

Tufarella v Carthew

2013 NY Slip Op 30530(U)

March 6, 2013

Supreme Court, Suffolk County

Docket Number: 37827/2010

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

L.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

John M. Tufarella, Aida Espinola, as
Administratrix of the goods, chattels and credits
which were of Anna Lisa Bruno, deceased, Donna
Brown, as Administratrix of the Estate of Michael
S. Bruno, deceased, and Donna Brown, as
grandmother and custodian of Barrett Bruno and
Baylee Bruno, infants under the age of 14,

Plaintiff,

-against-

Beth Carthew, Christopher Carthew, Jeffrey Brett
and Natalie Brett,

Defendants.

King Quality Siding and Windows, Inc.

Judgment-Debtor,

Index No.: 37827/2010Motion Sequence No.: 009; MOT.DMotion Date: 8/29/12Submitted: 11/28/12Motion Sequence No.: 010; MDMotion Date: 10/22/12Submitted: 11/28/12Motion Sequence No.: 011; XMGMotion Date: 11/21/12Submitted: 11/28/12Attorney for Plaintiff:

Jan Ira Gellis, P.C.
137 Fifth Avenue
New York, NY 10010

Attorney for Defendants

Beth Carthew, Christopher Carthew,
Jeffrey Brett and Natalie Brett:

Defendant:

Christopher Carthew
81a Crescent Beach Road
Glen Cove, NY 11542

Scott Lockwood, Esq.
1476 Deer Park Avenue, Suite 3
North Babylon, NY 11703

Clerk of the Court

Upon the following papers numbered 1 to 58 read upon this application for a protective order, separate motion and cross-motion for summary judgment: Notice of Motion and supporting papers, 1 - 10; 13 - 20; Notice of Cross Motion and supporting papers, 21 - 53; Answering Affidavits and

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supporting papers, 11 - 12; 54 - 56; Replying Affidavits and supporting papers, 57 - 58; it is

ORDERED that this motion (#009) by plaintiff, John M. Tufarella, for an order granting a protective order is granted only to the extent that within twenty (20) days from the date of this order defendants shall submit proposed written interrogatories to plaintiffs' counsel, and upon receipt and review of plaintiffs' responses to such interrogatories, defendants may move, if they be so advised, to compel the deposition of a knowledgeable witness and plaintiffs may move, if they be so advised, for a further protective order (*see Ceron v Belilovsky*, 92 AD3d 714, 938 NYS2d 607 [2d Dept 2012]); and it is further

ORDERED that the separate motion (#010) by defendants, Beth Carthew, Christopher Carthew, Jeffrey Brett and Natalie Brett, for an order awarding summary judgment in their favor dismissing the complaint against them is denied; and it is further

ORDERED that the cross-motion (#011) by plaintiffs for an order granting leave to reargue their prior application for summary judgment is granted, and upon such reargument, the cross-motion for an order awarding summary judgment in their favor on the first, fourth, seventh, tenth, thirteenth, sixteenth, nineteenth and twenty-second causes of action under Debtor and Creditor Law § 273-a is granted to the extent indicated herein, and the remaining causes of action are hereby severed and shall otherwise continue against the defendants.

Actions were commenced against King Quality Siding & Windows, Inc. (King Quality) and others by John M. Tufarella on October 14, 2004, by Aida Espinola, as administratrix of the goods, chattels and credits which were of Anna Lisa Bruno, deceased, on May 27, 2004, by Donna Brown, as administratrix of the estate of Michael S. Bruno, deceased, on June 3, 2004, and by Donna Brown, as grandmother and custodian of Barrett Bruno and Baylee Bruno, infants under the age of 14, on April 14, 2004, to recover damages for personal injuries and wrongful death as the result of a motor vehicle accident on June 9, 2002. Following a trial in which King Quality was found to be totally responsible for the accident, the claims asserted by plaintiffs were resolved by settlement and confessions of judgment entered into on behalf of the corporation by defendant Beth Carthew, as president of King Quality. Judgment was entered in favor of plaintiff Tufarella on June 3, 2009, in favor of plaintiff Aida Espinola in her representative capacity on June 19, 2009, and in favor of Donna Brown in her representative capacities on June 17, 2009. It is alleged by plaintiffs that the corporation has failed to satisfy the judgments.

Plaintiffs commenced this action as judgment creditors of King Quality to recover damages for alleged fraudulent conveyances of corporate assets. Plaintiffs seek recovery under Debtor and Creditor Law § 273-a against Natalie Brett and Jeff Brett for alleged distribution of corporate monies to Natalie Brett without fair consideration under the first, seventh, thirteenth and nineteenth causes of action, recovery under Debtor and Creditor Law § 273 against Natalie Brett and Jeff Brett for alleged distribution of corporate monies to Natalie Brett which rendered the corporation insolvent under the second, eighth, fourteenth and twentieth causes of action, and recovery under Debtor and Creditor Law § 274 against Natalie Brett and Jeff Brett for alleged fraudulent distribution of

corporate monies to Natalie Brett under the third, ninth, fifteenth and twenty-first causes of action. Plaintiffs also seek recovery under Debtor and Creditor Law § 273-a against Beth Carthew and Christopher Carthew for alleged distribution of corporate monies to Beth Carthew without fair consideration under the fourth, tenth, sixteenth and twenty-second causes of action, recovery under Debtor and Creditor Law § 273 against Beth Carthew and Christopher Carthew for alleged distribution of corporate monies to Beth Carthew which rendered the corporation insolvent under the fifth, eleventh, seventeenth and twenty-third causes of action, and recovery under Debtor and Creditor Law § 274 against Beth Carthew and Christopher Carthew for alleged fraudulent distribution of corporate monies to Beth Carthew under the sixth, twelfth, eighteenth and twenty-fourth causes of action.

In support of the defendants' motion for summary judgment, Jeffrey Brett submitted an affidavit dated September 20, 2012 in which he referred to and corrected his deposition testimony that defendants Beth Carthew and Natalie Brett have been officers of King Quality since 1996. In his affidavit, Brett set forth the following explanation: "The reason Beth and Natalie were placed in that position was because Christopher Carthew and I had legal problems and were no longer going to be directly affiliated with King Quality Siding and Windows any longer." In addition, in his affidavit dated November 13, 2012 which was submitted in opposition to plaintiffs' cross-motion, Jeffrey Brett averred that he was not permitted to be directly involved with the home improvement business and that he was "not able to be directly employed by a company which engaged in financing with banks." Such assertions, however, stand in direct contrast to the statement of facts set forth in the decision and order of the Court dated January 12, 2012 (Pastoressa, J.) in the action entitled **Bank of America, N.A. v King Quality Siding & Windows, Inc.**, ___ Misc3d ___, 2012 NY Misc LEXIS 389 (Sup Ct, Suffolk Co 2012) in which it is stated: "A guarantee agreement dated March 6, 2008, signed by Jeff Brett, Natalie Brett, Beth Carthew, and 1615 Sycamore Avenue Corp. was entered into guaranteeing payment in the event of a default by [King Quality Siding & Windows, Inc.] under the line of credit agreement [with Bank of America]." In view of the foregoing, defendants Jeffrey Brett, Natalie Brett and Beth Carthew are collaterally estopped from denying their affiliation with King Quality, since summary judgment was awarded in favor of Bank of America and against them, jointly and severally, upon their continuing and unconditional guaranty dated March 6, 2008 for amounts loaned to King Quality under a line of credit agreement.

Applying the principle of *falsus in uno, falsus in omnibus*, the affidavits of Jeffrey Brett are determined to be incredible and without evidentiary merit.

Beth Carthew testified at her deposition that she did "nothing" for King Quality from 2004 until July 2006. Natalie Brett testified that she is a "stay-at-home mom most of the time" and that in the twelve-year period prior to her deposition in 2010 she visited 1615 Sycamore Avenue, "maybe three times a year, maybe." She did not know who made decisions for King Quality nor did she know the identities of the shareholders of the corporation. She did not have an office at King Quality and she never worked from home for King Quality. Payroll records authenticated by an employee of Paychex, Inc., indicate that both Beth Carthew and Natalie Brett were paid salaries by King

Quality of \$63,000.00 each in 2004. The payroll records also indicate that in 2005 both Beth Carthew and Natalie Brett were paid salaries by King Quality of \$104,000.00 each, and for the first three quarters through September 30, 2006, each were paid salaries of \$119,500.00. In addition, Natalie Brett received salary for the last quarter of 2006 in the amount of \$58,000.00, plus a salary of \$5,000.00 for each of the first four weeks of January 2007, and a salary of \$6,000.00 for each week thereafter through December 26, 2007.

Debtor and Creditor Law § 273-a states as follows:

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.

To the extent that plaintiffs seek an order awarding summary judgment on the first, fourth, seventh, tenth, thirteenth, sixteenth, nineteenth and twenty-second causes of action under Debtor and Creditor Law § 273-a, plaintiffs have demonstrated that salaries were paid to Natalie Brett and to Beth Carthew during a period when King Quality was a defendant in the motor vehicle action and when judgments in the action were docketed against it, and that no services were provided by either Brett or Carthew in consideration for payment of those salaries. It has been held that where fraudulent conveyances have been established, each transferee who is not a *bona fide* purchaser for fair consideration is liable to the creditor to the extent of the value of the money or property he or she wrongfully received (*Farm Stores, Inc. v School Feeding Corp.*, 102 AD2d 249, 477 NYS2d 374 [2d Dept 1984]).

In view of the foregoing, plaintiffs have demonstrated that the aforementioned payments made to Beth Carthew from 2004 through July 31, 2006 and to Natalie Brett from 2004 through 2007 by King Quality were fraudulent under Debtor and Creditor Law § 273-a, thereby establishing their *prima facie* entitlement to judgment against defendants Natalie Brett and Beth Carthew as a matter of law (*see Kreisler Borg Florman Gen. Constr. Co. v Tower 56, LLC*, 58 AD3d 694, 872 NYS2d 469 [2d Dept 2009]), and defendants failed to raise a triable issue of fact (*see Petersen v Valenzano*, 285 AD2d 635, 728 NYS2d 192 [2d Dept 2001]). The remaining claims are hereby severed and shall otherwise continue against the defendants. Accordingly, plaintiffs may have judgment against Beth Carthew for conveyances made from October 4, 2004 to December 31, 2004 in the amount of \$23,217.39, for conveyances in 2005 in the amount of \$104,000.00, and for conveyances in 2006 through July 31, 2006 in the amount of \$77,833.33, for a total judgment of \$205,050.72, with interest from June 3, 2009, plus costs and disbursements. Plaintiffs also may have judgment against Natalie Brett for conveyances made from October 4, 2004 to December 31, 2004 in the amount of \$23,217.39, for conveyances in 2005 in the amount of \$104,000.00, for conveyances in 2006 in the amount of \$177,500.00, and for conveyances in 2007 in the amount of 308,000.00, for a total

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judgment of \$612,717,39, with interest from June 3, 2009, plus costs and disbursements.

Enter judgment accordingly.

Dated: *March 6, 2013*


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION