

Ehrler v Cataffo

2006 NY Slip Op 30445(U)

March 16, 2006

Supreme Court, Suffolk County

Docket Number: 00-30602

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7/7/05 (#004)
8/17/05 (#005,006,007)
ADJ. DATE 10/26/05
Mot. Seq. # 004 - MG
 # 005 - XMG
 # 006 - XMD
 # 007 - XMD

-----X		
ROBERT EHRLER d/b/a RYAN PROPERTIES II, :		WESTERMAN BALL EDERER MILLER, et al.
	:	Attorneys for Plaintiff
Plaintiff, :		170 Old Country Road, Suite 400
	:	Mineola, New York 11501
- against -	:	
	:	LOUIS J. PETRIZZO & ASSOCIATES
ARTHUR A. CATAFFO, LORRAINE CATAFFO, :		Attorneys for Defts. Cataffo,
ARTHUR A. CATAFFO, JR., NICOLE CATAFFO,:		Carrington's & Grill Room
RONALD CATAFFO, UNIVERSITY SHOP	:	200 West Main Street
REALTY, LLC, CARRINGTON'S IN THE PARK,:		Babylon, New York 11702
INC., GRILL ROOM, INC., PATSY'S PIZZA	:	
CORP. and PAPER LINENS LIMITED, INC.,	:	POLLINA & POLLINA
	:	Attorneys for Defts. University Shops,
Defendants. :		Patsy's Pizza & Paper Linens
	:	180 East Main Street
-----X		Smithtown, New York 11787

Upon the following papers numbered 1 to 76 read on this motion to strike jury demand; cross motions for dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; (3) Notices of Cross Motion and supporting papers 8 - 56; Answering Affidavits and supporting papers 57 - 62; Replying Affidavits and supporting papers 63 - 73; Other 74-76 (stipulation of adjournment); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion (#004) to strike defendants' demand for jury trial is granted. There is no right to a jury trial in an equitable action under Debtor and Creditor Law §270, *et seq.* (CPLR 4101, 4102; *Magill v Dutchess Bank & Trust Co.*, 150 AD2d 531, 541 NYS2d 437 [1989]); and it is

ORDERED that the cross motion (#005) by plaintiff for summary judgment is granted with respect to University Shops Realty Co., now known as University Shop Realty, LLC (hereinafter USR).

The court declares that the transfer of Arthur A. Cataffo's interest while a judgment debtor to his wife, Lorraine Cataffo, without consideration is annulled and void as a fraudulent conveyance in violation of law (CPLR 3212; Debtor and Creditor Law §270, *et seq.*; ***Stewart Title Ins. Co. v Equitable Land Services***, 207 AD2d 880, 616 NYS2d 650 [1994]; ***Sunrise Indus. Joint Venture v Ditrac Optics***, 873 F Supp 765 [EDNY 1995]); and it is

ORDERED that the conveyance of the USR interest by Arthur A. Cataffo to Lorraine Cataffo is hereby set aside. Lorraine Cataffo is directed to transfer and return the USR ownership interest into the name of Arthur A. Cataffo, as evidenced by an amended business certificate to be filed with the Clerk of Suffolk County; and it is

ORDERED that the cross motion (#005) by plaintiff for summary judgment is also granted with respect to real property located at 15 Canterbury Drive, Hauppauge, New York, SCTM Dist. 0500, Sec. 006.00, Block 01.00, Lot 029.000. The court declares that defendant Arthur A. Cataffo's 50% interest, which was transferred by deed recorded November 18, 1994 solely to the name of Lorraine Cataffo without consideration, was a fraudulent conveyance in violation of law (CPLR 3212; D&CL §270, *et seq.*; ***United States v Mazzeo***, 306 F Supp2d 294 [EDNY 2004]); and it is

ORDERED that defendant Lorraine Cataffo is directed to execute and record a deed which returns and vests title to the marital premises at 15 Canterbury Drive, Hauppauge, New York, jointly in both the names of Lorraine Cataffo and Arthur A. Cataffo, the judgment debtor herein; and it is

ORDERED that the cross motion (#005) by plaintiff for summary judgment is also granted with respect to a cooperative, Unit D-11, located in the Hermitage at Napeague, Ltd. The court declares the transfer of defendant Arthur A. Cataffo's interest in 50% of the shares to the judgment debtor's brother, Ronald Cataffo, for insufficient consideration demonstrates a violation of the fraudulent conveyance law (CPLR 3212; D&CL §270, *et seq.*, ***United States v Mazzeo***, *supra*; ***Sunrise Indus. Joint Venture v Ditrac Optics***, *supra*); and it is

ORDERED that defendant Ronald Cataffo is directed to execute, record, return and deliver the 50% ownership interest in the cooperative Unit D-11, located in the Hermitage at Napeague, Ltd., to the name of judgment debtor, Arthur A. Cataffo, subject to setoff for any amount paid by Ronald Cataffo to Arthur A. Cataffo at the time of the transfer, May 8, 1998; and it is

ORDERED that the injunctive relief granted by prior order of September 26, 2003 is continued, except as required to effect compliance herein, and in such event is vacated (CPLR 6301; Order, 9/26/03); and it is

ORDERED that upon compliance, vacatur and reinstatement of the conveyances made in violation of D&CL §270, *et seq.*, the judgment debtor, each of the defendants, their attorneys, servants, representatives, agents, affiliates, joint owners and any person acting on behalf of or in concert with the defendants are enjoined from effecting any transfer, conveyance, alienation, assignment or encumbrance of any asset previously or presently owned by the judgment debtor pending proof of payment or settlement of the money judgment owed plaintiff by defendant (D&CL §276-a; Order, 8/21/98; So-

Ordered Stipulation, 8/2/99); and it is

ORDERED that plaintiff's cross motion (#005) for reasonable attorneys' fees against defendants jointly and severally is granted in an amount to be determined pursuant to D&CL §276-a; and it is

ORDERED that the cross motion by defendants Arthur A. Cataffo, Lorraine Cataffo, Arthur Cataffo, Jr., Ronald Cataffo, Carrington's in the Park, Inc. and Grill Room, Inc. (#006) for summary judgment dismissing the first through fifth, thirty-first through thirty-fourth causes of action of plaintiff's complaint based on statute of limitations and the failure to state a claim is denied. Dismissal of the first, fourth, thirty-first and thirty-fourth causes of action is moot. Plaintiff has agreed to withdraw the claims by affidavit sworn to June 18, 2003. Dismissal of the second, third, fifth, thirty-second and thirty-third causes of action based on the same legal argument has been determined by order dated September 26, 2003 and is subject to the law of the case doctrine and precluded from relitigation pending appeal (CPLR 2221, *Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336, 681 NYS2d 296 [1998]); and it is further

ORDERED that the cross motion (#007) by defendants USR for summary judgment dismissing all those causes of action not previously disposed of by the September 26, 2003 order on statute of limitations and the failure to state a claim grounds is denied (CPLR 3212, 3211[a][5],[7], 2201; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 597 [1980]).

In this enforcement proceeding plaintiff seeks to set aside certain conveyances made by defendant Arthur A. Cataffo alleged to have been fraudulently made in order to avoid a money judgment held by plaintiff against this defendant arising out of the breach of an agreement for the lease of certain real property located in Farmingdale, New York. Mr. Cataffo, who was a tenant under the ten-year lease dated April 15, 1987 to 1997, commenced to default in April 1994 by failing to pay taxes with penalties. In the second week of November 1994 defendant stopped payment on the check drawn to plaintiff for the November rent and paid no further rent or arrears. However, operation of the restaurant on the premises continued until defendant vacated the premises on May 31, 1996.

Concurrent with the default under the lease, defendant Arthur A. Cataffo commenced a pattern and practice to divest assets titled in his name. On October 26, 1994 he transferred his 50% ownership interest in the marital premises to his wife, Lorraine, by deed recorded November 18, 1994 without consideration. Defendant continues to reside with Lorraine at the dwelling located at 15 Canterbury Drive, Hauppauge, New York. On December 2, 1994 by amended business certificate signed November 22, 1994, recorded in the office of the County Clerk on December 2, 1994, Arthur A. Cataffo withdrew his two-thirds ownership interest in the University Shops Realty Co., which is allegedly a multi-million-dollar interest. The assumed name and the two-thirds interest, including profits and liabilities, were legally transferred to Lorraine Cataffo, although Arthur continued to operate the interest and Ralph Tieri remained a one-third partner. The tenants at the strip mall were never notified that the title interest had been changed, and defendant continued to operate the leased premises pursuant to existing contracts. Despite the transfer Arthur A. Cataffo also admitted that he operated a Mercedes motor vehicle which was leased by USR.

On October 20, 1995 USR converted from a corporate entity to a limited liability corporation (USRLLC). One year later and prior to defendant's removal from the leased premises, USR Co. transferred the commercial property to USRLLC without consideration. All the transfers occurred and without consideration or notice to plaintiff, the judgment creditor.

Plaintiff obtained a money judgment on defendants' personal guarantee under the lease which was assigned to USRLLC. By order dated February 11, 1998 Justice Lester E. Gerard granted plaintiff judgment in the sum of \$907,082.44. Upon reargument the court order entered August 21, 1998 adhered to the original determination of liability and conceded that a possible error in amount owed was entitled to hearing. On appeal the order was affirmed by the Appellate Division Second Department order dated June 28, 1999. The parties were heard and by so-ordered stipulation dated August 2, 1999, entered September 7, 1999, agreed to set off and reduce the amount from \$907,082.44 to \$776,332.97. In addition, following the original money judgment on February 11, 1998, defendant on May 24, 1998 proceeded to transfer his 50% interest in Hamptons Oceanfront Cooperative Unit D-11, located in the Hermitage at Napeague, Ltd., to his brother, Ronald Cataffo, for the sum of \$44,600.00. The record indicates that this amount has been shown to be insufficient consideration and below fair market value. There is also allegation that the coop board has never received notice of the transfer.

Plaintiff commenced the instant action on December 6, 2000 to enforce the money judgment in the agreed sum of \$776,332.77. Upon deposition on May 24, 2000 defendant Arthur A. Cataffo disclaimed the transfers of assets. Plaintiff moved for injunctive relief on July 31, 2003 and summary judgment, to set aside the transfers on grounds of fraud under D&CL §270, *et seq.* By order issued September 26, 2003, this court denied judgment on the papers pending further disclosure and proof of interest, insolvency and consideration.

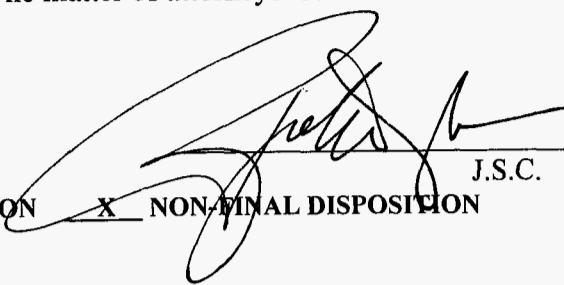
However, this court by its decision, dated September 26, 2003, determined that the statute of limitations was no bar to the action based on violations of the fraudulent conveyance statute (D&CL §§272, 273, 273-c, 275, 276; CPLR 213[8]). There was no lapse of limitation period or lack of diligence since judgment was not entered prior to August 21, 1998, affirmed June 28, 1999, and settled by so-ordered stipulation, September 7, 1999. In addition, the record documents the timing and notice of the transfers to family members with little or no consideration on pretext for purposes clearly intended to hinder and delay enforcement (D&CL §276; *Miller v Miller*, 276 AD2d 758, 715 NYS2d 70 [2000]; *Arzu v Arzu*, 190 AD2d 87, 597 NYS2d 322 [1993]; *Sunrise Ind. Joint Venture v Ditrice Optics*, *supra*). When badges of fraud exist from which inference of actual fraud is raised, liability need not be direct (*Marine Midland v Murkoff*, 120 AD2d 122, 508 NYS2d 17 [1986]; *Cadle v Newhouse*, 74 Fed Appx 152; 2003 US App Lexis 18976 [2003]).

The court is satisfied that disclosure is complete and plaintiff and defendants now move for summary judgment. On the record intent and insolvency have been established without rebuttal. Intra-family transfers with little or no consideration establish intent (*Apple Bank for Savings v Contaratos*, 204 AD2d 375, 612 NYS2d 51 [1994]; *United States v Mazzeo*, *supra*). Under New York law a transfer made without sufficient consideration is presumed to render a debtor defendant incapable of payment of the outstanding debt insolvent (*United States v Mazzeo*, *supra*; D&CL §§270, 275, 276). Pursuant to clear, convincing proof of actual intent and insolvency, there are no further questions of fact or doubt

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which remain for trial (*Apple Bank for Savings v Contaratos, supra; Cadle v Newhouse, supra; US v Mazzeo, supra*). Thus summary judgment and the determination of relief for plaintiff is warranted as directed (CPLR 3212, 3211, 2221, 213[8]). The matter of attorneys' fees is severed and shall be continued for determination.

Dated: MAR 16 2006



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION