

Hoffman v Goldman

2013 NY Slip Op 31682(U)

July 16, 2013

Supreme Court, New York County

Docket Number: 107753/11

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM A. HENNING
J.S.C.
Justice

PART 44

Index Number : 107753/2011
HOFFMAN, PETER
vs.
GOLDMAN, LLOYD
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 107753/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed decision.

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

FILED
JUL 26 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/16/13

Mat, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

107753 / 11

-----X
PETER HOFFMAN

Plaintiff,

-against-

LLOYD GOLDMAN, HARRIET GOLDMAN and LLOYD
GOLDMAN, as Executors of the ESTATE OF DAVID
GOLDMAN, GARY M. TISCHLER and KENNETH L.
HENDERSON,

Defendants.

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FILED

JUL 26 2013

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NEW YORK

Defendants Lloyd Goldman, Harriet Goldman and Lloyd Goldman as executors of the Estate of David Goldman, Gary M. Tischler and Kenneth L. Henderson move for summary judgment dismissing plaintiff's complaint pursuant to CPLR 3211 and CPLR 3212. Peter Hoffman (Plaintiff), cross moves for summary judgment, default judgment or preclusion of any evidence testimony or documentation containing information that the Defendants failed to disclose.

Pursuant to an affidavit by Lloyd Goldman, Partnership 94, L.P., Emmes Partners, IX and Bacael Partners II, L.P. purchased 303 East 83rd Street as a general partnership. Soon after the purchase, the partnership was converted into an LLC and the partners became members of the LLC. Peter Hoffman (Plaintiff) was sued in December 2005, by the owners of 303 East 83rd Street, where Plaintiff was a residential tenant. The owners partitioned the property on January 1, 2007 to the three members as tenants-in-common. Partnership 94, L.P., Emmes Partners, IX and Bacael Partners II, L.P. became direct owners of their respective interests. On June 6, 2007, the property was conveyed to an unrelated purchaser. All debts were paid before or at closing of the transfer. On July 15, 2008, Plaintiff obtained a judgment against 303 East 83rd Street.

The movant on a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law. *Winegrad v. New York Medical Center*, 64 N.Y.2d 851, 853 (1985). “The party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action.” C.P.L.R. Section 3213; *Zuckerman v. City of New York*, 49 N.Y.2d 577 (1980). The movant of a summary judgment motion has the initial burden to show evidentiary proof in an admissible form establishing entitlement to summary judgment. *Id.*

Plaintiff’s complaint is based on Section 276 and 273-a of the Debtor and Creditor Law. Section 276 states, “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.” Debtor and Creditor Law N.Y., § 276. “The burden of proving actual intent is on the party seeking to set aside the conveyance.” *U.S. v. McCombs*, 30 F.3d 310 (1994).

Defendants allege the property was not transferred by the individual defendants but by the partnerships themselves. Defendants also allege the transfer was a partition, in the event of a sale; each owner would be in a position to make a separate decision. Defendants assert there was no intent to hinder, delay or defraud when the transfer was made.

Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y.2d 577 (1980).

Plaintiff alleges defendants made the transfer so they would be judgment proof. Plaintiff asserts the transfer was made purposefully to prevent Plaintiff from recovering if he won the pending suit. Plaintiff puts forth no other evidence to establish the intent of defendants. Therefore, the motion for summary judgment as to Debtor and Creditor Law §276 is granted.

“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.” Debtor and Creditor Law N.Y., § 273-a.

Defendants assert the transfer was not made while defendants during the pendency of a case for money damages. Defendants allege Plaintiff was the defendant in the case referred to and there was no consideration about money damages at the time the transfer was made.

Plaintiff alleges the defendants made the transfer during an action for money damages. According to undisputed testimony, Plaintiff was the defendant in a civil suit for unpaid rent by the defendants in the present action. At the time the transfer was made, the suit for unpaid rent was still proceeding. A judgment was not entered for Plaintiff until nineteen months after the transfer was made. Therefore, the defendants did not make the transfer while a defendant in an action for money damages. Thus, the motion for summary judgment as to Debtor and Creditor Law §273-a is granted.

Pursuant to CPLR §3126 (3), where a party refuses to obey an order for disclosure or deliberately fails to disclose information which the court finds ought to have been disclosed the court may make an order striking out pleadings. McKinney’s CLPR §3126(3). “The drastic remedy of striking a party’s pleading pursuant to CPLR §3126, for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith.” *McGilvery v. New York City Transit Authority*, 213 A.D.2d 322 (1995). “Plaintiff’s failure to offer a reasonable excuse for his noncompliance gives rise to an inference of willful and contumacious conduct.” The defendants have not given a reasonable excuse for their failure to comply with discovery demands.

The court finds no genuine issue of disputed material fact and the motion for summary judgment as to Debtor and Creditor Law §276 and 273-a for defendants is granted. The cross motion for plaintiff is denied.

Dated: New York
July 16 2013



Honorable Milton A. Tingling J.S.C.

**MON. MILTON A. TINGLING
J.S.C.**

FILED

JUL 26 2013

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