

Gjuraj v Uplift El. Corp.
2014 NY Slip Op 30745(U)
March 26, 2014
Supreme Court, Bronx County
Docket Number: 308475/2012
Judge: Mark Friedlander
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART 25

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MHILL GJURAJ,

Plaintiff,

INDEX NO. 308475/2012

- against -

UPLIFT ELEVATOR CORP., ET AL,
Defendants.

DECISION/ORDER

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HON. MARK FRIEDLANDER

Defendant Uplift Elevator Corp. (Uplift), Ivica Lubina, Miriana Lubina, Peter Lubina, John Lubina and AJP Corp. of Westchester (AJP Corp.) seek dismissal of the complaint (or, alternatively, discrete portions of it) under several subparagraphs of CPLR 3211(a). Defendant Uplift Elevator of New York, Inc. (Uplift NY), seeks dismissal of the complaint as against it under CPLR 3211(a)(8). Plaintiff cross-moves to amend his complaint to add an additional party defendant.

Plaintiff commenced this action against defendants to recover damages and set aside certain conveyances of property made in violation of Debtor and Creditor Law §§ 273, 273-a, 275, 276 and 278. This action is predicated on the outcome of a prior action (*Gjuraj v Uplift Elevator Corp.*, Sup. Ct., Bronx County, index no. 302122-2008) in which plaintiff sued several defendants (including two of the defendants in the present action, Uplift and Ivica Lubina) to recover the value of his interest in Uplift and his share of certain profits. The prior action was tried without a jury by Justice Sharon A. M. Aarons.

By a decision dated August 1, 2012, Justice Aarons concluded that the defendants in the prior action had breached fiduciary duties they owed to plaintiff, directed that Uplift be dissolved, and awarded plaintiff damages for his minority share of Uplift (\$171,880) and his share of the profits (\$471,000). By an order dated September 7, 2012, Justice Aarons modified the August 1, 2012 decision to the extent of awarding plaintiff \$245,000 for his share of Uplift (as opposed to \$171,880) and allowing for pre- and post-judgment interest on plaintiff's equitable claim to recover the value of his interest in Uplift.

On October 5, 2012, judgment was entered in favor of plaintiff. That judgment was vacated on November 5, 2012 by so-ordered stipulation; plaintiff was afforded leave to submit a new proposed judgment after the court resolved a motion to reargue concerning the post-trial orders. After Justice Aarons decided the motion to reargue, a new judgment was entered on March 26, 2013, which, among other things, awarded plaintiff damages as against defendants Uplift and Ivica Lubina (as well as Paul Caldararo, an employee of Uplift) and dissolved Uplift. By an order dated October 22, 2013, the Appellate Division, First Department modified the March 26, 2013 judgment to the extent of vacating it as against Paul Caldararo and vacating the dissolution of Uplift. The Court otherwise affirmed that judgment (110 AD3d 540 [2013]).

In the present action, plaintiff alleges that defendants "engaged in a scheme to fraudulently transfer the assets of IVICA and UPLIFT to the other defendants for no consideration in order to frustrate Plaintiff's enforcement of the Judgment against them." Plaintiff alleges several such transfers among defendants occurred between

August 8, 2012 and August 23, 2012: on August 8, Uplift and Ivica transferred, without consideration, all Uplift's assets to another entity formed by Ivica, Uplift NY; on August 23, 2012, Ivica transferred, without consideration, his interest in his home to his wife, defendant Miriana Lubina; and, on August 23, 2012, Ivica transferred, without consideration, ownership of real property in Yonkers to another corporation formed by him, defendant AJP Corp. The complaint alleges that AJP is "owned" by defendants Ante, John, and Peter Lubina. Plaintiff claims that these transactions violated Debtor and Creditor Law §§ 273, 273-a, 275, 276 and 278, and that he was defrauded by defendants as a result of the transactions. Plaintiff seeks damages equal to the sum he was owed as a result of the judgment and further seeks to set aside those transactions.

Uplift, as well as Ivica, Peter and John Lubina seek dismissal of the complaint as against them on the ground that plaintiff failed to serve those defendants properly (see CPLR 3211[a][8]). Peter and John Lubina also seek dismissal of the complaint as against them on the ground that the complaint fails to state a cause of action (see CPLR 3211[a][7]). Miriana Lubina seeks dismissal of the complaint as against her on the ground that it is barred by documentary evidence (see CPLR 3211[a][1]). Uplift, APJ Corp., and Ivica, Miriana, Peter and John Lubina seek dismissal of the second and sixth causes of action on the ground that they do not state causes of action (see CPLR 3211[a][7]). Uplift NY seeks dismissal of the complaint as against it on the ground that plaintiff failed to serve it properly (see CPLR 3211[a][8]). Plaintiff opposes the dismissal motions, and cross-moves to amend his complaint to add Richard O'Brien as an

additional party defendant.

The jurisdictional challenges of Uplift, Ivica Lubina, and Uplift NY are without merit. The summons and complaint were filed on October 22, 2012, and plaintiff therefore had until February 22, 2013 to serve the process (see CPLR 306-b).

Affidavits of service of the summons and complaint on Uplift, Ivica Lubina, and Uplift NY were submitted by plaintiff in opposition to the dismissal motions: Uplift was served on January 2, 2013 under Business Corporation Law § 306 through the Secretary of State; Ivica Lubina was served on November 7 and 8, 2012 under CPLR 308(2); and Uplift NY was served on January 2, 2013 under Business Corporation Law § 306 through the Secretary of State. These affidavits of service are prima facie evidence of proper service, and, in the absence of any evidence contradicting those affidavits of service, established that proper service was effected on Uplift, Ivica Lubina, and Uplift NY. That aspect of the motion of Uplift, and Ivica, Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the complaint as against Uplift under CPLR 3211(8) is denied, as is the motion of Uplift NY.

Similarly, the court rejects the jurisdictional challenges of Peter and John Lubina. Those defendants assert that they were minors at the time they were served, and that special service rules applied to them that plaintiff did not satisfy (see CPLR 309[a]). However, neither Peter nor John Lubina submitted any evidence demonstrating that he was an infant at the time of service. Because Peter and John Lubina have not provided the court with evidence of their respective ages, and service on them appears to have been effected under CPLR 308(2), that aspect of the motion of Uplift, and Ivica,

Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the complaint as against Peter and John Lubina under CPLR 3211(8) is denied.

That aspect of the motion of Uplift, and Ivica, Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the complaint as against Peter and John Lubina under CPLR 3211(a)(7) is denied. Peter and John Lubina contend that the allegations against them merely claim that they are liable for the debts of AJP Corp., which they allegedly own, but that they are insulated from liability for the debts of the corporation, and that plaintiff has not pleaded any basis on which to permit a piercing of the corporate veil. However, giving the complaint a liberal construction, accepting the facts alleged in it to be true, and affording plaintiff the benefit of every possible reasonable inference (*see Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]), the complaint states causes of action against Peter and John Lubina in their individual capacities for fraudulent transfers and conveyances of assets of Ivica Lubina and Uplift.

That aspect of the motion of Uplift, and Ivica, Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the complaint as against Miriana Lubina on the ground that it is barred by documentary evidence (*see CPLR 3211[a][1]*) is granted. The complaint alleges that Ivica Lubina transferred his ownership interest in his Irvington, New York home to his wife, Miriana Lubina, without consideration. But the documentary evidence submitted in support of Miriana's motion, namely a December 3, 2012 deed (*see Crepin v Fogarty*, 59 AD3d 837 [3d Dept 2009]; *see also Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2011]), demonstrates conclusively a defense to plaintiff's

causes of action against her (see *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [1998] [CPLR 3211(a)(1) motion may be appropriately granted only where documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing defense as a matter of law]). Plaintiff's causes of action seek to set aside the allegedly fraudulent conveyance of the property by Ivica to Miriana; however, the December 3, 2012 deed demonstrates that the status quo ante was re-established, the very purpose of the remedies of the Debtor and Creditor Law (see *Marine Midland Bank v Murkoff*, 120 AD2d 122 [2d Dept 1986]). Because plaintiff has not raised any issue regarding the legitimacy of the December 3, 2012 deed, or articulated how he was damaged by Miriana's alleged conduct, dismissal of the complaint as against her is warranted under CPLR 3211(a)(1).

That aspect of the motion of Uplift, and Ivica, Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the second cause of action on the ground that it does not state causes of action (see CPLR 3211[a][7]) is denied. This dismissal request is based on the contention that a valid judgment is a necessary predicate for a claim under Debtor and Creditor Law § 273-a, but that no such judgment exists. As evidenced by the Appellate Division's October 22, 2013 order, there is a valid judgment, which may serve as a predicate for a Debtor and Creditor Law § 273-a claim.

That aspect of the motion of Uplift, and Ivica, Miriana, Peter and John Lubina, and AJP Corp., seeking dismissal of the sixth cause of action on the ground that it does not state causes of action (see CPLR 3211[a][7]) is granted. As these defendants

observe (and plaintiff tacitly acknowledges), the sixth cause of action seeks damages for common law fraud. Yet, that cause of action has not been pleaded with the requisite particularity (see CPLR 3016[b]). Therefore, the sixth cause of action is dismissed; however, plaintiff is granted leave to replead it.

Plaintiff's cross motion to add Richard O'Brien as an additional party defendant is granted. Plaintiff seeks to add O'Brien, allegedly a former employee or officer of Uplift, and officer or director of Uplift NY, because he participated in the fraudulent transfer and conveyance of assets from Uplift to Uplift NY. Because this action is still in its infancy, and plaintiff has adduced facts on his cross motion linking O'Brien to the transactions at issue, and the defendants that have already appeared in this action will not be prejudiced as a result of the amendment, the court grants plaintiff's cross motion.

Accordingly, it is hereby ordered that the motion of Uplift Elevator Corp., Ivica Lubina, Miriana Lubina, Peter Lubina, John Lubina and AJP Corp. of Westchester is granted to the extent that the complaint is dismissed in its entirety as against Miriana Lubina, and the sixth cause of action is dismissed with leave to replead, and that motion is otherwise denied; and it is further,

Ordered that the motion of Uplift Elevator of New York, Inc., is denied; and it is further,

Ordered that the cross motion of plaintiff is granted, Richard O'Brien is added as a party defendant, the amended summons and amended complaint are deemed filed as of the date of entry of this order, and plaintiff is directed to serve O'Brien in

accordance with CPLR article 3 within 120 days of the date of entry of this order; and it is further,

Ordered that the caption of this action is amended to read as follows:

MHILL GJURAJ,

Plaintiff,

-against-

UPLIFT ELEVATOR CORP., UPLIFT ELEVATOR
OF NEW YORK, INC., RAYMOND O'BRIEN,
IVICA "JOHN" LUBINA, MIRIANA LUBINA,
PETER LUBINA, JOHN LUBINA, ANTE LUBINA,
and AJP CORP OF WESTCHESTER,

Defendants.

This constitutes the decision and order of the court.

Dated: February 26, 2014

Mark Friedlander, J.S.C.