

Wells Fargo Bank, N.A. v Andalex Aviation II, LLC
2019 NY Slip Op 33165(U)
October 23, 2019
Supreme Court, New York County
Docket Number: 651415/2016
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

Justice

-----X

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Plaintiff,

- v -

ANDALEX AVIATION II, LLC, ALLEN SILVERMAN,

Defendant.

-----X

INDEX NO. 651415/2016MOTION DATE 08/07/2019MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 427, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447

were read on this motion to/for

EXTEND - ORDER

Upon the foregoing documents and for the reasons set forth on the record (10/22/2019), Wells Fargo Bank, National Association (the **Plaintiff**)'s motion is granted solely to the extent of (1) a declaration that service of the order of attachment on Allen Silverman and Eleonora Silverman was proper and effected a valid levy on Allen Silverman's interests in certain companies, (2) an extension of the levy for 60 days from the date of this decision, and (3) that a receiver is appointed to receive distributions of Allen Silverman's membership interests in certain companies and to prevent the sale, pledge, hypothecation, or other voluntary encumbrance of his interest in such companies.

The Relevant Facts and Circumstances

The Plaintiff commenced this action on March 17, 2016 to recover the principal of \$2,092,589.19, plus interest and applicable charges against Andalex Aviation II, LLC as borrower and Allen Silverman as guarantor.

During oral argument on September 26, 2016, New York State Supreme Court Justice Charles Ramos granted the Plaintiff's motion for an order of attachment (*see* NYSCEF Doc. No. 415, the **Order of Attachment**). The Order of Attachment was entered on November 17, 2016 and provided, in part that:

The Sheriff shall levy within his or her jurisdiction, at any time before final judgment, upon (i) real and personal property, tangible or intangible, in which [Allen] Silverman has an interest, and (ii) such debts owing to [Allen] Silverman, as will satisfy \$2,319,413.03, the amount of Wells Fargo's demand, together with probable interest, costs and the Sheriff's fees and expenses, and shall take into his/her actual custody all such property capable of delivery and shall collect and receive all such debts, including, but not limited to, assets maintained at any financial institution, including any securities, asset management or other similar types of accounts, up to and including the sum of \$2,319,413.03; (NYSCEF Doc. No. 416, at 2-3).

Due to difficulties in effecting personal service on the relevant parties, the court entered an ex parte order that permitted the Office of the Sheriff of the City of New York (the **NYC Sheriff's Office**) to serve Allen Silverman and his wife, Eleonora Silverman with the Order of Attachment by overnight delivery service to three addresses (NYSCEF Doc. No. 418, the **2016 Order**). In accordance with the 2016 Order, the NYC Sheriff's Office served Allen Silverman and Eleonora Silverman on December 6, 2016 (NYSCEF Doc. No. 419). The Order of Attachment was also served on Alexander Silverman and Andrew Silverman (collectively, the **Silverman Sons**) on November 30, 2016.

In an order dated April 17, 2017, the court extended the levies on Allen Silverman, Eleonora Silverman, Alexander Silverman, and Andrew Silverman until December 31, 2017 (NYSCEF Doc. No. 420). In an order dated April 17, 2018, the court further extended the levies from December 31, 2017 until up to 30 days after entry of judgment in this action (*id.*, the **2018**

Order). On August 8, 2019, a money judgment was entered against Allen Silverman and Andalex Aviation II, LLC in the sum of \$3,094,525.11 (NYSCEF Doc. No. 425, the **Judgment**).

On August 7, 2019, the Plaintiff moved by order to show cause for an extension of the levies and to obtain certain relief in connection with limited liability companies that Allen Silverman has an interest in (*see* NYSCEF Doc. No. 412, the **Silverman LLCs**).

Discussion

A. Service of the Levies on the Silverman LLCs

The Plaintiff seeks a declaration that service of the Order of Attachment, pursuant to the 2016 Order, on Allen Silverman and Eleonora Silverman constituted proper service and effected a valid levy on Allen Silverman's interests in the Silverman LLCs. Pursuant to CPLR § 6214(a),

The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

As service by the NYC Sheriff's Office was conducted in accordance with the 2016 Order, such service was proper upon Allen Silverman and Eleonora Silverman (*see* NYSCEF Doc. No. 418).

To the extent that the Plaintiff argues that Allen Silverman's membership interests in the Silverman LLCs are also subject to the Order of Attachment, the court agrees. Under CPLR § 6202, debt or property against which a money judgment may be enforced as per CPLR § 5201 is subject to attachment. Pursuant to CPLR § 5201,

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

Under CPLR § 5201 (c)1, Allen Silverman's interests in the Silverman LLCs constitute a right or share in a corporation. In opposing this motion, Allen Silverman's counsel asserts that the Plaintiff has failed to establish that his client is the appropriate garnishee. In support of this position, the judgment debtor, Allen Silverman, submits his own self-serving affidavit indicating that he is not the president or treasurer of the Silverman LLCs. To date, prior to the entry of the judgment, Allen Silverman has been "unavailable" and "unable" to be deposed due to his medical conditions. In other words, the Plaintiff has been unable to conduct any discovery where Allen Silverman is concerned. Having taken this position in the case, the court cannot now allow Allen Silverman to selectively offer testimony to defeat the Plaintiff's rightful assertion of its lien on the Silverman LLCs. The court notes, for the avoidance of doubt, that if there is a different president or treasurer, no such president or treasurer has appeared to oppose the assertion of a levy on Allen Silverman's interests. In addition, Allen Silverman's membership interests in the Silverman LLCs constitute "property which could be assigned or transferred" pursuant to CPLR § 5201 (b). Accordingly, the Plaintiff's motion for a declaration that service by the NYC Sheriff's Office of the Order of Attachment upon Allen Silverman and Eleonora Silverman constituted proper service on Allen Silverman as defendant and Eleonora Silverman as garnishee and effected a valid levy on the Silverman LLCs is granted.

B. Extension of the Levies

The Plaintiff seeks to extend the levies on Allen Silverman, Eleonora Silverman, Andrew Silverman, and Alexander Silverman for five months from the date of this decision. Pursuant to CPLR § 6214(e), a levy expires ninety days after service of the order of attachment, but the court may extend the expiration period of the levy if the plaintiff brings a motion to do so.

The Plaintiff argues that the levy should be extended because an extension would preserve the status quo and would not result in any prejudice to the relevant parties. The Plaintiff also stated at oral argument that extension of the levy would help to secure certain liens of attachment on Allen Silverman's assets, which liens are necessary to secure the Plaintiff's interests vis-à-vis competing creditors of Allen Silverman. Allen Silverman argues that the levy should not be extended because it is not appropriate to extend the Plaintiff's post-judgment remedy when judgment has already been entered. The Silverman Sons also argue that extension of the levy would be prejudicial to them because they provided pre-judgment discovery attesting that Allen Silverman had no interest in their assets and that such levy would adversely impact their credit and assets.

The levy at issue is a levy on the "(i) real and personal property, tangible or intangible, in which Silverman has an interest, and (ii) such debts owing to Silverman, as will satisfy \$2,319,413.03, the amount of Wells Fargo's demand" (NYSCEF Doc. No. 416, at 2). This is not a levy on the property of the Silverman Sons. The Silverman Sons are not identified anywhere in the Order of Attachment, except to the extent that they may be garnishees of Allen Silverman's property. The

2018 Order extended the levy for 30 days beyond the entry of judgment. Given the Plaintiff's difficulty in obtaining depositions and other difficulties that the Plaintiff discussed in trying to satisfy the debt due, but recognizing the concerns raised by the Silverman Sons, the court extends the levy for a final 60 days from the date of this decision following which, only post-entry judgment discovery and remedies shall be available to the Plaintiff as the judgment creditor.

C. Disclosure and Turnover of Books and Records

At oral argument, the Plaintiff withdrew the branch of its motion that sought disclosure of the books and records of the Silverman LLCs pursuant to CPLR § 6220.

D. Appointment of a Receiver

Finally, the Plaintiff seeks to appoint an independent receiver pursuant to CPLR § 5228 to receive distributions of Allen Silverman's membership interests in the Silverman LLCs. Under CPLR § 5228, "the court may appoint a receiver who may be authorized to 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 judgment."

There are three factors that a court will consider when deciding whether appointment of a receiver is justified: (1) 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 appointed (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010]). Appointment of a receiver "is especially 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 psychiatrist/judgment debtor in a professional corporation of which he is a member” (*id.*).

Here, the Plaintiff argues that a receiver is appropriate because Allen Silverman has refused to be deposed due to illness, has not turned over any property to the NYC Sheriff’s Office, and there are significant concerns regarding the risk of fraud. The court agrees. Although alternate remedies may be available to the Plaintiff, such as a turnover proceeding, this option does not sufficiently protect the Plaintiff’s interests in the interim, in light of prior transfers allegedly made by Allen Silverman. The receivership will also increase the likelihood of satisfaction as a receiver ensures that Allen Silverman’s interests in the relevant property is preserved. The record further indicates that there is a risk of fraud absent the appointment of a receiver.

Under these circumstances, appointment of a receiver is appropriate, and especially so because Allen Silverman’s membership interests in the Silverman LLCs are intangible and lack a ready market. Accordingly, the Plaintiff’s motion to appoint a receiver is granted such that the receiver will receive potential distributions from the Silverman LLCs and the receiver will prevent the sale, pledge, hypothecation, or other voluntary encumbrance of his interest in such companies.

Accordingly, it is

ORDERED that the plaintiff’s motion seeking a declaration that service (on December 5, 2016) by the Office of the Sheriff of the City of New York of the Order of Attachment upon defendant

Allen Silverman and Eleonora Silverman in accordance with the terms of this court's ex parte order, dated December 1, 2016, by serving copies of the Order of Attachment by overnight mail to the addresses specified in the December 1, 2016 order, constituted proper service on Allen Silverman as defendant, and Eleonora as garnishee, and effected a valid levy on Allen Silverman's interests in each of the companies identified at NYSCEF Doc. No. 412 is granted; and it is further

ADJUDGED and DECLARED that service (on December 5, 2016) by the Office of the Sheriff of the City of New York of the Order of Attachment upon defendant Allen Silverman and Eleonora Silverman in accordance with the terms of this court's ex parte order, dated December 1, 2016, by serving copies of the Order of Attachment by overnight mail to the addresses specified in the December 1, 2016 order, constituted proper service on Allen Silverman as defendant, and Eleonora as garnishee, and effected a valid levy on Allen Silverman's interests in each of the companies identified at NYSCEF Doc. No. 412; and it is further

ORDERED that the plaintiff's motion pursuant to CPLR § 6214 (e) is granted and the levies served on Allen Silverman, Eleonora Silverman, Alexander Silverman, and Andrew Silverman are extended 60 days from the date of this decision; and it is further

ORDERED that the plaintiff's motion to appoint a receiver pursuant to CPLR § 5228 is granted and a temporary receiver shall be appointed, as set forth below; and it is further

ORDERED that Judy S. Mock, Esq., having an address at 26 Court St., Suite 711, Brooklyn NY, 11242, be and hereby is appointed temporary receiver for The Andalex Group LLC, TAG Arris Retail LLC, TAG Court Square LLC, TAG Management LLC, TAG Sylvan Corporate Center LLC, Thomson Avenue Apartments LLC, NJFL Holdings LLC, NJFL Properties LLC, Silvermark LLC, and A&E Limited Partnership and Andalex Services, Inc. (i.e., the Silverman LLCs); and it is further

ORDERED that the temporary receiver hereby appointed shall take and hold and collect distributions of Allen Silverman's membership interests in the the Silverman LLCs and prevent the sale, pledge, hypothecation, or other voluntary encumbrance of Allen Silverman's membership interests in the Silverman LLCs; and it is further

ORDERED that the powers hereby granted to the temporary receiver may not be extended except on further order of the court; and it is further

ORDERED that the temporary receivership hereby authorized shall continue only up to satisfaction of judgment unless hereafter directed otherwise by this court upon motion; and it is further

ORDERED that the temporary receiver, before entering her duties, shall swear or affirm that she will faithfully and fairly discharge the trust committed to her unless the oath is waived upon consent of all parties and that the oath may be administered by any person authorized by the Real Property Law to take acknowledgments of deeds; and it is further

ORDERED that the temporary receiver shall give an undertaking in the amount of \$100 that she will faithfully discharge her duties in such capacity; and it is further

ORDERED that the temporary receiver shall keep written accounts as provided under CPLR § 6404; and it is further

ORDERED that, pursuant to Section 36.1 of Part 36 of the Rules of the Chief Judge, the temporary receivership shall be subject to said Part 36; and it is further

ORDERED that, by accepting this appointment, the temporary receiver certifies that she is in compliance with Part 36, including Section 36.2 (d) (“Limitations on appointments based upon compensation”), but if she is disqualified from receiving such appointment pursuant to the provisions of Part 36, she shall notify this court forthwith; and it is further

ORDERED that, by accepting this appointment, the temporary receiver certifies that she is familiar with the duties and responsibilities of a temporary receiver, has experience in such area, and is fully capable of assuming, and prepared to assume, those duties and responsibilities, which are commensurate with her abilities; and it is further

ORDERED that attorneys or support staff in the appointee’s office may perform tasks under the appointee’s direct supervision, but all substantive appearances and reports must be made, performed, and created by the appointee; and it is further

ORDERED that, upon receipt of this order and UCS Form 872 (Notice of Appointment and Certification of Compliance), the temporary receiver shall complete, execute, and return the Form 872 to the Fiduciary Clerk; and it is further

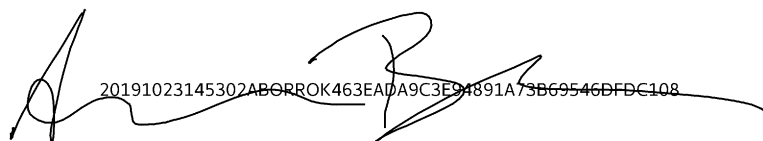
ORDERED that, pursuant to Section 36.1(a) (10) of Part 36 of the Rules of the Chief Judge, the temporary receiver is not authorized to hire counsel, an accountant, auctioneer, appraiser, property manager, or real estate broker (secondary appointees) without further order of this court, and that the temporary receiver is not authorized to pay fees to any secondary appointee without further order of this court; and it is further

ORDERED that, pursuant to Section 36.2 (c) (8), no temporary receiver shall be appointed as his or her own counsel and no person associated with a law firm of that receiver shall be appointed as counsel to that receiver unless there is a compelling reason to do so; and it is further

ORDERED that compensation for every secondary appointee is subject to prior court approval upon submission of an affirmation showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, and challenges presented and results achieved; and it is further

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this order, file a copy hereof with notice of entry with the Fiduciary Clerk; and it is further

ORDERED that such filing with the Fiduciary Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures For Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


20191023145302ABORROK463EAD9C3E94891A73B69546DFDC108

<u>10/23/2019</u>		<u>ANDREW BORROK, J.S.C.</u>	
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE