

<b>Kerison &amp; Willoughby Capital, Ltd. v Royale Etenia, LLC</b>
2016 NY Slip Op 30947(U)
May 20, 2016
Supreme Court, New York County
Docket Number: 155976/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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KERISON & WILLOUGHBY CAPITAL, LTD.,

Index no. 155976/13

Petitioner,

Motion seq. no. 05

-against-

**DECISION AND ORDER**

ROYALE ETENIA, LLC, MORTIMER SINGER,  
RACHEL ROY, and DAMON DASH,

Respondents.

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BARBARA JAFFE, JSC:

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Petitioner moves by order to show cause pursuant to CPLR 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 50 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

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. (NYSCEF 101).

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

Pending 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 50 percent interest in RE and/or from in any way impairing Dash's 18 percent interest in Rachel Roy Intellectual Property Company, LLC (RRIPCO) (TRO).

By notice of cross motion, OCSE 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 TRO as to OCSE's enforcement actions as a preferred creditor under CPLR 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. (NYSCEF 139). No party opposes the cross motion.

On March 30, 2016, oral argument was conducted on the petition. (NYSCEF 153). As Dash did not appear, his arguments, including those set forth in his letter dated April 7, 2016, are not considered.

## I. BACKGROUND

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

agreement. Its three original members were Dash, Roy, and an investor named Artmis. Dash held 46.53 percent, Roy held 33.47, and Artmis 20 percent. (NYSCEF 115). RE and The Jones Group each held a 50 percent interest in RRIPCO. (*Id.*).

On July 26, 2011, a judgment was entered in petitioner's favor and against defendant Dash and Damon Dash Enterprises, LLC, in the amount of \$330,038.28. (NYSCEF 104). In 2013, Jones sought to sell its interest in RRIPCO to a third party, but did not succeed until July 18, 2014, when Topson Downs of California, Inc., purchased Jones's interest. (NYSCEF 113).

By order dated August 14, 2013, the July 2011 judgment was modified pursuant to a settlement agreement (charging order), whereby Dash was ordered to pay to petitioner's attorney 50 percent of quarterly payments made to him as a member of RE and occasional preferential payments, all emanating from RE's 50 percent interest in RRIPCO, after the satisfaction of his child support obligations, and until he paid to petitioner's attorney \$285,000. (NYSCEF 105). 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 of \$406,370 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 of 2014, and that by an amendment to RE's operating agreement dated July 17, 2014, RE received \$4,550,000 as a special distribution from RRIPCO, \$2.3 million of which was distributed to Dash as "loan 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 Agreement." (NYSCEF 116). It is also undisputed that between July 17 and 19, 2014, Roy agreed to assign an ongoing 60 percent of RRIPCO's quarterly payments to RE to the law firm

of Kasowitz, Benson, Torres & Friedman (KBT&F) until \$350,000 was paid (NYSCEF 124).

As a result of the July 17 amendment to the RE operating agreement, 14 percent of RE's interest in RRIPCO was redeemed by RRIPCO and issued to RRIPIT. Both Roy and Dash participated in, 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 8, 2014, the original judgment in the amount of \$406,370 was reinstated, less any payments made. (NYSCEF 106).

According to OCSE, it has two judgments against Dash for unpaid child support, one for \$106,000 and one for \$101,000, and that its status as a preferred judgment creditor is acknowledged in the charging order, thereby entitling it to be paid before petitioner. (NYSCEF 140, 153).

## II. CONTENTIONS

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 103). Petitioner also observes that Roy's July 2014 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

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 "due diligence." (NYSCEF 150). 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. (NYSCEF 129).

### III. ANALYSIS

#### A. Applicable law

Article 52 of the CPLR contains a variety of enforcement devices (*see* Siegel, NY Prac § 492 [5th ed]), one of which is the appointment of a receiver "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." (CPLR 5228[a]). A receiver may be appointed upon a showing that "a special reason appears to justify one." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5228:l, at 324). In deciding whether the appointment of a receiver is justified, courts consider "(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], *quoting* *U.S. v Zitron*, 1990 WL 13278, \*1, 1990 US Dist LEXIS 1049, \*2 [SD NY 1990]).

A receivership 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 professional corporation of which [the debtor] is a member." (Siegel,

NY 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 judgment. (*See Hotel 71 Mezz Lender LLC*, 14 NY3d at 318; *Coscia v Eljamal*, 48 Misc 3d 361, 366 [Sup Ct, Westchester County 2015]; *Udel v Udel*, 82 Misc 2d 882, 884 [Civ Ct, New York 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. (*See* 6 Del C §18-703[d]; NY LLC Law § 607[b] [same]; *see also Hotel 71 Mezz Lender LLC*, 14 NY3d 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 OCSE are substantial, the appointment of a receiver will increase the likelihood of satisfying Dash's obligations. (*See Radio Engineering Industries v York*, 14 AD3d 893 [3d Dept 2005] [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];

*Chlopecki v Chlopecki*, 296 AD2d 640 [3d Dept 2002] [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 (NYSCEF 123), and its alleged failure to pay quarterly distributions to Dash or petitioner or child support payments to OCSE, and the payment of distributions to KBT&F instead, pose a risk of RE's fraud or insolvency. (*Melluzzo v Melluzzo*, 62 AD2d 1061 [1<sup>st</sup> 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 NY3d at 318 [danger of insolvency existed given evidence of defendants' precarious financial state and risk that defendants would be unable to satisfy future judgment]).

#### IV. OCSE'S CROSS MOTION

At oral argument, the appearing parties agreed that OCSE 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



above.

### V. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, 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 York County Sheriff for auction Dash's 50 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; and
- (2) appointing 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;

it is further

ORDERED and ADJUDGED, that petitioner submit a proposed order directing the appointment of a receiver, to be selected by this court, and recognizing the Office of Child Support Enforcement's priority as a judgment creditor; it is further

ORDERED, that the cross motion of Office 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 of Dash's membership interest, and is otherwise denied; it is further

ORDERED, that the action shall bear the following caption:

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KERISON & WILLOUGHBY CAPITAL, LTD.,

Petitioner,

- against -

ROYALE ETENIA, LLC, MORTIMER SINGER,  
RACHEL ROY, DAMON DASH, and NEW YORK  
CITY HUMAN RESOURCES ADMINISTRATION,  
OFFICE OF CHILD SUPPORT ENFORCEMENT,

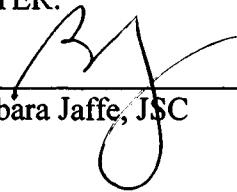
Respondents.

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And it is further

ORDERED, that counsel for Office of Child Support Enforcement shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional party.

ENTER:



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Barbara Jaffe, JSC

DATED: May 20, 2016  
New York, New York