

Malul v Azulay
2012 NY Slip Op 30499(U)
February 24, 2012
Supreme Court, Queens County
Docket Number: 8755/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

 SHALOM MALUL,

Plaintiff,

-against-

MAIMON ZIV AZULAY, PNINA AZULAY and
 72nd AVENUE LLC,

Defendants.

Index No. 8755/11

Motion

Date December 6, 2011

Motion

Cal. No. 16

Motion

Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants is determined as follows:

This action concerns the transfers of parcels of real property located at 196-45 McLaughlin Avenue, Jamaica Estates, New York ("the McLaughlin Property") and 159-15 72nd Avenue, Flushing, New York ("the 72nd Avenue Property"). It is undisputed that defendant Pnina Azulay is the wife of defendant, Maimon Ziv Azulay. Via the instant Complaint, plaintiff, Shalom Malul seeks to set aside the transfer of the McLaughlin Property as well as the transfer of the 72nd Avenue Property. It is alleged that plaintiff is a creditor of defendant, Maimon Ziv Azulay and that defendant 72nd Avenue LLC is a limited liability company in which defendant Maimon Ziv Azulay is the managing member.

Plaintiff sues for a first cause of action for fraudulent conveyance by Insolvent - Debtor and Creditor Law § 273, a second cause of action for fraudulent conveyance in anticipation of debts - Debtor and Creditor Law § 275, a third cause of action for fraudulent conveyance with Intent - Debtor and Creditor Law § 276, a fourth cause of action for constructive trust, a fifth

cause of action for fraudulent conveyance by Insolvent - Debtor and Creditor Law § 273, a sixth cause of action for fraudulent conveyance in anticipation of debts - Debtor and Creditor Law § 275, a seventh cause of action for fraudulent conveyance with Intent - Debtor and Creditor Law § 276, and an eighth cause of action for constructive trust. The first four causes of action relate to the McLaughlin Property and the second four causes of action relate to the 72nd Avenue Property.

Debtor and Creditor Law § 273 provides:

Every conveyance made 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 a fair consideration.

Debtor and Creditor Law § 275 provides:

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

Debtor and Creditor Law § 276 provides:

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.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the Complaint against defendants for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v Martinez*, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assocs.*

v Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999])). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992])). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006] [internal citations omitted]).

Applying these principles in this case, the court decides as follows:

(1) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance by Insolvent - Debtor and Creditor Law § 273.

(2) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance in anticipation of debts - Debtor and Creditor Law § 275.

(3) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the third cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance with Intent - Debtor and Creditor Law § 276.

(4) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is granted.

Defendants established a prima facie case that plaintiff failed to establish the elements necessary for the imposition of a constructive trust. It is well-established law that: "a constructive trust may be imposed '[when] property has been acquired in such circumstances that the holder of the legal title

may not in good conscience retain the beneficial interest' (internal citations omitted)'. In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment" (*Sharp v Kosmalski*, 40 NY2d 119 [1976] [internal citations omitted]). "However these elements are simply guidelines and are not to be applied rigidly in pursuing the goal of preventing unjust enrichment" (*Hennes v Hunt*, 272 AD2d 756 [3d Dept 2000]). In the instant case, there has been no allegation of a promise or a transfer in reliance on a promise.

Accordingly, that branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is granted.

(5) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fifth cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance by Insolvent - Debtor and Creditor Law § 273.

(6) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance in anticipation of debts - Debtor and Creditor Law § 275.

(7) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the seventh cause of action is denied, as the complaint adequately states a cause of action for fraudulent conveyance with Intent - Debtor and Creditor Law § 276.

(8) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the eighth cause of action is granted.

Defendants established a prima facie case that plaintiff failed to establish the elements necessary for the imposition of a constructive trust (see legal discussion, *supra*). In the instant case, there has been no allegation of a promise or a transfer in reliance on a promise.

Accordingly, that branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the eighth cause of action is granted.

That branch of defendants' motion seeking summary judgment pursuant to CPLR 3212 is hereby denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendants present a prima facie case that the first, second, third, fifth, sixth, and seventh causes of action should be dismissed. In support of these branches of the motion, defendants submit, inter alia: an affidavit of defendant, Maimon Ziv Azulay, who avers that: he was not insolvent in December 2005 and he has never been insolvent at any time, there is no basis for the assertion that the McLaughlin Property was purchased to defraud the plaintiff, or that his property on 72nd Avenue was placed in the name of a limited liability company for such a purpose, at no time did he ever believe or intend to incur debts beyond his ability to pay as they mature, he has never acted with any actual intent to hinder, delay or defraud any present or future creditors, the plaintiff is not a creditor as far as he is concerned; and an affidavit of defendant, Pnina Azulay, wherein she avers that: co-defendant, Ziv Azulay is her husband, she denied the allegation that Ziv or herself have any intent or purpose of hindering, delaying or defrauding any of Ziv's creditors, she owes the plaintiff nothing, and plaintiff could not possibly be construed as a creditor in 2005.

In opposition, plaintiff raises triable issues of fact. In

opposition, plaintiff submits, inter alia, an affidavit of plaintiff, himself wherein he avers that: he and defendant Maimon Ziv Azulay were in business together by March 2005. As plaintiff raises triable issues of fact, regarding, inter alia, whether the transfers of the two properties were made without fair consideration and whether defendant Maimon Ziv Azulay was ever rendered insolvent, summary judgment pursuant to CPLR 3212 is unwarranted.

The remaining branches of the motion seeking to dismiss and/or cancel the Notice of Pendency pursuant to CPLR Article 65 and to award the defendants costs, expenses, and attorneys' fees pursuant to CPLR 6514(c) are hereby denied as defendants have failed to establish a prima facie entitlement to such relief since the Complaint has not been dismissed.

This constitutes the decision and order of the Court.

Dated: February 24, 2012

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Howard G. Lane, J.S.C.