SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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PAUL KASMIN GALLERY, INC.

Plaintiff,

- v -

SUSAN M. DICKER,

Defendant.

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INDEX NO. 654442/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for Vacate restraints.

The motion by plaintiff to vacate the restraining notices served on it and on non-party Chase Manhattan Bank, N.A. is granted only to the extent that the restraining notice served on plaintiff is vacated in part.

Background

This dispute concerns artwork and nonparty MFA LLC ("MFA"). Defendant is a judgment creditor of MFA and, in seeking to enforce her judgment, served restraining notices on plaintiff and plaintiff's bank account.

Plaintiff is an art gallery. In 2018, it agreed to sell a Robert Motherwell painting to MFA for $5.3 million. The agreement provides that title does not pass to MFA until payment in full is made and that MFA was to pay a $100,000 nonrefundable deposit (and storage fees if there were delays). Although the 45-day deadline to pay in full has long since passed, plaintiff is still holding the Motherwell and admits that MFA made various payments totaling $3.12 million toward the purchase price but that MFA never paid the full amount.

The parties' contentions

Plaintiff acknowledges that it has retained the painting and says it reserves the right to sell it and apply the proceeds to the unpaid balance of the purchase price. According to plaintiff, it has never expressed an interest in cancelling the sale with MFA nor has MFA stated it has a right to cancel the sale. Plaintiff explains that if it decides to auction the painting, it will pay any proceeds that exceed the outstanding amount to MFA.

Defendant explains that in March 2019, she sold a Picasso painting for $3 million. In that transaction, MFA served as an intermediary and was supposed to facilitate the transfer of funds and delivery of the artwork. Defendant alleges that the money was paid to MFA and the painting was delivered to the buyer. Because MFA never gave her the money, she brought a case against MFA and secured a $3.5 million judgment. During post-judgment discovery, she allegedly discovered evidence showing that MFA used her stolen money and paid them to plaintiff toward the Motherwell painting. Defendant complains that plaintiff has refused to disburse any of the $3 million it is owed even though it retains possession of the painting.

She contends that as a judgment creditor she can restrain amounts owed to the judgment debtor (MFA) and characterizes the money paid to plaintiff as stolen funds. She claims she needs the restraining notices in place so that a future turnover proceeding would not be pointless (it would prevent plaintiff from moving the money).

Plaintiff complains that it has never had any interaction with defendant; it was not involved in any transactions with defendant nor was it aware of the facts asserted by defendant. It seeks to vacate the restraining notices issued against its bank account with Chase and against the Motherwell painting.

Discussion

CPLR 5222(b) provides, in part, that:

"A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section."

"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" (CPLR 5201[a]). CPLR 5201(b) provides that "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. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered."

The question in this case is whether defendant can enforce her money judgment against MFA on the approximately $3 million paid to plaintiff by MFA toward the purchase of the Motherwell and whether a restraining notice can be served to support that effort.

CPLR 5201(a)

As an initial matter, the Court finds that defendant cannot enforce the judgment and serve the restraining notices under CPLR 5201(a) because it is not a debt as defined by this CPLR section. "To qualify for application to the judgment under subdivision (a), the debt must be either past due or certain to become due either upon demand or by the mere passage of time. If the debt depends on a contingency, in other words, and if the contingency is not certain to arise, such as an event that may never happen, subdivision (a) excludes the debt from being levied. The aim is to prevent the court from being embroiled in disputes about intangible property interests that may never achieve economic significance" (Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5201:1).

At the time the restraining notices were served, plaintiff was involved in a prolonged transaction concerning a painting, but neither MFA not plaintiff had exercised any rights about it. As it stands, MFA made partial payments but has not sought to formally cancel the contract and neither has plaintiff. Certainly, there are conceivable and theoretical events that could result in MFA or plaintiff having some sort of claim. MFA could seek to cancel the contract and get a refund of the money it paid, less expenses and possible damages. Or, as plaintiff theorizes, plaintiff could try to sell the painting and then pay MFA a certain amount, depending on the purchase price. That situation might entitle defendant to claim such monies as a judgment creditor of MFA. Alternatively, plaintiff could simply do what is has been doing—wait

indefinitely for MFA to make the rest of the payments and sit on its rights. And MFA could do what it has been doing: essentially parking money in a form of an extended layaway plan.

In evaluating these facts under CPLR 5201(a), the down payment is not a debt because plaintiff's or MFA's entitlement to those funds depends on a series of contingencies. That is exactly the type of situation excluded from CPLR 5201(a) (*see Verizon New England Inc. v Transcom Enhances Servs., Inc.*, 98 AD3d 203, 948 NYS2d 245 [1st Dept 2012] [finding that a judgment creditor could not enforce a restraining notice against a third-party that would prepay the judgment debtor for services on a weekly basis and had the right to cancel at any time]).

CPLR 5201(b)

However, the Court finds that defendant may properly send restraining notices to enforce her judgment under CPLR 5201(b). The Court of Appeals decision in *ABKCO Indus., Inc. v Apple Films, Inc.* (39 NY2d 670, 385 NYS2d 511 [1976]) is instructive. In that case, the Court of Appeals found that potential net profits relating to a licensing agreement for a film constituted "property" under CPLR 5201(b) (*id*. at 674). Those profits were to come from a future promotion of the film (*id*.). The Court explained that the judgment debtor's interest in the licensing agreement was "intangible personal property" (*id*. at 675). Recently the Court of Appeals has clarified that the key "fact was whether the property interest had potential economic value that was worthy of pursuit by the creditor" (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 313, 900 NYS2d 698 [2010] [discussing *ABKCO*]).

Here, MFA has an interest in the partial payments it made to plaintiff. Under the terms of the contract for the Motherwell, "Title will not pass until payment is received in full" (NYSCEF Doc. No. 4 at 2). There are no provisions in the invoice about what happens if only partial payments are made, other than that there is a $100,000 non-refundable deposit as part of the

agreement. There isn't, for example, a liquidated damages clause stating that plaintiff could keep any partial payments. Instead, the contract required MFA to pay the balance within 45 days of the invoice and didn't mention anything at all about partial payments. Of course, MFA did not comply with the contract and it seems that plaintiff accepted payments well after the deadline in the contract. The Court observes that no amendment to the contract was submitted in this motion.

And while plaintiff emphasizes that it has not sought to formally declare MFA in default under the contract, that only means that the circumstances do not qualify under CPLR 5201(a) as a debt. Instead, the Court finds that MFA would be entitled to get its payments back under the contract as a future right or interest under CPLR 5201(b) and so defendant can restrain the Chase account. Although it seems to be plaintiff's position, the Court is not aware of any contractual principle that would allow plaintiff to keep both the payments and the painting in the context of a sale of goods.

In other words, defendant was entitled to serve the subject restraining notice on the bank account in order to enforce its judgment on the basis of MFA's interest in its property (the money) so that defendant can commence a turnover proceeding. While the Court recognizes that plaintiff argues that it has not sought to cancel the contract and MFA has also done nothing to demand the money back, that does not change the Court's conclusion. Under *ABKCO*, a future interest in a contract can qualify as property to enforce a judgment. There is no doubt that, here, at the time the restraining notice was served, MFA was entitled to most of its money back. While the exact amount might be subject to storage charges under the contract,[1] the $100,000 non-

[1] The contract includes a provision that requires MFA to pay storage charges in the event that delivery was delayed due to an "action or inaction" by MFA (NYSCEF Doc. No. 4).

refundable deposit and possibly other claims by plaintiff; the exact amount can be determined in the forthcoming turnover proceeding. It does not bar the restraining notice on the bank account.

Plaintiff's claim of Security interest

To the extent that plaintiff contends it has a security interest in the painting *and* the money, that claim is insufficient to compel a different outcome. Plaintiff admits it retains possession of the painting and that title has not passed to MFA. And even assuming it has some sort of security interest, plaintiff admits that it is considering auctioning off the painting. How could plaintiff simultaneously have a security interest in the painting, keep possession of the painting (presumably, under this theory, for MFA's benefit) and also have the right to auction it without MFA's consent? More importantly, *under the purchase agreement*, title does not pass to MFA until the purchase price is paid in full. That means that plaintiff currently has the title to the painting but not to the partial payments. Plaintiff's theory that it retains the painting merely as collateral under the UCC Article 9 makes no sense. The painting cannot both be collateral and wholly within plaintiff's possession.

The Court also fails to see for what the painting would be collateral—plaintiff has both the painting and the partial payments while MFA has nothing except a right to make the additional payments to complete the purchase or the right to demand the return of all the payments made except for what plaintiff is entitled to keep (storage fees, the non-refundable down payment, etc.). Moreover, the UCC sections cited by plaintiff are usually relevant where the goods are received by the buyer or sent to a third party, but the full payment has not been made. Here, the goods have stayed with the seller; this is a straightforward contract where the buyer simply hasn't paid the full purchase price and neither the buyer nor the seller has chosen to walk away from the sale.

The bank account restraint

The Court also rejects plaintiff's claim that restraining its bank account with Chase is somehow a step too far. The cases cited by plaintiff do not compel a different outcome. *Bingham v Zolt* (231 AD2d 479, 647 NYS2d 220 [1st Dept 1996]) merely stands for the proposition that a restraining notice could be served on the account of a judgment debtor's wife because he had deposited his funds into that account and that restraints were permissible on the account of corporate intervenors because the debtor used those accounts to pay legal expenses. The other case, *ERA Mgt., Inc. v Morrison Cohen Singer & Weinstein* (199 AD2d 179, 179, 605 NYS2d 91 [1st Dept 1993]) simply found that a restraining notice could be placed on corporate accounts which the judgment debtor used to pay personal expenses.

Here, the plaintiff does not deny that the money plaintiff received from MFA went into the Chase account. Certainly, that means that this bank account can be restrained. Under plaintiff's theory (that this is a step too far because Chase actually owns the account), only money held personally by a person or entity could be seized. That strains credulity—would a restraining notice therefore only apply to money a person has stashed under the mattress?

The restraint on plaintiff

However, based on the foregoing, the Court vacates the restraining notice served on plaintiff to the extent it seeks to restrain the painting. As stated above, MFA has not fully paid for the painting and does not have title thereto; MFA only has an interest in the money it paid toward the artwork. Therefore, defendant (as the judgment creditor) has no interest in the Motherwell. The balance of the restraining notice, which seeks to restrain the payments by MFA and monies owed to MFA remains in place.

Summary

The instant motion turns on the admittedly unusual factual scenario at issue. For reasons known only to plaintiff, it has decided to sit on its rights for years and not cancel the contract with MFA. Although plaintiff did send emails to MFA warning that it would bring a lawsuit if MFA did not complete the payment (NYSCEF Doc. Nos. 5-7), it never followed through with those threats. Ordinarily, plaintiff's decision wouldn't be an issue; a party is usually not required to exercise its rights. And for years, MFA has been content to allow plaintiff to hold millions of dollars. But here, where MFA is a judgment debtor and owes defendant over $3 million, the Court finds that plaintiff cannot hold onto both the painting and money forever. The contract between plaintiff and MFA states plaintiff retained possession of and title to the painting until MFA paid the full purchase price, and only after MFA pays the full price does MFA get title to the painting.

Although the contract did not specify what happens if MFA only paid some of the money, the contract does say the $100,000 deposit is nonrefundable; the Court finds that this means that the rest of the money (less storage and other miscellaneous fees) is refundable. Because MFA is entitled to get the money back, the defendant, MFA's judgment creditor, can step into MFA's shoes and claim that money via a restraining notice in contemplation of a turnover proceeding.

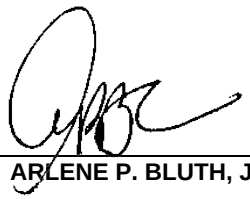
Here, the Court must answer a simple question: whose money is it? Plaintiff cannot have it both ways. Plaintiff cannot own both the painting and the money. The purchase contract clearly says that plaintiff owns the painting until the purchase price is paid in full. So plaintiff does not own the money – MFA does. As MFA's judgment creditor, defendant has the right to restrain that money pending a turnover proceeding.

Likewise, defendant, who stands in MFA's shoes, cannot have it both ways. She cannot claim an interest in the partial payments and an interest in the painting. MFA agreed that title to the painting would only pass when full payment was made. MFA could not force transfer of title based on less than full payment. Plaintiff cannot restrain the painting and the money; she can only restrain the money.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted only to the extent that the restraining notice served on plaintiff (NYSCEF Doc. No. 9) is vacated ONLY to the extent that it restrained the specific Motherwell painting at issue in this case and denied as to the remaining relief requested.

Remote Conference: November 8, 2021.



7/30/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE