

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

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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INDEX NO. 160995/2017

MARCO GRASSETTO, TRUSTEE FOR THE LIQUIDATION
OF SIMOD, S.P.A.

MOTION SEQ. NO. 005 006

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

AGNESE DONATELLA SARTORE,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 172, 173, 174

were read on this motion to REQUIRE POSTING OF AN UNDERTAKING.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 164, 165, 166, 167, 168, 169, 170, 171, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191

were read on this motion for SUMMARY JUDGMENT.

Knox Law Group, P.C., New York, NY (Daniel Knox of counsel), for plaintiff.

Reinhardt LLP, New York, NY (Andrea Fiocchi and Sarah E. Tallent of counsel), for defendant.

Gerald Lebovits, J.:

This decision addresses pre-trial motions relating to a dispute over a condominium apartment unit located on Wall Street in Manhattan.

In 2013, Simod, S.p.A, an Italian corporation, sought bankruptcy protection (a “concordato preventivo,” or arrangement with creditors) in an Italian bankruptcy court. Plaintiff, Marco Grassetto, trustee of Simod’s estate, brought this New York action in 2017. Grassetto has alleged that Simod had transferred the condominium apartment unit to defendant Agnese Donatella Sartore in 2013, without fair consideration, to shield the apartment from the Italian bankruptcy proceedings. Grassetto seeks in this action to recover the apartment for the Italian bankruptcy estate.¹ Additionally, in the Italian bankruptcy, Grassetto is seeking damages equal to the value of the apartment for the allegedly wrongful conveyance of the apartment from Simod to Sartore.

Two motions are now before this court. On motion sequence 005, Sartore moves under CPLR 6403, 6404, and 6405 to require Grassetto (i) to post an undertaking in the amount of the

¹ A tenant with no connection to this litigation currently resides in the apartment.

value of the apartment; (ii) replace the current receiver; and (iii) ensure that the new receiver satisfies the requirements of this court's two prior orders relating to the receivership. On motion sequence 006, Grassetto moves under CPLR 3212 for summary judgment; Sartore cross-moves under CPLR 2201 for a stay of proceedings in this action, or, alternatively, for summary judgment under CPLR 3212.

Motion sequences 005 and 006 are consolidated here for disposition. Sartore's motion to compel Grassetto to post an undertaking is granted. Sartore's cross-motion for a stay is granted with respect to Grassetto's fraudulent-conveyance claims. Grassetto's motion for summary judgment on that claim, and Sartore's cross-motion for summary judgment, are denied as academic.

BACKGROUND

The parties' dispute relating to Sartore's motion to require Grassetto to post an undertaking and comply with this court's receivership orders began over a year ago.

In early March 2021, Grassetto moved for an order appointing a receiver for the condominium apartment unit. (*See* NYSCEF No. 60.) In late March, this court granted the motion. (*See* NYSCEF No. 90 at 2-4.) This court's receivership order directed Grassetto to appoint an independent certified public accountant carrying malpractice insurance to serve as receiver. (*See id.* 2.) The receivership order also required Grassetto to pay the apartment's carrying costs. (*See id.* at 3.) And the order required the receiver "to endeavor to avoid foreclosure of the [apartment] through a refinancing, a negotiated payment plan with the mortgage holder, or any other method Receiver deems prudent in receiver's professional assessment." (*Id.* at 2-3.)

Later that year, Sartore, contending that Grassetto and his chosen receiver were not complying with the terms of the March 2021 receivership order, sought to compel Grassetto and the receiver to comply with that order, and asked this court to hold Grassetto in contempt. In September 2021, this court granted Sartore's motion in part and denied it in part. (*See generally* NYSCEF No. 140.)

This court held in its September 2021 order that although "the record demonstrates that plaintiff has not complied with aspects of this court's orders—and that his counsel's approach to his interactions with defendant's counsel has been somewhat unhelpful—this court does not agree at this time that plaintiff's conduct constitutes contempt." (*Id.* at 2.) The court granted, however, the branch of Sartore's motion to compel Grassetto to comply with the March 2021 receivership order. (*See id.* at 3-5.) Of particular note, the September 2021 order compelled Grassetto to submit to the court within 14 days proof that his chosen receiver is independent, carries malpractice insurance, and remains in good professional standing as a certified public accountant. (*See id.* at 3.)

Additionally, because Sartore had leased the apartment to a third party, this court required Grassetto's receiver to open an escrow account so that the tenant's monthly lease payments would be held in escrow. (*See id.* at 3.) The September 2021 order directed explicitly

that “payment of funds to be controlled by a receiver must be made to the receiver’s escrow account—not to a general account held by the receiver, or for that matter the receiver’s firm.” (*Id.* at 4.) Grassetto was required within 14 days of the September 2021 order to confirm with the court that the receiver had established an escrow account in his capacity as receiver. (*See id.* at 4-5.) And that order again required Grassetto to cover the carrying costs of the condominium unit. (*See id.* at 2.)

Grassetto did not meet the September 2021 order’s 14-day deadline to comply with the March 2021 receivership order. On November 3, 2021, Grassetto filed a letter with this court relating to the requirements of the September order. (*See* NYSCEF No. 152.) The November letter stated that Grassetto’s selected receiver was not able to deposit funds payable to a third party into the receiver’s firm’s escrow account. (*See id.* at 2.) The letter claimed that as a result, Grassetto’s only remaining option was to open an escrow account in the name of Simod, the company in the Italian bankruptcy proceedings for which Grassetto serves as trustee. (*See id.* at 2.) According to Grassetto, this court’s order directing Grassetto’s selected receiver to “establish[] an escrow account in his capacity as receiver” was impossible to comply with. (NYSCEF No. 140 at 4.) In fact, Grassetto asserted that the only path forward would “require[] the generation of a tax identification number for Simod with the Internal Revenue Service and [Grassetto] requires approval before he may do so and the request will be submitted concurrently with the aforementioned request to make payments [covering carrying costs.]” (NYSCEF No. 152 at 2.)

Grassetto’s November 2021 letter also argued that Sartore had acted in a wasteful manner by agreeing to a monthly rent of \$4,500, reduced from \$6,200 per month collected as part of a 2018 lease agreement. (*See id.* at 1.) Because Grassetto believed that the initial monthly rent would cover the carrying costs, but that the new reduced rental amount will not meet the carrying costs, he stated in his November letter that he would need approval from the Italian court to draw money from the Italian Estate to cover this difference in carrying costs. (*See id.* at 1.) Attached to the November letter are materials relating to the receiver’s independence, certified public accountant standing, and malpractice insurance, which Grassetto’s counsel had sent to Sartore’s counsel in October 2021. (*See* NYSCEF No. 145.)

In her papers on motion sequence 005, Sartore contends that the lack of action taken by the receiver since the receivership order was entered in March 2021 has resulted in waste and mismanagement of the apartment, which she asserts has a market value of at least \$1,027,198. (*See* NYSCEF No. 148 at 1.) As of October 29, 2021, the balance for common charges allegedly amounts to \$27,757.13, and the property-tax bill for the condominium unit amounts to \$86,650.14. (*See* NYSCEF No. 148 at 9.) The tenant living in the condominium unit has assertedly tried to pay rent, but because the receiver has not established an escrow account for this purpose as set forth in the receivership order, no rent has been collected. (*See* NYSCEF No. 174 at 2.) Grassetto admits that he did not make mortgage payments. (*See* NYSCEF No. 152 at 1-2.) Grassetto and Sartore, among others, are now named as defendants in a foreclosure action directed against the apartment. (*See* NYSCEF No. 156.)

DISCUSSION

I. Sartore's Motion to Require Grassetto to Post an Undertaking (Mot Seq 005)

Grassetto's *sole* argument in opposition to Sartore's motion to compel posting of an undertaking (and to compel compliance with this court's prior orders) is that the motion is jurisdictionally defective for failure to comply with the terms of the order to show cause that brought on the motion. (*See* NYSCEF No. 172 at 1-2.)

That is, the order to show cause provided, without specifying a required means of service, that "service of a copy of this Order[] together with the papers on which it was granted" on Grassetto's counsel would "be deemed sufficient service." (NYSCEF No. 163 at 2.) After this court e-filed the signed order to show cause, Sartore did not then separately e-file or serve Grassetto in hard copy with *another* copy of the signed order and the motion papers that she had already filed in support of the motion. Grassetto now argues that she was required to have done so, and that her not doing so rendered the motion jurisdictionally defective. This court disagrees.

This action is part of the mandatory e-filing program governing filing in Supreme Court. Under the mandatory e-filing rules, filing of an interlocutory document such as a motion simultaneously effects service of the document: When the document is filed, the "NYSCEF site shall automatically transmit electronic notification" to the service e-mail addresses given by the parties who have appeared, and transmission of that "notification shall constitute service of the document on the email service addresses identified therein." (22 NYCRR 202.5-b [f] [2].²)

Thus, Sartore's initial e-filing of the papers supporting her proposed order to show cause, and then this court's e-filing of the signed order to show cause, necessarily also notified Grassetto (through counsel) of the filing of these documents and afforded him access to the documents. (*Cf. Honeedew Investing Ltd. v Abadi*, 2021 WL 2315382, at *2 [Sup Ct, NY County June 4, 2021] [holding on a motion to hold defendants in contempt for violation of a court order that "[s]ince this matter is subject to mandatory e-filing . . . the court's uploading of the [order] was also effective service of the order on defendants".]) And the signed order to show cause did not specify any different, additional means by which Sartore was required to give Grassetto notice and copies of the order and supporting papers.³ In these circumstances, this court concludes that it would have been superfluous for Sartore to have filed a fresh copy of the exact same papers; and that the absence of this duplicate filing did not render Sartore's motion jurisdictionally defective.

² This provision, set out in the court rules governing participation-by-consent in Supreme Court e-filing, is incorporated by reference in the court rules governing mandatory e-filing participation. (*See* 22 NYCRR 202.5-bb [a] [1].)

³ This case thus differs from *Torres v Sedgwick Avenue Dignity Developers LLC*, in which the order to show cause had expressly ordered movant to serve one set of opposing parties with a copy of the signed order and supporting papers by overnight mail or personal delivery, and two other sets of opposing parties with copies of the papers by e-filing on NYSCEF. (*See* 74 Misc 3d 839, 840-841 [Civ Ct, Bronx County 2022].)

The cases cited by Grassetto’s counsel in his page-and-a-half affirmation opposing the motion stand merely for the unremarkable proposition that service of a motion brought on by order to show cause must comply with the terms of the order as signed by the court. They do not address the key issue here—what is required for compliance.

Given this court’s rejection of Grassetto’s procedural argument in opposition to the motion, and the absence of any substantive argument, Sartore’s motion to require posting of an undertaking is granted. Grassetto must within 30 days of entry of this order post an undertaking worth the current market value of the condominium unit, alleged as of October 2021 to be \$1,027,198.

This court additionally orders Grassetto to replace the current receiver within 30 days of entry of this order.

This court’s September 2021 order required Grassetto to comply with the March 2021 receivership order and submit to the court within 14 days confirmation that his selected receiver had established an escrow account in his capacity as receiver. (*See* NYSCEF No. 140 at 3-4.) Grassetto has concededly failed to comply with this second order. Grassetto suggested in his November 2021 letter to this court that compliance is infeasible because the receiver “is simply unable to deposit funds payable to a third party into his firm’s escrow account.” (NYSCEF No. 152 at 2.) But this court’s September 2021 order called for the *receiver* himself, not the receiver’s firm, to establish (or to have established) “an escrow account in his capacity as receiver.” (NYSCEF No. 140 at 4.) It is not apparent to this court—and Grassetto has never explained—why it should be impossible for Grassetto’s chosen receiver to take the basic step of establishing, and depositing funds into, an escrow account in his capacity as receiver. This court therefore directs Grassetto to replace him with a receiver who is capable of establishing and maintaining the necessary escrow account and who otherwise satisfies the requirements set out in this court’s prior orders.

II. Grassetto’s Motion for Summary Judgment and Sartore’s Cross-Motion for a Stay or for Summary Judgment (Mot Seq 006)

A. Sartore’s Cross-Motion for a Stay

Sartore cross-moves on motion sequence 006 to stay proceedings in this action pending the resolution of the Italian bankruptcy proceeding. Given that the resolution of this stay request may affect the court’s resolution of both the motion and cross-motion for summary judgment, this court addresses the stay issue first. The court concludes that this action should be stayed under CPLR 2201—at least with respect to the merits of Grassetto’s fraudulent-conveyance claims—pending the Italian bankruptcy court’s disposition of the parallel claim in that proceeding.⁴

⁴ The stay, in other words, does not apply to the various issues relating to the receivership over the apartment and payment of rent by the apartment’s tenant to the receiver, of the type that are discussed above on motion sequence 005.

CPLR 2201 affords “the court in which an action is pending” the discretion to “grant a stay of proceedings in a proper case, upon such terms as may be just.” Generally, a “stay pending determination of a related proceeding should be granted only when the other proceeding shares complete identity of parties, claims and relief sought.” (*Asher v Abbott Labs*, 307 AD2d 211, 211 [1st Dept 2003] [granting stay of New York action pending the outcome of a related federal action].) A stay may also be warranted, however, “when there is substantial identity between state and federal actions” and “consideration of issues of comity, orderly procedure, and judicial economy” favors a stay. (*Id.*; accord *OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 96 AD3d 541, 541 [1st Dept 2012] [affirming stay of New York action pending related action in Massachusetts state court].)

In *Asher*, for example, the Court held that a stay should be granted given (i) the federal courts’ particular expertise in the area of law at issue; (ii) that the federal action was commenced prior to the state action; (iii) the overlap of parties; (iv) the substantial overlap of issues; (v) that the state claims were encompassed within the federal action; (vi) that the federal action will result in a more complete disposition; and (vii) the need to avoid duplicative judicial effort and inconsistent rulings. (*See Asher*, 307 AD2d at 211-212.)

Here, the Italian bankruptcy proceeding was commenced first. Grassetto and Sartore are parties in each proceeding; and the issue of the validity of the transfer of the condominium apartment from Simod to Sartore will be at issue in both.⁵ *See* NYSCEF No. 178 at ¶¶ 6-11 [affidavit of Sartore’s Italian counsel].) Additionally, the inquiry into whether Simod received fair consideration from that transfer, on which the validity of the transfer will turn, will likely be resolved based on *Italian* law, not U.S. law. Thus, for this court to adjudicate Grassetto’s fraudulent-conveyance claims on the merits would lead not only to unnecessary expenditure of litigant and judicial resources, but also in the process create a potential for inconsistent results.⁶

In short, the *Asher* factors point strongly in favor of staying this court’s adjudication of Grassetto’s fraudulent-conveyance claims.

Grassetto contends that this court is nonetheless required to decide that claim on its merits under the law-of-the-case doctrine, because the court previously denied Sartore’s forum-non-conveniens motion to dismiss. (*See* NYSCEF No. 191 at 1.) This contention is meritless. The law-of-the-case doctrine prevents the relitigation of issues already determined; it applies “only to legal determinations that were necessarily resolved on the merits in a prior decision.”

⁵ This case thus differs from *Petra Fund REIT Corp. v Belfonti*, in which the legal issues in the two proceedings were different and distinct, although arising from the same facts. (*See* 2008 NY Slip Op 30804[U], at *6-*9 [Sup Ct, NY County Mar. 21, 2008].)

⁶ To be sure, as Grassetto contends (*see* NYSCEF No. 191 at 2), the *relief* that he seeks in the two proceedings is different, namely damages in the amount of the apartment’s value in the Italian proceeding, and ownership of the apartment itself in this action. But that difference in relief does not obviate the need in both proceedings to consider the validity of the transfer and the presence or absence of fair consideration—and thus the potential for the two sets of courts to duplicate their efforts yet reach inconsistent results.

(See *Wolf Props. Assoc., L.P. v Castle*, 174 AD3d 838, 842 [2d Dept 2019].) Here, the legal issues differ sufficiently that this court's denial of Sartore's motion to dismiss did not necessarily resolve her current cross-motion for a stay.

The forum-non-conveniens inquiry considers whether it would be “in the interest of substantial justice” to have an action heard elsewhere (CPLR 327 [a])—*i.e.*, whether, considered in isolation, a given set of claims belongs in New York courts or instead belongs in the courts of another jurisdiction. (See *e.g. Sambee Corp. v Moustafa*, 216 AD2d 196, 198 [1st Dept 1995] [discussing relevant forum-non-conveniens factors].) The stay question, on the other hand, does not involve an action's fitness for litigation in the New York courts, but instead whether an action that *does* properly belong in New York should nonetheless be temporarily put on hold in the interests of “comity, orderly procedure, and judicial economy.” (*Asher*, 307 AD2d at 211.) This court held at the pleading stage that Grassetto's claims may properly be heard in the New York courts. That holding is consistent with this court's conclusion on this motion that the full adjudication of Grassetto's claims here should await a resolution of very similar claims in the first-filed Italian bankruptcy proceeding.

B. The Parties' Motion and Cross-Motion for Summary Judgment

Given this court's conclusion that Sartore's cross-motion for a stay should be granted with respect to Grassetto's fraudulent-conveyance claims, the court need not, and does not, go on to consider the merits of the parties' respective motion and cross-motion for summary judgment on that claim.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of Sartore's motion under CPLR 6403 seeking to compel Grassetto to post an undertaking equal to the current value of the apartment (mot seq 005) is granted, and Grassetto shall post that undertaking within 30 days of entry of this order, with the amount of the undertaking to be based on the value of the apartment on the date of this order; and it is further

ORDERED that the branch of Sartore's motion seeking under CPLR 6405 to compel Grassetto to replace the current receiver (mot seq 005) is granted, and Grassetto shall within 30 days of entry of this order appoint a receiver who satisfies the requirements of this court's March 2021 and September 2021 orders; and it is further

ORDERED that Grassetto shall, within seven days of appointing a new receiver, submit to the court (by e-filing on NYSCEF and email to mhshawha@nycourts.gov) an affidavit attesting in detail to the new receiver's compliance with the requirements of the March 2021 and September 2021 orders; and it is further

ORDERED that the branch of Sartore's cross-motion under CPLR 2201 seeking a stay of proceedings in this action (mot seq 006) is granted to the extent of staying this court's adjudication of the merits of Grassetto's fraudulent-conveyance claims pending the disposition of that claim in the Italian bankruptcy proceeding; and it is further

ORDERED that the parties shall every three months submit to this court, by email to SFC-Part7-Clerk@nycourts.gov, an update on the status of the adjudication in the Italian bankruptcy proceeding of the fraudulent-conveyance claim there; and it is further

ORDERED that Grassetto’s motion for summary judgment under CPLR 3212, and the branch of Sartore’s cross-motion for summary judgment under CPLR 3212 (mot seq 006) are denied without prejudice as academic given this court’s disposition of Sartore’s stay request.

5/24/2022
DATE


HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	