

RH39 Realty, L.P. v Parigi Intl., Inc.

2010 NY Slip Op 33706(U)

December 27, 2010

Supreme Court, New York County

Docket Number: 604107/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

RH39 REALTY, L.P.,

Plaintiff,

INDEX NO. 604107/2007

- against -

MOTION DATE _____

PARIGI INTERNATIONAL, INC., LE ARC CORPORATION, L & L INVESTMENTS, LLC and LYN YU

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion by defendants(s) motion for summary Judgement.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

FILED

Cross-Motion: Yes No

JAN 21 2011

In this action, plaintiff seeks compensation, and ^{NEW YORK} ~~other relief~~, based on the alleged fraudulent conveyance of a condominium unit, in Trump International Hotel and Tower Condominium (the Condo), from defendant Le Arc Corporation (Le Arc) to defendant L&L Investments, LLC (L&L), effected by defendant Lyn Yu, in order to avoid the defendant Parigi International, Inc.'s (Parigi) lease obligations to plaintiff. Defendants move for summary judgment, pursuant to CPLR 3212, dismissing the complaint.¹

NEW YORK COUNTY CLERK'S OFFICE

¹In a related action, commenced under index number 601682/07, plaintiff alleges that Lyn Yu improperly transferred money from Parigi's bank and other accounts to herself and others. Defendants have also moved for summary judgment in that action, and many of the arguments made in that motion are identical to those made here.

BACKGROUND

Plaintiff leased space to Parigi, in which Parigi ran its business, pursuant to a lease with a durational term of December 1, 2003 through November 30, 2008 (the Lease). It is undisputed that Parigi vacated the premises it leased from plaintiff on November 30, 2005, after plaintiff commenced a summary proceeding for eviction in the New York City Civil Court. In early December 2005, plaintiff also commenced an action in this court, based on the Lease (Index No. 604298/2005 [the 2005 Action]). After inquest, plaintiff was awarded judgment of \$340,730.68 in the 2005 Action, in September 2006 [the 2006 Judgment]).

In financial statements produced by Lyn Yu, and submitted by plaintiff, Le Arc is noted to be the wholly owned subsidiary of Parigi, incorporated in 1995 for the purpose of acquiring a rental condominium in New York City. Defendant Lyn Yu, in her answer, states that she was a principal of Parigi. Lyn Yu also testified that she was an owner of Parigi (Pl. Op. Aff., Exh. L [Vol. 1, Lyn Yu Deposition (November 16, 2007)], at 19; Exh. L [Vol. 2, Lyn Yu deposition (August 25, 2009)], at 68). The parties agree that Parigi was dissolved by the Secretary of State, with defendants contending that, on November 15, 2005, Parigi made a request to the State for dissolution as of November 30, 2005.²

In plaintiff's complaint in this action, filed on December 14, 2007, it alleges that on November 1, 2005, Lyn Yu caused to be recorded a deed, dated March 30, 2002, conveying the Condo from Le Arc to L&L, a company that she owned. Plaintiff claims that the transfer was made without consideration but with intent, on the part of Le Arc, to

²There is no showing on the moving papers that Parigi was actually dissolved on November 30, 2005.

hinder, delay and defraud the plaintiff of its claim against Parigi, and that Parigi, after this transfer and others, was left with little or no capital, and rendered insolvent. Plaintiff further claims that these acts constitute a fraud on creditors and that it has been unable to collect on the 2006 Judgment. Plaintiff also alleges that Lyn Yu conspired with Parigi, Le Arc and L&L to defraud Parigi's creditors by disposing of all of Parigi's assets, including the Condo. Plaintiff demands a money judgment in the amount of the 2006 Judgment, \$340,730.68, or in the alternative restoration of the allegedly improperly transferred Condo, or a declaration that the transfer was fraudulent and void as to plaintiff. Plaintiff also seeks attorneys' fees pursuant to section 276 of the Debtor and Creditor Law (DCL), and punitive damages.

On June 17, 2010, by order to show cause, Lyn Yu moved to vacate the 2006 Judgment in the 2005 Action. In her papers on that motion, Lyn Yu stated that Parigi defaulted in payment of rent for the month of October 2005, and by letter dated September 28, 2005, advised plaintiff that it was going out of business, offering, on October 7, 2005, to surrender the premises at the end of December 2005. The motion was denied by order of the Honorable Marilyn Diamond, dated October 5, 2010, and Parigi, the only defendant in the 2005 Action, was thus unable to interpose an answer, or counterclaims.

DISCUSSION

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st

[*4]
Dept 2006]). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendants argue that the complaint should be dismissed because: (1) Parigi was not a defendant in an action for money damages when the Condo was conveyed and there was fair consideration for the Condo transfer which was made in good faith; (2) the complaint does not sufficiently allege fraud or meet the requirements of CPLR 3016; (3) the 2006 Judgment is void and likely to be vacated; (4) after entry of the 2006 Judgment, plaintiff received more than \$225,331.40 from re-letting the premises and may not seek double compensation for the same injury; and (5) plaintiff is not entitled to punitive damages and attorneys' fees. In opposition, plaintiff argues that defendants have not met the requirements of CPLR 3212 (a), because they failed to file their motion within 120 days of the filing of the note of issue, and CPLR 3212 (b), because they have not provided a complete copy of the pleadings. Plaintiff also argues that defendants have not provided competent evidence to support their motion and that documentary evidence demonstrates that the Condo was transferred without consideration.³

Plaintiff argues that the motion must be denied because defendants have not attached a complaint (CPLR 3212 [b]). Defendants have submitted a copy of the complaint from the 2005 Action and a copy of their answer. A movant's failure to

³Plaintiff also argued that Lyn Yu's defense of improper service is waived pursuant to CPLR 3211 because she did not move for dismissal on this ground within 60 days after service of her answer. As defendants counter that Lyn Yu has not moved on this ground, this issue is moot.

include a copy of the pleadings in the papers supporting a summary judgment motion would generally require denial of the motion, but “such a procedural defect may be overlooked if the record is sufficiently complete” (*Greene v Wood*, 6 AD3d 976, 976 [3d Dept 2004] [citation and quotation marks omitted]). As plaintiff has supplied a copy of the complaint with its opposition submissions, the record is sufficiently complete.

Plaintiff argues that the motion may not be granted because defendants failed to meet the 120-day deadline set forth in CPLR 3212 (a). There is no question that in the absence of good cause, which generally does not include a perfunctory claim of law office failure, the 120-day deadline of CPLR 3212 (a) must be enforced (*Fofana v 41 W. 34th St., LLC*, 71 AD3d 445, 447-448 [1st Dept 2010]). The note of issue was filed on March 26, 2010, and defendants served and filed their motion for summary judgment on July 30, 2010, 126 days later, thereby missing the 120-day CPLR 3212 (a) deadline.⁴ It is undisputed, however, that during the 120-day period, defendants' former counsel was suspended from the practice of law, and their current counsel asserts that he only had a very short time to review the file and prepare defendants' papers.⁵ The suspension of defendants' former counsel took effect on June 18, 2010 (*Matter of Emengo*, 75 AD3d 193, 198 [2d Dept 2010]), and resulted in an automatic stay of the action in favor of the defendants (CPLR 321 [c]; see Vincent, Practice Commentary, McKinney's Cons Laws of NY, CPLR C321:3 [Death, Removal or Disability of Attorney]). This suspension of counsel during the 120-day period demonstrates good cause for failing to meet the 120-

⁴Even had plaintiff filed the note of issue on March 31, 2010, the date the parties recorded in a written stipulation as the deadline for filing, the motion would still not be timely by a day.

⁵The record includes an notice of appearance on behalf of Parigi by its current counsel, dated July 22, 2010, and a stipulation substituting current counsel in this case dated July 23, 2010.

day deadline; alternatively, considering the 30-day period of the stay, the motion was timely made.⁶

Defendants' argument, that they are entitled to summary judgment because the 2006 Judgment was likely to be vacated, was made before the Honorable Marilyn Diamond issued a decision, dated October 5, 2010, denying Lyn Yu's motion to vacate the 2006 Judgment. As the motion to vacate has been denied, and the 2006 Judgment has not been vacated, it is unnecessary to address defendants' argument further.

Defendants argue that the complaint should be dismissed because the Condo was conveyed in 2002, when Parigi was not a defendant in an action for money damages and had not obtained the 2006 Judgment and because there was fair consideration for the Condo, which was transferred in good faith. Defendants' arguments are predicated on its contention that plaintiff seeks to recover pursuant to DCL § 273-a, which provides:

"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."

In opposition, plaintiff implicitly challenges defendants' contention that the Condo was conveyed in 2002, arguing that while the deed submitted is dated March 2002, the conveyance was not recorded until November 1, 2005, which is soon after Parigi

⁶ CPLR 321 (c) provides:

"If an attorney . . . is removed [or] suspended . . . at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs."

notified plaintiff of its plans to vacate the premises it leased from plaintiff. Plaintiff also points out that the deed does not contain a corporate acknowledgment, and that no closing or other documents for the sale were produced.⁷ While defendants correctly argue that recording is not synonymous with conveyance, they fail to offer any explanation as to why the deed was not recorded for over three years after the alleged conveyance. Furthermore, the documents submitted reflect that the transfer was either between partners or related companies, and that no transfer tax or consideration were paid on the exchange (see Pl. Op. Aff. of Substitution of Exhibits I and J). Drawing reasonable inferences in the non-movant's favor, as required on summary judgment, a fact question is raised as to whether or not the property was actually conveyed in 2002, precluding summary judgment on this record.

While defendants point to DCL § 273-a arguing that summary judgment is warranted because the conveyance was concluded prior to Parigi's becoming a defendant in the 2005 Action, this argument ignores that plaintiff did not mention DCL § 273-a in the complaint. Furthermore, DCL § 273 provides that "[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 or the obligation is incurred without fair consideration." This provision of the DCL does not require a plaintiff to be a defendant in a law suit, but merely a creditor (*see also* DCL §§ 274, 275). A creditor is defined as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (DCL § 270).

⁷On the motion, Lyn Yu does not dispute that she effected the conveyance from Le Arc to L&L, or that she owns L&L.

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Defendants have not demonstrated that plaintiff did not have a claim concerning the Lease at the time of the recording of the deed in November 2005.⁸

As to defendants' argument that the Condo transfer was made for fair consideration and in good faith, relevant here is DCL § 272 (a), which states that fair consideration for property is given "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed" To demonstrate fair consideration, defendants submit canceled checks (Def. Mov. Aff., Exh. 24, Exh. 25), one of which, it appears, is dated in 2000, and the other two 2002. Defendants fail to submit, or point to, evidence to demonstrate that these checks were for the Condo, or were a fair equivalent for it. The checks themselves do not contain a notation demonstrating that they were exchanged for the Condo. While defendants correctly state that an attorney affidavit may be used as a vehicle to present documentary evidence on summary judgment, defendants' counsel's affidavit is not supported by documentary evidence sufficient to establish their burden on summary judgment, and defendants' counsel does not aver that he has personal knowledge of this matter.

Defendants point to no other admissible evidence in support of their contention of fair consideration. In any event, plaintiff also raises an issue of fact by submitting Lyn Yu's deposition testimony that she did not know what the two checks were exchanged

⁸Plaintiff raises DCL § 273 in its opposition. To the extent that the defendants argue that the complaint did not meet the requirements of 3016 as to a DCL § 273 claim, CPLR 3016 does not apply to a claim of this nature (*Menaker v Alstaedter*, 134 AD2d 412, 413 [2d Dept 1987] [unnecessary to plead with particularity violations of Debtor and Creditor Law §§ 273, 273-a, 274 and 275]).

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for. Furthermore, the submitted recording and tax documents do not reflect that consideration for the Condo was exchanged.

In support of their motion, defendants cite to *Phillip v Zanani* (67 AD3d 877 [2d Dept 2009]), in which the court found that the plaintiff demonstrated that a conveyance was made for fair consideration and not to hinder enforcement of defendant's judgment. Here, defendants have not met their burden to eliminate material issues of fact, with admissible evidence, as to the issue of whether or not there was fair consideration for the Condo, and summary judgment may not be granted on this ground.

Defendants argue that, after the entry of the 2006 Judgment, but prior to the expiration of the Lease term, plaintiff re-let the premises to a new tenant, thereby entitling defendants to partial summary judgment offsetting plaintiff's damages claim by the amount received by plaintiff from the re-letting, of \$225,331.40.⁹ Defendants also argue that plaintiff did not return Parigi's security deposit and that there is a fact questions as to whether or not plaintiff re-let the premises immediately after Parigi's departure. These issues, concerning reduction of potential damages, are premature on a motion for summary judgment where liability has not been established. Furthermore, while defendants point to a name on a directory or doorbell for the floor previously let by Parigi, in order to demonstrate that the premises were re-let immediately after Parigi's

⁹Plaintiff argues that this issue was dealt with in its opposition to the order to show cause in the 2005 Action, but does not demonstrate, on this record, as a matter of law, that Parigi is precluded from interposing a counterclaim concerning setoff after the re-letting, and plaintiff's arguments on that motion do not sufficiently address the issues here. As the judgment in the 2005 Action was not vacated, Parigi did not submit a counterclaim in that action. Assuming, arguendo, that Parigi has a valid claim for the amounts of the re-letting (*see eg Nicholas A. Cutaia, Inc. v Buyer's Bazaar*, 224 AD2d 952 [4th Dept 1996]), an issue that neither party has adequately briefed, and is not reached here, Lyn Yu has not demonstrated, on this record, that she may assert such a claim on behalf of Parigi.

departure,¹⁰ plaintiff's witness testified that the tenant whose name was on the directory did not occupy that space (Def. Mov. Aff., Exh 21 [Hoppenstein deposition], at 117).

Defendants argue that plaintiff cannot prevail on a cause of action based on DCL § 276 because plaintiff failed to sufficiently detail the factual allegations forming the basis of its claim of actual fraud as to Lyn Yu in the complaint and because there is no evidence demonstrating that Lyn Yu possessed the requisite intent to defraud. Section 276 of the DCL governs transfers made with the actual intent, as opposed to constructive intent, to defraud creditors. Despite fair consideration for a transfer, it may be fraudulent if it was made with actual intent to hinder, delay or defraud a creditor (*Lippe v Baimco Corp.*, 249 F Supp 2d 357, 374 [SD NY 2003], *affd* 99 Fed Appx 274 [2d Cir 2004]). Only the actual intent to hinder or delay creditors needs to be established, not the actual intent to defraud (*United States of Am. v Carlin*, 948 F Supp 271, 277 [SD NY 1996]).

While CPLR 3016 applies to claims made pursuant to DCL § 276, for those matters that necessarily rest within the exclusive knowledge of the defendant, the pleading requirements of this provision are generally more relaxed (*see Lanzi v Brooks*, 43 NY2d 778 [1977]). The requirements of CPLR 3016 are met where the facts are sufficient to permit a reasonable inference of the alleged fraudulent conduct (*Sargiss v Magarelli*, 12 NY3d 527, 531 [2009]). As to the complaint, defendants argue that the second and third causes of action improperly lump both of the individual defendants together, but there is no other individual defendant in this case other than Lyn Yu.

¹⁰This argument is separate from defendants' argument that the premises were re-let during the lease term, but after the 2006 Judgment was entered. Defendants offer only conclusory argument that they are entitled to partial summary judgment in the amount of the security deposit.

Defendants also argue that plaintiff "alleges in conclusory terms that the defendants practiced a scheme to defraud creditors without specifically alleging how this particular plaintiff was defrauded by any identified conduct of the individual defendant[s]" (Def. Mov. Memo. of Law, at 8).

While the complaint is not artfully drafted, as to the actual intent requirement of DCL § 276, "[d]irect evidence of fraudulent intent is often elusive [and] courts will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004] [internal quotation marks and citation omitted]). In other words, actual intent may be inferred from the circumstances surrounding the transfer. "Badges of fraud include (1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them . . . (4) the retention of control of property by the transferor after the conveyance" (*id.*), and that a transfer is not made in the ordinary course of business (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). A review of the complaint and this record reveals that plaintiff claims that Lyn Yu caused Parigi to transfer the Condo to her own company, L&L, without consideration, when plaintiff's claim on the Lease was pending or anticipated, with Lyn Yu the signatory on the Lease, and that these acts rendered Parigi insolvent. Defendants have not demonstrated in what manner they have not been adequately apprised of the claim against them, which is sufficiently plead. Defendants' argument that there is no

evidence demonstrating that Lyn Yu possessed the requisite intent to defraud is conclusory.

Defendants argue that plaintiff has not made out a prima facie case for punitive damages and that punitive damages are not warranted. Plaintiff does not oppose this portion of defendants' motion. Indeed, punitive damages are not warranted here, as the "the alleged fraud was not so gross and wanton as to justify an award of punitive damages" (*Murphy v RMTS Assoc., LLC*, 71 AD3d 582, 583 [1st Dept 2010]; *James v Powell*, 19 NY2d 249, 260 [1967]; *NPR, LLC v Met Fin Mgt., Inc.*, 63 AD3d 1128, 1130 [2d Dept 2009]).

Defendants argue that, having failed to make a prima facie showing of entitlement to bring an action under DCL, plaintiff's claim for attorneys' fees must be dismissed, because there is no other basis for attorneys' fees. However, until the issue of liability is resolved, it is premature to address the question of attorneys' fees under DCL § 276-a.

FILED

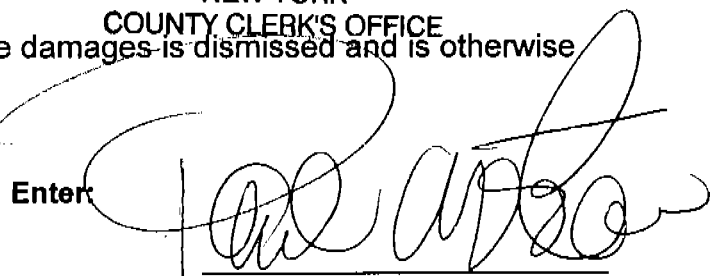
Accordingly, it is

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ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's demand for punitive damages is dismissed and is otherwise denied.

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Dated: December 27, 2010

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