Radiance Capital Receivables Twelve LLC v JPMorgan Chase Bank, N.A.
2018 NY Slip Op 32092(U)
August 14, 2018
Supreme Court, Kings County
Docket Number: 500236/2017
Judge: Sylvia G. Ash

At an IAS Term, Comm-11 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 14th day of August, 2018.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

----------X

APPLICATION OF RADIANCE CAPITAL RECEIVABLES TWELVE LLC...,

Petitioner,

DECISION & ORDER

For a judgment pursuant to C.P.L.R. 5225(b) and 5227 to compel payment of money and delivery of property

Index # 500236/2017

- against -

JPMORGAN CHASE BANK, N.A., JOSEPH KLEIN AND BETTY KLEIN,

Mot. Seq. 5 & 6

Respondents,

ALEXANDER KLEIN,

Judgment Debtor.

----------X

The following e-filed papers numbered 98 to 138 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	98-108; 114-126
Opposing Affidavits (Affirmations)	113; 132-35
Reply Affidavits (Affirmations)	136-38

After oral argument and upon the foregoing papers, Petitioner's motion is granted to the extent granted herein but otherwise denied without prejudice to renew. The application by Respondent JOSEPH KLEIN ("Joseph") is hereby denied.

Background

On or around October 17, 2016, Petitioner RADIANCE CAPITAL RECEIVABLES TWELVE LLC obtained a judgment against the debtor herein, ALEXANDER KLEIN ("Alexander"), in the amount of $411,759.20 under the action entitled *Radiance Capital... v. Harriman Estates LLC, et. al.*, Kings County Supreme Court Index #513599/2015. On or around December 6, 2016, Petitioner served Respondent JPMORGAN CHASE BANK, N.A. ("Chase") with a restraining notice and information subpoena, among other things, to restrain property in which Alexander has an interest. In response, Chase advised Petitioner that it had in its possession a safe deposit box located at its branch on 4901 13th Avenue in Brooklyn, New York,

that was owned jointly by Alexander and Respondents, Joseph and BETTY KLEIN ("Betty"), and that such box had been restrained pursuant to Petitioner's restraining notice.

Having been advised by Chase that Chase would not deliver the contents of the safe deposit box to Petitioner without a court order, Petitioner commenced the instant special proceeding pursuant to CPLR 5225[b] against Respondents seeking a turnover of the contents contained in the safe deposit box.

After oral argument, by Decision and Order dated June 6, 2018 ("Denial Order"), this Court denied Petitioner's application for a turnover on the basis that Petitioner, a foreign limited liability company, lacked standing to maintain the application as it was not licensed or authorized to do business in New York State pursuant to the relevant Business Corporation or Limited Liability Company Laws.

By way of the instant order to show cause, Petitioner seeks reargument of the Denial Order contending that Petitioner has standing because it qualifies as a "foreign investment corporation" as defined under New York Banking Law Article 1 §2(10), which allows it to perform the same functions and enjoy the same privileges as a banking corporation in this state. By short form order dated July 11, 2018, this Court re-imposed a temporary restraining order enjoining Alexander, Betty and Joseph from accessing the safe deposit box.[1]

Joseph opposes Petitioner's reargument application arguing that Petitioner has not shown that it is a foreign investment corporation or that a foreign investment corporation is equal to a bank. Joseph also contends that Petitioner should not be granted injunctive relief because the safe deposit box sought by Petitioner does not belong solely to Alexander, the judgment debtor. Joseph further explains that he added Alexander and Betty, his parents, as "parties to the deposit box in the event he suffered any problems and for no other purpose."[2] On July 24, 2018, Joseph moved, by emergency order to show cause, to renew the Court's Order granting an interim stay and, upon renewal, immediately vacating the stay. According to Joseph, a renewal application is warranted because he has learned from Petitioner that Petitioner is attempting to become licensed to do business in New York, which, if it occurs, Joseph believes will result in the retroactive legitimization of the current stay.

In response, Petitioner contends that it meets the definition of a "foreign investment company" as it is a limited liability company organized under the laws of the state of Washington and that its principal business is the purchase of mortgages on distressed real property and the notes attributable thereto in the secondary market. Further, that a foreign investment company is not held to the strictures of Business Corporation Law ("BCL") §1312 so long as its business activities in New York are merely incidental to its business in interstate commerce and are not

---

[1] A temporary restraining order was first imposed by Justice Leon Ruchelsman by Order and Judgment dated March 30, 2017.

[2] Joseph's papers do not divulge what is contained in the safe deposit box.

so regular and systematic as to invoke the statutory bar of BCL §1312. Petitioner submits that its business activities in New York are limited at this time to the underlying action and enforcing its judgment. Even if it were found to be "doing business" in New York, Petitioner argues that such a defect is not jurisdictional and the remedy would not be dismissal but, rather, a stay to provide Petitioner the opportunity to register in New York. Finally, Petitioner argues that it is entitled to the requested injunctive relief because it has been awarded a money judgment, that a search for Alexander's assets has yielded nothing except for the instant safe deposit box, and that Alexander has a history of moving his assets out of Petitioner's reach. Petitioner contends that Alexander transferred a house jointly owned by him and his wife, Betty, to a trust with Joseph named as trustee on December 18, 2008, a month after having defaulted on the loan that is the subject of Petitioner's judgment against Alexander. Further, Petitioner states that it sought to depose Joseph in order to ascertain the contents of the safe deposit box but that Joseph failed to appear.

Chase takes a neutral position with respect to Petitioner's application. At the Court's request, Chase provided the following information with regards to the safe deposit box: that the box was opened on September 28, 1993 with Joseph as the sole lessee, and that Alexander and Betty were added as lessees on July 28, 2016, a date preceding the date of entry of the subject judgment.

Discussion

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966 [2d Dept 2016]). "A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion" (*Robinson v Viani*, 140 AD3d 845, 848 [2d Dept 2016]).

Here, Petitioner's application for reargument must be granted as the Court misapprehended the relevant controlling law as set forth below. Joseph's application for renewal of the Court's Order dated July 11, 2018, and upon renewal, vacatur of said order enjoining him from accessing the safe deposit box, is denied. Although Joseph proffers a new fact – that Petitioner is now seeking to become authorized to conduct business in New York – Joseph fails to demonstrate how Petitioner's conduct is improper or how such fact mandates a vacatur of the interim stay. In fact, it is clear that Petitioner may comply with Limited Liability Company Law

§808[a],[3] *nunc pro tunc* (*see Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 [2d Dept 2009][finding that the lower court properly stayed the proceeding for 45 days to afford petitioner an opportunity to comply with Limited Liability Company Law §808[a], rather than dismiss the proceeding outright]).

Turning then to the merits of Joseph's challenge to Petitioner's standing, it is well established that BCL §1312[a] constitutes a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without having obtained the required authorization to do business there (*see Great White Whale Advertising, Inc. v First Festival Productions*, 81 AD2d 704, 706 [3d Dept 1981]). "The purpose of section 1312 of the Business Corporation Law and its predecessor statutory provisions is not to enable defendants to avoid contractual obligations but to regulate such foreign corporations which are in fact conducting business within the State so that they shall not be doing business under more advantageous terms than those allowed a corporation of this State" (*Von Arx, A.G. v Breitenstein*, 52 AD2d 1049, 1050 [4th Dept 1976]).

Absent proof establishing that the plaintiff is doing business in New York, it is presumed that the plaintiff is doing business in its State of incorporation and not in New York (*see Cadle Co. v Hoffman*, 237 AD2d 555, 555 [2d Dept 1997]). The party invoking the statutory barrier bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but "so systematic and regular as to manifest continuity of activity in the jurisdiction" (*Interline Furniture, Inc. v Hodor Industries, Corp.*, 140 AD2d 307, 307 [2d Dept 1988]).

Here, upon reargument, the Court finds that there is no basis to dismiss this proceeding pursuant to BCL §1312[a]. Joseph failed to show that Petitioner's activities in New York have been so systematic and regular as to manifest continuity of activity in the jurisdiction. Moreover, Petitioner represents that, at the present time, its only activity in New York relates to the enforcement of the judgment at issue here. Joseph fails to present any fact to the contrary.

The Court now turns to Petitioner's underlying application seeking summary judgment against Joseph, a default judgment against Betty and Alexander, and a judgment requiring Chase to turn over the contents of the subject safe deposit box pursuant to CPLR 5225[b].

"CPLR 5225[b] 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]). "In support of a petition commenced pursuant to CPLR 5225[b], a judgment creditor must make an evidentiary showing establishing that 'the judgment

[3] Limited Liability Company Law §808[a] is the analog to BCL §1312[a].

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'" (*Matter of Sirotkin v Jordan, LLC*, 141 AD3d 670, 671 [2d Dept 2016]).

Here, it is undisputed that Alexander is a lessee to the safe deposit box. However, Alexander and his wife, Betty, were not added as lessees until 23 years after the box was initially leased by Joseph. As such, in order to ascertain Alexander's actual interest in the contents of the safe deposit box, the Court hereby directs Chase to inventory the contents of the subject box and to provide such information to the Court and the parties herein within 45 days of notice of entry of this Decision. The parties are directed to appear for a conference on Thursday, October 18, 2018, at 10:00 a.m.

Accordingly, Petitioner's underlying application for summary judgment against Joseph is denied without prejudice to renew. Petitioner's application for a default judgment against Betty and Alexander, who have failed to appear or answer in this proceeding, is granted. Joseph's motion to vacate the stay is denied. Chase is directed to continue the stay until further order of this Court.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.