

Country Glen, LLC v Spennato

2007 NY Slip Op 34269(U)

December 21, 2007

Supreme Court, Nassau County

Docket Number: 0599-07/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

COUNTRY GLEN, LLC,

Plaintiff(s),

MOTION DATE:10/4/07

-against-

INDEX NO.:10599/07

SEQ. NO.1,2

CAL. NO.

GINA SPENNATO a/k/a GINA SPALLONE,

Defendant (s)

The following papers read on this motion :

Notice of Motion/ Order to Show Cause.....	1-5
Notice of Cross Motion.....	6-8
Answering Affidavits.....	9,10
Replying Affidavits.....	11,12
Briefs:	13-15a

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3211(a) (1) and (7) vacating a Notice of Pendency and dismissing plaintiff's complaint and cross motion by the plaintiff for an order pursuant to Part 130-1 of the Rules of the Chief Administrator of the Court for an award of sanctions and attorney's fees are determined as follows.

This is an action to recover money damages based upon the alleged fraudulent conveyance of real property pursuant to Article 10 of the New York Debtor and Creditor Law and to impress a constructive trust on real property based thereupon. Specifically, plaintiff alleges the defendant's transfer of the proceeds from the

sale of her marital residence held in title as tenants by the entirety with her husband was a fraudulent conveyance in violation of Debtor & Creditor Law §§ 273, 273-a, 274 and 276.

Defendant and her husband Alfonso Spennato owned 2601 Glenn Drive, Bellmore, N.Y. as tenants by the entirety. They sold said real property on February 11, 2005 for \$1,625,000. After paying off the mortgage the net proceeds from the sale were \$720,759.06. Also on February 11, 2005 defendant closed on the purchase of 10 Andrews Drive, Massapequa Park, New York. Although the contract of sale for 10 Andrews Drive listed defendant and her husband as purchasers, title was taken only in the name of defendant Gina Spennato. The purchase price of 10 Andrews Drive was \$840,000. Defendant procured a mortgage solely in her name in the amount of approximately \$500,000. She claims to make all the mortgage payments. Three hundred thousand dollars (\$300,000) came by check directly from the proceeds of the sale of 2601 Glenn Drive.

Alfonso Spennato claims that on or about November 1, 2004 his mother-in-law deposited \$42,000 into his bank account as a loan to the defendant to purchase 10 Andrews Drive and he then wrote a check for \$42,000 toward the down payment. When he closed on 2601 Glenn Drive, he repaid his mother-in-law the \$42,000. At issue is what happened to the balance of the \$720,759.06 after the \$300,000 was used to purchase 10 Andrews Drive?

The attorney for the plaintiff asserts that, based on the testimony of Alfonso Spennato, almost all the rest of the funds were deposited into his wife's bank account. Plaintiff claims that even though Mr. Spennato was the legal owner of half the \$700,000 net proceeds, the defendant obtained nearly all these proceeds. In addition, the \$42,000 down payment for 10 Andrews Drive was paid from a personal Chase Bank account of Alfonso Spennato, and not in reality a loan from defendant's mother.

On or about September 9, 1988 Yogurt & Such Carle Place, Inc. (Yogurt) entered into a lease agreement with the plaintiff for the retail premises at the Country Glen Center for a frozen yogurt store. Alfonso Spennato (defendant's husband) personally guaranteed the obligations under the lease. Yogurt defaulted under the lease by failing to pay rent commencing on July 1, 2004. On January 24,

2005 Country Glen commenced a lawsuit against Alfonso Spennato. On December 22, 2006 a judgment in Nassau County Clerk's office was entered in favor of the plaintiff herein against Alfonso Spennato in the sum of \$227,611.78.

The first cause of action alleges the transfer of \$192,000 by Alfonso Spennato to the defendant for the purchase of the 10 Andrews Drive house was made with the actual intent to hinder, delay and defraud Alfonso Spennato's creditor in violation of New York Debtor & Creditor Law § 276. In determining whether a conveyance was fraudulent, the court considers "badges of fraud," which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent. These "badges of fraud" include the lack or inadequacy of consideration, family, friendship or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a pattern or series of transactions or course of conduct after the incurring of the debt, and the transferor's knowledge of the creditor's claim and the inability to pay it (See **Steinberg v Levine**, 6 AD3d 620).

The second cause of action alleges Alfonso Spennato transferred the \$192,000 to the defendant for no consideration rendering him insolvent and in violation of New York Debtor & Creditor Law § 273.

The third cause of action alleges defendant was in violation of Debtor Creditor Law § 273-a, which reads as follows.

"Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." Debtor & Creditor Law § 273-a.

The alleged fraudulent conveyance took place on February 11, 2005. The action against Alfonso Spennato was filed on January 24, 2005.

The fourth cause of action alleges "the gratuitous transfer of \$192,000 by Alfonso Spennato to defendant left Alfonso Spennato with unreasonably small capital remaining in his hands thereby violating Debtor & Creditor Law § 274.

Section 3211(a) of the CPLR states, in relevant part, as follows:

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
7. the pleading fails to state a cause of action."

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference "determining only" whether the facts as alleged fit within any cognizable legal theory (**Sokoloff v Harriman Estates Development Corp.**, 96 NY2d 409, 414; **Polonetsky v Better Homes Depot**, 97 NY2d 46, 54; **Leon v Martinez**, 84 NY2d 83, 87-88). The plaintiff has alleged facts sufficient to establish a *prima facie* showing of a fraudulent transaction. The plaintiff has alleged with specificity that all the proceeds from the sale of 2609 Glenn Drive went to the defendant and in doing so Alfonso Spennato was rendered insolvent or near insolvent, thereby precluding the granting of the motion to dismiss for failure to state a viable cause of action.

Moreover, "[t]o succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"

(*Manfro v McGivney*, 11 AD3d 662; see also *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303; *Leon v Martinez*, supra, at 87-88; *Jorjill Holding Ltd. v Grieco Associates, Inc.*, 6 AD3d 500). The documentary evidence submitted (cancelled checks, closing statement, contract of sale) fails to establish as a matter of law that the subject conveyance did not render Alfonso Spennato insolvent and fair consideration was paid. The issues of insolvency and consideration are questions of fact which cannot be determined in a motion to dismiss pursuant to CPLR 3261(a)(1) or (7).

The fifth cause of action alleges plaintiff has an equitable lien on and a constructive trust in 10 Andrews Drive since "defendant used at least \$192,000 of funds that equitably are the property of and should be paid over to Country Glen as the creditor of Alfonso Spennato."

The existence of an equitable lien requires an express or implied contract concerning specific property where there is a clear intent between the parties that such property be held, given or transferred as security for an obligation (*Liselli v Liselli*, 263 AD2d 468; *Thomas Real Estate v Nezelek*, 100 AD2d 651). The fifth cause of action does not set forth any facts or circumstances upon which an equitable lien recovery could be granted. The record does not contain evidence that the parties agreed, expressly or impliedly, that the property was to be "held, given or transferred as security" for a pre-existing obligation (*Teichman v Community Hosp.*, 87 NY2d 514, 520; *Datlof v Turetsky*, 111 AD2d 364, 365). The plaintiff is not entitled to an equitable lien and the notice of pendency filed with respect to this claim must be canceled (see CPLR 6501; *Borrero v East Harlem Council for Human Servs.*, 165 AD2d 807; see also *Lester v Zimmer*, 197 AD2d 783). The fifth cause of action is, therefore, dismissed and the Notice of Pendency is vacated.

The County Clerk of the County of Nassau is hereby directed, upon payment of the proper fees, if any, to cancel and discharge of record a certain Notice of Pendency filed in this action against Section 65, Block 261, Lot 3. The clerk is directed to enter upon the margin of the record of same a notice of cancellation referring to this order.

The application for sanctions and attorney's fees pursuant to Part 130-1 of the Rules of the Chief Administrator of the Courts is denied.

Plaintiff may proceed on the first, second, third and fourth causes of action. The attorney for the defendant shall have twenty days from service of a copy of this order to interpose an answer.

A preliminary conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on January 23, 2008, at 11:00 a.m. This directive, with respect to the date of the conference, is subject to the right of the clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the preliminary conference clerk and the attorneys for the defendant.

Dated: 12-21-07

[Signature]
J.S.C.

ENTERED
DEC 27 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE