McLaughlin v Walker

2007 NY Slip Op 33545(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0120344/2002

Judge: Louis B. York

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[* 1]
SCANNED ON 10/31/2007

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

PRESENT: York
Justice

PART 2

Index Number : 120344/2002
MCLAUGHLIN, MARY UNDERHILL
VS
WALKER, JULIE
Sequence Number : 007
DISMISS ACTION

INDEX NO. 120344/2002
MOTION DATE
MOTION SEQ. NO. 007
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: Oct. 15, 2007

LOUIS B. YORK J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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MARY UNDERHILL MC LAUGHLIN formerly known as MARY NORTON,

Plaintiff,

Index No. **120344/02**

-against-

JULIE WALKER,

Defendant.

---x

LOUIS B. YORK, J.:

Defendant has moved to dismiss for lack of jurisdiction on the ground that neither long-arm out-of-state service on defendant nor personal service in the state conferred jurisdiction on the defendant. The Court has previously determined that service of process in the state was unsuccessful in obtaining jurisdiction. Left for decision is whether service on defendant in Rhode Island satisfied this Court's long-arm statute. Defendant also moves for dismissal on the ground that plaintiff has failed to state a cause of action, failure to join a necessary party and forum non-conveniens.

Plaintiff is the former wife of Roy Norton. Defendant is his current wife. By this action, plaintiff's aim is to recover support arrears. She claims defendant has colluded with Roy Norton to successfully avoid the payment of the arrears. Plaintiff has obtained a Judgment of Dissolution of Marriage between defendant and Roy Norton from the Superior Court of Connecticut, which was entered in this court as a foreign judgment. Due to Norton's failure to pay arrears, summary judgment on the foreign judgment has been entered in this court for $158,900.00.

In this action plaintiff alleges that a series of collusive arrangements between plaintiff and defendant, and their movement from state to state to avoid their creditors, has had the effect of fraudulently depriving the defendant of her alimony payments

Plaintiff is between 56 and 57 years old. Her motion papers state that she is holding down three jobs and has no retirement or savings accounts, having been a homemaker throughout her marriage of 23 years. She and her husband raised five children. She alleges that the Nortons take her children on all-expense vacations, live in a house on the beach in Newport Rhode Island and drive a BMW. At the end of their marriage, Norton had transferred assets to plaintiff which caused her to be investigated by the F.B.I. and to file for bankruptcy. Plaintiff's counsel has alleged that this pattern of transferring assets to avoid judgment creditors continues to be used by Norton.

In her deposition in Roy Norton's companion action, defendant testified that she and Roy Norton were shareholders and officers in several companies together, including Trade Resources International Limited in Bermuda where they also had a condominium. The corporation which was financed by a private offering plan was put together by the law firm of Dewey Ballantine. Defendant was in charge of marketing and Roy Norton was the president. Discovery revealed that she was the managing member of Finance Matrix, a corporation located at 180 Varick Street in Manhattan. The records are in storage, which they didn't have access to at the time the first motion to dismiss was brought because they

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had not paid the storage company. They also owed money to their landlord in New York, who brought an eviction proceeding against them. They owed about $5,500 on their credit cards. Norton also has an outstanding judgment against him of $142,699 in favor of a law firm in Minnesota. There was also a deposit in defendant's and Norton's joint count of $87,000. There were also checks that came into the Finance Matrix account that went into the joint account and then was moved to defendant's account. Norton is a member of the New York Yacht Club, paying dues of about $1,500 a year.

Recent discovery has revealed that Finance Matrix incurred operating expenses of $141,613.48. Interestingly, out of the $70,000 in consulting fees that was paid out, managing member defendant Julie Walker paid $60,000 to Roy Norton on December 30, 2002, one day before she signed a resolution terminating the business. Her deposition and documents submitted appear to affirm her ongoing presence in New York, while she was living here and even after she and Roy moved out of the state in June. She met with investors in an attempt to obtain investment funds. Finance Matrix was their sole source of income in 2002. After the dissolution of Finance Matrix, they immediately formed FM Group, also with offices in New York and continued to come to New York to raise funds for their investment company. They met with such groups as Partner Re Nas Solutions, Inc., Greenwich Capital, Lehman Brothers, Morgan Stanley, Goldman Sachs and Merrill Lynch.

The portion of the motion to dismiss because of lack of proper service of process in New York has already been decided in defendant's favor in a referee's hearing, the report of which has been confirmed. Defendant also contends that there can be no long-arm jurisdiction because the complaint does not allege it.

Defendant argues that the complaint does not allege that she has done business in the state in her personal capacity, nor committed a tort in the state, nor benefitted from the activities that caused her to derive substantial benefits in New York, possessed real property in New York or committed any tortuous act in New York. She then goes on to describe in great detail the accounts she maintains with Roy Norton and how the alleged tortuous acts of conversion and concealment, if they occurred at all, occurred outside the state of New York.

On a motion to dismiss, the pleadings are to be liberally construed in the plaintiff's favor. All doubts are to be resolved in favor of plaintiff (***Brandt v Toraby***, 273 AD2d 429, 710 NYS2d 115 [2d Dept 2000]) [Long-arm jurisdiction upheld where contract negotiated was finalized in New York. Injury occurred in Connecticut, but breach was in New York.]

Although the plaintiff may have omitted certain allegations from the complaint, such omissions may be cured by an affidavit in opposition to the motion (***Auto Body Federation of the Empire State, Inc. v Albert Lewis***, 80 AD2d 593 [2d Dept 1981]). Plaintiff has alleged acts and transactions which have occurred in New York via activities that defendant

carried out in New York for New York based corporations. In support of the allegations she alleges that in New York, money was transferred from here to banks in sister jurisdictions in support of a fraudulent scheme to avoid Roy Norton's paying his creditors, including plaintiff. Much of this is illustrated, she claims, by their skipping from residencies in Connecticut, New York, Florida and Rhode Island.

The Court's function on a motion to dismiss is to determine whether from the facts the plaintiff has made out a prima facie indicating that there is jurisdiction (***Alden Personnel v David***, 38 AD3d 697, 833 NYS2d 136 [2d Dept 2007]).

Defendant may not hide behind the shield of the corporation for which she claims she has been working. Those acts may be construed as supporting Roy Norton's scheme to avoid paying the plaintiff alimony she is entitled to. Defendant argues that her acts in behalf of the corporation are protected by a fiduciary shield insulating a corporate agent from liability when he/she is acting in behalf of corporate interests. But that is a creation primarily of the federal courts, (See, e.g. ***United States v Montreal Trust Co.***, 358 F2d 239 [2d Cir cert den 384 US 919]) and has been rejected in the First Dept. (***Hasbro Bradley v Coopers and Lybrand***, 121 AD2d 870 [1st Dept.1986]). Defendant's prior affidavits refer to ***Laufer v Ostrow***, 55 NY2d 305 [1982]. That case was decided on CPLR 301 grounds which does not invoke our long-arm statute, CPLR 302(a), is the basis on which jurisdiction is being decided by this Court. To the extent that the ***Laufer*** Court may have commented on jurisdiction under CPLR

302(a), the Court of Appeals, in rejecting the fiduciary shield doctrine outright, stated:

> The Laufer Court did note that the individual defendant was not subject to long-arm jurisdiction under CPLR 302. This was not because he was protected by the fiduciary shield, however, but because the claim was for a conversion which took place outside the State and no New York injury resulting from the defendant's tortuous conduct was alleged.

Kreutter v McFadden Oil Corp., 71 NY2d 460, 470 [1988]

In this case, the pleadings and affidavits may establish, that a corporation with offices in New York was used by the defendant, while in New York, to deprive the plaintiff of monies that should have been paid to her. That would establish, if true, that a conversion and fraudulent transaction with respect to defendant had occurred, at least in part, in New York. New York's long-arm statute "authorizes the Court to exercise jurisdiction over non-domiciliaries for claims arising from a defendant's transaction of business in this state. It is a single-act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York ..."(***Kreutter*** 71NY2d at 467). As long as there is purposeful activity in New York, which is substantially related to the cause of action, whether in support of one's own interests or in representing the corporation, the Court will have jurisdiction over the non-domiciliary action (***Optical v Castillo***, 25 AD3d 238, 806 NYS2d 84 [2d Dept 2005]). The Court concludes that the activities of the defendant, such as the clandestine transfer of consulting fees to plaintiff, are acts sufficiently tied to plaintiff's fraud claim to confer jurisdiction on the out-of-state service.

The Court notes that the myriad of residences that the defendant and Roy Norton have occupied, coupled with various corporate transactions and deposits and withdrawals from various corporate and individual bank accounts, makes it extremely difficult to follow the facts and the money. Leniency in determining jurisdictional issues is mandated in this situation, (See, **Bernstein v Kelso**, 23 AD2d 314, 659 NYS2d 276 [1st Dept 1997]).

As far as forum non conveniens is concerned, the Court is acutely aware of the inability to obtain jurisdiction in another jurisdiction. The court does not see whether any other jurisdiction is superior to this one. Plaintiff already has a judgment in Connecticut which she has been unable to enforce. Florida has already declined jurisdiction. They mention Vermont, but they don't live there either and the defendant's submissions do not indicate any significant presence there or anywhere else.

This issue is one grounded in equity. Taking the entire situation into account, fairness, justice and convenience makes New York an appropriate forum, especially in consideration that no other appropriate forum exists (***Martin v Mieth***, 35 NY2d 414, 362 NYS2d 853 [1974]). Except for the litigants, the bulk of the witnesses seem centered in New York. New York has an interest in the integrity of its judgments. This action may help enforce the judgment that the Court has rendered against defendant's husband and plaintiff's former husband. Finally, there is a national policy of requiring deadbeat dads and husbands to fulfill their familial obligations. In this case, while Roy Underhill has not paid a cent toward

satisfying his support obligation, there is evidence that he is engaged in a real estate venture in Florida. There appears to be money to support these ventures. If so, some of it should be made available to satisfy his support obligations.

On a 3211 motion to dismiss because of the insufficiency of the pleadings, the inquiry should be whether there is a cause of action not whether there are sufficient facts pled to establish a cause of action (***Bernstein v Kelso***, 23 AD2d 314, 659 NYS2d 276 [1st Dept 1997]). The complaint and the subsequent submissions establish the elements of a cause of action for a fraudulent conveyance under §276 of the Debtor and Creditor Law. There must be actual intent to defraud on the part of the transferor and the transferee. The factors to be considered are:

1. the close relationship between the parties;
2. a questionable transfer;
3. an adequate consideration
4. transferor's knowledge of creditor's claim
5. retention or control of property by transferor after conveyance

Wall Street Associates v Brodsky, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999]

In assessing these elements, one must conclude that the relationship of the transferor and transferee couldn't be closer. No evidence is proferred to justify the legitimacy of the transfer because nothing has been offered to show that there was any consideration for the transfer. Defendant Roy Underhill clearly knows of the creditor's claim, and the only thing not established is the 5th category. Nevertheless, these elements taken together certainly satisfy the pleading elements of the cause of action.

Defendant also argues that Roy Underhill is a necessary party. He may be a necessary witness, but complete relief can be granted against the defendant without him. He already has a judgment against him and a judgment against defendant will not affect his legal rights and liabilities. There is, therefore, no justification to require him to be a defendant in this action. Accordingly, it is

ORDERED that the motion to dismiss is denied.

Dated: October 15, 2007

Enter:

Louis B. York, J.S.C.

LOUIS B. YORK J.S.C.

FILED
OCT 31 2007
COUNTY CLERK'S OFFICE
NEW YORK