

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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624 WEST 47TH STREET, LLC,

Plaintiff,

- v -

GARY FLOM, ALEXANDER BOYKO, and VENJAMIN NILVA

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, and 132

were read on this motion to/for TURN OVER ASSETS-CPLR 5225/CROSS
MOTION TO VACATE RESTRAINING NOTICE.

DECISION AND ORDER

In this action to recover on a guaranty of a commercial lease, commenced by notice of motion for summary judgment in lieu of complaint, the plaintiff moves pursuant to CPLR 5225 to compel the defendant Alexander Boyko to turn over assets held in the name of Selvant Investing Group, Ltd. (Selvant), at Morgan Stanley Dean Witter & Co. (Morgan Stanley) in satisfaction of a judgment entered against him in this action on September 10, 2020 in the total sum of \$306,902.03. Boyko opposes the motion and cross-moves to vacate an April 12, 2021 restraining notice that the plaintiff served upon Morgan Stanley in connection with accounts held in Selvant's name. The motion is granted and the cross motion is denied, and the plaintiff is directed to turn over, to the plaintiff, the sum of \$306,902.03, plus interest at 9% per annum from September 10, 2020, from the Selvant accounts maintained at Morgan Stanley.

By decision and order dated May 1, 2018, this court granted the plaintiff's motion for summary judgment in lieu of complaint against Boyko (SEQ 001), upon Boyko's default in answering the complaint or otherwise appearing in the action. By order dated September 17, 2018, the court directed the plaintiff to settle a judgment.

On October 17, 2018, the Clerk of the court entered judgment in favor of the plaintiff and against the defendants, jointly and severally, in the principal sum of \$236,705.72, plus statutory interest from June 12, 2017 in the sum of \$28,715.98, along with costs and disbursements in the sum of \$655.00, for a total of \$266,076.69. The judgment recited that, although Boyko's codefendants, Gary Flom and Venjamin Nilva, had answered the complaint, the judgment was entered against Boyko upon his default.

By so-ordered stipulation dated January 8, 2019, the judgment was vacated against Boyko, the plaintiff was permitted to serve and file a complaint against Boyko, and Boyko was permitted to serve and file and answer. The plaintiff served and filed the complaint on January 28, 2019, and Boyko served and filed an answer on February 18, 2019.

By decision and order dated April 28, 2020, and entered May 27, 2020, the court granted the plaintiff's motion for summary judgment on the complaint against Boyko (SEQ 003), directed the Clerk to enter judgment against Boyko, jointly and severally with Flom and Nilva, in the principal sum of \$236,705.32, plus a separate award of statutory interest solely against Boyko from June 12, 2017, along with costs to be taxed, and referred the issue of contractual attorneys' fees to a referee to hear and report. By decision and order dated August 31, 2020, the court granted the plaintiff's unopposed motion to modify the April 28, 2020 order (SEQ 004) so as to direct the Clerk to vacate the October 17, 2018 judgment against Flom and Nilva in its entirety so as to permit the Clerk to enter the judgment as described in the April 28, 2020 order. On September 10, 2020, the Clerk vacated the October 17, 2018 judgment, and entered a new judgment against Flom, Niva, and Boyko, jointly and severally, in the total sum of \$302,902.03. The reference to consider an award of attorneys' fees (SEQ 005) is presently scheduled to be conducted on October 21, 2021.

The plaintiff now seeks to compel Boyko to deliver to it the sum of \$302,902.03, plus interest at 9% per annum from September 10, 2020, to "deliver any other personal property, including Boyko's beneficial interest in Selvant Investing Group, or so much of it as is of

sufficient value to satisfy the judgment, to the Sheriff for New York County,” and to execute and deliver “any document necessary to effect payment or delivery of his beneficial interest in Selvant Investing Group or to direct Morgan Stanley to disburse from Selvant Investing Group funds sufficient to satisfy the judgment, to the extent such funds are beneficially owned by Boyko.”

As explained by the plaintiff’s attorney, although Boyko resides at Strentensky bulva 5 app. 11, Moscow, Russia 106047, and claims that he does not maintain collectible assets in the United States, after post-judgment discovery and diligent investigation, the plaintiff identified assets subject to collection in the United States, to wit, investment accounts at Morgan Stanley in the name of Selvant, in which Boyko owns a beneficial interest and from which he pays his personal expenses.

Specifically, Morgan Stanley, in response to an information subpoena, disclosed that Selvant maintained three accounts with Morgan Stanley, one of which had more than \$2 million on deposit, and that a person named “Andrey Boyko” was a beneficial owner of those accounts, while other publicly available information suggests that both Andrey Boyko and Alexander Boyko are shareholders or beneficial owners of Selvant. Further information provided by Morgan Stanley established that the account opening documents for all three of the accounts maintained by Selvant at Morgan Stanley were executed by Alexander Boyko and that, while the share certificate for Selvant was issued to “Andrey Boyko,” it was executed by “Alexander Boyko, Director of the Company.” Moreover, the only authorized person on the account is Alexander Boyko, with an address at 3201 NE 183rd Street, Apt. 2302, Aventura, Florida 33160, which is the same address listed for Selvant in its publicly filed incorporation documents.

The plaintiff also submitted proof, in the form of statements and memoranda from Morgan Stanley, that Selvant directly paid the attorneys’ fees that Boyko had incurred both in defending the instant action and in defending a separate action commenced against him in

federal court, as well as making payments to an entity known as Albo Assets Management, LLC, which is owned and operated by Boyko's self-described "life partner," Irina Gryaznova.

In opposition to the plaintiff's motion, Boyko submitted his own affidavit, in which he asserted that

"Selvant Investing is a British Virgin Islands ("BVI") corporation that my son, Andrey Boyko, and I formed on July 3, 2007 as an investment enterprise. Starting well before then, Andrey and I had been shareholders in a Russian electronic commerce company named Center for Economic Development (more commonly referred to as "B2B-Center"), where Andrey was the CEO for a period of time and is currently the Commercial Director and a member of the Board of Directors.

"In 2007, the company's legal advisors recommended that at least a portion of the company's shares be spun off into several other companies. Most of the shares held by Andrey and me in B2B-Center were transitioned to the new company we created for this purpose, Selvant Investing, of which we then became the sole shareholders and directors, and from which we both initially received dividends.

"In 2016, I made to loan to BICOM and affiliated companies in excess of \$16 million in an effort to keep the companies afloat by covering certain bank debt. To generate those funds, I liquidated my entire ownership interest in Selvant Investing, based upon the estimated value of my shares in the company. As a result of that transaction, Andrey became the company's sole shareholder, and since then he alone has continued to receive dividends from the company. At Andrey's request, I have remained in the position of an uncompensated director of the company, providing occasional investing advice. Annexed hereto as Exhibit A is a copy of the most recent (from the year 2020) Incumbency Certificate that was filed on behalf of Selvant Investing pursuant to BVI law, which correctly shows the company's ownership in Andrey's name only, with me listed as director. To the extent that the First Solomon Affirmation alleges that I was still a shareholder after 2016, Plaintiff's attorney appears to be relying solely upon a database from 2010, which for obvious reasons fails to reveal anything that took place during the past eleven years, including the liquidation of my ownership interest in the company in 2016.

"Contrary to statements made in the First and Second Solomon Affirmations, I do not control any of Selvant Investing's banking or investment accounts. They are controlled by Andrey, as the company's sole shareholder, and my role has been clerical in nature, solely based on my capacity as the company's director."

Boyko further avers that he has nothing to do with payments to or investments made in Albo, and that the only reason that Selvant directly paid attorney for legal fees that he personally incurred was that

“banking relations between the United States and Russia have become complicated, in the sense that direct funds transfers can be difficult to get approved. This situation has made it difficult for me to pay from my bank accounts in Russia for expenses related to legal proceedings in New York.”

CPLR 5225(a) provides that,

“[u]pon 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(b) provides, in relevant part, that

“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, or against a person who is a transferee of money or other personal property from the judgment debtor, 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 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.”

Pursuant to CPLR 5225, “a judgment creditor may obtain an order from a New York court, requiring a defendant who is in possession or custody of money or other personal property in which a judgment debtor has an interest to turn over the property or pay the money to the judgment creditor” (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 540 [2009]). A depositor is deemed to have “possession” of those assets within the meaning of CPLR 5225(a), as “the court could order the defendant judgment debtor to turn over property because it had personal jurisdiction over the defendant,” regardless of where the bank holding the assets is

located (*id*; see *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 31 [1st Dept 2007] [“a turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York”]; *Starbare II Partners, L.P. v Sloan*, 216 AD2d 238, 239 [1st Dept 1995] [since the New York courts had personal jurisdiction over the defendant judgment debtor, it was entitled to order him to turn over his property wherever it is located]; see also *Miller v Doniger*, 28 AD3d 405, 405 [1st Dept 2006]).

If Boyko were shown to be an actual, named “owner” of Selvant’s assets by virtue of being a Selvant shareholder, the provisions of CPLR 5225(a) would be applicable. He has demonstrated, however, that, although he once was a shareholder, he no longer is, and that his son, Andrey, is the sole nominal owner of shares in Selvant.

Nonetheless, even if Boyko no longer is a shareholder, Selvant’s assets are subject to turnover because the plaintiff established that Boyko is an equitable owner of Selvant. Stated another way, property that is subject to turnover pursuant to CPLR 5225 includes money or property in which the judgment debtor holds equitable ownership, even if the judgment debtor is not the nominal owner. “New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an ‘equitable owner,’ notwithstanding the fact that the individual is not a shareholder of the corporation” (*Freeman v Complex Computing Co., Inc.*, 119 F3d 1044, 1051 [2d Cir 1997]; see *Guilder v Corinth Constr. Corp.*, 235 AD2d 619, 619-620 [3d Dept 1997] [where judgment debtors “dominated and controlled” the corporation to such an extent that they may be considered its equitable owners, it is irrelevant that they are not shareholders]; *Lally v Catskill Airways, Inc.*, 198 AD2d 643 [3d Dept 1993]; *State of New York v Easton*, 169 Misc 2d 282 [Sup Ct, Albany County 1995]; *Plunket v. Estate of Doyle*, 2009 US Dist LEXIS 1990, *10 [SD NY, Jan. 6, 2009]). Boyko does not refute the plaintiff’s contention that he is a director of Selvant, and he admits that he exercises “clerical” responsibility over Selvant, which clearly includes directing transfers of funds and payments out of Selvant’s accounts to third

parties. He provides no explanation of the manner in which Andrey actually operates, manages, or controls Selvant. Boyko's explanation as to why Selvant directly paid his personal attorneys' fees is patently insufficient to require a hearing (*cf. Guilder v Corinth Constr. Corp.*, 235 AD2d at 620), as he makes no attempt to describe the attempts that he made to wire funds to pay those fees out of his own personal accounts in Russia, why those attempts were unsuccessful or delayed, or why the wiring of funds was the only method of payment that was available to him.

Contrary to Boyko's contention, the effectiveness of a restraining notice is not limited to accounts owned by the judgment debtor. Rather, it is effective to restrain accounts from which the judgment debtor derives a direct benefit. Thus, an account maintained by a third party can be restrained pursuant to CPLR 5222(b) where, as here, a judgment creditor demonstrates that the account has been used "as a source for payment of the debtor's expenses" (*Bingham v Zolt*, 231 AD2d 479, 479 [1st Dept 1996]; see *ERA Management, Inc. v Morrison Cohen Singer & Weinstein*, 199 AD2d 179, 179 [1st Dept 1993]). "The fact that a judgment debtor will directly benefit from the payment of this sum is sufficient to require the party served with the restraining notice to comply with the provisions or be subject to the appropriate legal sanctions" (*MacArthur I, Inc. v Fields*, 188 AD3d 493, 494-495 [1st Dept 2020], quoting *Ray v Jama Prods., Inc.*, 74 AD2d 845, 846 [2d Dept 1980]; see *Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 2018 NY Slip Op 30868[U], *6-7, 2018 NY Misc LEXIS 1793, *7-8 [Sup Ct, N.Y. County, May 10, 2018]; *780 E., LLC v Commerce Bank*, 2005 NY Slip Op 30538[U], *4, 2005 NY Misc LEXIS 8564 [Sup Ct, N.Y. County, Jul. 11, 2005]). Hence, there is no basis for Boyko's request to vacate the restraining notice served upon Morgan Stanley.

In light of the foregoing, it is

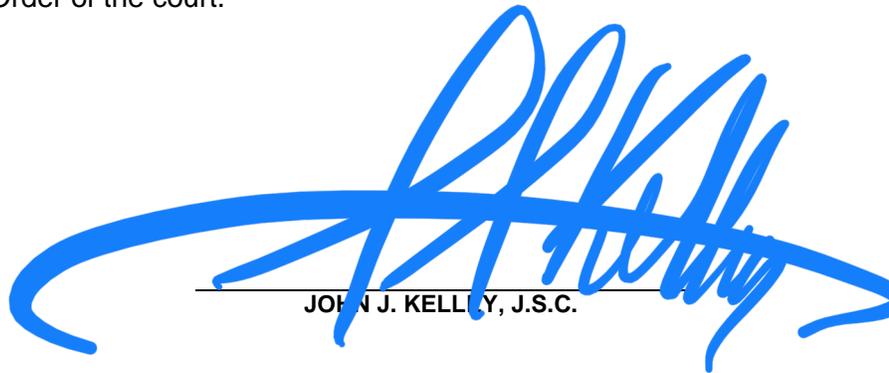
ORDERED that the plaintiff's motion to compel the defendant Alexander Boyko to turn over funds held in accounts maintained by Selvant Investing Group, Ltd., at Morgan Stanley Dean Witter & Co., sufficient to satisfy the judgment entered in favor of the plaintiff and against him on September 10, 2020 is granted, and it is further,

ORDERED that, on or before December 20, 2021, the defendant Alexander Boyko shall take all steps necessary and sign and submit to Morgan Stanley Dean Witter & Co. all papers necessary to turn over and transfer, to the plaintiff, 624 West 47th Street, LLC, or to the Sheriff of the City of New York, on behalf of the plaintiff, the sum of \$306,902.03, plus simple interest at 9% per annum from September 10, 2020, from accounts maintained at Morgan Stanley Dean Witter & Co. in the name of Selvant Investing Group, Ltd., including, but not limited to, accounts ending in the numbers 163, 254, and 128; and it is further,

ORDERED that the cross motion of the defendant Alexander Boyko to vacate the restraining notice dated April 20, 2021 that the plaintiff served upon Morgan Stanley Dean Witter & Co. is denied.

This constitutes the Decision and Order of the court.

10/18/2021
DATE



JOHN J. KELLY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input 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 type="checkbox"/>	FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input 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 type="checkbox"/>	FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE