

Silver v Whitney Partners LLC
2013 NY Slip Op 33424(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 100020/2013
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100020/2013

SILVER, JEFFREY

vs

WHITNEY PARTNERS LLC

Sequence Number : 001

DISMISS

PART 2

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/17/13

[Signature] J.S.C.
LOUIS B. YORK
J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

DEC 23 2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2COUNTY CLERK'S OFFICE
NEW YORK-----X
JEFFREY SILVER,*Plaintiff,*

Index No. 100020/2013

-against-

DECISION AND ORDER

WHITNEY PARTNERS LLC,

Defendant.
-----X

Motion Sequence Numbers 1 and 2, both of which seek sanctions, are consolidated for disposition and resolved as follows:

In this action, Plaintiff Jeffrey Silver brings suit to recover money allegedly owed by the successor company to the now defunct Whitney Partners LLC. Plaintiff asks the Court to award him \$40,000 owed to him by Whitney Group under a Joint Venture Agreement and sanctions. Defendant, through its assignee Douglas Pick, Esq., asks the Court to dismiss the Complaint in its entirety with prejudice pursuant to CPLR §3211(a)(4) as there is currently another action pending concerning the same subject matter and the same parties; and/or CPLR §3211(a)(7) because the Complaint fails to state a cause of action. Defendant also asks the Court to sanction Plaintiff by awarding it the costs, expenses, and reasonable attorney's fees it incurred as a result of Plaintiff's refusal to withdraw the Complaint. For the reasons below, the Court grants Defendant Whitney Partner's motion with respect to dismissal of the proceeding. The Court denies the portion of Defendant's motion that seeks sanctions, and also denies Plaintiff's separate motion for this relief.

Background

In 2008, Whitney Group discovered that over the past four years its Chief Financial Officer (CFO) had defalcated over \$7,000,000. In September of that year, Whitney Group closed

its doors because of these financial misappropriations. In October 2008 Whitney Group filed an Assignment in order to resolve its affairs under Article 2 of New York Debtor and Creditor Law. As the duly appointed Assignee under the supervision of the Court, Douglas J. Pick is currently administering Whitney Group's assets in a proceeding titled *In the Matter of the General Assignment for the Benefit of Creditors: Whitney Group, LLC, Assignor –to- Douglas J. Pick, Assignee*, Index No.510004/2008 (the "Assignment Proceeding"). The Assignment Proceeding was initially before Justice Carol Edmead but has been reassigned to Justice Joan Madden.

In October 2008, Justice Edmead authorized Mr. Pick to advertise for creditors to present their claims against Whitney Group, which he did. In January 2009, Defendant sold Whitney Group's business assets to a company called "Whitney Partners 'NG' LLC", formed by Gary Goldstein and Alicia Lazaro, both of whom are former members of Whitney Group.. At the time that Plaintiff filed this claim, Defendant had substantially completed his administration of the Assignment Proceeding, except for certain causes of action related to the \$7,000,000.00 that was misappropriated from Whitney Group's former CFO. Those claims were being litigated in a separate action pending before Justice Charles E. Ramos titled *Whitney Group, LLC v. Hunt-Scanlon Corporation, Christopher W. Hunt, Scott Scanlon, Jeffrey T. Sussman, Jaspan Schleisinger Hoffman LLP, and Robert Londrin*, Index No. 602775/08. Because of this second proceeding, Defendant cannot finalize the Assignment Proceeding.

In May 2012, Defendant learned that Plaintiff intended to commence a separate action against Whitney Group if Whitney Group did not repay its debt at once. Defendant then informed Plaintiff of the Assignment Proceeding. Nevertheless, Plaintiff failed to submit proof of a claim in the Assignment Proceeding for the debt Whitney Group owed him.

Plaintiff brought this *pro se* action against Whitney Group, Whitney Partners, LLC, and Alicia Lazaro, to recover \$40,000 payment which was allegedly due October 1, 2008. Whitney Group's former representatives have indicated their belief that they do in fact owe Plaintiff the \$40,000 in dispute and that this amount constitutes a valid debt obligation of Whitney Group. In response to this information, Defendant again asked Plaintiff to submit a proof of claim against Whitney Group. Plaintiff refused to do so for a second time, after he determined that doing so would not afford him sufficient "consideration" and that he had "nothing to lose" in continuing this proceeding.

Defendant Whitney Group now moves for dismissal. In the motion, Defendant alleges that Plaintiff's Complaint is barred by the Assignment, between the same parties for the same cause of action, and alleges that the Complaint fails to state a cause of action. Defendant also asks for sanctions against Plaintiff in the form of Defendant's costs, expenses and reasonable attorney's fees. Plaintiff moves separately for sanctions against Defendant.

Analysis

Defendant argues that Plaintiff's claim against Whitney Group is barred by the Assignment Proceeding and fails to state a cause of action. In a General Assignment, a debtor transfers all of his or her property to an assignee in trust for administration, liquidation, and equitable distribution among his creditors. *Compagnia Distribuzione Calzature v. PSF Shoes*, 206 AD2d 343, 344, 613 N.Y.S.2d 931, 932-933 (2nd Dept.1994). The aim of the Debtor and Creditor law "is to obtain expeditious finality and payment to creditors of obligations and debts due them from the estate of the Assignor." *Speciner v. Chase Manhattan Bank, N.A.*, 103 Misc.2d 19, 20, 425 N.Y.S.2d 242, 243 (Sup. Ct. Queens County1980). There is no automatic

stay in assignment proceedings *Abondolo v. Jerry WWHS Co. Inc.*, 829 F Supp.2d 120, 126-29 (E.D.N.Y. 2011).

Because a General Assignment does not result in the discharge of the assignor's debts "[t]he creditor is not estopped from exhausting his legal remedies against the assignor." *Century Factors v. Everything New, Inc.*, 122 Misc.2d 89, 90, 468 N.Y.S.2d 987, 988 (Civ. Ct. City of NY 1983). New York law governing the commencement of general assignments does not automatically impose a stay on all litigation and arbitration proceedings. *Abondolo v. Jerry WWHS Co. Inc.*, 829 F Supp.2d 120, 126-29 (E.D.N.Y. 2011). Nevertheless, public policy considerations generally tend to result in the dismissal of plenary actions in favor of assignments for the benefit of creditors.

Where there is a special course of procedure...adopted for the purpose of facilitating the disposition of matters cheaply and expeditiously, parties should be relegated to such method, and not be permitted a choice of tribunals, unless some substantial reason exists therefor... In the case of insolvent assignments, the statute provides an expeditious and cheap method of procedure, where the rights of all creditors can be fairly protected, and the estate cheaply administered. Under such circumstances, the assignee ought not to be subjected to the vexatious trouble and burden of an action ... nor should the assigned estate be made subject to the costs and expense of an action and the inevitable waste which the fees of referees and other contingencies produce, as well as the costs of the action itself, unless there be exceptional grounds therefore...

Hynes v. Alexander, 2 A.D. 109, 111, 37 N.Y.S. 527, 528 (2d Dep't 1896) *see Abondolo v. Jerry WWHS Co. Inc.*, 829 F Supp 2d 120, 126-29 (E.D.N.Y. 2011)

Furthermore, the decision whether to impose a stay or dismiss a claim in favor of an assignment proceeding remains a matter of judicial discretion. Although New York's Debtor and Creditor Law states that the Court shall have power "[t]o allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the estate...[t]o settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the

circumstances of the case render just and proper.” N.Y. Debtor and Creditor Law §15(McKinney 2013) see *Abondolo v. Jerry WWHS Co. Inc.*, 829 F Supp.2d 120, 126-29 (E.D.N.Y. 2011).

In the instant proceeding, public policy requires the dismissal of the Complaint. Pursuant to CPLR 602(a) “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” The Assignment Proceeding exists so that creditors can recover from the now insolvent Whitney Group. To permit creditors to bring individual actions would both frustrate the purpose of the Assignment Proceeding and result in the expenditure of unnecessary time, money, and judicial resources. Nor should the estate be subjected to multiple proceedings on the same issue, when doing so would inevitably result in the further diminution of the estates’ already limited financial resources. *Hynes v. Alexander*, 2 A.D. 109, 111, 37 N.Y.S. 527, 528 (2d Dep’t 1896) Accordingly, dismissal of the action is appropriate.

Because the Court finds in favor of Defendant on the issue of whether Plaintiff’s claims should be consolidated with the Assignment Proceeding, the Court need not reach the issue of whether Plaintiff states a cause of action. However, Defendant’s request for sanctions pursuant to NYCRR 130-1.1 is denied. The award of sanctions is discretionary and may be granted to any party or attorney in any civil action or proceeding before the court in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct as defined in the NYCRR. 22 NY ADC §130-1.1; *In re Estate of Levine*, 82 A.D.3d 524, 526, 918 N.Y.S.2d 445, 447(1st Dept., 2011). In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action

or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in ADC §130-1.3. The circumstances surrounding the instant proceeding do not warrant sanctions. Plaintiff has every right to bring a claim for the debt owed to him by Whitney Group. His actions in bringing this claim are not frivolous as defined by 22 ADC §130-1.1(c). Plaintiff's claims are not without merit under the law, were not undertaken primarily to prolong litigation or harm Defendant, nor do the claims assert false statements. The Court's sole reason for dismissal is that Plaintiff's claims are more properly joined with the Assignment Proceeding in order to conserve judicial resources and to prevent repetitive litigation. Similarly defendant's conduct does not warrant snactions.

Conclusion

For the reasons above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the case, as the claims asserted by Plaintiff should be resolved in the Assignment Proceeding; and it is further

ORDERED that the portion of Defendant's motion seeking sanctions is denied; and it is further

ORDERED that Plaintiff's motion is denied.

Enter:

Dated: 12/17/13

FILED

DEC 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

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Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.