

Commissioners of the State Ins. Fund v Weissman

2010 NY Slip Op 31589(U)

June 22, 2010

Supreme Court, New York County

Docket Number: 401064/2008

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 401064/2008

STATE INSURANCE FUND

vs

WEISSMAN, GLENNA

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendant to dismiss* is granted in accordance with the attached memorandum decision.

(Consistent with the decision with motion sequence number 003)

FILED

JUN 25 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/23/10

HON. DORIS LING-COHAN s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: JAS PART 36

-----X
THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

-against-

GLENNA WEISSMAN,

Defendant,

ASSOCIATES REALTY BUILDERS
CONSTRUCTION CORP.,

Judgment Debtor.

-----X
LING-COHAN, J.

Index No. 401064/2008

Motion Seq. No.: 001 & 003

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this fraudulent conveyance action, motion sequence numbers 001 and 003 are consolidated for disposition. In motion sequence 001, defendant Glenna Weissman moves for an order, pursuant to CPLR 3211 (a) (1), (7) and (10), to dismiss the complaint on the grounds of a defense founded upon documentary evidence, failure to state a cause of action, and that the court should not proceed in the absence of a person who should be a party.

In motion sequence 003, plaintiff, the Commissioners of the State Insurance Fund (SIF), moves for an order, pursuant to CPLR 3212, granting SIF summary judgment against defendant Glenna Weissman on its fraudulent conveyance claim under Debtor Creditor Law § 273. SIF also seeks dismissal of defendant's counterclaim on the grounds that this court lacks subject matter jurisdiction over the state agency.

SIF is an agency of the State of New York, authorized to conduct the business of insurance in the State of New York, including, but not limited to, offering workers' compensation insurance coverage.

Non-party Associates Builders Construction and Realty Corp. (Associates), mistakenly denominated as Associates Realty and Builders Construction Corp. in the caption, is a domestic corporation that was formerly known as 148th Avenue Realty Corporation (148th).

The following allegations are taken from the complaint. SIF commenced an action entitled *Commissioners of the State Ins. Fund v 148th Avenue Realty Corp.*, Supreme Court, Suffolk County, Index No. 06-31029 (148 Action), seeking recovery of the balance then due and owing under a policy providing workers' compensation insurance (Policy) that SIF issued to 148th. The Policy covered yearly periods from August 10, 2001 to August 10, 2006.

SIF alleges that, during each policy period, it estimated the premiums due for the coverage period. That amount was determined by examining the remuneration that 148th paid to its employees and uninsured subcontractors on its workers' compensation claims. SIF utilized a formula whereby it assigned the appropriate classification to the work performed by those employees, and it subsequently calculated the final premium due (Affidavit of Dennis Annastas, dated October 1, 2009) (Annastas Aff.). If the final premium was more than the estimated premium paid to SIF, then 148th had to pay the balance; if it was less, SIF refunded or credited the balance (*id.*).

SIF also alleges that 148th paid Weissman, its sole shareholder, dividends in the amount of \$25,900 in 2001; \$23,060, in 2002; \$34,505, in 2003; and \$35,190 in 2004, in bad faith because they were paid without fair consideration or compensation by Weissman; the disbursements rendered 148 insolvent; and the transfer of those funds were fraudulent as to SIF. The complaint further alleges that the aforementioned distributions were made by 148 when it was engaged in business, and that act subsequently left 148 with severely diminished capital, resulting in its inability to satisfy the debt owed to SIF.

On January 30, 2007, a default judgment was entered in the 148th Action in favor of SIF and against 148th for \$239, 285.15 (Default Judgment). SIF commenced this lawsuit against Weissman alleging four causes of action on its fraudulent conveyance claim, in order to satisfy its unpaid Default Judgment.

Motion 001

Weissman is moving to dismiss SIF's four causes of action on the basis that they fail to state a cause of action. As detailed below, SIF has pleaded a cause of action for fraudulent conveyance sufficient to survive dismissal under CPLR 3211 (a) (7). However, dismissal is warranted under CPLR 3211 (a) (1) because there is documentary evidence establishing that Weissman was not a named defendant in an action for money damages or that a judgment in such action had been docketed against her (*See Fisher v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]).

In assessing a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated. The motion must be denied if the factual allegations, taken together, manifest any cause of action cognizable at law (*See 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

Here, the factual allegations, taken together, manifest a cause of action for a fraudulent conveyance (*see Planned Consumer Mktg., Inc. v Coats & Clark, Inc.*, 127 AD2d 355, 370-71 [1st Dept 1987], *aff'd* 71 NY2d 442 [1988]).

Section 273 of the Debtor and Creditor Law provides: "Every conveyance made and every obligation incurred 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 or the obligation is incurred without a fair consideration.” A claim under this provision requires, in addition to the conveyance and unfair consideration, that the debtor was insolvent prior to the conveyance, or rendered insolvent thereby (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). That requirement is satisfied within the first and third causes of action.

Similarly, within its second cause of action, it appears that SIF has sufficiently pleaded claims under Debtor and Creditor Law § 274. Debtor and Creditor Law § 274 provides that:

“Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.”

SIF asserts that Weissman was the transferee of an unlawful transfer of corporate assets, and thus the aforementioned requirement is satisfied. Under the Debtor and Creditor Law, those transfers may be voided as against the defrauded creditor. Moreover, any such transfers, may be made available to the creditor for satisfaction of its judgment (*see Planned Consumer Mktg., Inc. v Coats & Clark, Inc.*, 127 AD2d 355, *supra*).

SIF has also sufficiently pleaded claims under Debtor and Creditor Law § 276-a, which provides, in part:

“In an action or special proceeding brought by a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors to set aside a conveyance by a 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 in law, to hinder, delay or defraud either present or future

creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at trial shall fix the reasonable attorney's fees of the creditor. . . ."

In plaintiff's fourth cause of action, SHF has sufficiently plead claims under section 276-a for attorneys' fees, alleging that a conveyance has been made by a debtor with an intent to delay or defraud present or future creditors.

Weissman also argues that dismissal is warranted under CPLR 3016 (b) because the complaint fails to plead fraud with the specificity required under the statute. However, the allegations in the complaint sufficiently detail the allegedly fraudulent conduct committed by Weissman and 148th (*See Sargiss v Magarelli*, 12 NY3d 527, 530-31 [2009]).

The purpose of CPLR 3016 is to inform a defendant of the incidents complained of, but it should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting fraud (*id.*). "What is '[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action,' and although under CPLR 3016 (b) 'the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud' [citation omitted]" (*id.* at 531). Thus, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (*id.*). Furthermore, on a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems (*id.*).

Section 276 of the Debtor and Creditor Law provides: "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.” In causes of action asserting claims under Debtor and Creditor Law § 276, because direct evidence of fraudulent intent by the debtor is difficult to prove, the pleader is allowed to rely on “badges of fraud” to support his case, i.e., “circumstances so commonly associated with fraudulent transfers” that their “presence gives rise to an inference of intent” (*Wall Street Assoc. v Brodsky*, 257 AD2d at 529). Indices of fraud may include: a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor’s knowledge of the creditor’s claims and the inability to pay it; and retention of control of the property by the transferor after the conveyance” (*id.*).

The complaint, along with SHF’s supporting affidavits, allege the requisite indices of fraud necessary to substantiate a claim for fraudulent conveyance (*See Sargiss v Magarelli*, 12 NY3d 527, *supra*). It should be noted that, the first two causes of action rely on Sections 273 and 274 of the Debtor and Creditor Law, respectively, and those provisions do not require that a plaintiff plead or prove intent. (*See Wall Street Assoc. v Brodsky*, 257 AD2d at 529). Hence, CPLR 3016 is inapplicable as to those causes of action.

Weissman further argues that she is entitled to dismissal because there is documentary evidence establishing that she is not a defendant in an action for money damages, nor has a judgment been docketed against her.

Documentary evidence may warrant dismissal under CPLR 3211 (a) (1) “if it ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claims’” (*Fortis Fin. Serv., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002]).

Section 273-a of the Debtor and Creditor Law provides that:

“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 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.”

Claims under this provision requires, in addition to the conveyance and the unfair consideration elements, a precondition that the person making the conveyance is a defendant in an action for money damages or a judgment in such action has been docketed against him (Debtor and Creditor Law § 273-a).

Here, the record establishes that Weissman was not a defendant in the 148 Action, nor was she named as the debtor in the Default Judgment (Exhibit C to Whitehorn Aff.). Although SIF alleges that Weissman was the sole shareholder, director and officer of 148th during the time in question, Weissman submitted evidence to refute SIF’s contention that she was the company’s sole shareholder. The record reveals that Barry Reeder, not Weissman, was 148th’s sole shareholder from 2001 to 2003 (Paragraph 8 of Exhibit D to Whitehorn Aff.). That fact is undisputed in the record. Moreover, SIF has failed to include allegations to establish claims that would hold Weissman personally liable for any alleged fraudulent conduct during her time as a corporate officer.

Further, to prevail on a fraudulent conveyance claim, the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied (*Fisher v Sadov Realty Corp.*, 34 AD3d 632, *supra*). Since the record fails to establish that Weissman was a defendant in an action to recover money

damages in which SIF was also a plaintiff, or that a judgment was docketed against her. Weissman is therefore entitled to dismissal (*See Cadle Co. v Organs Enter. Inc.*, 29 AD3d 927, 928 [2d Dept 2006]). Weissman's documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claims (*see Fortis Fin. Serv., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, *supra*).

Motion 003

Due to the dismissal of SIF's claims against Weissman, SIF's motion for summary judgment is denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant Glenna Weissman as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment of dismissal accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: June 2, 2010

Hon. Doris Ling-Cohan

FILED
 JUN 25 2010
 NEW YORK
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J: Summary Judgment State Insurance v Weissman carpenter.wpd