

Hough v Margulies

2010 NY Slip Op 31594(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 105695/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN

PART 1

Index Number : 105695/2007 J.S.C.

HOUGH, DENNIS

INDEX NO. 105695/07

vs

MARGULIES, JOSH

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. 004

PARTIAL SUMMARY JUDGMENT

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 ...

PAPERS NUMBERED

1, 2, 3

Answering Affidavits -- Exhibits _____

4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 24, 2010

J.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: IAS PART

----- X

DENNIS HOUGH,

Plaintiff,

Index No. 105695/07

- against-

JOSH MARGULIES, ELIZABETH MARGULIES and
ELAINE CARDARELLI,

Defendants.

----- X

MARTIN SHULMAN, J.S.C.:

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Dennis Hough's ("Hough" or "plaintiff") complaint herein alleges three causes of action based upon alleged fraudulent conveyances in violation of Debtor & Creditor Law ("DCL") §§ 273, 276 and 273-a. Hough is a judgment creditor of defendant Josh Margulies ("Josh"), having commenced a personal injury action against said defendant in or about August 2003 and ultimately obtained a judgment in his favor for over \$4.8 million dollars (the "judgment"). The judgment was entered on November 16, 2005 and arose from an August 2000 motor vehicle accident.

The complaint alleges fraudulent transfers of Josh's assets to co-defendants Elizabeth Margulies ("Elizabeth")¹ and Elaine Cardarelli² involving three parcels of real estate. The Margulies defendants now move for partial summary judgment dismissing the claims asserted against them as they pertain to the condominium apartment located at 150 Nassau Street in Manhattan (the "Nassau St. property") and for sanctions.

¹ The Margulies defendants were married as of the commencement of this action but have since filed for divorce.

² Plaintiff ultimately settled his claims with defendant Cardarelli and dismissed the complaint against her.

The moving defendants submit documentary proof³ that Elizabeth was the sole record owner of the Nassau St. property, having acquired it in March 2003 and sold it in November 2003. The complaint alleges, upon information and belief, that Elizabeth purchased this property with funds contributed by Josh during their marriage. In her supporting affidavit, Elizabeth denies that Josh contributed towards the purchase price and avers that she purchased the Nassau St. property with her "own personal monies and the proceeds of a mortgage loan from North Fork Bank." Josh submits his own affidavit confirming that he did not contribute to the purchase of the Nassau St. property.

In opposition, plaintiff argues that summary judgment is inappropriate since key facts at issue are within defendants' exclusive knowledge. Hough contends that, in violation of prior court orders, defendants have not yet been deposed; he should be permitted to examine and cross-examine defendants as to the allocation and disposition of their assets while married; and in light of the Margulies defendants' recent divorce, he should be permitted disclosure as to their property settlement. Plaintiff specifically cites the Margulies defendants' 2003 federal income tax return wherein they filed jointly and reported a capital gain in connection with the sale of the Nassau St. property. Exh. 4 to Shapiro Aff. in Opp. Finally, Hough testified at his deposition that Josh, an attorney, allegedly told him in a February 2007 telephone conversation *inter*

³ Attached to the moving papers are various closing documents, including copies of all checks exchanged at the closing of Elizabeth Margulies' purchase of the Nassau St. property, all of which were drawn on her individual Commerce Bank account; her mortgage application; and real property transfer tax returns.

alia that he had hidden his assets so that Hough would not be able to collect on his judgment.⁴

Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept. 1984), *aff'd* 62 NY2d 938 (1984); *Andre v. Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment, once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Freedman v. Chemical Const. Corp.*, 43 NY2d 260 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, *supra*.

⁴ In his reply affirmation, counsel for the Margulies defendants refers to a letter his clients sent to this court *ex parte* for consideration on this motion, wherein *inter alia* Josh denies having made such a statement to plaintiff. This court rejected this improper correspondence as it was not in proper form and was not timely submitted.

The Margulies defendants submit sworn affidavits and documentary proof establishing that the Nassau St. property was purchased by Elizabeth with her own funds. In response, plaintiff only speculates that depositions might reveal some contribution on Josh's part to the acquisition of the Nassau St. property. However, after obtaining financial disclosure from defendants during discovery, Hough points only to their joint 2003 federal income tax return listing the capital gain realized from the sale of the Nassau St. property.

"[A]lthough determination of a summary judgment motion may be withheld where discovery is incomplete (see CPLR 3212 [f]), there must be some evidentiary showing suggesting that completion of discovery will yield material and relevant evidence". See *Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 (3rd Dept 2007). Here, plaintiff's evidentiary showing is insufficient to suggest that further discovery will yield material and relevant evidence. Mere conclusory allegations, expressions of hope, speculation or conjecture are not sufficient to resist summary judgment. *Zuckerman, supra*. Accordingly, summary judgment must be granted dismissing plaintiff's claims as they pertain to the Nassau St. property.

Finally, the request for sanctions is denied. Plaintiff's pursuit of the claims dismissed herein cannot be said to constitute frivolous conduct within the meaning of 22 NYCRR §130-1.1. For the foregoing reasons, it is hereby

ORDERED that defendants' motion is granted solely to the extent that summary judgment is granted dismissing plaintiff's claims with respect to the Nassau St. property, and the motion is otherwise denied; and it is further

ORDERED that the remaining claims are severed and continued as to defendants Josh Margulies and Elizabeth Margulies.

Counsel for the parties are directed to appear for a status conference on July 27, 2010 at 9:30 a.m., **60 Centre Street, Room 325**, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
June 24, 2010



HON. MARTIN SHULMAN, J.S.C.

FILED
JUN 25 2010
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COUNTY CLERK'S OFFICE