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Index No: 25876/09

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-**Mot-d**
#002-**Mot-d**

MORRIS STOLER,

Plaintiff(s),

-against-

VAN CHION OF HUNTINGTON, LLC, CHION ENTERPRISES OF DIX HILLS, INC., GLEN FELDMAN AND RON FIORE,

Defendant(s).

ATTY FOR PLAINTIFF(S):
STANLEY M. GEWANTER, ESQ.
9 STILES DRIVE
MELVILLE, NY 11747

ATTY FOR DEFENDANT(S):
MITCHELL J. DEVACK, LLC
90 MERRICK AVE., STE. 500
E. MEADOW, NY 11554

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Upon the foregoing papers, the plaintiff moves for an order granting summary judgment and/or to compel discovery pursuant to CPLR §3124 and §3126 and a default judgment against Chion Enterprises of Dix Hills, Inc.; and the defendants Van Chion of Huntington, LLC, Glen Feldman, and Ron Fiore cross-move for an order granting summary judgment dismissing the complaint as to said defendants.

The complaint alleges that the defendants are liable for defrauding the plaintiff by transferring and/or selling certain assets of Chion Enterprises of Dix Hills, Inc. to Van Chion of Huntington, LLC. The plaintiff avers that he purchased certain jewelry, which he consigned to Chion Enterprises of Dix Hills, Inc. for them to sell and split the proceeds of the sale of said jewelry. The plaintiff avers that Von Chion of Huntington, LLC purchased assets of Chion Enterprises of Dix Hills, Inc. with the intent to defraud plaintiff by avoiding having to return his jewelry or to pay him the value of such jewelry or profits from the sale of such jewelry. The plaintiff alleges violations of sections 273-a, 274, 276, 278 and Article 10 of the Debtor and Creditor Law. Issue was joined by defendants Van Chion of Huntington, LLC, Glen Feldman, and Ron Fiore. Defendant Chion Enterprises of Dix Hills, Inc. failed to answer the complaint.

Chion Enterprises of Dix Hills, Inc. sold to Van Chion of Huntington, LLC its inventory and stock in trade, chattels, fixtures, and equipment, and good will of the business on or about November

of 2006. The owner and manager of Chion Enterprises of Dix Hills, Inc. was Anthony Chion. The members of Van Chion of Huntington, LLC in October 2006 were Glen Feldman, Ron Fiore, and Anthony Chion, however, Anthony Chion was removed as a managing partner of Van Chion of Huntington, LLC for the alleged failure to pay on his guarantee of Glenn Feldman's loan to Van Chion of Huntington, LLC on or about February 2009.

The proponent of a summary judgment motion 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (see, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and 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). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v Liberty Bus Co., 79 AD2d 1014). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065). "By the terms of Debtor and Creditor Law Article 10, a conveyance is deemed fraudulent as to creditors not only where it is made with actual intent 'to hinder, delay or defraud' creditors (Debtor and Creditor Law 276), but also where the fraud is constructive, i.e., the conveyance is made without fair consideration by a person (1) who is insolvent or will thereby be rendered insolvent (Debtor and Creditor Law §273), or (2) against whom an action is pending or a judgment has been docketed for money damages (Debtor and Creditor Law §273-a), or (3) who is engaged in a business for which his capital is unreasonably small (Debtor and Creditor Law §274), or (4) who believes he will incur debts beyond his ability to pay (Debtor and Creditor Law §275)" (Marine Midland Bank v Midland, 120 AD2d 122, 124-125). "The existence of actual intent, as distinguished from intent presumed in law (see, Debtor and Creditor Law §276), is generally a question of fact which precludes summary judgment" (Framers Prod. Credit Assn. of Middletown v Taub, 121 AD2d 681, 682). Moreover, "the question of what constitutes fair consideration is generally one of fact, to be determined under the circumstances of the particular case" (Framers Prod. Credit Assn. of Middletown v Taub, supra).

The plaintiff in support of its motion attaches an affidavit of Anthony Chion (hereinafter "Chion"), which avers that "about 8 years ago I had an opportunity to purchase some diamond jewelry from a vendor at substantial savings. I didn't have the funds at the time so I asked Morris if he wanted to participate in a joint venture of this specific deal. He purchased the diamond jewelry from the vendor at a substantial discount, then consigned it to Van Chion Jewelers at exactly his cost, no profit added. Our deal was, when I sold an item, he would receive his cost back plus one half the profit I made. This worked out well for me since I added new and well priced inventory at no cost to me, and when I did sell an item from our deal, Morris often took an item of jewelry or jewelry services from the store in place of cash payment." The affidavit of Chion further avers that he took on Glen Feldman as a new partner in the new company called Van Chion of Huntington, LLC and that the new company "inherited no vendor debt and all starting inventory was purchased new and numerous vendors left consignment inventory for sale, including Morris, based on my long term

relationship with them. Since consignment jewelry did not appear on our balance sheet since we did not own or owe for it, and I was the sole managing member in exclusive charge of operations, inventory and financial responsibility, I found it not necessary or informative to inform my partner of each and every potential memo arrangement I was negotiating for our new store. He was well aware of these fluid memo deals with various vendors but was not aware of any individual deal as he was not aware of any outright purchase deals with vendors pending." The Chion affidavit further states "when I left in January Morris asked me was his merchandise safe with Glenn Feldman in control. I said the merchandise was his not the stores and Ron was aware of the deal and even offered to give Morris back his items."

The defendants in opposition and in support of their cross-motion for summary judgment aver that Van Chion of Huntington, LLC acquired for full and fair consideration the assets purchased from Chion Enterprises of Dix Hills, Inc. The defendants in support submit an affidavit of Glenn Feldman, a member of the defendant Van Chion of Huntington, LLC, which states that he never met the plaintiff and never transacted any business with him and that Van Chion of Huntington, LLC was capitalized by his investment of $400,000 and loans of $500,000. In addition, the defendants submit the affidavit of Ron Fiore, a member of the defendant Van Chion of Huntington, LLC, which states in pertinent part that he has no knowledge of plaintiff's alleged consignment of merchandise to either Chion Enterprises of Dix Hills, Inc. or Van Chion of Huntington, LLC. The defendants attach a copy of the bill of sale with an affidavit of title conveying the assets of Chion Enterprises of Dix Hills, Inc. to Van Chion of Huntington, LLC. The defendants in support attach an affidavit of Anthony Chion who executed an affidavit in connection with the sale of Chion Enterprises of Dix Hills, Inc. to Van Chion of Huntington, LLC, which states that Chion represents to Van Chion of Huntington, LLC that it owns, free and clear and unencumbered all of the assets being transferred. The defendants contend that the Van Chion of Huntington, LLC has no knowledge of business between plaintiff and Chion and has never had any relationship with the plaintiff and that they have never entered into any agreement with plaintiff to assume any prior debts owed to plaintiff by Chion Enterprises of Dix Hills, Inc. The defendants aver that the affidavit signed by Anthony Chion in connection with the sale of the business acknowledges that the creditors of seller, existing as of the closing date, shall be the responsibility of the seller and "be promptly paid out of the proceeds received by the seller . . ." Finally, the individual defendants Ron Fiore and Glenn Feldman aver that they cannot be held personally liable because they were acting as agents of a fully disclosed principal and are not personally bound.

Here, the plaintiff failed to establish a prima facie entitlement to judgment as a matter of law that the defendants Van Chion of Huntington, LLC purchased assets from defendant Chion Enterprises, Inc. with actual intent to hinder, delay or defraud the plaintiff (see, Debtor and Creditor Law §276) or that the conveyance was without fair consideration and that it was done to avoid a judgment or pending litigation (see,Debtor and Creditor Law §273-a) or done by a person about to engage in a transaction for which the property remaining in his hands after the conveyance is unreasonably small (Debtor and Creditor Law §274). Moreover, the plaintiff failed to meet his burden as a matter of law for setting aside the conveyance of Von Chion Enterprises of Dix Hills, Inc. to Von Chion of Huntington, LLC (Debtor and Creditor Law 278). Critically, while the plaintiff submitted an affidavit from Anthony Chion stating that there was a consignment agreement with the plaintiff, and that the alleged consignment of jewelry was transferred with the sale of the business to Van Chion of Huntington, LLC, the defendants in opposition submit an affidavit from the same Mr. Chion given to them at the time of their purchase of Chion Enterprises of Dix Hills, Inc., wherein Mr. Chion avers that the inventory being sold and transferred is "free, clear and unencumbered". Thus, the court has before it two diametrically opposed affidavits from the same

individual, Mr. Chion. His contradictory affidavits, in and of themselves, raise issues of fact rendering summary judgment entirely inappropriate in this case. Moreover, there are, in any event, additional issues of fact with regard to whether the alleged jewelry was transferred over to the new entity. The Chion affidavit averred "to the best of my recollection" and based on what he can "recall" which raises genuine issues of fact as to what jewelry was under consignment with the defendant Van Chion Enterprises of Dix Hills, Inc. and what jewelry, if any, was transferred to Van Chion of Huntington, LLC. Accordingly, the plaintiff's portion of their motion for summary judgment is denied.

Turning to the defendants Van Chion of Huntington, LLC, Glen Feldman, and Ron Fiore's cross-motion to dismiss the plaintiff's complaint as a matter of law, the individual defendants Ron Fiore and Glenn Feldman established as a prima facie case of entitlement as a matter of law dismissing the plaintiff's complaint against them. The individual defendants established via affidavits and documents in support that they were not aware of any consignment agreement between the plaintiff and Anthony Chion and/or defendant Chion Enterprises of Dix Hills, Inc. Moreover, the individual defendants established that at the time of sale of Chion Enterprises of Dix Hills, Inc. that Anthony Chion was the President and sole stockholder of Chion Enterprises of Dix Hills, Inc. (see, defendants Exhibit" E") and that as part of the conveyance that he was representing to the purchasers that the inventory being sold was unencumbered and any debts existing at the time of the sale would be the responsibility of Chion Enterprises of Dix Hills, Inc. In opposition to the individual defendants cross-motion, the plaintiff failed to offer any evidence that the individual defendants (other than Anthony Chion) exercised complete domination of the corporation (i.e. Chion Enterprises of Dix Hills, Inc.) with respect to the transaction or conveyance under attack, and that such domination was used to commit a fraud or wrong against the plaintiff, resulting in damages (see, Matter of Morris v New York State Dept. Of Taxation & Fin., 82 NY2d 135; Fisher v Zaks, 48 AD3d 251) or that they were aware of the consignment agreement. In fact, the plaintiff's affidavit of Anthony Chion shows that they were not aware of the consignment agreement. The individual defendants did not have control over Chion Enterprises of Dix Hills, Inc. and therefore could not transfer assets to a new entity to plaintiff's detriment. Moreover, there is no evidence that the conveyance was not for fair value as evidenced by the documents in support (i.e. bill of sale, promissory note, security agreement, UCC filing, affidavit of Anthony Chion). In addition, the evidence established that the individual defendants Glen Feldman, and Ron Fiore were acting in their capacity as members of Van Chion of Huntington, LLC a disclosed principal, and not personally. Accordingly, the individual defendants Feldman and Fiore's portion of the cross- motion for summary judgment dismissing the complaint against them is granted.

The defendant Van Chion of Huntington, LLC, portion of the cross-motion to dismiss the complaint against them is denied. The defendant Van Chion of Huntington, LLC, failed to establish a prima facie entitlement to judgment as a matter of law. The defendant Van Chion of Huntington, LLC failed to show that the plaintiff's jewelry was not included in the sale of inventory and assets of Chion Enterprises of Dix Hills, Inc. to Van Chion of Huntington, LLC. The defendant Van Chion of Huntington, LLC attached the bill of sale of the conveyance of the assets and inventory of Chion Enterprises of Dix Hills, Inc. to Van Chion of Huntington, LLC, however, the bill of sale references the inventory as Schedule "A", which was not included with the cross-movants papers. Nonetheless, the plaintiff's affidavit in opposition to the cross-motion raised triable issues of fact precluding the issuance of summary judgment. The plaintiff in opposition averred that he saw his consigned jewelry in the display case of Van Chion of Huntington, LLC in the fall of 2009 which raises a triable issue of fact. Accordingly, the defendant Van Chion of Huntington, LLC's cross-motion for summary judgment is denied.

Turning to the plaintiff's portion of the motion pursuant to CPLR §3124 and/or CPLR §3126 seeking to compel a full and proper response to the plaintiff's interrogatories; "Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR §3126 is a matter of discretion with the court... The moving party must 'clearly demonstrate' that the failure to comply was willful and contumacious" (see, Pascarelli v City of New York, 16 AD3d 472). In the case at bar, plaintiff has failed to "clearly demonstrate" that the defendants' responses to the plaintiff's interrogatories was willful and/or contumacious conduct (see, Mangiapane v Brookhaven Beach Health Related Facility, 305 AD2d 642; Patterson v New York City Health & Hosps. Corp., 284 AD2d 516; Centerport Ins. Agency v Atlantic Fabricators of Rhode Is., 277 AD2d 414). The defendants timely provided a response to the plaintiff's discovery demand. Accordingly, the portion of the motion pursuant to CPLR §3126 is denied, however, the portion of the motion pursuant to CPLR §3124 seeking to compel is granted to the extent that defendant Van Chion of Huntington, LLC is directed to answer each question contained in the plaintiff's interrogatories separately and fully (see, CPLR §3133[b]).

The portion of the plaintiff's motion seeking a default judgment against the defendant Chion Enterprises of Dix Hills, Inc. is denied without prejudice to renew upon proof of an affidavit of service and compliance with CPLR §3215.

This shall constitute the decision and order of the court.

DATED: March 23, 2011

HON. JOSEPH C. PASTORESSA

____ **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**

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