# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

*Justice*

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**INDEX NO.** 154932/2016

8430985 CANADA, INC.,

Petitioner,

**MOTION DATE** 07/07/2017, 07/07/2017

- v -

**MOTION SEQ. NO.** 004 005

JACOB FRYDMAN, JFURTI LLC,JACOB FRYDMAN 2000 IRREVOCABLE TRUST, and MONICA LIBIN 2000 IRREVOCABLE TRUST,

**DECISION AND ORDER**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 123, 125, 126, 127, 128, 129, 130, 131, 132, 159, 160

were read on this motion to/for RESETTLE ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 122, 124, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 161

were read on this motion to/for RENEW, REARGUE, AND STAY.

Upon the foregoing documents, Motion 004, to resettle, is denied without prejudice solely as moot; and Motion 005, to renew and/or reargue and for a stay, is granted, and upon reargument, the court vacates the prior order, which decided motions 001, 002, and 003; the request to renew is denied without prejudice solely as moot; the request for a stay of enforcement of the prior order is hereby granted; respondents shall have 21 days from today's date to answer the petition; and the parties shall appear for a preliminary conference on Thursday, December 20, 2018, at 10:00 AM, in Room 418, 60 Centre Street, New York, NY.

Background

As evidenced by a promissory note dated October 24, 2014, instant petitioner 8430985 Canada Inc. ("Canada") lent $2,000,000 to non-party United Realty Advisors LP, which has since changed its name to First Capital Advisors, LP ("FCA"). Instant respondent Jacob Frydman, FCA's Chairperson and CEO, and non-party Eli Verschleiser each guaranteed half the loan amount. FCA defaulted, and Canada sued it and both guarantors ("the underlying action"). On February 5, 2016, in 8430985 Canada Inc. v United Realty Advisors L.P., Index Number 653564/2014, the clerk entered judgment ("the underlying judgment") in favor of Canada for $2,603,927.77 as against FCA, and for $1,302,444.80, each, against Frydman and Verschleiser. During the surprisingly long time between resolution of the underlying action and entry of the underlying judgment, Frydman (broadly speaking) purported to sell control of FCA (which, in

turn, owned and/or controlled a valuable Real Estate Investment Trust) to non-party First Capital Real Estate Investments LLC ("FCREI") (of which Suneet Singal was the Chairperson and CEO); and Frydman (narrowly speaking) purported to assume responsibility for the entirety of the underlying judgment (not just half). These machinations (Petitioner uses stronger language) set in motion the main current disputes. Frydman is a sophisticated businessman; he is licensed to practice law; and at one point he claimed a personal net worth of over $150,000,000. Although a full explication of the numerous agreements between Frydman and his company, JFURTI LLC (he is the sole manager), on the one hand, and the purchasers of FCA, on the other, is beyond the purview of this opinion, suffice it to say that Frydman claims that rather than remove assets from FCA, he sold it, and that the money he received was simply (well, nothing in this case seems simple) the proceeds of the sale.

The Instant Proceeding

On June 13, 2016, pursuant (in the main) to CPLR 5225(b) and 5227, petitioner commenced the instant turnover special proceeding, seeking, essentially, to collect its judgment, including the full amount as against Frydman, and $2,500,000 from JFURTI, which allegedly, and apparently, had received that amount in a payment related to the aforesaid sale of FCA. Petitioner has asserted causes of action pursuant to CPLR Article 52; the Debtor and Creditor Law; for unjust enrichment; and for a declaratory judgment that Frydman is responsible for the entire underlying judgment. Three days later, pursuant to CPLR 5519(a)(2), Frydman and Furti filed an undertaking for the Frydman guaranty part of the underlying judgment. Petitioner claims to have made several attempts to serve Frydman in his individual capacity; as sole manager of JFURTI; and as sole Trustee of respondents Jacob Frydman 2000 Irrevocable Trust and Monica Libin 2000 Irrevocable Trust. Claiming he was never served Frydman and his co-respondents, to date, have not answered the petition.

By October 2016 this Court had before it the turnover proceeding itself; a motion by petitioner for a default judgment; and a motion by respondents, appearing specifically, not generally, to dismiss for lack of service. In a Decision and Order dated May 24, 2017 ("the D&O") this Court (1) found that service was proper, incorrectly stating that service is deemed sufficient if it notifies the defendants/respondents of the litigation and gives them an opportunity to defend against it; (2) thus, denied the motion to dismiss; (3) denied the motion for a default judgment on the ground that respondents had appeared by making the motion to dismiss; and, (4) perhaps most significantly, granted the petition, finding that there were no material issues of fact, ruling in petitioner's favor on its CPLR Article 52 claims and Debtor and Creditor Law claims (and, apparently, its Declaratory Judgment claim); and directing respondents to turn over "funds" to be applied against the underlying judgment. Fairly soon thereafter, petitioner moved (004) to correct certain shortcomings and/or errors in the D&O; and respondents moved (005), pursuant to CPLR 2221, to renew and reargue, and, pursuant to CPLR 2201, for a stay of enforcement of the D&O.

Respondents' main arguments are that petitioner never effected proper service; that even if this Court found or finds that petitioner did, respondents are entitled to answer the petition and defend against it on the merits; that this court decided the petition prematurely; that, on the merits, this Court ordered Frydman to turn over money that he never received to satisfy part of a judgment (the part in excess of his guaranty) that was not against him; that FCA never paid or

transferred any money to respondents (FCREI did); that the D&O fails to specify which respondent is to turn over what money in what amounts; that the instant Debtor and Creditor Law, unjust enrichment, and declaratory judgment claims may not be asserted in a turnover special proceeding; and that petitioner has failed to prove, and cannot prove, its Debtor and Creditor Law claims.

Petitioner's main arguments are that all of its claims are "inextricably intertwined" and, thus, may be brought together; that JFURTI (i.e., Frydman) did receive $2,500,000 as a result of the sale of FCA to FCREI; that this money was intended to pay the underlying judgment; that all of Frydman's "suspicious" deals and transactions were accomplished with knowledge of the underlying judgment; that FCA cannot pay its debt to Canada; and that Frydman owns and/or controls, JFURTI and the trusts, and he did (or does) own FCA.

Discussion

The request to reargue is granted because this court erred in several respects, and the request to renew and the motion to resettle are denied without prejudice solely as moot, as the prior order is hereby being vacated.

Service of Process

Respondents are correct that this Court erred in declaring that service of process is deemed adequate if notice of the litigation and an opportunity to be heard are provided. Rather, service upon a person must be effected pursuant to the rules set forth in CPLR 308. Arguably, whether or not notice was actually received might bear upon the issue of whether service was properly effected, but, be that as it may, this Court is convinced, and adheres to its determination, that petitioner properly served respondents. "Let us count the ways." Petitioner served Frydman by leaving process with the concierge at an address Frydman had recently indicated was his and by following up with various mailings. Petitioner also made various attempts at personal service; attempted in-court service; attempted service on Frydman's (arguable) counsel. By attempting to avoid service in various ways at various times Frydman is estopped from contesting service; petitioner's papers lay out in gory detail its various attempts; enough is enough.

All-in-One Litigation

Many cases in Supreme Court partake of elements of both actions and special proceedings. For reasons of judicial, and party, economy, they can be litigated together, just keeping in mind the different rules (such as governing disclosure) that pertain to the different claims.

Defense on the Merits

This Court's two main, related errors were (1) denying respondents an opportunity to answer the petition, and (2) deciding the case on the merits, without granting respondents an opportunity to contest petitioner's claims. Petitioner vigorously asserts that there are no issues of fact, and that respondents clearly are liable. However, petitioner would seem to have to prove, at a minimum, that respondents transferred money (or other property) from FCA to themselves, and this Court finds that this presents an issue of fact (indeed, whether or not petitioner is actually claiming this is not clear). No Court wants to seem naïve, and Frydman's various deals raise some suspicion. But petitioner has to prove a case; and respondents are entitled to defend against it.

Relief Granted

This Court also agrees with respondents that the relief granted in the D&O, that respondents had to turn over "funds," was impermissibly vague. A court order has to be specific enough that a respondent has to know what it has to do, and everyone has to know whether or not it was done, so that a contempt proceeding will lie if it was not. Here the D&O failed to indicate exactly, within reason, what each respondent had to do to comply.

Conclusion

Thus, for the reasons set forth herein, Motion 004, to resettle, is denied without prejudice solely as moot; and Motion 005, to renew and/or reargue and for a stay, is granted, and upon reargument, the court vacates the prior order, which decided motions 001, 002, and 003; the request to renew is denied without prejudice solely as moot; the request for a stay of enforcement of the prior order is hereby granted; respondents shall have 21 days from today's date to answer the petition; and the **parties shall appear for a preliminary conference on Thursday, December 20, 2018, at 10:00 AM, in Room 418, 60 Centre Street, New York, NY.**

11/26/2018
DATE

ARTHUR F. ENGORON, J.S.C.

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