

Schroer v Boccasini

2007 NY Slip Op 31004(U)

April 26, 2007

Supreme Court, Suffolk County

Docket Number: 0015997/2004

Judge: Martin J. Kerins

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 10/13/06
ADJ. DATE: 04/05/07
MOT. SEQ: 003-MG

copy

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

-----X	
MICHAEL A. SCHROER,	:
	:
	:
Plaintiff(s),	:
	:
- against -	:
	:
	:
MICHAEL D. BOCCASINI, JR., SHERYL A. BOCCASINI, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS as nominee for FULL SPECTRUM LENDING, INC.,	:
	:
Defendant(s).	:
-----X	

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers _____; Answering
Affidavits and supporting papers 15-18; Replying Affidavits and supporting papers 19-27; Other _____; ~~(and
after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff for an Order pursuant to CPLR 3212 granting summary judgment on his complaint as against defendants, Michael D. Boccasini, Jr. And Sheryl Boccasini, is granted to the extent that plaintiffs application to set aside and vacate the bargain and sale deed dated August 15, 2003 is granted and in all other respects denied; and it is further

ORDERED that the Bargain and Sale Deed, dated August 15, 2003, purportedly transferring an interest in the premises with the postal street address of 80 Barraud Drive, Port Jefferson Station, New York, designated on the Suffolk County Tax Map as District 0200, Section 208.00, Block 04.00 and Lot 025.000 - 026.001, from Michael D. Boccasini and Sheryl Boccasini, his wife, to Cheryl Boccasini, is hereby vacated as a fraudulent conveyance; and it is further

ORDERED that upon presentation to the Clerk of the County of Suffolk of a certified copy of this Order and the payment of fees, if any, the Clerk of the County of Suffolk is directed to file and record this Order in the records pertaining to the property, and to enter upon the margin of the record of the deed the words "Vacated by Order of the Court"; and it is further

Michael A. Schroer v Michael D. Boccasini, Jr., Sheryl A. Boccasini, and Mortgage Electronic Registration Systems as nominee for Full Spectrum Lending, Inc.,

Index No: 015997-2004

Page two of four

ORDERED that movant shall serve a copy of this Order with Notice of Entry upon counsel for defendants pursuant to CPLR 2103(b)(1), (2), (3) or (6) and thereafter file the affidavit of service with the Clerk of the Court.

Plaintiff was awarded a judgment dated April 8, 2004 as against defendant, Michael D. Boccasini after trial in the Suffolk County Supreme Court (Catterson, J.), in the amount of \$91,440.73. During the pendency of the action before the Court, Michael Boccasini (hereafter Boccasini) transferred his half interest in the property located in this state to co-defendant, Cheryl Boccasini (hereinafter "S. Boccasini"), his wife. Plaintiff now moves under Suffolk County Index No. 04-015997) for summary judgment pursuant to the Debtor and Creditor Law (hereinafter "DCL") § 270 et.seq., alleging that the transfer of the property was a fraudulent conveyance and requests an Order to set aside the conveyance. In support thereof, plaintiff submits the affirmation of his counsel and supporting documents. The motion is opposed by defendants, who have submitted an affirmation by their counsel. Plaintiff is in compliance with the statutory requirements of CPLR 3212(b). Plaintiff has also annexed copies of the judgment rendered against Boccasini by this Court and a copy of the judgment filed with the Clerk of the County of Suffolk in the amount of \$91,440.73. Boccasini had appeared in the underlying action and was aware of the possibility and probability of a judgment being entered as against him. Neither of the defendants contest the validity of the judgments.

Turning to the merits of the plaintiffs claim that Boccasini's conveyance of his interest in the property constitutes an actual fraud pursuant to DCL § 276, or constructive fraud pursuant DCL § 275 or DCL 273, a conveyance is fraudulent if it is made with actual intent to "hinder, delay or defraud either present or future creditors" (see DCL § 276). When such intent is shown, no inquiry into the adequacy of the consideration or solvency of the transferor is required (see *Wall Street Assoc. v Brodsky*, 257 AD2d 526; *Grumman Aerospace Corp. v Rice*, 199 AD2d 365). On the other hand, constructive fraud requires no proof of intent to defraud. A conveyance is deemed fraudulent if it is made without fair consideration and either (i) the transferor is insolvent at the time of the transfer or will thereby be rendered insolvent (see DCL § 273) or (ii) at the time of transfer, the transferor intends or believes that he or she will become insolvent (see DCL § 275).

Regarding the claim of actual fraud, plaintiff bears the initial burden to establish a right to summary judgment by proof of actual intent to hinder, delay or defraud the plaintiff (see DCL § 276). Due to the difficulty of obtaining direct proof, fraudulent intent is generally established by the allegedly fraudulent act and an inference from the facts and circumstances surrounding the transfer (see *Grumman Aerospace Corp. v Rice*, 199 AD 2d 365, *supra*). "Direct evidence of fraudulent intent is often elusive. Therefore courts 'will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent'" (*Pen Park Corp. v LaSalle Natl. Bank*, 240 AD2d 384, 386 quoting *MFZ/Sun Life Trust-High Yield Sales v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SDNY 1995]; see also *Wall Street Assoc. v Brodsky*, 257 AD2d 526, *supra*; *Shelly v Doe*, 249 AD2d 756). A court, when determining a fraudulent conveyance will consider such factors as (1) a close relationship among the parties to the transaction; (2) a secret and

Michael A. Schroer v Michael D. Boccasini, Jr., Sheryl A. Boccasini, and Mortgage Electronic Registration Systems as nominee for Full Spectrum Lending, Inc.,

Index No: 015997-2004

Page three of four

hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) knowledge of the creditors claim and the inability to pay for it; (5) the use of dummies or fictitious parties; and (6) retention of control of property by the transferor after conveyance.

In the instant matter, there are several facts which lend credence to an inference of fraudulent intent. The parties to the conveyance are husband and wife who owned the property as tenants by the entirety and apparently resided together there. Their relationship casts doubt on the legitimacy of the conveyance. They were both aware of the underlying action against Boccasini and the fact that a judgment would, in all probability, be awarded. The conveyance has apparently not effected Boccasini's use or possession of the property as he still lives there. Moreover, there appears to have been no consideration for the conveyance. Significantly, just three months prior to the transfer, the defendants obtained a mortgage on the property in the amount of \$356,000.00. Plaintiff has demonstrated all of the above by documentary evidence.

The above noted factors are sufficient to shift the burden to defendants to produce evidence that the transfer was made in good faith (*cf Grumman Aerospace Corp. v Rice*, 199 AD2d 365, *supra* [here the plaintiffs claim was based upon an interspousal transfer of a marital residence, and the court noted that the transfer was made at a time when the husband was under federal investigation exposing him to financial liability, and that the husband continued to live in the marital home following the conveyance]).

The defendants' opposition is based solely on an affidavit by their counsel that the plaintiff's motion is procedurally defective and note that a preliminary conference has not been held on the matter. They do not, however, raise any issue of fact in regard to the merits of the motion. They fail to argue that the conveyance was for consideration or that it was made in good faith. Defendants' opposition fails to raise any issue of fact regarding the conveyance sufficient to warrant a trial. Therefore, the Court, based on the record before it, finds that it is compelled to grant summary judgment to plaintiff and vacate the conveyance as fraudulent pursuant to DCL § 275.

While a determination of an intent to hinder, delay or defraud creditors is ordinarily a question of fact, not often resolved on a summary judgment motion (*see Grumman Aerospace Corp. Rice*, 199 AD2d 365, *supra*), here, defendants have failed to produce any evidence in admissible form which is sufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557). Thus, in view of the fact that all such evidence is within the defendants' control, they cannot claim to be prejudiced or hindered by the lack of discovery in this matter.

While the above circumstances create an inference of fraud, they do not establish fraudulent intent as a matter of law. Unlike a presumption, an inference allows the trier of facts to draw a particular conclusion from proven facts, it does not mandate such a result (*see Kilburn v Bush*, 223 AD2d 110). In view of the foregoing, the Court does not need to consider the alternative grounds set forth in DCL § 273 or DCL § 276 and grants summary judgment to plaintiff on its cause of action, which does not require proof of actual intent (*see DCL § 275*).

Michael A. Schroer v Michael D. Boccasini, Jr., Sheryl A. Boccasini, and Mortgage Electronic Registration Systems as nominee for Full Spectrum Lending, Inc.,


Index No: 015997-2004

Page four of four

Although attorneys' fees are recoverable in an action to set aside a fraudulent conveyance under the Debtor and Creditor Law, counsel has submitted no affirmation regarding his fees. The Court, not having any documentation before it, cannot grant this request at this time. If counsel so desires, an application maybe made by motion for said relief.

Accordingly, the motion is granted as herein indicated.

Dated: April 26, 2007
RIVERHEAD, NY



Martin J. Kerins, J. S. C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION _____