

Sibling Fuel Co., Inc. v Kumok Realty Corp.
2014 NY Slip Op 31068(U)
March 4, 2014
Sup Ct, Bronx County
Docket Number: 304999/2009
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

Sibling Fuel Company, Inc.,
Plaintiff,
-against-

Index No. 304999/2009
Present: Hon. Sharon A. M. Aarons
DECISION and ORDER

Kumok Realty Corp. and Dave Palma,
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
<u>Notice of Motion and Affidavits Annexed</u>	<u>1</u>
<u>Affidavit in Opposition</u>	<u>2</u>
<u>Reply</u>	

Defendants Kumok Realty Corp. and Dave Palma move by Order to Show Cause to dismiss the action pursuant to CPLR 3211 (a) (5) as barred by the Statute of Limitations, to cancel the notice of pendency filed in this action pursuant to CPLR 6514, and to substitute Kathleen R. Bradshaw, Esq., as attorney of record for both defendants. The plaintiff submits written opposition. The motion is granted only to the extent of permitting substitution of counsel, and is otherwise denied.

The plaintiff Sibling Fuel Company, Inc. (Sibling) obtained a judgment against defendant Dave Palma on June 15, 1995, in the Civil Court of the City of New York, Bronx County (“the Civil Court judgment.”) Subsequently, on December 13, 1995, defendant and his wife transferred real property which they owned in Bronx County to a corporation controlled by the defendant. The complaint in this action, dated June 16, 2009, alleges that the transfer of the real property was fraudulent, as it was made to hinder, delay or defraud the plaintiff as a creditor.

In support of the motion, defendant submits a consent to change attorney; the summons,

answer and an order extending the notice of pendency herein; and an uncertified copy of a deed dated December 13, 1995, transferring premises described as Block 3851, Lot 20 (“the real property”) in Bronx County from David Palma and Kum OK Palma, his wife, to Kumok Realty Corp. Plaintiff maintains that as the Civil Court judgment was not docketed in Supreme Court, Bronx County, it did not become a lien on real property located within The Bronx, and that there were valid business reasons for the transfer. In any event, plaintiff maintains that the complaint must be dismissed as it is barred by the six-year statute of limitations applicable to fraudulent transfers.

In opposition, plaintiff submits an uncertified copy of the Civil Court judgment; a copy of information posted on the New York State Department of Corrections website indicating that defendant David Palma was incarcerated for a conviction for vehicular manslaughter in the second degree; and an affirmation submitted in support of plaintiff’s prior motion to extend the notice of pendency in this action. Plaintiff avers that collection of the Civil Court judgment was hindered by the fact that defendant Dave Palma was incarcerated from 2000 to 2004; that defendant Dave Palma transferred his interest in the real property without consideration to a corporation he controlled; that the summons and complaint were filed on June 19, 2009; and that defendant’s former counsel acknowledged the debt and stated that it would be paid. Plaintiff argues that the statute of limitations has not run, as the plaintiff had no knowledge from which it could be inferred that defendant David Palma had transferred any interest in the property.

“A cause of action based on actual fraud pursuant to Debtor and Creditor Law § 276 must be brought within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud should have been discovered, whichever is longer.” (*Liberty Co. v Boyle*, 272 AD2d 380, 381, 708 NYS2d 122 [2d Dept. 2000]; *Miller v Polow*, 14 AD3d 368, 368, 787 NYS2d

319 [1st Dept. 2005] [“An action for an actual fraudulent conveyance under Debtor and Creditor Law § 276 must, like other actions based on fraud, be commenced within six years from the date of the fraud, or within two years after the plaintiff discovered the fraud, or could with reasonable diligence have discovered it, whichever is longer.”])

The determinative issue on the present motion is whether the failure of the plaintiff to investigate the public record reflecting the transfer bars its claim that it could not have discovered the fraud with reasonable diligence at an earlier date. The present action is not barred by plaintiff’s failure to ascertain the fact of the conveyance, albeit the transfer was discoverable from a search of public records. As the court stated in *Citicorp Trust Bank, FSB v. Makkas* (67 A.D.3d 950, 953, 889 N.Y.S.2d 656 [2d Dept. 2009], overruled on other grounds by *Coyle v. Lefkowitz*, 89 A.D.3d 1054, 934 N.Y.S.2d 216 [2d Dept. 2011]):¹

“The failure to ascertain that an allegedly fraudulent conveyance has occurred through the inspection of public records is not a basis for imputing knowledge of the fraud in the absence of circumstances that would require the plaintiff to investigate (see *Guedj v Dana*, 11 AD3d 368, 783 NYS2d 37 [2004]; *McGuinness v Standard Drywall Corp.*, 193 AD2d 518, 597 NYS2d 407 [1993]; *Azoy v Fowler*, 57 AD2d 541, 542, 393 NYS2d 173 [1977]). ‘Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts’ (*Trepuk v Frank*, 44 NY2d 723, 725, 376 NE2d 924, 405 NYS2d 452 [1978]; see *Oggioni v Oggioni*, 46 AD3d 646, 649, 848 NYS2d 245 [2007]).” (Emphasis added.)

¹*Citicorp* was overruled on the sole ground that a constructive fraud claim predicated upon Debtor and Creditor Law § 273-a arises at the time that the alleged fraudulent conveyance is made, not from the time of the conveyance. Constructive fraud under Debtor and Creditor Law § 273 is not claimed by the plaintiff herein; this case involves only a claim of actual fraud under Debtor and Creditor Law § 276. Thus, *Citicorp* is still controlling authority as to the present claim of actual fraud.

It is true that the plaintiff could have docketed the judgment, thus creating a lien on the property. It has not been shown, however, that plaintiff's failure to docket the judgment deprives it of a cause of action under Debtor and Creditor Law § 276. That section provides,

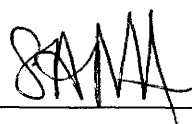
“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

The focus of the statute is on the intent of the judgment creditor in making the conveyance, and there is no indication in the statute that, in the case of real property, the judgment be docketed. Unlike Debtor and Creditor Law § 273-a,² which specifically refers to the docketing of the judgment, there is no such obligation under Debtor and Creditor Law § 276.

Accordingly, the motion is granted only to the extent of permitting substitution of counsel, and is otherwise denied.

The Clerk is directed to substitute Kathleen R. Bradshaw, Esq., 3114 East Tremont Ave., Bronx, N.Y. 10461 (718-931-4400) as attorney of record for defendants Kumok Realty Corp. and Dave Palma.

Dated: March 4, 2014



SHARON A.M. AARONS. J.S.C.

²That section states, “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.”