

East End Healthcare v Gegenheimer

2017 NY Slip Op 31189(U)

May 30, 2017

Supreme Court, Suffolk County

Docket Number: 21672/12

Judge: Martha L. Luft

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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. MARTHA L. LUFT
A.J.S.C.

-----x
EAST END HEALTHCARE d/b/a WESTHAMPTON
CARE CENTER,

Plaintiff

-against-

JOAN GEGENHEIMER, AS EXECUTRIX OF THE
ESTATE OF ANNA AMICO and JOAN
GEGENHEIMER, Individually,

Defendants.
-----x

Index No. 21672/12

**DECISION AND ORDER
AFTER TRIAL**

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Upon the bench trial conducted on March 29, 2017, and upon all prior proceedings in this matter, after due consideration, this matter is determined as follows.

This is an action seeking to recover outstanding payments due for room, board and skilled nursing care services provided by plaintiff, East End Healthcare, Inc., d/b/a Westhampton Care Center ("Westhampton") to the decedent Anna Amico ("Amico"). A detailed recitation of the background facts in this matter was set forth in the Court's short form order dated June 29, 2015 (Tarantino, J.) (2015 NY Slip Op. 31161[U]) ("June 29, 2015 Slip Op.") and is incorporated herein by reference.

Briefly, the essential undisputed facts are that defendant, Joan Gegenheimer ("Gegenheimer"), who is the niece of Amico, was named on a joint bank account, for convenience, with her aunt. The funds in the account exclusively belonged to Amico. In February, 2011, Amico was admitted to Brookhaven Hospital and diagnosed with terminal colon cancer. In late February, 2011, Gegenheimer was appointed Amico's attorney-in-fact pursuant to a General Durable Power of Attorney so that she could effectuate a \$45,000.00 draw upon Amico's reverse mortgage line of credit. That sum was then deposited into the joint account. On March 2, 2011 and March 11,

2011, while Amico was still in the hospital, Gegenheimer withdrew a total of \$40,000.00 from the joint account. On March 17, 2011, Amico was admitted to Westhampton. The following day, Gegenheimer withdrew an additional \$15,000.00 from the joint account. A Medicaid application was made on Amico's behalf in early April, 2011. On September 9, 2011, Amico passed away and on September 20, 2011 a notice was sent by the Suffolk County Department of Social Services ("SCDSS") stating that there would be a 5.24-month penalty period prior to Amico being eligible for Medicaid benefits based upon uncompensated transfers of her funds.¹ It should also be noted that there is no evidence that Amico lacked or had diminished mental capacity during the relevant time period.

In that June 29, 2015 Slip Op., the Court granted plaintiff's summary judgment motion on certain of the causes of action. The verified complaint contained eleven causes of action, eight against defendant Gegenheimer in her capacity as executrix of Amico's estate, and three against her in her individual capacity. Summary judgment was granted on the breach of contract claim and the related claims for interest, collection fees, including reasonable attorney's fees and court costs, as against Gegenheimer as executrix. This determination obviated the need to address the unjust enrichment claim.

With regard to the remaining claims, all of which were based upon Debtor and Creditor Law §§275 and 276, the Court denied summary judgment as against Gegenheimer in her capacity as executrix, because there remained triable issues of fact. Specifically, there had been no sufficient showing as to "whether either Amico or Gegnheimer in her capacity as executrix of the estate intended or believed prior to Amico's application for Medicaid assistance that the use of funds from the joint account for purposes other than paying for services at Westhampton would render Amico and/or her estate insolvent and unable to pay plaintiff, a creditor of the estate in violation of the Debtor and Creditor Law §§ 275 and/or 276." (June 29, 2015 Slip Op.)

The Court denied summary judgment on the claims asserted against Gegenheimer in her individual capacity, holding that the above-mentioned sections of the Debtor Creditor Law were not enforceable against her individually since Westhampton was not Gegenheimer's creditor and Gegenheimer did not sign Amico's admission agreement with Westhampton. However, the Court did not go on to grant summary judgment on these claims on behalf of defendant.

¹Defendant's argument in her memorandum of law, which essentially attacks the reasoning of SCDSS in imposing the penalty period, is entirely inapposite to the legal issues in the current matter. While, as a practical matter, Amico's expenses would have been covered and there would have been no need for the present law suit if no penalty period had been imposed, that fact has no bearing on whether there was a fraudulent conveyance under the Debtor and Creditor Law. Moreover, administrative review of the penalty determination was never sought by defendant and the time for doing so has long since elapsed.

Judgment was entered against the estate in the amount of \$144,806.50, including interest and all appropriate costs and fees, on December 14, 2016. The parties have stipulated that, upon Amico's death, the only asset in her estate was her former home, upon the sale of which no monies were realized by the estate once the closing costs and the balance due on the reverse mortgage were paid. Thus, plaintiff has not been able to enforce the existing judgment.

A bench trial on the remaining issues in this matter was conducted before the undersigned on March 29, 2017. Prior to trial, the parties entered into a stipulation of facts and a stipulation of documents. The sole witness at trial was Gegenheimer. The parties' positions were essentially unchanged from those presented in the summary judgment motion. Gegenheimer testified that she turned all of the cash over to her aunt over several intervals and that her aunt used the money to repay debts she owed to relatives and/or friends. She stated that she only personally observed one such transaction, when Amico gave \$5,000.00 to her sister, Gegenheimer's mother, who has since herself passed away. Plaintiff attacked Gegenheimer's credibility in an attempt to prove she kept the money for herself. Defendant presented a memorandum of law on the date of trial, and plaintiff was provided with some additional time to submit its own memorandum of law.²

As was clear from the plaintiff's presentation of its case, and, as was specifically stated in its memorandum of law, Westhampton's sole impetus for pursuing the case further to the bench trial was to attempt to prove liability on the part of Gegenheimer in her individual capacity. Because there was no money in the estate, Westhampton's only chance of compensation would be if another party had liability. As such, it is only this issue that the Court will address.

It is well established that, on a summary judgment motion, the Court may search the record and grant summary judgment in favor of a non-moving party. *Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429-430, 654 NYS2d 335, 337 (1996); *Backer v Bouza Falco Co.*, 28 AD3d 503, 504, 814 NYS2d 188, 190 (2d Dept. 2006). It is also the case that the denial of a motion for summary judgment is not an adjudication on the merits, *Neighborhood Partnership Housing Development Fund v Blakel Const. Corp.*, 34 AD3d 303, 304, 824 NYS2d 89, 90 (1st Dept. 2006); nor is it necessarily conclusive as to whether there is an issue of fact in the case to be established at trial. *Sackman-Gilliland Corp. v Senator Holding Corp.*, 43 AD2d 948, 351 NYS2d 733, 735 (2d Dept. 1974). The June 29, 2015 Slip Op. stated, in no uncertain terms, that the relevant sections of the Debtor Creditor Law "are unenforceable against Gegenheimer in her individual capacity inasmuch as Westhampton was neither her present nor her future creditor in her individual capacity at the time of the alleged conveyances of funds and Gegenheimer did not sign the admission agreement (citation omitted)."

²The defendant recently submitted a "reply" memorandum of law. This has not been considered by the court in that it was not authorized and was forwarded after the matter was *sub judice*

Rather than granting Gegenheimer summary judgment in her individual capacity, the Court merely denied the request for summary judgment against her. Thus, conceivably, at trial, plaintiff could have adduced new and additional facts to support its position that Gegenheimer should be held liable in her individual capacity.

However, no significant new facts were presented at trial. The sole witness, Gegenheimer, basically merely repeated testimony previously given. Thus, the Court sees no reason to disturb the findings made in the June 29, 2015 Slip Op. regarding the inapplicability of the Debtor Creditor Law to Gegenheimer in her individual capacity, although the reasoning of the undersigned differs somewhat from that contained in the earlier order.

Plaintiff argues that the three withdrawals of Amico's funds made by Gegenheimer from their joint account on March 2, 2011, March 11, 2011 and March 18, 2011, totaling \$55,000.00, were fraudulent conveyances by Gegenheimer pursuant to both section 275 and section 276 of the Debtor and Creditor Law. It is beyond dispute that one of the basic elements of a fraudulent conveyance claim is that the plaintiff be a creditor of the transferor. *Loblaw, Inc. v Wylie*, 50 AD2d 4, 7, 375 NYS2d 706, 709 (4th Dept. 1975). In the present case, the only party of whom plaintiff was a creditor is Amico. Thus, if Amico was not the party making the conveyance, then sections 275 and 276 do not apply.³

The analysis, however, does not necessarily end there, with regard to whether relief could be sought against Gegenheimer. In principle, if Amico were the transferor, plaintiff could seek to void any transfer made to Gegenheimer in her individual capacity if plaintiff proved by clear and convincing evidence that the conveyance was made by Amico to Gegenheimer with actual intent to defraud, *Putnam Nursing & Rehabilitation Center v Bowles*, 239 AD2d 479, 658 NYS2d 57 (2d Dept. 1997); or, indeed, if any sort of fraudulent conveyance were proven. *See* Debtor Creditor Law §278.

Plaintiff relies upon two provisions of the Debtor and Creditor Law. The first, §275, provides in pertinent part that “[e]very conveyance made . . . without fair consideration when the person making the conveyance . . . intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.” The second, §276 provides, in pertinent part, that “[e]very conveyance made . . . with actual intent, as distinguished

³Plaintiff attempts to finesse this point in its post-trial memorandum of law at p. 6 by characterizing the transferor as being “Anna Amico, through her attorney-in-fact, Joan Gegenheimer,” and the transferee as being Gegenheimer in her individual capacity. However, there is nothing in the record to establish that Gegenheimer was acting in her capacity as attorney-in-fact when the sums were withdrawn, since the bank account was in both parties' names even prior to the execution of the power of attorney. Moreover, such self-dealing cannot be viewed as a “conveyance” from a transferor to a transferee.

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from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

The fatal weakness in plaintiff’s case is its failure to meet its burden of showing, by clear and convincing evidence, that the funds were conveyed to Gegenheimer, rather than to other third parties. Because there are no other witnesses, nor any documentation of where the money went, the determination rests solely upon Gegenheimer’s credibility. While there were some discrepancies among Gegenheimer’s various sworn statements during the course of this matter, as also noted in the June 29, 2015 Slip Op., the Court finds that they are not sufficiently significant, in and of themselves, to undermine the otherwise credible testimony of the defendant that she turned the cash over to her aunt. In addition, it is undisputed that the bulk of the funds at issue, \$40,000.00, was withdrawn before Amico entered the nursing home. There is no evidence that she definitely knew she would be entering a nursing home at the time of those withdrawals.

It is not inherently unbelievable that a person facing terminal colon cancer would want to re-pay personal debts. In fact, Gegenheimer did show, both on the summary judgment motion and at trial, that two of the payments referred to by SCDSS in its determination, each for \$5,000.00, were made earlier by Amico herself to an Anna Elizabeth Renock. Furthermore, Gegenheimer testified that an additional \$5,000.00 cash payment was made by Amico to her sister (Gegenheimer’s mother) in her presence, thus establishing some kind of pattern of behavior on Amico’s part. She also testified that her aunt had many visitors at the nursing home. No additional proof has been presented by plaintiff to sway the Court from the observation in the June 29, 2015 Slip Op. that plaintiff has offered “only surmise, to support [its] fraudulent conveyance claims under the Debtor and Creditor Law.” Plaintiff’s heavy reliance on the “badges of fraud” argument or analysis is misplaced because there simply is not sufficient proof that a conveyance by Amico to Gegenheimer even occurred, which is a foundational requisite of any fraudulent conveyance claim.

Based upon the foregoing, the Court finds that all remaining causes of action in the complaint should be dismissed in their entirety, including those as against Gegenheimer in her individual capacity.

ORDERED that the defendant shall settle judgment on notice.

E N T E R

Dated: May 30, 2017


MARTHA L. LUFT, A.J.S.C.

X FINAL DISPOSITION

NON-FINAL DISPOSITION