Zelouf Intl. Corp. v Rivercity LLC
2012 NY Slip Op 32078(U)
July 3, 2012
Sup Ct, 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 Honorable Augustus C. Agate IA Part 24
Justice

ZELOUF INTERNATIONAL CORP x

Plaintiff,

-against-_

RIVERCITY LLC, EFSTATHIOS VALIOTIS, DEMETRIOS BEKAS and TOP COVE ASSOCIATES INC.,

x

Index Number 18790 2010

Motion Date April 17, 2012

Motion Cal. Number 32

Motion Seq. No. 4

The following papers numbered 1 to 11 read on this motion by plaintiff Zelouf International Corp. for summary judgment on its complaint, on this cross motion by defendant Efstathios Valiotis, defendant River City, LLC, and defendant Top Cove Associates, Inc. for summary judgment dismissing the complaint and all of the cross claims against them, and on this cross motion by defendant Demetrios Bekas for summary judgment on his cross claims.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits......................................	1
Notice of Cross Motion - Affidavits - Exhibits.............................	2-5
Answering Affidavits - Exhibits..	
Reply Affidavits..	6-8
Memoranda of Law	9-11

Upon the foregoing papers it is ordered that: The motion by plaintiff Zelouf International Corp. is denied. The cross motion by defendant Demetrios Bekas is denied. The cross motion by defendant Efstathios Valiotis, defendant River City LLC, and defendant Top

Cove Associates, Inc. for summary judgment dismissing the complaint and all of the cross claims against them is granted.

Plaintiff Zelouf International Corp. brought this action pursuant to the Debtor and Creditor Law for the purpose of setting aside a sale of stock in Top Cove Associates from defendant Demetrios Bekas to defendant Efstathios Valiotis as fraudulent. The court has stated the plaintiff's allegations in its decision and order (one paper) dated March 30, 2011 which denied a motion by defendant Valiotis, defendant River City, LLC, and defendant Top Cove Associates, Inc. for an order dismissing the complaint against them pursuant to CPLR 3211.

In deciding a motion for summary judgment, the court's function is to identify material issues of fact or to point to their absence. (*Vega v. Restani Const. Corp*., 18 NY3d 499.) The record made in the case at bar permits the court to determine as a matter of law that defendant Valiotis obtained the 40 shares of Top Cove from defendant Bekas in partial satisfaction of an antecedent debt of over $3,200,000 owed by Bekas to Valiotis. The antecedent debt accrued in the following manner: First, Peter Kreatsoulas brought an action against Valiotis, Bekas, Peter Xenopolous, Demetrios Demetrios, and John Zapanis, successfully recovering a judgment in the amount of $1,699,999. Kreatsoulas assigned the judgment to Valiotis, who then sought to enforce the judgment against the other defendants. On or before August 10, 1999, Valiotis confessed judgment to Valiotis in the amount of $400,000 plus interest. Second, in 2000, Valiotis agreed that he would co-sign a note with Bekas evidencing a loan from Commodore Factors Corp. in the amount of $2,000,000. Bekas borrowed in excess of $2,000,000 from the factor, but failed to make repayment as required by the terms of the note and guaranty signed by his company, Positive Newbel. Valiotis and his company, Parsons Associates, repaid more than $1,800,000 of the funds borrowed by Bekas who thus became indebted to Valiotis for that sum. Third, during the period September, 1995 through November, 1995, Valiotis made several personal loans to Bekas or his company, Positive Influence, in the amount of not less than $385,000, and Valiotis also made other loans to Bekas. The court notes that Zelouf did not begin an action for, inter alia, goods sold and delivered against Bekas and his company until October, 2003, after the antecedent debt had accrued.

Around the end of 2003, Bekas and Valiotis held discussions concerning the repayment of the debt owed by the former to the latter, and Bekas offered to convey to Valiotis 40 shares of Top Cove Associates, Inc., a company in which he held a 40% interest, in satisfaction of $2,500,000 of the debt. Evangelos Gatzonis, one of the co-owners of the corporation, brought an action in the New York State Supreme Court, County of Queens to prohibit Bekas and Dimitrios Politis (another co-owner) from transferring their shares to Valiotis (*Gatzonis v. Bekas,* Index No. 7502/04). The parties ended the action by entering

into a Settlement Agreement whereby Gatzonis promised to pay Bekas $2,500,000 for his 40 shares in Top Cove and to pay Politis $1,000,000 for his 20 shares. However, Gatzonis breached the settlement agreement, and Bekas never transferred his shares to him.

On or about May 27, 2004, Bekas executed an affidavit for Judgment by Confession in favor of Valiotis, acknowledging debts in the amount of $3,243,445, representing principal and interest due on (1) personal loans made by Valiotis, (2) the unpaid portion of the *Kreatsoulas* judgment, and (3) the Commodore Factors loan. At the time that he signed the affidavit, Bekas did not inform Valiotis that Zelouf had begun an action against him and his company, Positive Influence Fashions, Inc, in the New York State Supreme Court.

By a letter written in June, 2004, Valiotis offered to purchase the interest of both Bekas and Politis in Top Cove, stating that he would pay Bekas $3,250,000 for his 40 shares and Politis, $1,250,000 for his twenty shares. Valiotis offered to pay a premium for the shares of both men in order to obtain a controlling interest in the company, and Valiotis conditioned the offer upon the acceptance by both men. Politis rejected the offer, and Valiotis subsequently entered into an agreement with Bekas for the purchase of his shares alone, but at a lesser price (the satisfaction of $2,500,000 of the debt owed by Bekas). Valiotis and his wife, Stamika Valiotis, organized River City, LLC to receive the shares purchased from Bekas. On July 29, 2004, Bekas sold his shares to Valiotis or his company for the satisfaction of $2,500,000 in antecedent debt.

In January, 2005, Gatzonis began a second action in the New York State Supreme Court, County of Queens, against Bekas, Valiotis, Politis, and other parties, again seeking to prohibit the sale of stock to Valiotis (*Gatzonis v. Top Cove Assoicates, Inc.,* Index No. 1493/05). Bekas had turned over documents to Gatzonis to prove that he had received adequate consideration for his shares of stock. Bekas' attorney stated to the court in an affirmation submitted on a CPLR 3211 motion: " These documents show that Mr. Bekas had significant debts to Mr. Valiotis and those debts resulted in a Confession of Judgment which Mr. Valiotis was entitled to and was in the process of executing upon. ***All parties had independent counsel and the reduction of Mr. Bekas' debt by $2.5 million dollars was significant and actual consideration." Bekas submitted an affidavit adopting the statements made by his attorney.

In exchange for the shares of Top Cove, Valiotis agreed to extinguish $2,500,000 of the debt owed to him by Bekas. The record in this case reveals that the debtor acknowledged the validity of the debt in five documents, including: (1) a May 27, 2004 affidavit in support of a confession of judgment signed by Bekas, (2) a stipulation filed in the first *Gatzonis* action, (3)a sale of stock agreement signed by Bekas who was represented by an attorney, (4) an affidavit of Bekas filed in the second *Gatzonis* action adopting the statements made

by his attorney, and (5) a release of lien signed in February, 2005 in connection with a real estate transaction..

On November 10, 2005, Zelouf entered judgment against Bekas and Positive Influence Fashions, Inc. for $1,184,311. On January 9, 2005, Zelouf entered a second judgment against Bekas for $40,361. Valiotis charges Zelouf and Bekas with collusion in this lawsuit. Valiotis alleges that Bekas owned real property located at 25-36/38 31st Street, Astoria, New York and 1-15 Samos Lane, Whitestone, New York worth millions of dollars at the time that Zelouf obtained its judgment against him, but Zelouf took no action to enforce the judgment against the property. Although there may have been mortgages and liens on the property, Zelouf does not allege that it attempted to enforce its judgment against the property.

Turning first to the cross motion made by Valiotis and related parties, "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 ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) Defendant Valiotis, defendant River City, LLC, and defendant Top Cove Associates successfully carried this burden. The burden on this cross motion for summary judgment then shifted to its opponents to produce evidence showing that there is a genuine issue of fact which must be tried. (*See*, *Alvarez v. Prospect Hospital, supra*.) Plaintiff Zelouf and defendant Bekas failed to carry this burden.

Debtor and Creditor Law § 273, "Conveyances by insolvent," 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." (*See*, *Citibank, N.A. v. Plagakis*, 8 AD3d 604; *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 AD3d 780; *St. Teresa's Nursing Home v. Vuksanovich*, 268 AD2d 421.) Debtor and Creditor Law § 271, "Insolvency," provides that: " 1. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." (*See*, *Grace Plaza of Great Neck, Inc. v. Heitzler, supra*.) The court notes that there is an issue of fact in this case concerning whether Bekas was insolvent at the time that he transferred his stock in Top Cove to Valiotis, but the issue need not be tried.

Debtor and Creditor Law §273-a, “Conveyances by defendants,” provides: “Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the

defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment" (*See*, *Thompson v. Cooper*, 91 AD3d 461.)

Debtor and Creditor Law§ 274, " Conveyances by persons in business," provides: "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent." (*See*, *Sharrer v. Sandlas*, 103 AD2d 873)

Debtor and Creditor Law § 275, "Conveyances by a person about to incur debts," 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." (*See*, *Grace Plaza of Great Neck, Inc. v. Heitzler*, *supra; Shelly v. Doe*, 249 AD2d 756.) A conveyance made by a person who has a "good indication of oncoming insolvency" is deemed to be fraudulent pursuant to Debtor and Creditor Law §275. (*See*, *Grace Plaza of Great Neck, Inc. v. Heitzler, supra*; *Shelly v.Doe*, *supra*.)

An essential element of a cause of action asserted under Debtor and Creditor Law §§ 273, 273-a, 274, and 275 is a lack of fair consideration. (*See*, *Atlanta Shipping v. Chemical Bank*, 818 F2d 240; *In re 9281 Shore Road Owners Corp*., 214 BR 676.) Debtor and Creditor Law § 272, "Fair consideration," provides in relevant part: "Fair consideration is given for property, or obligation, a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied ***." (*See*, *Prudential Farms of Nassau County v. Morris*, 286 AD2d 323.) The satisfaction of an antecedent debt or obligation amounts to fair consideration. (*Palermo Mason Const., Inc. v. Aark Holding Corp*., 300 AD2d 458.) "Under the law of this state, a conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper, even if its effect is to prefer one creditor over another." (*Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A.* 191 AD2d 86, 90-91.)

Debtor and Creditor Law §276, "Conveyance made with intent to defraud," 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." (*See*, *B.M.H. Management, Inc. v. 81 & 3 Of Watertown, Inc*., 13 AD3d 1182; *Citibank, N.A. v*. Plagakis, *supra; Grace Plaza of Great Neck, Inc. v. Heitzler, supra*.)

In regard to Debtor and Creditor Law §§ 273, 273-a, 274, and 275, the absence of fair consideration must be proven by a fair preponderance of the evidence (*see*, *Lippe v. Bairnco Corp*., 249 F.Supp.2d 357; *In re Cambridge Capital, LLC*., 331 B.R. 47), and the record reveals that Zelouf and Bekas cannot meet this standard. In regard to Debtor and Creditor Law § 276, actual fraud must be proven by clear and convincing evidence (*see*, *Micalden Investments S.A. v. Guerrand-Hermes*, 30 AD3d 341; *Access Lending Corp. v. ALA Associates*, 303 AD2d 495; *Symbax, Inc. v. Bingaman*, 219 AD2d 552), and the record reveals that Zelouf and Bekas cannot meet this standard.

Concerning fair consideration, pro se defendant Bekas, who asserted cross claims against Valiotis seeking, inter alia, to rescind his sale of Top Cove stock to Valiotis, is judicially estopped from alleging that Valiotis did not exchange fair consideration for the stock. Bekas alleges that he was "fraudulently induced to sign a confession of judgment and transfer Top Cove stock to River City, LLC based upon Valiotis' misrepresentations that he would hold the stock as a nominee, cause the Top Cove property to be rezoned to increase its market value, and from the added equity to recoup monies that Bekas and Valiotis had joint liabilities." The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed ***." (*Ford Motor Credit Co. v Colonial Funding Corp*., 215 AD2d 435, 436; *see*, *Tedesco v Tedesco*, 64 AD3d 583; *City of New York v College Point Sports Assn., Inc*., 61 AD3d 33.) Although no judgment was entered in the second *Gatzonis* action, this court's computer records show that the second *Gatzonis* action is marked "disposed." The case in which Bekas made representations that Valiotis paid fair consideration for his Top Cove stock ended favorably for Bekas, and Valiotis can successfully invoke the doctrine of judicial estoppel. "An opponent's withdrawal of his or her claim based on a party's argument is sufficient to estop the party from changing its position ***." (57 NYJur2d, "Estoppel, Etc.," § 66.) In any event, in light of all the evidence submitted by Valiotis, the allegations made by Zelouf and Bekas about fair consideration were insufficient to raise a genuine issue of fact. The allegations that Bekas makes in this case contradict those made in five documents that he signed as early as 2004. Summary judgment cannot be defeated by allegations that are "patently incredible" as a matter of law. (*See*, *Citibank, N.A. v. Plagakis*, 8 AD3d 604.)

Valiotis made a prima facie showing that (1) Bekas satisfied part of an antecedent debt owed to him by the transfer of 40 shares of Top Cove stock to him or to his closely held company, (2) that the extinguishment of $2,500,000 in antecedent debt constituted fair and adequate consideration for the 40 shares of Top Cove stock, (3) that he did not know of any litigation between Bekas and Zelouf at the time that he received the 40 shares of Top Cove stock, and (4) that he had no intent to defraud any creditor of Bekas and committed no fraud.

Zelouf and Bekas did not submit evidence sufficient to raise a genuine issue of fact which must be tried. (*See*, *Alvarez v. Prospect Hospital, supra*.)

Dated: July 3, 2012

HON. AUGUSTUS C. AGATE, J.S.C.