

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

772

CA 24-01074

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, NOWAK, AND KEANE, JJ.

THOMAS HORNING, INDIVIDUALLY AND ON BEHALF
OF J.B. WISE BLOCK, LLC, AND ITS MEMBERS DERIVATIVELY,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

J.B. WISE PROFESSIONAL BUILDING LLC, VINA BONNER,
JAMES M. BONNER, MARK J. BONNER AND WILLIAM BONNER,
DEFENDANTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

MARK J. BONNER, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Jefferson County (Gregory R. Gilbert, J.), entered May 23, 2024. The order, *inter alia*, granted the motion of defendant Mark J. Bonner for summary judgment dismissing the complaint against him and dismissed the complaint in its entirety.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, those parts of the ordering paragraph rescinding any and all prior directives to hold the proceeds of sale and directing the release of all funds held in escrow not otherwise encumbered to the parties now entitled thereto are vacated, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action pursuant to Debtor and Creditor Law article 10 seeking, *inter alia*, to set aside the transfer of certain property. Defendant Mark J. Bonner (Mark) moved to dismiss the complaint against him pursuant to CPLR 3211 or, in the alternative, for summary judgment dismissing the complaint against him pursuant to CPLR 3212. Supreme Court, by focusing on the parties' evidentiary showings in its decision (*see generally* CPLR 3211 [c]; *Michael P. v Dombroski*, 211 AD3d 1469, 1470-1471 [4th Dept 2022]; *Smithers v County of Oneida*, 138 AD3d 1504, 1504 [4th Dept 2016]) in effect granted the motion insofar as it sought summary judgment with respect to Mark and also in effect searched the record and granted summary judgment to the remaining, nonmoving defendants by dismissing the complaint in its entirety (*see* CPLR 3212 [b]; *Mohamed v Blackowl*, 116 AD3d 678, 678-679 [2d Dept 2014]). Plaintiff appeals from the order that, *inter alia*, granted the motion, and we now reverse.

We agree with plaintiff that the court, by repeatedly reasoning in the first instance that plaintiff had not adduced sufficient evidence to sustain his causes of action, erred in placing the initial burden of proof on plaintiff with respect to Mark's motion (see *Pelow v Tri-Main Dev.*, 303 AD2d 940, 940 [4th Dept 2003]; *Kasinski v Questel*, 99 AD2d 396, 398 [4th Dept 1984], *appeal dismissed* 62 NY2d 977 [1984]). "[W]hile the ultimate burden of proof at trial will fall upon the plaintiff[], a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form" (*Can Man Carting, LLC v Spiezio*, 165 AD3d 1029, 1030 [2d Dept 2018] [internal quotation marks omitted]). "[T]he issue [on a motion for summary judgment] is not whether [the] plaintiff[] can ultimately establish liability, but, rather, whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial" (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). Here, we conclude that Mark failed to meet his initial burden on the motion inasmuch as he merely pointed to gaps in plaintiff's proof (see *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *Kasinski*, 99 AD2d at 398). Mark's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Finally, we conclude that none of Mark's contentions require a different result.