

Sirotkin v Jordan LLC
2015 NY Slip Op 32589(U)
November 23, 2015
Supreme Court, Kings County
Docket Number: 510237/14
Judge: Wavny Toussaint
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FILED
KINGS COUNTY CLERK

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2015.

PRESENT: 2015 NOV 24 AM 9:06

HON. WAVNY TOUSSAINT,
Justice.

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PAUL SIROTKIN,

Petitioner,

DECISION AND ORDER

- against -

Index No. 510237/14

JORDAN LLC and
ELIYAHU SPITZER, a/k/a ELIOT SPITZER,

Mot. Seq. No. 1-2

Respondents.

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The following e-filed papers read herein:

NYSCEF No.

Notice of Petition and Petition Annexed _____
Answer to Petition _____
Notice of Motion, Supporting Affirmations (Affidavits)
and Memorandum of Law Annexed _____
Reply Affirmation _____

1-2 _____
3 _____
4-5 _____
6 _____

Petitioner Paul Sirotkin (Sirotkin) commenced this special proceeding against respondent Eliyahu Spitzer, also known as Eliot Spitzer (Spitzer), and respondent Jordan LLC (Jordan). Sirotkin is a judgment creditor of Spitzer, who is a member of Jordan, which is a New York limited liability company. Sirotkin is not a member of Jordan, although Sirotkin's son (nonparty Alexander Sirotkin) is a member of Jordan. Sirotkin seeks a court order, pursuant to CPLR 5225 (b), directing a turn-over of Spitzer's membership interest in Jordan. Jordan has answered the petition, but Spitzer has not. Several members of Jordan – nonparties Teddy Lichtschein and Eliezer Scheiner – move to intervene as party respondents. Sirotkin opposes the motion to intervene.

The Petition (Seq. No. 1)

A judgment creditor's ability to satisfy a judgment in his or her favor from assets that are not in the possession of the judgment debtor is governed by CPLR 5225. That statute "provides for an expedited special proceeding by a judgment creditor to recover 'money or other personal property' belonging to a judgment debtor 'against a person in possession or custody of money or other personal property in which the judgment debtor has an interest' in order to satisfy a judgment" (*Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept 2009], quoting CPLR 5225 [b]). Pursuant to CPLR 5225 (b), "a judgment creditor must first establish that the judgment debtor has an interest in the property held by the third party, and then must demonstrate either that the judgment debtor is entitled to possess the property or that the judgment creditor has a right to the property superior to that of the party who possesses it" (*Miraglia v Essex Ins. Co.*, 96 AD3d 945 [2d Dept 2012]).

Limited Liability Law § 607 (a) provides, in part:

"On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest."

Limited Liability Law § 603 (a) (3) states that except as provided in the LLC's operating agreement, "the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled."

Limited Liability Law §§ 607 (a) and 603 (a) (3) articulate that a judgment creditor of a member can only obtain rights, as an assignee, to the debtor/member's receipt of profits pursuant to his or her allocated membership interest. Thus, Sirotkin is only entitled to obtain rights, as Spitzer's assignee, to the distribution of any profits pursuant to Spitzer's membership interest in Jordan.

The terms of Jordan's operating agreement do not change the outcome. The relevant terms of the operating agreement, as quoted in ¶ 7 of Jordan's answer,¹ provide that:

“[N]o Member shall have the right to Transfer or otherwise dispose of all or any portion of his Membership Interest in the Company, except with the unanimous consent of the non-transferring Members (which consent may be granted or withheld in their sole or absolute discretion); provided, however, that the Members are under no restrictions as to the transfer by them of their Membership Interest among themselves or to their Affiliates . . . but such Affiliates and[/]or transferee(s) shall acquire no other rights hereunder unless admitted as Members”

“‘Affiliate’ shall mean with respect to any Member . . . any spouse, parent or issue of any Member . . .” (emphasis added).

Relying on the foregoing italicized language, Sirotkin argues that Spitzer's membership interest is assignable to him because, though he (Sirotkin) is not a member of Jordan, his son is a member of Jordan. The Court does not read the operating agreement so broadly. The operating agreement permits a member to transfer his or her membership interest to his or her children, spouses, or parents; in other words, it permits an *intra-family* transfer. The operating agreement, as the Court construes it, does not permit a member to transfer a membership

¹ Although a copy of the operating agreement has not been provided to the Court, Sirotkin does not challenge its terms as quoted in Jordan's answer.

interest to a stranger whose child (or spouse or parent, for that matter) also happens to be a member of the LLC; in other words, it does not permit an *inter-family* transfer. Thus, all that Sirotkin is entitled to under the operating agreement and the Limited Liability Law is a distribution of any profits pursuant to Spitzer's membership interest in Jordan.

In accordance with CPLR 5225 (b) and CPLR 5240, the petition is granted solely to the extent that Sirotkin is hereby issued a charging order against Spitzer's membership interest in Jordan. (*Born to Build, L.L.C. v Saleh*, 43 Misc 3d 1213[A], 2014 NY Slip Op 50594[U] [Sup Ct, Nassau County 2014]; *Boyce v Willner*, 2013 WL 358604 [Sup Ct, NY County 2013]; *SCR Joint Venture, L.P. v 309 Realty, LLC*, 2008 NY Slip Op 32268[U] [Sup Ct, NY County 2008]). At best, a creditor such as the petitioner may only obtain an interest in a members share of the profits and losses of a limited liability company, not the membership interest itself. As a judgment creditor with a charging order, Sirotkin may not directly attach Spitzer's membership interest in Jordan, but may only receive a distribution of any profits on account of Spitzer's membership interest. If Jordan makes no distributions, Sirotkin will not receive any payments (*see 3 West 16th St., LLC v Ancona*, 2013 NY Slip Op 32355[U] [Sup Ct, NY County 2013]).

The Motion to Intervene (Seq. No. 2)

In a special proceeding, the court is authorized to "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409 [b]; *Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 72 AD3d 694, 695 [2d Dept 2010]). A court in a turnover proceeding "will apply summary judgment analysis

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and[,] absent a factual issue requiring a trial,” the matter will be summarily determined on the papers presented (see *Matter of Trustco Bank, N.A. v Strong*, 261 AD2d 25, 27 [3d Dept 1999]). Further, no intervention in a special proceeding is allowed except by leave of court (see CPLR 401). CPLR 5225 (b) provides that “[t]he court may permit any adverse claimant to intervene in the proceeding. . . .” Where a specific provision, such as CPLR 5225 (b), authorizes intervention in a special proceeding, it preempts the general intervention provisions set forth in CPLR 1012 and 1013 (see *Vanderbilt Credit Corp. v Chase Manhattan Bank, N.A.*, 100 AD2d 544, 545 [2d Dept 1984]).

As noted, the Court has ruled that Sirotkin is not entitled to a turn-over of Spitzer’s membership interest in Jordan, and has limited Sirotkin’s rights to a charging lien. The Court’s determination moots the intervenors’ concerns about Spitzer becoming a member of Jordan without their consent. Hence, the intervenors’ motion is denied as moot.

Accordingly, the petition is granted, only to the extent that petitioner is hereby issued a charging order against Spitzer’s membership interest in Jordan and is otherwise denied. The motion by Jordan LLC to intervene is denied, as moot. This constitutes the decision and order of the Court.

E N T E R,



Hon. Wavny Toussaint
J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.

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