

Englander Capital Corp. v Zises

2013 NY Slip Op 32904(U)

November 14, 2013

Supreme Court, New York County

Docket Number: 156927/12

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Scarpulla

PART 19

Justice
Index Number : 156927/2012
ENGLANDER CAPITAL CORP.
vs
ZISES, SELIG
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 per the memorandum decision dated _____
which disposes of motion sequence(s) no. 001+002.

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

Dated: 11/14/13

_____, J.S.C.

SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

-----X
ENGLANDER CAPITAL CORP.,

Plaintiff,

Index No.: 156927/12
Submission Date: 5/29/13

-against-

SELIG ZISES, JAY ZISES, LAWCASH STRUCTURED
SETTLEMENTS LLC N/K/A STRUCTURED
SETTLEMENTS, LLC, STRUCTURED SETTLEMENT
INVESTMENTS, LP, ASPYRE SETTLEMENT
FUNDING, INC., STRUCTURED SETTLEMENT
INVESTMENTS 2009 LLC, SSI-GP LLC A/K/A
SSI-GP HOLDING LLC, MANGO CAPITAL, INC.
F/K/A MANGOSOFT, INC., PLAINTIFF FUNDING
CORP. A/K/A PLAINTIFF FUNDING HOLDING, INC.
D/B/A LAWCASE, AND "JOHN DOE 1" THROUGH
"JOHN DOE 10,"

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Finkelstein Filler, LLP
57 Beach Street, 4th Floor
New York, NY 10304

For Defendants Selig Zises, Jay Zises, Structured Settlements, LLC,
Structured Investments, LP, Structured Settlements 2009, LLC, SSI-GP
Holding, LLC and Plaintiff Funding Holding, Inc.:
Zukerman Gore Brandeis & Crossman, LLP
Eleven Times Square
New York, NY 10036

For Defendant Mango Capital Inc.
f/k/a Mangosoft, Inc.:
Heimerl Law Firm
110 Wall Street, 11th Floor
New York, NY 10005

Papers considered in review of the motions to dismiss and cross-motion for disqualification:

Notice of Motion 1
Notice of Motion 2
Notice of Cross-Motion 3
Affidavits/Affirmations 4-6
Memoranda of Law 7-12

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, fraudulent conveyance, defendants Selig Zises, Jay Zises, LawCash Structured Settlements, LLC n/k/a Structured Settlements, LLC, Structured Settlement Investments, LP, Structured Settlements 2009, LLC, SSI-GP Holding, LLC and Plaintiff Funding Holding, Inc. ("Zises defendants") move to dismiss the complaint insofar as asserted against them, defendant Mango Capital Inc. f/k/a Mangosoft, Inc. ("Mango") moves to dismiss the complaint insofar as asserted against it, and plaintiff Englander Capital Corp. ("Englander") cross moves for an order disqualifying Zukerman Gore Brandeis & Crossman, LLP from representing any party in this action, for an order granting it leave to replead, and for a default judgment against defendant Aspyre Settlement Funding, Inc. ("Aspyre").

Pursuant to a promissory note dated September 6, 2006, defendant LawCash Structured Settlements, LLC n/k/a Structured Settlements LLC ("LawCash") agreed to pay Englander the principal sum of \$1,000,000.00 with interest plus costs. LawCash executed the note to partially fund its September 2006 purchase of Structured Settlement Investments, LP ("Structured Settlement") from Englander. LawCash defaulted on the note, and Englander commenced an action to recover a judgment against LawCash in October 2009. On or about October 18, 2010, a judgment was entered in favor of Englander against LawCash in the amount of \$1,030,502.85.

Englander then commenced this action, alleging that no portion of the judgment had been paid, and \$1,030,502.85 plus interest from October 18, 2010 remained due and

owing. According to the allegations of the complaint, in November 2009, one month after Englander commenced its action against LawCash, LawCash's attorneys wrote to LawCash on behalf of their other clients, Jay Zises and Selig Zises (collectively referred to as "Zises"), demanding that LawCash pay a debt allegedly owed to them. In December 2009, LawCash conveyed Structured Settlements, its only asset, to Zises in order to satisfy that alleged debt. Englander claimed that the conveyance was without fair and adequate consideration and was only made to delay and hinder Englander from collecting on its judgment against LawCash. Zises, who also had controlling interests in LawCash, and who were represented by the same attorneys as LawCash, accepted the conveyance with knowledge of LawCash's fraudulent intentions.

Englander further alleged in its complaint that in 2010, after it entered its judgment against LawCash, Zises engaged in further fraudulent conduct by conveying Structured Settlement to Mango, a company in which Zises and their family members were shareholders. In 2010 or 2011, Mango rebranded Structured Settlement as "Aspyre," which then showed annual revenue of \$2.8 million. Finally, Englander contended that Zises rendered LawCash further insolvent by shifting hundreds of thousands of dollars of debt from the books of other companies to those of LawCash, and by diverting any of LawCash's remaining business operations to defendant Plaintiff Funding Corp.

In its complaint, Englander alleged claims of intentional and constructive fraudulent conveyance, claims for conspiracy with intent to defraud, and a claim for

attorneys fees pursuant to the Debtor and Creditor Law.¹ Englander also sought a judgment imposing a trust in its favor on the revenue, assets and property of Mango, Structured Settlements, Aspyre and the ownership and/or controlling interest of Zises to the extent necessary to fully satisfy the judgment.

The Zises defendants move to dismiss the complaint insofar as asserted against them pursuant to CPLR §3211(a)(7) and CPLR §3016(b) and Mango moves to dismiss the complaint insofar as asserted against it pursuant to CPLR §3211(a)(7) and CPLR §3016(b).

In support of their motions, the Zises defendants and Mango argue that (1) the complaint fails to adequately allege either intentional fraudulent conveyance or constructive fraudulent conveyance; (2) Englander's conspiracy claim must fail because conspiracy is not recognized in New York as an independent cause of action; (3) Englander's claim for attorneys fees must fail because it has not pled any basis for attorneys fees; and (4) Englander fails to allege the required elements for a constructive trust.

In support of its motion, Mango also argues that the complaint lacks any allegations that would give rise to liability as to Mango because it was a purchaser for fair value from an entity other than the judgment debtor (LawCash) without knowledge of any

¹ Englander also premises its claim for attorneys fees on the terms of the note itself, but, in its cross motion and opposition papers, seems to abandon that portion of its claim, and instead, centers its claim for attorneys fees only on Debtor and Creditor Law §276-a.

fraud, and it acquired the interest in Structured Settlement before Englander obtained its judgment.

Englander cross moves for an order disqualifying Zukerman Gore Brandeis & Crossman, LLP from representing any party in this action, for an order granting it leave to replead, and for a default judgment against defendant Aspyre.

In support of its cross-motion and in opposition to the Zises defendants and Mango's motions, Englander first argues that the complaint adequately pleads causes of action under Debtor and Creditor Law Sections 273, 273-a, 274, 275, 276 and 276-a. It maintains that the facts alleged support these causes of action, the heightened particularity requirements of CPLR §3016 do not apply to claims based on violations of these sections of the Debtor and Creditor Law, and, in any event, the allegations in the complaint sufficiently provide the indicia of fraud necessary to satisfy CPLR §3016.

Englander additionally argues that (1) it adequately pled a cause of action for a constructive trust; and (2) a claim for conspiracy is recognized in New York where, as here, an underlying tort is adequately alleged.

Englander also maintains that Zukerman Gore Brandeis & Crossman, LLP should be disqualified from representing any party in this action because it was an active participant in the underlying issue, has significant personal knowledge of facts in this matter, and will be called as a witness. The law firm defended LawCash in the action giving rise to the judgment, it represented Zises in connection with the transfer of

Structured Settlement to Zises, and it represented Zises in connection with their interest in Mango.

Finally, Englander seeks a default judgment against Aspyre because it has not appeared in this action.

Discussion

CPLR § 3211(a)(7) provides that a defendant may move for judgment dismissing the complaint on the grounds that "the pleading fails to state a cause of action." On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction. The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dept. 2002).

The Zises defendants and Mango argue that (1) Englander's claims for constructive fraudulent conveyance (2nd, 4th and 5th causes of action) do not properly allege lack of good faith or lack of fair consideration; (2) Englander's claims for actual fraudulent conveyance and attorneys fees (1st and 6th causes of action) do not allege fraudulent intent with particularity in accordance with CPLR §3016(b); (3) even if Englander's claim for conspiracy (3rd cause of action) was coupled with a properly pled underlying tort of fraudulent conveyance, the conspiracy claim would be duplicative; (4)

Englander is not entitled to a constructive trust (7th cause of action) because there was no properly pled claim for fraud and because it is not an appropriate remedy in this case.

Mango additionally argues that it can not be held liable because it was merely the beneficiary of the transfer of Structured Settlement, it was a purchaser for fair value without knowledge of any fraud, it was not a transferee in any transaction with the judgment debtor LawCash, and it acquired title to Structured Settlement before Englander obtained its judgment.

Debtor and Creditor Law §§ 273, 273-a, 274 and 275 serve as the bases for the complainant's constructive fraudulent conveyance claims and require a showing of lack of fair consideration. These statutes do not require a showing of actual motive or intent to defraud and therefore dispense with the particularity of pleading requirement under CPLR §3016 (b). *See Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141 (2nd Dept. 2009). Englander also alleges actual fraudulent conveyance and entitlement to attorneys fees, relying on Debtor and Creditor Law §§ 276 and 276-a, which require proof that the transferor intentionally hindered, delayed, or defrauded present or future creditors. *See Zanani v. Meisels*, 78 A.D.3d 823 (2nd Dept. 2010). Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on "badges of fraud" to support its case, such as: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's

claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance. *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526 (1st Dept. 1999). Further, although CPLR §3016(b) requires claims of fraud to be pled with particularity, it should not be construed so strictly so as to prevent an otherwise valid cause of action where it would be impossible for the plaintiff to state in detail all of the circumstances of the fraud because the knowledge of those details is in the exclusive possession of the defendants. *Auguston v. Spry*, 282 A.D.2d 489 (2nd Dept. 2001).

Here, accepting the allegations in the complaint as true, the court will not dismiss the causes of action under the Debtor and Creditor Law at this time. The court finds that Englander has sufficiently set forth constructive fraudulent conveyance claims and alleges badges of fraud with sufficient particularity to support his causes of action for actual fraudulent conveyance and attorneys fees pursuant to the Debtor and Creditor Law. Neither the Zises defendants nor Mango submit any affidavits from individuals with personal knowledge to address the allegations set forth in these causes of action. The causes of action are pled with enough specificity to permit a reasonable inference of the alleged conduct. *See generally Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141 (2nd Dept. 2009); *Board of Mgrs. of the Park Slope Views Condominium v. Park Slope Views, LLC*, 39 Misc. 3d 1221(A) (Sup. Ct. Kings. Co., 2013).

The court further finds that Mango's arguments that it can not be held liable because it was merely the beneficiary of the transfer of Structured Settlement prior to

entry of Englander's judgment, and not a transferee in any transaction with the judgment debtor LawCash, does not warrant dismissal of the causes of action asserted against it at this time. At this stage in the litigation, the relationship between the parties remains unclear, and Mango has not submitted any affidavit from an individual with personal knowledge or any other material evidence proving that the complaint fails to state any claim against it.

However, Englander's third cause of action alleging conspiracy is dismissed as asserted against the Zises defendants and Mango. A conspiracy to commit a tort is never itself a cause of action. *Alexander & Alexander, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). While conspiracy allegations may be pled to connect someone to an actionable tort committed by another, where the substantive tort is already pled against the parties, the conspiracy claim will be dismissed as duplicative. *Bahiri v. Madison Realty Capital Advisors, LLC*, 30 Misc. 3d 1208(A), *7 (Sup. Ct. N.Y. Co., 2010). Here, the fraudulent conveyance claims were already pled against the defendants, and the conspiracy claim alleges nothing more than that the defendants conspired to commit the fraudulent conveyances already alleged. Therefore, the conspiracy claim is dismissed as duplicative.

Further, the court dismisses the seventh cause of action seeking a constructive trust as asserted against the Zises defendants and Mango. Based on the facts alleged in this action, a constructive trust would not be an appropriate remedy. *See generally Marine Midland Bank v. Murkoff*, 120 A.D.2d 122 (2nd Dept. 1986).

With regard to Englander's cross motion, the court first finds that Englander has not met its burden of showing, at this time, that Zukerman Gore Brandeis & Crossman, LLP must be disqualified from representing any party in this action. The disqualification of a lawyer is a matter that rests within the sound discretion of the Supreme Court. *Boyd v. Trent*, 287 A.D.2d 475, 476 (2nd Dept 2001). A party's entitlement to be represented in ongoing litigation by counsel of its choice is a valued right. *See Hudson Val. Mar., Inc. v. Town of Cortlandt*, 54 A.D.3d 999 (2nd Dept. 2008). However, a lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. In determining whether the lawyer's testimony is necessary, the court must consider the relevance of the expected testimony and must take into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence. *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437 (1986). The court finds that Englander has not met its burden of proving, at this stage of the litigation, prior to the commencement of discovery, that Zukerman Gore Brandeis & Crossman, LLP's testimony is necessary. Therefore, the branch of Englander's motion seeking disqualification is denied, without prejudice.

Further, the branch of Englander's cross motion seeking a default judgment against defendant Aspyre is denied, without prejudice. While Englander submits documentary evidence that it served the summons and complaint on Aspyre, and did not receive any response from Aspyre, it is not entitled to a default judgment at this time because it does

not submit proof that it served the instant cross motion upon Aspyre, and does not submit an affidavit of merit setting forth its claims against Aspyre.

In accordance with the foregoing, it is hereby

ORDERED that defendants Selig Zises, Jay Zises, LawCash Structured Settlements, LLC n/k/a Structured Settlements, LLC, Structured Settlement Investments, LP, Structured Settlements 2009, LLC, SSI-GP Holding, LLC and Plaintiff Funding Holding, Inc.'s motion to dismiss the complaint insofar as asserted against them is granted only to the extent that the third cause of action alleging conspiracy, and the seventh cause of action seeking a constructive trust are dismissed insofar as asserted against those defendants, and the remaining claims are severed and shall continue; and it is further

ORDERED that defendant Mango Capital Inc. f/k/a Mangosoft, Inc.'s motion to dismiss the complaint insofar as asserted against it is granted only to the extent that the third cause of action alleging conspiracy, and the seventh cause of action seeking a constructive trust are dismissed insofar as asserted against it, and the remaining claims are severed and shall continue; and it is further

ORDERED that plaintiff Englander Capital Corp.'s cross motion is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
November 14, 2013

ENTER:


J.S.C.
SALIANN SCARPULLA