

Sunshine Care Corp. v Davis

2011 NY Slip Op 32426(U)

September 12, 2011

Supreme Court, Nassau County

Docket Number: 014291-09

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
SUNSHINE CARE CORP., d/b/a HEMPSTEAD PARK
NURSING HOME,

Plaintiff,

-against-

DEBRA DAVIS

Defendant.

-----X
SUNSHINE CARE CORP. d/b/a HEMPSTEAD PARK
NURSING HOME,

Plaintiff,

-against-

DOROTHY JOHNSON,

Defendants.

TRIAL PART: 14

NASSAU COUNTY

ACTION NO: 1

INDEX NO: 014291-09

ACTION NO: 2

INDEX NO: 019815/10

MOTION SEQ. NO:1,2

SUBMIT DATE:07/22/11

AMENDED ORDER

The following papers having been read on this motion:

- Notice of Motion.....1, 2
- Cross Motion.....3
- Reply.....4

Plaintiff, SUNSHINE CARE CORP. d/b/a HEMPSTEAD PARK NURSING HOME, has moved for consolidation and joint trial pursuant to CPLR § 602(a). Defendant, DOROTHY JOHNSON, in Action No. 2 opposes the motion and cross-moves to dismiss the matter for failure to state a cause of action against the defendant pursuant to CPLR § 3211(a)(7), and further dismiss the matter for failure of the plaintiff to engage in discovery or alternatively precluding evidence that has not been subject to discovery pursuant to CPLR § 3126.

The related action revolves around the alleged debt of James Edwards and the alleged liability of the defendants for fraud, constructive fraud, and violation of the New York State Debtor and Creditor Law ("DCL") for their fraudulent conveyances of the Edwards assets and/or resources

rendering the Edwards and/or his estate insolvent as a result thereof, and unable to pay his debts, including to HEMPSTEAD.

In Action No. 1, the verified complaint alleges fraud, constructive fraud, and violation of the New York State Debtor and Creditor Law as against Debra Davis. In Action No. 2, the verified complaint also alleges fraud, constructive fraud, and violation of the New York State Debtor and Creditor Law as against DOROTHY JOHNSON. Both actions concern the estate of the decedent, James Edwards, and monies owed to the plaintiff, SUNSHINE CARE CORP. d/b/a HEMPSTEAD PARK NURSING HOME.

CPLR § 602(a) is intended to consolidate cases to avoid unnecessary costs and delay when the actions involve a common question of law or fact. Although a motion pursuant to CPLR § 602(a) is addressed to the sound discretion of the trial court, consolidation is favored by the courts in serving the interests of justice and judicial economy. *Flaherty v. RCP Assocs.*, 208 A D 2d 496 (2nd Dep't 1994). The action at hand involves the same common questions of facts as well as the same issue of law. The fact that the actions are in different procedural states will cause minimal to no harm to the defendants in Action No. 1 and Action No. 2 if consolidation is granted. Defendant in Action No. 1 has provided some limited discovery responses and no discovery has been exchanged between the parties in Action No.2. Furthermore, depositions have not yet been conducted in either action. Thus, no prejudice would result from consolidation of these matters at this time. In order to reduce the need for duplicative judicial resources, plaintiffs' motion to consolidate is granted.

Defendant moves under CPLR § 3211(a)(7) to dismiss all three matters for failure to state cause of action against the defendant. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff's the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory. *Sokol v. Leader*, 74 A D 3d 1180 [2nd Dept 2010].

The first cause of action maintains that the defendant transferred assets away from the resident and/or his estate intending to defraud, hinder, delay, or otherwise prevent the plaintiff from collecting debts owed, in violation of New York Debtor and Creditor Law ("DCL") § 276. The second cause of action maintains that the defendant transferred assets away from the resident and/or

his estate for unfair consideration or no consideration at all, in violation of DCL § 273. The third cause of action is for constructive fraud.

Plaintiff's complaint sufficiently pleads all three causes of action. Regarding the first cause of action, DCL § 276 provides that "every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Assuming the truth of the allegations in the complaint most favorable to the non-moving party, the plaintiff's complaint sets forth that the defendant intended by her actions of transferring the assets and/or income away for no consideration to defraud, hinder, delay, or otherwise prevent plaintiff from collecting debts owed.

As to the second claim of fraud in violation of DCL § 273, the statute states that "every conveyance and every obligation incurred 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." Thus, both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under § 273. *Joslin v. Lopez*, 309 AD2d 837, 837-838 (2d Dep't 2003). Assuming the truth of the allegations in the complaint most favorable to the non-moving party, the plaintiff's complaint sets forth that the monies from the decedent's estate were transferred for little to no consideration, rendering the estate insolvent.

Moreover, with regards to the third cause of action, the defendant's reliance on CPLR § 3016(b) to dismiss the claim for failure to plead a fraudulent claim with particularity is misplaced. Plaintiff alleges a *constructive* fraudulent conveyance, which is not subject to the heightened pleading requirements of CPLR § 3016 because the element of scienter upon the part of the defendant is not required. *Levin v Kitsis*, 82 AD3d 105 (2d Dep't 2011). In order to recover damages for constructive fraud, the following elements must be established: that (1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship. *Del Vecchio v. Nassau County*, 118 AD2d 615 (2d Dep't 1986). Unlike actual fraud, in order to recover damages for constructive fraud, the crucial exception is that the element of scienter upon the part of the defendant, his knowledge of the falsity

of his representation, is dropped and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances. *Brown v. Lockwood*, 76 AD2d 721, 731 (N.Y. App. Div. 2d Dep't 1980).

Plaintiff has sufficiently proven all elements required. Plaintiff sets forth that (1) defendant transferred all monies away from the decedent's estate rendering it insolvent, (2) therefore the monies were not available to pay off the debt owed to plaintiff, (3) the transfer was for little to no consideration, thereby false, (4) the transfer was made with the intent to defraud, hinder, or delay the plaintiff in recovering the monies owed, (5) the plaintiff relied on the monies in the estate to pay off the debt, (6) plaintiff have been injured in the amount of \$22,653.36, and (7) defendant was in a confidential or fiduciary relationship with the plaintiff by having authority and access of decedent's accounts and assets. Thus, plaintiff's claim to dismiss under CPLR § 3016(b) is denied.

Lastly, defendant moves under CPLR § 3126 to dismiss matters for failure of the plaintiff to engage in discovery or alternatively precluding evidence that has not been subject to discovery. When the record does not reveal that the nonmoving party's failure to comply with CPLR § 3126 is willful or contumacious, it is proper for the court to deny the motion to strike the nonmoving party's answer. *McCarthy v. Klein*, 238 AD2d 552 (2d Dep't 1997). Instead, the courts favor a conditional order as an appropriate remedy when it affords the party who is refusing to comply with a disclosure order an additional opportunity to comply prior to the imposition of the final sanction. *Casas v. Romanelli*, 232 AD2d 445 (2d Dep't 1996).

Therefore, it is so ordered that plaintiff must submit its responses to the discovery demand within 20 days of the date of this order, or it will be precluded from introducing any evidence at trial as to the issues pertaining to the outstanding discovery.

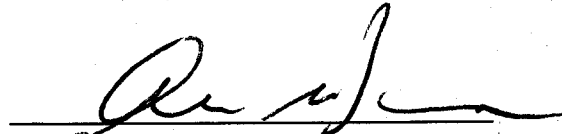
Ordered that plaintiff SUNSHINE CARE CORP. d/b/a HEMPSTEAD PARK NURSING HOME motion pursuant to CPLR § 602(a) for consolidation of Action 1 against defendant DEBRA DAVIS and Action No. 2 against defendant DOROTHY JOHNSON, is granted. The caption shall read as follows: SUNSHINE CARE CORP. d/b/a HEMPSTEAD PARK NURSING HOME against DEBRA DAVIS AND DOROTHY JOHNSON under index # 019815/2010.

It is further Ordered that defendant DOROTHY JOHNSONS's cross motion to dismiss the matter for failure to state a cause of action against the defendant pursuant to CPLR § 3211(a)(7), and further dismiss the matter for failure of the plaintiff to engage in discovery or alternatively precluding evidence that has not been subject to discovery pursuant to CPLR §3126, is denied as set forth herein.

This constitutes the decision and order of this Court.

ENTER

DATED: September 12, 2011



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

SEP 15 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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