

**Colonial Funding Network, Inc. v Long Is. Hospitality
Mgt., Inc.**

2019 NY Slip Op 33738(U)

December 18, 2019

Supreme Court, New York County

Docket Number: 653591/2016

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON

PART

IAS MOTION 42EFM

Justice

-----X

INDEX NO. 653591/2016

COLONIAL FUNDING NETWORK, INC.,

MOTION DATE 12/05/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

LONG ISLAND HOSPITALITY MANAGEMENT, INC., ANNE
FINLEY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for

TURNOVER PROCEEDING

In this breach of contract action, the plaintiff, Colonial Funding Network, Inc., moves pursuant to article 52 of the CPLR for an order directing the defendants Long Island Hospitality Management, Inc. d/b/a Shipwreck Tavern (Shipwreck Tavern) and its owner Anne Finley (Finley) to turn over to the plaintiff or the sheriff in which any of the personal property is located, all property of the defendant in which the plaintiff has a security interest. The plaintiff also seeks an order authorizing the sheriff to break open, enter, search for and seize the aforementioned property located at Shipwreck Tavern's place of business located at 10 Bayville Avenue, Bayville, New York 11709, or any other commercial location where Shipwreck Tavern may operate, should the defendant fail to comply with the turnover order, and an extension of the plaintiff's priority period relative to the defendant's personal property, including property that is an is not capable of delivery, pursuant to CPLR 5234(c) and 5232(a) until June 19, 2020, without prejudice to further extension. No opposition is submitted. The petition is granted to the extent discussed below.

The parties settled the action pursuant to an agreement dated September 7, 2016. The defendants defaulted. On April 21, 2017, a money judgment was entered in favor of the plaintiff and against the defendants in a principal sum of \$94,604.61, with statutory interest accruing

thereon. On July 25, 2019 the judgment was entered in Nassau County and now operates as a lien on defendants' real property located therein. The plaintiff subsequently delivered property executions to the sheriff directed at Shipwreck Tavern and Finley, on August 21, 2019, and an income execution to Shipwreck as a garnishee relating to Finley's income, on October 3, 2019. On October 17, 2019, the plaintiff advised the sheriff that it was extending the 60-day period as to personal property capable of delivery pursuant to CPLR 5234(c). In the affirmation submitted with the motion, made pursuant to CPLR 2106, counsel asserts that the defendants still have not satisfied any part of the money judgment.

In support of the motion, the plaintiff submits, *inter alia*, a copy of the amended money judgment, the revenue based factoring agreement and UCC-1 financing statement, filed April 21, 2016, pursuant to which plaintiff maintains a security interest in pursuant to a revenue based factoring agreement between the parties, "all accounts, chattel paper, cash, deposit accounts, documents equipment, general intangibles, instruments, inventory or investment property, as those terms are defined in Article 9 of the [New York UCC]."

CPLR 5225(a) provides, in relevant part, that

"[u]pon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff."

Here the property that the plaintiff seeks pursuant to the UCC-1 filing is included in the statutory definition of personal property. See CPLR 5201. Thus, the court may direct the current holder of such property, Shipwreck Tavern, to transfer such property, or execute the appropriate instruments to enable the sheriff or a city marshal to liquidate such property, in order that the proceeds of the sale are applied to the satisfaction of the judgment. See Koehler v. Bank of Bermuda Ltd., 12 NY3d 533 (2009); Samuels v Samuels, 99 AD2d 986 (1st Dept. 1984). Although the plaintiff further requests an order authorizing the sheriff to break open, enter,

search for and seize the aforementioned property located at Shipwreck Tavern's place of business located at 10 Bayville Avenue, Bayville, New York 11709, or any other commercial location where Shipwreck Tavern may operate, should the defendant fail to comply with the turnover order, the court does not find that an order authorizing a sheriff to seize chattel on behalf of the plaintiff is proper at this juncture, as the plaintiff has failed to allege with proper specificity the chattel to be seized. See generally CPLR 7102. However, that branch of the motion is denied without prejudice to renewal upon proper papers should the defendants fail to comply with this order.

Turning to the plaintiff's request for an extension of its priority period pursuant to CPLR 5234(c) and 5232(a) until June 19, 2020, the court finds that such extensions are proper. It is well settled that "[t]he order of priority among judgments is to be determined strictly in accordance with the chronological service of execution levies and the filing of orders for turnover or receiverships." New York v Panzire, 23 AD2d 158 (1st Dept. 1965). A judgment creditor who, like the plaintiff, has taken "required...further steps in enforcing his judgment, such as the execution or levy upon the judgment debtor's property, in order to prevent the intervening rights of third parties from taking precedence over his claim against the judgment debtor" (see Aspen Industries, Inc. v. Marine Midland Bank, 52 NY2d 575 [1981]), has shown good cause for an extension under CPLR 5234(c) for personal property capable of delivery. Furthermore, for the extension of a plaintiff's priority period regarding personal property not capable of delivery, CPLR 5232 expressly authorizes the court to order an extension, and such extensions "should be freely granted." As such, the court orders an extension of the plaintiff's priority period pursuant to CPLR 5234(c) and 5232(a) until June 19, 2020.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion is granted in part, without opposition, and it is further

ORDERED that defendants Long Island Hospitality Management, Inc. and Anne Finley shall, within 45 days of this order, deliver to the plaintiff or to the Sheriff of the City of New York or to a City Marshal, all accounts, chattel paper, cash, deposit accounts, documents equipment, general intangibles, instruments, inventory or investment property, in order to satisfy the April 21, 2017 money judgment entered by this court; and it is further,

ORDERED that if such accounts, chattel paper, cash, deposit accounts, documents equipment, general intangibles, instruments, inventory or investment property are delivered to a City Marshal, the defendants Long Island Hospitality Management, Inc. and Anne Finley shall immediately notify the plaintiff, in writing, of the identity and contact information of that City Marshal; and it is further,

ORDERED that defendants Long Island Hospitality Management, Inc. and Anne Finley are restrained and enjoined from transferring or encumbering the subject accounts, chattel paper, cash, deposit accounts, documents equipment, general intangibles, instruments, inventory or investment property pending their delivery to Sheriff of the City of New York or to a City Marshal; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon defendants Long Island Hospitality Management, Inc. and Anne Finley, by regular and certified mail, return receipt requested, within 10 days of this order; and it is further,

ORDERED that the plaintiff's motion for an extension of its priority period pursuant to CPLR 5234(c) and 5232(a) until June 19, 2020, without prejudice to seek further extension, is granted; and it is further,

ORDERED that the branch of the plaintiff's motion seeking an order authorizing the sheriff to break open, enter, search for and seize the aforementioned property located at Shipwreck Tavern's place of business located at 10 Bayville Avenue, Bayville, New York 11709, or any other commercial location where Shipwreck Tavern may operate, should the defendant fail to comply with the turnover order, is denied without prejudice to renew upon proper papers.

This constitutes the Decision and Order of the court.

12/18/2019

DATE

CHECK ONE:

APPLICATION:

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CASE DISPOSED
GRANTED
SETTLE ORDER

☐

DENIED

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NON FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER

NANCY M. BANNON, J.S.C.

NANCY M. BANNON

☐

OTHER