

5-13-10

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

PRESENT: BRANSTEN

PART 3

HON. EILEEN BRANSTEN Justice

RDLF FINANCIAL SERVICES

INDEX NO. 101391/09

MOTION DATE 3/2/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

MARIE BORNSSTEIN

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

NYS SUPREME COURT REVIEWED

MAY 18 2010

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

[REDACTED]

ISSUED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

[REDACTED]

[REDACTED]

RECEIVED

MAY 11 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT

FILED

MAY 18 2010

NEW YORK COUNTY CLERK'S OFFICE

MD

Dated: 5-10-10

Eileen Bransten

J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X

RDLF FINANCIAL SERVICES, LLC and
RONI DERSOVITZ,

Plaintiffs,

Index No.: 101391/09

Motion Date: 3/2/09

Motion Sequence No.: 001

-against-

MARC A. BERNSTEIN, MICHAEL ALBANO and
HOUSTON ACQUISITION LLC,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J:

Defendants Marc A. Bernstein, Michael Albano (“Mr. Albano”) and Houston Acquisition LLC (“Houston Acquisition”) (collectively, “Defendants”) move for summary judgment to dismiss the complaint, to remove the restraint from transferring the properties located at 331 Houston Street, New York, NY and 163 Ridge Street, New York, NY (the “Properties”)¹ and to impose sanctions upon plaintiffs RDLF Financial Services, LLC (“RDLF”) and Roni Dersovitz (collectively, “Plaintiffs”) for bringing a frivolous action. Plaintiffs oppose the motion.

¹ Pursuant to an Order of this Court dated March 3, 2009 in connection with motion sequence numbers 002 and 003, the temporary restraining order executed by this Court on February 3, 2009 was lifted and of no further force or effect. Accordingly, Defendants’ application to remove the restraint from transferring the Properties is moot and need not be discussed here.

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

BACKGROUND

On April 19, 2006, Mr. Albano and his sister, Theresa Albano (“Ms. Albano”), as owners of the Properties, transferred the Properties to Houston Acquisition (Compl ¶¶ 7-8).

Plaintiffs maintain that Bernstein and Mr. Albano are the only members and are equal owners of Houston Acquisition, with Bernstein as the Managing Member (*id.* at ¶¶ 9-10).

On December 28, 2006, RDLF commenced an action in this Court² against Bernstein and Bernstein’s law firm, Bernstein & Bernstein LLP (“B&B”), to recover \$607,500.00, representing the amount that Bernstein and B&B allegedly owed RDLF pursuant to a loan agreement (*id.* at ¶ 12).

On June 27, 2008, RDLF, Bernstein and B&B entered into a Stipulation of Settlement resolving and settling the Prior Action (*id.* at ¶ 13).

On August 31, 2008, Bernstein and B&B allegedly defaulted under the terms of the Stipulation of Settlement (the “Default”) (*id.* at ¶ 16).

During the pendency of the Prior Action and after the Default, Houston Acquisition transferred the Properties to Mr. Albano without consideration (*id.* at ¶ 18).

Plaintiffs contend that Bernstein caused Houston Acquisition to transfer the Properties to Mr. Albano to avoid his liability to Plaintiffs (*id.* at ¶ 19).

² *RDLF Financial Services, LLC v March A. Bernstein, Bernstein & Bernstein LLP and North Fork Bank*, index No. 119185/2006 (Sup Ct, NY County) (the “Prior Action”).

Plaintiffs commenced this action: (1) asserting three causes of action involving violations of Debtor and Creditor Law; and (2) asserting two causes of action seeking to impose liability upon Mr. Albano and to restrain him from transferring the Properties.

Defendants now move for summary judgment to dismiss the complaint, to remove the restraint from transferring the Properties and to impose sanctions.

ANALYSIS

I. Violations under Debtor and Creditor Law (first, second and third causes of action)

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). At the outset, the movant carries the burden of establishing a *prima facie* showing of entitlement to summary judgment (*see Zuckerman*, 49 NY2d at 562). Summary judgment should not be granted if there is any doubt as to the existence of a factual issue or if the existence of a factual issue is even arguable (*Glick & Dolleck v Tri-Pac*, 22 NY2d 439, 441 [1968]).

Defendants contend that Bernstein has never had a direct ownership interest in the Properties, as distinct from having an ownership interest in Houston Acquisition (*see* Affirmation of Marc A. Bernstein [“Bernstein Aff”] at ¶¶ 4, 6; *see also* Affidavit of Michael Albano [“Albano Aff”] at ¶¶ 4, 6, 8, 9). The import of Defendants’ contention is that if

Bernstein never held an ownership interest in the Properties, Bernstein could not have fraudulently conveyed the Properties to avoid Plaintiffs' judgment against him.

Plaintiffs' first three causes action assert violations of the Debtor and Creditor Law §§ 276 (first cause of action), 273 and 273-a (second cause of action) and 275 (third cause of action). The keystone to each section cited by Plaintiffs is that the debtor or defendant in an action for money damages made a conveyance to evade his or her debt or money judgment.³ However, the debtor or defendant must actually have had ownership in the asset that the creditor or plaintiff is alleging was fraudulently conveyed (*Savitsky v Mazzella*, 210 Fed Appx 71, 73 [2d Cir 2006] ["(w)ithout evidence that (the debtor) owned any interest in the properties, there was no transfer of interest, and thus no fraudulent conveyance"]).

³ Debtor and Creditor Law § 276 provides that "[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Section 273 provides that "[e]very conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Section 273-a provides that "[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment . . . is fraudulent as to the plaintiff . . . without regard to the actual intent . . . if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

Section 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation 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."

In opposition, Plaintiffs argue that Bernstein did hold an ownership interest in the Properties. Plaintiffs maintain that because Bernstein was a member of Houston Acquisition, and because Houston Acquisition was the owner of the Properties, Bernstein had an ownership interest in the Properties through his ownership in Houston Acquisition.

Plaintiffs argue that an LLC member has an ownership interest in the LLC as well as its capital and profit. However, while real property may be contributed to a LLC as capital (*see* Limited Liability Law § 501), neither of the cases cited by Plaintiffs may be read to extend an LLC member's ownership interest in the LLC to include ownership of the LLC's real property as well.

In the first case cited by Plaintiffs, *Chiu v Chiu*, the Appellate Division referenced the LLC's tax documents. Those documents listed the plaintiff and the defendant as members having 25% and 75% "ownership of capital, profit sharing, and loss sharing," respectively (38 AD3d 619, 621 [2d Dept 2007]). Based on the tax documents, the Court held that the trial court's finding that the plaintiff was the "sole member" of the LLC was unsupported by the record (*id.*). However, *Chiu* does not support the proposition that Plaintiffs urge – that an LLC's real property is owned by the LLC's members simply because an LLC member's tax documents listed "ownership of capital, profit sharing, and loss sharing" (*see id.*).

The second case cited by Plaintiffs only offers the quotidian principle that a LLC's "owners are its members" – an issue not disputed here (*Willoughby Rehab. & Health Care*

Ctr., LLC v Webster, 13 Misc 3d 1230[A], 2006 NY Slip Op 52067[U], *3 [Sup Ct, NY County 2006]).

Unmistakably, while a membership interest in an LLC constitutes personal property, an LLC member has “no interest in specific property of the [LLC]” (Limited Liability Company Law § 601; *see Matter of Meadowsweet Dairy, LLC v Hooker*, __ AD3d __, __, 2010 NY Slip Op 1868, *3 [3d Dept 2010] [the LLC “must sell or give its dairy products to its members because they only have a property interest in shares of the (LLC); they do not have an ownership interest in specific property of the LLC, namely the milk or milk products themselves”]; *Sealy v Clifton, LLC*, 68 AD3d 846, 847 [2d Dept 2009] [“a cause of action to wind up the affairs of a (LLC) would not support a notice of pendency, as ‘(a) membership interest in the (LLC) is personal property,’ and ‘(a) member has no interest in specific property of the (LLC)’”]).

If an LLC’s assets are threatened by a fraudulent conveyance, only the LLC has standing to challenge such a threat (*see Weber v King*, 110 F Supp 2d 124, [ED NY 2000]; *see also Bartfield v Murphy*, 578 F Supp 2d 638, 647 [SD NY 2008] [“Claims that (the LLC’s) assets were misappropriated allege an injury to (the LLC), and an injury to (the LLC) that is entirely derivative of (defendant’s) failure to preserve an asset owned by (the LLC)”]).

In *United States v Surgent* (CR-04-364 [JG] [SMG], 2008 US Dist LEXIS 109643, *1 [ED NY 2008] [Gold, USMJ]),⁴ the defendant was convicted of securities fraud, conspiracy to commit securities fraud and of participating in a money laundering conspiracy all in violation of federal law. The court entered a Preliminary Order of Forfeiture that authorized the government to forfeit the defendant's right, title, and interest in certain assets, including real property (*id.* at *1-2). The government subsequently moved for entry of an Amended Preliminary Order of Forfeiture that would include the defendant's interest in a LLC that held title to property referred to as the Franklin Lakes property (*id.* at *2). The government argued that, by virtue of the defendant's participation in the LLC, he had acquired a forfeitable legal interest in the Franklin Lakes property (*id.* at *39). Applying Nevada LLC law analogous to New York LLC law § 601, the court concluded that "the LLC holds its own, independent legal title to the Franklin Lakes property, and no forfeitable interest in the property itself is currently held by" the defendant (*id.* at *41).

Interestingly, the court also considered an alternate argument asserted by the government: "that 'the LLC is simply a shell, a nominee created to disguise [the defendant's] ownership interest in the Franklin Lakes property'" (*id.* at *42-43 [citation omitted]). The

⁴ Because *Surgent* involves a criminal forfeiture proceeding applying both federal and Nevada law, this Court discusses the case only for illustrative purposes and disclaims any reliance on the case as binding authority.

court characterized the government's argument as "reverse piercing," in which the government sought to hold the LLC responsible for the debts and obligations of the individual, the defendant (*id.* at *43-44).

The court determined that the government failed to demonstrate that the defendant used the LLC to defeat forfeiture or defraud the United States and declined to set the transfer aside (*id.* at *46). The court noted that the Franklin Lakes property was owned entirely by the defendant's wife before it was transferred to the LLC and that the defendant held no forfeitable interest in the property at that time (*id.*). The court further observed that if the transfer of the Franklin Lakes property to the LLC was indeed a fraudulent conveyance, the remedy would most likely be to set the conveyance aside – in which case, the LLC would merely return the property to the defendant's wife as the sole owner (*id.* at *46-47).

Here, Plaintiffs' insistence that Bernstein held an ownership interest in the Properties conflates Bernstein's ownership in Houston Acquisition with Houston Acquisition's ownership in the Properties. It is undisputed that Plaintiffs sought a money judgment against Bernstein in the Prior Action – not Houston Acquisition (Compl at ¶¶ 12-17). It is also undisputed that, during the relevant period, the Properties were conveyed by Houston Acquisition to Mr. Albano as the sole title holder – not Bernstein to Mr. Albano (*id.* at ¶ 19; Albano Aff at ¶ 8; Bernstein Aff at ¶ 4). Because Plaintiffs cannot allege status as a creditor of Houston Acquisition, Plaintiffs' causes of action under sections 273, 273-a, 275 and 276

fail as a matter of law and Defendants' motion for summary judgment to dismiss causes of action one through three is granted.

II. Conspiracy to defraud
(fourth cause of action)

In its fourth cause of action, Plaintiffs seek judgment against Mr. Albano for the amount owed to Plaintiffs by Bernstein. Plaintiffs base their claim on Mr. Albano's alleged participation in a conspiracy to defraud Bernstein's creditors (Compl at ¶ 39).

Because Plaintiffs fail to state violations of Debtor and Creditor Law under sections 273, 273-a, 275 or 276, they fail to state a claim that would support judgment against Mr. Albano based on a conspiracy to defraud (*see Yuko Ito v Suzuki*, 57 AD3d 205, 207 [1st Dept 2008] ["absent any underlying tort, the conspiracy claim is () without foundation"]; *Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [1st Dept 2006] ["Since New York does not recognize a substantive tort of conspiracy and plaintiffs have not properly pleaded any other causes of action, the action was properly dismissed"]). Accordingly, Defendants' motion to dismiss the fourth cause of action is granted.

III. Preliminary injunction
(fifth cause of action)

In its fifth cause of action, Plaintiffs allege that “Bernstein has insufficient assets to satisfy any judgment awarded plaintiffs in the Prior Action” (Compl at ¶ 41) and that the “Properties are the only assets from which any judgment awarded [Plaintiffs] in the [Prior] Action may be satisfied” (*id.* at ¶ 42). Plaintiffs seek to restrain Mr. Albano from transferring the Properties (*see id.* at ¶ 43).

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Plaintiffs fail to establish entitlement to a preliminary injunction enjoining Mr. Albano from transferring the Properties because Plaintiffs have not demonstrated a likelihood of success on the merits of their claims. Accordingly, Defendants’ motion to dismiss the fifth cause of action is granted.

IV. Sanctions

22 NYCRR 130-1.1(a) authorizes the court to award any party “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees,

resulting from frivolous conduct as defined in this Part.” Conduct is frivolous if, among other things, “it is completely without merit in law” or “asserts material factual statements that are false” and includes making a “frivolous motion for costs or sanctions” (*id.*).

Plaintiffs have not demonstrated that sanctions are warranted.

Accordingly, it is hereby

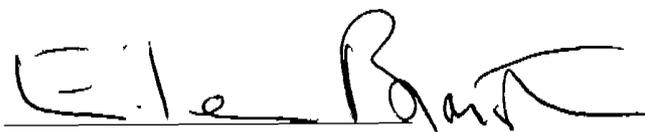
ORDERED that Defendants’ motion for summary judgment is granted and the complaint against it is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

May 10, 2010

ENTER:



Hon. Eileen Bransten

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE