

Phillip v Zanani

2008 NY Slip Op 31291(U)

April 21, 2008

Supreme Court, Kings County

Docket Number: 0012267/2007

Judge: Herbert Kramer

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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of April, 2008.

P R E S E N T:

HON. HERBERT KRAMER

Justice.

-----X

ROBERT PHILLIP,

Index No. 12267/07

Plaintiff,

- against -

DORON ZANANI,

Defendant,

- and -

CASEY WHITE,

Additional Defendant

-----X

The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-4
Opposing Affidavits (Affirmations) _____	5
Reply Affidavits (Affirmations) _____	6

Upon the foregoing papers, defendant Doron Zanani (Zanani) moves for an order (1) pursuant to CPLR 3212, granting summary judgment in his favor and declaring that a certain transfer of real property from Casey White (White) to Robert Phillip (Phillip) was fraudulent as to Zanani, White's judgment creditor, and (2) pursuant to CPLR 5015(a)(3), vacating or modifying the orders of this court dated December 15, 2004 and September 29, 2005 that were entered in the case of *Robert*

Phillip v Casey White, Index No. 42318/02 (the prior action) on the ground that such orders were based on fraud, misrepresentation, or misconduct by Phillip. Phillip cross-moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing all of Zanani's counterclaims against him on the ground that no material, triable issues of fact exist in this case.

Factual and Procedural Background

The following, gleaned from the parties' affidavits and the court's review of two motions for summary judgment filed by Zanani in the prior action,¹ sets forth a time line of certain relevant events:

The Prior Action

On December 22, 2000, Phillip and White, who are unrelated to each other, acquired real property located at 267 Kosciusko Street in Brooklyn (the property) as tenants in common. The property was originally a four-story, four-family house. Subsequently, they subdivided two of the apartments to make the property a six-family house.

On December 30, 2000, Phillip and White entered into the Owners' Agreement, which provided for a buy-out by each party in the event the other no longer wished to own the property. Section 5(B)(i) of the Owners' Agreement stated, in relevant part:

Should either party choose to nullify the agreement each party's ownership interest will be determined ... [as follows]: ...

If only one of both parties is interested in continued ownership, the uninterested party will sell his ownership interest to the interested party – each party will obtain an appraisal at their own expense and the agreed on sale price would be the average of both appraisals. The party that is uninterested in continued ownership will receive 50% of

¹ A court may take judicial notice of its own records in another action in the same court (see, e.g., *People v Burnside*, 13 Misc 3d 649, 652 n.1 [2006]).

the sale price less 50% of the outstanding mortgage and meet all his customary closing costs. The party that is interested in continued ownership will obtain financing allowing him to cover the sale price and his customary closing costs....

Some time after the acquisition of the property, the relationship between Phillip and White deteriorated to the point that, on or about October 10, 2002, Phillip commenced an action against White in this court seeking, among other things, specific performance of the option to purchase and an accounting.

On December 6, 2002, Phillip and White, through their respective counsel, entered into a detailed stipulation of settlement, which provided, in relevant part:

“2. Casey White hereby agrees to purchase the ½ interest of Robert Phillip in the subject property under the following terms.

3. Both parties within 10 days will hire and pay a certified real property appraiser in accordance with the agreement of the parties dated December 30, 2000....

* * *

7. The purchase price will then be determined in accordance with the [Owners’] [A]greement of 12/30/00.

* * *

12. Sale is subject to all tenancies[,] violations[,] liens and “as is” condition of building in which both parties reside and are fully familiar with.

* * *

15. If White is unable to obtain mortgage financing within the 45 day period, in that event White hereby agrees to sell his interest in the subject property to Phillip.

* * *

17. The accounting cause of action is referred to a JHO [Judicial Hearing Officer] to hear and determine. The parties will make a good faith effort to adjust upon financial issues, or will be determined by the Temporary Receiver....”

On December 19, 2002, White retained Zanani as his counsel and discharged the attorney who negotiated the stipulation of settlement. Zanani's claim in this action arises out of his representation of White in the prior action.

On or about March 5, 2003, in accordance with the stipulation of settlement, Zanani obtained an appraisal of the property from Vardakis Associates for the benefit of White (the White appraisal). It set the value of the property at \$400,000. On April 15, 2003, Zanani transmitted the White appraisal to Phillip's counsel. In his cover letter, Zanani stated that White wished to exercise its right to acquire the property for \$400,000, as follows:

"Mr. White demands that Mr. Phillip sell his interest in the real property known as 267 Kosciusko Street, Brooklyn, New York ('Real Property') in accordance with Paragraph 5 (B) (i) of the Owners' Agreement dated December 30, 2000.

Enclosed please find copies of the following documents: (1) an appraisal by Vardakis Associates, Inc. dated April 2, 2003, stating that the appraised value of the Real Property is \$400,000.00; (2) a payoff statement from CitiMortgage dated April 10, 2003, showing a mortgage balance of \$426,216.66; and (3) a deed, NYS TP-584, and NYC RPT forms.

Please have Mr. Phillip ... sign the deed, NYS TP-584, and NYC RPT forms and return them to me as soon as possible with a check in the sum of \$16,776.00 payable to my escrow account....

* * *

I hope that we can finally bring this lawsuit to an end without our clients incurring additional, unnecessary fees. If there is anything in this letter that you or [your] client believe is inaccurate, please [p]rovide me with a letter listing each item that you disagree with, stating your contrary position or understanding and the basis thereof."

When Phillip refused to sell his share, Zanani, on behalf of White, moved for partial summary judgment, asserting that White was entitled to purchase Phillip's share in accordance with the terms of the Owners' Agreement, as modified by the stipulation of settlement, at the \$400,000 fair market value listed in the White appraisal. White's affidavit, prepared and filed by Zanani in

support of that motion, explained the basis for the fair market value in the White appraisal, as follows:

“8. The Real Property was a legal four-family residential dwelling at the time the plaintiff [Phillip] and I bought it. We altered the Real Property by subdividing each of the four-bedroom apartments on the second and fourth floors into two separate apartments. Thus, the Real Property now contains six apartments.

9. The two additional apartments substantially reduce the market value of the Real Property by making it potentially subject to the Rent Stabilization Code. This factor was addressed by the parties in Par. 12 of the Stipulation [of settlement]..., which provided that my purchase of the plaintiff’s interest in the Real Property was subject to all tenancies, violations, liens and the ‘as is’ condition of the building. This provision means that I agreed to assume and be liable for the legal and financial consequences of the two additional apartments. I have to either legalize the apartments and register the Real Property pursuant to the Rent Stabilization Code or remove the occupants of those apartments and restore the second and fourth floors to their original condition at my cost and expense.”

On May 9, 2003, the parties resolved White’s motion for partial summary judgment by permitting Phillip to submit a valuation report from his own appraiser. The consent order, dated May 9, 2003 (the consent order), which the parties entered through respective counsel, with Zanani representing White, stated, in relevant part:

“Stipulation [of settlement] dated December 6, 2002 is modified as follows:

1. Phillip will obtain appraisal pursuant to stipulation forthwith and serve same on Zanani when received;

* * *

3. Within 30 days of Zanani’s receipt of appraisal parties will exchange all objections to either appraisal in writing;

4. If parties cannot agree on a buyout price from the two appraisals then the parties reserve the right to apply to Justice Kramer for a hearing to determine fair market value;

5. Parties on this date shall sign a consent order referring the accounting between the parties to JHO Slavin to hear and report;

6. After determination of the accounting and buy-out price or fair market value, the parties will reasonably and in good faith re-negotiate the buy-out procedure as set forth in the stipulation. If the buy-out procedure cannot in good faith be renegotiated, parties reserve right to apply to Justice Kramer to set same;

* * *

9. Motion [for partial summary judgment] by White returnable 5/23/03 is withdrawn.

On June 3, 2003, in accordance with the consent order, Zanani received an appraisal for the property by Inyoung Pak at Expert Appraisal Services prepared for Phillip on May 7, 2003 (the Phillip appraisal). The Phillip appraisal set the fair market value of the property at \$530,000 or \$130,000 higher than the White appraisal.

By letter dated June 24, 2003, Zanani objected to the methodology utilized in the Phillip appraisal and listed what he perceived to be 14 issues with the Phillip appraisal, including:

“3. Mr. Pak did not make dollar adjustments for adverse conditions that affected the marketability of 267 Kosciusko Street.

4. Mr. Pak did not make dollar adjustments to reflect that 267 Kosciusko Street contains two illegal apartments that jeopardize its status as an apartment building that is not subject to rent regulation.

5. Mr. Pak did not make dollar adjustments to reflect that 267 Kosciusko Street has an excessive number of leases that jeopardizes its status as an apartment building that is not subject to rent regulation.

* * *

10. Mr. Pak did not make dollar adjustments to 267 Kosciusko Street’s fair market value to reflect that it may have lost its status as an apartment building that is not subject to rent regulation.”

On December 2, 2003, Zanani, on behalf of White, prepared and filed a cross motion for partial summary judgment, asserting, among other things, that a hearing should be scheduled to calculate the amount to be paid by White to Phillip for the purchase of Phillip’s share in the property. In support of the motion, White submitted an affidavit, prepared by Zanani, which relied on White’s

\$400,000 appraisal and criticized Phillip's \$530,000 appraisal as being "inflated" because it was based on the erroneous methodologies previously enumerated by Zanani in his June 24, 2003 to Phillip's counsel.

On or about January 22, 2004, White discharged Zanani as attorney and hired different counsel. On March 19, 2004, Zanani filed a notice of charging lien in the amount of \$27,476.53, "which lien attaches to any verdict, report, determination, decision, judgment or final order in the defendant's favor and the proceeds therein in whatever hands they may come." On the same day, Zanani filed an action against White in the Civil Court of the City of New York, New York County, for unpaid fees and disbursements in the sum of \$24,950 (the collection action). On April 21, 2004, White filed an answer in the collection action and asserted that Zanani "did not do a good job." On October 12, 2004, the Civil Court granted judgment in favor of Zanani against White (the Zanani judgment) in the amount of \$24,950.

Notwithstanding Zanani's departure, the prior action continued. On June 18, 2004, in accordance with the consent order negotiated by Zanani, a Judicial Hearing Officer determined the issue of an accounting between the parties and concluded that White owed \$12,000 to Phillip to be paid at the closing.

On December 15, 2004, the court entered an order providing for the sale of the property (the sale order). The sale order established the selling price of the property at \$495,000, which was closer to the Phillip appraisal than to the White appraisal, based on a bona-fide offer for the property from a third party, as follows:

"ORDERED that the Court having determined on the motion that there exists a bona fide offer from a third party to purchase the subject premises ... for a price of

\$495,000.00 and having further determined that same is a fair and reasonable price for the said premises, hereby sets the buy-out price at \$495,000...."

In accordance with the consent order, the sale order granted White the first option to purchase the property within a specified period of time and, if White did not exercise his option, Phillip would then have the second option to purchase the property. The sale order listed all liens then pending against the property, including a lien of the Department of Social Services for monies advanced to White. The sale order did not list Zanani's claim because, at that time, there was no record of the Zanani judgment. The sale order was not appealed by either party. Zanani obtained a copy of the sale order by no later than March 22, 2005. Subsequent to the entry of the sale order, on February 7, 2005, Zanani filed a transcript of the Zanani judgment in the sum \$26,577.28 in New York County. The Zanani judgment remains unpaid and unsatisfied to date. Thereafter, White failed to timely exercise his buy-out option under the sale order. After Phillip timely exercised his buy-out option, White failed to respond to the "time of the essence" closing provision of the sale order. Phillip then moved to effect the transfer of the property to him under the auspices of the Sheriff of the City of New York and to deposit into the court's registry the balance of the purchase price he owed to White for White's share of the property.

In response to Phillip's motion, the court made two written inquiries of Phillip's counsel regarding the documented history of the case and the calculation of the amount due to White.² In response, the court received two detailed letters from Phillip's counsel, dated September 19 and September 26, 2005, enclosing and recounting the terms of the Owners' Agreement, the stipulation of settlement, and the consent order, and confirming that, based on the amounts set forth in the sale

² White, who received a copy of the court's correspondence to Phillip's counsel, was unavailable and had no attorney at that time.

order, the findings of the Judicial Hearing Officer, and the expense reports prepared by the property manager, White's share of the equity in the property was approximately \$24,000 (after taking into account White's share of the mortgages on the property) and the net amount payable to White was approximately \$4,100.

On September 29, 2005, the court entered an order confirming the sale of the property and approving the distribution of the sale proceeds to White, all in furtherance of the sale order (the implementation order). Because White was unavailable and had no attorney at that time, the implementation order directed the Sheriff of the City of New York to execute a quitclaim deed in the name of White with respect to White's share in the property and deliver it to Phillip, subject to Phillip depositing approximately \$4,100 with the Clerk of the Court. The implementation order stated that "the said deed shall bind Casey White and all persons claiming under him or through him with the same force and effect as if the deed had been executed by Casey White...." Notice of entry of the implementation order was served on October 17, 2005 and, on October 31, 2005, the Sheriff executed and delivered a quitclaim deed to Phillip, thereby terminating White's interest in the property.

After the deed was executed and delivered, White filed several lengthy, pro se motions seeking to reargue the sale order and the implementation order. In his motions, White contested certain deductions determined by the Judicial Hearing Officer, but did not argue that the sale price was unfair. By order dated December 7, 2005, the court denied White's motions to reargue, stating:

"the defendant [White] has not brought to this Court's attention any new facts that would affect the result of the proceedings had herein which included findings made by a Judicial Hearing Officer at the conclusion of a lengthy hearing in which the defendant fully participated."

No appeal was taken from the court's December 7, 2005 order.

The Instant Action

As stated, Zanani docketed his judgment against White in February 2005. For the next two years, Zanani apparently took no steps to collect on his judgment until his response to Phillip's action against Zanani

On April 12, 2007, Phillip commenced the instant action against Zanani seeking a declaratory judgment that Zanani's judgment lien against White is invalid. Phillip alleged that he recently refinanced the property and was unable to receive the full amount of his loan because of Zanani's judgment lien against White.

On April 24, 2007, Zanani obtained an appraisal of the property from Neglia Appraisals, Inc. (the Zanani appraisal). This appraisal set the value of the property at \$900,000 or more than twice the amount of the White appraisal originally commissioned by Zanani. The appraisal, which was made as of October 31, 2005, the date of the conveyance to Phillip, was based on an exterior examination of the property and assumed the property to be a four-family residence (although it had been converted to a six-family residence) and disclaimed any responsibility "for matters of a legal nature that affect ... the property," such as rent stabilization. Furthermore, the appraisal utilized "a quantitative sales comparison for use in a mortgage finance transaction" and, although the property was income producing, the appraiser, by agreement with the client (Zanani), determined not to utilize the cost and income approach to valuation. In support of this appraisal, Zanani offers an affidavit of Dominick Neglia, dated December 7, 2007, which does not address the much lower values set forth in the White or the Phillip appraisals.

On July 20, 2007, Zanani filed an answer in the instant action and asserted, in several counterclaims, that the sale of the property pursuant to the sale order and the implementation order was a fraudulent conveyance under Debtor and Creditor Law §§ 273, 273-a, and 276 and that Zanani was entitled to attorneys' fees for enforcing his claim pursuant to Debtor and Creditor Law § 276-a.

On October 19, 2007, the court entered an order impleading White as an additional defendant herein. However, the parties have advised the court that they have not been able to locate or serve White.

On December 19, 2007, Zanani filed the instant motion for summary judgment seeking an order: (1) pursuant to CPLR 3212, dismissing Phillip's complaint against Zanani as a matter of law and granting summary judgment in favor of Zanani on his counterclaims under Debtor and Creditor Law §§ 273 and 273-a, and (2) pursuant to CPLR 5015(a), vacating or modifying the sale order and the implementation order entered in the prior action.

On January 17, 2008, Phillip filed a cross motion for an order granting summary judgment in his favor and dismissing all of the counterclaims asserted by Zanani.

Parties' Contentions

Zanani

Zanani contends that Phillip's complaint against Zanani should be dismissed because the conveyance of White's interest in the property to Phillip was fraudulent to the extent of the Zanani judgment. Zanani states that, based on his personal knowledge, White had no assets other than his share in the property and that the conveyance left White insolvent. Zanani further contends that the property was conveyed for less than fair consideration because the Zanani appraisal valued the property at \$900,000. Zanani argues that, using the Phillip appraisal as the baseline, the value of the

property grew significantly in the two years between the appraisal and the conveyance date and reached \$927,500 on October 31, 2005. Thus, Zanani contends that White's equity in the property was at least \$202,500, not \$24,000 as represented by Phillip, and Phillip's purchase of White's equity interest was not for a fair consideration. In addition, Zanani argues that the sale order and the implementation order should be vacated or modified to the extent necessary to enforce the Zanani judgment. Zanani asserts that Phillip committed fraud and misrepresentation regarding these orders because of his failure to submit to the court a contemporaneous appraisal, to advise the court that Zanani was a creditor of White, and to give notice to Zanani of the relevant motions.

Phillip

Phillip contends that neither he nor this court was complicit in any fraudulent scheme. Phillip relies on the White and Phillip appraisals and on a third-party offer for the property to justify the purchase price set forth in the sale order.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see Alvarez v Prospect Hosp*, 68 NY2d 320, 324 [1986]). Mere conclusory statements, expressions of hope or unsubstantiated allegations are insufficient to defeat the motion (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

Relief from Judgment or Order Pursuant to CPLR 5015(a)(3)

The court views the relief requested in Zanani’s motion as another attempt to circumvent the prior determination of this court embodied in the sale order and the implementation order. Previously, Zanani’s former client, White, made the same attempt and failed.

The court starts with the consideration of CPLR 5015(a)(3), which provides, in relevant part:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

* * *

fraud, misrepresentation, or other misconduct of an adverse party

As an initial matter, this court finds that Zanani, as a judgment creditor of White, has standing to seek relief under CPLR 5015(a)(3). “To seek relief from a judgment or order, all that is necessary is that some legitimate interest of the moving party will be served and that judicial assistance will avoid injustice” (*Lane v Lane*, 175 AD2d 103, 105 [1991] [citation omitted]; see *Citibank, N.A. v. Keller*, 133 AD2d 63 [1987] [ex-wife, in asserting her right to marital residence against creditors who had obtained default judgment against her ex-husband, was an “interested person” under CPLR 5015(a)]).

The next issue is whether Zanani has timely sought relief under CPLR 5015(a)(3). Although there is no express time limit for making a motion pursuant to CPLR 5015(a)(3), such a motion must be made “within a reasonable time” (*Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475 [2005]; see *Richardson v Richardson*, 309 AD2d 795, 796 [2003]; *City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, 993 [1998]). In making the determination of reasonableness, courts have looked to whether the movant was aware of the relevant facts surrounding the issue (see, e.g., *Rizzo v St. Lawrence Univ.*, 24 AD3d 983, 984 [2005]). In this case, Zanani was aware of the sale order

since at least March 22, 2005 when he requested, by way of a facsimile transmittal letter to Phillip's counsel, "a copy of the Notice of Entry for the December 15, 2004 Order [the sale order]." Zanani's 2-1/2 year delay in seeking a relief from the sale order, which established the \$495,000 fair market value of which Zanani now complains, and which the court's subsequent order merely implemented, constitutes laches and precludes the application of the statute in this case (*see Rizzo*, 24 AD3d at 984 [plaintiff's delay of two years despite awareness of all relevant facts was unreasonable]; *Weimer v Weimer*, 281 AD2d 989 [2001] [motion brought pursuant to CPLR 5015(a)(3) three years after judgment of divorce deemed untimely]).

Even without considering Zanani's laches, the court cannot agree that the sale order and the implementation order were tainted by fraud. In speaking about "fraud, misrepresentation, or other misconduct," CPLR 5015(a)(3) requires that "the fraud not have been discoverable before the judgment" (*Cohen v Marshall*, 1 Misc 3d 867, 871 [2003] [citing *H & Y Realty Co. v Baron* , 193 AD2D 429, 430 [1993]]). Thus, if Zanani had prior actual or constructive notice of Phillip's allegedly fraudulent conduct, Zanani may not succeed (*see Cohen*, 1 Misc 3d at 871). In actuality, however, it was Zanani's client, White, whose conduct appears questionable. At White's behest, Zanani originally commissioned a \$400,000 appraisal for the property and prepared a motion seeking to compel Phillip to sell his share to White based on that price. When Phillip produced a \$530,000 appraisal, Zanani sought to discredit it by listing 14 grounds, the same bases he subsequently used in preparing White's affidavit in support of yet another motion to compel Phillip to sell. On the other hand, when it became advantageous to him to claim a higher value, he obtained a \$900,000 appraisal, which, ironically, contained some of the same impediments which he had previously found in the Phillip appraisal. Although the sale of the property occurred when he was no longer White's

counsel, Zanani made substantial preparations for the sale of the property by negotiating the consent order, commissioning an appraisal, and preparing and filing two summary judgment motions. Assuming there were fraud or other misconduct surrounding the entry of the sale order, Zanani knew or should have known of same before it was entered. In fact, Zanani admits that the White and Phillip appraisals “were ordered by Mr. Phillip and Mr. White [, respectively,] when they were motivated to establish an artificially low value for 267 Kosciusko to reduce the buy-out price.” Zanani cannot now complain of the alleged fraud when he could be considered a willing participant.

Furthermore, the fraud for which an order or judgment can be vacated or modified pursuant to CPLR 5015(a)(3) “must relate to matters other than the issues which could have been resolved in the action wherein the judgment [or the order] was obtained and must be a fraud upon the court as distinguished from fraud between the parties” (*J.J. Miller Construction Co. v Berlanti Construction Co., Inc.*, 197 NYS2d 818, 819-820 [1960], citing *In re Holden*, 271 NY 212, 218 [1936] [an order or judgment may be vacated when procured by fraud upon the court, but not for fraud between the original parties]; *524 East 73rd St. Garage v Pantex Mills, Inc.*, 274 AD 617, 618 [1949] [fraud alleged must be in some matter other than the issue in controversy in the action]).

The court infers from a reading of Zanani’s papers that he alleges a fraud in the underlying sale. Zanani’s allegations do not involve fraud in the means by which the orders were procured.

To summarize, Zanani has not established that he is entitled to relief from the sale order and the implementation order pursuant to CPLR 5015(a)(3) because of laches, his knowledge of the alleged fraud and the absence of the fraud in the means by which the orders were obtained. Therefore, CPLR 5015(a)(3) does not provide a basis for vacatur of the sale order or the

implementation order. Accordingly, the court denies that branch of Zanani's motion which seeks such relief.³

Fraudulent Conveyance Pursuant to

Article 10 of the Debtor and Creditor Law

In his answer to Phillip's complaint, Zanani asserts four counterclaims: constructive fraud under Debtor and Creditor Law §§ 273 and 273-a (Zanani's first and second counterclaims) and actual fraud under Debtor and Creditor Law §§ 276-276-a (Zanani's third and fourth counterclaims). Zanani moves for summary judgment on his first and second counterclaims, while Phillip cross-moves for summary judgment dismissing all four counterclaims.

Constructive Fraud under Debtor and Creditor Law §§ 273 and 273-a

(Zanani's first and second counterclaims)

Debtor and Creditor Law § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." "[B]oth insolvency and lack of fair consideration are prerequisites to a finding of

³ The court notes that this may be a proper case for the application of the doctrine of judicial estoppel, which "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." (*Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [2005] [citation and internal quotation marks omitted]). "[T]his rule has, properly, been applied as well to court rulings that are not denominated as 'judgments'" (*D & L Holdings, LLC v RCG Goldman Co., LLC*, 287 AD2d 65, 71 [2001] [citations omitted]). In addition, successors in interest are bound by their predecessors' legal positions (*Secured Equities Investments, Inc. v McFarland*, 300 AD2d 1137, 1138 [2002]). In this case, Zanani, as a putative successor to his client White, may be judicially estopped from contesting the representations of White regarding the value of the property made in his two motions for summary judgment which were drafted and filed by Zanani in the prior action.

constructive fraud under [the statute], and the burden of proving these elements is upon the party challenging the conveyance" (*Joslin v Lopez*, 309 AD2d 837, 838 [2003]). A person is deemed insolvent when "the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (Debtor and Creditor Law § 271[1]). Proof of lack of fair consideration is also necessary under Debtor and Creditor Law § 273-a,⁴ which permits a judgment creditor to avoid a conveyance made at the time when the creditor had an unsatisfied judgment entered against his debtor.

Although Zanani has offered no evidence regarding White's insolvency, other than his self-serving statement that he represented White and became knowledgeable of his finances and assets, it may be inferred that White was insolvent from the fact that he was unable to pay his share of expenses for the property pending the sale, that he owed approximately \$1,000 to the Department of Social Services, and that apparently he could not afford a lawyer when he appeared pro se on his motions to reargue. Accordingly, Zanani need only prove that there was no fair consideration for the sale of the property.

Pursuant to Section 272(b) of the Debtor and Creditor Law, "fair consideration" exists "[w]hen ... property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained." Here, White obtained the following consideration for the sale: (1) the satisfaction of his

⁴ Debtor and Creditor Law § 273-a provides:

"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."

obligations to pay the mortgages on the property, his share of the property obligations as determined by the Judicial Hearing Officer, his share of other property obligations, and his individual debt to the Department of Social Services, and (2) the cash balance remaining after the payment of the foregoing obligations. Such consideration, totaling \$495,000, was not disproportionately small when compared to the \$530,000 appraisal obtained by Phillip, was equal to the \$495,000 bona fide, third-party offer for the property, and was more than fair when compared to the \$400,000 appraisal which Zanani obtained in preparation for the sale.

Furthermore, the sale was at arms' length and vigorously contested, with both parties being represented by counsel (in White's case, three different counsel). A Judicial Hearing Officer heard and rendered a report on the accounting between the parties. The court supervised the sale and, in response to its requests, received additional documentary submissions from Phillip's counsel. Thus, the other element of "fair consideration" – good faith – is also present here. Accordingly, Phillip has made a prima case entitling him to summary judgment on Zanani's third and fourth counterclaims as a matter of law and the burden shifts to Zanani to prove otherwise.

Zanani contends that the consideration for the property was not fair based on the Zanani appraisal which he obtained in the instant action. The Zanani appraisal is irrelevant, however, because the court had sufficient information at the time of the sale order to determine whether the sale price was fair. Moreover, the Zanani appraisal suffers from the same faults which Zanani himself found in the Phillip appraisal. Overall, the court attaches no credibility to the Zanani appraisal because Zanani previously obtained the White appraisal which indicated a value that was

substantially less.⁵ Accordingly, Zanani has failed to rebut Phillip's case with regard to the constructive fraud claims. Consequently, Zanani's motion for summary judgment is denied and Phillip's motion for summary judgment is granted to the extent that Zanani's first and second counterclaims are dismissed.

Actual Fraud under Debtor and Creditor Law §§ 276 and 276-a

(Zanani's third and fourth counterclaims)

In contrast to the constructive fraud theory which requires proof of lack of fair consideration, proof of actual fraud contains no such requirement. Pursuant to Debtor and Creditor Law § 276, "[e]very conveyance and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."⁶

Although the parties have not addressed this issue, the court will first discuss the timeliness of Zanani's actual fraud claim. Pursuant to CPLR 213(8), the statute of limitations for an action to set aside a fraudulent conveyance, when premised upon actual fraud, is the greater of six years from the commission of the fraud or two years from the time the complaining party discovered the fraud or could with reasonable diligence have discovered it (*see Lefkowitz v Appelbaum*, 258 AD2d 563 [1999]). The burden of establishing that the fraud could not have been discovered before the

⁵ Any fluctuations in the value of the property after the White and Phillip appraisals were obtained can properly be disregarded. Where, as here, the value of the property is subject to fluctuations, price changes after the appraisal date are irrelevant (*see Clarkson Co. Ltd. v Shaheen*, 533 F Supp 905 [1982] [a pledge of stock to secure a judgment was not a fraudulent conveyance, even though the value of the stock pledged was twice the amount of its obligation on the judgment, because the price of the pledged stock had been subject to wide fluctuations]).

⁶ Debtor and Creditor Law § 276-a provides for the recovery of attorneys' fees in an action brought by a successful creditor to set aside a conveyance based upon actual fraud.

two-year period prior to the commencement of the action rests on the party who seeks the benefit of the exception (*see Lefkowitz, supra*).

It appears that Zanani was aware, as early as March 2005, of the entry of the sale order. The sale order is crucial because it established both the sale price and the process which the court's September 29, 2005 order implemented. More than 2-1/2 years later (in December 2007), Zanani filed the instant motion in which he alleged that the sale order was obtained by actual fraud. Accordingly, the court views Zanani's actual fraud claims to be untimely.

Even if the untimeliness of Zanani's actual fraud claims is overlooked, such claims are not valid. Actual fraud is often proven through "'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [1997] [citation omitted]). "Badges of fraud include (1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance" (*Dempster v Overview Equities, Inc.* , 4 AD3d 495, 498 [2004], *lv to appeal denied*, 3 NY3d 612 [2004]). The burden of proving such actual intent is on the party seeking to set aside the conveyance and such intent must be proven by clear and convincing evidence (*see Marine Midland Bank v. Murkoff*, 120 AD2d 122, 126 [1986]).

In the instant case, it is undisputed that: (1) Phillip and White are unrelated to each other and they negotiated the sale at arms' length, (2) the fair market price of \$495,000 for the property was established based on the existence of a bona fide offer from a third party, consistent with the Phillip appraisal, and in excess of the White appraisal by \$95,000, (3) although the transferor, White, knew

of the Zanani judgment, he was unavailable at that time and the sale of the property was conducted without his participation, while the transferee, Phillip, was not aware of the Zanani judgment because Zanani did not file it until after the entry of the sale order, and (4) White retained no control over the property after the sale. Because the sale does not implicate the "badges of fraud" and Zanani has not alleged facts tending to show otherwise, Zanani's "actual fraud" claim under Debtor and Creditor Law § 276 is without merit. Likewise, Zanani is not entitled to an award of an attorneys' fees pursuant to Debtor and Creditor Law § 276-a, inasmuch as he has not established actual fraud. Accordingly, Phillip's motion for summary judgment is granted to the extent that Zanani's third and fourth counterclaims are dismissed.

Declaratory Judgment Pursuant to CPLR 3001

Phillip seeks summary judgment on his complaint for a declaration that the Zanani judgment does not constitute a lien on the property.⁷ Zanani, in turn, seeks summary judgment dismissing Phillip's complaint.

CPLR 3001 provides:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

"Where no question of fact is raised but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the court may render a determination and declare the rights of the parties" (*Spilka v Town of Inlet*, 8 AD3d 812, 813 [2004] [citations

⁷ In his complaint, Phillip also seeks damages of not less than \$100,000. Phillip does not address the issue of damages in his summary judgment motion and the court deems his claim to damages as abandoned.

omitted]). If defendant prevails on any point, the proper determination is a declaration in its favor rather than dismissal of the complaint (*see Maurizio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

Pursuant to the sale order, the court approved a settlement of the action for partition between Phillip and White by permitting Phillip to acquire White's share in the property. The sale order, entered in December 2004, provided for the payment of the then-outstanding obligations with respect to the property, as well as the payment of the lien of the Department of Social Services, which secured White's obligations. The Zanani judgment was not listed in the sale order.

Zanani includes with his moving papers a copy of the transcript of the Zanani judgment filed in New York County. The filing of the Zanani judgment in New York County could not create a lien on the property because the property is located in Kings County. A judgment lien must be filed in the county in which the real property is located in order for a lien to attach to that property (*see* CPLR 5203[a]). Zanani, as the movant for summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law. However, Zanani has failed to demonstrate that he has a lien on the property in Kings County. Accordingly, that branch of Zanani's motion for summary judgment which seeks a declaration that Zanani has a lien on the subject property is denied.

Zanani further requests that the court declare that the sale of the property to Phillip was a fraudulent conveyance, either in whole or in part, to the extent of the Zanani judgment. As the court has previously ruled, however, the sale of the property was not a fraudulent conveyance and the court will not set it aside. The court will not enter a judgment in Zanani's favor against Phillip for the amount owed by White because the Zanani judgment was and remains a personal obligation of

White. Likewise, the court will not order Phillip to convey to Zanani “a fractional fee simple interest as tenant in common” in the property.

Finally, Phillip seeks a declaration that the property is free and clear of the Zanani judgment. Phillip states in his moving papers that a title search has disclosed the Zanani judgment as a lien on the property. While this search result assumes that Zanani filed his judgment in Kings County, Phillip’s moving papers do not include a copy of the Zanani judgment so filed. This is a significant oversight because the court cannot consider the validity of a judgment unless it has a record of it. Accordingly, Phillip’s motion for summary judgment is denied, with leave to renew, to the extent he seeks a declaration that he holds title to the property free and clear of the Zanani judgment.

Conclusion

In summary:

- (1) Zanani’s motion for summary judgment is denied; and
- (2) Phillip’s cross motion for summary judgment is granted to the extent that Zanani’s first, second, third, and fourth counterclaims are dismissed and it is otherwise denied with leave to renew.

The foregoing constitutes the decision and order of the court.

ENTER,

J.S.C.

HON. JUSTICE HERBERT KRAMER