,* for a declaratory judgment that CGMI's rights are superior to the Tripp Firm's claims, and that CGMI has a right to set off in the amount of $342,221.66 from the proceeds of an $800,000 judgment held by CGMI (Mot.Seq.No.1)

2) Petitioner moves by order to show cause pursuant to CPLR 6301 and 6311 for an order enjoining CGMI from invading the funds at issue that are subject to a restraining notice. CGMI opposes the requested relief. (Mot.Seq.No.2)

3) CGMI moves to dismiss the petition pursuant to CPLR 3211(a)(2) and CPLR 5227. The Tripp Firm opposes the requested relief. (Mot.Seq.No.3)

BACKGROUND

The Tripp Firm seeks to enforce its judgment for attorneys' fees against the funds held by Respondent CGMI, as garnishee, of Respondent Fiorilla. On August 24, 2020, the Tripp Firm was awarded a judgment of $131,859.35 against Fiorilla, (Billings, J) for unpaid attorneys' fees in an action entitled *Law Firm of Alexander D. Tripp, P.C. v John Leopold Fiorilla*, New York County Index No. 654991/2019.

On May 15, 2014, a $800,00 judgment was entered in favor of Fiorilla and against CGMI, a corporation and registered broker/dealer in *Citigroup Global Markets, Inc., and Edward James Mulcahy, Jr* v *John Leopoldo Fiorilla, as Trustee FBO John Trustee FBO John Leopoldo Fiorilla Trust U/A/D 06-25-203*, New York County Index No. 653017/2013 (the "*CGMI v. Fiorilla Action*"). Thereafter, Fiorilla commenced actions both in Supreme Court, New York County and the Paris First Instance Court in Paris, France to relitigate the award of the judgment, which resulted in the imposition of sanctions and a finding of contempt against Fiorilla pursuant to court order. [1]

Said orders also awarded CGMI attorney fees in the amount of $342,22.66 to defend said post judgment actions, to be set off from the 2014 Judgment of $800,000. Additionally, the court orders also permitted CGMI to file two supplemental affirmations for additional attorneys' fees representing work from September 16, 2019 through November 30, 2019.[2]

[1] See orders of the court dated August 1, 2018 (J.Ramos) and October 28, 2019 (J.Friedman), respectively.
[2] CGMI filed affirmations on November 8, 2019 and February 12, 2021, respectively.

To date, Fiorilla allegedly has not paid the Tripp Firm's judgment or CGMI's award of attorneys' fees.

On September 10, 2020, the Tripp Firm served an Information Subpoena with Restraining Notice on CGMI pursuant to CPLR 5222 (b) regarding the funds held by CGMI on Fiorilla's behalf from the 2014 judgment. The Restraining Notice prohibited CGMI from, among other things, "sale, assignment or transfer of, or any interference with" any debt CGMI owed Fiorilla.

In conjunction therewith, the Tripp Firm commenced the instant petition pursuant to CPLR 5227 for an order compelling CGMI to turnover funds CGMI is holding for Fiorilla in order to satisfy the Tripp Firm's outstanding judgment for attorneys' fees. CGMI filed its answer with affirmative defenses and counterclaims for declaratory relief, pursuant to Debtor Creditor Law ("DCL") 151, and asserts that the Tripp Firm's right, if any, to claim a portion of the restrained funds are junior and subordinate to CGMI's right to set off the attorneys' fees Fiorilla owes CGMI. Pending the determination of the petition, the Court granted a temporary restraining order[3], enjoining CGMI and its agents from undertaking any further actions that would have the effect of transferring, depleting, or encumbering any funds CGMI holds for the benefit of Fiorilla. Thereafter, CGMI filed a notice to withdraw, without prejudice, CGMI's supplemental affirmations for attorneys' fees.

CGMI now moves to dismiss the petition as jurisdictionally defective, which the Court shall now consider since the petition and petitioner's order to show cause for preliminary injunction would be rendered moot, if CGMI's motion is granted.

DISCUSSION

In the instant proceeding, the Tripp Firm seeks the turnover of funds in possession of CGMI arising out of an $800,000 judgment filed on May 12, 2014 in favor of Fiorilla. Article 52 is the

[3] The Court granted the TRO upon the signing of the Tripp Firm's order to show cause (Mot.Seq.2), and thereafter issued an order dated March 10, 2021 extending the TRO pending the determination of the OSC.

procedural device for enforcement of a judgment against an asset of a judgment debtor in the possession or custody of a third person (*see JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 301 [1st Dept 2007]). CPLR 5227 provides that notice of a turnover proceeding shall be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. Here, CGMI argues that the Tripp Firm did not effectuate service of process on Fiorilla pursuant to CPLR 5227 and, therefore, dismissal of the petition is warranted under CPLR 3211(a)(2), based on lack of jurisdiction. Further, CGMI argues that the 120 day deadline to serve notice of the within proceeding expired on March 17, 2021, and as a result, the petition is jurisdictionally defective.

In the case at bar, Fiorilla entered into two engagement letters with the Tripp Firm, dated June 3, 2016 and September 16, 2016, respectively, wherein Fiorilla waived service of process in the event of a dispute with the Tripp Firm. It is well settled that waiver of service of process precludes a challenge to the court's jurisdiction, and that parties to a contract are free to contractually waive service of process (see *Rental v DecWood Corp.*, 51 Misc 2d 999 [App Term 1966]; see also *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept 2010]; see also, *Putnam Leasing Co. v Sweet*, 2015 N.Y. Misc. LEXIS 5896, at *3 [Sup Ct, Nassau County Aug. 4, 2015, No. 602836/15]) [parties may agree to a method of service not sanctioned by the CPLR]. The Court finds that CGMI's reliance on the 120 day deadline to serve process is misplaced since service of process as prescribed in CPLR 5227 was waived by Fiorilla. Contrary to CGMI's contentions, service was effectuated based on the "particular mode of notification to which the parties had agreed" (*see Credit Car Leasing Corp. v. Elan Group Corp.*, 185 AD2d 109 [1st Dept 1992]). Here, pursuant to the engagement letters, Fiorilla agreed to accept service in any dispute with the Tripp Firm by overnight courier such as FedEx or DHL to a designated address in Florida. Pursuant thereto, Tripp served Fiorilla by overnight courier at his Florida

address. "Where a party is served in accordance with the parties' own agreement, courts deem service valid" (*Id*).

While CGMI argues that the engagement letters apply solely to disputes between Fiorilla and Tripp and that Fiorilla and CGMI are the real parties in interest in the within proceeding, no authority has been provided in support of CGMI's position that Fiorilla may not be named and served as a judgment debtor herein. By contrast, petitioner, in opposition, cites various cases involving the turnover of assets where judgment debtors have been named and served as a co-respondent in a turnover proceeding. This practice is consistent with the rationale governing CPLR 5227 and its companion statute CPLR 5225 which permits a judgment debtor in a turnover proceeding to intervene when they are not already a party.

Based on the foregoing, CGMI's motion to dismiss the instant proceeding as jurisdictionally defective is denied. The Court finds that Fiorilla is a proper party to the within proceeding and that jurisdiction was obtained based on the agreed upon method of service set forth in the Fiorilla and Tripp Firm engagement letters.

As to the Tripp Firm's order to show cause for a preliminary injunction against CGMI, CPLR 6301 provides in pertinent part that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual..." (see *Uniformed Firefighters Ass'n of Greater N.Y. v City of N.Y.*, 79 NY2d 236, 241 [1992]). The case law is well settled that under CPLR 6301, a moving party must establish: 1) a likelihood or probability of success on the merits; 2) irreparable harm in the absence of an injunction; and 3) a balance of the equities in favor of granting the injunction (see *Doe v Axelrod,* 73

NY2d 748,750 [1988]; see also *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; see also *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264-65 [1st Dept 2009]).

Firstly, as a threshold matter, the Court finds that the Tripp Firm's rights under the restraining notice and CPLR 5222(b) have not been violated. Pursuant to CPLR 5222(b), upon receiving the restraining notice, CGMI was "forbidden to make or suffer any sale, assignment or transfer of, or interference with, [the funds held for Fiorilla]…except upon direction of the sheriff or pursuant to an order of the court." Here, CGMI's right to set off its award of attorneys' fees was made prior to the Tripp Firm's judgment as directed by court order dated October 28, 2019 (Friedman, J.), and thus, was not a violation of CPLR 5222(b). The Court further notes that the Tripp Firm's contention regarding the filing of the supplemental affirmations is of no moment, since CGMI's supplemental affirmation for fees has been withdrawn and is deemed moot.

Additionally, the Tripp Firm has not demonstrated a likelihood of success on the merits, under CPLR 6301 since it has failed to establish as a matter of law how the claims of the Tripp Firm are superior to the claims of CGMI. DCL 151 grants a party the right "to set off and apply against any indebtedness, whether mature or unmatured, of such creditor to such debtor[4], any amount owing from such debtor to such creditor". The case law is well settled that the right to set off under DCL151 is "superior to the rights of intervening judgment creditors and may be exercised even after the judgment creditor has undertaken enforcement of his claim against the judgment debtor" (see *Aspen Indus., Inc. v Mar. Midland Bank*, 52 NY2d 575, 582 [1981])

[4] The case law has interpreted that a bank is a debtor of its depositor for purposes of section 151 of the Debtor and Creditor Law (see *Aspen Indus., Inc. v Mar. Midland Bank*, 52 NY2d 575 [1981];*see also Matter of Industrial Comr. of State of N. Y. v. Five Corners Tavern*, 47 N.Y.2d 639, 645, n. 2 [1979]; see also, *Brigham v. McCabe, Brigham v McCabe*, 20 NY2d 525, 530-31 [1967]; see also *Solicitor for Affairs of His Majesty's Treasury v Bankers Tr. Co.*, 304 NY 282, 291 [1952]).

Contrary to petitioner's contentions, the Court finds that CGMI has demonstrated that DCL 151 is applicable to the within facts, since the right to set off applies to "any indebtedness, whether matured or unmatured" (see *Carpet Resources, Ltd. v JP Morgan Chase Bank, N.A.*, 83 AD3d 460 [1st Dept 2011]). Here, CGMI had been granted the right to recover attorneys' fees due pursuant to court order (Friedman, J.), prior to the Tripp Firm's judgment, which, constitutes an unmatured debt, and not a contingent liability. An unmatured debt "is a readily discernible amount which can be expected in the normal course of events to be due and owing in the future" (see *Pisane v Feig*, 41 Misc 3d 216 [Sup. Ct. Kings Cnty 2013]). On the other hand, a contingent claim is defined as one which has not accrued and is dependent on the happening of some future event, which may or may not happen" (see *In re Lexington Sur. & Indem. Co.*, 272 NY 210, 214 [1936]).

The Tripp Firm's order to show cause for preliminary injunction is denied since it has not established a likelihood to prevail on the merits. Notwithstanding this finding, the Court also notes that Petitioner's remaining contentions are without merit and, therefore, are not considered by the Court.

As to the Tripp Firm's application for a special proceeding, CPLR 409 (b) makes clear that the special proceeding is to be adjudicated in the same manner as a motion for summary judgment *(see, e.g., Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]). In this regard, while The Tripp Firm has an enforceable judgment pursuant to CPLR 5227, CGMI in its counterclaim has established its entitlement to a declaration of rights as a matter of law with respect to its superior right to the restrained funds (DCL 151; see *Aspen Indus., 52 N.Y.2d 582-583*). "A declaratory judgment may be obtained where …[a] legality or meaning of a statute is in question and no question of fact is involved" (*see Dun & Bradstreet v City of New York*, 276 NY 198, 206 [1937].

Based on the foregoing, it is hereby,

ORDERED that the Tripp Firm's petition for turnover of funds is denied (Mot.Seq.1); and it is further,

ORDERED, ADJUDGED, and DECLARED that CGMI's counterclaims are granted to the extent that CGMI's right to set off its attorney fees in the amount of $342,221.66, from the proceeds of the $800,000 judgment held by CGMI, is superior to the Tripp Firm's right to collect against said judgment; in all other respects, CGMI's counterclaims are denied (Mot. Seq 1), and it is further,

ORDERED that the Tripp Firm's order to show cause is denied and all stays are vacated (Mot.Seq.2); and it is further,

ORDERED that CGMI's motion to dismiss is denied (Mot. Seq.3).

This constitutes the decision and order of the Court.

4/14/2022
DATE

/S/ Kathy J King

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE