

Tufarella v Carthew

2013 NY Slip Op 32240(U)

September 13, 2013

Sup Ct, Suffolk County

Docket Number: 37827/2010

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.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.: 37827/2010

Motion Sequence No.: 012; MOT.D

Motion Date: 04/25/13

Submitted: 06/12/13

Motion Sequence No.: 013; XMOT.D

Motion Date: 04/25/13

Submitted: 06/12/13

Motion Sequence No.: 014; XMD

Motion Date: 06/05/13

Submitted: 06/12/13

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Clerk of the Court

Upon the following papers numbered 1 to 81 read upon this application for an order to enforce judgments, cross-motion to reargue, and separate application for injunctive relief: Notice of Motion and supporting papers, 1 - 11; Notice of Cross Motion and supporting papers, 12 - 49; 50 - 66; 67 - 68; Answering Affidavits and supporting papers, 69 - 71; 72 - 73; 74 - 75; 76 - 77; Replying Affidavits and supporting papers, 78 - 81; it is

ORDERED that this motion (#013) by defendants Beth Carthew, Jeffrey Brett and Natalie Brett, deemed herein to be a cross-motion, for an order awarding leave to reargue the motion by plaintiffs for summary judgment which was decided by order of the Court dated March 6, 2013 is granted, and upon such reargument the aforementioned order of this Court is hereby recalled and vacated; and it is further

ORDERED that the prior application by plaintiff, John M. Tufarella, for an order granting a protective order is granted only to the extent that if defendants have not yet submitted proposed written interrogatories to plaintiffs' counsel they shall do so within twenty (20) days from the date of this order, 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 application 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, as movants failed to sustain their burden of showing entitlement to such relief; and it is further

ORDERED that the previous cross-motion by plaintiffs is granted and summary judgment in their favor is awarded on the first, fourth, seventh, tenth, thirteenth, sixteenth, nineteenth and twenty-second causes of action under Debtor and Creditor Law § 273-a to the extent indicated herein, and the remaining causes of action are hereby severed and shall otherwise continue against the defendants; and it is further

ORDERED that the motion by plaintiffs (#012) for an order directing Beth Carthew and Natalie Brett to turn over to the Sheriff of Suffolk County their respective shares of stock in King Quality Construction, Inc., and in 1615 Sycamore Avenue Corporation is granted (*see Matter of National Enterprises, Inc. v Clermont Farm Corp.*, 46 AD3d 1180, 848 NYS2d 420 [3d Dept 2007]), plaintiffs having submitted proof that service of the motion papers was effectuated as directed by the Court in the Order to Show Cause dated March 29, 2013 (Baisley, J.), and said defendants shall forthwith relinquish their stock certificates to the Sheriff and they shall execute any and all appropriate documents necessary for the satisfaction and/or partial satisfaction of the judgments and prospective amended judgments against them; and it is further

ORDERED that the separate motion by defendants, deemed herein to be a cross-motion (#014), for injunctive and related relief is denied as moot.

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 dated May 20, 2009 were executed 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 the amount of \$1,602,225.00, in favor of plaintiff Aida Espinola in her representative capacity on June 19, 2009 in the amount of \$1,005,467.40, in favor of Donna Brown in her representative capacity for the Estate of Michael S. Bruno on July 17, 2009 in the amount of \$808,634.94, and in favor of Donna Brown, as grandmother and custodian of Barrett Bruno and Baylee Bruno, on June 17, 2009 in the amount of \$600,975.00. To date, the judgments have not been satisfied.

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.

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, the location of the corporate office, “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, of which \$24,000 was paid to each of them in the last quarter. 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 in 2006 each were paid salaries of \$177,500.00. In addition, Natalie Brett received payments 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. No documentary evidence of payments made to Beth Carthew for 2007 was submitted to the Court.

According to the deposition testimony of Beth Carthew, she stopped working for King Quality Siding & Windows in 2007, when she and Jeff Brett decided to do business under the corporate name of King Quality Construction. Both King Quality Siding & Windows and King Quality Construction performed siding work, window work, and roofing work. She testified that there was never a break in the employees being paid by one of the two companies, and all of the King Quality Siding & Windows employees worked for King Quality Construction in the same job titles, with the same job responsibilities and for the same salaries. Both companies used the same phone number and the same website. It is not disputed that approximately two years after the transfer of operations to King Quality Construction, Beth Carthew executed confessions of judgment on behalf of King Quality Siding & Windows, Inc., to settle the underlying personal injury and wrongful death claims.

In support of the defendants' motion for summary judgment, Jeff Brett, sued in this action as 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 [*sic*]." According to Jeff Brett, the arrangement allowed Brett and Christopher Carthew "to assist King Quality Siding and Windows from our positions within our consulting company" while simultaneously letting Beth Carthew and Natalie Brett "devote more time to our personal matters and family obligations." In addition, in his affidavit dated November 13, 2012 which was submitted in opposition to plaintiffs' cross-motion, Jeff Brett averred that he and Christopher Carthew were not permitted to be directly involved with the home improvement business or to hold a license to do home improvements because of "legal difficulties" which began in or about 1996. "For these reasons, Beth [Carthew] and Natalie [Brett] were installed as the directors and officers of King Quality Siding and Windows, Inc." Brett also stated that both Beth Carthew and Natalie Brett were paid salaries of \$24,000 each, while Christopher Carthew was paid \$234,000 and Jeff Brett was paid \$258,000 by King Quality in 2004. In 2005, both Beth Carthew and Natalie Brett were paid salaries of \$104,000 each, while Christopher Carthew as paid \$309,016 and Jeff Brett was paid \$316,016. In 2006, Beth Carthew was paid \$180,399 and Natalie Brett was paid \$179,500, while Christopher Carthew was paid \$189,601 and Jeff Brett was paid \$197,000. In 2007, after Beth and Christopher Carthew separated, Beth Carthew was paid \$322,652 and Natalie Brett was paid \$292,500. Christopher Carthew, who was "no longer involved in the business as much", was paid

\$80,000, while Jeff Brett was paid \$116,381.

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.

Here, it is alleged by plaintiffs that the moneys paid to defendants Beth Carthew and Natalie Brett after the actions were commenced in 2004 were fraudulent under Debtor and Creditor Law §273-a because they were conveyances “made without fair consideration.” Fair consideration requires not only equivalency, but also that the transferor and transferee each conduct the transaction in good faith (*Bernasconi v Aeon, LLC*, 105 AD3d 1167, 1168, 963 NYS2d 437 [3d Dept 2013]). Here, faced with undisputed testimony by Beth Carthew that she did “nothing” for King Quality in 2004, 2005 and half of 2006, and by Natalie Brett that she provided no services whatsoever for King Quality, there is no issue of fact that the moneys paid to them by the corporation constitute conveyances made without fair consideration within the meaning of the statute. Although the affidavits of Jeff Brett purport to explain the reason for which Beth Carthew and Natalie Brett were named as officers and directors of the corporation, each conveyance made without fair consideration is fraudulent “without regard to the actual intent . . .” Furthermore, the affidavits that were previously submitted, as well as the transcripts of the deposition testimony of Beth Carthew and Natalie Brett, fail to set forth any factual basis whatsoever to demonstrate that the payments made by King Quality to Beth Carthew and Natalie Brett were supported by consideration. In fact, none of the evidence previously submitted set forth in any detail the nature of any services allegedly provided to King Quality by either Beth Carthew or Natalie Brett. Rather, the close relationships of the parties involved, the significant increase in moneys paid to Beth Carthew and Natalie Brett in 2005, 2006 and 2007 without concomitant increases in responsibilities, and the failure of any defendant to identify any services that were performed for the payments support plaintiffs’ contention that the payments were not made in good faith. Defendants have failed to raise any triable issues of fact to challenge the proof that the payments made to Beth Carthew and Natalie Brett were without fair consideration and that they constitute fraudulent conveyances (*see Fane v Howard*, 13 AD3d 950, 788 NYS2d 432 [3d Dept 2004]).

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]). 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 moneys were paid to Natalie Brett and to Beth Carthew during a period when King Quality was

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a defendant in the personal injury and wrongful death actions, and that no fair consideration was provided by either Brett or Carthew for such payments.

In view of the foregoing, plaintiffs have demonstrated that the aforementioned payments made to Beth Carthew 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, based on the evidence before this Court, plaintiffs shall have judgment against Beth Carthew for conveyances made from April through December 2004 in an undetermined amount that is not less than \$24,000.00, 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 made in 2007 in an undetermined amount, plus interest from June 3, 2009, plus costs and disbursements. Plaintiffs also shall have judgment against Natalie Brett for conveyances made from April through December 2004 in an undetermined amount that is not less than \$24,000.00, 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, plus interest from June 3, 2009, plus costs and disbursements.

Dated: 9/13/2013


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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION