

Grinshpun v Borokhovich

2016 NY Slip Op 31873(U)

October 6, 2016

Supreme Court, New York County

Docket Number: 651846/2012

Judge: Kelly A. O'Neill Levy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----- X
ARON GRINSHPUN, SAM ZELTSER, ZELIG
ZELTSER, and THREE STAR CAPITAL, LLC,

Plaintiffs,

Index No.:
651846/2012

-against-

DECISION/ORDER
Mot. Seq. 014

GENNADY (a/k/a Eugene) BOROKHOVICH, ELENA
BOROKHOVICH, BOROKHOVICH & SONS MANAGEMENT
GROUP LLC, 2824 EMMONS LLC, LAVANDA & BLUES
LLC, 2814 EMMONS LLC and 2814-2824 EMMONS
ACQUISITION, LLC,

Defendants.
----- X

Kelly O'Neill Levy, J.:

In the underlying action, plaintiffs Aron Grinshpun, Sam Zeltser, Zelig Zeltser, and Three Star Capital, LLC, seek to set aside the transfer and conveyance of certain properties to satisfy a judgment they obtained against defendant Gennady (a/k/a Eugene) Borokhovich (Gennady). In this motion, motion sequence number 014, which was brought by order to show cause, pursuant to CPLR 6515, defendant 2814-2824 Emmons Acquisition LLC (Emmons Acquisition) seeks an order canceling the notices of pendency covering the properties located at 2814 and 2824 Emmons Avenue, Brooklyn, New York. Emmons Acquisition is also requesting an order directing the county clerk to file certain business documents under seal. Plaintiffs oppose the motion to vacate the notices of pendency. In addition, the other defendants in this

action, Gennady, Elena Borokhovich (Elena), Borokhovich & Sons Management Group LLC (Borokhovich & Sons LLC), 2824 Emmons LLC, Lavanda & Blues, LLC and 2814 Emmons LLC (collectively, Borokhovich defendants), also submit their opposition to canceling the notices of pendency.

BACKGROUND AND FACTUAL ALLEGATIONS

In a previous action, on November 9, 2011, plaintiffs obtained a judgment against Gennady in the amount of \$2,348,696.54. See *Grinshpun v Borokhovich*, Index No. 115376/2010. Plaintiffs had alleged that Gennady defrauded plaintiffs in a "land scam," and caused plaintiffs to transfer over \$2,000,000.00 to various entities that Gennady controlled. Emmons Acquisition's exhibit A, amended complaint, ¶ 22.

Plaintiffs commenced the instant action on September 25, 2012 to enforce the underlying judgment against Gennady, which still remains unpaid. Plaintiffs allege that Gennady fraudulently conveyed properties and assets to multiple defendants as way to defraud his creditors.

In brief, the amended complaint alleges that Gennady, through his 100% membership interest in Borokhovich & Sons LLC, purchased one of the subject properties located at 2824 Emmons Avenue in Brooklyn, New York. After Gennady allegedly transferred 100% of the membership interests in Borokhovich & Sons LLC to his wife, Elena, Borokhovich & Sons LLC then

transferred its ownership interest in 2824 Emmons Avenue to 2824 Emmons LLC, an LLC controlled by Elena. After this transfer, 2824 Emmons LLC transferred the property to Emmons Acquisition. Plaintiffs claim that the property was transferred without fair consideration and that, although the purchase price was listed for \$350,000.00, that amount was never paid. Even if the purchase price was paid, plaintiffs contend it is inadequate as the property had a estimated fair market value of \$2,000,000.00.

Similarly, Gennady, through his 100% ownership interest in Lavanda & Blues LLC, purchased a property located at 2814 Emmons Avenue, Brooklyn, New York. After taking similar steps as taken with the 2824 Emmons Avenue property, the 2814 Emmons Ave property was eventually transferred to Emmons Acquisition. Plaintiffs claim that the transfer documents list the purchase price as \$1,400,000.00 but that this was not paid. According to plaintiffs, even if it was paid, the price paid was inadequate as the estimated market value is \$6,000,000.00.

The amended complaint contends, among other things, that, as the transfer and conveyances of properties located at 2814 and 2824 Emmons Ave were fraudulent, plaintiffs are entitled to a judgment setting aside those transfers and conveyances, to the extent necessary to satisfy the judgment owed to plaintiffs.

In 2012, plaintiffs filed notices of pendency against these two properties and one other. By settled order of this court, on

May 13, 2015, the notices of pendency were extended until June 1, 2018. This order was granted on plaintiffs' motion, without opposition.

Now, by order to show cause, Emmons Acquisition seeks to cancel the notices of pendency for the two properties located at 2814 and 2824 Emmons Avenue. According to Emmons Acquisition, on December 28, 2015, Emmons Acquisition entered into a contract to sell the properties to 2814-2824 Emmons Avenue LLC for a purchase price of \$5.2 million. In support of the order to show cause, Emmons Acquisition claims that there is a pending contract of sale of the two properties and that the purchaser will not close on the contract of sale unless the notices of pendency are cancelled.

Emmons Acquisition argues that the notices of pendency for the two properties should be cancelled and that it should not be required to take an undertaking. Among other things, Emmons Acquisition believes that, even if plaintiffs are ultimately successful in setting aside the transfers of properties to Emmons Acquisition, plaintiffs' default judgment would be subordinate to mortgage liens that need to be paid off.

Emmons Acquisition explains that nonparty 2814 Emmons Acquisition closed on the purchases of the mortgages covering the two properties owned by 2814 Emmons LLC and 2824 Emmons LLC. According to Emmons Acquisition, 2814 Emmons Acquisition is an

affiliate of Emmons Acquisition. 2814 Emmons Acquisition allegedly then negotiated with 2814 Emmons LLC and 2824 Emmons LLC, the entities that were owned by Elena that were also the mortgagors, concerning the arrears. Emmons Acquisition claims that it acquired the properties after its affiliate 2814 Emmons Acquisition "purchased the mortgages encumbering each Property from local banks." Emmons Acquisition's memo of law at 3. According to Emmons Acquisition, after Elena, on behalf of the mortgagors, could not meet the terms, "the mortgagors entered into transactions that transferred title to the Properties to Emmons Acquisition." *Id.* at 6.

As a result, according to Emmons Acquisition, if the transactions are found to be fraudulent, the first recorded mortgages that 2814 Emmons Acquisition LLC obtained from Flushing Savings and Northeast Community Banks, would be reinstated. At the time of the closing in 2010, the amount of the mortgage was approximately \$4 million. Now, Emmons Acquisition estimates the amount due under the mortgages to be \$22,207,663.58. This amount exceeds the amount of plaintiffs' judgment as well as the amount of the current sale price of the properties. As a result, according to Emmons Acquisition, as the default judgment is subordinate to these mortgages, "requiring any bond amount would serve only to unfairly confer upon plaintiffs rights that they would not have under the law." Emmons Acquisition's memo of law

at 10.

In addition to canceling the notices of pendency, Emmons Acquisition is requesting that the court enter an order sealing certain documents that contain Emmons Acquisition's confidential business information. According to Emmons Acquisition, the public filing of these documents, which include the executed purchase agreement and satisfaction of mortgage for 2814 Emmons Avenue, among others, "could undermine the efforts of Emmons Acquisition in connection with the negotiation of future transactions." Geercken affirmation, ¶ 3.

The Borokhovich defendants oppose the motion to cancel the notice of pendency for the two properties. The Borokhovich defendants state that they do not believe the transfers were fraudulent. Nonetheless, they argue that the properties need to be available to satisfy the potential liability to plaintiffs if the court ultimately decides that the transfers were fraudulent. The Borokhovich defendants claim that what happened after 2814 Emmons Acquisition LLC acquired the mortgages and discharged such mortgages "remain[s] murky."¹ In support of their motion, Elena submits an affidavit where she states the following, in pertinent part:

"I do know that my companies, 2814 Emmons LLC and 2824

¹ Plaintiffs state that 2814 Emmons Acquisition LLC was not named as a defendant because it discharged the mortgages and did not have a lien on record.

Emmons LLC, have never been mortgagors under the mortgages held by Northeast Community Bank and Flushing Savings Bank. I have never negotiated with [the lawyer] or anyone else to reduce the principal amount of these mortgages, or to increase the applicable interest rate, or anything else. I did sign whatever documents [the lawyer] asked me to sign, and walked away. He did keep his word; the banks left me alone."

Elena aff, ¶ 7.

On June 2, 2016, Emmons Acquisition informed the court that it terminated the contract for sale of the two properties. Counsel for Emmons Acquisition stated that the potential purchaser had demanded a substantially reduced price for the properties due to the notices of pendency. Counsel continued that "[t]his latest development underscores the continuing harm to Emmons Acquisition as long as the Notices of Pendency encumber the Properties." Plaintiffs' exhibit F at 1.

In light of the canceled sale, according to plaintiffs, the instant motion should be denied as moot. Plaintiffs further allege that questions of fact remain as to whether or not the transfers were fraudulent and as to which other potential creditors may take priority over plaintiffs' judgment. They state, "[t]he instant motion is nothing more than a thinly veiled motion for summary judgment." Berfond affirmation in opposition, ¶ 32.

In support of its alleged attempted summary judgment motion, plaintiffs argue that Emmons Acquisition has not provided relevant documentary evidence or affidavits from anyone with

personal knowledge of the transactions in question. In addition, plaintiffs claim that the notices of pendency should not be canceled because Emmons Acquisition failed to oppose plaintiffs' motion to extend the notices of pendency.

DISCUSSION

CPLR 6515: Undertaking for cancellation of notice of pendency

In sum, Emmons Acquisition seeks to cancel the notices of pendency and would like this court to dispense with the requirement for posting an undertaking. Although there is currently no contract to sell the properties, Emmons Acquisition claims that prospective buyers will not close on a sale unless the notices of pendency are canceled. It contends that, even if plaintiffs are successful in unwinding the transactions, plaintiffs' judgment would be subordinate to payment under mortgages. These mortgage payoff amounts, according to Emmons Acquisition's calculations, would be greater than the money owed to plaintiffs. As a result, Emmons does not believe it should have to post an undertaking as this would purportedly unfairly enhance plaintiffs' position. Emmons Acquisition further reiterated, during oral argument, "In this case we don't think a bond is really required." Tr at 4.

"Once a notice of pendency had been filed, it may only be cancelled, upon motion, for one of the reasons set forth in CPLR 6514 or 6515." *Whelan v J.T.T. Contrs.*, 155 AD2d 451, 452 (2d

Dept 1989). Emmons Acquisition may make a motion, at any time, to cancel the notices of pendency. Contrary to plaintiffs' contentions, it is irrelevant that Emmons Acquisition did not oppose plaintiffs' extension of the notices of pendency or that the potential contract for sale has been canceled.

Nonetheless, the court will not vacate the notices of pendency at this time because Emmons Acquisition did not satisfy the statutory criteria of CPLR 6515. In relevant part, CPLR 6515 states the following:

"the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or
2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled."

As explained in the statute, CPLR 6515 requires the moving party to post an undertaking. Although Emmons Acquisition contends in its memorandum of law that it is prepared to post a suitable undertaking, "concededly, no undertaking was requested of or posted by [Emmons Acquisition]." *Whelan v J.T.T. Contractors, Inc.*, 155 AD2d at 452; see also *Reingold v Bowins*,

34 AD3d 667, 668 (2d Dept 2006) ("the court properly refused to cancel the notice of pendency pursuant to CPLR 6515 because that provision requires the moving party to post an undertaking, and the defendant failed to request that the court fix an undertaking securing the cancellation or to post an undertaking").

Emmons Acquisition argues that it should not have to post an undertaking. "If the notice of pendency is valid, the court may, in its discretion, cancel the notice, but the moving party will generally have to post an undertaking." *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 (1984). In the present situation, questions of fact still remain regarding the mortgage and property transactional history. Accordingly, as no undertaking has been posted, in its discretion, the court is denying Emmons Acquisition's motion to cancel the notices of pendency.

Emmons Acquisition's Request to File Certain Exhibit Under Seal

Emmons Acquisition requests that certain documents containing confidential business information be placed under seal. It alleges that the public filing of these documents could negatively impact its future business interests. The other parties take no position with respect to the request and Emmons Acquisition does not address this request in its memorandum of law. The request to seal those materials is granted without opposition.

CONCLUSION, ORDER AND JUDGMENT

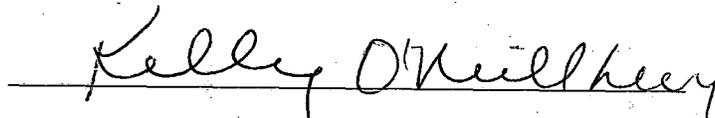
Accordingly, it is hereby

ORDERED that the motion by Emmons Acquisition is granted only to the extent that it is granted leave to file under seal the exhibits delineated in its motion and is otherwise denied.

This constitutes the decision and order of the court.

Dated: October 6, 2016

ENTER:

A handwritten signature in cursive script, reading "Kelly O'Neill Levy", is written over a horizontal line.

HON. KELLY O'NEILL LEVY
J.S.C.