

**Kamco Supply Corp. v Nevada Construction &
Drywall, Inc.**

2004 NY Slip Op 30255(U)

June 8, 2004

Supreme Court, New York County

Docket Number: 105487/01

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

KAMCO SUPPLY CORP.

INDEX NO. : 105487/01

Plaintiffs,

MOTION DATE:

- v -

MOTION SEQ. NO.: 008

NEVADA CONSTRUCTION AND DRYWALL, INC.

MOTION CAL. NO.:

Defendant.

FILED
JUN 15 2004

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

NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Plaintiff Kamco Supply Corp. ("Kamco") moves, by order to show cause, for an order pursuant to 5205(c) declaring that certain assets held in trust by T.A.T. Property is non-exempt property of the defendant Abcon Associates Inc. ("Abcon") and/or Michael Zenobio, Jr. and directing the sheriff of Nassau County to sell the assets of T.A.T. Property to satisfy the judgment granted to Kamco in this matter, and appointing Kamco's counsel as the receiver of rents, Abcon and Michael Zenobio, Jr. oppose the motion and cross move for a stay pending appeal in the event that the motion is granted." As set forth below, the motion is denied and the cross motion is denied as moot.

Background

This action arises out of a construction project to build a primary care facility on two floors of an existing commercial space located at 275-77 8th Avenue, New York, NY ("the site"). Abcon was hired by defendant St. Vincent's Catholic Medical Center as the general contractor on the project. Plaintiff, Kamco Supply Corp. ("Kamco") and some of the defendants were suppliers and subcontractors on the project.

This action began as one to foreclose on a mechanic's lien. Subsequently, based on information that Kamco obtained from St Vincents, Kamco amended its complaint to allege a failure to comply

with article 3-A of the Lien Law, which requires a general contractor to maintain certain funds intended for construction projects in trust to assure the payment of suppliers, subcontractors and others working on the project. By decision and order dated December 20, 2001, this court found that Kamco had met the statutory requirements to allow the action to proceed as a Lien Law trust fund action.

On or about July 2, 2002, the parties entered into a stipulation agreeing to, *inter alia*, the appointment of a **Special Referee** to hear and determine all disputes regarding disclosure and the disbursements of trust fund moneys.’ In light of the stipulation, by decision and order dated July 25, 2002, this court referred the issue regarding the disclosure and the disbursements of trust fund moneys to a Special Referee.

The matter was assigned to Special Referee Nicholas Doyle (“Doyle”), After Abcon failed to bring any witnesses to the original hearing date, Abcon obtained an adjournment through its counsel Neil Greenstein. On the adjourn date, only Abcon’s principal Michael Zenobio, Jr. appeared at the hearing. The report indicates that Doyle informed Zenobio that a corporation must appear by counsel but that Zenobio told Doyle that Mr. Greenstein was not appearing for personal reasons, and that it was unclear whether Mr. Greenstein’s firm still represented Abcon. In his report Doyle wrote that:

In light of the fact that Mr. Greenstein never contacted me, prior to the date of this hearing; that the initial adjournment was granted to Abcon and that Abcon had a lengthy period in which to prepare for this hearing and/or substitute counsel, I find that Abcon was not entitled to an adjournment and was unable to proceed with evidence, at this hearing, due to its appearance without counsel. Accordingly, I find Abcon failed to offer any proof that it produced documentation in response to all of St Vincents’ requests and in compliance with the requirements of Lien Law §§ 75 and 76. Therefore I find and recommend that Abcon has failed to rebut the presumption found in Lien Law § 75(4) which is it had applied or consented to the application of trust funds actually received, for purposes other than a purpose of the trust.

Kamco then moved to confirm the Special Referee’s report and for summary judgment on its claim under the Lien **Law** in the amount of \$289,933, representing the difference between the total amount received by Abcon from St Vincents (\$884,009) and the amount paid by Abcon to those entities involved in the project (\$543,551.39). By decision and order dated March 27, 2003, this court confirmed the report. The court also found, after considering the evidence in the

‘In the stipulation that parties also agreed to consolidate the Kamco action with an action entitled Grandview v. Abcon Associates, et al; Index. No. 125191/00.

record, that Kamco was entitled to summary judgment on its Lien Law claim. The court held that Abcon's failure to keep books and records as required by Lien Law § 75 gave rise to a presumption that the \$289,933 shortfall was not used for the purposes of the project, and that the evidence submitted by Abcon in opposition was insufficient to raise a triable issue of fact.

Subsequently, in a letter dated April 4, 2003, counsel for Kamco requested that this court amend its decision and order dated March 27, 2003 to substitute Abcon's principals, Michael Zenobio, Jr., and Christopher Zenobio a/k/a Chris Zenobio, as defendants in the place and stead of Michael Zenobio, Sr. in accordance with the parties' stipulation dated July 25, 2002, and to enter judgment against these defendants as well as Abcon on the fourteenth cause of action. Kamco's counsel sent a copy of the letter to all counsel/parties involved in the action. There was no opposition to the request, and the court amended the earlier decision and order on May 8, 2003 to reflect that summary judgment was granted as against Abcon as well as its principals:

The Application

Kamco now seeks to enforce the judgment obtained against Abcon and Michael Zenobio, Jr. by directing that "the assets" of a trust held by T.A.T. Property be sold to satisfy or partially satisfy the judgment. The assets held by the trust consist of Abcon's corporate headquarters located at 45 Executive Drive, in Plainview, New York ("the property"). Kamco submits evidence that Abcon obtained its corporate headquarters, from a trustee in bankruptcy for an unrelated company for consideration of \$1,200,000 by deed dated October 17, 1983. By deed dated January 31, 1985, and recorded with the Nassau County Clerk on February 18, 1986, Abcon transferred the property to The Abcon Trust. The Abcon Trust subsequently became known as T.A.T. Property Trust.

Kamco contends that based on the books and records of Kamco that prior to the transfer of the property from Abcon to The Abcon Trust on January 29, 1985, Michael Zenobio, Jr. owned 100% of the stock of Abcon and that subsequent to the transfer of the property, Michael Zenobio, Jr. transferred one share of stock to his son, and one share to his wife, and that the beneficial interest in the trust was held by Michael Zenobio, Jr., his son, and wife, Kamco essentially argues that since

the property in the trust came from Abcon for the benefit of Michael Zenobio, Jr. it is not subject to the exemption provided under CPLR 5205(c).

In opposition, Abcon and Zenobio argue that the purpose of the trust was to benefit all of the shareholders of Abcon and not only Michael Zenobio, Jr. and his family. Furthermore, they assert that the Abcon Trust was "a duly formed real estate grantor trust created to avoid certain tax consequences that would result from corporate ownership of real property and to afford the best tax advantage to each beneficiary under the trust."

In support of their position, Abcon and Zenobio submit an amended and restated trust agreement dated January 30, 1985 ("Abcon Trust Agreement"). The Abcon Trust Agreement is between Abcon, as Grantor, and Zenobio, as Trustee. It provides that the purpose of the trust is, to provide a vehicle to acquire, hold and lease property located at 45 Executive Drive, Plainview, New York for the benefit of the shareholders of Abcon." It further provides that "[p]ursuant to a distribution to be made by Abcon to its shareholders, the shareholders of Abcon will become the beneficiaries of the trust. The percentage interests of the beneficiaries shall equal their percentage interests in the stock of Abcon at the time of such distribution." It also provides that, "it is intended that the beneficiaries be treated as substantial owners of the trust pursuant to §§672 and 679 of the Internal Revenue Code of 1954, as amended in accordance with their percentage interest."

Attached to the Abcon Trust Agreement is an Assignment of Beneficial Interest indicating that the Board of Directors has declared a dividend of the entire beneficial interest in the Abcon Trust, to be paid to the shareholders of interest at the close of business on January 29, 1985. It provides that as of the close of business on that date, Michael Zenobio, Jr., as the holder of 7123 shares, owns a 71% interest in the trust, Richard Fiore, as the holder of 2375 shares, owns a 23.75% interest in the trust, Frank Wedl, as the holder of 500 shares, owns a 5% interest in the trust, and that Michael Zenobio III and Theresa Zenobio as the holders of 1 share each own a .01% interest in the trust.

Abcon and Michael Zenobio, Jr. also submit evidence that The Abcon Trust changed its name to T.A.T. Property Trust on or about May 6, 1987 and submit a letter from counsel advising them that the name change was valid.

In reply, Kamco acknowledges, based on the deposition testimony of Michael Zenobio, Jr. after the submission of its order to show cause, that the T.A.T. Property Trust is a real estate grantor trust and that, it currently is for the benefit of Michael Zenobio Jr., Richard Fiore, Michael Zenobio III and Theresa Zenobio in the percentage amounts provided for in the Assignment of Beneficial Interest. As the undisputed record shows that property is not owned solely by Michael Zenobio, Jr., Kamco withdraws that part of its request which sought to Sell the property and to appoint Kamco's attorney as a receiver. However, Kamco maintains that Michael Zenobio Jr.'s absolute control over the T.A.T. Property Trust requires that his percentage interest in the trust be sold by the Sheriff.

Under CPLR 5201(b) "a money judgment may be enforced against any property [of the judgment debtor] which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of a judgment." Thus, a judgment creditor may reach any of the judgment debtor's property to satisfy his judgment unless the property is protected by statute. Plymouth Rock Fuel Corp. v. Bank of New York, 91 Misc2d 837 (Civ. Ct. Kings Co. 1977), aff'd 102 Misc2d 235 (App Term 1979).

At issue here is whether the property is protected under CPLR 5205(c) which exempts from application for the satisfaction of money judgments "all property while held in trust for a judgment debtor, where the trust has been created by, or the funds so held in trust has proceeded from, a person other than a judgment debtor." Here, there is no dispute that the property on which Kamco seeks to execute is held in trust. At issue is whether the trust created by Abcon for the benefit for its shareholders, including Michael Zenobio, Jr., falls outside the exemption provided under CPLR 5205(c).

The protection to the judgment debtor afforded by CPLR 5205(c) does not apply when the trust is created for the use of person creating the trust (i.e. the settlor) and the trust is subject to the creator's control and can be abrogated when the creator wishes. See Vanderbilt Credit Corp. v. Chase Manhattan Bank, N. A., 100AD2d 544 (2d Dept 1984); Plymouth Rock Fuel Corp. v. Bank of New York, 91 Misc2d 837. The purpose of this restriction on the trust exemption is to prevent a property owner from creating a trust to insulate his assets from present and future creditors, and it is irrelevant that the creator of the trust did not intend to defraud its creditors or was solvent at the time the trust was made. Vanderbilt Credit Corp. v. Chase Manhattan Bank, N. A., 100 AD2d at 546.

In this case, the relevant trust was not created for the use of its settlor Abcon. Instead, the record shows that the trust was created for the benefit of Abcon's shareholders, including Michael Zenobio, Jr. **And**, contrary to Kamco's apparent position, the distinction between Abcon and its shareholders cannot be ignored, See Bowery Savings Bank v. 130 East 72nd Street Realty Corp., 173 AD2d 364 (1st Dept 1991) ("it is axiomatic that a corporation is a legal entity separate and distinct from its shareholders"); Harris v. Stony Clove Lake Acres Inc., 202 AD2d 745, 747 (3d Dept 1994) ("A corporation: even when wholly owned by a single individual, has a separate legal existence from its shareholders").

Thus, as the trust at issue was not created by Michael Zenobio, Jr., his interest in the trust is not subject to Kamco's judgment. Fordyce v. Fordyce, 80 Misc2d 909 (Sup Ct. Nassau Co. 1974). In addition, while as the trustee of the relevant trust, Michael Zenobio, Jr. has substantial discretion over the disposition of the property in the trust, Kamco cites no legal authority to support its assertion that such control by a beneficiary of the trust who did not create the trust renders the trust exemption inapplicable. Thus, as long as the interest of Michael Zenobio, Jr. in the property remains in trust it cannot be reached by Kamco to satisfy its money judgment.

With respect to Abcon, although it created the trust, as previously indicated, pursuant to a distribution made by Abcon to its shareholders the property in trust belongs to the shareholders **and**

not to it and therefore cannot be reached to pay Abcon's debt. Bowery Savings Bank v, 130 East 72nd

Street Realty Corp., 173 AD2d 364.

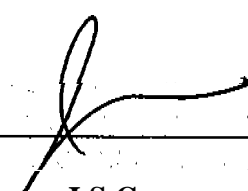
Finally, the court notes that although Kamco seeks to sell only Michael Zenobio Jr.'s share of the trust property, as the trust property consists of a building such a sale would necessary involve the sale of all the property in the trust and would impact on the interests of the other shareholders and an entity identified by Abcon that holds a \$6,725,000.00 mortgage on the property was assigned the lease and rents on the property in September 1998. And, despite the obvious interest of the shareholders and mortgagee in the sale of the property, they were not provided notice of Kamco's application.

In view of the above, it is

ORDERED that Kamco's application is denied; and it is further

ORDERED that the cross-motion by Abcon and Michael Zenobio, Jr. for a stay pending appeal is denied as moot.

DATED: June 8, 2004



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
JUN 15 2004
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