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Vintage Flooring & Tile, Inc. v DCM of NY LLC
2014 NY Slip Op 51376(U)
Decided on September 5, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on September 5, 2014

Supreme Court, Kings County

Vintage Flooring and Tile, Inc., Petitioner,
against
DCM of NY LLC, Respondent.

19094/12

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Carolyn E. Demarest, J.

Respondent brought the present Order to Show Cause for an order of the court recognizing a purported automatic stay of the enforcement of a judgment, pursuant to CPLR 5519, and to enforce an undertaking pending the appeal of a judgment awarded in this action.

BACKGROUND

The respondent, DCM of NY LLC ("DCM"), was the general contractor on a construction project for a Best Buy retail store at Kings Plaza Mall. The respondent entered into agreements with various subcontractors including petitioner Vintage Flooring and Tile, Inc. ("Vintage"). Disputes arose, the parties entered arbitration, and the petitioner commenced this action to confirm the arbitration award. On February 13, 2013, [FN1](#) this court granted petitioner's motion to confirm the arbitrator's July 2012 award for the petitioner against the respondent (*see* [\[*2\]](#) *Vintage Flooring v DCM*, 2013 NY Slip OP 32939(U) [Sup Ct, Kings County 2013]). A judgment in the Amount of \$93,865.20 was entered on July 31, 2013 ("Judgment"). The respondent filed and served upon petitioner a

notice of appeal on or about August 21, 2013.^[FN2] Subsequently, on October 17, 2013, the respondent brought an Order to Show Cause, pursuant to CPLR 5240, seeking to vacate any restraining notices or executions served by petitioner and to enjoin petitioner from serving any more restraining notices or executions upon respondent's TD Bank account pending the respondent's appeal. In an order dated February 7, 2014, this court denied the respondent's Order to Show Cause (*Vintage Flooring v DCM*, Sup Ct, Kings County, February 7, 2014, Demarest, J., Index No. 19094/12).^[FN3]

On or about January 7, 2014, Best Buy Stores LP, a defendant in the related action 5 *Brothers v DCM* (Index No. 500824/11), served upon petitioner an undertaking ("Undertaking") intending to stay the execution of the Judgment in this action.^[FN4] On or about January 15, 2014, the petitioner served a written notice of the petitioner's objections to the Undertaking upon the respondent. The petitioner objected on the grounds that the Undertaking was untimely because it was not served before or contemporaneously with the notice of appeal, that the obligee is not the appellant, and that the Undertaking lacked the necessary certification of qualification of the surety pursuant to New York Insurance Law §1111.

The respondent filed the current Order to Show Cause on February 19, 2014. In support of this motion, the respondent argues that the Undertaking was timely pursuant to CPLR 5519(a)(2) and Article 25 of the CPLR and it automatically stayed the enforcement of the Judgment pending the respondent's appeal. The Order to Show Cause also included the necessary certification for the Undertaking and respondent argues that the petitioner's objection to the sufficiency of the Undertaking is now moot. The appeal was perfected on or about March 30, 2014. Accordingly, the respondent seeks an order recognizing a stay of the enforcement of the Judgment pursuant to CPLR 5519.

The petitioner opposes the Order to Show Cause and argues that the aforementioned objections to the Undertaking preclude a stay of the enforcement of the Judgment. Petitioner also argues that respondent failed to move to justify the Undertaking within the 10 days of service of petitioner's notice of exception, as is required pursuant to CPLR 2507(a), and the respondent has not demonstrated proof that the Undertaking was filed with the clerk of the court as is required pursuant to CPLR 2505.

DISCUSSION

Pursuant to CPLR 5519(a)(2), "[s]ervice upon the adverse party of a notice of appeal [for a money judgment] . . . stays all proceedings to enforce the judgment or order appealed from" where an undertaking for that sum is given. Pursuant to CPLR 2505, "[a]n undertaking together with any affidavit required by [Article 25 of the CPLR] shall be filed with the clerk of the court in which the action is triable, or, upon an appeal, in the office where the judgment or order of the court of original instance is entered, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed."

In opposition to the Order to Show Cause, petitioner argues that the respondent has not shown proof that it ever filed the Undertaking with the Kings County Clerk. The court takes judicial notice that the Undertaking was not filed with the Kings County Clerk under the present index number. As respondent has not demonstrated any proof that the Undertaking was ever filed with the clerk of the court pursuant to CPLR 2505, the Undertaking was never effective and, therefore, there was no automatic stay pursuant to CPLR 5519(a)(2). As the Undertaking was ineffective, the petitioner's remaining objections to the Undertaking are moot. [\[FN5\]](#)

Respondent's request to stay the enforcement of the Judgment pursuant to CPLR 5519 (c), pending the appeal, is also denied. Should respondent seek such relief, it is advised to seek it before the Appellate Division Second Department.

CONCLUSION

Accordingly, the respondent's Order to Show Cause is denied.

This constitutes the decision and order of the court.

E N T E R,

Carolyn E. Demarest

J. S. C.

Footnotes

Footnote 1: This court also issued an "amended" order granting petitioner's motion to confirm the arbitration award on April 12, 2013. However, this order was identical to the February 13, 2013 order. It appears that the "Amended" order was signed in an effort to enter the decision with the county clerk more expeditiously. The substance of the decision was not amended.

Footnote 2: Although the respondent included a notice of appeal dated April 4, 2013, the court takes judicial notice that it was not filed with the county clerk under the present index number.

Footnote 3: Respondent argued that the funds in the account were "trust funds" and did not belong to DCM. However, the court declined to grant DCM relief as DCM failed to submit sufficient evidence to establish that the funds were trust assets pursuant to Article 3-A of the Lien Law.

Footnote 4: In a letter dated January 6, 2014, the attorneys for Best Buy informed petitioner that they represented Best Buy in the *5 Brothers* action and that their enclosed undertaking was intended to stay the execution of the money judgment against the respondent.

Footnote 5: It is noted, however, that even if the Undertaking had been filed at the time it was served upon the petitioner, it would have been untimely and no automatic stay would have been in place (*see Pauk v Pauk*, 232 AD2d 386, 392 [2d Dept 1996], citing *Tencza v Hyland*, 149 Misc 2d 403, 405-06 [Sup Ct, Oneida County 1990]).

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