

**Diamond Truck Lines Corp. v Jacob**

2009 NY Slip Op 30069(U)

January 6, 2009

Supreme Court, Nassau County

Docket Number: 10260/08

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
NASSAU COUNTY - PART 15**

**Present: HON. WILLIAM R. LAMARCA  
Justice**

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**DIAMOND TRUCK LINES CORP. and  
DIAMOND TRUCK LEASING CORP.,**

**Motion Sequence #1  
Submitted September 12, 2008  
XXX**

**Plaintiffs,**

**-against-**

**INDEX NO: 10260/08**

**JOSEPH A. JACOB and RAINA LYONS,**

**Defendants.**

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**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Affirmation in Reply.....</b>	<b>3</b>

Plaintiffs, DIAMOND TRUCK LINES CORP. and DIAMOND TRUCK LEASING CORP. (hereinafter referred to as "DIAMOND TRUCKS"), moves for an order, pursuant to CPLR §3212, granting them summary judgment against defendants, JOSEPH A. JACOB and RAINA LYONS, declaring the conveyance of certain real property by JACOB to LYONS to be fraudulent and void and granting attorneys fees, costs and disbursements of the action, pursuant to Debtor Creditor Law §276-a. Counsel for defendants opposes the motion, which is determined as follows:

Counsel for DIAMOND TRUCKS relates that, sometime between January 1, 2006 and April 5, 2007, JACOB committed a fraud against DIAMOND TRUCKS, which resulted in litigation entitled *Diamond Truck Lines Corp. v Joseph A. Jacob, Cemil Bayram, Jose T. Collado, Ivan Macychev and David Martinez*, under Nassau Index No. 006827/07, which was assigned to the Commercial Division before Justice Warshawsky. Said action was commenced on or about April 20, 2007, with the filing of the summons and complaint. Counsel for DIAMOND TRUCKS states that, prior to that time, in December 2006, criminal charges of fraud were brought against JACOB, who pled guilty in Nassau County Court where JACOB was found guilty and was ordered to pay restitution to DIAMOND TRUCKS in the sum of \$80,413.56, by judgment and order dated March 27, 2008.

Moving counsel states that, on or about April 30, 2007, with the intent to defraud his creditors, particularly DIAMOND TRUCKS, JACOB conveyed certain real property located at 75 Westwood Road, Massapequa Park, New York, to defendant, RAINA LYONS, his spouse, without consideration, and for the purpose of protecting said property from his creditors and with fraudulent intent, which was known to RAINA LYONS. Counsel for DIAMOND TRUCKS argues that said conveyance was fraudulent under the Debtor Creditor Law and the conveyance should be set aside or annulled to the extent necessary to satisfy DIAMOND TRUCKS' claim against JACOB. Moreover, counsel claims that DIAMOND TRUCKS is entitled to a money judgment against the fraudulent transferee to whom the debtor has conveyed property in the amount of the claim.

In opposition to the motion, counsel for defendants states that the transfer between husband and wife occurred on April 30, 2007, prior to service of the civil action before Judge Warshawsky, to which RAINA LYONS was not a party. Indeed, counsel states that,

in said action, plaintiff acknowledged that JACOB had not been served and that he was first served in May 2007 at the County Courthouse. Therefore, it is counsel's position that the property was not transferred after the proceedings were commenced, but before, when there were no restrictions on defendant JACOB, and that the criminal proceedings, commenced in April 2007, did not bar defendant from transferring any property. Moreover, counsel for defendants states that, while DIAMOND TRUCKS is a beneficiary of restitution under the judgment and order of the Criminal Court, it does not say that plaintiff is the "judgment creditor". Counsel argues that the order of restitution does not appear as a civil judgment against JACOB, but is rather an order of probationary restitution. In any event, he claims that even if it is considered a judgment, it is dated March 27, 2008, well after the transfer of the property in April 2007. Additionally, counsel for defendants claims that JACOB has answered the present complaint with the affirmative defense of lack of jurisdiction and claims that neither he nor LYONS has been served with process. Counsel for defendants has not provided the Court with a copy of the answer or an Affidavit of Service, so the Court cannot calculate whether said defense has been waived. See, CPLR §3211(e).

In reply, counsel for plaintiff points out that it is uncontroverted that JACOB committed a fraud against plaintiffs which resulted in over \$80,000.00 being stolen from them and, as such, JACOB was aware of his debt well in advance of the instant action, well in advance of the commercial action and prior to commencement of the criminal proceeding, as was his wife. Counsel argues that both defendants knew that the subject property might be accessible to satisfy a creditor of JACOB, and both defendants participated in the transfer of the property in order to prevent the collection of any judgment

that might be obtained. Counsel urges that the transfer was made with the intent to defraud creditors and is, therefore, void and must be set aside.

By the terms of the Debtor and Creditor Law article 10, a conveyance is deemed fraudulent as to creditors not only where it is made with actual intent "to hinder, delay or defraud creditors (Debtor and Creditor Law §276), but also where the fraud is constructive, i.e., the conveyance is made without fair consideration by a person (1) who is insolvent or will thereby be rendered insolvent (Debtor and Creditor Law §273), or (2) against whom an action is pending or a judgment has been docketed for money damages ( Debtor and Creditor Law §273-a), or (3) who is engaged in a business for which his capital is unreasonably small ( Debtor and Creditor Law §274), or (4) who believe he will incur debts beyond his ability to pay ( Debtor and Creditor Law §275).

*Marine Midland Bank v Murkoff*, 120 AD2d 122, 508 NYS2d 17 (2<sup>nd</sup> Dept. 1986). In said case, the defendant had guaranteed three (3) notes made to plaintiff by Rocket Stores, Inc., in which the defendant, his wife and her brother held a controlling interest. When Rocket Stores filed for bankruptcy and defaulted on the notes, plaintiff brought three (3) separate actions against defendant based on the guarantees and obtained three (3) money judgments against him. While these actions were pending, defendant conveyed his interest in his home to the wife. Plaintiff commenced litigation to set aside the conveyance as fraudulent, which was granted by the Lower Court on a motion for summary judgment, based upon DCL §273 (conveyance by a person who is or will thereby be rendered insolvent) and DCL §273-a (conveyance by a person against whom an action is pending), neither of which requires proof of actual intent to defraud. Plaintiff appealed on the ground that the relief afforded was too narrow and, *inter alia*, because to recover attorneys fees under DCL §276-a, actual intent to hinder, delay or defraud must be established. After relating the history of the Debtor and Creditor Law which dispensed with the outmoded presumption that intent to defraud could be shown from certain acts which now formed the

rationale for constructive fraud, Second Department found that the circumstances surrounding the conveyance established clearly and convincingly the defendant's "actual intent" to hinder, delay and defraud plaintiff which entitled plaintiff to counsel fees under DCL §273-a.. *Marine Midland Bank v. Murkoff, supra.*

... [F]raudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act. . . The circumstances established by the evidence suffice to prove the defendants' actual intent to defraud.

*Marine Midland Bank v Murkoff, supra.*

In the case at bar, the conveyance was made while criminal charges of fraud were pending against JACOB with respect to his actions concerning DIAMOND TRUCKS, and shortly after the Commercial Division Action was commenced. A transfer between husband and wife for no consideration must be scrutinized carefully in light of the circumstances facing the parties. *See, Marine Midland Bank v Murkoff, supra.* Based upon a careful reading of the submissions herein, it is the judgment of the Court that DIAMOND TRUCKS has established defendants' actual intent to hinder, delay and defraud and is entitled to an order declaring the conveyance of the subject real property by JACOB to LYONS to be fraudulent and void and granting attorneys fees, costs and disbursements of the action, pursuant to Debtor Creditor Law §276-a. Accordingly, it is hereby

**ORDERED**, that the deed, dated April 30, 2007, conveying Section 48, Block 530, Lot 29 from JOSEPH A. JACOB to RAINA LYONS, is declared to be fraudulent and void pursuant to Debtor and Creditor Law §276 and §273-a; and it is further

**ORDERED**, that the defendants are directed to convey the subject property back to the debtor, JOSEPH A. JACOB, in the form of the Bargain and Sale Deed, dated

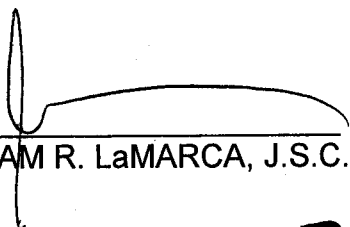
September 28, 2001, and defendant, JOSEPH A. JACOB, is enjoined and restrained from any further conveyance of said property until his obligation to DIAMOND TRUCKS is satisfied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Settle judgment on notice, with affirmation of attorney services rendered, to enable the Court to fashion an award of reasonable counsel fees, pursuant to Debtor and Creditor Law §276-a.

Dated: January 6, 2009

  
WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**  
JAN 14 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE