

Commissioners of State Ins. Fund v Wolf
2011 NY Slip Op 33524(U)
December 23, 2011
Supreme Court, New York County
Docket Number: 400059/10
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 400059/2010

STATE INSURANCE FUND

VS.

WOLF, MARINA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

400059/10

MOTION DATE

7/26/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

this motion to/for

summary judgment

PAPERS NUMBERED

1-19

20-22

23-25

26-27

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

12/23/11

JOAN M. KENNEY J.S.C.

Check one:



FINAL DISPOSITION



NON-FINAL DISPOSITION

Check if appropriate:



DO NOT POST



REFERENCE



SUBMIT ORDER/ JUDG.



SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
COMMISSIONERS OF THE STATE INSURANCE FUND,
Plaintiff,

- against -

MARINA WOLF and VAN BRUNDT REALTY CORP.,
Defendants,

MEGASTREAM SERVICES, INC.,

Judgment Debtor
-----X

DECISION AND ORDER

Index Number: 400059/10

Cal.: 7/26/2011

Motion Seq. No.: 001

FILED

JAN 09 2012

KENNEY, JOAN M., J.

NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in ~~considered in~~ **CLERK'S OFFICE**
motion for summary judgment:

Papers

Notice of Motion, Affirmation, Exhibits, & Memo in Support
Wolf Affidavit in Opposition & Exhibits
Notice of Cross-Motion & Affidavit
Reply Affirmation in Support of Motion for Summary Judgment

Numbered

1-19
20-22
23-25
26-27

Appearances

Jan Ira Gellis, P.C.
Attorneys for Plaintiff
137 Fifth Avenue
11th Floor
New York, New York 10010

Michael Greber
Attorney for Defendants
Marina Wolf
9016 Third Avenue
Brooklyn, New York 11209

Spanakos & Spanakos, Esqs.
Attorneys for Defendant Van
Brundt Realty Corp.
7207 Fort Hamilton Parkway
Brooklyn, New York 11228

Plaintiff, The Commissioners of the State Insurance Fund (SIF) seeks an Order, pursuant to CPLR 3212, granting SIF summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In or around 2005, defendant Marina Wolf (Wolf) and her husband were approached by non-parties Maria Georgiadis (Maria), Vassilios Georgiadis (Vassilios), and Koula Georgiadis (Koula) (collectively, Georgiadis) with a proposition to invest in Georgiadis' company, Megastream Services, Inc. (Megastream). Megastream was an asbestos abatement company that had been established three years prior in 2002. In or around August 2005, Wolf became President of Megastream and acquired 100% interest in Megastream. Wolf made a payment of an "initial capitalization" of \$121,000.00 (see Deposition of Marina Wolf, Ex. 13 attached to notice of motion at 11-12). Wolf testified that this "initial capitalization" was a loan and that prior to Wolf leaving Megastream in or around

August 15, 2008, only \$61,533.00 of her “initial capitalization” loan was paid back to her by Megastream (*see* Affidavit of Marin Wolf attached to notice of motion ¶ 17).

During 2006 to 2008, Megastream employed four individuals including Maria and Vassilios, but had no other officers besides Wolf as President (Wolf depo. at 14). Although she signed Megastream’s tax returns, Wolf testified that Vassilios, who was employed as the “expert supervisor” for Megastream, provided information to Megastream’s accountants for its 2006 tax returns (Wolf depo. at 37:15-18) and 2007 tax returns (Wolf depo. at 78:8-10). Wolf also testified that, although Megastream leased a property listed as 332-336 Van Brundt Street that is owned by Van Brundt Realty Corp. (Van Brundt) for \$4,000.00 per month beginning October 15, 2005 (October lease) (*see* Ex. “12” attached to notice of motion), Megastream was instead forced to pay \$12,000 a month because Wolf was threatened by the Georgiadis’ that Megastream would lose the services of Vassilios if Megastream did not pay the excess rent (Wolf depo. at 39: 20-25).

On March 26, 2007, SIF commenced an action against Megastream’s failure to recover the balance due and owing for worker’s compensation insurance coverage provided by plaintiff to Megastream from March 15, 2006 to November 19, 2006 (*see The Commissioners of the State Insurance Fund v Megastream Services, Inc.*, Sup Ct, New York County, August 21, 2008, Index No. 401590/07). On August 21, 2008, SIF obtained a judgment of \$159,653.48 against Megastream (*see* Ex. “2” attached to notice of motion).

In the instant action, SIF now seeks to recover the judgment amount in the underlying action by asserting causes of action lying in fraudulent conveyance against Wolf. SIF alleges *inter alia* that the loans Wolf made to Megastream during her tenure as President were made without good faith and fair consideration. Megastream also alleges that Megastream’s payment of rent in excess of the amount listed in the 2005 lease made fraudulent conveyances in the form of excessive rent payments to Van Brundt, which was the lessor of Megastream during the relevant period of coverage.

In opposition, Wolf attaches Megastream’s bank statement for the period of October 2007 to December 2007, which indicates a balance of over \$100,000.00 in or around November 2007 (the 2007 bank statement) (*see* Ex. 1 attached to Wolf opposition). Wolf asserts that the 2007 bank statement evidences that Megastream held sufficient funds to pay any outstanding balance due and

owing to SIF.

In opposition to the instant motion, Van Brundt states by affidavit of its President, Koula Georgiadis (Koula), that Megastream payment of rents in excess of October lease's monthly amount of \$4,000.00 was due to Megastream's use of additional lots, 334 and 336, including a warehouse located on 140 Kings Street (the warehouse) (*see* Affidavit of Koula Georgiadis in opposition to notice of motion). The October lease lists the property as "332 - 336 Van Brundt Street."

ARGUMENTS

SIF argues that the instant motion should be granted as no triable issues exist as to SIF's allegations of fraudulent conveyances in the form of Wolf's loans to Megastream and the excess rent payments made by Megastream to Van Brundt.

In opposition, Wolf swears by affidavit that, because Vassilios exclusively managed the accounting and kept her "in the dark" with regard to Megastream's outstanding balance to SIF, the loans Wolf made to Megastream were done in good faith.

Van Brundt, by the Koula affidavit, argues that the instant motion should be denied because any payments in excess of the \$4,000.00 rent term pursuant to the October lease were for Megastream's use and occupancy of additional lots including *inter alia* the warehouse.

DISCUSSION

The standard for summary judgment is clearly delineated in *Alvarez v Prospect Hosp.* (68 NY2d 320, 324 [1986]):

"As we have stated frequently, 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 demonstrate the absence of any material issues of fact. . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" [internal citations omitted].

On a motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-movant and the motion should not be granted where there is any doubt as to the existence of a genuine factual issue (*see The Ins. Corp. of New York v Central Mutual Ins. Comp.*, 47 AD3d 469, 472 [1st Dept 2008]). This "drastic remedy" should not be granted where

there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Here, triable issues of fact exist sufficient to preclude a grant of summary judgment at this juncture (*see Commissioners of State Ins. Fund v Ramos*, 80 AD3d 447, 447 [1st Dept 2011]). In *Ramos*, plaintiff Commissioners of State Insurance Fund, the same plaintiff as in the action herein, alleged fraudulent conveyances by former officers of a judgment debtor corporation that was eventually rendered insolvent. Although the *Ramos* court saw evidence supporting the plaintiff's allegations, it relied on *inter alia* the testimony of one of the corporate officers that assets purchased from the judgment debtor corporation by the newly formed corporation were at fair market value. Additionally, it is significant that the *Ramos* court, as a factor in its holding, noted that it was not clear that the individual defendants knew of the judgment debtor corporation's liability to plaintiff (*see Ramos*, 80 AD3d 447, 447-48 [1st Dept 2011]).

Similarly, Wolf's affidavit and deposition testimony raises a factual dispute as to whether the Wolf loans were made in bad faith or without fair consideration. Furthermore, the undisputed fact that Wolf gave loans in 2006 and 2007, prior to the 2008 judgment, and her reliance on Megastream's bank statement in 2007, raises a triable issue of fact as to whether those loans were made in good faith. Wolf testified that only a fraction of her loans were returned to her, and that she was unaware of Megastream's relationship with SIF by Vassilios (*see Ramos*, 80 AD3d at 449). If anything, Wolf's admissions demonstrate a gross negligence on her part as an officer of Megastream.

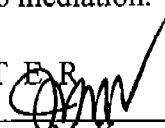
Furthermore, Van Brundt also raises a factual dispute regarding the excess rent paid by Megastream. Koula swears by affidavit that the excess rent payments were due to Megastream's use and occupancy of additional lots 334 and 336 Van Brundt Street and the warehouse. Koulas' assertions that lots 334 and 336 were not included in the October lease is clearly contradicted by the terms of the October lease listing the property as "332-336 Van Brundt Street." Nevertheless, SIF has failed to make its *prima facie* showing of entitlement to its fraudulent conveyance causes of action. Namely, the October lease is silent as to Megastream's alleged use of the warehouse and is sufficient to raise a triable issue of fact as to the existence of fair consideration for Megastream's

increased rent payments. Accordingly, it is:

ORDERED that plaintiff's motion for summary judgment is denied; and it is

ORDERED that the parties are directed to proceed to mediation.

Dated: December 23, 2011

ENTER


Hon. Joan M. Kenney
J.S.C

FILED

JAN 09 2012

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COUNTY CLERK'S OFFICE**