

Sutton 58 Assoc. LLC v Beninati
2017 NY Slip Op 31403(U)
June 29, 2017
Supreme Court, New York County
Docket Number: 651296/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SUTTON 58 ASSOCIATES LLC,

Index No.: 651296/2016

Plaintiff,

DECISION & ORDER

- against -

JOSEPH BENINATI, CHRISTOPHER JONES, and
DANIEL LEE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Sutton 58 Associates LLC moves, pursuant to New York Limited Liability Company Law (NY LLC Law) § 607 and 6 *Del. C.* § 18-703, for an order charging the interests of defendants Joseph Beninati (Beninati), Christopher Jones (Jones), and Daniel Lee (Lee) (collectively, Judgment Debtors) in four New York LLCs—515 West 29th Street Owner LLC (Owner), 515 West 29th Street Operating Member LLC (Operating Member), 515 West 29th Street Control Investor LLC (Investor), and 515 High Line LLC (High Line) (collectively, New York LLCs)—and one Delaware LLC, Oriel Development LLC (Oriel) (collectively, LLCs), and granting plaintiff all rights as assignee of Judgment Debtors’ membership interests therein. Plaintiff also moves, in the alternative, under CPLR 5240 for other relief as may be necessary to reach the Judgment Debtors’ interests in a building under construction located at 515 West 29th Street in Manhattan (the Project). Seq. 003. The motion is unopposed. Plaintiff’s motion is granted in part and denied in part for the reasons that follow.

Plaintiff sued defendants to enforce a guarantee signed by them. Dkt. 5.¹ On January 4, 2017, this court granted plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Dkt. 73 (Order); Dkt. 81 (1/22/16 Tr. at 13). On January 12, 2017, this court entered judgment against defendants, jointly and severally, in the amount of \$24,047,342.47. Dkt. 82 (Judgment). Plaintiff avers that the Judgment is wholly unsatisfied.

The Judgment Debtors are equity investors in the Project, which comprises 12 residential units that will reportedly be offered for sale at purchase prices totaling over \$100 million. Owner is the sponsor of the Project. In its response to a subpoena, Owner stated that the Judgment Debtors have no interest in Owner as individuals, and that Operating Member is a non-controlling member of Owner owning less than 5% of the equity in the Project. Dkt. 93 at 2. Plaintiff and Owner aver, upon information and belief, that the remaining LLCs are members of Operating Member, and that the Judgment Debtors are members of those LLCs as follows: Investor (Beninati's LLC), High Line (Jones's LLC), and Oriel (Lee's LLC). Plaintiff provides no additional proof as to the membership or internal structure of any of the LLCs.

Under both New York LLC Law § 607 and 6 *Del. C.* § 18-703, a judgment creditor of a member of a New York or Delaware LLC may apply to a court having jurisdiction² for an order

¹ References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to those of the e-filed PDF file.

² Both statutes are silent on whether personal jurisdiction over the member LLCs is required, as opposed to personal jurisdiction over the judgment creditor. The subject LLC is often, but not always, a party in cases issuing charging orders under NY LLC Law § 607 or 6 *Del. C.* § 18-703. Compare, e.g., *Sirotkin v Jordan LLC*, Civ. No. 510237/2014, 2015 WL 12316318 at *2-3 (N.Y. Sup. Dec. 15, 2015) (granting charging order against individual defendant's membership interest in defendant New York LLC), *aff'd*, 141 AD3d 670 (2d Dept 2016) with *Gen. Elec. Capital Corp. v JLT Aircraft Holding Co., LLC*, Civ. No. 09-1200, 2010 WL 3023316, at *2-5 (D. Minn. July 28, 2010) (granting motion for charging order against defendant's interest in non-party Delaware LLCs). The court is unaware of any refusal by a New York or Delaware court to issue a charging order due to lack of personal jurisdiction over the subject LLC. As a charging order

charging the membership interest of the member with payment of the unsatisfied amount of the judgment. The judgment creditor cannot obtain possession of, or exercise legal or equitable remedies with respect to, the property of the LLC itself. NY LLC Law § 607(b); 6 *Del. C.* § 18-703(e). While New York law confers on the judgment creditor all rights of an assignee of the membership interest,³ a charging order under Delaware law confers only the right to receive the judgment debtor's distributions from that LLC. 6 *Del C* § 18-703(a). Moreover, under Delaware law, a charging order is the judgment creditor's exclusive remedy with respect to the judgment debtor's interest in a Delaware LLC, and attachment, garnishment, foreclosure or other legal or equitable remedies are not available. *Id.* §§ 18-703(d).

This court will issue a charging order under NY LLC Law § 607 as to the Judgment Debtors' membership interests in the New York LLCs—specifically, Beninati's, Jones's, and Lee's membership interests in Operating Member, Beninati's membership interest in Investor, and Jones's membership interest in High Line.⁴ The court will also issue a charging order under

affects neither the property interests of the subject LLC nor that of its non-creditor members, but only the economic interests of the judgment creditor (although an operating agreement, under NY LLC § 603, may grant additional rights to an assignee, and therefore also to the charging order beneficiary), the subject LLC is not a necessary party to issue a charging order. *See* CPLR 1001(a) (“Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.”).

³ Under New York LLC Law § 603 provides, however, “[e]xcept as provided in the operating agreement, ... (3) 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.”

⁴ A charging order confers the same rights as an assignment. NY LLC Law § 607(a). Unless otherwise provided for in the governing operating agreements, those rights will consist only of “distributions and allocations of profits and losses to which [the Judgment Debtors] would be entitled.” *Id.* § 603. To apprise plaintiff of its rights under this charging order, and to aid plaintiff's enforcement efforts, the court will also order defendants to produce copies of any operative operating agreements and amendments thereto, as well as documents sufficient to show the nature of defendants' interests in the relevant LLCs.

6 *Del C* § 18-703 as to Lee's membership interest in Delaware LLC Oriel, which is the "exclusive remedy" available under Delaware law for a judgment creditor of a member of an LLC. *See* 6 *Del C* § 18-703(d). Plaintiff's request for other relief as to the Judgment Debtors' interests in the Project is denied, without prejudice to seeking such relief in a CPLR 5225(b) proceeding against one or more of the New York LLCs in a non-commercial part.⁵ Accordingly, it is:

ORDERED that plaintiff's motion is granted in part and denied in part to the extent described above; and it is further

ORDERED that plaintiff shall submit a proposed charging order by e-file with hard-copy to the courtroom within one week of the entry of this order on NYSCEF, and within one week of its submission of the proposed order, plaintiff shall call Chambers⁶ to discuss the proposed order; and it is further

ORDERED that within 20 days of the entry of this order on NYSCEF, defendants shall provide plaintiff with the following: (1) copies of the presently operative operating agreements for each of Operating Member, Investor, High Line, and Oriel (Charged LLCs) together with any amendments thereto, if any exist in defendants' possession, custody, or control, and (2) documents sufficient to show the identity of the members of each of the Charged LLCs and

⁵ The present record fails to provide certainty as to whether individuals besides Judgment Debtors have direct or indirect membership in Operating Member, Investor, High Line, and/or Oriel. Other remedies affecting ownership and property of the LLCs would therefore be improper and likely outside the court's jurisdiction in this action. To support its request for alternative relief under CPLR 5240, plaintiff erroneously flips the holding of *Sirotkin v Jordan, LLC*, 141 AD3d 670 (2d Dept 2016). *See* Dkt. 89 (Attorney Aff.) ¶ 24. *Sirotkin* held that CPLR 5240 gives the court discretion to substitute the remedies obtainable in a special turnover proceeding under CPLR 5225(b) with a charging order under NY LLC Law § 607—not the other way around. 141 AD3d at 671-72.

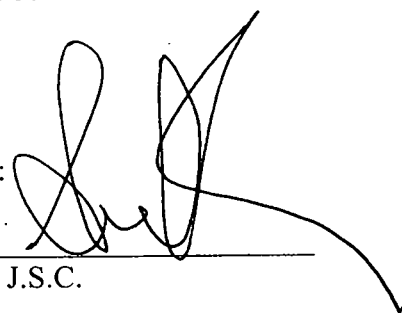
⁶ Between the hours of 4:00pm and 5:30pm, Monday through Thursday.

the percentage interest in each LLC for each member, to the extent that defendants have such knowledge in their possession, custody, or control; and it is further

ORDERED that plaintiff shall serve a copy of this order within one week of the entry of this order on NYSCEF by overnight mail on each of the defendants and on each of 515 West 29th Street Owner LLC, 515 West 29th Street Operating Member LLC, 515 West 29th Street Control Investor LLC, 515 High Line LLC, and Oriel Development LLC, through its registered agent or another party authorized to accept service on behalf of such LLC.

Dated: June 29, 2017

ENTER:

A handwritten signature in black ink, appearing to read 'Shirley Werner Kornreich', written over a horizontal line. A long, sweeping flourish extends from the end of the signature down and to the right, ending in a small checkmark.

J.S.C.

**SHIRLEY WERNER KORNREICH
J.S.C**