

Thompson v Cooper

2010 NY Slip Op 32726(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 116079/09

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Elaine Thompson

INDEX NO. 116079/09

MOTION DATE 9/3/10

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

- v -

Mel Cooper, Et Al

The following papers, numbered 1 to 23 were read on this motion to/for dismiss

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-8
19-23

Cross-Motion: Yes No

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

*See separate order of
reference*

Dated: 9/29/10

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ELAINE THOMPSON,

Petitioner,

Index No. 116079/09

Decision and Order

-against-

MEL COOPER a/k/a MELVIN COOPER, and IMPERIAL
CAPITAL LLC

Respondents,
-----X

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

JOAN B. LOBIS, J.S.C.:

Respondent Imperial Capital, LLC, ("Imperial") moves, by order to show cause, for an order dismissing the petition for failing to state a cause of action and failing to state facts sufficient to constitute grounds for the relief sought. For the reasons discussed below, the motion is denied and the matter is set down for a hearing. Respondent Mel Cooper a/k/a Melvin Cooper, proceeding pro se, put in an affidavit requesting the same relief. Mr. Cooper's request is denied for his failure to properly cross-move for the relief (See C.P.L.R. Rule 2215) and for the reasons discussed below.

On or about November 16, 2009, petitioner commenced this special proceeding for a judgment pursuant to Debtor and Creditor Law § 273, alleging that a conveyance of unit 45-K located in 721 Fifth Avenue in Manhattan from Mr. Cooper to Imperial was fraudulent and void. On or about February 4, 2010, respondents attempted to dismiss the petition (Motion Sequence Number 002) on grounds similar to those in the instant order to show cause; however, the court dismissed the motion due to the fact that it was not noticed properly and contained several irregularities.

When deciding a motion to dismiss for failure to state a cause of action, the court must assume “the truth of the petition’s material allegations and the reasonable inferences therefrom.” Y & Q Holdings (NY), Inc. v. Bd. of Managers of Executive Plaza Condo., 278 A.D.2d 173 (1st Dep’t 2000). Under Debtor Creditor Law § 273, in pertinent part, “[e]very 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.”¹ A plaintiff in a pending lawsuit is considered a creditor. See Estate of Goldman v. Goldman, 297 A.D.2d 541, 542 (1st Dep’t 2002).

In the petition, petitioner alleges that she commenced a lawsuit against Mr. Cooper on or about August 14, 2002, seeking monetary damages. The petition sets forth that on April 20, 2006, Mr. Cooper conveyed real property owned by him to Imperial, a company partially owned by Mr. Cooper. Petitioner further alleges that the conveyance of property was made without consideration and attaches copies of a deed and transfer documents in support of this claim. Petitioner alleges that the conveyance rendered Mr. Cooper insolvent. Petitioner further alleges that a judgment was docketed in her favor and against Mr. Cooper on September 4, 2009 in the form of a sum of money exceeding \$4 million.

In support of the motion, Imperial disputes the veracity of the allegations. Imperial asserts that Mr. Cooper was not rendered insolvent by the conveyance nor was he insolvent at the time of the

¹ The court notes that petitioner did not maintain a cause of action under Debtor Creditor Law § 273-a, which states that “[e]very 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.”

conveyance; that the conveyance was made with adequate consideration; and that Imperial was a good faith purchaser. At this juncture, Imperial's arguments cannot be considered, because on a motion to dismiss for failure to state a cause of action, the court must examine "the sufficiency of the pleadings . . . [and not] the sufficiency of the evidence underlying the pleadings." Friedman v. Connecticut General Life Ins. Co., 30 A.D.3d 349, 350 (1st Dep't 2006). Here, the allegations in the petition sufficiently set forth a cause of action under Debtor Creditor Law § 273.

As discussed in the previous court conference held on June 8, 2010, a hearing is required to settle the facts raised by the petition. Therefore, the issues of whether Mr. Cooper's conveyance of real property known as 45 K at 721 Fifth Avenue in Manhattan to Imperial was made while Mr. Cooper was insolvent or rendered Mr. Cooper insolvent and was made without consideration will be submitted to a special referee in order to hear and report, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317. The separate order dated June 8, 2010 referring the matter to the Office of the Supervising Referee and attached hereto is modified to reflect that the only issues for the special referee to hear are whether Mr. Cooper's conveyance of real property known as 45 K at 721 Fifth Avenue in Manhattan to Imperial was made while Mr. Cooper was insolvent or rendered Mr. Cooper insolvent and was made without consideration. Accordingly, it is hereby

ORDERED that Imperial's motion is denied; and it is further

ORDERED that the issues of whether Mr. Cooper's conveyance of real property known as 45 K at 721 Fifth Avenue in Manhattan to Imperial issues of whether Mr. Cooper's conveyance of real

property known as 45 K at 721 Fifth Avenue in Manhattan to Imperial was made while Mr. Cooper was insolvent or rendered Mr. Cooper insolvent and was made without consideration, is referred to a special referee in order to hear and report, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317. (See separate order dated June 8, 2010 as modified herein); and it is further

ORDERED that a decision on the petition shall be held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to C.P.L.R. Rule 4403 or receipt of the determination of the special referee or the designated referee; and it is further

ORDERED that in the event the parties do not agree to hear and determine, following the filing of the report and notice to each party of the filing of the report, petitioner shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If petitioner fails to do so, then respondent shall so move within thirty (30) days after notice of the filing is given.

Dated: September 29, 2010



JOAN B. LOBIS, J.S.C.

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

I.A. PART 6

ELAIVE Thompson Plaintiff
v.

Index # 11607A/09
Cal. # _____

MEL COOPER Defendant

HON. JOAN B LOBIS

This matter hereby is assigned to the Office of the Supervising Referee for designation of a Special Referee to (hear and report with recommendations) (hear and determine pursuant to the stipulation of the parties) with respect to the issue of MEL COOPER'S insolvency at the time of the transfer of his real property & the consideration therefor; and whether Debtor & Creditor Law 273 is applicable & action is entia to require sale

The court has been advised that the hearing will take approximately 1 days. Pending receipt of the Special Referees report, final determination of this matter is held in abeyance.

The clerk shall deliver a copy of this order to the Office of the Supervising Referee forthwith.

Please do not schedule until on or after Oct. 29, 2010
This constitutes the decision and order of the court.

6/8/10
Date

J.B.L.
J.S.C.
JOAN B. LOBIS

For Supervising Referee's Use

Assigned to Special Referee _____
Date _____

Supervising Referee

NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR
HON. JACQUELINE W. SILBERMANN, PRESIDING JUSTICE (PART 50R)

INFORMATION SHEET

Title of Action: ELAWE Thompson v Mel Cooper

Index No.: 116079/09

Issues Referred: Whether Mel Cooper was insolvent at the time of the transfer of

his real property - whether said property was transferred without consideration and whether
Debtor Cred. Law 283 is applicable to petitioner is entitled to requested relief

Estimated Time Needed for Hearing: Approx 1 day

Attorney for Plaintiff/Petitioner: Rosenthal & Goldhaber PC

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Phone: 516-280-4600 E-Mail: mfishman@mfellowny.com

Fax: 516-280-4530

Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office
60 Centre Street - Room 119, New York, New York 10007

- - You will be notified by mail of the date and time of the hearing.
- - Please direct all inquiries to the Special Referee Clerk (374-5657); DO NOT contact Part 50R.
- - Please consult the court's website (www.courts.state.ny.us/supctmanh) (see "Justices' Rules" under "Courthouse Operations"; the rules are listed under Hon. Jacqueline W. Silbermann, Part 50R)) or the New York Law Journal website for the Rules of Part 50R.
- - Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment. See Part 50R Rules.