

Medallion Bank v Mama of 5 Hacking Corp.
2018 NY Slip Op 32461(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 651617/2017
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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MEDALLION BANK, ET AL.

Plaintiffs,

- v -

MAMA OF 5 HACKING CORP., ET AL.

Defendants.

INDEX NO. 651617/2017

MOTION DATE 05/10/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

EXTEND - TIME

Under motion sequence 001, plaintiffs Medallion Bank and Medallion Financial Corp. (collectively, “Medallion”) seek, pursuant to CPLR 5232 (a), an order extending the ninety-day period to perfect the levies of a judgment obtained in the amount of \$1,738,206.01 against defendant judgment debtors Symon Garber and Mama of 5 Hacking Corp., individually and severally, on March 28, 2017 (NYSCEF Doc No. 13 ¶ 2; NYSCEF Doc No. 10). On March 9, 2017, Medallion commenced this action by filing a Confession of Judgment signed by Garber in his individual capacity as Guarantor, and in his representative capacity as President of Mama of 5 Hacking Corp. (NYSCEF Doc No. 1). On March 28, 2017, the Clerk entered the aforementioned judgment (NYSCEF Doc No. 10). On January 16, 2018, Medallion served the New York City Marshal with an execution (NYSCEF Doc No. 13 ¶ 5). On January 23, the Marshal then served the execution on eleven entities in which Garber is purported to have an interest (*id.* ¶ 6). Garber denies holding an interest in any of the entities listed in Medallion’s execution (NYSCEF Doc No. 24 ¶¶ 2–8), and to date, no part of the judgment has been satisfied (NYSCEF Doc No. 13 ¶ 7). On April 23, 2018, exactly ninety days after the execution was served, Medallion filed this motion to extend the time to perfect for one-hundred and eighty days (NYSCEF Doc No. 12).

Medallion argues that CPLR 5232 (a) permits the requested extension. Despite diligent efforts on the part of Medallion and the Marshal, defendant judgment debtors and garnishees refuse to turn over property subject to the execution (NYSCEF Doc No. 13 ¶ 7). Medallion must therefore continue to work with the Marshal to “identify all personal property in which the Judgment Debtors hold an interest and ensure that the same is turned over to the Marshal for immediate sale” (*id.* ¶¶ 7–9).

Garber contends that “there are simply no assets that are capable of being turned over pursuant to the execution,” (NYSCEF Doc No. 23 at 4) citing various explanations – he does not

own the property or have an interest in the property, the entities owe him no debt, the entities are not active or do not exist, or the entities have no assets (NYSCEF Doc No. 24 ¶¶ 3–7). Moreover, Garber argues that CPLR 5232 (a) requires not only that a party move within the ninety-day perfection period, but also that they obtain the extension within that same time frame. Thus, the levies are void because Medallion has not obtained an extension within the ninety-day period (NYSCEF Doc No. 23 at 3, citing *New York State Com’r of Taxation and Finance v Bank of New York*, 275 AD2d 287, 288–89 [1st Dept 2000] [“The statute unequivocally states that a levy becomes void 90 days after service is made unless a special proceeding specified by the particular provision has been commenced or an order of extension has been obtained.”]). Finally, Garber argues that this motion constitutes undue harassment (*id.* at 3–4).

In reply to Garber’s reading of the CPLR, Medallion points out the impracticability of such an interpretation – a plaintiff judgment creditor could not possibly know prior to attempting to perfect the levies whether defendant judgment debtors would prove uncooperative (NYSCEF Doc No. 26 at 5). Medallion also cites *Kitson & Kitson v City of Yonkers* (10 AD3d 21, 26 [2d Dept 2004]), for the proposition that “an extension of the 90 Day Period may be made after the levy has expired” (NYSCEF Doc No. 26 at 4). In response to Garber’s argument characterizing this motion as harassment, Medallion cites documentary evidence indicating, *inter alia*, that although Garber and his wife transferred ownership of Unit 3210 at 101 Warren Street to purchaser 3210 101 Warren Street LLC (NYSCEF Doc No. 28), Garber and his wife are actually the sole members of that entity (NYSCEF Doc No. 29). Furthermore, Garber, signed a 2013 mortgage on behalf of 3210 101 Warren Street LLC under the title of Manager-Member (*id.*), thereby appearing to contradict Garber’s sworn disclaimer of any interest in those properties (NYSCEF Doc No. 26 at 8).

CPLR 5232 (a) provides, in relevant part,

[a]t the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought.

The First and Second Departments have taken two different approaches to interpreting CPLR 5232 (a) (*Medallion Financial Corp. v Jeffery Hacking Corp.*, No. 651618/2017, 2018 WL 4182942, at *2 [Sup Ct, NY County, Aug. 27, 2018]). In *Bank of New York*, the First Department found that CPLR 5232 (a) is facially unambiguous — “a levy becomes void 90 days after service is made unless a special proceeding specified by the particular provision has been commenced or an order of extension has been obtained” (*Bank of New York*, 275 AD2d at 289). The court then held that a second levy could be issued where the first had expired (*id.*). Whereas the First Department requires that the party seeking to enforce the money judgment do so within the ninety-day period provided, the Second Department has held that “there is no provision in the CPLR prohibiting an extension after the levy has expired”; thus, the correct process is not to serve a second levy but to move to extend the time to perfect the original levy, even if the ninety-day period has expired (*Kitson*, 10 AD3d at 26 [citing CPLR 5240; *Kalman v Neuman*, 71 AD2d 996 [2d Dept 1979]; *Seider v Roth*, 28 AD2d 698 [2d Dept 1967]; *Amoco Overseas Oil Co. v*

Compagnie Nationale Algerienne de Navigation, 605 F2d 648 [2d Cir 1979]). But because Medallion filed their motion within the ninety-day period, this conflict is of no consequence, and because this court is situated within the First Department, *Bank of New York* applies.

In two decisions on similar proceedings recently resolved by the New York County Supreme Court, Commercial Division, the court read *Bank of New York* and CPLR 5232 (a) to provide for flexibility as to the means of enforcing a money judgment where a party makes a timely application. Specifically, the court found that “[a]lthough Medallion moved pursuant to CPLR 5232 (a), instead of commencing a special proceeding pursuant to CPLR 5225 or 5227, all three of these statutes provide similar means to enforce money judgments, and it is reasonable to permit an extension where a motion for such relief was brought in a timely manner instead of a special proceeding” (*Medallion Bank, et al. v TLG Hacking Corp., et al.*, Sup Ct, NY County, Sept. 21, 2018, Masley, J., index No. 651619/2017) [citing *Medallion Bank, et al. v Papa of 5 Hacking Corp.*, No. 651613/2017, 2018 WL 3067913, at *2 (Sup Ct, NY County, June 21, 2018)]]). Therefore, because Medallion made its motion to extend within the ninety-day period, the levies are preserved and may be extended by court order.

The court notes a third similar proceeding, *Medallion Financial Corp., et al. v Jeffery Hacking Corp., et al.* The Supreme Court in that action held that under *Bank of New York*, “[b]ecause Medallion did not receive an extension order or commence a special proceeding under CLPR 5225 or CPLR 5227, its levy is void as a matter of law, and its motion for an extension of the 90-day period is denied” (*Medallion Financial Corp. v Jeffery Hacking Corp.*, No. 651618/2017, 2018 WL 4182942, at *2 [Sup Ct, NY County, Aug. 27, 2018]). The court declines to adopt this reading of the statute for the reasons stated above.

Before granting an extension, the court must also consider whether an extension would constitute harassment of the judgment debtors and garnishees (*Bank of New York*, 275 AD2d at 290). Exhibits 1 and 2 of the reply affirmation indicate, at least at the time the documents were made, that Garber was a Manager-Member of the company that purchased one of the properties at issue, and therefore would have had a clear interest in the entity. Although Medallion did not raise these documents until the reply, Garber also failed to provide any documentation other than an affidavit indicating otherwise in the opposition papers (*see* NYSCEF Doc Nos. 23–25). There is therefore neither any indication that Garber truly has no interest in any of the entities at issue, nor any indication that granting the extension would constitute harassment.

Accordingly, it is hereby **ORDERED** that plaintiffs’ motion to extend its time to perfect the levies of judgment is **GRANTED** and the time for plaintiffs and/ or the appropriate Marshal to perfect the levies is extended until one-hundred and eighty (180) days from entry of this order. Plaintiffs are directed to mail a copy of this order to the last known addresses of all appearing parties and garnishees, in addition to e-filing a copy of this order with notice of entry, which shall constitute service on the defendants.

9/28/2018
DATE


O. PETER SHERWOOD, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE