

Zelouf Intl. Corp. v Rivercity, LLC

2011 NY Slip Op 31129(U)

March 30, 2011

Supreme Court, Queens County

Docket Number: 18790/2010

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

	x	Index Number <u>18790</u> 2010
ZELOUF INTERNATIONAL CORP.		
- against -		Motion Date <u>December 7,</u> 2010
RIVERCITY, LLC, et al.	x	Motion Cal. Number <u>38</u> Motion Seq. No. <u>1</u>

The following papers numbered 1 to 10 read on this motion by defendants River City, LLC, Efstathios Valiotis and Top Cave Associates Inc., for an order dismissing the complaint in its entirety on the grounds of documentary evidence, collateral estoppel, equitable estoppel, and failure to state a cause of action, pursuant to CPLR 3211(a)(1), (5) and (7).

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavits-Exhibits (A-I).....	1-4
Opposing Affirmation-Exhibits (1-7).....	5-7
Reply Affirmation-Exhibit (A).....	8-10

Upon the foregoing papers the motion is determined as follows:

Plaintiff Zelouf International Corp. (Zelouf) commenced this action on July 26, 2010, and alleges in its complaint that on October 1, 2003 it commenced an action in Supreme Court, New York County entitled *Zelouf International Corp. v Positive Influence Fashions, Inc. and Demetrios Bekas* (Index No. 603088/2003) and thereafter obtained a judgment entered against said defendants on November 10, 2005, in the sum of \$1,184,311.06, which was docketed with the Queens County Clerk on December 13, 2005. On January 9, 2006 a second judgment was entered in the New York County action in favor of Zelouf and against Mr. Bekas, in the sum of \$40,361.34.

Plaintiff Zelouf alleges that both of these judgments remain unsatisfied, and it filed executions with the City Marshall which were served on Mr. Bekas on May 12, 2010.

Plaintiff Zelouf alleges that at the time it commenced the New York County action against Mr. Bekas, he was the owner of 40 shares or 40% of the outstanding stock in Top Cove Associates Inc. (Top Cove); that Top Cove was the owner of improved real property known as 4-05 26th Avenue, Astoria, New York; that Mr. Bekas was also liable to Commodore Factors for loans made to his companies, including Positive Influence, Inc., and Positive Newbel, Inc., and had executed personal guaranties to suppliers of these entities; that Bekas' liability under the personal guarantees he gave to Zelouf, Commodore Factors, and the other suppliers of his companies exceeded \$5,000,000.00; that Bekas entered into an arrangement with Efstathios Valiotis whereby Bekas would transfer his interest in Top Cove, and Valiotis would hold the stock as a nominee for Bekas; that commencing in June 2004 Bekas advised several close friends and business associates of said arrangement; that in June 2004 Bekas signed a confession of judgment listing numerous debts which had either been satisfied or paid or were contingent, representing an alleged debt due Valiotis; that River City, LLC was formed on July 28, 2004; that Valiotis is the 100% owner and/or manager of River City, LLC; that "[b]y purported agreement dated July 29, 2004 defendant Bekas transferred his interest in Top Cove to defendant River City listing as purported 'consideration' the amount of the confession of judgment to Valiotis"; that "[o]n information and belief, VALIOTIS reneged on his agreement to act as nominee for BEKAS and BEKAS filed suit to enforce this agreement in the Supreme Court of the State of New York, Queens County Index No. 9318/10."

Plaintiff alleges in its first cause of action that the transfer of the shares of stock in Top Cove from Bekas to River City and Valiotis was without fair consideration, rendered Bekas insolvent or occurred when Bekas was insolvent, and was without good faith, as defined in the Debtor Creditor Law. That said transfer occurred at a time when Bekas had, intended or believed he would incur debts beyond his ability to pay; and that said transfer was made with the actual intent to hinder, delay or defraud creditors of Bekas, including the plaintiff, in violation of Debtor Creditor Law §§ 273, 273-a, 274, 275, 276, 278 and 279. Plaintiff seeks a declaration that said transfer was void or voidable, and seeks a judgment setting aside the transfer and returning the shares of stock to Bekas, directing the defendants to cancel the stock issued to River City and to issue new shares of stock in the name of Bekas, and directing that said shares be turned over to Zelouf so that they may be sold or otherwise used to satisfy its judgments against Bekas.

The second cause of action alleges that after the transfer of the shares of stock from Bekas, Top Cove has made cash distributions or payments to its shareholders including River City or Valiotis, and seeks an accounting as to all of Top Cove's distributions since July 29,

2004. Plaintiff further seeks to declare void or voidable Top Cove's distributions and seeks the entry of a money judgment against the defendants in the amounts of the distributions each received from, or from which they were beneficiaries, in an amount equal to each transfer up to the total combined amounts of the Zelouf judgments.

The third cause of action seeks to recover reasonable attorney's fees, pursuant to Debtor Creditor Law § 276-a.

Defendant Bekas, pro se, has served an answer and interposes a counterclaim against Mr. Valiotis which he repeats many of the allegations set forth in his complaint in the action commenced against Valiotis under Index No. 9318/2010.

Defendants River City, LLC, Efstathios Valiotis and Top Cave Associates Inc., seek an order dismissing the complaint in its entirety on the grounds of documentary evidence, collateral estoppel, equitable estoppel, and failure to state a cause of action, pursuant to CPLR 3211(a)(1), (5) and (7). Plaintiff, in opposition, asserts that its causes of action are not time barred, that the complaint properly states a claim under the Debtor Creditor Law and that the documentary evidence presented is insufficient to defeat its claims.

Pursuant to the terms of the 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 believe he will incur debts beyond his ability to pay (Debtor and Creditor Law § 275) (*see Marine Midland Bank v Murkoff*, 120 AD2d 122 [1986]).

A cause of action based on constructive fraud in New York is governed by a six-year Statute of Limitations (*see* CPLR 213 [8]), and such a cause of action arises at the time the fraudulent conveyance occurs (*see Wall St. Assocs. v Brodsky*, 257 AD2d 526, 530 [1999]). A cause of action based on actual fraud pursuant to Debtor and Creditor Law § 276 must be brought within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud should have been discovered, whichever is longer (*see Wall St. Assocs. v Brodsky, supra; Leone v Sabbatino*, 235 AD2d 460 [1997]; *Ghandour v Shearson Lehman Bros.*, 213 AD2d 304 [1995]). Here, plaintiff's causes of action under the Debtor and Creditor Law insofar as they relate to an alleged fraudulent conveyance on July 29, 2004 of Mr. Bekas' interest in Top Cove, are not barred by the statute of limitations, as this action

was commenced on July 26, 2010, within the six-year statute of limitations. Therefore, that branch of the defendants' motion which seek to dismiss the complaint on the grounds of statute of limitations, is denied.

“In order to invoke the doctrine of collateral estoppel, (1) the identical issue must have necessarily been decided in the prior action and be decisive of the present action, and (2) the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Franklin Dev. Co., Inc. v. Atl. Mut. Ins. Co.*, 60 AD3d 897, 899 [2009])” (*Scartozzi v Potruch*, 72 AD3d 787 [2010]).

Here, the issue of whether the confession of judgment and transfer of shares were entered into in order to impair the plaintiff's rights was not determined in any prior action. Furthermore, as plaintiff was not a party to any of the prior actions commenced in this court entitled *Demetrios Bekas v Efstathios Valiotis, Top Cove Associates Inc., and River City LLC* (Index No. 9318/2010), *Gatzonis v Top Cove Associates Inc.* (Index No. 1493/2005) and *Gatzonis v Bekas* (Index No. 7502/2004), it did not have a full and fair opportunity to contest the prior determinations with respect to the confession of judgment and transfer of the shares of Top Cove. Therefore, that branch of defendants' motion which seeks to dismiss the complaint on the grounds of collateral estoppel, is denied.

In order to prevail on the theory of equitable estoppel, the party seeking estoppel must demonstrate a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position (*see BWA Corp. v Alltrans Express U.S.A. Inc.*, 112 AD2d 850, 853 [1985]; *Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [1980]). Defendants' assertions that Valiotis and/or River City as a shareholder of Top Cove expensed sums with respect to the re-zoning of the real property owned by Top Cove, and that Valiotis expended further sums in connection with the purchase of an interest in an adjoining property, do not state a defense to this action based upon equitable estoppel. Furthermore, Valiotis and River City cannot demonstrate a lack of knowledge of the true facts with respect to the confession of judgment and transfer of shares of Top Cove, and cannot establish that they relied upon the conduct of the plaintiff, a judgment creditor or Bekas. Therefore, that branch of defendants' motion which seeks to dismiss the complaint on the grounds of equitable estoppel is denied.

It is well settled that “ ‘[i]n considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (*see* CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]);

Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]; *see also Bovino v Village of Wappingers Falls*, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see Guggenheimer v Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

When a defendant moves, pursuant to CPLR 3211(a)(1), to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]; *see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347, *supra*; *see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20*).

A review of the documents submitted herein establishes that Demetrios Bekas executed the June 8, 2004 confession of judgment in favor of Mr. Valiotis; that included in the confession of judgment was a statement concerning the loan made by Commodore Factors Inc.; that a secured demand promissory note dated February 25, 2000, in the sum of \$2 million dollars was executed by Valiotis and Bekas in favor of Commodore Factors Inc.; that both Valiotis and Bekas were jointly and severally liable for the payment of said loan; that Valiotis, as a partner in Parsons Associates, entered into a security agreement with respect to the Commodore loan; that Parsons Associates or Alma Realty Associates made payments to Commodore totaling \$1,812,518.00, during the period of May 2003 through April 2008; that in a prior action involving the shareholders of Top Cove, the shareholders

stipulated that the value of Mr. Bekas' shares was \$2.5 million dollars, and that the shareholders could sell their shares to third parties, without objection, in the event that the settling shareholder failed to pay a down payment of \$100,000.00, and that no such payment was made in the applicable time period.

The documentary evidence, however, fails to set forth any information regarding the nature of any agreement between Mr. Valiotis and Mr. Bekas with respect to the use of the proceeds of the Commodore loan, or the repayment of any such sums by Mr. Bekas to Mr. Valiotis. At the most, the confession of judgment establishes that Mr. Bekas acknowledged that he was indebted to Mr. Valiotis for various sums of money. No documentary evidence, however, has been presented which establishes that the confession of judgment was assigned to River City, LLC. Although the "sale of stock agreement" recites that Mr. Bekas is indebted to River City, LLC in the sum of \$3,243,445.00, the identical sum recited in the confession of judgment, this document does not recite any facts with respect to said debt. The documentary evidence submitted herein, therefore is insufficient to establish that the transfer of stock by Mr. Bekas to River City, LLC was for fair consideration, and would not have rendered him insolvent, at a time when Mr. Bekas was a defendant in the action commenced by the plaintiff to enforce a debt. That branch of defendants' motion which seeks to dismiss the complaint on the grounds of documentary evidence therefore is denied.

That branch of defendants' motion which seeks to dismiss the complaint for failure to state a cause of action is denied, as the complaint states a claim under the provisions of the Debtor Creditor Law.

Defendants are directed to serve an answer within 20 days from the date of service of a copy of this order, together with notice of entry.

Dated: March 30, 2011

AUGUSTUS C. AGATE, J.S.C.