

Herbil Holding Co. v Bletter

2010 NY Slip Op 31702(U)

June 24, 2010

Supreme Court, Nassau County

Docket Number: 20999-09

Judge: Vito M. DeStefano

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

**HERBIL HOLDING CO AND WILLIAM
COHN, and CONSTANCE KLEIN AS
EXECUTRIX OF THE ESTATE OF HERMAN
COHN,**

Decision, Order and Judgment

Petitioners,

MOTION SUBMITTED:

May 3, 2010

-against-

MOTION SEQUENCE:01, 02

INDEX NO. 20999-09

**GLADYS BLETTER, CYNTHIA BLETTER,
HARRY J. HEWELL Jr. As Executor of the
Estate of HARRY J. HEWELL, III, WENDY L.
SUMMERS and GREGORY HEWELL ,**

Respondents.

The following papers and the attachments and exhibits thereto have been read in this proceeding:

Notice of Petition	1
Notice of Cross Motion	2
Reply in Support of Petition and in Opposition to Cross Motion	3

Introduction

The Petitioners seek a judgment, *inter alia*, directing the respondents to “turn over payments due” on a mortgage against real property located at 24 Calvin Ave, Syosset, NY, and “the note which is secured by such mortgage” in order to satisfy judgments in their favor. Respondents Gladys Bletter (“Bletter”) and Cynthia Bletter oppose the Petition and cross-move for an order directing Petitioners to file a satisfaction piece pursuant to CPLR 5020 and an accounting of all funds credited towards satisfaction of the judgments.

For the reasons that follow, the Petition is granted and Respondents' cross motion is granted to the extent that Petitioner Herbil Holding Co. ("Herbil") is directed to file a satisfaction piece and an updated accounting of all funds credited towards satisfaction of the Herbil Judgment, in accordance herewith.

Factual and Procedural Background

Gladys Bletter ("Bletter") and Petitioners Herbil, William Cohn and the Estate of Herman Cohn (the "Estate")¹ were involved in a business relationship that entailed the purchase of tax liens and other real estate transactions. In 1999, the Petitioners commenced an action in the Supreme Court, Nassau County (Index No. 01649/99) against Bletter and three other entities in which Bletter was the sole owner (Petition at ¶ 10).² The action, which was subsequently transferred to Surrogate's Court, sought an accounting from Bletter and the three entities for certain funds and property that had come into Bletter's possession as a result of her joint ventures with Petitioners (Petition at ¶ 10).

By decree of the Surrogate's Court dated January 13, 2004, the Estate of Herman Cohn was granted judgment against Bletter in the amount of \$364,393.17 (Ex. "F" to Petition).³ Two years later, following a lengthy trial in Surrogate's Court, another decree was entered granting judgments in favor of Herbil and William Cohn in the amounts of \$1,988,881.27 and \$119,187.66, respectively (Exs. "C" and "D" to Petition).

After the judgments were entered, a restraining notice was served upon Bletter on July 29, 2006 (Ex. "G" to Petition). In addition, garnishments and information subpoenas were served on various parties believed to be in possession of funds or property in which Bletter had an interest. A Sheriff's sale of Bletter's business interests in various entities resulted in the receipt of funds credited against the Herbil judgment only. No credits were made against the judgments in favor of the Estate or William Cohn. (Reply in Support of Petition at ¶¶ 18, 19). The total unsatisfied judgments remaining is approximately \$1,654,842⁴ (Petition at ¶ 40).

¹ Herbil Holding ("Herbil") is a partnership in dissolution consisting of partners William Cohn and the Estate of Herman Cohn (Petition at ¶ 1).

² The entities are GKB Enterprise LLC, SAAL Corporation and C.D. Holding.

³ This judgment was based upon a promissory note signed by Bletter in 1994 and due for payment in 1999 (See Ex. "F" to Petition).

⁴ Outstanding judgment in favor of the various Petitioners is as follows: \$952,300 for Herbil; \$153,659.97 for William Cohn; and \$548,883.67 for the Estate.

The subject of the instant Petition concerns the payments due under a \$160,000 mortgage dated June 7, 2001. Pursuant to this mortgage, Harry J. Hewell III,⁵ Wendy Summers, and Gregory Hewell (collectively referred to as "Mortgagor-Respondents") were required to make mortgage payments to Bletter for the Property located at 24 Calvin Avenue in Syosset (the "Mortgage"). It is unclear from the parties' submissions as to how Bletter became the mortgagee on the property. However, on January 11, 2006, Bletter assigned the mortgage to her daughter Cynthia Bletter ("daughter") (Ex. "M" to Petition). The consideration for the assignment was \$10.00 (Ex. "M" to Petition). Thereafter, the Mortgagor-Respondents were served with restraining notices requiring them to forward their payments due under the mortgage to Petitioners (Ex. "O" to Petition). Mortgagor-Respondents have not forwarded the mortgage payments as required by the restraining notices.

By their Petition, Petitioners seek judgment directing: 1) Mortgagor-Respondents to turn over all mortgage payments that came due since the date they were served with the restraining notice; 2) Mortgagor-Respondents to make all future mortgage payments that come due under the mortgage to Petitioners; and 3) Bletter and her daughter to turn over to Petitioners the note which is the underlying obligation for the mortgage. In addition, Petitioners ask that any sums received be applied first towards satisfying the William Cohn judgment in full, then towards satisfying the Herbil judgment, and, lastly, if any sums are remaining, to be applied towards the judgment in favor of the Estate (Petition at ¶ 46).

In opposition to the Petition, respondents cross-move for an Order pursuant to CPLR 5020(a), directing the Petitioners to file a satisfaction piece with the clerk. Bletter further argues that Petitioners must demonstrate that they are in fact entitled to receive the payments due under the Mortgage and that this fact can only be demonstrated after a full accounting for all sums received and credited towards the judgments (Affirmation in Support of Cross-Motion at ¶¶ 8, 15). In addition, Bletter claims that, as a one-third residuary beneficiary of the Estate, she was entitled to distributions which should have been credited to her. According to Bletter, had such distributions been credited, all judgments would have been satisfied (Affirmation in Support of Cross-Motion at ¶¶ 9-14).

⁵ Harry J. Hewell III died in November, 2006 and Harry J. Hewell Jr. was named the executor of the estate.

Analysis

Debtor and Creditor Law § 273-a 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 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.

At the time Bletter assigned the Mortgage to her daughter, in January 2006, Bletter was involved in litigation with respect to monies owed to Petitioners pursuant to the tax lien purchase business in which they were engaged. In fact, by that time, a decree had been entered in favor of the Estate in the amount of \$364,393.17 (Ex. "F" to Petition.). Also, following a lengthy trial on the issue of damages, a judgment was rendered June 13, 2006 by the Surrogate's Court (Riordan, J.) in favor of Herbil and William Cohn in the amounts of \$1,988,881.27 and \$119,187.66, respectively (Exs. "C" and "D" to Petition). On these facts, Bletter's assignment of the Mortgage to her daughter, made without fair consideration, while a defendant in an action for money damages, and after judgment had been entered against her, constitutes a fraudulent conveyance as a matter of law (Debtor and Creditor Law § 272; *Lengares v B&A Warehousing*, 159 AD2d 692 [2d dept 1990]).

Furthermore, petitioners correctly contend that the Mortgagor-Respondents are required to turn over all mortgage payments "that came due since they were served with the restraining notice" (Petition p. 9; *see*, CPLR 5227; *Aspen Industries, Inc. v. Marine Midland Bank*, 52 NY2d 575, 580 [1981]; *Nardone v Long Island Trust Co.*, 40 AD2d 697 [2d Dept 1972] [garnishee liable for damage caused the judgment creditor by garnishee's disobedience of restraining notice]).

In the cross motion, Bletter urges this Court to offset the amount purportedly due her as a beneficiary of the Estate of Herman Cohn to the outstanding judgments. This contention is without merit, however, as the Estate has already filed its final accounting, with the accounting period ending in December 31, 2006. In this regard, the final accounting demonstrated that Bletter received a total distribution of \$550,000 from the Estate (Ex. "D" to Reply in Support of Petition and Opposition to Cross Motion). Bletter's claim against the Estate, if any, raised in opposition to the Petition, should, therefore, be brought in the Surrogate's Court.

To the extent that the cross motion seeks an order of this Court directing Petitioners to file a satisfaction piece and accounting of all sums received to date, the following is relevant. It

[* 5]
is undisputed that some funds collected on behalf of Bletter have been credited towards the Herbil judgment (with no funds being credited towards satisfaction of the remaining judgments in favor of the Estate or William Cohn). Pursuant to CPLR 5020(a), “[w]hen a person entitled to enforce a judgment receives satisfaction or partial satisfaction of the judgment, he *shall* execute and file with the proper clerk . . . a satisfaction-piece or partial satisfaction-piece” (CPLR 5020(a) [emphasis added]). Petitioners suggest that they did not file a partial satisfaction of judgment because Bletter did not request it. However, the application of CPLR 5020(a) does not depend upon the “request” of the judgment debtor. Rather, given the use of the word “shall”, Petitioners were required to file a satisfaction piece with respect to the Herbil judgment.⁶

Based on the foregoing, it is the judgment of the Court that the petition is granted and it is hereby adjudged that the: the Mortgagor-Respondents are ordered to turn over to Petitioner William Cohn the underlying note as well as all mortgage payments pursuant to the Mortgage, until such time as the William Cohn judgment is satisfied in full, at which time the note and any remaining mortgage payments shall be turned over to Petitioner Herbil. In the event the William Cohn and Herbil judgments are satisfied while there are still payments remaining due under the Mortgage, then such payments, as well as the underlying note, shall be turned over to the Estate. Moreover, Mortgagor-Respondents are directed to turn over forthwith mortgage payments that have/will come due since the date on which they were served with the restraining notices.

The cross motion is granted to the extent that, within 20 days of service of the within paper with the notice of entry thereof, Petitioners are hereby directed to: 1) provide an accounting with respect to the Herbil judgment and all funds received from December 1, 2009 through the date of entry of the within Judgment; and 2) execute and file satisfaction pieces with respect to all sums received from Bletter towards satisfaction of the judgments, copies of which are to be served upon Bletter within 10 days after the filing (CPLR 5020(a)).⁷

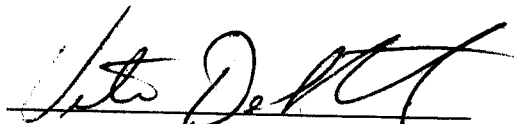
This constitutes the decision, order and judgment of the court.

Dated: June 24, 2010

ENTERED

JUL 02 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. Vito M. DeStefano, J.S.C.

⁶ No satisfaction piece is due with respect to the Estate or William Cohn judgments as no payments have yet been credited by Bletter towards satisfaction of those judgments.

⁷It is significant that there is no conflict between granting the petition and the cross motion (to the extent granted herein). In this regard, considering the amount of judgments outstanding (approximately \$1.6 million) and the amount of monies owed under the note (\$160,000), there is no need to delay the turn over of the note and mortgage payments pending the accounting and filing of satisfaction.