

**Bank of New York v Elter**

2006 NY Slip Op 30131(U)

September 22, 2006

Supreme Court, Orange County

Docket Number: 0001259/2006

Judge: Lawrence I. Horowitz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

P R E S E N T:  
HON. LAWRENCE IVAN HOROWITZ,  
SUPREME COURT JUSTICE

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THE BANK OF NEW YORK,

Plaintiff,

Index No. 1259/06  
DECISION and ORDER

-against-

STEPHEN ELTER, SUSAN ELTER, JOHN  
P. ELTER, and PRINCIPAL RESIDENTIAL  
MORTGAGE, INC.,

Defendants.

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HOROWITZ, JSC,

Plaintiff moves for an Order granting it Summary Judgment pursuant to CPLR 3212 declaring that a certain transfer of real property between John P. Elter, as transferor, and Stephen P. Elter and Susan Elter, as transferees, was fraudulent as to Plaintiff and declaring a certain judgment obtained by Plaintiff in the sum of \$49,722.86 a lien against the transferred property.

The following papers were read on this motion:

Notice of Motion for Summary Judgment	1
Affirmation & Affidavits in Support with Exhibits A to I	2
Affirmation & Affidavit in Opposition,	3
Affirmation in Partial Opposition with Exhibit A	4
Reply Affirmation with Exhibit A	5

Background

On or about October 11, 2000, Plaintiff loaned the sum of \$50,000 to a corporation called El-Jo, Inc., which loan was personally guaranteed by the defendant in this action John P. Elter. At the time of the loan John P. Elter, and his wife Patricia I. Elter owned and resided in a premises located at 38 Park Drive, Chester, New York (hereinafter the

“Premises”) as tenants by the entirety. Defendants, Stephen Elter and Susan Elter, who are the son and daughter-in-law of John and Patricia Elter, also resided in the Premises.

The following, gleaned from the submissions and which does not seem to be contested, sets forth a timeline of certain relevant events: Plaintiff avers that El-Jo, Inc. defaulted in the repayment of its loan on or about June 24, 2004; by deed dated August 24, 2004<sup>1</sup>, and recorded in the Orange County Clerk’s Office on August 31, 2004, John P. Elter and his wife transferred the Premises to their son and daughter-in-law, Stephen Elter and Susan Elter (hereinafter the “Transfer”); thereafter on November 22, 2004, an index number was purchased in order to commence the action known as The Bank of New York v. El-Jo, Inc. And John P. Elter, bearing Orange County Index No. 7951/2004 (hereinafter the “Underlying Action”); on April 4, 2005 a Judgment was entered on default in the Underlying Action against both the corporation and, the defendant herein, John P. Elter in the sum of \$49,722.86, which Judgment remains unpaid and unsatisfied (hereinafter the “Judgement”).

### Legal Discussion

At the outset it is important to note that a motion for summary judgment is a drastic remedy which should be granted only when there is no doubt as to the absence of a triable issue of fact. The Court may not resolve issues of fact or determine matters of credibility. See generally, Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573, 774 N.Y.S.2d 792 (2nd Dept., 2004).

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<sup>1</sup>The subject deed does not reflect a date on its face, but, the acknowledgment of the Deed as well as the HUD-1 Settlement Statement from the closing, all of which were submitted by the Plaintiff, reflect the closing date was August 24, 2004.

In the case before the Court, Plaintiff alleges that the Transfer was a fraudulent conveyance, and has set forth causes of action alleging both constructive and actual fraud. While the complaint does not set forth the specific statutes from which they proceed, plaintiff motion papers make reference to and Creditor Law §§ 273, 273-a, 274 and 276.

Dealing first with the claim of actual fraud, Debtor and Creditor Law § 276 requires Plaintiff to demonstrate that, in transferring the Premises, John P. Elter actually intended to hinder, delay or defraud Plaintiff *or* that it was made without fair consideration. See, Marine Midland Bank v. Murkoff, 120 A.D.2d 122, 508 N.Y.S.2d 17 (2<sup>nd</sup> Dept., 1986), *appeal dismissed*, 69 N.Y.2d 875, 507 N.E.2d 322; Farmers Production Credit Ass'n of Middletown v. Taub, 121 A.D.2d 681, 504 N.Y.S.2d 448 (2<sup>nd</sup> Dept., 1986).

Turning to the claims of constructive fraud, Debtor and Creditor Law §§ 273, 273-a and 274, as well as the other fraudulent conveyance statutes emanating from constructive fraud, require Plaintiff to show that Defendant John P. Elter conveyed the Premises without fair consideration.

Pursuant to the New York Debtor and Creditor Law “fair consideration” exists “[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied” (Debtor and Creditor Law § 272 [a]) or “[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained” (Debtor and Creditor Law § 272[b]). “The good faith of both the transferor and transferee is an indispensable component of fair consideration.” Mega Personal Lines, Inc. v. Halton, 9 A.D.3d 553, 555, 780 N.Y.S.2d 409, 410 - 411 (3<sup>rd</sup> Dept., 2004)

The existence of actual intent, whether a party has been rendered insolvent, as well as the issue of fair consideration are ordinarily questions of fact which cannot be resolved on a motion for summary judgment. Serota v. Power House Realty Corp., 274 A.D.2d 427, 427, 711 N.Y.S.2d 778, 779 (2nd Dept., 2000); Farmers Production Credit Ass'n of Middletown v. Taub, *supra*. Similarly, the issue of whether a person has acted in good faith is again an issue of fact and is “dependent upon the circumstances of the particular case”. Wagman v. Lagno, 141 A.D.2d 720, 721, 529 N.Y.S.2d 585 (2d Dep't, 1988); Farmers Production Credit Ass'n of Middletown v. Taub, *supra*.

A review of the submissions does not convince this court that plaintiff is entitled to judgment on a claim for actual or constructive fraud claims as a matter of law. Clear questions of fact regarding actual intent, fair consideration and good faith exist and preclude summary judgment.

Furthermore, Debtor and Creditor Law § 273-a requires the Plaintiff to show, aside from the lack of fair consideration, that Defendant John P. Elter was at the time of the conveyance a defendant in an action for money damages or that a judgment was docketed against him. This Plaintiff cannot not show. The Transfer occurred approximately three (3) months prior to the index number in the underlying action being purchased.

On account of the foregoing, Plaintiff's motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of this Court.

E N T E R

Dated: September 22, 2006

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HON. LAWRENCE I. HOROWITZ  
SUPREME COURT JUSTICE