The CIT Group v Burger King First Ave. Corp.
2008 NY Slip Op 31063(U)
March 28, 2008
Supreme Court, Nassau County
Docket Number: 0870-06/
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

THE CIT GROUP/EQUIPMENT FINANCING, INC.

Plaintiff,

-against-

MOTION DATE: 12/17/2007
MOTION SEQ. NO.: 003

INDEX NO.: 20870/2006

BURGER KING FIRST AVENUE CORP., D&F FOOD SERVICE, INC., OCEANSIDE RESTAURANT ASSOCIATES, L.P., 1085 RESTAURANT CORP., SSB ASSOCIATES, LLC., AND THIRD AVENUE ASSOCIATES, LLC

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion to Reargue and to Renew.....1
Memorandum of Law in Opposition to Cross-Motion.....2
Notice of Cross Motion.....3

Motion by Intervenor Irwin Franchise Capital Corporation for leave to renew and reargue is **denied**. Motion by petitioner CIT Group/Equipment Financing for leave to renew and reargue is **denied**.

This is a special proceeding pursuant to CPLR § 5225(b) to compel respondents to pay money in which judgment debtors have an interest to the judgment creditor. Petitioner also seeks to compel respondents to pay certain debts owed to the judgment debtors to petitioner pursuant to CPLR § 5227.

By order dated September 12, 2007, the court referred the matter to a special referee to hear and report as to adverse claims to certain "excess rents" payable under a sublease. Petitioner CIT Group asserts a claim to the excess rents as a

judgment creditor of Steven Zavidow, who is the purported owner of the sub-landlord, 1085 Restaurant Corp. Intervenor Irwin Franchise Capital Corp. is the assignee of 1085 Restaurant and asserts a claim to the excess rents as a secured party.

The assignment agreement, which is dated November 12, 2003, provides that "as additional security for Borrower's performance under the Loan Documents and for each Guarantor's performance under his respective Guaranty, each Guarantor herein assigns to Lender all of Guarantor's right, title, and interest in and to the rental payments due 1085 Restaurant" under the sublease. The assignment agreement identifies the "Borrower" as BMZ Multi-Food Corp. and the "Guarantors" as Jerome and Steven Zavidow. BMZ Multi-Food was owned or controlled by the Zavidows, who along with the corporation are the judgment debtors in this proceeding.

Although the assignment agreement does not define the "Loan Documents," it does recite that Borrower is in default "pursuant to Section 8(vi) of the Master Security Agreement # 16835, dated July 18, 2002 in that S.Z. Restaurant Corp. has closed the Burger King restaurant located at 547 W. 110th Street...in which Lender had a security interest." Pursuant to the Master Security Agreement, BMZ Multi-Food granted Irwin a security interest in all goods, including inventory, equipment, and money then or thereafter acquired by BMZ in the course of operating a Dunkin Doughnuts Restaurant located at 95-56 Queens Boulevard in Rego Park. The Master Security Agreement was intended to secure all of BMZ' indebtedness to Irwin "whether now existing or hereafter arising," including a secured promissory note in the amount of $750,000 executed by BMZ that date. Jerome and Steven Zavidow each executed unconditional guaranties of BMZ'

indebtedness to Irwin. In Section 8(vi), the Master Security Agreement provided that a breach or default by either guarantor under any guaranty or other agreement with Irwin would constitute an "Event of Default" under the security agreement.

It appears from the documents submitted to the court that neither Jerome nor Steven Zavidow ever guarantied a loan from Irwin to S.Z. Restaurant Corp. Nevertheless, the assignment agreement recites that the guarantors had asked "Lender's forbearance in declaring the Loan in default," and the lender was willing to forbear provided the guarantors entered into the assignment agreement.

In its prior order, the court determined that the assignment agreement created a security interest in the excess rents in favor of Irwin to secure BMZ' indebtedness. The court further determined that the security interest became perfected when Irwin filed a financing statement on October 22, 2004. Nevertheless, the court ruled that a hearing was necessary to determine whether the granting by 1085 Restaurant of a security interest in the excess rents constituted a fraudulent conveyance.

Irwin moves for leave to reargue so much of the court's order as directed the referee to consider whether 1085 Restaurant's granting of a security interest to Irwin constituted a fraudulent conveyance. Alternatively, Irwin moves to renew its motion for an order directing that CIT's lien is subordinate to Irwin's security interest. CIT Group cross-moves for leave to renew and reargue so much of the court's order as granted Irwin leave to intervene as to excess rents which had not been paid over to CIT Group as of May 31, 2007.

In the original order, the court noted certain evidence indicating that 1085 Restaurant may have been insolvent at the time of the assignment agreement. Assuming that 1085 Restaurant was insolvent, the assignment of excess rents

would be a constructively fraudulent conveyance, if the credit which Irwin actually extended to BMZ was not "fair consideration" for the assignment(Debtor and Creditor Law § 273). Alternatively, regardless of whether 1085 Restaurant was insolvent or the consideration adequate, the assignment of rents would be a fraudulent conveyance if made with actual intent to hinder, delay, or defraud creditors(Debtor and Creditor Law § 276; *In re Monaghan Ford Corp.*, 340 B.R. 1, 38 [EDNY 2006]).

In determining actual fraud, a court will look to such factors as lack or inadequacy of consideration; family, friendship, or other close relation 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 debt; and the transferor's knowledge of the creditor's claim and the inability to pay it(*Steinberg v. Levine*, 6 AD3d 620 [2d Dep't 2004]). In addition to these commonly occurring "badges of fraud," a court may consider any other circumstances which give rise to an inference of fraudulent intent. In identifying actual fraud as an issue for the hearing, the court noted that the Master Security Agreement and promissory note were dated over two months prior to the loan commitment expiration date. Irwin's backdating of the loan documents, or any other irregularity with respect to the BMZ loan, would be evidence of 1085 Restaurant's actual intent to defraud with respect to the assignment of excess rents. Accordingly, Irwin's motion for leave to reargue the portion of the court's order directing the referee to consider whether the assignment of excess rents constituted a fraudulent conveyance is **denied.**

In support of its motion to renew, Irwin submits the commitment letter pertaining to the BMZ loan. Irwin asserts that the reason that it did not submit the

commitment letter on the prior motion was that it did not understand CIT to be "questioning the propriety" of the original loan to BMZ. However, because CIT clearly argued that the assignment of rents constituted a fraudulent conveyance, the issue of whether the BMZ loan was fair consideration for the assignment to Irwin was clearly presented. Thus, Irwin has not offered reasonable justification for its failure to present the commitment letter on the prior motion(CPLR 2221(e)[3]). Nonetheless, as a matter of discretion, in the interests of justice the court will consider this "new evidence" on the present application(See *Altimari v. Meisser*, 23 AD2d 672 [2d Dep't 1965]).

The commitment letter is dated July 15, 2002, prior to the date of the promissory note and Master Security Agreement. Nevertheless, according to the affidavit of Michael Baronio dated October 29, 2007, the loan was not funded until January, 2003. The fact that the loan was funded over five months after the date of the loan documents does not rebut the inference that the documents may have been backdated. Moreover, although BMZ signed a promissory note in the amount of $750,000, the commitment letter refers to a maximum loan of only $725,000. BMZ' "disbursement instructions" concerning the loan confirm that at most $725,000 was actually borrowed, including $16,214 closing costs. As the court noted in the prior order, backdating of the loan documents may be evidence of actual fraud. Additionally, the fact that the face amount of the note exceeds the amount actually borrowed suggests that the assignment of rents may not have been made for fair consideration. Accordingly, Irwin's motion for leave to renew its motion for an order that CIT's lien is subordinate to Irwin's security interest is **denied**.

CIT Group seeks leave to renew and reargue the portion of the order

granting Irwin leave to intervene as to excess rents which had not yet been paid to the judgment creditor. In support of its motion to renew and reargue, CIT asserts that the funding of the BMZ loan after the documents were executed undermines the court's finding that the assignment of excess rents created a valid security interest. Nevertheless, Irwin has submitted a "wire transfer request" dated January 9, 2003, directing Fleet Bank to transfer $708,000 to Marvin Robbins, the principal payee named on BMZ' disbursement instructions. If Irwin can establish that $708,000 was in fact transferred to Robbins on BMZ' behalf, BMZ' antecedent debt can constitute fair consideration, if the debt was not "disproportionately small" as compared with the value of the assignment(Debtor and Creditor Law § 272). While the granting of a security interest may constitute a fraudulent conveyance, or be voidable in bankruptcy as a preference, a valid security interest may be created even though the obligation secured arose prior to the security agreement(*In re Sharp Intern'l Corp.*, 403 F.3d 43, 54-55 [2d Cir. 2005]).

CIT further argues that because of the lack of evidence that BMZ was in default, there was no consideration for the assignment agreement. In response, Irwin has submitted a guaranty dated July 18, 2002 whereby S.Z. Restaurant Corp. unconditionally guarantees all of BMZ' debts to Irwin. The guaranty appears to be signed by Jerome Zavidow on behalf of S.Z. Restaurant Corp. Irwin also submits a security agreement pursuant to which S.Z. Restaurant Corp. granted Irwin a security interest in equipment located at 547 W. 110th Street, New York, NY. The security agreement, which is dated September 11, 2002, purports to secure S.Z. Restaurant's guaranty dated July 18, 2002 "in connection with its loan transaction with BMZ Multi-Food Corp." As with the commitment letter, the

court will accept the S.Z. Restaurant guaranty and security agreement in the interests of justice. Nevertheless, the court notes that Irwin has shown no reasonable justification for not including these documents on the prior motion.

It appears that the purpose of the security interest in S.Z. Restaurant's equipment was to secure S.Z. Restaurant's guaranty of the anticipated loan to BMZ. Indeed, the commitment letter provides that the unconditional guaranty of S.Z.Restaurant Corp. was to be secured by a "first priority blanket lien" on all personal property, fixtures, equipment, and leasehold improvements at the Burger King located at 547 W. 110th Street in Manhattan. While BMZ may not actually have been in default when the assignment agreement was executed, it was a condition of the commitment letter that there be no "material adverse change" in the financial condition of BMZ or any guarantor. When S.Z. Restaurant closed the Burger King located at 547 W. 110th Street, it was apparently discovered that Irwin's lien on the equipment was subordinate to that of another creditor. In any event, Irwin asserts that because the collateral was "impaired," it took an assignment of rents payable to 1085 Restaurant, a corporation controlled by BMZ' guarantor, Steven Zavidow. An agreement to give time and forebear suit is a sufficient consideration to uphold the promise of a third party given to secure or pay the debt(*Mechanics' and Farmers' Bank v. Wixson*, 42 NY 438 [1870]). Moreover, the issue is not whether the assignment agreement was an enforceable contract, but rather whether the assignment gave rise to a security interest and whether it was a fraudulent conveyance. Accordingly, CIT's motion for leave to reargue the court's order granting Irwin leave to intervene as to excess rents which had not been paid over to the judgment creditor is **denied**.

Finally, CIT asserts that Irwin is not entitled to priority because on

September 20, 2007, it filed a "U.C.C. termination statement." The court notes that the UCC3 form filed by Irwin is a "UCC Financing Statement Amendment," which provides that the effectiveness of the "initial financing statement" filed by Irwin on September 16, 2002 is "terminated with respect to security interest of the secured party authorizing the termination statement." The initial financing statement listed BMZ Multi-Food Corp. as the debtor and covered collateral located at the address of the Dunkin Doughnuts restaurant in Rego Park. The court notes that the financing statement amendment form filed by Irwin contains a section for "collateral change," but Irwin did not utilize that section. CIT argues that the termination of the effectiveness of the initial financing statement is tantamount to a termination of all security interests securing the BMZ loan, including the assignment of excess rents.

UCC § 9-513[c] provides with respect to financing statements not covering consumer goods, that within 20 days after a demand from the debtor, the secured party shall file or send to the debtor a termination statement, if there is no obligation secured by the collateral covered by the financing statement. On the other hand, UCC § 9-512 provides that the secured party may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a financing statement by filing an amendment. The effect of a termination statement on a security interest is "dramatic and final"(*In re Kitchen Equipment Co.*, 960 F.2d 1242, 1247 [4th Cir. 1992]). However, a termination statement is "a unique filing created by a different code section than the one governing financing statements and amendments(Id)."

UCC § 9-513(d) provides that "upon the filing of a termination statement..., the financing statement to which the termination statement relates ceases to be

effective." By referring to the financing statement as "ceasing to be effective," UCC § 9-513(d) means that the security interest in the collateral is no longer perfected. However, because "effectiveness" ceases only as to the financing statement "to which the termination statement relates," priority is terminated only as to the security interest in the specific collateral identified in the financing statement. In any event, as the form filed by Irwin was denominated a "Financing Statement Amendment" and not a termination statement, the court concludes that it had the effect of releasing only the Rego Park collateral and not the Oceanside excess rents. Accordingly, CIT's motion for leave to renew as to the court's order granting Irwin leave to intervene as to excess rents which had not been paid over to the judgment creditor is **denied**.

This constitutes the Order of the court.

Dated: March 28, 2008 ENTER:

Dana Winslow
J.S.C.

ENTERED

APR 10 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE