



Kerison & Willoughby Capital, Ltd. v Royale Etenia, LLC

2016 NY Slip Op 30947(U) (2016) | Cited 0 times | New York Supreme Court | May 20, 2016

SUPREME COURT OF OF YORK COUNTYOFNEWYORK: IASPART12

KERISON WILLOUGHBY CAPITAL,

Petitioner,

ROY ROY, DAMON DASH, 05

DECISION ORDER

S. 48 1 h St., 6 1 h 10017

S. 60 Street 0002 10019

ForOCSE:

Support Unit 150 St., 10007

Petitioner CPLR

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2 of 10 THE STATE NEW

-----x & LTD.,

-against-

ALE ETENIA, LLC, MORTIMER SINGER, RACHEL and

Respondents. Index no. 155976/13



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Motion seq. no.

AND

-----x BARBARA JAFFE, JSC:

For petitioner: Martin Rapaport, Esq. 18 E. Fl. New York, NY 212-688-190

For Dash: Natraj Bhushan, Esq. Poppington Gallery Orchard New York, NY | For Roy: Jessica T. Rosenberg, Esq. Kasowitz, Benson et al. 1633 Broadway New York, NY 212-506-1700

Elizabeth Haynes, Esq. Zachary W. Carter, Esq. Corp. Counsel of City of New York Human Resources Administration Office of Legal Affairs Child Litigation Greenwich 38th Fl. New York, NY 929-221-6609

moves by order to show cause pursuant to 5225(a) for an order directing

defendants Dash and Royale Etenia, LLC (RE), to turnover, forthwith, to the New York County

Sheriff for auction Dash's percent membership interest in RE, and apply the proceeds of the

sale to the satisfaction of the July 2011 judgment obtained by petitioner against Dash. In the

alternative, petitioner seeks an order directing Dash to give and turnover by assignment all of his

interest in RE until the judgment is satisfied in full. Additionally, petitioner seeks the [* 1] (NYSCEF 101

(OCSE). (NYSCEF

Pending

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Property (RRIPCO)

OCSE

TRO

OCSE's CPLR



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(NYSCEF

On 30, 3016, (NYSCEF

2016,

3 of 10 appointment of a receiver for and over RE to ensure that the order directing the turnover and auction of Dash's interest in RE be carried out, with the proceeds applied to the satisfaction of the judgment, together with all interest accrued thereon, and/or directing that a receiver be appointed for and over RE to ensure and enable that RE acknowledges the existence of and validity of and the enforceability of the assignment.).

Dash and defendant Roy oppose, as does non-party Office of Child Support Enforcement 128, 129).

the hearing of the order to show cause, I temporarily restrained Dash and RE and/or Roy from selling, transferring, pledging, collateralizing, conveying or in any way impairing Dash's percent interest in RE and/or from in any way impairing Dash's 18 percent interest in Rachel Roy Intellectual Company, LLC (TRO).

By notice of cross motion, moves for an order: (1) permitting it to intervene as a party as of right and amending the caption to add it as a party, (2) vacating or amending the as to enforcement actions as a preferred creditor under 5241 and 5232, (3) denying petitioner's request for a transfer of Dash's ownership interest in RE, (4) denying petitioner's request for an assignment of Dash's interest in RE to petitioner until Dash's judgment is satisfied, and (5) denying petitioner's request for the appointment of a receiver. 139). No party opposes the cross motion.



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March oral argument was conducted on the petition. 153). As

Dash did not appear, his arguments, including those set forth in his letter dated April 7, are not considered.

I. BACKGROUND

Respondent RE is a Delaware limited liability company that is governed by an operating

2 [* 2] 20 (NYSCEF

50 RRIPCO.

On 2011,

of\$330,038.28. (NYSCEF 104).

2013, RRIPCO

2014, (NYSCEF

2013, 2011

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50 RRIPCO,

\$285,000. (NYSCEF 105).

of\$406,370

of2014,

2014, \$4,550,000

RRIPCO, "loan

(NYSCEF 2014,

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4 of 10 agreement. Its three original members were Dash, Roy, and an investor named Artmis. Dash held 46.53 percent, Roy held 33.47, and Artmis percent. 115). RE and The Jones Group each held a percent interest in (Id.).

July 26, a judgment was entered in petitioner's favor and against defendant

Dash and Damon Dash Enterprises, LLC, in the amount In

Jones sought to sell its interest in to a third party, but did not succeed until July

18, when Topson Downs of California, Inc., purchased Jones's interest. 113).

By order dated August 14, the July judgment was modified pursuant to a

settlement agreement (charging order), whereby Dash was ordered to pay to petitioner's attorney

percent of quarterly payments made to him as a member of RE and occasional preferential

payments, all emanating from RE's percent interest in after the satisfaction of his

child support obligations, and until he paid to petitioner's attorney

The charging order also provides that Dash's failure to pay entitles petitioner to proceed and

prosecute any further lawful collection and enforcement mechanisms against Dash in the amount

less any payments made. (Id.).

It is undisputed that Dash paid petitioner monthly, a total of \$137,131.47 on the charging

order, that the payments stopped in the spring or early summer and that by an

amendment to RE's operating agreement dated July 17, RE received as a

special distribution from \$2.3 million of which was distributed to Dash as

repayment/return of capital, and in consideration for this consent to certain transactions relating

to (RE) and its affiliates, and in satisfaction of his Preference Amount under the Operating



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Agreement." 116). It is also undisputed that between July 17 and 19, Roy

agreed to assign an ongoing percent of RRIPCO's quarterly payments to RE to the law firm

3 [* 3] Benson, \$350,000

RRIPCO RRIPCO

in,

8, 2014,

\$406,370 106).

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\$106,000 \$101,000,

140,

CONTENTIONS

103). 2014

5 of 10 of Kasowitz, Torres & Friedman (KBT&F) until was paid (NYSCEF 124).

As a result of the July 17 amendment to the RE operating agreement, 14 percent of RE's

interest in was redeemed by and issued to RRIPIT. Both Roy and Dash

participated negotiated, and cooperated with the transaction, notwithstanding the restraining

order set forth in the original judgment. It is also undisputed that RE has no managing member

and that Dash owes Roy outstanding child support. (Id).

By order and judgment dated December the original judgment in the amount of

was reinstated, less any payments made. (NYSCEF

According to it has two judgments against Dash for unpaid child support, one for



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and one for and that its status as a preferred judgment creditor is

acknowledged in the charging order, thereby entitling it to be paid before petitioner. (NYSCEF 153).

IL

Petitioner seeks to enforce its judgment, maintaining that it is unaware of any other assets belonging to Dash from which the judgment may be satisfied, and that it has been hindered in its effort to discover the details behind the \$2.3 million transfer to Dash. Thus, it claims entitlement to the requested relief. (NYSCEF Petitioner also observes that Roy's July assignment of RE's royalties to KBT&F has deprived it of monies that RE should have been paying it pursuant to its judgment against Dash. (NYSCEF 153).

Roy argues that because RE is a Delaware limited liability company, petitioner's exclusive and sole remedy is the charging order. She maintains that Dash's interest in RE is sufficiently tangible for a sheriff's auction, whereas a receiver may administer only intangible interests, and she otherwise denies that petitioner is entitled to have a receiver appointed over all 4 [* 4] "due diligence." (NYSCEF 150).

(NYSCEF

ANALYSIS

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NY3d 303, [201 O], U.S. Zitron, 1990

1990 US 1049, [SD NY 1990]).

"especially

member."

6 of 10 of the proceeds being distributed to RE. However, Roy would condition the sale of Dash's

membership interest on her approval of the buyer, and she alleges that she has approved a

prospective buyer who was conducting Thus, she asserts, the

availability of the alternative relief of a judicial sale, and petitioner's failure to demonstrate how

the appointment of a receiver will lead to the satisfaction of its judgment, warrants denial of the

application. Roy also denies any risk of fraud or insolvency if a receiver is not appointed.

129).

III.

A. Applicable law

Article 52 of the CPLR contains a variety of enforcement devices (see Siegel, Prac

§ 492 [5th ed]), one of which is the appointment of a receiver administer, collect, improve,

lease, repair or sell any real or personal property in which the judgment debtor has an interest or

to do any other acts designed to satisfy the (CPLR 5228[a]). A receiver may be

appointed upon a showing that special reason appears to justify (Siegel, Practice



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Commentaries, McKinney's Cons Laws of Book 78, CPLR C5228:1, at 324). In deciding whether the appointment of a receiver is justified, courts consider alternative remedies available to the creditor ... ; (2) the degree to which receivership will increase the likelihood of satisfaction ... ; and (3) the risk of fraud or insolvency if a receiver is not (Hotel 71

Mezz Lender LLC v Falor, 14 317 quoting v WL 13278,

*1, Dist LEXIS *2

A receivership is appropriate when the property interest involved is intangible, lacks a ready market, and presents nothing that a sheriff can work with at an auction, such as the interest of ... a professional corporation of which [the debtor] is a (Siegel,

5 [* 5] NY

(See NY3d

[Sup 2015]; Ude/ Ude/, York

(See §18-703[d]; NY 607[b]

NY3d

OCSE

(See

2005]

7 of 10 Prac § 512 [5th ed]).

B. Alternative remedy

As a membership interest in a limited liability company lacks a ready market, a sale of

Dash's membership interest in RE is not a realistic or expedient method of satisfying petitioner's



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judgment. Hotel 71 Mezz Lender LLC, 14 at 318; Coscia v E/jama/, 48 Misc 3d 361, 366 Ct, Westchester County v 82 Misc 2d 882, 884 [Civ Ct, New County 1975]). Consequently, there is no alternative remedy available to petitioner. Roy's representation during oral argument that she had a buyer interested in purchasing Dash's interest is disregarded absent any supporting evidence.

While Roy's concerns about having a stranger manage her company's affairs may be well-founded, a judgment creditor who obtains an economic interest in a limited liability company does not obtain an interest in the company's property and acquires no right to exercise control over its operation. 6 Del C LLC Law§ [same]; see also Hotel 71 Mezz Lender LLC, 14 at 318 [receiver properly appointed; plaintiff sought receivership over defendants' ownership/membership interests in various companies, not over day-to-day operation of companies]).

C. Likelihood of satisfaction

Given Dash's default in paying petitioner pursuant to the charging order and his failure to pay child support, and as the sums due petitioner and are substantial, the appointment of a receiver will increase the likelihood of satisfying Dash's obligations. Radio Engineering Industries v York, 14 AD3d 893 [3d Dept [receivership continued due to defendant's conduct in attempting to avoid paying judgment by several fraudulent transfers and non-disclosure of assets, and difficulty in collecting mortgage payments owed to defendant];

6 [* 6] 2002]

(NYSCEF



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OCSE,

NY3d

OCSE'S CROSS MOTION

OCSE

8 of 10 Chlopecki v Chlopecki, 296 AD2d 640 [3d Dept [appointment of receiver appropriate as debtor owed large amount of money and it would take inordinate amount of time to satisfy remaining judgments]).

Dash's default in appearing at oral argument on this motion, and his failure to appear at a preliminary conference in the lawsuit he instituted against Roy scheduled for April 18, 2016, set up for the purpose of discussing whether to consolidate the two actions before me, warrants an inference that he will not willingly satisfy the judgments, and that a receivership will be more effective than the action against Roy in obtaining satisfaction of the judgments against him.

D. Risk of fraud or insolvency

RE's current lack of a manager 123), and its alleged failure to pay quarterly distributions to Dash or petitioner or child support payments to and the payment of distributions to KBT&F instead, pose a risk of RE's fraud or insolvency. (Melluzzo v Melluzzo, 62 AD2d 1061 [1st Dept 1978] [receiver properly appointed to manage property during pendency of enforcement proceeding, given risk of insolvency and substantial possibility of fraud against creditors]; see also Hotel 71 Mezz Lender LLC, 14 at 318 [danger of insolvency existed given evidence of defendants' precarious financial state and risk that defendants would be unable to satisfy future judgment]).



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IV.

At oral argument, the appearing parties agreed that should be permitted to intervene in this case based on its judgments against Dash and their priority over petitioner's judgment. Its request for an order denying petitioner's request for a transfer of Dash's ownership interest in RE or for an assignment of Dash's interest in RE to petitioner until Dash's judgment is satisfied, and for the appointment of a receiver is denied for the reasons set forth

7 [* 7] V. CONCLUSION

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ORDERED,

KERISON WILLOUGHBY

9 of 10 above.

Accordingly, it is hereby

and that petitioner's motion is granted to the extent of:

(1) directing defendants Dash and Royale Etenia, LLC (RE), to turnover, forthwith, to the New County Sheriff for auction Dash's percent membership interest in RE, and apply the proceeds of the sale to the satisfaction of the July judgment obtained by petitioner against Dash; and

(2) appointing a receiver for and over RE to ensure that the order directing the turnover and auction



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ofDash's interest in RE be carried out, with the proceeds applied to the satisfaction of the judgment, together with all interest accrued thereon;

it is further

and that petitioner submit a proposed order directing the

appointment of a receiver, to be selected by this court, and recognizing the of Child

Support Enforcement's priority as a judgment creditor; it is further

that the cross motion of of Child Support Enforcement is granted

solely to the extent of (1) permitting it to intervene in this proceeding and amending the caption

to add it as a party, and (2) recognizing its status as a preferred judgment creditor entitled to be

paid first out of the proceeds of any auction or sale ofDash's membership interest, and is

otherwise denied; it is further

that the action shall bear the following caption:

& CAPITAL, LTD.,

Petitioner,

- against -

8 [* 8] ROY MORTIMER

ROY, DAMON DASH, YORK CITY HUMAN RESOURCES ADMINISTRATION, OFFICE OF
SUPPORT ENFORCEMENT,

ORDERED, Office

Office

20, York, York

10 of 10 ALE ETENIA, LLC, SINGER, RACHEL and NEW



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CHILD

Respondents.

And it is further

that counsel for of Child Support Enforcement shall serve a copy of

this order with notice of entry upon the County clerk (Room 141 B) and the Clerk of the Trial

Support (Room 158), who are directed to mark the court's records to reflect the additional

party.

DATED: May 2016 New New

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