

28-13 Rockaway Blvd. Corp. v Prasad

2009 NY Slip Op 31787(U)

August 3, 2009

Supreme Court, Queens County

Docket Number: 4704/2009

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

128-13 ROCKAWAY BOULEVARD CORP. x
D/B/A OZONE PARK,

Plaintiff,

-against-

DWARKA PRASAD A/K/A DWARKA P. PRASAD,
PATSY PRASAD, DAYANAND PRASAD A/K/A
SONNY PRASAD A/K/A SUNIL PRASAD,
MICHAEL L. GANGADEEN, and JOHN DOE "1"
THROUGH JOHN DOE "10" inclusive the last
ten names being fictitious and unknown to
plaintiff, the persons or parties intended being
the persons or corporation, if any, having or claiming
an interest in or lien upon the real property described
in the Complaint,

Defendants.

_____ x

Index
Number 4704 2009

Motion
Date June 3, 2009

Motion
Cal. Number 28

Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by defendant Michael Gangadeen for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint and for an order awarding costs, sanctions and punitive damages against plaintiff and plaintiff's counsel pursuant to Disciplinary Rule 7-102(a)(1) and 22 NYCRR 130-1.1.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavits - Exhibits (A-I).....	1-6
Opposing Affirmation - Exhibits (A-K).....	7-9
Reply Affirmation - Exhibits (J-L).....	10-13

Upon the foregoing papers this motion is determined as follows:

Plaintiff 128-13 Rockaway Boulevard Corp. d/b/a Ozone Park Lumber (Ozone Park), a building materials supplier, sold and delivered materials to Treasure Development Corp. between June 5, 2006 and June 4, 2007, totaling \$47,367.83. Treasure Development Corp.'s principal, Dwarka Prasad, executed a personal guarantee on June 8, 2005 in favor of Ozone Park. Treasure Development paid Ozone Park the sum of \$7,755.15. In October 2007, Ozone Park commenced an action to recover the sums owed by Treasure Development and Dwarka Prasad, entitled *128-13 Rockaway Boulevard Corp. d/b/a Ozone Park Lumber v Treasure Development Corp., et al.* (Index No. 27082/07). A judgment was entered against Dwarka Prasad and Treasure Development on September 8, 2008 in the sum of \$40,237.68. Michael Gangadeen was the attorney of record for Treasure Development Corp. and Dwarka Prasad in said action.

Plaintiff alleges in his complaint that the judgment debtor Dwarka Prasad and various relatives conveyed to Michael L. Gangadeen three parcels of real property, for little or no consideration, rendering Dwarka Prasad judgment proof. Mr. Gangadeen, an attorney, allegedly represented the Prasads in connection with these real estate transactions as well as in connection with their construction business Treasure Development. It is alleged that the Prasad defendants purchased single-family residences, converted them to two-family residences and sold them at profit, and that they entered into a business arrangement whereby defendant Gangadeen shared in the profits of the Prasads' real estate holdings and construction business.

Plaintiff further alleges that Michael Gangadeen is the chairperson of MTS Funding Inc., a short-term business credit institution and that MTS Funding drafted a promissory note with itself as the promisee and Patsy Prasad as the promisor in the sum of \$25,407.05 dated April 2007; that MTS Funding drafted a promissory note with itself as the promisee and Dwarka Prasad as the promisor in the sum of \$30,000.00 dated May 30, 2007, stating that payment was made in cash and deposited with Sunil Prasad; that Gangadeen drafted a promissory note with himself as promisee and Dwarka Prasad as promisor, in the sum of \$30,000.00 dated June 1, 2007 stating that payment was made in cash and deposited with Sunil Prasad. It is alleged that defendant Dayanand Prasad is also known as Sunil Prasad and as Sonny Prasad, and is the husband of Patsy Prasad and the president of Treasure Development.

It is alleged that defendant Gangadeen is the owner of the real property known as 190-24 Woodhull Avenue, Jamaica, New York, which was conveyed to him by Dwarka Prasad for no consideration on June 21, 2007; that Gangadeen is the owner of the real property known as 120-45 147th Street, South Ozone Park, New York, which was

conveyed to him by Dwarka Prasad for no consideration on June 21, 2007; and that Gangadeen is the owner of the real property known as 117-18 143rd Street, Jamaica, New York, which was conveyed to him by Patsy Prasad for no consideration, on June 21, 2007. It is alleged that Gangadeen simultaneously acted as the attorney for the Prasad sellers and as the buyer in each of these transactions.

In the first cause of action against Dwarka Prasad and Gangadeen, plaintiff seeks pursuant to the Debtor and Creditor Law, to set aside the conveyance of the real property known as 190-23 Woodhull Avenue, Jamaica, New York. It is alleged that at the time of the conveyance, these defendants knew that Dwarka Prasad was indebted to the plaintiff; that said conveyance was made without fair consideration; that Gangadeen knew that said conveyance was part of a scheme to render Dwarka Prasad insolvent; that said conveyance was made with the intent to render Dwarka Prasad insolvent; that as a result of said conveyance, Dwarka Prasad was rendered insolvent; and that said conveyance was intended to hinder, delay and defraud plaintiff's claims against Dwarka Prasad.

The second cause of action against Dwarka Prasad and Gangadeen seeks to set aside the conveyance of the property known as 120-45 147th Street, South Ozone Park, New York and sets forth identical allegations with regard to this property.

The third cause of action against Dwarka Prasad, Patsy Prasad and Gangadeen to set aside the conveyance of the property known as 117-18 143rd Street, Jamaica, New York. It is alleged that at the time said property was conveyed by Patsy Prasad to Gangadeen, Gangadeen and his business associate, Dwarka Prasad, were indebted to the plaintiff for the sum of \$39,712.68; that the conveyance of the property by Patsy Prasad occurred at a time when she and defendants Dwarka Prasad and Gangadeen knew Dwarka Prasad was indebted to the plaintiff; that said conveyance by Patsy Prasad to Gangadeen was without consideration and with Gangadeen's knowledge that the conveyance was part of a scheme to render Patsy Prasad, Dwarka Prasad, and Dayanand Prasad insolvent; that said conveyance was made with the intent to render Patsy Prasad, Dwarka Prasad, and Dayanand Prasad insolvent and that as a result of said conveyance; that Patsy Prasad was rendered insolvent and that said conveyance was intended to hinder, delay and defraud plaintiff's claims against Dwarka Prasad.

The fourth cause of action against Dwarka Prasad, Patsy Prasad and Gangadeen alleges that the subject three parcels of real property were conveyed by Patsy Prasad and Dwarka Prasad to Gangadeen for no consideration; that on June 21, 2007, a fourth parcel of real property known as 134-25 226th Street, Laurelton, New York, was conveyed to Gangadeen and then reconveyed by Gangadeen to Patsy Prasad for no consideration; and that the Laurelton property was then conveyed to a third party for consideration. It is alleged that

at the time of said conveyance to Gangadeen, Dwarka Prasad was indebted to the plaintiff for \$39,712.68; that defendants Dwarka Prasad, Patsy Prasad, Dayanand Prasad and Gangadeen had knowledge of said debt; that these conveyances were made for no consideration; that these conveyances were part of a conspiracy with the intent to defraud; and that as a result of said fraudulent conduct, plaintiff sustained damages of no less than \$39,712.68.

Plaintiff attached to his complaint copies of the deed recording and endorsement pages for the real properties known as 190-24 Woodhull Avenue, 120-45 147th Street, and 117-18 143rd Street. Copies of the three promissory notes were also attached to the complaint.

Defendant Gangadeen now moves to dismiss the complaint on the grounds of documentary evidence and the failure to state a cause of action, pursuant to CPLR 3211(a)(1)(7). Mr. Gangadeen states in his affidavit that he is an attorney and that he represented the Prasads in the purchase of real estate properties, and also maintained a business relationship with Dwarka Prasad, Patsy Prasad and Dayanand Prasad. He states that the Prasads obtained loans from his company in the sum of \$90,000.00; that they were unable to repay these loans; and that he entered into a partnership with the Prasads whereby he would finance the construction of the properties and share in the profits. Mr. Gangadeen states that in order to protect his investments, he required that the Prasads convey the deeds to the subject properties to him, and that upon the completion of construction and the sale of the property said deeds would be re-conveyed to the Prasad grantor at the closing of title. He states that he was unaware of Dwarka Prasad's debt to the plaintiff when title was conveyed to him in June 2007, and that he did not learn of the debt until the commencement of the action on the debt in October 2007. He states that he negotiated a stipulation between plaintiff and Treasure Development and Dwarka Prasad for the payment of said debt and that the debtors' failure to comply with the stipulation resulted in the entry of the September 8, 2008 judgment.

Mr. Gangadeen alleges that the Prasads failed to make mortgage payments on the subject properties and, therefore, all of the properties are in foreclosure. He asserts that he never owned the property identified as 134-25 226th Street in the fourth cause of action; and that the transfer of the other properties did not render the Prasad defendants insolvent, as they own other assets.

In support of the motion, defendant Gangadeen has submitted an affidavit from Bernardo Gamba, the chief executive and senior manager of Expert Designers Digital Corp. Mr. Gamba states that this firm was retained by Sunil Prasad to draw up and submit to the Department of Buildings, plans for new construction of properties owned by Dwarka Prasad

or Patsy Prasad, including the properties located at 190-24 Woodhull Avenue, 120-45 147th Street, and 117-18 143rd Street. He states that the Prasads were not able to pay for the work his firm performed and that they brought in a partner, Michael Gangadeen, who paid for said work. He states that he discovered that Mr. Gangadeen also paid for the electricians, plumbers, building materials and workers for these properties.

Upon review, the factual allegations presumed to be true, the pleader given the benefit of every favorable inference that can be drawn from the pleading, and supporting affidavits and documentary evidence considered for the limited purpose of determining whether plaintiffs have a cause of action (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526 [1999]), it is clear that plaintiff has stated claims on several theories for fraudulent conveyance under the Debtor and Creditor Law (*see Shisgal v Brown*, 21 AD3d 845 [2005]).

A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration (Debtor and Creditor Law § 273). Also fraudulent are conveyances made without fair consideration when the conveyor “intends or believes that he will incur debts beyond his ability to pay as they mature” (Debtor and Creditor Law § 275). “Every conveyance made 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” (Debtor and Creditor Law § 276). Thus, where a conveyance was made for fair consideration, it may constitute a fraudulent conveyance under Debtor and Creditor Law § 276. “DCL § 276, unlike sections 273 and 275, . . . does not require proof of unfair consideration . . .” (*Wall St. Assoc. v Brodsky*, *supra* at 529 [1999]).

Dismissal under CPLR 3211(a)(1) is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, *supra* at 87-88 [1994]). The documentary evidence submitted by defendant Gangadeen does not conclusively establish a defense to these claims as a matter of law.

An antecedent debt can constitute fair consideration (*Matter of American Inv. Bank v Marine Midland Bank*, 191 AD2d 690, 692 [1993]). Debtor and Creditor Law § 272(a) provides, in relevant part, that “fair consideration is given for property . . . when in exchange for such property . . ., as a fair equivalent therefore, and in good faith, . . . an antecedent debt is satisfied.” In order for the satisfaction of the antecedent debt to constitute fair consideration for a transfer of property, there must be a fair equivalency between the value of the antecedent debt deemed to be satisfied and the value of the property transferred, and the transfer must have been made in good faith.

Here, Mr. Gangadeen asserts that the properties were transferred to him due to the Prasads' inability to pay three promissory notes. However, only one promissory note in the sum of \$30,000.00 was given by Dwarka Prasad which names Mr. Gangadeen as the promisee. The other two promissory notes names as the promisee a corporate entity. In the absence of any evidence of the appraised value any of the subject real properties conveyed by Dwarka Prasad to Mr. Gangadeen, said promissory note is insufficient to establish that it is an antecedent debt which constitutes fair consideration.

Mr. Gangadeen's claim that he paid for various materials and work performed at the subject properties during the time he held title to said properties, does not establish the existence of a bona fide debt, antecedent or otherwise. Therefore, neither Mr. Gangadeen nor Mr. Gamba's affidavits are sufficient to establish the existence of an antecedent debt.

The documentary evidence submitted by the defendants is insufficient to establish that any of the subject properties were conveyed by the debtors for fair consideration. In addition, absent any documentary evidence regarding the chain of title of these properties, defendants have failed to establish that the subject properties were neither assets of the debtors Dwarka Prasad and Treasure Development Corp., nor purchased with the assets of the debtors.

Mr. Gangadeen's claim that the Prasads have remained solvent despite the subject conveyances is not supported by the documentary evidence. The deed submitted by Mr. Gangadeen for the real property known as 97-11 106th Street, Ozone Park, New York between Rafica Curich and Joseph Curich and Patsy Prasad, recites a consideration of \$10.00, and is dated April 10, 2007. The deed dated August 24, 1998 for an apartment located at 35-23 Crescent Street, Astoria, New York recites no consideration, and states that Dwarka Prasad has a one percent interest in said property. However, no evidence has been submitted regarding the appraised value of these properties, or the appraised value of Dwarka Prasad's interest in Treasure Development Corp.

The documentary evidence establishes that the Woodhull Avenue property was transferred on May 22, 2007 by deed from Dwarka Prasad to Angela Augustine for the recited consideration of \$10.00 and that Mr. Gangadeen represented Mr. Prasad in this transaction. This deed was recorded on June 19, 2007. The documentary evidence further establishes that Ms. Augustine obtained two mortgage loans totaling \$580,000.00 and said amount was recited as the sale price on a New York State Real Property Transfer Report executed by Ms. Augustine and Mr. Prasad. Ms. Augustine apparently made at least one mortgage payment. Mr. Prasad, pursuant to a deed dated June 21, 2007, conveyed the identical Woodhull Avenue property to Mr. Gangadeen, for the recited consideration of

ten dollars, which was recorded on September 6, 2007. The New York State Real Property Transfer Report executed by Mr. Gangadeen and Mr. Prasad, dated June 21, 2007, states that the sale price is zero dollars. Ms. Augustine thereafter filed for bankruptcy, and one of the mortgagors filed a foreclosure action against the Woodhull Avenue property.

Mr. Gangadeen asserts that he never owned the Woodhull Avenue property, as it was recorded after the Augustine deed. However, as Mr. Gangadeen represented Mr. Prasad in the Augustine transaction, he was aware of the prior conveyance, and he has offered no explanation as to why the property was subsequently conveyed to him. The court, therefore, finds that discovery is warranted as to these transactions, and the request to dismiss the complaint as to said property is denied.

As regards the premises known as 117-18 143rd Street, Jamaica, New York, plaintiff was not a creditor of Pasty Prasad. However, a plaintiff does not lack standing to assert a fraudulent conveyance claim, and to seek to have a conveyance set aside, merely because the plaintiff is not a creditor of the transferor. Rather, Debtor and Creditor Law § 278(1)(a) specifically provides that, where a conveyance is fraudulent as to a creditor, the creditor may, “as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or immediately from such a purchaser, . . . have the conveyance set aside . . . to the extent necessary to satisfy his claim.” Thus, although plaintiff is not a creditor of Patsy Prasad, if for example, plaintiff is able to establish that the 143rd Street property was acquired by Patsy Prasad using assets belonging to the debtors, that the conveyance to Gangadeen was a fraudulent conveyance, and that he was not a bona fide purchaser for fair consideration, then plaintiff could presumably have the transfer of the assets set aside to the extent necessary to satisfy its claim. The court, therefore, finds that discovery is warranted as to this transaction, and the request to dismiss the complaint as to said property is denied.

The fact that the subject properties may have been sold pursuant to a foreclosure action or pursuant to a sale to a bona fide third party does not warrant the dismissal of this action. Generally, the creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance (*Neshewat v Salem*, 365 F Supp 2d 508, 521 [2005]). However, where the assets fraudulently transferred no longer exist or are no longer in the possession of the transferee, a money judgment may be entered against the transferee in an amount up to the value of the fraudulently transferred assets (*id.* at 521-22; *see Stochastic Decisions, Inc. v DiDomenico*, 995 F2d 1158, 1172 [1993]). Thus, plaintiff's fourth cause of action properly alleges a claim for damages arising out of the alleged fraudulent conveyances.

To the extent that Mr. Gangadeen states that he never owned a fourth parcel identified in the fourth cause of action as 134-25 226th Street, Laurelton, New York, this statement is contradicted by the plaintiff's documentary evidence which shows that this property was conveyed by Patsy Prasad to Michael Gangadeen on June 21, 2007 for the recited consideration of \$10.00, and that said deed was recorded on September 6, 2007, and that the Real Property Transfer Tax form states that the sale price was zero and was executed by Ms. Prasad and Mr. Gangadeen. Whether Mr. Gangadeen accepted the deed for said property, however, is insufficient to defeat this claim, as he admits to having been in possession of the three subject properties.

Finally, as to the fourth cause of action, in pleading intentionally fraudulent conveyance (Debtor and Creditor Law § 276), plaintiff has alleged the overall fraudulent scheme in detail (*see Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307 [1995]), and fraudulent intent is fairly inferred from such details (*cf. 125 Assoc. v Cralin Trading Assoc.*, 196 AD2d 630). Plaintiff is, therefore, in compliance with CPLR 3016(b).

Accordingly, defendant Michael Gangadeen's motion to dismiss the complaint, and for the imposition of sanctions is denied.

Dated: August 3, 2009

J.S.C.