

**Ehrler v Cataffo**

2003 NY Slip Op 30247(U)

September 26, 2003

Supreme Court, Suffolk Court

Docket Number: 00-30602

Judge: John J. Dunn

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOHN J. DUNN  
Justice of the Supreme Court

MOTION DATE 4/17/03  
ADJ. DATE 7/3 1/03  
Mot. Seq. # 001 - MotD  
# 002 - XMD  
# 003 - XMD

..... X  
ROBERT EHRLER d/b/a RYAN PROPERTIES II, :  
Plaintiff, :  
- against - :

WESTERMAN BALL EDERER  
MILLER & SHARFSTEIN, LLP  
Attorneys for Plaintiff  
170 Old Country Road  
Mineola, New York 11501

ARTHUR A. CATAFFO, LORRAINE CATAFFO, :  
ARTHUR A. CATAFFO, **JR.** NICOLE CATAFFO, :  
RONALD CATAFFO, UNIVERSITY SHOP :  
REALTY, LLC, CARRINGTON'S IN THE PARK, :  
INC., GRILL ROOM, INC., PATSY'S PIZZA CORP.:  
and PAPER LINENS LIMITED, INC., :  
Defendants. :

LOUIS J. PETRIZZO & ASSOCIATES  
Attys for Defts Cataffo, Carrington's & Grill Room  
200 West Main Street  
Babylon, New York 11702  
POLLINA & POLLINA  
Attorneys for Deft. University Shop Realty  
180 East Main Street  
Smithtown, New York 11787

Upon the following papers numbered 1 to 68 read on this motion and cross motions for preliminary injunction and summary judgment (CPLR 3212; 6301 et seq.; 5222; 1 - 30; Notices of Cross Motions and supporting papers 31 - 55; Answering Affidavits and supporting papers 56 - 62; Replying Affidavits and supporting papers 63 - 66; Other 67-68 (stipulations); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this is an enforcement proceeding. The application is submitted by plaintiff for injunctive relief preliminarily restraining and enjoining all the Cataffo defendants, University Shop Realty, Carrington's in the Park, Grill Room, Patsy's Pizza Corp. and Paper Linens Limited, their attorneys, servants, representatives, agents, affiliates and all persons acting on behalf or in concert with defendants from a transfer, conveyance, alienation, assignment or encumbrance of any portion of the following interests, assets, property or income therefrom and is granted to the extent directed (CPLR 6301, 6311; CPLR article 52, 5201, et seq; D&CL §270, et seq.). The relief shall remain in effect pending appeal, the final determination of this action or the satisfaction/vacatur of the judgment entered February 11, 1998, which was reargued, adhered to, superseded by order August 21, 1998, decided together with and affirmed June 28, 1999 (262 AD2d 628, 692 NYS2d 671 [1999]). Thereafter the matter was settled after hearing held June 2, 1999 by so-ordered stipulation, judgment entered August 17, 1999 and filed in the Office of the Clerk of Suffolk County, September 7, 1999; and it is

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**ORDERED** that defendants are restrained and enjoined as directed with respect to the assets and property formerly owned and title held by Arthur A. Cataffo, now conveyed, without fair or with insufficient consideration, from defendant's name, possession and custody into the title, possession and custody, in part or whole, of third parties, who had knowledge at the time of the conveyance that the assets were subject to claim for satisfaction of a debt which was accrued. Such assets include: (a) Arthur A. Cataffo's 50% joint interest in the marital premises located at 15 Canterbury Drive, Hauppauge, New York, to Lorraine Cataffo, recorded November 18, 1994; (b) Arthur A. Cataffo's two-thirds ownership interest in University Shop Realty to Lorraine Cataffo, including profits, rents, penalties, fees and monies collected and realized by the commercial real property at 1247-1255 Melville Road, Fanningdale, New York 11735, District 0100, Section 38, Block 1, Lot 21; (c) the 50% ownership interest held by defendant Arthur A. Cataffo in Grill Room to Arthur A. Cataffo, Jr. and any third parties, including profits, fixtures, property or assets affiliated with Grill Room; and (d) the 50% ownership interest formerly held by Arthur A. Cataffo, now held by brother, Ronald Cataffo, or third parties in the cooperative Unit D-11 of the complex known as the Hermitage at Napeague, Ltd. Transactions in the ordinary course of business are exempt from restraint, provided, however, that written accounts and documentation are maintained, identified and subject to submission to plaintiff and the court, upon demand, as necessary. The remaining requests are denied pending trial; and it is

**ORDERED** that the injunction and restraints imposed are effective immediately upon plaintiff's proof of posting an undertaking in the sum of twenty-five thousand (\$25,000.00) dollars and shall continue pending determination at trial of the issues raised with respect to fraud, intent, the solvency of defendant Arthur A. Cataffo at the time of the transfers, and the knowledge and intent of the intra-family defendants and corporate transferees in the accrual and avoidance of the debt; and it is

**ORDERED** that plaintiff's motion for judgment to set aside the transfers under the Debtor and Creditor Law § 270, *et seq.*, is premature. Prior to proof of fraud and the insolvency of Arthur A. Cataffo at the time of the transfers with or without consideration, the determination to set aside, annul or disregard the conveyances and the request for attorneys' fees, is denied without prejudice (D&CL §§ 272, 273, 274, 275, 276, 276-a, 277, 278, 279; CPLR 3212[b]); and it is

**ORDERED** that the motion by defendants Arthur A., Lorraine, Arthur A., Jr., Nicole and Ronald Cataffo, Carrington's in the Park and Grill Room to dismiss the first through fifth and thirty-first through thirty-fourth causes of action based on violation of New York Debtor and Creditor Law §§ 272, 273, 273-c, 275, 276 under the applicable six-year statute of limitations, is denied without merit (CPLR 3211[a][5], CPLR 3211[a][7]); and it is

**ORDERED** that the cross motion by defendant University Shop Realty to dismiss the first through fifth and thirty-first through thirty-fourth causes of action based on statute of limitations and failure to state a claim grounds, is denied without merit (CPLR 3211[a][5], CPLR 3211[a][7]); and it is

**ORDERED** that plaintiff has voluntarily discontinued the action based on constructive fraud.

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This is an action to enforce the money judgment against defendant Arthur A. Cataffo, individually, and Carrington's of Melville, Inc. (CMI), which was entered upon order issued by Justice Gerard, dated February 11, 1998, in the sum of \$907,082.44 following the breach and default on or about April 1994 of a commercial lease. The judgment affirmed on appeal by the Appellate Division, Second Department (*Ryan Management Corp. v Cataffo*, 262 AD2d 628, 691 NYS2d 891 [2d Dept 1999]); the original order and reargument decided by order August 21, 1998. Following a hearing the parties stipulated, so-ordered by Justice Catterson and entered September 7, 1999, to reduce the amount of the judgment to \$776,332.77. With the exception of a \$72,000 security deposit and a Sheriff's execution on Patsy's Pizza Corp., which realized \$5,020.75, the judgment remains unpaid. The parties were under a ten-year commercial lease, commencing April 15, 1987 to April 14, 1997. The premises were to be used by defendant as a "first class sit down restaurant and café business." Defendant Arthur A. Cataffo was a personal guarantor.

Plaintiff contends that the individual defendant commenced a pattern of conduct in response to plaintiffs refusal to consent to a change in the use of the premises from a restaurant to a more risqué use. In April 1994 defendant failed to pay real estate taxes. In November 1994 the rent fell into default and was never paid. The rent check was stopped and the conveyance of Arthur A. Cataffo's 50% interest in 15 Canterbury Drive, Hauppauge, to Lorraine occurred, allegedly without consideration, recorded November 18, 1994. Also the conveyance of Arthur's two-thirds interest in University Shop Realty was made to Lorraine without consideration. The business certificate was amended December 2, 1999, but operation and control of the commercial properties appear to have been retained by Arthur pursuant to remarks from lessees who occupy the shops.

In addition, Arthur conveyed a 50% interest in a luxury ocean-front cooperative unit on May 8, 1998 to his brother, Ronald Cataffo, for a sum that would not account for one-third the value of the asset at the time of the transfer. Miscellaneous assets and transfers in business, investments and accounts have been admitted; the ownership of cars and apartments by family members or commercial interests has been shown.

However, Arthur retains an interest in defendant Grill Room with his son Arthur, Jr., and the restaurant appears to operate successfully. Thus, the evidence is not clear that the defendant who enjoys a better than average lifestyle was rendered insolvent at the time of the transfers and unable to **pay** the debt/judgment for the purposes of D&CL § 271 (D&CL §§ 270,273,274,275,276,276-a).

Despite complete default in November 1994, defendant remained in occupancy at the premises until May 31, 1996. The action to recover a judgment for default and breach of the lease was filed August 1, 1996. Judgment in favor of plaintiff issued February 11, 1998 was reargued, entered and affirmed by Second Department order dated June 28, 1999. Thereafter the parties were heard, and by so-ordered stipulation, entered September 7, 1999, they agreed to reduce the amount of the judgment to \$776,332.77. The within action to enforce the judgment was commenced December 6, 2000. Disclosure began and the conveyances in question were discovered.

Plaintiff/judgment creditor claims defendants violated the Debtor and Creditor Law. Prima facie proof documents that the debtor, Arthur Cataffo, conveyed title, if not possession and control to family members and has effectively avoided the satisfaction of the debt and judgment. The record evidence and admissions show that breach commenced on or about April 1994 and continued in a pattern of default and debt concomitant with the conveyance of defendant/guarantor's properties and assets to intra-family

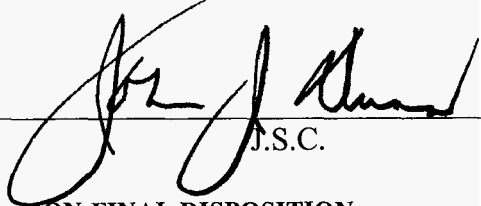
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members. These changes in record title to business or personal interests were made without fair consideration or the surrender of possession and control. Plaintiff contends that defendant transferred intentionally to render the guarantor judgment proof and to circumvent payment.

Clearly a claim for relief under D&CL § 270, *et seq.* through 278 has been pleaded. Plaintiff was a creditor and defendant indebted to plaintiff under the lease. The assets were not exempt and were conveyed while the debt was outstanding. Proof of fair consideration is lacking (D&CL §§ 270,272). The action for money judgment based on breach was not filed until the premises were vacated in 1996. Judgment was rendered in favor of plaintiff in 1998. Thus, the action was pending within the limitations period (D&CL § 273-a) and when the conveyances occurred. The outstanding issues concern the issues of fraud, intent, and whether defendant was or would be considered insolvent under D&CL §§ 271,273,274,275 and 276.

The limitations period is no bar to a fraud claim commenced within two (2) years of disclosure of the facts of conveyance (CPLR 203[f], 213[8]). In addition, defendant intra-family, corporate and business transferees of the assets who assisted the debtor in the alleged disguise of ownership are named defendants and may be as liable as the debtor/guarantor under the law (D&CL 278; *RTC Mortgage Trust 1995-S/NI v Sopher*, 171F.Supp2d 192[2001]. Liability under the D&CL need not be direct. The record reflects that badges of fraud exist sufficient to raise the inference if not the fact of actual fraud (*Murine Midland v Murkoff*, 120AD2d 122,508NYS2d 17[1986]; *Cadle v Newhouse*, 2003 US App LEXIS18976 [2d Cir NY Sept 12,20031.

Dated: September 26,2003

  
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J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION