

Matter of Fox Capital Group, Inc. v Bank of Am.

2023 NY Slip Op 31494(U)

May 2, 2023

Supreme Court, New York County

Docket Number: Index No. 150237/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

-----X

In the Matter of FOX CAPITAL GROUP, INC. Petitioner,	<table border="0"> <tr> <td>INDEX NO.</td> <td><u>150237/2023</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>02/14/2023</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001</u></td> </tr> </table>	INDEX NO.	<u>150237/2023</u>	MOTION DATE	<u>02/14/2023</u>	MOTION SEQ. NO.	<u>001</u>
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MOTION SEQ. NO.	<u>001</u>						

- v -

BANK OF AMERICA,

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8 were read on this motion to/for TURNOVER PROCEEDING.

In this proceeding pursuant to CPLR 5225 and 5227, the petitioner, Fox Capital Group, Inc. (Fox), seeks an order directing the respondent Bank of America (the bank) to turn over, from an account that the bank maintains for judgment debtors Paramount Express Transport, LLC, Royal Construction Services, Select Marble and Granite, LLC, SMG Trucking, Consulting & IT, LLC, and Bahridden Kodirovich Bobholov (collectively the judgment debtors), the sum of \$333,679.44, plus statutory simple interest on the sum of \$316,895.93 at 9% per annum, from December 29, 2022, to satisfy a judgment that had been entered in the Supreme Court, Nassau County, in favor of Fox and against the judgment debtors, jointly and severally, on December 20, 2022. No opposition is submitted. The petition is granted.

On December 20, 2022, in a Supreme Court action entitled *Fox Capital Group, Inc. v Paramount Express Transport, LLC, et al.*, Fox secured a money judgment on default against the judgment debtors, jointly and severally, in the total sum of \$316,895.93, inclusive of costs, disbursements, and prejudgment contractual interest (see *Fox Capital Group, Inc. v Paramount Express Transport, LLC, et al.*, Sup Ct, Nassau County, Index No. 607032/2022, Dec. 20,

2022). Fox established that no portion of that judgment has been satisfied. On December 28, 2022, Fox requested that an appropriate enforcement officer serve a levy upon the bank in connection with any funds that it held on behalf of the judgment debtors. On December 29, 2022, New York City Marshal Richard J. Pagnotta served the bank with a levy and final demand pursuant to CPLR 5232(a), directing that it pay over to him, from any and all of the judgment debtors' accounts that they maintained with the bank, the sum of \$333,679.44, constituting the \$316,895.93 judgment, \$547.91 in accrued post-judgment statutory interest, \$345.00 in statutory sheriffs/marshal's fees, \$15,889.50 in poundage fees, and \$1.10 in expenses. Fox commenced this proceeding on January 9, 2023. On January 11, 2023, Fox served the bank and the judgment debtors with the notice of petition, petition, and levy. Neither the bank nor the judgment debtors have answered or moved with respect to the petition, or otherwise appeared in the proceeding.

"CPLR 5225(b) provides for an expedited special proceeding by which a judgment creditor can 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 New York Community Bank v Bank of Am., N.A.* 169 AD3d 35, 37-38 [1st Dept 2019], quoting *Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918 [2d Dept 2009]). That provision thus is the appropriate provision under which to pursue a turnover proceeding against a bank that holds the judgment debtor's assets on deposit (see *Matter of First Am. Tit. Ins. Co. v Kenderian*, 157 AD3d 891, 891-892 [1st Dept 2018]; see also *Plymouth Venture Partners, II, L.P. v GTR Source, LLC*, 37 NY3d 591, 613-614 [2021] [Wilson, J., dissenting]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5225:1; see generally *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 540-541 [2009]). Alternatively, CPLR 5527 provides, in relevant part, that:

“[u]pon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness.”

In *Commonwealth of N. Mariana Is. v Canadian Imperial Bank of Commerce* (21 NY3d 55, 59 n 3 [2013]), however, the Court of Appeals declined to reach the defendant bank's contention that CPLR 5227, referable to persons indebted to the judgment debtor, is the appropriate statute under which a turnover proceeding should be commenced against a bank that holds the debtor's assets on deposit, rather than CPLR 5225(b), which is referable to persons in possession or custody of money belonging to debtor. Consequently, the court deems the instant proceeding to be one that is being prosecuted pursuant to CPLR 5225(b).

Fox, after causing New York City Marshal Pagnotta to serve the bank with the levy and demand, properly commenced this proceeding pursuant to CPLR 5225 to secure an order turning over all non-exempt funds in the subject bank account either to Pagnotta, properly named and served the bank, and served the judgment debtors with all of the papers in this proceeding.

Accordingly, it is

ORDERED that the petition is granted, without opposition; and it is further,

ORDERED that the respondent Bank of America is directed, within 45 days of service upon it of a copy of this order, with notice of entry, to deliver, to New York City Marshal Richard J. Pagnotta, all sums up to \$333,679.44, plus statutory simple interest on the sum of \$316,895.93 at 9% per annum, from December 29, 2022, that it holds for the account or accounts of Paramount Express Transport, LLC, Royal Construction Services, Select Marble and Granite, LLC, SMG Trucking, Consulting & IT, LLC, and Bahriden Kodirovich Bobholov, by

certified, bank, or treasurer's check, payable to New York City Marshal Richard J. Pagnotta for the benefit of the petitioner, Fox Capital Group, Inc.; and it is further,

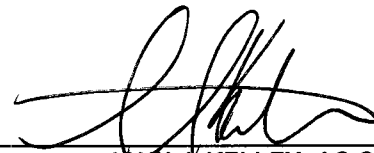
ORDERED that, upon receipt of that payment from Bank of America, New York City Marshal Richard J. Pagnotta shall, after compensating himself from those funds for statutory fees, poundage, and expenses, turn over the remainder of the proceeds of the levy to the petitioner and its attorney, and any draft or check representing said payment shall be made payable to the petitioner and its attorney, jointly and severally; and it is further,

ORDERED that the petitioner shall serve a copy of this order upon Bank of America, New York City Marshal Richard J. Pagnotta, Paramount Express Transport, LLC, Royal Construction Services, Select Marble and Granite, LLC, SMG Trucking, Consulting & IT, LLC, and Bahridden Kodirovich Bobholov, both by regular and certified mail, return receipt requested, within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

5/2/2023

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE