

Surizon v Cohen

2011 NY Slip Op 30572(U)

February 24, 2011

Supreme Court, Nassau County

Docket Number: 18032/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**IZHAK SURIZON, individually and on behalf of
NEW GENERATION SCHOOL AND OFFICE,
INC.,**

Plaintiff(s),

Index No. 18032/10

**Motion Submitted: 12/10/10
Motion Sequence: 001**

-against-

NISSIM COHEN,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....X

Defendant/petitioner Nissim Cohen moves this Court by order to show cause for an Order dissolving plaintiff New Generation School and Office Products, Inc. ("NGOP")¹ pursuant to Business Corporation Law §§ 1104 (a)(1)-(3), and for an Order attaching real property belonging to plaintiff Izhak Surizon, pursuant to CPLR §§ 6201(3) and 6212. Plaintiffs/respondents oppose the requested relief.

Surizon and Cohen are brothers-in-law who have engaged in a number of business ventures together, including NGOP, which is the subject of this action. Surizon and Cohen

¹According to the New York State's Department of State database, the corporate plaintiff is registered as "New Generation School & Office Products, Inc."

have also been arrested in Nassau County in connection with a scheme to evade payment of cigarette taxes. By Surizon's own admission, he pled guilty to a misdemeanor, and he states that Cohen also pled guilty to a misdemeanor in connection with the criminal case. Although Cohen does not comment on the disposition of his criminal matter, his attorney admits that Cohen paid a fine in connection with the sale of illegal cigarettes.

Additionally, Surizon and Cohen have been involved as adversaries in previous lawsuits involving their other businesses. In 2009, Cohen sued Surizon and their limited liability corporation, NGP 112, for dissolution of the LLC and distribution of the assets. In that matter (Index No. 23497/2009), the Court (Warshawsky, J.) granted dissolution of the LLC, and referred the matter to a referee for a hearing on the issue of payment of outstanding obligations to creditors. Cohen claims that the matter was settled during the hearing.

Presently, there is a lawsuit pending before the Court (Mahon, J.), assigned Index No. 10688/2010. In that matter, Cohen and New Generation Realty Group, LLC seek dissolution of the LLC, in addition to other forms of relief. The defendants in that matter, Surizon and DL Hart Co., Inc., cross-moved for dismissal of the complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7). The Court dismissed Cohen's dissolution application for failure to submit an affidavit of service attesting to service of the order to show cause as directed by the Court. Defendants' cross-motion for dismissal was denied, and that matter remains open and active.

By the instant petition, Cohen seeks to dissolve NGOP, and hold a hearing to determine monies due and owing to him from plaintiffs. Cohen also asserts in his petition that Surizon transferred the title to his home to his wife, for less than ten dollars, in an attempt to become "judgment proof." Thus, Cohen also seeks an order of attachment on Surizon's residence located in Brookville, New York, based on the allegation that Surizon's transfer of the deed to his wife was done with the intent to frustrate the enforcement of a judgment that might be rendered in Cohen's favor (*CPLR § 6201[3]*).

CPLR § 6201(3) reads, in pertinent part, that an order of attachment may be granted:

where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, . . . when the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.

Furthermore, Cohen is required by CPLR § 6212 to "show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that

the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.”

CPLR § 6212 also mandates that, “on a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than five hundred dollars” Inasmuch as attachment is a “harsh remedy, courts have strictly construed the statute in favor of those against whom it may be employed” (*Kornblum v. Kornblum*, 34 A.D.3d 748, 749, 828 N.Y.S.2d 404 [2d Dept., 2006]).

In this case, Cohen has not provided any evidence that he has complied with the mandate of the statute requiring him to give an undertaking. Thus, on this basis alone, Cohen’s application for an order of attachment can be denied.

In any event, Cohen has not established the existence of the ground for attachment based on intent to defraud found in CPLR § 6201 (3). Fraudulent intent must be proven, and cannot merely be inferred (*DLJ Mortgage Capital, Inc. v. Kontogiannis, et. al.*, 594 F.Supp.2d 308, 319, 2009 U.S. Dist. LEXIS 4755 (E.D.N.Y. 2009); *Rosenthal v. Rochester Button Company, Inc.*, 148 A.D.2d 375, 376, 539 N.Y.S.2d 11 (1st Dept., 1989); *Societe Generale Alsacienne De Banque, Zurich v. Flemingdon Development Corp.*, 118 A.D.2d 769, 772, 500 N.Y.S.2d 278 (2d Dept., 1986); *Anderson v. Malley*, 191 A.D. 573, 574, 181 N.Y.S. 729 [1st Dept., 1920]).

Moreover, the mere removal or assignment of property does not constitute grounds for ordering an attachment. Fraudulent intent cannot be presumed by a mere showing of the liquidation of assets (see *Rosenthal, supra* at 376; *Computer Strategies, Inc. v. Commodore Business Machines, Inc.*, 105 A.D.2d 167, 173, 483 N.Y.S.2d 716 [2d Dept., 1984]). Likewise, affidavits submitted in support of an attachment, which contain allegations raising a “suspicion” of intent to defraud, are insufficient (*Mitchell v. Fidelity Borrowing, LLC*, 34 A.D.3d 366, 827 N.Y.S.2d 107 [1st Dept., 2006]; *Rosenthal, supra*; *Computer Strategies, Inc., supra*).

Recognizing that fraud is not generally proven by direct evidence, courts examine transfers of property for what have been referred to as “badges of fraud” (*DLJ Mortgage Capital, Inc., supra* at 320; see also *Wall Street Associates v. Brodsky*, 257 A.D.2d 526, 684 N.Y.S.2d 244 [1st Dept., 1999]). “Among the badges courts consider are: (1) gross inadequacy of consideration; (2) a close relationship between transferor and transferee; (3) the transferor’s insolvency as a result of the conveyance; (4) a questionable transfer not in the ordinary course of business; (5) secrecy in the transfer; and (6) retention of control of the property by the transferor after the conveyance” (*DLJ Mortgage Capital, Inc., supra* at 320).

In this case, Cohen argues that, "it is clear that [Surizon] is trying to become judgment proof, and he should be restrained from engaging in such conduct." Aside from Cohen's claim that Surizon has "acted cavalierly" and "made clear that he will evade any judgment against him," there is no other evidence that Surizon has acted with intent to defraud.

While the transfer of Surizon's residence was made to his wife, for nominal consideration, and Surizon apparently continues to live in his family's home, these factors alone do not provide a sufficient basis upon which this Court may find that Surizon acted with fraudulent intent. In his affidavit, Surizon states that the transfer was "done solely for estate planning purposes." Surizon further claims that he still has assets in his name, including his new business, which he does not identify in his affidavit.

Additionally, there is no evidence that Surizon was rendered insolvent as a result of the transfer of the family home to Surizon's wife, nor does Cohen point to a pattern or series of asset transfers (see *DLJ Mortgage Capital, Inc., supra* at 322-23). Moreover, and based on Cohen's own Exhibit G, the transfer was apparently made in December 2009, nearly one year prior to Cohen's instant application for an order of attachment. According to Cohen, the transfer was published in a Newday article regarding real estate sales. Thus, the transfer was also not done in secret.

Finally, the Court struck that portion of the order to show cause for a restraining order prohibiting Surizon from transferring any of his assets pending a determination of the instant petition.

Based on the foregoing, Cohen's application for an order of attachment is denied.

Cohen's application for judicial dissolution of NGOP is likewise denied. Cohen has failed to submit proof that a copy of the Court's Order dated November 12, 2010 was "published at least once in each week for the three weeks immediately preceding the said 10th day of December, 2010, in Newsday, Nassau edition, a newspaper published in the County of Nassau, State of New York"

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 7th of April, 2010, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

The foregoing constitutes the Order of this Court.

Dated: February 24, 2011
Mineola, N.Y.

Karen V. Murphy

J. S. C.

ENTERED
MAR 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE