

Peckar & Abramson, P.C. v Lyford Holdings, LTD.

2014 NY Slip Op 30461(U)

February 11, 2014

Supreme Court, New York County

Docket Number: 100005/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Miller
Justice

PART 11

Index Number : 100005/2009
PECKAR & ABRAMSON, P.C.
vs.
LYFORD HOLDINGS, LTD.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 005

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 Memorandum Decision & Order.

FILED

FEB 26 2014

NEW YORK
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NYS SUPREME COURT - CIVIL

Dated: February 15, 2014

[Signature], 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----- X
PECKAR & ABRAMSON, P.C.,

Index No. 100005/09

Plaintiff,

- against -

LYFORD HOLDINGS, LTD., MITCHELL STERN,
SAVOY MANAGEMENT CORPORATION,
SAVOY SENIOR HOUSING CORP., JACOB,
FRYDMAN, WHITE ACRE EQUITIES, LLC,
TUSCANY BUILDERS, LLC, TIVOLI PARTNERS,
LLC, and SAVOY LITTLE NECK ASSOCIATES, L.P.,

FILED

Defendants.

FEB 28 2011

----- X
JOAN A. MADDEN, J.:

Defendant Mitchell Stern (Stern) moves, pursuant to CPLR 3212, for summary judgment dismissing the third cause of action (motion seq. 005). Defendants Savoy Management Corporation (Savoy Management), White Acre Equities, LLC (White Acre), Tuscany Builders, LLC (Tuscany), Tivoli Partners LLC (Tivoli), and Savoy Little Neck Associates, L.P. (Savoy Little Neck) (collectively, Savoy defendants) move, pursuant to CPLR 3212, for summary judgment, dismissing the complaint (motion seq. 006).¹

Background

The facts and allegations with respect to this action were discussed in a prior decision by this court, dated November 15, 2011 (Prior Decision), disposing of motion sequence numbers 003 and 004 and familiarity with that decision is assumed.

The facts will be repeated to the extent relevant to the instant motion. In 2006, plaintiff Peckar & Abramson, P.C. (P&A) obtained a default judgment (Judgment) in the amount of

¹Motion sequence numbers 005 and 006 are consolidated for disposition.

\$237,731.75 against its former client, Savoy Little Neck, for legal services rendered, in an action entitled *Peckar & Abramson, P.C. v Savoy Little Neck Assoc., L.P. and Savoy Boro Park Assoc., L.P.* (index No. 105261/04) (Underlying Action). In this action, P&A alleges that it is a creditor of Savoy Little Neck pursuant to Article 10 of the Debtor Creditor Law (DCL) and that Savoy Little Neck violated the DCL when it transferred funds to various entities to avoid satisfying the Judgment.

The following allegations are asserted in the amended complaint unless otherwise noted.²

Savoy Little Neck is a limited partnership, operating pursuant to an Agreement of Limited Partnership as amended (LP Agreement), dated December 23, 1998. Savoy Little Neck purchased property located at 55-15 Little Neck Parkway, Little Neck, New York (the Property) which it converted into an assisted living facility that Savoy Little Neck operated pursuant to the LP Agreement. Savoy Little Neck is one of more than a dozen entities operated by dismissed defendant Jacob Frydman (Frydman), who is also an owner and/or indirect beneficiary of each related entity. Stern and dismissed defendants, Lyford Holdings, Ltd. (Lyford) and Frydman were limited partners of Savoy Little Neck. Savoy Little Neck failed to pay P&A for the legal services it provided, and in 2004, P&A commenced the Underlying Action for breach of contract and for legal services which, as noted above, resulted in the Judgment.

In June 2004, after commencement of the Underlying Action, Savoy Little Neck sold the Property to an unrelated entity, CRP Little Neck, L.P., and made certain payments and transfers to or for the benefit of the defendants to avoid the Judgment.

²While the original complaint was dismissed, P&A was permitted to replead and subsequently filed an amended complaint, containing four causes of action based on violations of the DCL

Prior to the commencement of the Underlying Action, Savoy Little Neck maintained three checking accounts at North Fork Bank (NFB): an operating account, a payroll account, and a checking account. In the 10 days prior to the sale of the Property, Savoy Little Neck depleted several hundred thousand dollars from its NFB checking account, and transferred the cash to defendants Tuscany, White Acre, and Tivoli, which were affiliates of Savoy Little Neck at the time they received the Other Transfers.³ On September 2, 2004, Savoy Little Neck depleted the NFB payroll account by transferring the remaining balance of \$3,008.97 to White Acre, after which the account was closed.

On September 24, 2004, the Department of Finance of the City of New York issued the Property Tax Refund by a check payable to Savoy Little Neck in the amount of \$722,365.43. On September 30, 2004, the Property Tax Refund check was endorsed "Savoy," and deposited into the "Operating" account of Savoy Management, an entity related to Savoy Little Neck and controlled by Frydman. Within 15 days after deposit, all proceeds of the Property Tax Refund were depleted, leaving Savoy Management's operating account with a negative balance. From the Property Tax Refund, Savoy Management transferred \$425,000 to Stern and \$65,000 to White Acre. The alleged consideration for the \$425,000 paid to Stern was the assignment to Savoy Senior Housing Corporation (SSHC) of Stern's interest and the interest of and certain other investors whose interest in Savoy Little Neck had been assigned to Stern.⁴ The assignment

³The amended complaint contains allegations with respect to nonparty Frydman & Co., which will not be addressed in this decision.

⁴The Assignment reflected Stern's 19.8% interest in Savoy Little Neck and those of Stern's friends and family (amounting to 17.82%), who assigned to him their interests. The total, 37.62% will be referenced as Stern's interest.

is as of August 1, 2004, as set forth in an "Assignment and Assumption of Limited Partnership Interests" (Assignment).

P&A contends that as of the date of sale of the Property, Savoy Little Neck was insolvent, and its major remaining asset was the claim for the Property Tax Refund. P&A contends that the violations of the DCL at issue here are the Other Transfers, that is, the payments Savoy Little Neck made to remaining Savoy defendants Tivoli, White Acre and Tuscany before it obtained the Property Tax Refund, the transfers of funds to Stern and White Acre after it received the Property Tax Refund, and the transfer of funds into Savoy Management's account.

The amended complaint contains four causes of action. The first three causes of action allege that the Other Transfers and Savoy Management's transfers of the proceeds of the Property Tax Refund to Stern and White Acre violated Debtor Creditor Law §§ 273, 273-a, 274, 275, 276, 277, 278 as the transfers (1) lacked consideration and good faith; (2) rendered Savoy Little Neck insolvent, or occurred when Savoy Little Neck was insolvent or would incur debts beyond its ability to pay; (3) occurred at a time when Savoy Little Neck believed it would incur debts beyond its ability to pay; (4) left Savoy Little Neck with unreasonably small capital to remain in business; and (5) was made and received with the intent to defraud creditors of Savoy Little Neck.

The first cause of action seeks judgment setting aside the Other Transfers to Tuscany, White Acre, and Tivoli; the second cause of action seeks judgment setting aside the transfer of the Property Tax Refund to Savoy Management; the third cause of action seeks judgment setting aside Savoy Management's transfers of the proceeds of the Property Tax Refund to Stern and White Acre; and the fourth cause of action seeks judgment against each of the defendants,

* 6] awarding reasonable legal fees pursuant to Debtor and Creditor Law § 276-a.

Stern and the Savoy defendants now move for summary judgment.

Stern argues that: (1) P&A's claims are time-barred as a distribution to a limited partner; and (2) the transfer to Stern was not fraudulent as a matter of law, because: (a) the disputed transfer was paid in consideration of an antecedent debt; (b) Savoy Little Neck was not insolvent at or after the time of the disputed transfer, (c) Savoy Little Neck was not left with unreasonably small capital to operate, (d) Savoy Little Neck did not believe it would incur debts it could not repay, and (e) Stern had no "actual intent" to hinder, delay, or defraud creditors.

The Savoy defendants argue that P&A has failed to establish that the transfers were fraudulent under the Debtor and Creditor Law in that it has not shown that: (1) the transfers were made without fair consideration, (2) the debtor was insolvent or was rendered insolvent by the transfer, (3) the debtor was left with an unreasonably small capital, and (4) the debtor intended or believed that it would incur debts that would be beyond its ability to pay or that the debtor intended to defraud creditors.

Discussion

For the reasons discussed below, Stern's motion is granted, and the motion by the Savoy defendants is denied.

Motion 005

Stern first argues that since the transaction is in fact a return on Stern's capital contribution, it is a distribution of partnership property to a limited partner, and is time-barred under the three year statute of limitations for partnership distributions in Revised Limited

Partnership Act (RLPA)⁵. Since the \$425,000 payment to him was made in 2004, and P&A commenced this action in 2009, the action was commenced after the expiration of the three year statute of limitations. Stern asserts that although the transaction was structured as an assignment of the Stern's interest in Savoy Little Neck to SSHC, the parties intended and treated the \$425,000 payment to him as a return on his capital contribution. Stern contends that the \$425,000 payment was less than the \$1,200,000 invested and resulted in a \$725,000 loss. Stern contends that irrespective of the structure of the transaction, the \$425,000 was partnership property which he received in his capacity as a partner. According to Stern's explanation of the transaction, Savoy Management, which made the payment, was an intermediary between Savoy Little Neck and SSHC, the contracting party to the Assignment. Stern contends that Savoy Management was merely a conduit for the transaction, since Savoy Little Neck's bank accounts had been closed in June 2006.

In support of the assertion that the challenged transaction constituted a return on Stern's capital contribution, Stern cites his deposition testimony as well as that of Frydman, where they both recalled that the payment represented a return based on Stern's capital contribution to Savoy Little Neck. Specifically, Stern cites his testimony, that it was his understanding that Savoy Little Neck "said they are willing to pay me \$425,000 for my interest." He also cites deposition

⁵RLPA § 121-607 (c) states:

Unless otherwise agreed, a limited partner who receives a wrongful distribution from a limited partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution.

The term "distribution" is defined under RLPA § 121-101 to mean "the transfer of property by a limited partnership to one or more of its partners in his capacity as a partner."

testimony of Frydman, “the signatory on behalf of SSHC for Savoy Little Neck,” that management intended for the Assignment to be structured as a redemption of Stern’s interest, and not as a sale of such interest to a third party. Stern notes that Frydman testified that “[t]he limited partnership redeemed the shares by paying \$425,000 to Stern and it acted through Savoy Senior Housing Corp., which was the only entity it could act through.”

This testimony conflicts with the Assignment which states that the \$425,000 payment to Stein was in connection with the assignment of the Stern’s interest in Savoy Little Neck to SSHC. It also conflicts with Frydman’s 2006 testimony in the Underlying Action that Stern’s interest was purchased by Frydman’s affiliate and the purchase did not involve the use of the \$425,000 Property Tax Refund. According to Frydman’s 2006 testimony, the Property Tax Refund was used to pay a \$360,000 development fee to SSHC, with \$50,000 reserved to pay the limited partnership debts, and the balance going to “the 49 percent partners.” This conflicting testimony and the structure of the transaction as an assignment, would appear to create issues of fact. However, as discussed below, case law holds that it is the nature of the transaction and its effect on creditors, and not the structure of the transaction that determines whether the transaction constitutes a return on capital, and, thus, a distribution of partnership assets (*see Whitley v. Klauber*, 51 NY2d 555 [1980]).

In *Whitley*, the Court of Appeals held that where as part of a plan to dispose of the partnership at issue, the partners sold their interest to a corporation in exchange for stock of the purchaser’s parent corporation, the partners received a return of their partnership capital. Thus, under Partnership Law § 106(4) a limited partner remained liable to the partnership for its debts up to the amount he received as a return on capital. The court articulated the rationale for its

determination in its analysis of § 106(4) of the Partnership Law as follows:

Subdivision (4) of section 106 of the Partnership Law provides that: "When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return." In determining the meaning of the words "return * * * of the capital of his contribution"... one must look not only to those words but to the purpose of the provision and to its context as well (McKinney's Cons Laws of NY, Book 1, Statutes, §§ 96, 97). That the purpose of the subdivision is the protection of creditors is crystal clear not only from the explicit reference to "creditors who extended credit or whose claims arose before such return" but also from the imposition of liability under its provision even though the contributor has "rightfully received the return." It follows that primary in the determination whether a particular transaction constitutes a return of capital is not the limited partner's purpose or intent or how the transaction is structured but its effect upon partnership creditors. On the basis of that overriding purpose we and other courts have held limited partners liable under subdivision (4) of section 106 notwithstanding the absence of fraud, the fact that property other than cash is received by the limited partner or the fact that the transaction takes the form of a sale of the limited partners' interests to a third person, rather than a distribution by the partnership itself.

Id., at 563.

Here, like the transaction at issue in *Whitley*, the effect of the payment of the \$425,000 from the Property Tax Refund to Stern constituted a return on capital to a limited partner at a time when the partnership had outstanding liabilities. The fact that the Property Tax Refund was endorsed as "Savoy" and placed in Savoy Management's account, and that the transaction was structured as an assignment of interest to third party SSHC, are not dispositive factors. Rather, of significance is that part of the Property Tax Refund was used to purchase the Assignment of Stern's interest in the partnership and that this occurred at a time when Property Tax Refund was Savoy Little Neck's sole remaining asset. As such, the effect of the transaction on Savoy Little

Neck's creditors is clear. Based on the foregoing, under the Whitley analysis, the transaction constituted a return on Stern's capital contribution, and a distribution by the partnership.

Having reached this conclusion, I note that it is consistent with the purpose of RLPA § 106(4), that is, the protection of creditors, as, but for the statute of limitations, Stern would be liable to the partnership for the \$425,000 to the extent necessary to pay the partnership's creditors. Nonetheless, the cause of action against Stern must be dismissed as it is time-barred by the three year statute of limitations for partnership distributions under RLPA § 121-607(c)⁶ (*see Williamson v. Culbro Corp. Pension Fund*, 41 AD3d 229[1st Dept 2007], *lv denied*, 10 NY3d 402 [2008]).

Motion 006

The Savoy defendants move for summary judgment dismissing the complaint against them. As White Acre, Tuscany, Tivoli, and Savoy Management are not limited partners of Savoy Little Neck, the transfers at issue on this motion are subject the six-year statute of limitations under the DCL. Accordingly, the determination of the summary judgment motion as to the Savoy defendants involves an analysis of the DCL.

As indicated above, with respect to the Savoy defendants, the first cause of action seeks judgment setting aside the Other Transfers to Tuscany, White Acre, and Tivoli; the second cause of action seeks judgment setting aside the transfer of the Property Tax Refund from Savoy Little Neck to Savoy Management; the third cause of action seeks judgment setting aside Savoy

⁶While in the Prior Decision, the court found that the third cause of action against Stern as pleaded in the Amended Complaint was not subject to the three year limitations period under RLPA § 121-607(c) this finding is not dispositive of the court's determination on this summary judgment motion which is based on the evidence, rather than the pleadings.

Management's transfers of the proceeds of the Property Tax Refund to White Acre. The first, second and third causes of action each assert violations of DCL §§ 273,⁷ 273-a⁸, 274⁹, 275,¹⁰ 276¹¹, 277, 278 and/or 279.¹² The fourth cause of action seeks a judgment against each of the

⁷Under DCL § 273, "a 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 without fair consideration."

⁸Section 273-a, provides a conveyance made without consideration by a defendant in an action for money damages is fraudulent "without regard to actual intent if after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

⁹DCL § 274 provides that:

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 the hands after the conveyance is unreasonably small capital, is fraudulent as to the creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to actual intent.

¹⁰DCL § 275 provides that:

a conveyance made without fair consideration at a time when the person making the conveyance intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors. Pursuant to this constructive fraud provision, a conveyance made by a person who has a good indication of oncoming insolvency is deemed to be fraudulent [internal quotation marks and citation omitted].

¹¹ DCL § 276 provides that "[e]very 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."

¹²Section 277 addresses when the conveyance of partnership property renders the partnership insolvent. Sections 278 addresses when the conveyance is fraudulent with respect to a creditor whose claims have matured, while section 279 addresses claims that have not matured. Since plaintiff's

Savoy defendants, awarding reasonable legal fees pursuant to Debtor and Creditor Law § 276-a.

As movants, the Savoy defendants have the burden of making “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 Hosp.*, 68 NY2d 320, 324 [1986]; *Madeline D’Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012]).

The Savoy defendants have not met their burden. They are relying upon the affidavit of Frydman, which is conclusory, and, thus, they fail to establish a prima facie entitlement to summary judgment (*see Forssell v Lerner*, 101 AD3d 807, 808 [2d Dept 2012] [“Contrary to Lerner’s contention, the vague and conclusory assertions in his affidavit in support of his motion were insufficient to make a prima facie showing that he did not have the authority to supervise or control the performance of the plaintiff’s work”]; *see also Bartee v D & S Fire Protection Corp.*, 79 AD3d 508, 508 [1st Dept 2010]).

According to Frydman, he is or was the manager of Savoy Management, White Acre, Tuscany, Tivoli, and Savoy Little Neck Partners. Although he may be a person with knowledge of the facts, his statements are entirely conclusory, “not supported by documentary evidence, lack[] probative value, and [are] insufficient to establish entitlement to judgment as a matter of law” (893 *Bway LLC v Warman Enters.*, 90 AD3d 578, 578 [1st Dept 2011]). Frydman states that the transfers to Tuscany, White Acre, and Tivoli were: (1) made for valid consideration; (2) did not render Savoy Little Neck insolvent; (3) were made in good faith; (4) did not occur at a time when Savoy Little Neck had, or intended, or believed it would incur debts beyond its ability to pay; (5) were not made with the actual intent to hinder, delay, or defraud creditors of Savoy

claim has been reduced to a judgment, § 278 is applicable here.

Little Neck, including P&A; and (6) were not received with the actual intent to hinder, delay, or defraud creditors of Savoy Little Neck, including P&A.

He also states that the transfer of the Property Tax Refund to Savoy Management: (1) was made for valid consideration; (2) did not render Savoy Little Neck insolvent; (3) was made in good faith; (4) did not occur at a time when Savoy Little Neck had, or intended, or believed it would incur debts beyond its ability to pay; (5) was not made with the actual intent to hinder, delay, or defraud creditors of Savoy Little Neck, including P&A; and (6) was not received with the actual intent to hinder, delay, or defraud creditors of Savoy Little Neck, including P&A.

He further states that the transfers of the Property Tax Refund to White Acre and Stern: (1) were made for valid consideration; (2) did not render Savoy Management insolvent; (3) were made in good faith; (4) did not occur at a time when Savoy Management had, or intended, or believed it would incur debts beyond its ability to pay; (5) were not made with the actual intent to hinder, delay, or defraud creditors of Savoy Management, including P&A; and (6) were not received with the actual intent to hinder, delay, or defraud creditors of Savoy Management, including P&A. His assertions merely track the legal elements of a fraudulent conveyance claim, without containing any facts upon which those assertions are based.

The Savoy defendants also cite deposition testimony of Frydman, wherein he stated that the transfers at issue represented repayment of loans (Frydman dep tr at 82-84). Again, his testimony as to the loans is conclusory, and the Savoy defendants do not submit any supporting documentation as to the alleged repayment of loans.

In their reply papers, the Savoy defendants argue that P&A failed to cite any case or statute that requires companies to maintain the records of loans and transfer dating back to 2004.

The fact that they may not have had any duty to maintain relevant documentation does not render their evidence any less conclusory. Rather, it impairs the impact of their assertions (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d at 302 [“However, in the absence of a copy of the lease between CMS and the Partnership, invoices or rent history records evidencing proof of the monthly rental obligation and the total amount of arrears, the Partnership fails to demonstrate a bona fide debt, antecedent or otherwise”]).

The Savoy defendants argue that P&A’s evidence is inadequate. However, given its initial burden of establishing a prima facie case, which it failed to meet, they cannot obtain summary judgment by showing inadequacies in P&A’s proof (*see Torres v Industrial Container*, 305 AD2d 136, 136 [1st Dept 2003] [movant “cannot obtain summary judgment by pointing to gaps in plaintiffs’ proof”]). Therefore, the motion must be denied regardless of the sufficiency of the opposing papers (*id.*). Finally, the federal cases cited by the Savoy defendants in reply (*see e.g., U.S. v. McCombs*, 30 F3d 310 [2d Cir 1994]) are not to the contrary, as they address the parties’ respective burdens at trial as opposed to on a motion for summary judgment.

Accordingly, it is

ORDERED that the motion (005) by defendant Mitchell Stern for summary judgment is granted and the Clerk is directed to enter judgment accordingly in favor of defendant Mitchell Stern; and it is further

ORDERED that the caption is amended to reflect the dismissal of the claims against defendant Mitchell Stern; and it is further

ORDERED that counsel for defendant Mitchell Stern shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office

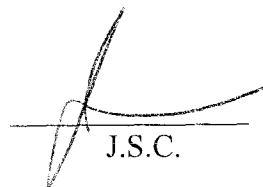
(room 158), who are directed to mark the court records to reflect the change in caption herein;
and it is further

ORDERED that the action is severed and continued against the remaining defendants;
and it is further

ORDERED that the motion (006) by Savoy Management Corporation, White Acre
Equities, LLC, Tuscany Builders, LLC, Tivoli Partners LLC, and Savoy Little Neck Associates,
L.P. for summary judgment is denied; and it is further

ORDERED that the remaining parties shall proceed to mediation.

Dated: February //, 2013



J.S.C.

FILED

FEB 26 2014

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