

Sarasota CCM, Inc. v Kuncman
2009 NY Slip Op 32135(U)
September 8, 2009
Supreme Court, New York County
Docket Number: 019911/07
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SARASOTA CCM, INC.,

Plaintiff,

-against-

CATHERINE KUNCMAN,

Defendant,

CATHERINE KUNCMAN,

Third-Party Plaintiff,

-against-

BEN ZION C. KUNCMAN,

Third-Party Defendant.

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 019911/07

MOTION DATE: June 8, 2009
Motion Sequence #002

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Affirmation in Support..... X
- Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR 3212 directing the entry of a summary judgment in favor of the plaintiff and against the defendant, Catherine Kuncman, for the relief demanded in the complaint, \$96,042.36 plus interest and costs of suit, on the ground that defendant, in order to aid her husband, Ben Kuncman a/k/a Ben-Zion C. Kuncman [against whom plaintiff already has a judgment in the amount of \$96,042.36 plus interest and costs of suit], defrauded his creditors, including plaintiff, by, among other things, unlawfully diverting moneys to her husband that she received from various Dunkin' Doughnut franchises nominally in her name but equitably owned by her husband, and for such other and further relief as may be just, proper and equitable, is determined as hereinafter set forth.

FACTS AND CONTENTIONS

The plaintiff obtained a judgment against the defendant's former husband, Ben Zion C. Kuncman for \$96,042.36 in August 2004. Mr. Kuncman acquired title to his marital home from his own corporation, Land Associate Realty, Inc. in April, 1998. He applied for a mortgage of \$330,000 to purchase the home on the same date of the acquisition. Thereafter, he conveyed the property to his wife, the defendant in the instant action.

He also had shares of a corporation, Get-A-Lot-Of-Dough that consisted of two Dunkin' Donuts franchises, with two other shareholders but became the sole share-holder of the franchises in 1998. He transferred his shares in Dunkin' Donut franchises to the defendant in or around 1999 for which consideration is not known. After the transfer of the marital home and the shares of the franchises, he became insolvent to his creditors.

The judgment against Ben Kuncman remains unsatisfied. The plaintiff initiated this action against the defendant alleging that the defendant should be held personally liable for the debts of Ben Kuncman because she engaged in a concerted effort to defraud the creditors of Mr. Kuncman by unlawfully diverting or permitting him to hide his income and his assets away from the reach of his creditors.

The plaintiff asserts that Mr. Kuncman conveyed the marital home and the corporate shares to the defendant without fair consideration in order to defeat his creditors but used the money from the franchises to pay down the mortgage on the marital home and to pay other debts that he was personally liable for, as if he still owned them. It argues that the defendant engaged in a fraud, by helping or letting Mr. Kuncman to hide money from the reach of his creditors and by diverting the money unlawfully to him.

The plaintiff further asserts that by permitting the diversion, and by paying his personal obligations out of revenues generated by operating the franchises, this defendant has wasted corporate assets for unlawful purposes and, therefore, is directly liable to the plaintiff.

The defendant alleges that the plaintiff's motion for summary judgment does not satisfy the requirements of such motion since it is not supported by an affidavit from a person with actual knowledge of relevant facts and, therefore, should be denied. She further alleges that the plaintiff's use of her deposition in support of its instant motion is inadmissible since she did not certify the deposition. She denies the plaintiff's allegation that the above transfers were made without consideration stating that the plaintiff distorts the nature of her husband's testimony regarding the adequacy of consideration for the transfers.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

It is also well settled law that an affidavit in opposition to a motion for summary judgment must show evidentiary facts that warrant the necessity of trial. (See, Shapiro v. Health Ins. Plan of Greater New York, 7 NY2d 56, 194 NYS2d 509, 1959).

The Court concludes, after examining the transcript of Mr. Kuncman's testimony, that he concededly acknowledged that he transferred the interest in the franchises without fair consideration thereby making him insolvent to his creditors. Every conveyance made 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 without a fair consideration. (Debtor Creditor Law 273). Under DCL 273, actual intent to defraud need not be proven. (Dutchess County v. Dutchess Sanitation Services, Inc., 86 AD2d 884, 447 NYS2d 531, 2nd Dept., 1982).

It is the Court's finding that Mr. Kuncman admitted that he gave the shares to the defendant for nominal, if any, consideration. The defendant did not offer any evidence that there was fair consideration paid for the transfer of the marital home.

The defendant was a full time employee of a high school during the time of her ownership and maintained her employment while she owned the franchises. In 2006, Mr. Kuncman wrote a letter that appears to be directed to a bank employee, in which he states: "I am employed at GOT-A-LOT-A-DOUGH; my yearly income is \$80,000. It is impossible to sustain payments of \$6500.00 per months..Please can you help me to spread out my payments to 36 months. THANK YOU". Mr. Kuncman testified, during the deposition taken in November, 2006, that he had not been employed for the past five years of 2001 to 2006. The plaintiff's documentary evidence shows that Mr. Kuncman was being paid by the Dunkin' Donut franchises even after 2007, supporting the allegation that he was the actual owner of the business, operated the business, and the defendant permitted Mr. Kuncman to divert the corporate assets unlawfully.

The defendant does not offer any reason for the franchises's payment to Mr. Kuncman so that he could pay the mortgage for the marital home. According to her testimony, she assumed the mortgage when the property was conveyed to her. She does not provide any evidence that she actually paid the mortgage after she assumed it. The reason why Mr. Kuncman, who did not have any authority to utilize the corporate assets, wrote a letter authorizing Nisha Deonarine, the manager of the Dunkin' Donuts stores to sign the checks to pay his debts is similarly unexplained.

The Court also notes the defendant's failure to explain the reason that the deed to the marital home was reversed in date with the discrepancy of 8 months. Mr. Kuncman acquired title to the property in April, 1998. However, the deed from Mr. Kuncman to the defendant is dated August, 1997. These facts, and circumstances suggest that Mr. Kuncman back dated the deed to the defendant for a nominal consideration of ten dollars in order to avoid the liability. He could not possibly have conveyed the property in August, 1997 that he did not hold title to until April, 1998. This reversal in the date of transaction supports the plaintiff's allegation that the defendant engaged in a concerted effort to defraud the creditors of Mr. Kuncman.

The defendant's contention is wholly unsupported by any evidentiary proof to defeat the plaintiff's motion for summary judgment. She fails to raise a triable issue of fact regarding the allegedly fraudulent conveyance of the marital home and the franchises, by her failure to produce any evidence relative to the consideration for the conveyance of the marital home and Dunkin' Donuts franchises. The Court holds that the plaintiff sufficiently proved its case by offering evidentiary documents while the defendant provides no evidentiary proof whatsoever to persuade the Court to conclude otherwise.

It was Mr. Kuncman who actually owned the franchises and that the defendant was merely a figurehead of the franchises. The Court also finds that the defendant allowed her husband to divert the corporate assets with the resulting loss of the franchises and participated in the fraudulent scheme.

The defendant's contention that the plaintiff's use of her deposition improperly supports this motion, is based on a flawed interpretation of the law. It is well settled law in this State that when the party is represented by a counsel, service of interlocutory papers is to be made on the attorney for a party, not upon the party herself. (CPLR 2103(b); See **Monarch Ins. Co. v. Pollack**, 32 AD2d 819, 302 NYS2d 432, 2nd Dept., 1969). The rule regarding service of interlocutory papers is distinguished from the rule of the service of initiatory papers, i.e., complaint and the summons. Plaintiff's counsel has demonstrated that Mr. Smith, the defendant's counsel at the time of her deposition, was served with a copy of her deposition, as well as plaintiff's counsel, in the normal course of business. Therefore, the defendant is deemed to have been furnished with the copy of her deposition. In addition, the defendant and her counsel had ample opportunity to request and review the copy of her deposition during the intervening years.

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Accordingly, pursuant to CPLR 3116, such transcript may be utilized in full effect.

In addition, it is well established that an attorney's affirmation in support of a motion for summary judgment annexing deposition testimony and other proof, rather than affidavits of fact made on personal knowledge, is not fatal to summary judgment motion. (See Woods v. Zik Realty Corp., 172 AD2d 606, 568 NYS2d 146, 2nd Dept., 1991). The requirements for a motion for summary judgment can be met without a supporting affidavit of fact where the supporting documentary evidence clearly shows that the defendant is not likely to defeat the motion. Therefore, the defendant's contention that the plaintiff's motion for summary judgment does not satisfy the requirements of CPLR 3212 is meritless since the plaintiff has provided evidentiary documents proving its cause of action.

In summary, the plaintiff established its **prima facie** entitlement to summary judgment by demonstrating that the subject property and the shares of the franchises were transferred without fair consideration. In opposition to the plaintiff's **prima facie** showing, the defendant failed to raise a triable issue of fact by submission of admissible proof. The plaintiff's motion for summary judgment is **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated SEP 08 2009


XXX J.S.C.

ENTERED
SEP 10 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE