

<b>Kasen v Mission Cantina, LLC</b>
2020 NY Slip Op 30929(U)
April 10, 2020
Supreme Court, New York County
Docket Number: Index No. 652506/2017
Judge: Andrew Borrok
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

*Justice*

SCOTT KASEN

Plaintiff,

- v -

MISSION CANTINA, LLC,

Defendant.

INDEX NO. 652506/2017

MOTION DATE 04/10/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for TURNOVER PROCEEDING.

Upon the foregoing documents and for the reasons set forth below, Scott Kasen's motion pursuant to CPLR § 5225 (a) directing Mission Cantina LLC (**Mission Cantina**) to satisfy the judgment entered against it and in favor of Mr. Kasen on April 25, 2019 (the **Judgment**) by immediately paying cash to Mr. Kasen in an amount sufficient to satisfy the judgment, with interest, or in the alternative, for an order directing Mission Cantina to assign to Mr. Kasen its claims in the case captioned *Mission Cantina LLC v. Pan Asian Bistro LES Inc., et al.*, Index No. 653581/2014 (Sup. Ct., NY County) (the **Pan Asian Case**), and any other causes of action that Mission Cantina has or may have against any other person or entity, as needed to satisfy the Judgment, is denied without prejudice.

## The Facts Relevant to the Motion

Mr. Kasen commenced this lawsuit against Mission Cantina to recover damages resulting from Mission Cantina's failure to repay funds that it borrowed from Mr. Kasen to operate a restaurant. Mr. Kasen filed a summons and notice of motion for summary judgment in lieu of complaint on

May 8, 2017 (NYSCEF Doc. No. 1). Pursuant to a so-ordered stipulation, dated April 5, 2019, Mission Cantina withdrew its answer and affirmative defenses and consented to judgment (NYSCEF Doc. No. 78). On April 25, 2019, the Clerk of New York County entered the Judgment against Mission Cantina and in favor of Mr. Kasen in the amount of \$568,221.22, with interest at the rate of 9% from April 10, 2019 (NYSCEF Doc. No. 80). Mr. Kasen has recovered \$83,000 from Mission Cantina, leaving a principal balance of \$485,221.22, plus applicable interest (Bartholomew Aff., ¶ 7).

In the Pan Asia Case, Mission Cantina sued Pan Asian Bistro, LES, Inc. (**Pan Asia**), for damages relating to its purchase of a restaurant from Pan Asia in 2013. Pan Asia and its principal, Connie Yu, failed to appear at a compliance conference on September 19, 2017. The court ordered the parties to appear for a compliance conference on November 28, 2017, and further ordered that if Pan Asia and Ms. Yu failed to appear, either in person or by counsel, their answers would be stricken and Mission Cantina would be directed to file a notice of inquest and proceed to a hearing on damages only (NYSCEF Doc. No. 97).

Pan Asia and Ms. Yu failed to appear at the compliance conference on November 28, 2017, and the court directed Mission Cantina to file a notice of inquest against those defendants (NYSCEF Doc. No. 89). Mission Cantina filed the notice of inquest (NYSCEF Doc. No. 90), but no inquest has been scheduled and Mission Cantina has not taken any action to proceed in obtaining a judgment against Pan Asia and Ms. Yu. Mr. Kasen now seeks an order attaching Mission

Cantina's claims in the Pan Asia Case so that Mr. Kasen can proceed with the inquest to recover funds from Pan Asia and Ms. Yu to satisfy the Judgment against Mission Cantina.

### Discussion

CPLR § 5225 (a) provides:

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, ***upon notice to the judgment debtor***, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested (CPLR § 5225 [a] [emphasis added]).

Here, Mr. Kasen has not provided any proof that he served notice of this turnover proceeding on Mission Cantina. His motion therefore must be denied without prejudice.

In addition, to the extent that Mr. Kasen seeks an order directing Mission Cantina to immediately turn over cash sufficient to satisfy the Judgment pursuant to CPLR § 5225 (a), Mr. Kasen has not shown that Mission Cantina is possession or custody of funds sufficient to satisfy the judgment. In fact, on the contrary, in his papers filed in support of the instant motion, Mr. Kasen states that “upon information and belief . . . Mission Cantina ***does not possess sufficient funds to satisfy the judgment*** (Pl. Mem. In Support, at 2 [emphasis added]).

And, inasmuch as Mr. Kasen seeks to levy Mission Cantina's causes of action against Pan Asia and Ms. Yu in the Pan Asia Case, Mr. Kasen's motion is likewise procedurally defective.

“CPLR article 52 authorizes the court, upon a special proceeding brought by the judgment

creditor, to compel any debtor of the judgment debtor to pay the debt, or so much of it as will satisfy the judgment, to the judgment creditor,” (*Port Chester Elec. Const. Co. v Atlas*, 40 NY2d 652, 675 [1976]). This includes any causes of action that the judgment debtor may have against other defendants to the extent of satisfying the judgment (*id.*).

The procedural mechanism to enforce a money judgment against a cause of action differs depending on whether the cause of action is considered a debt or property. Specifically, with respect to the enforcement of money judgments against debts of the judgment debtor, CPLR § 5201 (a) provides:

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

And, with respect to the enforcement of money judgments against property, CPLR § 5201 (b) provides, in relevant part:

(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.

Here, the court in the Pan Asia Case found Pan Asia and Ms. Yu to be in default and ordered Mission Cantina to file a notice of inquest and proceed to a hearing on damages. Because the court effectively granted judgment on liability, the causes of action may be deemed “debts” as opposed to property. “Where the asset held by the garnishee is a ‘debt’ the garnishee owes to the

judgment debtor, the statute authorizing the proceeding is CPLR 5227” (*JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 301-302 [1st Dept 2007]).

CPLR § 5227 provides:

Upon 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. ***Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.*** The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239 (CPLR § 5227 [emphasis added]).

The court notes, however, that even if Mr. Kasen were to proceed on the theory that the causes of action are property (*see* Siegel, NY Prac § 489 n 1 [6th ed 2018] [noting that “[t]he line between a ‘debt’ and ‘cause of action’ is often imperceptible”]), notice is still required. Specifically, “where the asset held by the garnishee is ‘property’ of the judgment debtor, the statute authorizing the proceeding is CPLR 5225 (b)” (*JPMorgan*, 47 AD3d at 301).

CPLR § 5225 (b) provides:

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, . . . where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor’s rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor . . . . ***Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.*** The court may permit the judgment debtor to intervene in the

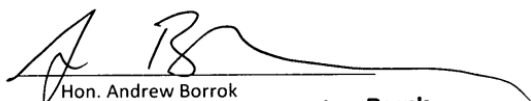
proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

In other words, significantly for the purposes of the instant motion, “[b]oth CPLR § 5225 (b) and 5227 require that notice of the proceeding be served upon the judgment debtor, whom the court may permit to intervene in the proceeding” (*id.* at 302). Here, as discussed above, Mr. Kasen has failed to file proof that he served notice of the instant turnover proceeding on Mission Cantina, the judgment debtor. Without appropriate notice, Mission Cantina would be deprived of the opportunity to seek leave to intervene.

For the foregoing reasons, Mr. Kasen’s motion is denied without prejudice.

Accordingly, it is

ORDERED that the motion is denied without prejudice.

  
Hon. Andrew Borrok  
J.S.C. Hon. Andrew Borrok

04/10/2020

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: