

Spinnell v Seldon

2009 NY Slip Op 30592(U)

March 12, 2009

Supreme Court, New York County

Docket Number: 110472/07

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

SPINNELL, ANDREW

Plaintiff,

-against-

PHILIP SELDON, et al.,

Defendants.

INDEX No. 110472/07

MOTION DATE _____

MOTION SEQ. No. 004

MOTION CAL No. _____

FILED

MAR 20 2009

NEW YORK COUNTY CLERK'S OFFICE

FILED

MAR 20 2009

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7 were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1-3

Answering Affidavits- Exhibits _____

4-5

Replying Affidavits _____

6-7

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 3/12/09

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----- X

ANDREW J. SPINNELL,

Plaintiff,

INDEX NO.
110472/07

-against-

PHILIP SELDON, MAGAZINE EMPORIUM, INC.,
VINTAGE WINE AND DINE SOCIETY, INC. a/k/a
VINTAGE FOUNDATION and a/k/a VINTAGE
FOUNDATION, INC., SILENCE IS GOLDEN
FOUNDATION, INC., BIRDDOG ASSOCIATES
INC., SHELFTALKER PUBLICATIONS, INC.,
THE PHILIP SELDON FOUNDATION, INC., and
THE VINTAGE FOUNDATION, INC.

Defendants

----- X

DONNA M. MILLS, J.:

Plaintiff, who is an attorney appearing *pro se*, moves for an order: (i) pursuant to CPLR 3212 granting plaintiff partial summary judgment on the first and second causes of action of the amended complaint for fraudulent conveyance of the title to a 1961 Chrysler 300G automobile (the "Chrysler") upon the ground of collateral estoppel; (ii) directing defendant Philip Seldon ("Seldon") to satisfy the garageman's lien of Auto Fusion Garage of Huntington, New York in an amount in excess of \$22,000 and enjoining Seldon from incurring further garageman's liens and from driving the Chrysler; (iii) granting plaintiff an award of reasonable attorneys' fees pursuant to the Uniform Fraudulent Conveyance Act; (iv) pursuant to 22 NYCRR § 130-1.1 sanctioning Seldon for making material misrepresentations to Special Referee Hoahng regarding his inability to participate at the hearing in this matter because of his health; and (v) in the alternative, in the

event the court does not grant collateral estoppel effect to the orders of the New Jersey court, directing that the instant matter be restored to the Special Referee Calendar for a hearing on the issues of whether defendant Seldon fraudulently conveyed the Chrysler to defendant Magazine Emporium, Inc. ("Magazine") and whether Magazine subsequently fraudulently conveyed the Chrysler to defendant Vintage Foundation, Inc. ("Vintage").

Seldon cross-moves for an order granting sanctions, costs, and attorneys' fees for plaintiff's frivolous conduct in moving for summary judgment.

The corporate defendants cross-move for an order granting them sanctions, costs, and attorneys' fees for plaintiff's frivolous conduct in moving for summary judgment.

In November 2006 plaintiff entered a judgment against Seldon in the amount of \$515,013. In an attempt to collect part of the judgment plaintiff commenced this action in July 2007 seeking, *inter alia*, to set aside Seldon's allegedly fraudulent transfer of the Chrysler, which he perceived as a classic car in good condition, and enjoin any further transfers. The first and second causes of action of the amended complaint (plaintiff's exhibit D) allege that Seldon transferred ownership of the Chrysler to his solely owned corporation Magazine for no consideration with the intent to hinder, delay and defraud plaintiff from satisfying the balance of the judgment in violation of Article 10 of the Debtor and Creditor Law (Fraudulent Conveyances) and that Magazine thereafter transferred ownership of the Chrysler to Seldon's solely owned corporation Vintage for no consideration with the intent to hinder, delay and defraud plaintiff from satisfying the balance of the judgment, in violation of Article 10 of the Debtor and Creditor Law (*id.*, ¶¶ 29-40).

Plaintiff made two prior motions seeking injunctive relief and an order of attachment. By

order dated February 14, 2008 (plaintiff's exhibit F) this court granted both motions to the limited extent of referring the issues of whether Seldon's conveyance of the Chrysler to Magazine and Magazine's subsequent conveyance to Vintage were fraudulent to a Special Referee. The court also directed defendants to maintain the *status quo* and not sell, transfer or convey the Chrysler and to keep it within 75 miles of New York City (*id.*). Between April 24 and September 15, 2008 the referee's hearing was adjourned seven times at Seldon's request and ultimately marked off the calendar because Seldon and his doctor claimed that Seldon was suffering from a severe outbreak of Tourette's syndrome. During this period plaintiff and Seldon were involved in a related action in New Jersey. On March 20, 2008 the New Jersey court made a bench finding that Seldon was the president and controlling member of Vintage (which was not a party to the New Jersey action) and sole signatory on all bank accounts of Birddog Associates, Inc. ("Birddog"), Magazine and the Silence is Golden Foundation, Inc. and that Seldon controls the finances of these corporations (see plaintiff's exhibit I, pp 11-12, 15). The court found further that the transfer of \$400,000 from Birddog's New Jersey bank account to Magazine's New Jersey bank account was a fraudulent conveyance (*id.*, at 13).

There are five branches to plaintiff's application. In the first branch he requests summary judgment. In his notice of motion (which includes his arguments for the relief requested) plaintiff argues that he is entitled to summary judgment on his first two causes of action under the doctrine of collateral estoppel because the New Jersey court found that Magazine was Seldon's *alter ego* and that Seldon's conveyance of the Chrysler to Magazine was fraudulent. According to plaintiff, the New Jersey court's finding precludes defendants from relitigating the issue and warrants a finding by this court that Magazine's subsequent conveyance of the Chrysler

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to Vintage was also fraudulent. In his supporting affidavit plaintiff significantly alters his argument by stating that the New Jersey court's finding that a \$400,000 transfer from Birdog's bank account to Magazine's bank account was fraudulent "is relevant to the transfer of the Chrysler because it was a transfer made by the same insider to the same wholly dominated transferee" (see Spinnell supporting affidavit, ¶ 20).

The party seeking to invoke the benefit of collateral estoppel (also known as issue preclusion) must prove that the identical issue was "necessarily decided" in the prior action and is decisive in the present action and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (see *D'Arata v New York Central Mutual Fire Insurance Co.*, 76 NY2d 659, 664 [1990]). The doctrine of collateral estoppel is not applicable herein because the issues of whether the transfer of the Chrysler from Seldon to Magazine and Magazine's subsequent transfer of the Chrysler to Vintage were fraudulent were not necessarily decided in the New Jersey action which involved bank accounts. Furthermore, Vintage was not a party to that action.

Plaintiff's request for attorneys' fees in the third branch of his motion will be denied because it is predicated on the court's granting the first branch of his motion. Plaintiff's request for sanctions against Seldon in the fourth branch of his motion has been withdrawn.

The second and fifth branches of plaintiff's motion remain. In the second branch plaintiff seeks an order directing Seldon to satisfy a \$22,000 garageman's lien held by Auto Fusion Garage which is in Huntington, Long Island contending that Seldon violated the intent of the restraint set by this court's February 14, 2008 order (see *supra*) by encumbering the Chrysler. Plaintiff's claims are disputed by Seldon. In the fifth branch of his motion plaintiff alternatively

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requests that this matter be restored to the referee's calendar in the event that the first branch of his motion is denied. The court finds that this matter should be restored to the referee's calendar at which time the issues raised by plaintiff in the second branch of his motion can be addressed.

Seldon and the corporate defendants have separately cross-moved "for an Order granting defendants sanctions, costs and attorneys' fees based on plaintiff's allegedly frivolous conduct in moving for summary judgment." 22 NYCRR section 130-1.1 provides for an award of costs for actual expenses reasonably incurred and reasonable attorney's fees and for the imposition of financial sanctions resulting from "frivolous" conduct. Conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false" (22 NYCRR § 130-1.1[c][1], [2] and [3]). Frivolous conduct includes the making of a frivolous motion for costs or sanctions (*id.*). In his supporting affidavit Seldon accuses plaintiff of falsely accusing him of making various false representations. The corporate defendants contend that plaintiff's motion is frivolous because the doctrine of collateral estoppel cannot apply to Vintage which was not a party to the New Jersey action and because the New Jersey order relied on by plaintiff was superseded by another order which deleted the language stating that Magazine was Seldon's *alter ego*. They add that plaintiff was forewarned that his motion was baseless.

Plaintiff's "[motion] for summary judgment," upon which defendants' cross-notice of motion explicitly focus, is based on the doctrine of collateral estoppel which the court found to be inapplicable. While the court disagrees with plaintiff's conclusion, his arguments in support

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of applicability are not “completely without merit in law” given the *alter ego* issue which permeates this action.

Accordingly, plaintiff’s motion is granted to the extent that it is hereby

ORDERED that the issues of Seldon’s liability for the garageman’s lien held by Auto Fusion Garage in Huntington, Long Island and whether Seldon’s conveyance of the Chrysler to Magazine and Magazine’s subsequent conveyance of the Chrysler to Vintage were fraudulent shall be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee’s Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that plaintiff’s motion is in all other respects denied; and it is further

ORDERED that this court’s order dated February 14, 2008 and entered on February 25 2008 shall remain in full force and effect; and it is further

ORDERED that the cross-motions by Seldon and the corporate defendants for sanctions and related relief are denied.

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court’s website.

This constitutes the decision and order of the court.

DATED: *March 12*, 2009



J.S.C.

FILED DONNA M. MILLS, J.S.C.

MAR 20 2009

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