

Home Design Realty Corp. v Aude Realty Corp.

2010 NY Slip Op 31380(U)

June 4, 2010

Supreme Court, Suffolk County

Docket Number: 25035/2007

Judge: Paul J., Jr. Baisley

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SHORT FORM ORDER

INDEX NO. 25035/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:**Hon. Paul J. Baisley, Jr.**

HOME DESIGN REALTY CORP.,

Plaintiff(s),

-against-

AUDE REALTY CORP. AND RENZON
CONCEPCION,

Defendant(s).

ORIG. RETURN DATE: June 3, 2008**FINAL RETURN DATE:** June 10, 2008**MTN. SEQ. #:** 001-MG**PLTF'S ATTORNEY:**CYNTHIA BURKE, ESQ.
50 CLINTON ST, STE 503
HEMPSTEAD, NY 11550**DEFT'S ATTORNEY:**CARDINO & CARDINO, ESQS.
825 MERRICK RD,
COPIAGUE, NY 11726

Upon the following papers numbered 1 to 13 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 6; Affidavits in Opposition 7 - 10; Affirmation in Reply 11 - 13; it is

ORDERED that summary judgment is granted to the plaintiff as follows; it is

ORDERED and DECLARED that, pursuant to Debtor and Creditor Law §273-a, the deed between the defendants Aude Realty Corp. and Renzon Concepcion, dated October 23, 2006 (recorded in Liber 12, page 403; as to Dist 0500, Section 138.00, Block 01.00, Lot 016.000; and as further particularized in the instant complaint), as to the conveyance of certain real property located on Second Avenue, Brentwood, New York, is a fraudulent conveyance of said property and, as such, is declared null and void; and it is further

ORDERED that the County Clerk shall mark her records accordingly; and it is further

ORDERED that the defendant Renzon Concepcion is personally liable on the underlying judgment in *Home Design Realty Corp. v Aude Constr. Corp. and Aude Realty Corp.* (Suffolk County District Court, Second District, Index No. BAC 2346/04), with interest at the statutory rate from November 29, 2006 (the date of docketing of the underlying judgment), to the extent that the plaintiff cannot be placed in the position it would have been in had the fraudulent transfer not have occurred; and it is further

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ORDERED that, pursuant to Debtor and Creditor Law §276-a, the court finds the defendants had the actual intent to defraud the plaintiff by transferring the subject property in order to prevent the plaintiff from satisfying its judgment against Aude Realty Corp. and, accordingly, the plaintiff is entitled to legal fees in the amount of \$2,500.00 for legal services already provided and for additional legal fees incurred from this point until the completion of this action in an amount to be determined upon the submission of an attorney's affirmation of service on notice to the defendants; and it is further

ORDERED that the defendants are jointly and severally liable for such attorney's fees; and it is further

ORDERED that the defendants' counterclaim is dismissed; and it is further

ORDERED that with regard to the issues remaining in this action, the parties are directed, pursuant to 22 NYCRR 202.8(f), to appear for a preliminary conference on June 15, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action for a declaration that a deed conveying certain land in Brentwood from the defendant Aude Realty Corp. (hereinafter Aude Realty) to its president and sole shareholder, the defendant Renzon Concepcion (hereinafter Concepcion), is null and void pursuant to Debtor & Creditor Law §273-a as it was done with the intention to defraud and deprive the plaintiff of assets available to satisfy a potential judgment during the pendency of an action for money damages brought by the plaintiff against Aude Realty and a related Aude corporation (Aude Construction Corp.). In addition, the plaintiff seeks attorneys fees pursuant to Debtor & Creditor Law §276-a from the parties to the property transfer based upon those parties actually intending to deprive the plaintiff of its ability to satisfy any potential judgment. Lastly, the plaintiff also seeks to hold the defendant Concepcion personally liable on the underlying judgment to the extent that said property has been otherwise disposed of or depreciated and no longer has the value it had if it had otherwise been available to satisfy the judgment owed.

By way of background, the plaintiff brought an action in Second District Court against Aude Realty and Aude Construction Corp. in June of 2004 (Index No. BAC 2346/04) for commissions earned in a real estate transaction. After trial, in which Concepcion (as the president and sole shareholder of Aude Realty) testified, the court issued a decision, dated October 20, 2006, in the plaintiff's favor for \$15,000.00 (the jurisdictional limit of the District Court) with interest from July 21, 2003 plus statutory costs and disbursements (*Home Design Realty Corp. v Aude Constr. Corp.*, Dist Ct [2d Dist], Suffolk County, October 20, 2006, Barton, J., index No. BAC 2346/04). In addition, the court found that Concepcion was "a control person of both defendants" (*id.*).

Three days after the decision issued (which was one business day later), on October 23, 2006, Aude Realty transferred title of a vacant lot it owned in Brentwood, New York to Concepcion. This transfer was for minimal consideration (\$10.00).

On November 29, 2006, a final judgment in the amount of \$20,000.50 was rendered and docketed at the Second District Court of Suffolk County.

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It is not contested that the District Court judgment has not been satisfied either in whole or in part.

The plaintiff now brings this motion for summary judgment.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the plaintiff submits, inter alia, an attorney's affirmation, a copy of the District Court decision after trial, a transcript of the underlying judgment and a copy of the deed transferring title of the subject real estate.

Debtor & Creditor Law §273-a provides as follows:

“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.” (Emphasis provided.)

In this case, based upon the submissions on this motion, it is clear that Aude Realty was a defendant in an action for money damages and while that action was pending, Aude Realty made a transfer of what is described by the plaintiff and not refuted by the defendants of the only asset in the possession of Aude Realty. Indeed, the transfer, while before the entry of a final judgment, was right after the court's decision awarding judgment to the plaintiff. Furthermore, the conveyance was not for fair consideration and was from the corporate defendant, Aude Realty, to an insider; to wit, Concepcion - its president and sole shareholder.

Under these facts, such a conveyance is fraudulent pursuant to Debtor & Creditor Law §273-a (*see Fischer v Sadv Realty Corp.*, 34 AD3d 632, 633, 829 NYS2d 108 [2d Dept 2006]). Moreover, when an insider is the transferee or grantee of the property in question, the transfer establishes a lack of good faith as a matter of law (*see Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555, 780 NYS2d 409 [3d Dept 2004]). Indeed, under such circumstances, “there is no factual dispute that the purpose of the transfer was to confer on the insider a preference over other creditors” (*id.*). Accordingly, the plaintiff has made a prima facie showing that the conveyance was fraudulent regardless of the stated intentions of Aude Realty and Concepcion and, thus, is entitled to have the conveyance declared null and void.

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As to Concepcion being personally liable to any extent on the underlying judgment, the plaintiff must show that the fraudulently conveyed property was either disposed of by the transferee (Concepcion) or that the transferee (Concepcion) depreciated the value of the property. If this is shown, Concepcion would be liable to the extent that the plaintiff cannot be placed in the position he would have otherwise been in had the fraudulent transfer not taken place (*see Joslin v Lopez*, 309 AD2d 837, 839, 765 NYS2d 895 [2d Dept 2003]; *Marine Midland v Markoff*, 120 AD2d 122, 132-133, 508 NYS2d 17 [2d Dept 1986]).

In this motion, the plaintiff, having made a prima facie showing of entitlement to setting aside the underlying conveyance as fraudulent, has also made a prima facie showing of entitlement to holding Concepcion personally liable as discussed herein. Such personal liability, however, depends upon the ability to apply the value of the property in question toward satisfying the underlying judgment in an amount consistent with what the value of said property would have been if the transfer had not taken place in the first instance. To the extent that there is a deficit in the value as a result of the fraudulent transfer, the defendant Concepcion is personally liable but the actual amount, if any, can only be determined after the plaintiff attempts to satisfy the judgment with said property. Accordingly, the corresponding cause of action will have to abide the resolution of the plaintiff attempting to satisfying the judgment.

Lastly, as to attorney's fees, Debtor & Creditor Law §276-a provides, in pertinent part, as follows:

“In an action . . . brought by a creditor . . . to set aside a conveyance by the debtor, where such conveyance is found to have been made by the debtor and received by the transferee with *actual intent*, as distinguished from intent presumed by law [as pursuant to Debtor & Creditor Law §273-a], *to hinder, delay or defraud* either present or future creditors . . . in which action . . . the creditor . . . shall recover judgment, the justice . . . at the trial *shall fix the reasonable attorney's fees* of the creditor . . .” (Emphasis provided.)

Here, the plaintiff has made a prima facie showing of entitlement to attorney's fees from both defendants, jointly and severally, by showing that the transferee (Concepcion) was the alter ego of the transferor (Aude Realty), by showing that Concepcion was the president and sole shareholder of Aude Realty, that the deed in question recited minimal consideration, that there is no indication of any consideration being paid and that both Aude Realty and Concepcion knew of the pending claim for money damages (*see Carey v Crescenzi*, 923 F2d 18, 21 [2d Cir 1991]). Indeed, Concepcion knew of the pending claim as he personally testified at the District Court trial. None of these factual allegations made by the plaintiff is controverted or disputed by the defendants. These showings support a finding that the defendants took part in the transfer of the property in question with the actual intent, not just the presumed intent, to prevent the plaintiff from having his judgment satisfied by the value of said land.

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In support of the request for reasonable attorney's fees, counsel for the plaintiff includes in his affirmation in support of this motion a description of his legal experience and background and the hours spent thus far (10 hours) on specific legal services provided. At counsel's hourly rate of \$250.00, which is a reasonable rate under these circumstances, counsel has shown he is entitled to \$2,500.00 and that the defendants are jointly and severally responsible for same. As for further legal services to be provided in this pending action, in the absence of any material issues of fact being raised in this regard, upon the conclusion of this action at the trial level, counsel for the plaintiff will be entitled to further reasonable attorney's fees pursuant to Debtor & Creditor Law §276-a as shall be determined upon the submission to the IAS or trial justice presiding of an affirmation of services on notice to the defendants.

In short, the plaintiff has made a prima facie showing of entitlement to summary judgment declaring the transfer of the subject property null and void pursuant to Debtor & Creditor Law §273-a; that the defendant Concepcion is personally liable to the extent provided herein; and, that the plaintiff is entitled to reasonable attorney's fees pursuant to Debtor & Creditor Law §276-a jointly and severally from the defendants as provided herein.

With the plaintiff having satisfied its burden on this motion for summary judgment, the burden now shifts to the defendants to come forward with evidence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980])2d at 401, 565 NYS2d at 427). Here, the defendants have failed to satisfy that burden.

In their opposition to this motion, the defendants submit two affidavits from Concepcion: one in his individual capacity and one as president of Aude Realty. Both affidavits are essentially the same and state, inter alia, the following: Concepcion had no knowledge of the underlying District Court action at the time of the transfer of the subject property; that although the property in question was titled to Aude Realty before the transfer, Concepcion personally paid the carrying costs; that the transfer was due to the fact that Aude Realty "could not afford to continue the development [of the property] and to cover the debts owed to Concepcion..." (Corporate affidavit, ¶4). Concepcion also states that he first heard of the underlying decision (which is dated October 20, 2006) in November of 2006, after the transfer had been made on October 23rd, in a phone call from his attorney who had received a copy of the decision in the mail (*Id.* at ¶5).

These statements in opposition are insufficient to rebut the plaintiff's prima facie showing of entitlement to summary judgment in its favor and do not raise material issues of fact requiring a trial.

Concepcion's statement that he had no knowledge of the underlying District Court action completely lacks credibility. Concepcion was not only the president of Aude Realty but was its "control person" (*see Home Design Realty Corp. v Aude Constr. Corp., supra*). Furthermore, Concepcion testified at the District Court trial.

As to the timing of when Concepcion learned of the decision, even if true, it does not affect the applicability of Debtor & Creditor Law §273-a as to nullifying the transfer of property. As discussed earlier, the action for money damages need only be pending - not resolved - in order for the court to find that a conveyance without fair consideration by a defendant in said action is fraudulent.

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Concepcion's self-serving comments that he personally carried the costs for the Aude Realty property are also unavailing as such does not comprise fair consideration for the transfer to an insider while the money damages action was pending. This is especially true in this case because the defendants have provided no proof of the payments of such costs. In short, the defendants have raised no material issues of fact as to the insider transfer of the only corporate asset available to satisfy the judgment against Aude Realty during the pendency of the District Court action for money damages which the defendant Concepcion, both in his corporate and individual capacities, was fully aware of.

As to the request for attorney's fees pursuant to Debtor & Creditor Law §276-a, the defendants offer no opposition.

Accordingly, the defendants have not sustained their burden to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*) on any of the three causes of action in this case. In addition, based upon these same findings, the defendants' counterclaim for abuse of process with regard to the bringing of this action must be dismissed. The plaintiff's motion for summary judgment, thus, is granted and judgment is awarded to the plaintiff as provided herein.

The court also notes that the defendants entitled their opposition to this motion as, "Affidavit in Opposition to Plaintiff's Summary Judgment Motion and Cross Motion for Summary Judgment." Insofar as the defendants are attempting to submit a cross motion to the court (seeking summary judgment in their favor), such cross motion is rejected by the court as it lacks a Notice of Cross Motion (*see CPLR 2214[b]*; 22 NYCRR 202.7[a]) and the defendants failed to provide proof of payment of the required motion fee (*see CPLR 8020[a]*).

In any event, the defendants' affidavits in opposition fail to make a prima facie showing of entitlement to summary judgment in their favor.

This constitutes the decision and order of the court.

Dated:

June 4, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.