Kerison & Willoughby Capital, Ltd. v Royale Etenia, LLC
2015 NY Slip Op 32367(U)
December 11, 2015
Supreme Court, New York County
Docket Number: 155976/2013
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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KERISON & WILLOUGHBY CAPITAL, LTD,

Petitioner,

-against-

ROYALE ETENIA, LLC, MORTIMER SINGER, RACHEL ROY, and DAMON DASH,

Respondents.

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Index No. 155976/2013

Mot. seq. no. 004

DECISION AND JUDGMENT

BARBARA JAFFE, J.:

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By order to show cause, petitioner/judgment creditor moves pursuant to CPLR 5223, 5224, and 5210 for orders directing the following:

1) Danny Abramovitch and/or Topson Downs of California (Topson) to produce documents and answer questions, in response to the demands of a subpoena duces tecum and ad testificandum dated January 3, 2015, and/or demands to produce made during the deposition of Abramovitch on February 5, 2015, in order to aid in petitioner's efforts to enforce a judgment against Damon Dash, relating to:

a) the purchase, control, and operation by the owners of Topson, of Rachel Roy Operating Company (RROPCO), and Rachel Roy IPIT Company (RRIPIT);

b) the purchase of a controlling interest in Rachel Roy IP Company, LLC (RRIPCO), the ownership interest of Artmis in respondent Royale Etenia LLC (RE), the modification of the ownership interest of Dash and/or Roy in RE and the diminution of the ownership interest of RE in RRIPCO;

c) the payment of more than $2 million to Dash in connection with the aforesaid acquisitions of RROPCO and RRIPIT, the purchase of a controlling interest in RRIPCO, the purchase of the ownership interest of Artmis in RE, the modification of the ownership interest of Dash and/or Rachel Roy in RE and the diminution of the ownership interest of RE in RRIPCO; and

2) restraining Topson and/or John Poye and/or Danny Abramovitch and/or Joe Wirht and/or Camille Bergher and/or RRIPIT and/or RROPCO from paying over or allowing the payment over of any and all monies which would otherwise be payable directly by Topson to Dash or 50 percent of any and all monies which would otherwise be payable to RE until the Dash judgment is satisfied in full.

I. BACKGROUND

In this proceeding, petitioner seeks to enforce a judgment it obtained against Dash in 2011. In August 2013, the parties entered into a settlement agreement, by which Dash agreed to make quarterly payments to petitioner. The payments were to be made by Dash through distributions he was entitled to receive from RE, a company of which he then owned 46.53 percent; Roy owned 33.47 percent and Artmis, Inc. owned 20 percent. RE was receiving its payments from RRIPCO, and RE owned 50 percent of RRIPCO with Jones Investment Co., Inc. owning the other 50 percent. (NYSCEF 83).

By decision dated December 4, 2014, I adjudged and declared that a settlement agreement between the parties, so ordered on August 14, 2013, had been breached by RE and/or Dash, that the installment payment provisions and settlement amount provisions were of no further force and effect, and that the amount of the judgment which Dash was required to pay was $406,370, less $137,131.47, the amount paid by RE to petitioner, for a total amount due of $269,238.53. I also adjudged and declared that the restraining order and denial of Dash's motion to vacate the judgment in the order survived the elimination of the said installment payment settlement amount provision. (NYSCEF 46).

In attempting to enforce the judgment, petitioner sought to depose those in control of the businesses with which Dash and Roy were involved. Counsel alleges that in 2014, Topson and/or its owners, Poyer, Abramovitch, Wirht, and Bergher, purchased control of the Rachel Roy clothing business from Jones, and that on or about January 3, 2015, petitioner served a subpoena duces tecum and ad testificandum on Topson, which maintained an office and showroom in Manhattan and was licensed to do business in this state. Following Topson's response and initial failure to appear or produce documents, on February 5, 2015, Abramovitch was deposed. (NYSCEF 50).

According to petitioner, in 2014, when Topson purchased Roy's business, the ownership of RRIPCO was then altered whereby RE's interest in RRIPCO was reduced to 36 percent, whereupon RRIPIT was formed and given 64 percent of RRIPCO. Poyer, Wirht, Abramovitch, and Bergher own RRIPIT, Topson and RROPCO, the latter of which was Rachel Roy's licensee. Topson marketed and promoted the Rachel Roy clothing line. In reducing RE's interest in RRIPCO, Poyer, *et al.* bought out Artmis's 20 percent interest in RE, along with Jones's 50

percent interest in RRIPCO. Petitioner asserts that Dash was "induced" to agree to the reduction of RE's shares in RRIPCO, in exchange for which he was given a 50 percent interest in the reconstituted RE, plus approximately $2 million. (NYSCEF 83).

This corporate restructuring, it is alleged, resulted in the obstruction and frustration of petitioner's ability to obtain satisfaction of the Dash judgment by permanently reducing the distributions that Dash was entitled to receive from RE and against which petitioner would enforce the judgment, thereby depriving petitioner of its right to enforce the judgment. Petitioner also maintains that the deal violates the restraining order that survived the settlement agreement. (*Id.*).

During the course of a deposition of Abramovitch, his counsel offered in evidence a chart reflecting the current corporate structures of the Rachel Roy entities. Nevertheless, Abramovitch refused to answer certain questions concerning the corporate structure and financial transactions among the entities and Dash, claiming to be barred from doing so by a confidentiality agreement. However, he testified that in 2014, he met with Dash, who urged him and his company to buy an interest in Rachel Roy's business. When asked about whether any payments were being made to RE "in connection with revenues" of RRIPCO, Abramovitch indicated that 36 percent of the available cash was paid out quarterly to RE, and he referred counsel to Topson's CFO Kris Scott for information as to the amounts of such payments. (*Id.*).

Petitioner thus seeks documents and information to enable it to enforce the judgment and a restraining order preventing Topson, Poyer, Wirht, Abramovitch, and Bergher from paying Dash or any companies owned in part or wholly by Dash. (*Id.*).

II. CONTENTIONS

Petitioner asserts that it is entitled to disclosure of the information and documents that Abramovitch and Topson have thus far failed to produce, and alleges that the agreement between Topson's and Roy's companies has harmed petitioner as Dash will now receive less money from RE and has nonetheless benefitted from it by receiving approximately $2 million to agree to it. Petitioner also argues that the deal and the parties to it violated the restraining order that survived the termination of the settlement agreement. (NYSCEF 85, 97-99).

Topson denies that it has an obligation to provide documents other than its own corporate records, and maintains that petitioner's document requests are overbroad and seek irrelevant information. Topson also denies that petitioner, as Dash's judgment creditor, has a right to information regarding business transactions between companies that owe no money to Dash, or that it violated the restraining order as it received no notice of it until December 2014. (NYSCEF 91-92, 97-99).

Roy contends that the transaction was made with Topson to save her brands from being shut down by Jones, and that RE was compelled to reduce its share of interest in RRIPCO in order to have the deal consummated. She also denies that Dash is RE's alter ego, and argues that RE has an obligation to pay other entities, and that petitioner is entitled only to funds disbursed from RE to Dash, and not to any of RE's other funds or disbursements. Roy thus opposes the imposition of a restraining notice related to RE's or Roy's regular business operations. (NYSCEF 97-99).

Dash denies that he has received any distributions from RE in 2015 and claims ignorance as to what RE has done with the money that was to be distributed to him. He also contends that

the $2.3 million he received from Topson constituted the repayment of money he had loaned RE and that the restraining order here provides that petitioner's judgment would be satisfied solely from distributions made by RE to Dash. (NYSCEF 97-99).

III. ANALYSIS

A. Discovery

Pursuant to CPLR 5223, "[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . . ." This is "a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third p[arty] with knowledge of the debtor's property." (*Gryphon Dom. VI, LLC v GBR Info. Servs.*, 29 AD3d 392, 393 [1st Dept 2006], *quoting ICD Group v Israel Foreign Trade Co. [USA]*, 224 AD2d 293, 294 [1st Dept 1996]).

As a judgment creditor may seek information from third parties (*see* CPLR 5223 [judgment creditor may serve subpoena on "any person"]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5223:1 [third party may be compelled to make disclosure, including not only garnishee in possession of judgment debtor's property, but also "mere witnesses who may be able to identify or locate the property or otherwise supply information relevant to the enforcement process"]), it is irrelevant that Topson and the Rachel Roy companies are not parties to the action between petitioner and Dash or to petitioner's judgment against Dash or that they owe no money to Dash.

The information that has been disclosed so far shows that the transactions between Topson and the various Rachel Roy companies involved RE and Dash's interest therein to the extent of diminishing his interest in RE, and that they thereby may affect or alter the monies that

petitioner is entitled to receive from Dash, through distributions made to Dash from RE, to fulfill its judgment against him. Petitioner has thus shown that the Topson and the Rachel Roy entities may have knowledge of the debtor's property, i.e., Dash's interest in RE and RE's distributions to Dash, and that the information may be relevant to the satisfaction of the judgment. (*See e.g., Gryphon Domestic VI, LLC*, 29 AD3d at 392 [petitioner entitled to pursue discovery against third party as party did not conclusively establish that it lacked information to assist judgment creditors in obtaining satisfaction of judgment]).

However, the information sought by petitioner must be limited to material that involves or impacts RE and Dash. Thus, the subpoenaed parties need only respond to the information requested by petitioner to the extent that it relates to RE and Dash and/or affects RE's distributions to Dash. Abramovitch's further questioning should also be so limited.

B. Restraining order

Petitioner's request for a restraining order is denied without prejudice to renew upon the completion of discovery as ordered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion is granted to the extent that Danny Abramovitch and/or Topson Downs of California are directed, within 60 days of the date of this order, to produce documents and answer questions, to the extent that the information sought is relevant to Royal Etenia LLC and Damon Dash's interest therein, relating to:

1) the purchase, control, and operation by the owners of Topson, of Rachel Roy Operating Company and Rachel Roy IPIT Company;

2) the purchase of the ownership interest of Artmis in Royale Etenia LLC, the modification of the ownership interest of Dash and/or Roy in Royal Etenia LLC and the diminution of the ownership interest of Royal Etenia LLC in Rachel Roy IP Company; and

3) the payment of more than $2 million to Dash in connection with the aforesaid acquisitions.

ENTER:

Barbara Jaffe, JSC

DATED: December 11, 2015
New York, New York